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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0747**

State of Minnesota,
Respondent,

vs.

Daniel Saldana,
Appellant.

**Filed May 8, 2023
Affirmed
Bratvold, Judge**

Cottonwood County District Court
File No. 17-CR-20-390

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Nicholas A. Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Barry S. Edwards, Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Johnson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct involving penetration or sexual contact with a person under 13 in violation of Minn. Stat.

§ 609.342, subd. 1(a) (Supp. 2019). Appellant argues he is entitled to a new trial because the district court abused its discretion by admitting expert-witness testimony and receiving a video recording of the complainant's forensic interview (recorded interview) into evidence. Appellant also contends the prosecuting attorney committed misconduct affecting his substantial rights. Because we conclude that the district court did not err by admitting expert testimony or receiving the recorded interview, and there was no prosecutorial misconduct, we affirm.

FACTS

The following summarizes the evidence received during the jury trial. The complainant, K.B., was born September 27, 2012, to parents J.M. (mother) and R.B. (father). K.B. has a brother, D.B., who is two years older. Mother and father divorced in 2014, and K.B. and D.B. divided their time between their parents' two households.

Father married E.B. (stepmother) in 2020. Father and stepmother live in Mountain Lake with stepmother's son, K.B., and D.B. Appellant Daniel Saldana, stepmother's brother, also lived in Mountain Lake in 2020. Saldana lived with father and stepmother and then moved to a condominium with his girlfriend.

In February 2020, K.B. reported that D.B. had initiated sexual contact with her. Child-protection specialist Rachael Pudenz reviewed K.B.'s report of sexual contact with D.B. and later testified during Saldana's trial about K.B.'s forensic interview discussing the disclosure. Father testified that, after K.B.'s report, D.B. and K.B. alternated schedules with mother and father so that they no longer stayed together at the same house at the same time.

Relevant to the issues on appeal, Saldana babysat K.B. and stepmother's son "a couple times a week" when father and stepmother were at work. On August 12, 2020, K.B. told father that she "need[ed] to talk to [him] about what Uncle Dan is doing" and then said that Saldana was touching "her private area." K.B. also told father that Saldana sexually touched her while they were watching a movie in his bedroom.

K.B. repeated her statements about Saldana to stepmother, who testified that K.B. said Saldana "had been touching her . . . on top [of and] under her clothes." When stepmother asked K.B. where Saldana had touched her, K.B. "pointed to her vagina." K.B.'s statements about Saldana were reported to law enforcement and child protection, which referred K.B. for a forensic interview.

On August 18, 2020, K.B. participated in a recorded interview at Child's Voice conducted by Amanda Liebl, who had been trained in the CornerHouse method.¹ During the interview, K.B. stated that while she and Saldana were watching television on Saldana's bed, Saldana put his hand "in" her underwear and "tried to put his finger up [her] private," by "put[ting his finger] at a point and sticking it . . . where the hole is" so that his finger went "up in" her vagina. K.B. also described Saldana squeezing her butt.

On August 24, 2020, respondent State of Minnesota charged Saldana with criminal sexual conduct involving penetration or sexual contact with a person under 13 in violation

¹ CornerHouse is a training and evaluation center focused on child-abuse issues that, among other things, trains other professionals in forensic interviewing. During trial, testimony established that the "CornerHouse method" of forensic interview includes four phases, specific protocols for the interview, and that a professional using the CornerHouse method must participate in ongoing training.

of Minn. Stat. § 609.342, subd. 1(a). The state notified Saldana of its intent to introduce K.B.'s recorded interview and to offer the expert testimony of Rachel Johnson about the typical behavioral characteristics of children who have been victims of sexual abuse. Saldana moved in limine, seeking to exclude the recorded interview and objecting to the admission of Johnson's testimony.

After a hearing, the district court issued a written order that included detailed findings about the reliability of K.B.'s forensic interview and concluded the interview had sufficient indicia of reliability to be received as evidence under Minn. Stat. § 595.02, subd. 3 (2022). The district court preliminarily granted the state's motion to admit the recorded interview with some redactions and denied Saldana's motion to exclude the interview. The district court also preliminarily granted the state's motion to admit the proposed expert testimony from Johnson, stating that the expert may opine about "common myths and perceptions regarding child sexual abuse victims, including but not limited to delayed reporting."

The jury trial began March 8, 2022. Before opening statements, Saldana renewed his objection to Johnson's expert testimony about "the dynamics of child abuse." The district court ruled it would not revisit its preliminary ruling. The state called K.B., father, stepmother, Saldana's brother, and Saldana's girlfriend. Father and stepmother testified to, among other things, K.B.'s statements about Saldana's sexual abuse. The state also called Pudenz, Liebl, and Johnson. The district court received K.B.'s redacted recorded interview into evidence, and the recorded interview was played for the jury. Saldana testified and denied any sexual contact with K.B.

The jury found Saldana guilty of first-degree criminal sexual conduct. The district court imposed a sentence of 156 months in prison. Saldana appeals.

DECISION

I. The district court did not plainly err by admitting the challenged testimony.

Saldana challenges the testimony of Liebl, Johnson, and Pudenz on three grounds: (1) the witnesses lacked expert credentials; (2) their opinions lacked foundational reliability; and (3) their testimony amounted to vouching for K.B.’s credibility.

Saldana did not object during trial to the testimony of Liebl, Johnson, or Pudenz on any of the three grounds raised in his brief to this court. “Appellate review of an evidentiary issue is forfeited when a defendant fails to object to the admission of evidence.” *State v. Vasquez*, 912 N.W.2d 642, 649 (Minn. 2018). Appellate courts review unobjected-to error under the “plain error test.”² *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). “In order to meet the plain error standard, a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.” *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). We consider the testimony of each witness in turn, discussing appellant’s three challenges.

² Saldana’s brief to this court does not request plain-error review. Rather, Saldana frames the issue as an abuse of discretion. Because Saldana did not object to the admission of the testimony he now challenges on appeal, we review this issue for plain error.

Liebl

Liebl testified about her credentials to conduct forensic interviews using the CornerHouse method and the video-recording process. She also testified about K.B.’s recorded interview.

Saldana first challenges Liebl’s qualifications and argues that the district court erred in receiving Liebl’s testimony because she should not “have been qualified as an expert and allowed to give expert testimony.” The district court, however, was not asked to qualify Liebl as an expert and did not do so. On appeal, Saldana identifies none of Liebl’s testimony as opinion testimony.³ In reviewing the transcript, we discern no improper opinion testimony by Liebl. Indeed, Liebl testified that she does not substantiate claims of child abuse. We find no merit to Saldana’s argument that the district court plainly erred by admitting Liebl’s testimony as an expert opinion.

Saldana next challenges the “foundational reliability” of Liebl’s testimony about K.B.’s forensic interview, specifically arguing that the CornerHouse method’s “only foundational reliability was its repeated use.” We understand Saldana’s brief to argue that the district court plainly erred by receiving Liebl’s testimony about K.B.’s forensic interview because, according to Saldana, the CornerHouse method is not reliable.

³ The Minnesota Rules of Evidence provide for the admission of two types of opinion testimony—lay-witness opinion in rule 701 and expert-witness opinion in rules 702-706. Although Saldana’s brief to this court challenges the admission of Liebl’s testimony as “expert opinion,” he does not identify any opinion testimony by Liebl either as an expert or lay witness.

Our review of the foundational reliability of K.B.’s CornerHouse interview implicates a statute and caselaw. The statute allows the admission of a recorded interview of a child witness when reliability is established. Minn. Stat. § 595.02, subd. 3.⁴ Similarly, admission of a recording requires foundation. *Turnage v. State*, 708 N.W.2d 535, 542 (Minn. 2006). Although a forensic interview is not a “test,” caselaw offers some guidance. “Foundational reliability requires the proponent of a test to establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (quotations omitted).

The record on the foundational reliability of K.B.’s forensic interview unfolded at several stages. After a pretrial hearing, the district court found that K.B.’s recorded interview was conducted under circumstances with sufficient indicia of reliability to satisfy Minn. Stat. § 595.02, subd. 3. During trial, Liebl testified that she was trained in the CornerHouse method, receives ongoing training in the CornerHouse method, and used the CornerHouse method when she interviewed K.B. The trial testimony of Johnson, who was qualified as an expert, also described the CornerHouse method in some detail.

Based on our review of the record, we conclude that the district court had ample support for its determination that Liebl’s forensic interview of K.B. used the CornerHouse method and conformed with established procedure. *See Goeb*, 615 N.W.2d at 814. Thus,

⁴ Minn. R. Evid. 702 requires an expert opinion to have foundational reliability. As discussed above, however, Liebl did not offer expert-opinion testimony.

we conclude that the district court did not plainly err by admitting Liebl's testimony about her forensic interview of K.B.

Lastly, Saldana argues that Liebl's testimony was improper vouching because she "testified at length about the emotions experienced by a victim of sexual abuse and that K.B.'s feelings were consistent with the emotions experienced by a victim." When Liebl was asked to "describe some of the emotions" that she sees during forensic interviews of children reporting child abuse, Saldana objected, and the district court sustained the objection. Liebl did not offer any opinion about the emotions of an abuse victim or the veracity of K.B.'s allegations.

Saldana is correct that generally, a witness may not vouch for the credibility of another witness. "[O]ne witness may not vouch for or against the credibility of another witness." *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quotation omitted). Saldana's brief to this court does not clearly identify at what point he believes Liebl's testimony crossed over into improper vouching. Based on our review of Liebl's testimony, we discern no testimony that vouched for K.B.'s credibility.

Liebl's testimony provided context about K.B.'s forensic interview. Liebl described K.B.'s ability to talk about body positions, stated that K.B. corrected Liebl if she "got information wrong," and provided other details about the forensic interview. Importantly, Liebl did not testify that K.B.'s behavior or feelings, as seen or described during the interview, conformed with the behavior of a child who had been sexually abused. We conclude that the district court did not plainly err by admitting Liebl's testimony about K.B.'s forensic interview.

Johnson

Johnson testified about her education and experience using and teaching the CornerHouse method and understanding the behaviors of children who experience abuse of many different types. Johnson also testified about the purpose of forensic interviews. During trial, Saldana took “no position” on Johnson’s qualifications, and the district court found that she was qualified to testify as an expert. On appeal, Saldana first challenges Johnson’s credentials as an expert. Based on Johnson’s extensive experience performing and teaching forensic interviewing and her knowledge of child abuse, we discern no plain error in qualifying Johnson as an expert about the common behaviors of sexual abuse.

Saldana’s second challenge relates to the foundational reliability of the CornerHouse method, which we have addressed above.

Third, Saldana argues that “[t]he entire point of . . . Johnson’s testimony was vouching.” Caselaw does not support Saldana’s premise. An expert may opine about the common behaviors of child victims of sexual abuse without crossing the line into impermissible vouching. *See, e.g., Vick*, 632 N.W.2d at 689 (“[T]he therapist’s statement in this case was a comment on the general characteristics of abused children and therefore not vouching.”).

Johnson testified that she had not met K.B. and offered no opinion related to K.B. Johnson testified that it is “very common” that a victim will disclose sexual abuse and then recant and that “delayed disclosure” is “very, very common” among child victims of sexual abuse. Because Johnson’s testimony only described typical behaviors of child victims of

sexual abuse, and Johnson offered no testimony about K.B. or the truthfulness of K.B.'s forensic interview, the district court did not plainly err by admitting Johnson's testimony.

Pudenz

On appeal, Saldana's challenge to Pudenz's testimony is limited to her expert credentials and the foundational reliability of her testimony. Pudenz testified that she was trained in the CornerHouse method of forensic interviewing and about K.B.'s disclosure, during a forensic interview, of sexual contact with her older brother, D.B., in February 2020.

As with Liebl's testimony, the district court was not asked to receive Pudenz's testimony as expert testimony and Saldana's brief to this court identifies no opinion testimony from Pudenz. Because we discern no opinion testimony from Pudenz, we conclude the district court did not plainly err in relation to Pudenz's credentials when it admitted her testimony. We addressed Saldana's challenge to the foundational reliability of the CornerHouse method above.

In sum, the district court did not plainly err in receiving the testimony of Liebl, Johnson, or Pudenz on any of the three grounds raised by Saldana in this appeal.

II. The district court did not err by admitting the recorded interview.

Saldana raises two challenges to the admissibility of Liebl's recorded interview of K.B. at Child's Voice. First, Saldana argues that the recorded interview was not admissible as a prior consistent statement under the hearsay evidence rule. Second, Saldana contends that "[a]dmission of the video recording of K.B.'s testimony violated . . . Mr. Saldana's right to confrontation." Each argument is addressed in turn.

Hearsay and Admission Under Minn. Stat. § 595.02, subd. 3

Saldana challenges the admission of the recorded interview as “inadmissible hearsay,” arguing on appeal that the district court erred in determining that the recorded interview was admissible as a prior consistent statement under Minn. R. Evid. 801. “Evidentiary rulings rest within the sound discretion of the district court, and [an appellate court] will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). We only need to conclude that evidence was admissible on one ground to conclude there was no abuse of discretion. *See In re Welfare of L.E.P.*, 594 N.W.2d 163, 169 (Minn. 1999) (declining to address alternative grounds when concluding evidence was admissible on one ground).

Here, K.B.’s recorded interview was admitted on more than one ground. In a pretrial ruling, the district court preliminarily determined that the recorded interview was admissible under Minn. Stat. § 595.02, subd. 3, and Minn. R. Evid. 807, the residual hearsay exception. The district court reserved ruling on whether the recorded interview was also admissible under Minn. R. Evid. 801(d)(1)(B) as a prior consistent statement of a witness. During trial, Saldana repeated his hearsay objection to the recorded interview’s admission, and the district court repeated its ruling that the recorded interview was admissible under Minn. Stat. § 595.02, subd. 3, and also determined it was admissible under Minn. R. Evid. 801(d)(1)(B).

We begin by reviewing the admissibility of K.B.’s recorded interview under Minn. Stat. § 595.02. Section 595.02, subdivision 3, allows evidence of “[a]n out-of-court statement made by a child under the age of ten years . . . describing any act of sexual

contact or penetration” if the district court determines the statement is reliable, the child testifies at trial, and there is sufficient notice of the intent to introduce the evidence. *See, e.g., L.E.P.*, 594 N.W.2d at 171 (reversing a district court’s finding that a seven-year-old’s consistent statements were not reliable under Minn. Stat. § 595.02, subd. 3); *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990) (affirming a district court’s finding that statements made by a three-year-old to a daycare provider were reliable under Minn. Stat. § 595.02, subd. 3).

The district court determined that the recorded interview of K.B. satisfied all the statutory criteria. In a pretrial order, the district court outlined the factors it considered, which followed the statutory requirements and included “the time, content and circumstances of the statement and the reliability of the person to whom the statement is made.” Minn. Stat. § 595.02, subd 3(a). The district court determined that the recorded interview was “made under circumstances with sufficient indicia of reliability” and identified these circumstances: K.B. “demonstrated she knew the difference between the truth and a lie,” the interview was conducted “by a trained forensic interviewer,” and the questions asked were not leading. When Saldana renewed his objection to the recorded interview during trial, the district court noted that “none of th[e] analysis has changed.” Although Saldana’s brief to this court mentions this statement, he does not challenge the district court’s analysis under the statute. We discern no error in the district court’s admission of the recorded interview under Minn. Stat. § 595.02, subd. 3.

Saldana’s brief to this court limits his argument to attack the admissibility of the recorded interview as a prior consistent statement of a witness under Minn. R. Evid.

801(d)(1)(B). Saldana contends that K.B.’s testimony was more limited in scope than the content of the recorded interview. Because the recorded interview was admissible under Minn. Stat. § 595.02, subd. 3, we need not consider the district court’s alternative grounds for receiving the recorded statement. *See L.E.P.*, 594 N.W.2d at 169. Even so, though we agree with Saldana that K.B.’s trial testimony was not as detailed as her statements in the recorded interview, K.B.’s testimony largely tracked her statements in the recorded interview.

Finally, any error in receiving the recorded interview was harmless because the record includes cumulative evidence of K.B.’s statements to her father and stepmother. *State v. McDonald-Richards*, 840 N.W.2d 9, 19 (Minn. 2013) (“Improperly admitted evidence is harmless, however, when the evidence is cumulative” of other admissible evidence).

For all the reasons mentioned, the district court therefore did not abuse its discretion by admitting the recorded interview under Minn. Stat. § 595.02, subd. 3, and any error in the interview’s admission was harmless.

Confrontation Rights

Saldana objected to the admission of the recorded interview as a “violation of the Confrontation Clause.” We recognize that the admission of a child’s recorded interview under Minn. Stat. § 595.02 does not address Saldana’s right to confrontation under the U.S. or Minnesota constitutions. *See Crawford v. Washington*, 541 U.S. 36, 61 (2004). The Confrontation Clause ensures that a criminal defendant “shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const.

art. I, § 6. Whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law that is reviewed de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Saldana argues that the admissibility of the recorded interview “relies on the opportunity for effective cross examination. That did not happen here.” Caselaw guides our analysis of this issue. “The Confrontation Clause is satisfied by a declarant’s appearance at trial for cross-examination” *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008). In *Holliday*, the supreme court concluded that the admission of a declarant’s prior statement did not violate a defendant’s right to confrontation, despite the declarant’s memory loss, because the declarant was subject to cross-examination at trial. *Id.* at 564-68.

K.B. testified at trial and was subject to cross-examination. Saldana argues the scope of cross-examination was limited by K.B.’s direct testimony. K.B.’s direct testimony answered questions about Saldana’s sexual abuse and K.B.’s statements to her parents and Liebl about the abuse. On cross-examination, K.B. answered two questions. First, she agreed that she had talked with the prosecuting attorney before testifying. Second, K.B. described her contact as occurring “a few days ago” at the prosecuting “attorney’s office.”

Because K.B. was subject to cross-examination, the district court did not violate Saldana’s right to confrontation by admitting the recorded interview.

III. We need not consider Saldana’s sufficiency-of-the-evidence argument.

Saldana contends that, without K.B.’s recorded interview, his conviction cannot be sustained because no other evidence establishes the element of penetration, and we should therefore reverse. Because we conclude that the district court did not err in admitting the

recorded interview, we need not reach Saldana's sufficiency-of-the-evidence argument, which hinges on the inadmissibility of the recorded interview. *See State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (describing a review for sufficiency of the evidence as a "painstaking analysis" of the entire record).

IV. There was no prosecutorial misconduct.

Saldana argues that there were three instances of prosecutorial misconduct during opening statements. Following opening statements, Saldana moved for a mistrial based on "inappropriate argument." Saldana later withdrew the motion without receiving a ruling. Thus, any prosecutorial error was not preserved during trial. In reviewing claims of unobjected-to prosecutorial misconduct, an appellate court applies the modified plain-error test. *State v. Epps*, 964 N.W.2d 419, 422-23 (Minn. 2021). If an appellant establishes that a prosecuting attorney's statements were plain error, then the burden shifts to the state to prove that the appellant's substantial rights were not affected. *Id.* at 423.

First, Saldana argues that because the state never intended to prove that K.B. was "smart" and "funny," "has a bunch of hobbies," "loves art," and likes to "go swimming in the summer," it was misconduct and "inflammatory" for the prosecuting attorney to make these statements during opening statements.

"A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quotation omitted). Saldana argues that the prosecuting attorney's descriptions of K.B. as "smart" and "funny" were misconduct because "they are images to create sympathy and pity in the jury" and

were therefore inflammatory. Saldana cites no caselaw suggesting that a prosecuting attorney's sympathetic descriptions of a witness amount to inflaming the jury's passions.

Saldana relies on *State v. Montgomery*, in which this court held that it was prosecutorial misconduct to begin an opening statement by asking the jury to imagine a "newspaper headline announcing that a Twin Cities drug dealer was caught in a small-town sting." 707 N.W.2d 392, 400 (Minn. App. 2005). This court determined that this was language intended to inflame the passions of the jurors because the language "could have little effect other than to arouse jurors' negative emotions toward Montgomery." *Id.* Saldana's comparison is unpersuasive. Though the prosecuting attorney's statements about K.B.'s personality and hobbies likely made her sympathetic, we conclude that the statements did not inflame the jury's passions and are therefore materially different from the statements criticized in *Montgomery*.

Second, Saldana argues that it was misconduct during opening statements for the prosecuting attorney to ask the jury to "carefully consider all of the evidence" and to say that if it did, the attorney was "confident that [the jury] w[ould] do justice in this case." Saldana argues that the prosecuting attorney, in essence, implied that "the only way [the jury could] do justice is to convict" Saldana.

We disagree. In determining whether there was plain error, appellate courts review the statements as a whole rather than just selective phrases. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000). The prosecuting attorney did not conflate justice with conviction and separated the two ideas into two sentences. The prosecuting attorney asked the jury to "carefully consider all of the evidence" and stated that if it did, the attorney was

“confident that [the jury] w[ould] do justice in this case.” Saldana ignores that the prosecuting attorney also stated she would “come back before [the jury], and . . . ask that [the jury]” find Saldana guilty. The prosecuting attorney’s use of “justice,” when understood in context, asked the jury to consider the evidence when reaching the verdict. We therefore discern no plain error.

Third, Saldana argues that it was prosecutorial misconduct during opening statements for the prosecuting attorney to say that she “hope[s] that when [K.B.] comes in [to testify], she’ll be able to tell you about the horrible things that the defendant did to her.” Saldana contends that the prosecuting attorney’s use of “horrible things” to describe the sexual abuse was plainly erroneous. Saldana relies on caselaw stating that it is unprofessional conduct for an attorney to express their personal beliefs. *See State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993). But the prosecuting attorney did not refer to her beliefs when making this statement. And an attorney’s statements need not lack adjectives to avoid plain error. In *State v. Davis*, the supreme court determined that the prosecuting attorney’s use of “preposterous” to describe a defendant’s self-defense testimony was “colorful” and “did not constitute error.” 735 N.W.2d 674, 682-83 (Minn. 2007). Similarly, the prosecuting attorney’s use of “horrible things” to describe K.B.’s testimony avoids summarizing her anticipated testimony in detail and does not rise to the level of plain error.

Lastly, Saldana argues that “the cumulative effect of all the errors warrants reversal of [Saldana’s] conviction.” Because we discern no plain error in any of the prosecuting

attorney's statements identified in Saldana's brief to this court, we need not consider the cumulative effect.

Affirmed.