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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1216**

State of Minnesota,
Respondent,

vs.

Ruben Perez-Robles,
Appellant.

**Filed August 19, 2024
Reversed and remanded
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-21-5105

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Britta Nicholson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Cleary, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this appeal from a final judgment of conviction for first- and third-degree criminal sexual conduct, appellant contends that his convictions must be reversed and the case remanded for a new trial because the prosecutor committed misconduct by stating in his rebuttal closing argument that “[t]he presumption of innocence is gone.” Appellant also maintains that the district court erred by admitting expert testimony from the forensic interviewer of the victim and that the district court erred in sentencing appellant to lifetime conditional release after completing his sentence. We conclude that the prosecutor’s misstatement of the burden of proof in his rebuttal closing argument constitutes plain error that requires reversal under the supreme court’s recent decision in *State v. Portillo*, 998 N.W.2d 242 (Minn. 2023). Because the issue is likely to recur on remand, we consider appellant’s challenge to the admission of expert testimony on delayed reporting and counterintuitive behaviors of sexual-assault victims, but need not address appellant’s sentencing challenge.

FACTS

As summarized from testimony at trial, appellant Ruben Perez-Robles sexually abused Z.F.R., one of his first cousins, beginning when Z.F.R. was between the ages of six to eight years old. The abuse continued over approximately the next 20 years. Perez-Robles is eight years older than Z.F.R.

Perez-Robles's and Z.F.R.'s families spent time together when Z.F.R. was growing up. Perez-Robles's family also lived with Z.F.R.'s family for several months when she was young. Z.F.R. testified at trial that it was during this time that Perez-Robles first assaulted her. She testified that, when the two of them were taking out the garbage, Perez-Robles cornered her by the trash can and put his hands down her pants. She also testified about a number of additional assaults by Perez-Robles, including when he first raped her when she was 12.

Z.F.R. did not tell anyone about the sexual abuse for a number of years. She eventually disclosed the abuse to her boyfriend when she was in her early 20s, and to her mom after going to therapy. Z.F.R. reported the abuse to law enforcement in 2020. The investigating officer allowed Z.F.R. to choose whether she wanted to be interviewed by a police officer or a forensic interviewer at CornerHouse. Z.F.R. opted to be interviewed at CornerHouse. During the interview, Z.F.R. shared a letter documenting her abuse, which she had written in 2018 to process her trauma.

Respondent State of Minnesota subsequently charged Perez-Robles with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (Supp. 1995) (victim under age 16, significant relationship, multiple acts over an extended period of time), and third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2008) (sexual penetration using force or coercion).

Before trial, the state provided notice that it intended to present, as an expert witness, the forensic interviewer from CornerHouse who had conducted Z.F.R.'s interview. The state also moved to admit the entirety of the CornerHouse video documenting the

interview, which was over two hours long, the body-worn camera video of Z.F.R.'s statement to law enforcement, and Z.F.R.'s 2018 letter. Perez-Robles filed a motion in limine to exclude this evidence. The district court determined that the forensic interviewer could offer expert testimony on delayed reporting and other counterintuitive behaviors of sexual-assault victims and could testify about statements made by Z.F.R. during the interview as prior consistent statements. But the district court excluded the video of Z.F.R.'s CornerHouse interview as cumulative and allowed only a nine-minute edited version of body-worn camera video of her statement to police and a heavily redacted version of her 2018 letter. The district court also advised the state to limit the forensic interviewer's testimony concerning statements made by Z.F.R. to the "highlights."

This case was tried to a jury in March 2023. Z.F.R. explained during her testimony that she delayed reporting the sexual abuse because she thought her family must have known about it and would not do anything if she disclosed it to them; she did not want to exacerbate any of her family members' health issues; she was in denial and did not want to admit the abuse happened; and she thought the abuse was her fault. The forensic interviewer testified about several of the incidents of sexual assault reported by Z.F.R. during the interview and provided an explanation of delayed reporting in sexual-abuse cases and the types of conduct associated with "grooming."

The jury found Perez-Robles guilty of both first- and third-degree criminal sexual conduct. The district court entered adjudications for the two convictions and sentenced him to 86 months in prison for the first-degree conviction and 48 months in prison for the third-degree conviction, to be served concurrently. The district court further ordered that,

after completion of his sentence, Perez-Robles would be placed on a term of conditional release for the first-degree conviction and lifetime conditional release for the third-degree conviction.

DECISION

I. The prosecutor’s statement that the “presumption of innocence is gone” constitutes reversible plain error under *State v. Portillo*.

We first address Perez-Robles’s argument that the prosecutor engaged in prosecutorial misconduct. Specifically, Perez-Robles challenges the following statements made by the prosecutor at the beginning of the state’s rebuttal closing argument:

The presumption of innocence is gone. The presumption of innocence is gone because [Z.F.R.]’s credible testimony proves this case beyond a reasonable doubt. More is not needed.

Perez-Robles did not object to the prosecutor’s statements at trial, but he maintains that the prosecutor’s statements and the relevant circumstances here are virtually identical to those found to be reversible plain error in *Portillo*. We agree.

Appellate courts apply the four-step modified plain-error standard of review articulated in *State v. Ramey* to claims of unobjected-to prosecutorial misconduct. 721 N.W.2d 294, 302 (Minn. 2006). Under that standard, the defendant bears the burden of demonstrating that the misconduct constitutes “(1) error, (2) that is plain.” *Id.* An error is “plain” when it “contravenes case law, a rule, or a standard of conduct.” *Id.* If the defendant satisfies that burden, “the burden then shifts to the State[, under the third step,] to demonstrate that the error did not affect the defendant’s substantial rights.” *Portillo*, 998 N.W.2d at 248 (quotation omitted). In assessing “whether there is a reasonable

likelihood that the prosecutor's error had a significant effect on the verdict, we consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Id.* at 251-52 (quotation omitted). "If these three prongs are satisfied, [under the fourth and final step,] the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* at 248 (quotation omitted).

Portillo, although decided after the trial in this case, controls our analysis. In that case, *Portillo* was charged and convicted of criminal sexual conduct involving sexual abuse of a child that occurred over a number of years. *Id.* at 245-46. The prosecutor began the state's rebuttal closing argument by stating:

The presumption of innocence comes with an individual accused, unless and until the state proves its case beyond a reasonable doubt. [Defense counsel] correctly told you that. But it leaves him when the state has proven its case beyond a reasonable doubt. He no longer has that presumption. You've heard all the evidence. You've heard all of the state's case against Mr. *Portillo*. He no longer has that presumption of innocence. He has been proven guilty beyond a reasonable doubt. We've gone through those elements. You'll be able to talk and consider each other's thoughts and the information you heard throughout the course of the case, but he no longer has that presumption of innocence.

Id. at 246-47. *Portillo* did not object to the state's argument but challenged it on appeal as prosecutorial misconduct under the modified plain-error standard. The supreme court agreed and reversed and remanded the case for a new trial. *Id.* at 256.

In our analysis, we summarize the supreme court’s reasoning in *Portillo* on each of the four steps of the modified plain-error standard and then apply that guidance to this case.

Plain Error

The supreme court reasoned in *Portillo* that the prosecutor’s statement that the defendant “no longer has th[e] presumption of innocence,” is contrary to the constitutional protections afforded criminal defendants “because the prosecutor’s statement erroneously suggested that Portillo, *at the time the prosecutor made this statement*, had been proven guilty beyond a reasonable doubt and was therefore no longer entitled to the presumption of innocence.” *Id.* at 249-50. The court noted that “[a] defendant is only proven guilty beyond a reasonable doubt . . . when the jury has deliberated and reached that conclusion, not before.” *Id.* at 250. The court thus determined that the argument constituted an error. The supreme court further determined that the error was plain because precedent has made clear that “[t]he presumption of innocence is a . . . bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law.” *Id.* at 251 (quotations omitted). The court therefore determined Portillo satisfied his burden on the first two steps, that the argument constituted an error and that the error was plain.

The prosecutor’s statements challenged on appeal here are virtually indistinguishable from the statements the supreme court deemed to be plain error in *Portillo*. At Perez-Robles’s trial, the prosecutor made the very same error in the rebuttal closing argument by telling the jury that “[t]he presumption of innocence is gone.” This was plain error because, as in *Portillo*, the prosecutor’s statement erroneously suggested

that, “*at the time the prosecutor made this statement,*” Perez-Robles was no longer entitled to the constitutional protections afforded criminal defendants. *Id.* at 250.

The state argues that this case is more like the statements found not to be plain error in *State v. Young*, 710 N.W.2d 272 (Minn. 2006), and *State v. Vue*, 797 N.W.2d 5 (Minn. 2011). But the supreme court expressly distinguished both cases in *Portillo*, and those distinctions are equally applicable here. 998 N.W.2d at 249-51. With regard to *Young*, the supreme court in *Portillo* noted that “the prosecutor never explicitly mentioned the presumption of innocence in the portion of the State’s closing argument at issue; even in the context of the argument as a whole, the prosecutor only stated that the evidence was sufficient to find the defendant guilty, so ‘[h]e’s no long[er] an innocent man.’” *Id.* at 249-50 (quoting *Young*, 710 N.W.2d at 280); *see also State v. Johnson*, No. A23-1196, 2024 WL 3407693, at *3 (Minn. App. July 15, 2024) (distinguishing *Portillo* because the prosecutor in *Johnson* merely argued that “the presumption [of innocence] only remains” if the state proves the essential elements beyond a reasonable doubt).

The prosecutor in *Vue* made the statement in closing argument that the defendant “has now lost that presumption of innocence as a result of the evidence that you have heard.” 797 N.W.2d at 13-14. The supreme court distinguished this statement from *Portillo* explaining that the prosecutor’s statement in *Vue* was to the effect that the state “had produced sufficient evidence to overcome the presumption rather than a contention that the defendant was not entitled to the presumption.” 998 N.W.2d at 251 (quotation omitted). While the difference in wording between the challenged argument in *Vue* and *Portillo* may appear to be slight, the supreme court determined that it was significant.

Because the prosecutor's statement in this case is virtually identical to the prosecutor's statement in *Portillo*, we are constrained to similarly conclude that the prosecutor's statement that "[t]he presumption of innocence is gone" constitutes an error that is plain.

Likelihood that the Misconduct had a Significant Effect on the Verdict

With regard to the third step of the *Ramey* standard, the supreme court held in *Portillo* that the state had failed to satisfy its burden of establishing that there is "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* at 254 (quotations omitted). As to the pervasiveness of the error, the supreme court acknowledged that the prosecutor's misstatements occurred three times in just "half a page of the six-page rebuttal and the 20-page total closing argument," but it noted that the state made the misstatements during its rebuttal closing argument such that the defense had no opportunity to respond. *Id.* at 253. And the supreme court rejected the state's argument that the misstatement was cured by the district court's subsequent jury instruction that the presumption of innocence "remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt." *Id.* at 247.

The circumstances identified by the supreme court as relevant in *Portillo* are, again, markedly similar to those present here. While the most recent incidents of sexual abuse in this case were closer in time to the trial than those in *Portillo*, this case also involved assaults that occurred many years earlier. *See id.* at 252. And as is typical in these kinds of criminal-sexual-conduct cases, the evidence here relied almost exclusively on the testimony of Z.F.R., the victim. While there was corroborating testimony concerning

factual elements related to the incidents, there were no corroborating firsthand witnesses to the actual assaults and no physical evidence.

The only notable point of difference between *Portillo* and this case is that Z.F.R. testified clearly and consistently about the incidents of abuse that she recalled and was able to provide details about where the abuse occurred, her age at the time, what she was wearing, the events leading up to the sexual assault, and how Perez-Robles touched her. In *Portillo*, the supreme court concluded that the state's case was "relatively weak" because there were inconsistencies in the testimony provided by the victim. *Id.*

But we are not persuaded that this alone is sufficient to demonstrate that the state carried its burden on the third prong. This is particularly true when the erroneous statements were contained in the state's rebuttal closing argument as they were in *Portillo*, which deprived the defense of the opportunity to rebut the error. In addition, as occurred in *Portillo*, while the state correctly outlined the presumption of innocence in its initial closing argument and the district court also provided a correct instruction, neither of these was "specific enough to undo the harm" identified by the supreme court in *Portillo*. *Id.* at 253. The prosecutor's misstatement here likely affected the jury's verdict because it implied that Perez-Robles "had already lost the presumption of innocence *before deliberations.*" *Id.* at 254. We are thus compelled by the holding in *Portillo* to conclude that the state has not satisfied its burden of demonstrating that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury.

Preservation of Fairness and Integrity of Court Proceedings

As to the fourth and final prong, the supreme court held in *Portillo* that the preservation of fairness and integrity of judicial proceedings required reversal. *Id.* at 256. The court explained that “[t]he uncorrected, erroneous statement that Portillo was not entitled to the presumption of innocence as the jury deliberated deprived Portillo of the ability to present his defense and have the charges against him considered under the proper, correct instructions.” *Id.* The court expressed concern that, if “[l]eft unchecked, such errors would . . . have a substantial and deleterious effect on future trials and undercut the historic standard of proof imposed on the State in criminal trials.” *Id.* (quotation omitted).

Guided by *Portillo*, we similarly conclude that the prosecutorial error here must be addressed to ensure the fairness and integrity of judicial proceedings, even though the reversal will “undoubtedly cause distress” to Z.F.R. *Id.* at 255-56. In reaching this conclusion, we are mindful that *Portillo* had not yet been decided when this case was tried, the erroneous statement was isolated, and the prosecutor correctly outlined the burden of proof and the presumption of innocence in the state’s initial closing argument. But because the relevant facts here are not distinguishable in any meaningful way from *Portillo*, we must reach the same conclusion.

II. The district court did not abuse its discretion in allowing expert testimony regarding delayed reporting and counterintuitive behaviors of sexual-assault victims.

Because it is likely to recur on remand, we address Perez-Robles’s challenge to the admission of expert testimony by the forensic interviewer. Perez-Robles argues that the testimony was not needed to “assist the trier of fact to understand the evidence or to

determine a fact in issue” as required under Minn. R. Evid. 702. Perez-Robles also argues that the interviewer’s testimony should not have been admitted as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B). Finally, he argues that, under Minn. R. Evid. 403, the testimony by the forensic interviewer was needlessly duplicative and that her testimony about grooming behaviors and manipulation should have been excluded because any probative value of the testimony was substantially outweighed by the danger of unfair prejudice.

“Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020) (quotation omitted). On appeal, the appellant has the burden of showing (1) the district court abused its discretion by admitting the challenged testimony, and (2) that the error led to prejudice. *State v. Thao*, 875 N.W.2d 834, 840-41 (Minn. 2016) (reviewing admission of expert testimony); *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (reviewing the admission of evidence as a prior consistent statement under rule 801). We address each of Perez-Robles’s arguments below, beginning with his challenge to the admissibility of the testimony under rule 702.

Expert Testimony on Delayed Reporting and Counterintuitive Behaviors of Sexual-Assault Victims

Perez-Robles argues that expert testimony by the forensic interviewer on delayed reporting and counterintuitive behaviors of sexual-assault victims should not have been admitted because Z.F.R. was an adult at the time of trial and had worked at an advocacy organization for victims of domestic violence and was thus “familiar with the effects of trauma and more than capable of explaining her emotions and why she delayed her report.” In addition, Perez-Robles notes that Z.F.R. “did not suffer from a disability or another condition that made her testimony hard to follow or understand.” Perez-Robles thus contends that the forensic interviewer’s testimony was not admissible under rule 702.

Expert testimony is admissible under rule 702 if: “(1) the witness is qualified as an expert; (2) the expert’s opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard.” *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). Expert testimony is helpful when it is “outside the common understanding of an average juror” and unhelpful if it will not aid the jury in reaching a conclusion. *Id.* at 289, 293. “Even if acceptable under Rule 702, expert testimony should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” *State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003) (citing Minn. R. Evid. 403).

This case involves sexual abuse of Z.F.R. throughout her childhood and continuing through her early 20s. Even though Z.F.R. was an adult during the last few years of the abuse and may have had insight into the effects of trauma through her work as a community

advocate for victims of domestic violence, that does not negate the fact that delayed reporting and counterintuitive behaviors of sexual-assault victims remain outside the common understanding of a jury. In support of his argument, Perez-Robles cites to earlier opinions, but he does not cite to the more recent opinion of the supreme court in *Obeta*, a case involving an *adult* rape victim.

In *Obeta*, which involved an interlocutory appeal by the state challenging the exclusion of expert testimony concerning typical behaviors of rape victims, the supreme court stated:

[W]e have recognized that the experiences and reactions of victims of certain crimes are outside the common knowledge of the jury. In these cases, expert testimony on typical victim behavior may be helpful to assist the jury in evaluating the facts in the case. The rationale we applied in allowing expert testimony on the typical behaviors of battered women, battered children, and child- and adolescent-victims of criminal sexual conduct applies with equal force to expert-opinion testimony on typical rape-victim behaviors that are outside the common understanding of most jurors.

Obeta, 796 N.W.2d at 291. The supreme court reversed the district court's exclusion of the expert testimony, explaining: "We reach this conclusion because the mental and physical reactions of an adult sexual-assault victim may be outside the common understanding of an average juror." *Id.* at 294.

The reasoning of *Obeta* applies with even greater force in this case—a case that involves allegations of 20 years of repeated sexual abuse by Z.F.R.'s relative that began when Z.F.R. was a young child. We discern no abuse of discretion by the district court in

its determination that this evidence is outside the common understanding of jurors and would be helpful. We thus reject Perez-Robles's challenge to the testimony on this ground.

Prior Consistent Statement

Perez-Robles next argues that the testimony should not have been admitted as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B) because Z.F.R. never testified about delayed reporting or other counterintuitive behaviors of sexual-assault victims. Perez-Robles's argument, however, conflates the interviewer's expert testimony with her testimony as a fact witness, relaying consistent statements made by Z.F.R. during the forensic interview. The expert portion of her testimony was admitted under rule 702, not as a prior consistent statement, and we discern no abuse of discretion by the district court in doing so.

Needless Duplication

Perez-Robles further claims that the interviewer's testimony provided needless duplication under Minn. R. Evid. 403.¹ The district court, however, took measures to limit duplication. For example, the district court did not allow the two-hour video of the forensic interview to be submitted into evidence and restricted the interviewer's testimony concerning the substance of the forensic interview to just the "highlights," along with other measures designed to avoid the needless presentation of cumulative evidence. The district

¹ Rule 403 provides that "[a]lthough relevant," evidence may nevertheless be excluded if, among other reasons, "its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence." Minn. R. Evid. 403.

court balanced the interests of the parties, and we discern no abuse of discretion based on this trial record.

Prejudice Resulting from Testimony Related to Grooming Behaviors

Perez-Robles also argues that the admission of the interviewer's testimony about grooming and manipulation was an abuse of discretion because any probative value was substantially outweighed by the danger of unfair prejudice. At trial, the forensic interviewer was asked to explain grooming behaviors. She testified that it can include behaviors to "normalize" the alleged behavior that the person is perpetrating. She also testified that it can involve "threatening tactics to keep people quiet" and include "things like gifts to placate the individual." In her testimony, the interviewer also characterized certain alleged behaviors of Perez-Robles as examples of grooming behavior. Perez-Robles argues that this testimony was unduly prejudicial under rule 403.

Defense counsel objected on the ground of relevance to questioning on the topic of grooming behaviors, which objection was overruled by the district court. Counsel did not assert any objection under rule 403 for prejudice. Accordingly, review of this issue would be subject to a plain-error analysis. *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). Because this case is being remanded for a new trial, we need not analyze this issue further in this appeal.

III. Because we reverse Perez-Robles's convictions and remand for a new trial, we decline to address Perez-Robles's argument that the district court erred by sentencing him to lifetime conditional release after he has served his sentence.

Perez-Robles argues, in the alternative, that the district court erred in sentencing him to lifetime conditional release on the second of his convictions because the two counts

were adjudicated simultaneously, not consecutively. Because we reverse Perez-Robles's convictions and remand for a new trial, we need not address this issue.

Reversed and remanded.