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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1712**

State of Minnesota,
Respondent,

vs.

Christopher Gregory Roth,
Appellant.

**Filed November 25, 2024
Affirmed
Harris, Judge**

Ramsey County District Court
File No. 62-CR-23-60

Keith Ellison, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Patrick Monnens, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Harris, Presiding Judge; Larkin, Judge; and Smith,
Tracy M., Judge.

NONPRECEDENTIAL OPINION

HARRIS, Judge

Appellant Christopher Gregory Roth challenges his conviction, following a jury trial, for domestic assault by strangulation. He contends the district court erred by (1) allowing the state to introduce vouching testimony, (2) allowing the state to provide

testimony on rebuttal that exceeded the scope of the defense evidence, and (3) allowing the jury to review body-worn-camera footage introduced as evidence of a prior inconsistent statement. Additionally, Roth contends that the prosecutor committed misconduct by suggesting through cross examination of Roth that he tailored his testimony. In the alternative, Roth asserts that the cumulative effect of these errors requires a new trial. Because we conclude that the district court did not err, and the prosecutor committed misconduct that did not affect appellant's substantial rights or deprive appellant of his right to a fair trial, we affirm.

FACTS

In January 2023, respondent State of Minnesota charged appellant Christopher Gregory Roth with domestic assault by strangulation, in violation of Minnesota Statutes section 609.2247, subdivision 2 (2022), based on a domestic incident with his wife, M.O. Roth pleaded not guilty and the matter proceeded to a jury trial.

The state introduced into evidence the 911 call made by M.O. on the day of the incident. In the call, M.O. stated that her husband, Roth, choked her and twisted her neck before leaving in his vehicle. M.O. told the dispatcher that Roth choked her in front of their daughter, that she “wants a restraining order against him,” and that she “can’t do this [anymore].” She denied needing an ambulance and stated that she was afraid to hang up with the dispatcher until police arrived because Roth was “known to come back and hurt [her] some more.” M.O. can be heard crying and breathing heavily for the entirety of the 911 call.

The state next called M.O.'s father, R.O., as a witness. He testified that on the day of the incident, he awoke to yelling between M.O. and Roth. R.O. said that he heard M.O.'s voice getting weaker and described hearing M.O. trying to breathe. R.O. testified that he saw Roth hit and grab M.O. and hold her in a chokehold. He stated that Roth acted "[l]ike he was a tough guy" throughout the altercation that night, explaining that he carried a "you're gonna listen to me or you're gonna . . ." demeanor. R.O. added that Roth "continued to choke" until "all of a sudden he quit and he ran." Then, the police arrived.

The state next called M.O. as a witness. M.O. testified that, on the date of the incident, she had been living with Roth, their three children, and her mother and father. She testified that it was her father who called 911 and not she, but that she did speak with Officer C.D. that night. M.O. also testified that she was high and lied to Detective A.B. about the entire incident.

The state introduced evidence of Officer C.D.'s body-worn camera (BWC). Before playing the video, the court gave the following instruction:

So, ladies and gentlemen, . . . you're about to hear some evidence concerning statements that the witness allegedly testify – or testified to earlier on. These statements may be inconsistent. They're considered prior inconsistent statements, and you should consider that statement as evidence of the fact referred to in a prior statement that is admitted into evidence.

The court then clarified its instruction:

[T]he evidence that has just been received, Exhibit 3, concerning the statement that is allegedly to have been made sometime before [M.O.] testified here is admitted only for the light it may cast on the truth of her testimony at trial. You must not consider this statement as evidence of the facts referred to in the statement itself.

The state played video and audio footage of Officer C.D.'s BWC for the jury. The footage shows Officer C.D. speaking with M.O. shortly after midnight. Officer C.D. asked M.O. whether Roth ever threatened or tried to kill her, to which she responded affirmatively. M.O. then testified that she is "the one who gets physical," she "was a hot mess in that video," and that she would "be the first to tell [that she] was high as hell."

Roth testified in his own defense. He testified that he has been married to M.O. for eight years and they have three children together. Roth explained that M.O. suffers from physical and mental illnesses, that M.O. has assaulted him in the past, and that M.O. has instructed him that "the only way to get her to calm down if she's in a mania from bipolar is to hold her, and then to tell her that I love her and everything else."

Roth explained that, on the night of the incident, he picked up their daughter from school and then learned from M.O. that the police were called to their residence earlier that day. When he arrived home, he was met by one of the police officers who explained that M.O. and R.O. had gotten into an altercation and that things were physically escalating. Roth got M.O. to calm down in a separate room, but M.O. continued to yell back and forth with her parents. He said that M.O. expected him to defend her by telling her parents to "stop talking about [them]." Roth testified that he told M.O., "It's enough. [You]'ve got to stop. This has got to stop." Roth then turned away from her to face the television when he felt M.O. push him from behind and hit him with something. When he turned around his arm hit M.O. Roth told M.O. that he was going to leave and that they could not continue this anymore, but she became upset and would not let him leave. According to Roth, M.O. then pushed him and hit him in the back of the head with something.

Roth additionally testified that he has had to call 911 multiple times for disturbances. He explained that he does not always call 911 due to M.O.'s behavior because she has an extensive history and worries that the next call may get her arrested and their children do not deserve to see a parent "behind bars."

During rebuttal, the state called Detective A.B. The detective testified that he has worked for the White Bear Lake Police Department for twelve years. He also testified that, based on his experience and training, "if a couple's involved in long term abusive relationships, domestic assaults tend to increase over time." "Those begin from arguments to punching, hitting, and eventually strangulation." Detective A.B. explained that a victim may report that they were assaulted but then recant because they overexaggerated, lied about the situation, or because they don't want to see their partner get in trouble. Detective A.B. also testified that the police department has responded more than 40 times to situations between M.O. and Roth since 2015.

Detective A.B. testified that, during a meeting with M.O. in June 2023, M.O. admitted that she lied about the incident, that she was high, and that Roth did nothing wrong. M.O. also denied that Roth choked her. The state introduced photos of M.O.'s neck and arm. Detective A.B. testified that the bruising on M.O. was consistent with being assaulted, hit, or strongly held. When the prosecutor asked whether he was surprised at M.O.'s recantation during the June 2023 meeting, Detective A.B. stated, "No, . . . [b]ecause that's – she has done that in the past, where she's called saying that [Roth] has done something; we respond to the address. She'll either, one, say nothing happened or become uncooperative. So, again, yeah, I'm not surprised when she said that."

The jury returned a guilty verdict. The district court sentenced Roth to 12 months and a day, stayed execution of that sentence, and placed him on supervised probation for three years. Roth appeals.

DECISION

Roth challenges his conviction on two grounds. First, Roth argues that the district court plainly erred when it: (1) allowed testimony from Detective A.B. vouching against M.O's credibility; (2) allowed Detective A.B. to provide testimony on rebuttal that exceeded the scope of the defense evidence; and (3) played BWC footage introduced as evidence of a prior inconsistent statement for the jury during jury deliberation. Second, Roth asserts that the prosecutor committed misconduct by suggesting through cross-examination of Roth that Roth had tailored his testimony. Roth did not object at trial to any of the actions that he challenged now. We address each argument in turn.

I. The district court did not commit plain error.

A. Standard of Review.

We review unobjected-to admissions for plain error. *State v. Kelley*, 855 N.W.2d 269, 273 (Minn. 2014). Under the plain error standard, the appellant must demonstrate that (1) there was an error; (2) the error was plain; and (3) the error affected appellants substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). If each prong is satisfied, we will then determine whether the error requires reversal to “ensure fairness and the integrity of the judicial proceedings.” *Griller*,

583 N.W.2d at 740. But “[i]f the [appellant] fails to establish that the claimed error affected his substantial rights, we need not consider the other plain error factors.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011).

B. The district court did not commit plain error because Detective A.B.’s testimony did not vouch for or against M.O.’s credibility.

Roth argues that the district court committed plain error because it permitted vouching testimony by Detective A.B. during the state’s redirect examination. Roth alleges that Detective A.B.’s testimony about his experience with domestic violence victims and lack of surprise that M.O. recanted her statement was vouching testimony. Roth asserts that this testimony communicated to the jury that M.O.’s trial testimony was not credible. The state argues that Detective A.B.’s testimony was not erroneously admitted because he did not vouch for or against M.O.’s credibility or opine on her truthfulness.

“The credibility of a witness is for the jury to decide.” *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (quotation omitted). A witness testifying for or against the credibility of another witness is improper vouching testimony. *Ferguson*, 581 N.W.2d at 835; *see State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995) (concluding it was improper to admit a police officer’s testimony that he was certain he was taking a truthful statement, but also finding no prejudice because other evidence revealed the opinion on truthfulness was little more than corroborative); *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981) (holding the district court erroneously admitted a police officer’s testimony that he believed the defendant lied when making her statement to the police).

In *Ferguson*, the supreme court held that a police officer who testified that an informant had provided law enforcement with information on prior occasions was not vouching testimony. 581 N.W.2d at 836. The court stated that the officer “did not testify that [the informant] was telling the truth or that he believed one witness over another.” *Id.*

Similarly, here, Detective A.B. did not testify that he believed M.O. was lying or telling the truth during the June 2023 meeting. He instead testified about his experience working in domestic violence cases and that victims may recant earlier statements because they either lied, exaggerated, or loved their partners. And based on his prior dealings with M.O., he testified that he was not surprised that M.O. recanted her statement. For these reasons, we reject Roth’s assertion that Detective A.B. vouched against M.O.’s testimony and conclude there was no plain error.

C. The district court did not commit plain error by permitting the state to present rebuttal testimony of Detective A.B. because the testimony did not exceed the scope of the defense evidence.

Next, Roth argues that Detective A.B.’s rebuttal testimony exceeded the scope of his defense evidence and effectively allowed the state to re-emphasize its case-in-chief.

Minnesota Rules of Criminal Procedure 26.03, subdivision 12(g), permits the state to “rebut the defense evidence” after the defense presents its case. “[R]ebuttal evidence consists of that which explains, contradicts, or refutes the defendant’s evidence . . . and the determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the trial court.” *State v. Swanson*, 498 N.W.2d 435, 440 (Minn. 1993) (quotation omitted). The purpose of rebuttal evidence “is to cut down defendant’s case and not merely to confirm the case in chief through restatement or new facts.” *State v. Walker*,

235 N.W.2d 810, 815 (Minn. 1975). “It is the jury’s role to assess the credibility of the evidence and the state may present rebuttal evidence for the jury to consider in making its decision.” *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004).

The state argues that Detective A.B.’s testimony was proper because Roth’s testimony corroborated M.O.’s recantation that Roth had done nothing wrong and, therefore, the state needed to present evidence for the jury to credit her initial report of the incident during the 911 call.

Here, Roth testified generally about his relationship with M.O. and the January 2023 incident. Detective A.B. testified that domestic-abuse victims often recant earlier complaints either because they exaggerated, lied, or did not want to see their loved ones get in trouble. He also testified that the police department had responded to disputes between Roth and M.O. over 40 times, that M.O. recanted in the past, and that the bruising on her arms was consistent with being assaulted.

We reject Roth’s assertion that the state presented rebuttal evidence far beyond the scope of the defense’s case. Roth’s testimony corroborated M.O.’s recantation, which speaks to their credibility as witnesses. The state then introduced Detective A.B.’s testimony that could explain, contradict, or refute Roth’s testimony that tended to align with M.O.’s recanted statement. In sum, the district court did not plainly err by admitting the state’s rebuttal testimony.

D. The district court did not commit plain error when it permitted the jury to review Officer C.D.'s BWC video during deliberations.

Roth next argues that the district court committed plain error when it played Officer C.D.'s BWC footage during jury deliberations. A district court “must permit received exhibits or copies into the jury room including audio or video exhibits. The court may exclude audio or video exhibits from the jury room . . . if the court determines that allowing the exhibits into the jury room is not feasible,” or if “a party objects that allowing the exhibits into the jury room will result in prejudice.” Minn. R. Crim. P. 26.03, subd. 20(1)(a)-(b). “The court must not permit into the jury room . . . audio and video exhibits that contain oral statements that would unfairly deemphasize live testimony.” *Id.*, subd. 20(2)(b). The court may allow the jury to review specific evidence under the following circumstances:

(a) If the jury requests review of specific evidence during deliberations, the court may permit review of that evidence after notice to the parties and an opportunity to be heard.

(b) Any jury review of depositions admitted in lieu of testimony, and audio or video exhibits not permitted in the jury room under paragraph (1) of this rule, must occur in open court. The court must instruct the jury to suspend deliberations during the review.

Minn. R. Crim. P. 26.03, subd. 20(2)(a)-(b). Here, the district court gave notice and an opportunity to both parties to state their positions on the jury's request to review the BWC footage. Neither party objected.

Roth insists, however, that under *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991), the district court was required to consider “(i) whether the material [would] aid the

jury in proper consideration of the case; (ii) whether any party [would] be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.” His reliance on *Kraushaar* is misguided. There, the jury requested and was permitted to review video evidence in the jury room. *Kraushaar*, 470 N.W.2d at 515. The supreme court outlined three considerations that district courts “*should* take into account in exercising its discretion.” *Id.* (emphasis added). The supreme court added that, while the district court likely did not abuse its discretion, “it would have been preferable for the review to have taken place in the courtroom rather than in the jury room.” *Id.* at 516.

In contrast, here, the district court permitted the jury to view the BWC video in the courtroom rather than in the jury room. Moreover, the BWC video was admitted into evidence during trial.

Roth additionally argues that playing the video was improper because the BWC footage was only admitted for prior inconsistent statements. “A witness’s prior inconsistent statement is admissible for impeachment purposes, but it is generally not admissible as substantive evidence.” *In re Welfare of D.D.R.*, 713 N.W.2d 891, 901 (Minn. App. 2006). However, the district court offered a limiting instruction to the jury:

And I just want to clarify in earlier instructions, the evidence that has just been received, Exhibit 3, concerning the statement that is allegedly to have been made sometime before [M.O.] testified here is admitted only for the light it may cast on the truth of her testimony at trial. You must not consider this statement as evidence of the facts referred to in the statement itself.

Still, Roth asserts that he had no method to counter the evidence during deliberations, and that the jury was “allowed to use non-substantive evidence for any purpose [it] saw fit.” However, we presume “that the jury follows the court’s instructions.” *State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005). And here, the district court gave a limiting instruction when the footage was first introduced. As noted earlier, neither party objected to the BWC video and Roth’s *Miranda* statement being played again since the jury had just returned after a long weekend. Roth could have objected or requested the court to read a cautionary instruction again, but he did not.

In sum, it was not plain error for the district court to permit the jury to review the video evidence in open court after deliberations began.

II. The prosecutor committed misconduct by suggesting that Roth tailored his testimony but the plain error did not affect his substantial rights.

Roth argues that the prosecutor engaged in prosecutorial misconduct by implying that Roth tailored his testimony after listening to the state’s case-in-chief. The state asserts that, although the issue is a “close one,” there was no plain error because the prosecutor had evidentiary grounds to suggest Roth tailored his testimony.

Defendants have the right “to be present at trial under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.” *Swanson*, 707 N.W.2d at 657-58. The prosecution may not “use a defendant’s exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state’s case.” *Id.*

When the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing error that is plain, but upon doing so the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id.* at 299-300.

During Roth's cross-examination, the prosecutor asked the following questions:

Q: And you had a chance to listen to the recording in its entirety that was played in court earlier today; is that right?

A: Yes.

Q: And at the time when Officer [C.D.] spoke with you, you hadn't heard what [M.O.] had told police officers; is that right?

A: Right.

Q: And you hadn't heard the 911 call at that time; is that right?

A: Right.

Q: And you hadn't heard what [M.O.]'s father stated to police on the date of the incident; is that right?

A: Right.

. . . .

Q: And then as part of [the] proceedings, you got to see the evidence that the State had gathered in this case; is that right?

A: Not all of it.

Q: But you had a chance to review the evidence in this case and know what existed; is that right?

A: Very minimum.

Q: Yes or no?

A: Some.

Q: So, yes, you had a chance to review the evidence in this case, even a part of it?

A: Yes.

Q: And you had a chance to discuss all of that, right, and review it?

A: Yes.

Q: And, in fact, you're the only witness in this whole trial that has had a chance to review all the evidence, and then, in fact, hear all the evidence; is that right?

A: I believe so.

The prosecutor proceeded to ask Roth whether he was in court when the 911 operator, M.O., M.O.'s father, and Officer C.D. testified, to which Roth answered affirmatively.

We conclude that the prosecutor plainly erred by suggesting that Roth tailored his testimony. The state maintains that the prosecutor did not commit plain error because Roth's testimony at trial was more detailed than his police statements after hearing M.O.'s testimony. The state relies on *State v. Leutschaft*, 759 N.W.2d 414, 419 (Minn. App. 2009), in which we held that even though the prosecutor came "dangerously close" to violating the *Swanson* rule, "there was at least an arguable suspicion of tailoring." We concluded that the "facts omitted by Leutschaft in his statements to the police were significant enough that it would be reasonable to expect an arrested person to disclose them if they were true." *Id.* Notably, the line of questioning that was "dangerously close" consisted of the following exchange:

Q: You got to listen to the testimony here of [T.B.], right?

A: Yes, I did.

Q: She didn't get to listen to yours, right?

A: I don't know that.

Id. at 419. Here, however, the prosecutor asked 12 questions "to imply that [Roth] had an opportunity to adjust his version of the incident after hearing the state's evidence." *Id.*

Because the prosecutor committed plain error, the state must demonstrate that the error did not violate Roth's substantial rights. The state argues that the prosecutor's questions were limited, did not directly accuse Roth of tailoring, and did not suggest in closing argument that Roth tailored his testimony.

"To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant." *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017) (quotation omitted). Moreover, "[i]f the State fails to demonstrate that the alleged error did not affect the defendant's substantial rights, we consider whether the error should be addressed to ensure fairness and the integrity of judicial proceedings." *Id.*

Of the prosecutor's six-page cross-examination of Roth, two pages consisted of improper suggestions. While we cannot say that the improper suggestions were not pervasive, we nevertheless conclude that Roth's substantial rights were not affected given the strength of the evidence. At trial, the state presented the 911 call by M.O., when she can be heard crying and breathing heavily, and reporting that Roth choked her and twisted her neck. The state also presented Officer C.D.'s BWC footage interviewing M.O. the night of the incident, which showed M.O. was clearly distraught while describing the incident. R.O. also testified to hearing yelling and M.O.'s voice getting weaker and described her breathing difficulty. Although the testimony of R.O. was inconsistent at times, "it is for the jury, not this court, to determine the credibility and weight to be given to the testimony of witnesses." *Pendleton*, 706 N.W. 2d at 512. And "[e]ven [when] witness credibility has been challenged, the jury may nonetheless believe the witness." *Id.*

“We assume that the jury believed the witnesses whose testimony supports the verdict and that the jury did not believe evidence to the contrary.” *Id.*

In sum, while the state’s questions were improper, we conclude that the state met its burden to demonstrate that the improper questioning did not affect Roth’s substantial rights. And this single error is not enough to deprive Roth of a fair trial.

III. Roth is not entitled to a new trial due to the cumulative effect of the alleged errors.

Roth argues that he should be granted a new trial based upon the cumulative effect of all the alleged errors. “[An] appellant may be entitled to a new trial in rare cases where the ‘errors, when taken cumulatively, have the effect of denying [the] appellant a fair trial.’” *State v. Fraga*, 898 N.W.2d 263, 278 (Minn. 2017) (quoting *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009)). We have concluded that the district court did not err in its evidentiary rulings. *See supra* part I. Because we have concluded that there is only one error, prosecutorial misconduct, the cumulative-error rule does not apply. *See State v. Mayhorn*, 720 N.W.2d 776, 791-792 (Minn. 2006) (reversing and remanding for new trial based on combination of multiple evidentiary errors and multiple incidents and types of prosecutorial misconduct).

Affirmed.