

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1897**

State of Minnesota,
Respondent,

vs.

Russell James Bankey,
Appellant.

**Filed November 4, 2024
Affirmed
Frisch, Judge**

Mille Lacs County District Court
File No. 48-CR-22-105

Keith Ellison, Attorney General, Jacob Campion, Assistant Attorney General, St. Paul, Minnesota; and

Corey Haller, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Frisch, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this direct appeal following a conviction for first-degree criminal sexual conduct, appellant argues that the prosecutor committed plain-error misconduct during closing

argument by impermissibly vouching for the credibility of a witness. Because the state satisfied its burden to establish that there is no reasonable likelihood that the alleged misconduct had a significant effect on the jury's verdict, we affirm.

FACTS

Respondent State of Minnesota charged appellant Russell James Bankey with first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(h)(iii) (2008). The following evidence was received during Bankey's jury trial.

Bankey is M.B.'s grandfather. He engaged in frequent sexual conduct with M.B. beginning when she was around six years old until she was 12 or 13, including touching her vagina with his mouth and hands, penetrating her vagina with his mouth, hands, and penis, and making M.B. touch his penis. M.B. told a friend about the sexual contact when she was in sixth or seventh grade but "didn't tell her much" because she was "scared." Sometime between 2018 and 2019, M.B. told a family member about the sexual conduct and that "nobody knew." Several months later, M.B. told the family member that Bankey was the person who had committed the sexual conduct.

On August 10, 2021, when M.B. was 18 years old, she told her parents that Bankey "molested" her. M.B.'s father called the police and reported that Bankey had engaged in sexual contact with M.B. A police officer spoke to M.B. over the phone and received a statement from her. Another officer met with M.B. and received a statement in which M.B. "described digital vaginal contact," "attempted penile penetration," and "oral vaginal contact and oral penile contact." On August 21, M.B. called Bankey and, unbeknownst to him, recorded their conversation. During the call, Bankey acknowledged the sexual

conduct, apologized to M.B., and expressed concern that M.B. would tell someone what happened and that if she did, he would “be in a lot of trouble.” At trial, the jury heard the recording and reviewed a transcript of the call.

Bankey testified in his own defense and denied M.B.’s allegations. When questioned about the recorded conversation, Bankey testified that his communication style sometimes caused confusion, and that he wore hearing aids and misunderstood what M.B. was asking him about on the call. Bankey also testified that he believed M.B. was dishonest and that the touching referenced during the recorded call was about Bankey touching M.B.’s knee.

The jury found Bankey guilty of first-degree criminal sexual conduct and determined that M.B. was sexually penetrated in multiple ways—an aggravating sentencing factor. The district court entered a conviction for the offense and sentenced Bankey to 344 months’ imprisonment.

Bankey appeals.

DECISION

Bankey argues that the prosecutor committed misconduct during closing argument by impermissibly vouching for M.B.’s credibility. Because Bankey did not object to the alleged misconduct at trial, we “review the prosecutor’s statements under a modified plain error analysis.” *State v. Davis*, 982 N.W.2d 716, 726 (Minn. 2022). Under this analysis, Bankey bears the burden to demonstrate an error that is plain. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017). “An error is plain if it was clear or obvious” and is typically established where the prosecutor’s conduct “contravenes case law, a rule, or a standard of

conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotations omitted). If Bankey establishes plain error, “the burden shifts to the State to demonstrate that [this] error did not affect [his] substantial rights.” *Parker*, 901 N.W.2d at 926. “A plain error affects a defendant’s substantial rights if it was prejudicial and affected the outcome of the case.” *Id.* (quotation omitted). An error is prejudicial where “there is a reasonable likelihood that the error had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). If the state does not satisfy its burden, we “consider whether the error should be addressed to ensure fairness and the integrity of judicial proceedings.” *Id.*

Bankey argues that the prosecutor committed misconduct by vouching for M.B.’s credibility during the initial closing argument and then again in rebuttal. A prosecutor commits misconduct by “impl[ying] a guarantee of a witness’s truthfulness” or “express[ing] a personal opinion as to a witness’s credibility.” *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009) (quotation omitted). “While a prosecutor must not personally endorse a witness’s credibility, the State may, in closing argument, argue that a witness was or was not credible.” *Id.*; *see also State v. Fields*, 730 N.W.2d 777, 786 (Minn. 2007) (discerning no prosecutorial misconduct where challenged statements were about “the credibility of witnesses in the context of the evidence before the court and the conclusions that can be drawn from that evidence”).

During the state's closing argument, the prosecutor addressed an anticipated argument from Bankey that M.B. was lying based on inconsistencies in her testimony and prior statements, stating:

If she is going to lie, why wouldn't she lie better? Right? Why wouldn't she say, "Nobody was around when this happened." Why wouldn't she just say, "You know, he only used his fingers. That's it." Wouldn't that be a better lie? Why wouldn't she say it was just from five to ten, some nice round numbers? Why wouldn't she say it only happened one or two times? So not as to make this overblown. Right? She had a long time to think about it, but that's not what she did. She told you what happened.

During the state's rebuttal and in response to Bankey's closing argument, the prosecutor stated with regard to M.B. that "[a]ttorneys have an ethical duty to put people on the stand that they believe will tell the truth." Bankey argues that these statements amounted to prosecutorial plain error, and the state concedes that the prosecutor plainly erred by personally vouching for M.B.'s credibility in rebuttal. We assume without deciding that both statements constitute prosecutorial plain error.

But we conclude that the state has satisfied its burden to establish that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the jury's verdict. *See State v. Portillo*, 998 N.W.2d 242, 251 (Minn. 2023). "To determine whether there is a reasonable likelihood that the prosecutor's error had a significant effect on the verdict," we consider: (1) "the strength of the evidence against the defendant," (2) "the pervasiveness of the improper suggestions," and (3) "whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *Id.* at 251-52 (quotation omitted).

The state's evidence was strong. M.B. testified at length about the sexual conduct, including detailed instances of abuse occurring throughout Bankey's home and camper, and when M.B. was on vacations with Bankey. The jury then heard the recorded phone call between Bankey and M.B. During the call, Bankey apologized to M.B. multiple times and acknowledged that he "did some dumb stuff" when M.B. was a child. When M.B. stated that "[t]here was no reason to touch me as a child," Bankey responded, "I understand, I agree with you," and that "it wasn't [her] fault." And additional witnesses testified that M.B. had told them about the sexual conduct.

The misconduct was not pervasive. The identified vouching by the prosecutor was limited to the above-described passages during closing arguments spanning 33 transcript pages. And the prosecutor also reminded the jury during both the principal and rebuttal argument that the jury was responsible for determining the credibility of witnesses.

Additionally, any improper suggestions by the prosecutor about M.B.'s credibility were rebutted or mitigated by the defense. While Bankey did not have a specific opportunity to respond to the vouching during rebuttal, our review of the closing argument as a whole reveals that Bankey's closing argument consisted of a fulsome defense of his credibility and impeachment of M.B.'s credibility. *See State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000) ("With respect to claims of prosecutorial misconduct arising out of closing argument, we consider the closing argument as a whole rather than focus on particular phrases or remarks that may be taken out of context or given undue prominence.")

(quotation omitted)). And the prosecutor blunted the impact of the witness vouching by reminding the jury:

You get to make the determination on credibility. It's right there. The Judge read you all the rules, including presumption of innocence, including proof beyond a reasonable doubt, including credibility and what you get to take into account on who to believe, because there's two very different stories. One is [M.B.'s] and one is [Bankey's].

In sum, the state met its burden to show that there is no reasonable likelihood that the prosecutor's error had a significant effect on the verdict.¹ *See Portillo*, 998 N.W.2d at 251.

Affirmed.

¹ Even if the prosecutor's error had a significant effect on the verdict, reversal is not warranted to ensure the fairness or integrity of the judicial system. Bankey argues that if we take no remedial action, the public is "likely to seriously question whether our court system has integrity and generally offers accused persons a fair trial." *See Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022). But Bankey offers no rationale as to how or why public trust in the judicial system would be undermined in the absence of reversal. Because any misconduct by the prosecutor was not pervasive, and the evidence of Bankey's guilt was otherwise strong, we need not address the error "to ensure the fairness and the integrity of judicial proceedings." *See Parker*, 901 N.W.2d at 926.