

*This opinion is nonprecedential except as provided by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
A24-1379**

State of Minnesota,
Respondent

vs.

Victor Zuniga Gonzalez,
Appellant.

**Filed July 14, 2025
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-23-16775

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

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

Amber S. Johnson, Johnson Criminal Defense, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Worke, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct, alleging multiple instances of unobjected-to prosecutorial misconduct. Because there was no plain error, we affirm.

FACTS

The Richfield Police Department received a report that appellant Victor Zuniga Gonzalez sexually assaulted his 13-year-old cousin. Respondent State of Minnesota charged him with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1a(e) (2022). The case proceeded to a jury trial.

At trial, the cousin testified that, after she and Gonzalez went to a movie theater, Gonzalez brought her into his apartment and sexually assaulted her. She testified that, after the assault, she spent the night with an aunt who lived in an apartment down the hall from Gonzalez. The cousin said that she disclosed the assault to her mother, and that she recalled going to the hospital on three occasions for visits related to the incident. Multiple witnesses corroborated the cousin's testimony, including the mother, a doctor, a police officer, and a forensic interviewer. Jurors also heard testimony that both the cousin and Gonzalez tested positive for chlamydia. The district court admitted exhibits confirming the positive test results. When Gonzalez presented his case, two aunts and another relative testified that they did not recall any out-of-the-ordinary behavior by the cousin the day after the alleged incident. Gonzalez also testified. He acknowledged bringing the cousin back to his apartment but denied any sexual contact.

On cross-examination, Gonzalez had the following exchange with the prosecutor:

Q: Okay. So your testimony is [the cousin] is making all this up about what happened inside your apartment?

A: (Interpreter) Yes.

Q: Why?

A: (Interpreter) I don't know what she's thinking. As you can see, I am here to testify, to what I—what I did and what I saw.

....

Q: She's just making this up for no reason?

A: (Interpreter) As I said, I do not know what—what is going through her mind. I am here to testify to say what I did and what I saw.

Q: Well, you're here to tell your version of the events, right?

A: (Interpreter) Of course.

When the parties proceeded to closing argument, the prosecutor stated that the cousin “has been nothing but consistent about what [Gonzalez] did to her. She's been unimpeached.” The prosecutor went on to say:

The reasonableness of her testimony, is this something that is outlandish, unbelievable? Everything she said except for the rape itself was corroborated by [Gonzalez] himself. This isn't an outlandish story. He got her alone. He's not willing to admit that he raped her, but the only thing that's unbelievable about what she says happened is that some adult would do this to a child. Unfortunately, that's the world we live in. It happens all the time. People do that to kids. He did that to [the cousin].

She has no motive to lie to you about what he did, none. . . . [Gonzalez] himself can't even come up with a reason as to why she would make this up about him. None of his witnesses could think of a reason.

When defense counsel presented closing argument, it sought to undermine the credibility of the cousin and the reliability of the state's evidence. First, defense counsel emphasized the severity of the allegation: “The allegation is a Chernobyl-style nuclear meltdown” that “hits you in the chest.” Second, he highlighted that, during her testimony, the cousin struggled to remember whether she had stayed overnight with her aunts in the building before the incident: “We all forget things. But when she's not remembering if she stayed over at her aunts' house, people that she's known all of her life, it's difficult to believe that that is just something that just fell out of [her] head and [she] can't figure it

out.” Third, defense counsel noted that family members did not notice any problems with her the day after the alleged incident. Fourth, defense counsel stated that the cousin struggled to recall who exactly was involved in her multiple trips to the hospital and that she could not remember her symptoms during those visits.

On rebuttal, the prosecutor stated:

Who cares how many times she spent the night at her aunt’s house before [Gonzalez] raped her? Who cares how long they lived together? No offense to the defense, this case is about July 1st of 2023 and whether or not the defendant sexually assaulted her, not about how many times she spent the night with her cousins, not about how long they lived together, none of that.

Regarding defense counsel’s statements about the hospital visits, the prosecutor stated that “it’s easy for [the cousin] through an interpreter to not understand [defense counsel’s] questions about the exact day, [and] the exact doctor she talked to.” Regardless, the prosecutor again added, “no offense to the defense, who cares?”

To close rebuttal, the prosecutor stated:

To suggest that he’s just that unlucky that [the cousin], for no reason, with no motivation, decided to lie about him raping her, say that it occurred on the one night that he admits that they were alone together, and they both just happen to have chlamydia[,] . . . is not reasonable doubt. That is fanciful. It’s implausible, and it is not supported by the evidence.

After deliberation, the jury found Gonzalez guilty. The district court sentenced Gonzalez to 144 months in prison with conditional release after confinement. This appeal followed.

DECISION

On appeal, Gonzalez argues that he is entitled to a new trial because the prosecutor committed misconduct during cross-examination and closing argument. He argues that the prosecutor improperly (1) shifted the burden of proof; (2) expressed a personal opinion on his credibility; (3) belittled the defense theory and attacked defense counsel; and (4) appealed to the passions and prejudices of the jury.

“The overarching concern regarding prosecutorial misconduct . . . is that [the] misconduct may deny the defendant’s right to a fair trial.” *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Prosecutors are ministers of justice who “have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt.” *Id.*

When, as is the case here, a defendant “fail[s] to object at trial to the prosecutor’s alleged misconduct, we review the issue under a modified plain-error standard.” *State v. Johnson*, 915 N.W.2d 740, 746 (Minn. 2018). Plain error requires “(1) [an] error; (2) that is plain; and (3) [that] . . . affect[s] 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) (quotations omitted). Plain error affects substantial rights when it is “prejudicial” and impacts “the outcome of the case.” *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010). Modified plain-error review differs from traditional plain-error review because, if the defendant shows an error that is plain, the burden shifts to the state to demonstrate “no reasonable likelihood that the absence of the misconduct in

question would have had a significant effect on the verdict.” *See Ramey*, 721 N.W.2d at 302 (quotation omitted). Whether the state met its burden depends on factors like the strength of the state’s evidence, the error’s pervasiveness, and whether the defendant had an opportunity to rebut the error. *State v. Davis*, 735 N.W.2d. 674, 682 (Minn. 2007).

However, even if we identify a plain error that affects substantial rights, we reverse only if it is necessary to “address the error to ensure fairness and the integrity of the judicial proceedings.” *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004) (quotation omitted).

Shifting burden of proof

First, Gonzalez argues that the prosecutor improperly shifted the burden of proof during cross-examination and closing argument. He contends the prosecutor committed misconduct on cross-examination by asking him: “She’s just making this up for no reason?” and “Well, you’re here to tell your version of the events, right?” He also contends the prosecutor committed misconduct during closing argument by stating: “[Gonzalez] himself can’t even come up with a reason as to why she would make this up about him. None of his witnesses could think of a reason.” Gonzalez argues that these statements erroneously implied that he had the burden to prove his innocence.

“Misstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct.” *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). However, “a prosecutor’s comment on the lack of evidence supporting a defense theory does not improperly shift the burden,” *State v. McDaniel*, 777 N.W.2d 739, 750 (Minn. 2010), and a prosecutor “may argue that particular witnesses were or were not credible,” *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003).

In *State v. Fields*, for example, the Minnesota Supreme Court rejected the argument that the prosecutor improperly shifted the burden of proof by suggesting to the jury that the defendant “could not explain why [the victim] would lie about . . . rape.” 730 N.W.2d 777, 785 (Minn. 2007). The supreme court concluded that the prosecutor’s statement did not amount to misconduct because “the prosecutor raised the issue of motive for [the victim] to lie in the context of credibility” and the defendant “fail[ed] to point to any explicit misstatement of the burden of proof.” *Id.* at 786.

Here, when the prosecutor made the challenged statements, he sought to cast doubt on Gonzalez’s credibility and his theory that the cousin fabricated her allegations. Specifically, on cross-examination, the prosecutor asked: “So your testimony is [the cousin] is making all this up about what happened inside your apartment?” Gonzalez responded “Yes,” and the prosecutor then asked whether she did so for “no reason,” to which Gonzalez responded “I do not know. . . . I am here to testify to say what I did and what I saw.” Consistent with this exchange, the prosecutor stated during closing argument: “[Gonzalez] himself can’t come up with a reason as to why she would make this up,” nor could any of his witnesses. Because the prosecutor permissibly cast doubt on Gonzalez’s credibility and theory of the case, and did not explicitly misstate the burden proof, we do not discern any plain error.

Expressing personal opinion on credibility

Second, Gonzalez argues that the prosecutor improperly expressed a personal opinion on his credibility during cross-examination. Gonzalez again relies on the prosecutor’s statement: “Well, you’re here to tell your version of the events, right?” He

argues that, when the prosecutor asked this question, he implicitly expressed the opinion that Gonzalez was lying and that “*his version* of the facts is not the truth.”

Prosecutors commit misconduct by giving their “own opinion about the credibility of a witness.” *State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006), *rev. denied* (Minn. Mar. 20, 2007). A prosecutor gives a personal opinion about credibility by, without a basis in the record, suggesting that a defendant is not being truthful. *Id.* However, no such misconduct occurs when a prosecutor comments upon credibility by analyzing the evidence. *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006).

Here, the challenged statements occurred in a context where Gonzalez responded “Yes” to the prosecutor asking whether the cousin made up “what happened inside your apartment.” Eventually, the prosecutor followed up with the challenged statement: “Well, you’re here to tell your version of the events, right?” To the extent the prosecutor implied that Gonzalez was not being truthful, the prosecutor did so in response to Gonzalez asserting that the cousin was not being truthful, and to help show that such a theory was not credible and contradicted much of the evidence in the record. We conclude that the prosecutor did not improperly comment on Gonzalez’s credibility.

Belittling the defense theory and attacking defense counsel

Third, Gonzalez argues that the prosecutor belittled the defense theory and personally attacked defense counsel during the rebuttal portion of closing argument. Gonzalez focuses on the following statement: “Who cares how many times she spent the night at her aunt’s house before the defendant raped her? Who cares how long they lived together? No offense to the defense, this case is about July 1st of 2023 and whether or not

[Gonzalez] sexually assaulted her.” In addition, he focuses on the prosecutor’s statement that it was understandable that the cousin could not recall “the exact day, [and] the doctor she talked to,” but regardless, “no offense to the defense, who cares?” Finally, Gonzalez focuses on the prosecutor’s statement that the notion the cousin made up the allegations was “fanciful” and “implausible.”

A prosecutor may “vigorously argue [the] case, including during closing arguments,” but “should not disparage defense counsel personally or belittle the defense, either in the abstract or by suggesting that the defendant raised the defense because it was the only one with any hope for success.” *State v. Davis*, 982 N.W.2d 716, 726 (Minn. 2022) (quotations omitted). However, no misconduct occurs when the challenged statements, “in context, were about the merits of potential defenses and an actual defense in closing argument,” or were “about the evidence.” *Id.* at 727.

Here, defense counsel stated during closing argument that the cousin had trouble remembering whether she had stayed overnight before with her aunt and the details of her medical visits. When the prosecutor used the phrases “no offense” and “who cares,” he rebutted those statements by refocusing the case on the events of the alleged incident itself. And when the prosecutor described the theory that the allegations were false as “fanciful” or “implausible,” he did so within the context of emphasizing the strength of the evidence in the record, noting that Gonzalez and the cousin were alone on the night of the incident and that they both tested positive for chlamydia. We conclude that the prosecutor did not improperly belittle the defense theory or attack defense counsel.

Appealing to the passions and prejudices of the jury

Fourth, Gonzalez argues that the prosecutor made statements during closing argument that improperly appealed to the jury's passions and prejudices. Specifically, Gonzalez points to the prosecutor's statement that "the only thing that's unbelievable about what [the cousin] says happened is that some adult would do this to a child. Unfortunately, that's the world we live in. It happens all the time. People do that to kids. He did that to [the cousin]."

"A prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (quotation omitted). Nevertheless, a prosecutor has some flexibility to render arguments that "might have a tendency to evoke sympathy," if the purpose for doing so is to counter anticipated arguments from defense. *State v. Carter*, 289 N.W.2d 454, 455 (Minn. 1979).

Here, in the challenged statement, the prosecutor described the general reality that child sexual assault does occur. Later, when defense counsel presented closing argument, it questioned the truth of the allegations based on details that were ancillary to the allegations themselves and characterized the allegations as "a Chernobyl-style nuclear meltdown" that "hits you in the chest." Because the prosecutor correctly anticipated that defense counsel would attack the cousin's credibility and emphasize the incendiary nature of the allegations, we conclude that the prosecutor did not improperly inflame the passions and prejudices of the jury by stating that child sexual assault does in fact occur.

Gonzalez also argues that by using a "we" statement, the prosecutor improperly aligned himself with the jury: "[T]he only thing that's unbelievable about what [the cousin]

says happened is that some adult would do this to a child. Unfortunately, that's the world we live in." (Emphasis added.)

"[A] prosecutor is not a member of the jury, so to use 'we' and 'us' is inappropriate and may be an effort to appeal to the jury's passions." *State v. Mayhorn*, 720 N.W.2d 776, 790 (Minn. 2006). In *Mayhorn*, a prosecutor said about the defendant: "This is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world and drug dealing." *Id.* at 789. On appeal, the Minnesota Supreme Court determined that the statement was misconduct because a prosecutor cannot describe himself "and the jury as a group of which the defendant is not a part." *Id.* at 789-90. But it is not misconduct when a "we" statement, in context, "does not necessarily exclude the defendant because the 'we' could reasonably be interpreted . . . to refer to everybody who was in court when the evidence was presented." *Nunn v. State*, 753 N.W.2d 657, 663 (Minn. 2008).

Here, in describing a world where child sexual assault occurs, the prosecutor was not distinguishing between a world in which the defendant lives and a world in which the prosecutor and jury live. Rather, the prosecutor was describing a general reality in a world in which everyone lives. Therefore, we conclude the prosecutor did not improperly align himself with the jury through a "we" statement.

Because Gonzalez fails to show misconduct by the prosecutor, we need not consider whether the state met its burden to demonstrate there was "no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict," *see Ramey*, 721 N.W.2d at 302 (quotation omitted), or whether to reverse in order

“to ensure fairness and the integrity of the judicial proceedings,” *Bernhardt*, 684 N.W.2d at 475 (quotation omitted).

Affirmed.