

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1040**

State of Minnesota,
Respondent,

vs.

Dickson Onaminyangau Makori,
Appellant.

**Filed April 30, 2012
Affirmed
Crippen, Judge***

Hennepin County District Court
File No. 27-CR-09-60265

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Johnson, Chief Judge; and
Crippen, Judge.

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant disputes admissibility of the state's evidence of the complainant's lack of previous sexual activity and argues that the prosecutor committed misconduct in closing argument, vouching for the credibility of the complainant and improperly referencing appellant's travel to Canada during the police investigation. Because none of appellant's arguments show plain error, and because the challenged evidence did not affect appellant's substantial rights, we affirm the judgment of conviction.

FACTS

This prosecution arose on the complaint of S.N.-S., who testified at trial that appellant Dickson Onaminyangau Makori, while visiting in her home, made sexual advances upon her and forcibly engaged in sexual intercourse. Appellant described events differently and stated that S.N.-S. made advances that included performing oral sex on him.

Approximately two months after this event, appellant left for Canada, where he remained for five months. He was arrested soon after returning to the United States and charged with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2008). Before trial, the district court granted appellant's motion in limine, limiting the state's introduction of evidence regarding appellant's travel to Canada to the difficulty experienced by police in reaching appellant. Following a multi-day jury trial, appellant was found guilty and was later sentenced to 48 months in prison.

DECISION

1.

Appellant asserts that the prosecutor committed misconduct by eliciting testimony from S.N.-S. regarding her sexual history.¹ Because appellant did not object to this alleged error during trial, we review this claim under the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The standard requires (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is “clear or obvious” or “conduct the prosecutor should know is improper.” *Ramey*, 721 N.W.2d at 302, 300 (quotation omitted). However, if appellant establishes plain error, the burden then shifts to the state to establish a lack of prejudice; that is, that the misconduct did not affect the case’s outcome. *Id.* at 302. This burden is met if the state can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury’s verdict. *Id.*

Appellant contends that Minn. Stat. § 609.347 (2008), the rape shield law, prohibited the state, as well as appellant, from eliciting evidence regarding S.N.-S.’s sexual history; an altered version of the statutory concept was adopted as Minn. R. Evid 412. The state asked S.N.-S. if she had been sexually active since her divorce in 1995, and she testified that she had not been sexually active for more than 18 years prior to the incident.

¹ Viewed appropriately, appellant’s argument goes to the district court’s admission of the evidence. This altered view of the issue would not affect our analysis of appellant’s claim.

Minn. Stat. § 609.347 states that in a criminal sexual conduct prosecution, absent exceptions that do not bear on this issue, evidence of “the victim’s previous sexual conduct” is not admissible; likewise, “reference to such conduct” is not permitted in the presence of the jury. *Id.*, subd. 3 (2008); Minn. R. Evid. 412. Appellant acknowledges that the rule does not specifically deal with evidence on the absence of sexual conduct, but he asserts a broad construction of the standard to encompass the evidence in question. In support of its argument that the statute focuses on the admission of evidence by defendants showing prior conduct, respondent points to a 2006 committee comment that states: “The rape shield rule should be applicable in all cases where the accused is offering evidence of the past sexual conduct of the alleged victim.” Minn. R. Evid. 412 2006 advisory comm. cmt.

Both parties address *State v. Aveen*, which concluded that the district court did not err by permitting the prosecution to elicit testimony from the complainant, after the defendant asserted consent as a defense, that she was a virgin prior to being sexually assaulted by the defendant. 284 Minn. 194, 197, 169 N.W.2d 749, 751 (1969). *Aveen* held that “[i]t was neither unreasonable nor unfair for the prosecution to anticipate the obvious defense strategy and to introduce this evidence upon its case in chief.” *Id.* *Aveen* was decided before the rape-shield law was adopted but remains good law. The state does not dispute that its offer of evidence denying prior conduct opened the door to rebuttal evidence that otherwise would be inadmissible.

Appellant cites no authority to support his arguments, and they fall short of establishing plain error conduct that the state should have known was improper and that

can be corrected despite the absence of contemporaneous objection. *Ramey*, 721 N.W.2d at 300. Moreover, the record establishes the absence of a reasonable likelihood that the evidence had a substantial effect on the decision to convict. The record includes ample evidence of appellant's guilt, including extensive testimony regarding S.N.-S.'s lack of consent and evidence of her multiple statements to others that appellant had sexually assaulted her. In addition, the evidence on S.N.-S.'s prior sexual inactivity was not extensive. *See State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007) (considering strength of evidence and "pervasiveness of the improper suggestions" when determining if misconduct had a significant effect on verdict). Also, appellant was afforded the chance to testify and to cross-examine S.N.-S. *Cf. State v. Carpenter*, 459 N.W.2d 121, 127 n.7 (Minn. 1990) (noting any error in exclusion of evidence was harmless, in part, because appellant allowed extensive cross-examination). Appellant has not established plain error, and it is not reasonably likely that the challenged evidence significantly affected the verdict.

2.

Appellant also argues that Minn. R. Evid 404(a), the rule proscribing character-trait evidence, precluded testimony from S.N.-S. and her daughter, A.N., regarding S.N.-S.'s more than 18 years of celibacy. Because appellant did not object at trial to this asserted error, this argument also is reviewed under the plain-error standard. *Montanaro v. State*, 802 N.W.2d 726, 732 (Minn. 2011).

Rule 404(a) prohibits admitting evidence to prove a person's character for the purpose of proving action in conformity with that character. *State v. Pak*, 787 N.W.2d 623, 628 (Minn. App. 2010).

Character has been described as “the aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes; the opinion generally entertained of a person derived from the common report of the people who are acquainted with him,” and more specifically as a “generalized description of a person's disposition in respect to a general trait such as honesty, temperance or peacefulness.”

8 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 32.25 (3d ed. 2001) (citations omitted).

Appellant offers no Minnesota authority to support the assertion that evidence of S.N.-S.'s past pattern of sexual behavior is character evidence. Character refers to “distinguishing attributes,” a “generalized description of a person's disposition,” and general traits “such as honesty, temperance or peacefulness.” *Id.* In addition, respondent convincingly observes that a lack of sexual activity may be attributed to illness or other circumstances, rather than a person's disposition. The issue is further affected by the holding in *Aveen*, 284 Minn. at 197-98, 169 N.W.2d at 751, which concluded that the state's chastity evidence was neither irrelevant nor unduly inflammatory. Error in the form of a violation of rule 404(a) is not clearly shown.

3.

Appellant argues that the prosecutor committed misconduct by vouching for S.N.-S.'s credibility when commenting on the testimony of her mother and daughter. Because

appellant did not object at trial to the potential vouching errors, his argument again is reviewed under the plain-error standard.

In the portion of the prosecutor's closing argument at issue, the prosecutor stated that S.N.-S. made statements to others who knew her, who were not

strangers that you can tell a story to. You know when someone you know that well is telling you the truth or not. You know, when someone breaks down the way she did, that she has been traumatized severely This is not something that was or could be fabricated, or else [S.N.-S.] is a really good actress.

Although it is improper for a prosecutor to express a personal opinion regarding witness credibility, it is not improper for a prosecutor "to analyze the evidence and argue that particular witnesses were or were not credible." *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006). A prosecutor's statements in closing argument become improper vouching when the statement "implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted).

The argument highlighted by appellant is only theoretically related to vouching. The argument at issue was used to illustrate that the complainant would not lie about not consenting to sex with appellant. Such analysis of evidence is permissible as part of a prosecutor's vigorous argument to demonstrate the credibility of a witness. *See State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (holding prosecutor free to argue which witnesses were credible); *see also State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009) (determining no error where prosecutor "invited the jury to make its assessment on

the basis of what it heard and saw in the courtroom”), *review denied* (Minn. Mar. 17, 2009). Appellant’s assertion of error does not show that plain error occurred.

4.

Finally, appellant argues that the prosecutor improperly argued that appellant’s travel to Canada was evidence of flight, in violation of the district court’s order in limine. Appellant did not object at trial to the state’s argument regarding his Canada travels. Although the earlier court determination preserved his objection for purposes of offering evidence, there was no error claimed or preserved relating to the state’s argument, which again is reviewed for plain error.

In her closing argument, the prosecutor asked the jurors to “consider [appellant’s] actions after the fact in evaluating whether he is telling the truth.” The prosecutor pointed out that police called to speak to appellant about two weeks after S.N.-S. reported her sexual assault assertion to appellant’s wife and that appellant left for Canada at about the time of the call. The prosecutor stated, “Now, I’m not suggesting that he did that to avoid charges in this case. There isn’t evidence of that. But I am asking you to consider the reasonableness of that in light of all the evidence in the case.” The prosecutor went on to argue that appellant knew the police wanted to talk to him and failed to contact police even after his return to Minnesota. “And I ask you to consider this, because these actions bear on the believability of [appellant’s] version of events.” The prosecutor then asserted that the testimony of other witnesses appeared more believable.

Appellant himself testified about his travel to Canada, providing the jury a detailed explanation for his travels: he hoped to avoid his wife because he had lied about having

consensual extramarital sex with S.N.-S. By presenting an alternative explanation for appellant's travels in its closing argument, the prosecutor was rebutting appellant's version of events. A prosecutor may anticipate a defense argument and respond to it. *State v. Washington*, 725 N.W.2d 125, 135 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). The prosecution's references to appellant's travel to Canada do not rise to the level of plain error.

Appellant argues that the cumulative effect of the prosecutor's errors denied him a fair trial. Because we conclude that the various assertions by appellant do not show plain error, there is no occasion for considering cumulative error.

Affirmed.