STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1530

State of Minnesota,
Respondent,

vs.

Katherine A. Krikorian,
Appellant.

Filed January 8, 2008
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Stevens County District Court
File No. K1-05-103

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Charles C. Glasrud, Stevens County Attorney, 109 East 6th Street, P.O. Box 66, Morris, MN 56267 (for respondent)

John M. Stuart, State Public Defender, Jessica Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges her conviction of two counts of first-degree criminal sexual conduct for the sexual abuse of her son and daughter. She contends that the district court made ten errors before, during, and after her trial that warrant relief. These claims include the contentions that the district court incorrectly ruled that the statute of limitations allowed her prosecution and that she was sentenced using incorrect sentencing guidelines. Because we conclude that the statute of limitations bars appellant's prosecution for the sexual abuse of her son, we reverse in part. But because we conclude that the statute of limitations does not preclude appellant's prosecution for the sexual abuse of her daughter and we reject her remaining claims of error, we affirm her conviction on that count. We remand for resentencing.

FACTS

Appellant is the biological mother of a son, C.F., and a daughter, D.F. Appellant began to sexually abuse both children no later than August 1994 while the family was living in Stevens County. At the time the abuse began, C.F. was seven years old, and D.F. was three years old. Appellant forced C.F. to have sexual intercourse with her, often several times a week. Appellant sexually abused D.F. by using a vibrator to stimulate her and her fingers to penetrate her. Appellant also forced C.F. to have sexual intercourse with D.F. on multiple occasions.

During the time period that appellant was abusing C.F. and D.F., they were not constantly in her care. Starting in October 1993, C.F. and D.F. were periodically placed

in the temporary foster care of K.F. and her husband. Eventually, C.F. and D.F. were placed in the permanent foster care of the couple. D.F. was permanently placed with K.F. and her husband on August 1, 1995, and C.F. several months later on January 29, 1996. These respective dates were the last times that either child had any contact with appellant. In February 1998, K.F. and her husband adopted both children, after appellant's parental rights were terminated.

Appellant's abuse of C.F. and D.F. did not come to light for many years. In January 2004, appellant was in custody on unrelated charges. During an in-custody assessment to determine whether she should be committed to the Minnesota Security Hospital in St. Peter, she disclosed to the psychiatrist who was performing the assessment that she had abused C.F. many years earlier, while the family was living in California. This information was relayed to Stevens County authorities, who launched an investigation into possible abuse of C.F. by appellant. A Stevens County sheriff's deputy interviewed C.F. on March 17, 2004, and he disclosed to the deputy that appellant had abused both himself and D.F. while the family had resided in Stevens County in the mid-1990s. It does not appear from the record that authorities ever interviewed D.F. regarding appellant's abuse.

Based on C.F.'s statements, authorities charged appellant with two counts of criminal sexual conduct in the first degree for violating Minn. Stat. § 609.342, subd. 1(h)(iii) (1994), for sexual abuse of C.F. and D.F. Although authorities learned about the abuse in March 2004, the complaint charging appellant was not filed until June 17, 2005 to allow C.F. to finish high school before the trial began. The state's first attempt to try

appellant ended in a mistrial, which the district court declared after appellant's counsel made improper comments during his opening statement.[1] After a second trial, in which C.F. testified but D.F. did not, the jury found appellant guilty on both counts. The district court sentenced appellant to consecutive sentences of 132 months for the first count and 102 months for the second count. This appeal follows.

D E C I S I O N

I.

Appellant's first contention of error is that the district court incorrectly interpreted Minn. Stat. § 628.26(c) (Supp. 1995)—the relevant statute of limitations—to allow appellant's prosecution.[2] The parties dispute the date on which the statute of limitations began to run for appellant's offenses. When the offense is a continuing one, such as here, the statute of limitations begins to run when the offense ends. *See State v. Burns*, 524 N.W.2d 516, 519 (Minn. App. 1994) (when criminal-sexual-conduct offense involving multiple acts over extended time period was completed in 1986, seven-year limitations period expired in 1993), *review denied* (Minn. Jan. 13, 1995); *see also State v. Danielski*, 348 N.W.2d 352, 355-57 (Minn. App. 1984) (noting that the general rule is that a statute of limitations begins to run when a continuing offense is completed), *review denied*

[1] The district court found these comments were not made in bad faith but made based on a reasonable belief that evidence supporting the statements was admissible without a pre-trial ruling on the evidence.

[2] The 1995 version of the statute of limitations was the provision in effect at the last possible time of appellant's criminal conduct. Minn. Stat. § 628.26(e) (2006) is the current citation to the appropriate statute of limitations for first-degree criminal sexual conduct. This statutory subsection has been renumbered, but the substance of the subsection has not changed since the 1995 amendment.

(Minn. July 26, 1984). When the complaint was filed, it asserted that multiple acts of sexual abuse of C.F. and D.F. occurred between August 1, 1994, and December 31, 1997. At trial, the jury was instructed to determine whether "the acts took place between . . . August 1, 1994 until . . . December 31, 1997." The state argues that testimony at trial established that the sexual abuse of C.F. and D.F. continued until late 1997. If this is correct, the complaint was undeniably filed within the limitations period.

The evidence that the state relies on in arguing that the abuse occurred into late 1997 is C.F.'s testimony at trial. Questioned about the timing of the abuse, C.F. stated that "there were multiple incidents that occurred during that time frame" and that the acts of sexual abuse were "scattered throughout" the stated time frame. But this testimony establishes nothing more than that multiple acts of abuse occurred sometime within the dates specified in the complaint and incorporated into the jury instructions. When directly asked on cross-examination, C.F. understandably was unable to provide any specific dates on which the abuse occurred. But multiple witnesses testified that D.F. was placed in permanent foster custody on August 1, 1995, and C.F. on January 29, 1996, and that neither child had any further contact with appellant after these dates. In other words, these respective dates are the last potential dates of appellant's abuse of either child. Thus, these dates must be treated as determinative in applying the statute of limitations.

Statutory interpretation is a question of law, which this court reviews de novo. *State v. Al-Naseer*, 734 N.W.2d 679, 683-84 (Minn. 2007). The goal of statutory interpretation is to effectuate the intent of the legislature. Minn. Stat. § 645.16 (2006).

"[W]hen the legislature's intent is clear from plain and unambiguous statutory language, this court does not engage in any further construction and instead looks to the plain meaning of the statutory language." *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004) (quotation omitted); *see also* Minn. Stat. § 645.16 (the letter of the law should not be disregarded if its application is clear and unambiguous). Only when a statute is ambiguous should courts use other canons of construction or extrinsic evidence to discern the legislature's intent. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). A statute is ambiguous only if it is subject to more than one plausible interpretation. *Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 453 (Minn. 2007). When construing a statute, this court presumes that the legislature does not intend absurd or unreasonable results. Minn. Stat. § 645.17(1) (2006).

Appellant argues that the plain and unambiguous language of the statute of limitations precludes prosecution of her for the abuse of both C.F. and D.F. The state urges us to adopt an interpretation of the statute that allows both of appellant's convictions to stand. The statutory text of Minn. Stat. § 628.26(c) provides:

> Indictments or complaints for [first-degree criminal sexual conduct] if the victim was under the age of 18 years at the time the offense was committed, shall be found or made and filed in the proper court within nine years after the commission of the offense or, if the victim failed to report the offense within this limitation period, within three years after the offense was reported to law enforcement authorities.

Both August 1, 1995 and January 29, 1996 are more than nine years before June 17, 2005, the date the complaint against appellant was filed. Accordingly, the plain language of the first part of Minn. Stat. § 628.26(c) does not allow the prosecution of appellant

because the complaint was not found or made within the requisite nine years. But the statute also creates an exception to this general limitations period, allowing complaints to be filed more than nine years after the offense ended under certain circumstances.

The exception to the statute's general nine-year limitations period has two parts, each of which is an independent inquiry. Regarding the first part, the plain language of the statute states that the "victim" of the sexual abuse must not have reported the abuse to authorities within nine years of the end of abuse for the exception to be applicable. But once it is determined the exception is applicable, the plain language of the last clause of the statute states that a report of abuse to law enforcement originating from *any* source triggers the three-year limitations period. In contrast to the clause immediately preceding it, the last clause of Minn. Stat. § 628.26(c) does not restrict from whom a report of abuse may originate in order to trigger the running of the three-year limitation period. The present facts highlight the importance of this distinction.

Here, both C.F. and D.F. are victims of appellant's sexual abuse. C.F. reported the abuse of both himself and D.F. in an interview with a Stevens County sheriff's deputy on March 17, 2004. The date of C.F.'s report of the abuse is within nine years of the last possible date that appellant could have abused him—January 29, 1996—so the exception to the limitations period does not apply to C.F's report of his own abuse. Thus, under the statute, the state had to file a complaint within nine years of the end of C.F.'s abuse, or by January 2005. But the state did not file a complaint until June 2005. Therefore, the plain language of Minn. Stat. § 628.26(c) precludes prosecution of appellant for her abuse of C.F.

The state proffers two primary arguments as to why we should not rely on the plain language in Minn. Stat. § 628.26(c) to preclude the prosecution of C.F. First, the state claims that construing Minn. Stat. § 628.26(c) as written produces an absurd result. Second, the state points out several amendments that the legislature has made over the last 25 years that have extended the statute of limitations for criminal sexual conduct. The state claims that barring appellant's prosecution under Minn. Stat. § 628.26(c) would be contrary to this legislative intent.

Both of these arguments overlook the principle of statutory interpretation that a statute must be ambiguous before courts will look to extrinsic evidence in an attempt to construe the statute. *Kiffmeyer*, 721 N.W.2d at 911 ("[U]se of extrinsic aids to determine legislative intent where there is no ambiguity in the express language of the statute would be unnecessary and improper."). Because we conclude that the language of Minn. Stat. § 628.26(c) is not ambiguous, there is no need to resort to such evidence to determine its meaning.

The state points out that a victim's report of sexual abuse received five minutes before midnight on the last day of the nine-year limitations period would be barred because there would not be enough time to file a complaint, while a report of that same sexual abuse received five minutes after midnight would fall under the exception. The state contends that this result is absurd. But any offense reported five minutes before the applicable limitations period accrues is likely to preclude prosecution for that offense. Such arbitrariness is the reality of all statutes of limitation.

The state is essentially asking us to strike the language "if the victim failed to report the offense within this limitation period" from Minn. Stat. § 628.26(c) in regards to the prosecution of C.F. Such a task is not the job of this court. *See, e.g.*, *Hutchinson Tech., Inc. v. Comm'r of Revenue*, 698 N.W.2d 1, 12 (Minn. 2005) (reiterating that courts may not write into a statute what the legislature did not); *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) (stating that "[i]f there is to be a change in the statute, it must come from the legislature, for the courts cannot supply that which the legislature purposefully omits or inadvertently overlooks"); *In re Welfare of S.J.T.*, 736 N.W.2d 341, 355 (Minn. App. 2007) ("it is not the province of this court to create law, but rather to interpret legislation"), *review denied* (Minn. Oct. 24, 2007); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (stating that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"), *review denied* (Minn. Dec. 18, 1987). The numerous amendments that the state highlights in its brief demonstrate that the legislature has made changes to this statute in the past and may do so in the future.

Regarding D.F., C.F. reported her abuse at the same time that he reported his own. We have found nothing in the record to indicate that authorities ever interviewed D.F. or that she has ever disclosed her abuse to anyone. At trial, the jury convicted appellant of sexually abusing D.F. based on C.F.'s testimony. Because D.F. did not personally disclose her own abuse within nine years of it ending, the exception to the limitations period is applicable. *See* Minn. Stat. § 628.26(c) ("if the *victim* failed to report the offense within this limitation period" the exception applies (emphasis added)). Since

D.F. falls within the scope of the exception, an independent inquiry is then made into whether the exception is satisfied. In this inquiry, the originating source of a report of abuse is irrelevant; C.F.'s disclosure of appellant's abuse of D.F. qualifies as a report of the abuse. Accordingly, the state had three years from March 17, 2004, to charge appellant with the abuse of D.F. Because the June 2005 complaint falls within this time period, the plain and unambiguous language of Minn. Stat. § 628.26(c) does not preclude prosecution of appellant for her abuse of D.F.

II.

Because we conclude that the statute of limitations does not preclude the prosecution of appellant for her abuse of D.F., we must address the other claims of error that appellant asserts, as they pertain to this count of her conviction. The first of these claims is that appellant's retrial violated her protection against double jeopardy.

In addition to the abuse that C.F. suffered at the hands of appellant, evidence established that C.F. had been abused by his uncle while he was an infant living in California. In appellant's first trial, her counsel referred to this prior sexual abuse in his opening statement. The prosecutor objected and asked for a bench conference. Out of the hearing of the jury, the prosecutor requested a mistrial, arguing that appellant had not brought a proper motion under Minn. R. Evid. 412 to admit such evidence. The district court recessed and a one hour, off-the-record discussion with counsel in chambers ensued. Back on the record, the district court concluded that the evidence that appellant desired to introduce "could satisfy the definition of prior sexual conduct which therefore would trigger a Rule 412 motion and because that wasn't done procedurally, . . . that's

the basis for the granting of the mistrial." Before her retrial, appellant moved to preclude the prosecution as a violation of double jeopardy, claiming that no manifest necessity justified the granting of the mistrial over her objection. The district court denied the motion in a subsequent order that further explained its decision to declare a mistrial.

Both the United States and Minnesota constitutions prohibit twice placing a person in jeopardy for the same crime. U.S. Const. amend. V; Minn. Const. art. I, § 7. Appellate courts generally review de novo whether the Double Jeopardy Clause bars a defendant's retrial. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999). But when a district court declares a mistrial over a defendant's objection, its decision is reviewed for an abuse of discretion. *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997). "[T]he overriding interest in the evenhanded administration of justice" requires an appellate court to accord "the highest degree of respect" to the district court's evaluation that a mistrial was necessary. *Arizona v. Washington*, 434 U.S. 497, 511, 98 S. Ct. 824, 833 (1978). Failure to do so might deter a district court from declaring a mistrial, when such an action would be proper, out of fear that an appellate court's disagreement with such a decision would bar retrial. *Id.* at 513, 98 S. Ct. at 834.

When a mistrial is declared over a defendant's objection, the defendant may not be retried unless a "manifest necessity" justified the mistrial or the "ends of public justice would otherwise be defeated." *Illinois v. Sommerville*, 410 U.S. 458, 461, 93 S. Ct. 1066, 1069 (1973) (quoting the "fountainhead" decision on a mistrial granted over the defendant's objection, *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)). A manifest necessity justifying a mistrial is a high degree of necessity, but not an absolute

necessity. *State v. Gouleed*, 720 N.W.2d 794, 801 (Minn. 2006) (citing *Washington*, 434 U.S. at 506, 98 S. Ct. at 830-31). Determining whether a manifest necessity justified a mistrial in a particular case is a fact-intensive inquiry and is not capable of formulaic description. *State v. McDonald*, 298 Minn. 449, 454, 215 N.W.2d 607, 610 (1974). The manifest-necessity standard is a flexible one that "seeks to achieve fairness for the prosecution, the defendant, and the public interest." *Gouleed*, 720 N.W.2d at 800. An important factor often considered in determining whether the district court exercised sound discretion in granting a mistrial over the defendant's objections is whether it sufficiently assessed less drastic alternatives to a mistrial. *Long*, 562 N.W.2d at 296.

The United States Supreme Court case of *Arizona v. Washington* and the recent Minnesota Supreme Court case of *State v. Gouleed* provide us with guidance in analyzing the present issue. In *Washington*, the Supreme Court considered the propriety of the district court's decision to declare a mistrial after the defendant's attorney made improper remarks in his opening statement. *Washington*, 434 U.S. at 510, 98 S. Ct. at 833. The Court stated that appellate courts must give "special respect" to a decision to grant a mistrial based on an attorney's improper remark made during an opening statement because the remark's impact is not easily assessed on review. *Id.* The Court went on to uphold the decision to grant a mistrial based on a manifest necessity. It did so notwithstanding the district court's failure to articulate on the record all the factors relied on in making its decision because the "basis for the trial judge's mistrial order is adequately disclosed by the record." *Id.* at 517; 98 S. Ct. at 836.

In *Gouleed*, the district court granted a mistrial based on a perceived manifest necessity after a defense expert violated discovery rules. 720 N.W.2d at 798-99. On appeal, the supreme court first acknowledged that "there was no discussion on the record of the possible double jeopardy consequences of a mistrial." *Id.* at 799. But the record did reveal that the district court considered, and rejected as inadequate, possible alternatives to declaring a mistrial and that the district court had recessed to its chambers with counsel in order to consider how to proceed on the matter. *Id.* at 798-99. The supreme court stated that the record was "somewhat lacking," but still condoned the district court's decision to declare a mistrial based on manifest necessity because "the mistrial decision cannot be said to have been made rashly or altogether without consideration of alternatives." *Id.* at 802. Thus, both the *Washington* Court and the *Gouleed* court upheld as proper a district court's decision to grant a mistrial, even absent express findings addressing double jeopardy, because the record revealed that the district court did not act impulsively or carelessly in granting a mistrial. *Cf. United States v. Jorn*, 400 U.S. 470, 486-87, 91 S. Ct. 547, 558 (1971) (finding that double jeopardy barred a defendant's retrial after a district court, on its own initiative and without any deliberation or discussion, declared a mistrial to allow a witness for the government to consult with a lawyer about the consequences of testimony).

While determining whether a manifest necessity justifies a mistrial is generally a fact-specific inquiry, we note that there are strong similarities between the present case and *Gouleed*. In *Gouleed*, the district court recessed to consider the proper course of action and discussed the matter with counsel in chambers. Each of these deliberative

actions also occurred here. In addition, the district court's subsequent written order, denying appellant's double-jeopardy motion, further explains its reasoning in granting a mistrial. *See Long*, 562 N.W.2d at 297 (explaining that the "thoughtfulness of the judge's decision [to declare a mistrial] is further evidenced by his subsequent written decision" and relying, in part, on that order to reject a defendant's double-jeopardy appeal). Here, the district court stated in its order that, after the prosecutor made a motion for a mistrial,

> [a] recess was taken while the [c]ourt and counsel discussed how to proceed with the matter. First, the [c]ourt determined that allegations of prior sexual abuse perpetrated upon a minor victim do constitute "prior sexual conduct" as contemplated in Rule 412. *See State v. Kobow*, 466 N.W.2d 747 (Minn. App. 1991). The [c]ourt then determined that since no motion had been brought according to the procedures set forth in Rule 412, both parties and the [c]ourt were deprived of the opportunity to fully examine the proposed evidence as contemplated by the rule. The [c]ourt was then faced with the procedural difficulty that if the [c]ourt determined that the requested evidence was fully or partially admissible, the plaintiff would be precluded from pursuing a pre-trial appeal of that ruling in view of the fact that a jury had already been impaneled. Since the crux of the issue rested upon the admissibility of the evidence rather than any curative instruction given to the jury, the [c]ourt determined that no alternative existed but to declare a mistrial based upon the unintended statements of defense counsel.

Importantly, this order outlines the bases for the district court's determination that the alternatives to granting a mistrial were inadequate. Given the "special respect," *Washington*, 434 U.S. at 510, 98 S. Ct. at 833, due a district court's decision to grant a mistrial based on improper remarks made during an opening statement and the record's reflection of deliberation by all parties on the propriety of declaring the mistrial, we cannot say the district court abused its discretion in determining that a manifest necessity

justified a mistrial. *Cf. Jorn*, 400 U.S. at 487, 91 S. Ct. at 558 (noting that the district court "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the . . . declaration of this mistrial.").

III.

Appellant's third contention of error concerns a particular evidentiary ruling of the district court and the district court's decision to permit the prosecutor to comment on this disputed evidence during closing argument. On direct examination, the district court permitted the prosecutor to elicit testimony from D.F.'s psychologist about D.F.'s present mental and emotional condition and how she would react if she were called as a witness. The following exchange occurred during direct examination:

> Q: Did you also provide psychological counseling for a period of time for [D.F.], [C.F.]'s younger sister?
>
> A: Yes, sir.
>
> Q: What time frame did you see her?
>
> A: Also from 1996 and the last time I saw her was Tuesday of this week.
>
> Q: Doctor, in your opinion would [D.F.] be able to accurately and reliably . . . relay information to this [c]ourt if she were called to testify about things that happened to her in the time frame 1994 through 1997?
>
> A: No, sir.

During his closing argument, the prosecutor noted that, while D.F. was present for some of the abuse about which C.F. testified, her psychologist "said she wouldn't be able

to testify" about that abuse in a reliable or accurate manner. Although appellant did not object to either of these statements at trial, appellant had objected to this anticipated testimony earlier in chambers.

A district court's decision to admit a particular piece of evidence or permit a particular closing argument is reviewed for abuse of discretion. *State v. Kendell*, 723 N.W.2d 597, 613 (Minn. 2006) (holding that whether to allow 911 tape to be played during closing is reviewed for abuse of discretion); *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (evidentiary rulings are reviewed for abuse of discretion). To prevail on a claim of prosecutorial misconduct during a closing argument, a defendant must demonstrate that prosecutorial misconduct occurred and the misconduct prejudiced the defendant. *State v. Voorhees*, 596 N.W.2d 241, 253 (Minn. 1999). Reversal because of prosecutorial misconduct during a closing argument is generally warranted only if it is so prejudicial as to infringe on a defendant's right to a fair trial. *State v. Johnson*, 616 N.W.2d 720, 727-28 (Minn. 2000).

In claiming that this testimony and commentary are improper, appellant relies on the case of *State v. Shupe*, 293 Minn. 395, 196 N.W.2d 127 (1972), and its progeny. In *Shupe*, the defendant was charged with burglary. During his closing argument, the prosecutor stated, "I was going to call a series of witnesses. Several of the witnesses I did not call . . ., this was due to unexpected illness . . . so it's unfortunate that this supplementary testimony could not come in, but things like that happen." *Shupe*, 293 Minn. at 396, 196 N.W.2d at 128. The supreme court reversed the defendant's conviction, stating, "the prosecutor's reference to the asserted fact that there was other

testimony bearing upon defendant's guilt which he was prevented from submitting" to the jury was so prejudicial that it required a new trial. *Id.* at 396, 196 N.W.2d at 128.

The subsequent case of *State v. Thomas*, 305 Minn. 513, 232 N.W.2d 766 (1975), addressed the same issue. There, the court held that a prosecutor's comment that he did not call certain witnesses because they would have merely given redundant testimony did not taint the verdict because "it contain[ed] no prejudicial inference of supplementary evidence of guilt as prohibited in *Shupe*." *Thomas*, 305 Minn. at 515-17, 232 N.W.2d at 768-69; *see also State v. Page*, 386 N.W.2d 330, 336 (Minn. App. 1986) (citing *Shupe* and reversing a conviction based in part on a prosecutor's statement that witnesses he did not call would have allowed additional criminal charges to be brought against the defendant), *review denied* (Minn. June 30, 1986).

Thus, the dispositive distinction regarding the propriety of such commentary is whether the comments regarding the uncalled witness contain a prejudicial inference that, had the witness been called to testify, he or she would have provided supplementary evidence of the defendant's guilt. Contrary to appellant's assertion, here the testimony and reference to D.F. contained no such implication. D.F.'s psychologist's testimony was that D.F. could not provide accurate or reliable information if she testified. In other words, D.F. could *not* provide "supplementary evidence of guilt as prohibited in *Shupe*" because any testimony she might have given would be unreliable and inaccurate. *See Thomas*, 305 Minn. at 515-17, 232 N.W.2d at 768-69. The prosecutor's comment on this matter during his closing argument was consistent with the testimony by D.F.'s psychologist. Accordingly, the district court did not abuse its discretion in either

admitting the psychologist's testimony or allowing this comment during closing argument.

IV.

Appellant claims that the prosecutor committed misconduct during his closing argument by vouching for the credibility of the state's witnesses and by inflaming the passions of the jury.

A. Impermissible Vouching

"It is improper for a prosecutor in closing argument to personally endorse the credibility of witnesses." *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). Vouching occurs "when the government 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). When evaluating alleged prosecutorial misconduct during a closing argument, a court will evaluate the closing argument as a whole. *State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006). Reversal because of prosecutorial misconduct during a closing argument is generally warranted only if it is so prejudicial as to infringe on a defendant's right to a fair trial. *Johnson*, 616 N.W.2d at 727-28. Because appellant did not object during the prosecutor's closing argument, we apply a plain-error analysis in evaluating this issue. *See State v. Ramey*, 721 N.W.2d 294 (Minn. 2006) (describing the modified plain-error test that applies to un-objected-to prosecutorial misconduct).

Here, appellant claims that there were three instances of impermissible vouching. Immediately after reading the jury instruction on witness credibility, the prosecutor

stated, "I submit to you [the prosecution's witnesses testified] in a believable way." In discussing K.F.'s testimony, the prosecutor stated, "I submit to you that she's not a lying person." Lastly, in reviewing C.F.'s testimony, the prosecutor said, "Is there anything about [C.F.] that does not have a ring of truth to it? I submit not. I submit that you can't look at [C.F.] testifying in this case, that you can't look at the case, what he told and how he told it and not conclude that he was truthful."

Whether or not a prosecutor's use of the phrase "I submit" constitutes an impermissible injection of the prosecutor's opinion into a closing argument has been examined by appellate courts on multiple occasions. *See, e.g., State v. Tiessen*, 324 N.W.2d 163, 164 (Minn. 1982) (concluding that the defendant's argument that the repeated use of the phrase "I submit" by the prosecutor was prejudicial error has "no merit"); *State v. Reed*, 398 N.W.2d 614, 617 (Minn. App. 1986) (holding that prefacing "argument on various issues with 'the state submits' did not inject the personal opinion of the prosecutor"), *review denied* (Minn. Feb. 13, 1987); *but see Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (finding that "the use of the first-person pronoun 'I' during closing argument . . . was an improper interjection of personal opinion into the argument").

In this case, the prosecutor's use of "I submit" preceded his arguments on witness credibility. "An attorney may argue a particular witness's credibility, but may not interject his or her personal opinion so as to "personally attach[] himself or herself to the cause which he or she represents." *Ture*, 681 N.W.2d at 20 (citation omitted). Having reviewed the closing argument, we conclude that the prosecutor stopped short of interjecting his personal opinion of the witnesses' credibility, instead asking the jurors to

make their own determinations. As a result, we conclude that the prosecutor's statements did not constitute misconduct.

B. Inflaming the Passions of the Jury

In the alternative, appellant asserts that the prosecutor's comment during closing argument regarding how difficult it was for C.F. to testify and asking the jury to protect C.F.'s privacy after they reached a verdict inflamed the passions of the jury. Because appellant did not object to these comments at trial, we again utilize a plain-error analysis. A "prosecutor must avoid inflaming the jury's passion and prejudices against the defendant" and special attention must be paid "to statements that may inflame or prejudice the jury where credibility is a central issue." *Porter*, 526 N.W.2d at 363.

While testifying, C.F. stated how difficult it was for him to talk about appellant's abuse of D.F. and himself. Thus, commenting on this testimony during closing arguments was not improper. *See State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990) ("A prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence."). We also conclude that, when evaluated within the context of the entire closing argument, the prosecutor's brief request that the jury protect C.F.'s privacy after trial was not so plainly improper and prejudicial as to deprive appellant of a fair trial. Thus, appellant has failed to satisfy her burden under the plain-error test.

V.

Appellant's fifth claim of error concerns the district court's decision to prohibit appellant from eliciting certain testimony from C.F. First, she claims that the district

court erred in ruling that Minn. R. Evid. 412 precluded questioning C.F. about his past abuse by his uncle. In the alternative, appellant claims that, even if Minn. R. Evid. 412 barred evidence of this abuse, preclusion of this evidence violated her due-process right to present a complete defense.

A. Application of Minn. R. Evid. 412

"Rulings on evidentiary matters rest within the sound discretion of the district court, and we will not reverse a district court's evidentiary ruling absent a clear abuse of discretion." *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). Minn. R. Evid. 412(1), commonly known as the rape-shield rule, generally prohibits in a "prosecution for acts of criminal sexual conduct . . . evidence of the victim's previous sexual conduct." *See also* Minn. Stat. § 609.347, subd. 3 (2006) (the legislative codification of Minn. R. Evid. 412). But Minn. R. Evid. 412(2) allows a district court to admit evidence prohibited under rule 412(1) if the district court determines that the evidence meets certain requirements.

Appellant made a rule 412 motion to the district court, seeking to establish, among other things, that C.F. had been abused by his uncle while C.F. was an infant living in California. Through the introduction of this evidence, appellant hoped to establish that this abuse, and not appellant's, was the source of C.F.'s knowledge of sexual activities, and, therefore, C.F. had knowledge to draw upon if he wanted to fabricate an incident with appellant.

The district court carefully examined this issue in its order, stating:

> [T]he admissibility of th[is] evidence is based . . . upon what evidence the [state] introduces. If the [state] introduces evidence to support an argument [that appellant was] the

> source of C.F.'s knowledge relating to sexual activity, then evidence of his prior sexual abuse . . . will be admissible to rebut such testimony.
>
> . . . .
>
> . . . If such testimony is not elicited, the prior sexual conduct testimony is not relevant and thus inadmissible.
>
> The Court's rationale for conditionally admitting the evidence of prior sexual conduct involves a balancing of the interests to protect the alleged victim from potential embarrassment versus the right of the defendant to confront the evidence against her. . . .
>
> . . . Neither counsel may discuss the prior sexual conduct of C.F. in opening statements or otherwise comment upon it in the presence of the jury until first obtaining additional permission from the Court outside the presence of the jury so that the Court may assess whether the conditional evidence that is the basis for admissibility has been placed on the record.

In challenging this ruling on appeal, appellant contends that the district court erred in finding that the phrase "sexual conduct" as contemplated in rule 412(1) includes prior acts of sexual abuse, such as the abuse of C.F. by his uncle. But in *State v. Kobow*, 466 N.W.2d 747, 751 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991), we held that allegations of prior sexual abuse fall within the scope of the rule.[3]

[3] *Kobow* was technically interpreting the scope of the phrase "sexual conduct" as contained in Minn. Stat. § 609.347, subd. 3 (1988). In 1988, this statute was the legislative codification of current Minn. R. Evid. 412's predecessor, Minn. R. Evid. 404(c). Former Minn. R. Evid. 404(c) was redesignated Minn. R. Evid. 412 in 1990. Minn. Stat. § 609.347, subd. 3 (2006) remains the current legislative codification of Minn. R. Evid. 412. Neither the relevant substantive language of Minn. Stat. § 609.347, Minn. R. Evid. 412, nor rule 412's predecessor—i.e. the meaning of "sexual conduct"—has been altered since the *Kobow* decision.

Appellant urges us to overrule *Kobow*. We decline to do so. *See State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005) (stating that a court should be "extremely reluctant to overrule [its own] precedent under principles of *stare decisis*" and generally a "compelling reason" must exist to do so). Thus, the district court exercised sound discretion in ruling that Minn. R. Evid. 412 conditionally prohibited introduction of evidence of the prior abuse of C.F. by his uncle.

B. The right to present a complete defense

In the alternative, appellant contends that the district court's ruling prohibiting her from introducing this evidence violated her constitutional right to present a complete defense. The Minnesota Supreme Court has acknowledged that there will be some instances when exclusion of evidence under the rape-shield law violates a defendant's constitutional rights, *State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992), but we do not believe this is one of those times.

A criminal defendant has a due-process right to present a complete defense, and this right includes the opportunity to present the defendant's version of the facts by witness testimony. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). While the right to present a complete defense is constitutionally protected, the right is not unlimited. A defendant still "'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *State v. Richards*, 495 N.W.2d 187, 195 (Minn. 1992) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)). "We review evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence

deprived the defendant of his constitutional right to present a complete defense." *Penkaty*, 708 N.W.2d at 201.

The "rape shield statute serves to emphasize the general irrelevance of a victim's sexual history." *State v. Carroll*, 639 N.W.2d 623, 627 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. May 15, 2002). But "a [district] court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge" notwithstanding this rule. *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). The district court addressed appellant's source-of-knowledge argument in its order denying her motion. The district court concluded that appellant would be allowed to elicit testimony from C.F. that his uncle had abused him if the state offered evidence indicating that appellant was C.F.'s source of sexual knowledge. Furthermore, the district court allowed appellant to inquire on cross-examination about other possible sources from which C.F. gained his knowledge of sexual activity.[4] The district court's ruling, conditionally prohibiting introduction of this evidence, was carefully tailored, allowing admission of this evidence if it became relevant for rebuttal purposes. As such, we conclude that the district court acted within its discretion.

[4] The district court also considered, and rejected, appellant's argument that she had a constitutional right to present evidence of this prior abuse because it could cast doubt on C.F.'s credibility regarding the occurrence of the current abuse. It found that there was no evidence that this prior abuse was fabricated, noting that appellant herself confirmed that the abuse occurred during her psychiatric evaluation conducted at the St. Peter security hospital.

VI.

Appellant's sixth claim of error is that the district court incorrectly sentenced her because it used the sentencing guidelines in effect when she was convicted instead of when she committed the abuse. The state concedes that the incorrect guidelines were used. *See* Minn. Sent. Guidelines III.F. (stating that any modifications to the sentencing guidelines "will be applied to offenders whose date of offense is on or after the specified modification effective date"); *see also Miller v. Florida*, 482 U.S. 423, 426-27, 435-36, 107 S. Ct. 2446, 2449, 2454 (1987) (holding that the application of revised sentencing guidelines that increased the sentence of a defendant whose crimes occurred before the revision's effective date violated the Ex Post Facto Clause). We therefore reverse appellant's sentence for her conviction of abusing D.F. and remand for resentencing.

VII.

In her pro se supplemental brief, appellant asserts four additional claims.

A. Sufficiency of the evidence

Appellant contends that the evidence produced at trial was not sufficient to prove her guilt beyond a reasonable doubt. Appellant bases this claim entirely on the purported inconsistencies in the testimony of various witnesses at trial. She argues that these inconsistencies raise questions about the witnesses' credibility and, when taken together, are enough to create reasonable doubt.

In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jurors to reach the

verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The fact-finder has the exclusive function of judging witness credibility, *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995), and a reviewing court must assume that the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Accordingly, appellant's argument that purported inconsistencies in certain witnesses' testimony create a reasonable doubt is without merit.

B. Delay in bringing charges

The Stevens County Attorney had probable cause to charge appellant for sexually abusing C.F. and D.F. in March 2004. But he did not file the complaint for another 15 months. Appellant claims that this pre-charging delay requires reversal of her conviction.

In *United States v. Marion*, 404 U.S. 307, 316-20, 92 S. Ct. 455, 462-63 (1971), the Supreme Court held that a defendant's speedy-trial right is not implicated until the defendant is formally charged with a crime. But the court did state that a pre-charging delay might violate a defendant's due-process right if (1) the delay substantially prejudiced a defendant's right to a fair trial by impeding the defendant's ability to mount an effective defense at trial and (2) the government delayed charging the defendant in order to gain a tactical advantage. *Marion*, 404 U.S. at 324, 92 S. Ct. at 465; *see also State v. Klindt*, 400 N.W.2d 127, 190-30 (Minn. App. 1987) (applying this two-prong test). The burden is on the defendant to demonstrate that both of these requirements are met. *State v. Hanson*, 285 N.W.2d 487, 489 (Minn. 1979)

Appellant has provided no evidence that the state delayed charging her in order to gain a tactical advantage. The record reveals that the reason for the 15-month delay was

to allow C.F. to complete high school before being put through the stress of a trial that required him to disclose details of his sexual abuse. Because appellant failed to demonstrate that the purpose of the state's delay in charging her was to gain a tactical advantage, we need not address the other prong of this inquiry.

C. Statements made by appellant while at the St. Peter security hospital

In December 2003, appellant was taken to the Minnesota Security Hospital in St. Peter to determine whether she should be committed as mentally ill and dangerous. While there, a psychiatrist performed an assessment of appellant as part of the commitment determination. During this assessment, appellant admitted that she sexually abused C.F. when he was roughly three months old and the family was living in California. This statement was provided to Stevens County authorities, who then started the investigation that eventually led to appellant's conviction and this appeal. Appellant claims that she involuntarily made this statement and that the entire investigation was the poisonous fruit of this coerced admission.

A confession's voluntariness is reviewed de novo as a question of law based on "all factual findings that are not clearly erroneous." *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999). The totality of the circumstances is examined to determine whether a confession was voluntary. *Id.* "[O]ur inquiry examines whether [the questioner's] actions, together with other circumstances surrounding the interrogation, were so coercive, so manipulative, so overpowering that [the defendant] was deprived of his [or her] ability to make an unconstrained and wholly autonomous decision to speak as he did." *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991). The ultimate "question in

each case is whether the defendant's will was overborne at the time he [or she] confessed." *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920 (1963).

The record, although somewhat sparse on this issue, establishes that the psychiatrist to whom appellant made her statement is assigned to treat patients in the St. Peter security hospital. The purpose of his interview with appellant was to assess and diagnose any possible mental-health conditions, not to interrogate her about possible criminal activity. The psychiatrist did not know or even suspect that appellant may have abused C.F. Appellant was warned that any statements she made during the assessment would not be confidential and would be submitted to the court as part of her commitment determination. Based on this record, we cannot say that appellant's "will was overborne" by a psychiatrist's non-adversarial interview of her for the purposes of assessing and treating any potential mental-health issues. *Lynumn*, 372 U.S. at 534, 83 S. Ct. at 920.

D. Length of appellant's sentence

Finally, appellant contends that the district court abused its discretion in sentencing her to consecutive, "top-of-the-box" sentences. Because we have reversed one of her convictions and remanded the other for resentencing, this issue is moot.

Affirmed in part, reversed in part, and remanded.