This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1670

State of Minnesota,
Respondent,

vs.

Gabriel Estrada,
Appellant.

Filed January 15, 2008
Affirmed
Peterson, Judge

Clay County District Court
File No. K2-05-1879

Lori Swanson, Attorney General, Catherine M. Keane, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian J. Melton, Clay County Attorney, Clay County Attorney, 807 North Eleventh Street, P.O. Box 820, Moorhead, MN 56561 (for respondent)

John M. Stuart, State Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

PETERSON, Judge

In this appeal from a conviction of second-degree criminal sexual conduct, appellant argues that (1) the 14-year-old victim's testimony was insufficient to support the conviction because she initially denied sexual activity when talking to police and only changed her story after persistent questioning by police, and her credibility was suspect due to the changes or inconsistencies in her story and the implausibility of her account; and (2) the prosecutor committed prejudicial misconduct constituting plain error by injecting his personal opinion as to the credibility of the victim, shifting the burden of proof by implying that the defense had a duty to call the victim's sister to testify, and playing to the jury's passions by repeatedly pointing out the victim's mental disability. We affirm.

FACTS

Appellant Gabriel Estrada lived with his girlfriend, N.C.; their daughter together, T.E.; and N.C.'s three daughters, S.H., B.H., and C.H. At the time of trial, which was about two years after the offense occurred, the ages of S.H., B.H., C.H., and T.E., respectively, were 14, 12, 10, and 6. At the time of the offense, appellant was 33 years old, and the victim, S.H., was 12.

In 2004, N.C. went to work in the morning and was usually home by 3:00 p.m. When appellant was laid off from his construction job during the winter months, he watched the children while N.C. worked.

S.H. has been diagnosed as mildly mentally retarded, with learning disabilities, and has been held back a grade in school at least once. N.C. described S.H. as being "very immature for her age." Although S.H. is older than B.H., B.H. has been more outspoken and the leader among her sisters. S.H. and B.H. have had a close relationship.

In May 2005, while N.C. was at work, B.H. told her about an allegation that appellant had touched S.H. inappropriately. N.C. went home and confronted appellant. When N.C. tried to talk to S.H. about the allegation, S.H. "clammed up." N.C. called 911 and spoke to various authorities, who advised her to not question S.H. further and to allow a professional to interview S.H.

Tamara Anderson, a child-protection investigator for Cass County, North Dakota Social Services (where N.C., appellant, and the children were living at the time) received N.C.'s report on May 27, 2005, and referred it to the Moorhead, Minnesota Police Department (where the sexual abuse had occurred). Detective Thad Stafford, a juvenile investigator for the Moorhead Police Department, was assigned to investigate the case. Stafford interviewed S.H. on June 8, 2005. Although Stafford conducted the actual interview of S.H. and was alone with her in the interview room, Anderson and three other professionals watched the interview on a television monitor and were available for consultation during the interview.

After asking general background questions, Stafford used drawings of male and female anatomies to have S.H. identify various body parts. S.H. identified the chest area on both drawings as "boobies," the female genitalia as "privates," and the male genitalia

as "private parts." S.H. listed "boobies, butt, and private parts" as bad places to touch. S.H. denied that any male had shown her his private parts.

After consulting with the interview team, Stafford questioned S.H. about where she currently lived and where she had lived in Moorhead. In response to a question about when appellant moved out, S.H. replied "when I told that he was like touching, like saying stuff to me." S.H. reported that when her mother was at work, appellant "would tell me spread open my legs and stuff like that" and that that made her "real scared." S.H. said that appellant also told her to touch his private parts, and she pointed to the chest and genital areas when asked to show what she meant by private parts. S.H. denied that appellant touched her or that she spread her legs for him. She stated that when appellant told her to touch his private parts, she ran off to tell B.H.

S.H. said that when appellant asked her to touch his private parts, he had pants or shorts on but not a shirt. She also told Stafford about an incident the previous afternoon when appellant showed her a video case with "nasty stuff on it, like a girl like sucking on private parts and stuff like that." S.H. said that appellant told her not to tell her mom about appellant asking her to touch his private parts. S.H. said that she did try to tell her mom, but her mom was talking to a friend and not paying attention.

Anderson talked to S.H. for five or ten minutes after the interview. Anderson testified that S.H. was slightly more at ease with her than with Stafford and that it is typical for a child to be more comfortable talking with someone who is the same gender. S.H. repeated much of what she had told Stafford but also provided additional information to Anderson. S.H. stated that appellant "touched my boobies" and that as his

hand began moving down her stomach, she moved his hand away, jumped up, and ran away. Anderson testified that it is not unusual for a child to provide more details about an incident as time goes on, explaining that children explain things in fragmented thoughts rather than all at one time and that fear can play a part. Anderson also felt that S.H.'s intellectual delays and handicaps made it more difficult to articulate her thoughts, so Anderson used questions to help S.H. broaden her articulation.

At Stafford's request, N.C. provided her pornographic videos to him. One of the videos matched S.H.'s description of the cover appellant had shown her. N.C. testified that she had always kept the videos in a place that was not accessible to her children.

Stafford interviewed appellant on June 10, 2005. Appellant denied all of S.H.'s allegations against him. Appellant suggested that B.H. got S.H. to make up the allegations against him. Appellant said that the girls did not like him because he disciplined them and that B.H. was angry with him on the day she told N.C. about what appellant had done to S.H.

Appellant was charged with one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2002) (sexual contact when offender has significant relationship with victim and victim is under age 16), and two counts of attempted second-degree criminal sexual conduct in violation of Minn. Stat. § 609.17, .343, subd. 1(g) (2004). The case was tried to a jury.

At trial, S.H. testified that the day before appellant touched her, he showed her a "nasty" video case. S.H.'s description of the video case was consistent with her description of it to Stafford. Regarding the sexual-abuse incident, S.H. testified that

when her mom went to work, appellant told her to spread her legs and that when she did so, appellant touched her vaginal area over her clothes. S.H. denied that appellant touched her anywhere else and specifically denied that appellant touched her chest or stomach area. S.H. testified that appellant then told her to touch his private parts, and she touched it over his clothes.

Consistent with her statement to Stafford, S.H. testified that appellant told her not to tell her mom and that she tried to tell her mom, but her mom was busy talking to a friend. S.H. testified that she did not tell Stafford about appellant touching her because she was scared.

A jury found appellant guilty as charged. The district court sentenced appellant on the criminal-sexual-conduct conviction to a stayed term of 27 months. This appeal followed.

D E C I S I O N

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 the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756

(Minn. 1988). In evaluating the reasonableness of the jury's decision to convict, the court defers to the jury on the issues of witness credibility and the weight to be assigned each witness's testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Under Minn. Stat. § 609.343, subd. 1(g) (2004), a defendant is guilty of second-degree criminal sexual conduct if the defendant has a significant relationship with the victim and the victim was under age 16 when the sexual contact occurred. The definition of "sexual contact" includes the intentional touching by the defendant of the victim's intimate parts, the touching by the victim of the defendant's intimate parts, and touching of the clothing covering the immediate area of the intimate parts. Minn. Stat. § 609.341, subd. 11(b)(i), (ii), (iv) (2004).

Appellant argues that inconsistencies between S.H.'s out-of-court statements and her trial testimony made her version of events incredible as a matter of law. Initially, S.H. denied to Stafford that appellant had touched her inappropriately and denied seeing pictures of private parts. Later, she told Stafford about the video case and said that appellant had asked her to spread her legs and touch his private parts, but she did not do so. S.H. told Anderson that appellant had touched her "boobies" and moved his hand down her stomach. At trial, S.H. testified that appellant had touched her vaginal area but not her chest or stomach area and that she complied with appellant's instructions to spread her legs and touch his private parts.

S.H.'s statement to Stafford and her trial testimony were also inconsistent as to when the sexual abuse occurred. S.H. told Stafford that it happened on a Monday or Tuesday in February in Moorhead, and at trial, she testified that it happened on a

Saturday or Sunday in December in Fargo. Appellant also cites S.H.'s testimony that appellant used the term "privates" when asking her to touch him as supporting his claim that S.H. fabricated the allegations against him.

Assessing the credibility of witnesses and weighing their testimony are within the exclusive province of the fact-finder. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). Inconsistencies and conflicts do not require reversal; they are merely factors to consider when making credibility determinations, which is the role of the fact-finder. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). A sexual abuse victim's testimony need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2006).

Reasonable explanations for the inconsistencies were given by Anderson and S.H. Specifically, Anderson testified that it is not unusual for a child to provide more details about an incident as time goes on, explaining that children explain things in fragmented thoughts rather than all at one time and that fear can play a part. S.H. testified that the incident had occurred a long time ago, that she had forgotten some of the things that had happened, and that she was not good with dates.

S.H.'s statements and testimony were consistent in many respects. She consistently stated that appellant showed her the video case the day before the sexual abuse and that just before the sexual abuse, she was in the bedroom with N.C. and appellant, watching N.C. get ready for work. She consistently stated that appellant instructed her to spread her legs and to touch his private parts. She consistently described the video case, and her description matched a case that belonged to N.C.

The inconsistencies between S.H.'s out-of-court statements and her trial testimony and the credibility of appellant's claim that B.H. had gotten S.H. to fabricate the allegations against him were issues for the jury to resolve. *See State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990) (noting that jury was entitled to believe testimony of sexual-abuse victim whose story had changed over time), *review denied* (Minn. May 23, 1990); *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (concluding that when child victim told officer that she had been sexually abused by defendant on five or more occasions but at trial testified to only three incidents, inconsistency between testimony and the prior statement was for jury to consider in weighing victim's credibility). The evidence was sufficient to support appellant's conviction.

II.

When the defendant has failed to object to alleged prosecutorial misconduct, we review the claim for plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error, an appellant must show that there was "(1) error; (2) that was plain; and (3) that affected substantial rights." *In re Welfare of D.D.R.*, 713 N.W.2d 891, 899 (Minn. App. 2006) (quotation omitted). An appellate court may grant relief only if these three elements are met and "the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005) (alteration in original) (quotation omitted). Under *Ramey*, a defendant is still required to show that the alleged unobjected-to misconduct was error and that it was plain, but the prosecution bears the burden of showing that its misconduct did not affect the defendant's substantial rights. 721 N.W.2d at 299-300.

Appellant argues that the prosecutor improperly vouched for S.H.'s credibility. "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." *D.D.R.*, 713 N.W.2d at 900 (quotation omitted). The prosecutor listed ten reasons that the jury should find S.H. credible, including her limited knowledge of sex and her mental ability, the plausibility of appellant's theory that S.H. was influenced by B.H., and evidence tending to corroborate her allegations. This argument was based on the evidence and referred to legitimate factors for the jury to consider in assessing credibility. *See State v. Googins*, 255 N.W.2d 805, 806 (Minn. 1977) (stating prosecution has right to vigorously argue state's witnesses are credible); *see also State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (distinguishing between addressing credibility and directly endorsing witness credibility).

Appellant also objects to the prosecutor describing S.H.'s story as "believable," "forthright," "straightforward," and "sound[ing] pretty good to [him]." These terms were used in the context of reviewing the evidence and urging the jury to find S.H. credible and, therefore, were not improper. *See State v. Gail*, 713 N.W.2d 851, 866 (Minn. 2006) (concluding that calling a witness "a believable person" and "frank and sincere" was not misconduct); *State v. Bradford*, 618 N.W.2d 782, 799 (Minn. 2000) (concluding that prosecutor's use of "I submit" was interpretation of evidence and, therefore, not misconduct).

Appellant argues that the prosecutor improperly attacked appellant's defense by (1) stating that appellant was lying "for a reason," suggesting that appellant lied about

owning pornographic videotapes, not because he was embarrassed but because he was guilty, and (2) implying that even if appellant had lied due to embarrassment, he would also lie to avoid conviction. As with the argument regarding S.H.'s credibility, this argument was based on the evidence and referred to legitimate factors for the jury to consider in assessing credibility.

Appellant argues that the prosecutor improperly shifted the burden of proof to him by implying that he had a responsibility to call B.H. to the stand. The prosecutor stated, "B.H. was never called, you never heard from [her]." The state concedes that the prosecutor should not have referred to B.H.'s failure to testify. But it was only a single reference during a 21-page argument. Appellant's failure to object suggests that he did not consider the remark prejudicial. *See Johnson*, 679 N.W.2d at 389 (noting that failure to object may indicate a defendant did not consider an error obvious or important). Also, if appellant had objected, the district court would have had an opportunity to ameliorate any prejudice by giving a curative instruction.

Appellant argues that the prosecutor improperly invoked the passions and prejudices of the jury by referring to S.H. as "mentally retarded," "mentally handicapped," having limited "mental ability," and appellant stealing her innocence. A prosecutor's closing argument should be based on the evidence and should not be calculated to inflame the passions and the prejudices of the jury. *State v. Clark*, 296 N.W.2d 359, 371 (Minn. 1980). Arguing facts intended to inflame the fact-finder and misstating the law are both misconduct. *Ramey*, 721 N.W.2d at 300; *see State v. Jolley*, 508 N.W.2d 770, 772-73 (Minn. 1993). But a prosecutor is free to make all legitimate

arguments on the basis of all proper inferences from the evidence introduced. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). A prosecutor is not constrained to deliver a colorless argument. *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). The references to S.H.'s mental disabilities and appellant stealing her innocence were based on the evidence, and, therefore, not misconduct.

To the extent there was misconduct, it does not meet the plain-error standard. The jury was repeatedly instructed on its role to make credibility determinations and the state's burden of proof. *See State v. Washington*, 521 N.W.2d 35, 41 (Minn. 1984) (concluding instructions to the jury are relevant in determining whether the jury was unduly influenced by improper comments). Any misconduct was minor. Appellant is not entitled to reversal based on his claims of prosecutorial misconduct. *See State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (finding no prejudice when remarks were isolated and not representative of closing argument in entirety).

Affirmed.