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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2243**

State of Minnesota,
Respondent,

vs.

Dhanny Nankoo,
Appellant.

**Filed January 20, 2009
Affirmed
Klaphake, Judge**

Sherburne County District Court
File No. K1-06-2750

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

Samuel Wertheimer, II, Assistant Sherburne County Attorney, Government Center,
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Drive, Suite 110, Woodbury, MN 55125 (for appellant)

Considered and decided by Worke, Presiding Judge; Lansing, Judge; and
Klaphake, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Dhanny Nankoo challenges his conviction for first-degree criminal
sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), arguing that the district court

erred by permitting an expert witness to bolster the child victim's credibility and that the prosecutor engaged in misconduct by placing prejudicial emphasis on the victim's ability to tell the truth. Appellant also asserts that he was denied his right to a fair trial because of ineffective assistance of counsel.

Because the expert witness's testimony was helpful and relevant and its probative value outweighed its potential for prejudice, and because the prosecutor's discussion with the child victim about the need to testify truthfully was harmless beyond a reasonable doubt, we affirm. But because the record is inadequate, we decline to address appellant's claim of ineffective assistance of counsel at this time.

DECISION

Expert Witness

Appellant argues that the district court erred by permitting registered nurse Beth Carter to testify as an expert witness. Carter testified that child victims often delay reporting sexual abuse and engage in self-destructive behavior. Appellant asserts that this testimony had the effect of improperly bolstering the credibility of the child victim, J.R.

The district court has broad discretion in deciding whether to admit expert testimony and will only be reversed for a clear abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). The rules of evidence permit expert testimony if the expert's specialized knowledge will assist the factfinder "to understand evidence or to determine a fact in issue." Minn. R. Evid. 702. An expert may be qualified by "knowledge, skill, experience, training, or education." *Id.* Expert testimony is usually

admissible if it is helpful, relevant, reasonable, and its probative value outweighs its prejudicial effect. *In re the Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998).

Minnesota courts have generally permitted expert testimony on the effects of sexual abuse to child victims. *See, e.g., State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987) (permitting testimony about reporting conduct and continued contact with assailant); *K.A.S.*, 585 N.W.2d at 76 (permitting testimony about common emotional and behavioral characteristics of sexually abused children); *State v. Jones*, 500 N.W.2d 492, 494 (Minn. App. 1993) (permitting testimony about psychological or emotional symptoms of sexual abuse), *review denied* (Minn. June 9, 1993).

Carter testified as to the results of her examination of J.R., which she described as normal. She did not offer an opinion as to whether J.R. had been sexually abused. She did testify that older children often delay reporting and that they may engage in self-destructive behaviors such as cutting or scratching. This is the type of testimony permitted in the cases cited above.

In *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984), the supreme court acknowledged that “an indirect effect of that portion of [the expert’s] testimony was to bolster the complainant’s credibility. Much expert testimony tends to show that another witness either is or is not telling the truth. That fact, by itself, does not render the testimony inadmissible.” Here, Carter’s testimony was offered to explain J.R.’s delay in reporting the abuse and J.R.’s intensive scratching, which was noted by her mother and grandmother. It may also have had the effect of bolstering J.R.’s credibility, but this

effect alone does not demonstrate that the district court abused its discretion by permitting the testimony.

Prosecutorial Misconduct

Appellant argues that the prosecutor placed undue emphasis on J.R.'s ability to tell the truth by inquiring about her truthfulness after she had taken the oath. Appellant asserts that he was prejudiced because the prosecutor was, in effect, vouching for J.R.'s credibility. Appellant did not object to this questioning at trial.

When no objection is made, a defendant may obtain relief from prosecutorial misconduct only when there is plain error affecting substantial rights. *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Error is plain when it is clear or obvious, usually requiring contravention of "case law, a rule, or a standard of conduct." *Id.* at 302.

We conclude that appellant has failed to demonstrate that the prosecutor's questioning of J.R. about the need to testify truthfully was plain error. Because J.R. was over ten years old on the day of her testimony, it is presumed that she was competent to testify. *See* Minn. Stat. § 595.02, subd. 1(m) (2006) (stating that a child under the age of ten is presumed a competent witness unless the court finds the child lacks capacity); *see also State v. Brovold*, 477 N.W.2d 775, 778 (Minn. App. 1991) (obligating court to examine child under ten years of age to learn if the child has capacity to tell the truth and ability to recall facts), *review denied* (Minn. Jan. 17, 1992). Thus, the court had no duty to assess J.R.'s competence prior to administering an oath because she was more than 10 years old.

When the court conducts such an examination, it is attempting to establish that the child is competent to testify, not that the child's testimony will be credible.

The jury will judge the child's credibility and decide the weight to assign the testimony. A competency hearing is not a credibility hearing. Competency concerns the child's ability to be truthful and to understand the importance of telling the truth in court. It also concerns the child's ability to remember and relate events. Whether a child is easily led goes more to credibility than competency. . . . It is the jury's province to sort out the inconsistencies and determine credibility.

State v. Lanam, 459 N.W.2d 656, 660 (Minn. 1990). In light of J.R.'s age, a demonstration of competence is not unreasonable.

An attorney is allowed some scope in examination, particularly as to preliminary matters. *See, e.g., United States v. Londondio*, 477 F.3d 777, 788 (8th Cir. 2005) (stating that leading questions are permitted on preliminary matters). Here, the prosecutor asked J.R. about her age, family, and school—questions not atypical for any witness. Then the prosecutor asked four questions intended to show that J.R. knew the difference between the truth and a lie. These questions tend to show J.R.'s competence to testify, rather than her credibility. In view of J.R.'s young age, these questions did not amount to a clear and obvious contravention of case law, a rule, or a standard of conduct. Appellant has failed to demonstrate plain error.

Ineffective Assistance of Counsel

Appellant argues that his right to a fair trial was denied because of the ineffective assistance of his trial counsel. Generally, this issue is better raised in a postconviction proceeding in which a defendant has the opportunity to present additional facts to support the claim. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Here, appellant has presented a generalized summary of actions that he considers deficient, but the record before us does not include information necessary to explain counsel's actions or permit us to determine if they were deficient. We therefore decline to review appellant's claim of ineffective assistance of counsel.

Affirmed.