**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-34**

State of Minnesota,
Respondent,

vs.

Richard Darnell Evans,
Appellant.

**Filed May 4, 2010**
**Affirmed**
**Peterson, Judge**

Ramsey County District Court
File No. 62-CR-08-3953

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

Susan Gaertner, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, 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 his conviction of third-degree criminal sexual conduct, appellant argues that (1) the district court committed plain error by failing to instruct the

jury on all of the elements of the charged offense, and (2) the prosecutor committed misconduct during closing argument by expressing personal opinion about witness credibility and by misusing evidence of appellant's character. We affirm.

## FACTS

Appellant Richard Darnell Evans was charged with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (Supp. 2007). The charge was tried to a jury.

A.O. was 14 years old on March 17, 2008, when she babysat her stepsister R.D.'s two young children. R.D. told A.O. that appellant, who was R.D.'s fiancé, would pick up the children after his work shift ended. Appellant was 24 years old.

At trial, A.O. testified that appellant arrived at her house to pick up the children shortly after 8:00 p.m. When he arrived, appellant told A.O. that he had something to discuss with her upstairs. Once upstairs, appellant led A.O. to her bedroom, removed her pants and underwear, and vaginally penetrated her with his penis. He then used the bathroom and left with R.D.'s children. A.O. testified that appellant was in the house for 20 or 30 minutes and not more than an hour. At some point after the incident, appellant told A.O. not to tell anyone about it.

After appellant left, A.O. called a friend and then her brother and told them what had happened. According to A.O., she did not tell anyone else about the incident until May, when she told her boyfriend and his mother. A.O. later reported the incident to an assistant principal at her high school in the presence of the school liaison police officer. Finally, A.O. spoke with a nurse who specialized in child abuse. The nurse found no

evidence of physical injury, but she testified that approximately 95% of sexually abused children have no physical findings.

Appellant testified that he got off work at 8:15 p.m. on March 17. R.D. picked him up at work, and he drove her to work, which took ten to 15 minutes. He stopped to visit at the place where R.D. worked for about five minutes, and then drove for about ten minutes to A.O.'s house to pick up the children. Appellant stated that he was in the house "[f]ive minutes at the max." He denied having sexual intercourse with A.O.

J.T. testified that on March 17, appellant called her and told her to come over to his house after she was done with work. J.T. stated that she was with appellant from approximately 9:00 or 9:15 p.m. until 11:30 p.m. and that she had sex with him during this time.

The jury found appellant guilty, and the district court sentenced him to a stayed 36-month prison sentence. This appeal followed.

## D E C I S I O N

### I.

Appellant argues that the district court committed reversible error by failing to instruct the jury on all of the elements of third-degree criminal sexual conduct. To be convicted of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b), (1) a person must be found to have engaged in sexual penetration with another person, (2) the complainant must be at least 13 but less than 16 years old, and (3) the actor must be at least 24 months older than the complainant. When instructing the jury, the district court stated: "The statutes of Minnesota provide that whoever engages in

sexual penetration with another person under the age of 16 and who is more than 24 months older than that person is guilty of a crime. That crime is Criminal Sexual Conduct in the Third Degree." While instructing the jury on each element individually, the court stated, "The second element of the crime: At the time of the defendant's act, [A.O.] had not reached her sixteenth birthday." Appellant did not object to this instruction, and he argues on appeal that the district court committed plain error by not including in this instruction that A.O. was at least 13 years old.

Generally, failure to object to a particular jury instruction forfeits the issue for appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). However, we may review the issue for plain error. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). For an appellate court to grant relief for "an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *Griller*, 583 N.W.2d at 740-41. If the three prongs of the plain-error test are met, the reviewing court may reverse if it concludes that reversal is required to ensure fairness and the integrity of the judicial proceedings. *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

A jury instruction is erroneous if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). The second element of third-degree criminal sexual conduct requires a finding that the complainant was at least 13 but less than 16 years old. Minn. Stat. § 609.344, subd. 1(b). Because the district court's instruction did not include the minimum-age requirement of the offense, the instruction materially misstated the law, and the first prong of the plain-error test is satisfied.

To satisfy the second prong of the plain-error test "it is sufficient that the error is plain at the time of the appeal." *Id.* at 741. For purposes of a plain-error analysis, "plain" is synonymous with "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993); *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). A review of the plain language of the statute reveals that the error in the instruction is clear and obvious. Therefore, the second prong of the plain-error test is satisfied.

The third prong of the plain-error test is satisfied if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. The United States Supreme Court has concluded that a jury instruction that erroneously omitted an element of the crime charged was harmless when the omitted element was not contested at trial and the record contained overwhelming evidence establishing the omitted element. *Neder v. United States*, 527 U.S. 1, 16, 19-20, 119 S. Ct. 1827, 1837, 1839 (1999). And the Minnesota Supreme Court has concluded that a defendant's substantive rights were not affected by a jury instruction that omitted an element of the charged offense when there was "no reasonable likelihood that a more accurate instruction would have changed the outcome." *Ihle*, 640 N.W.2d at 917; *see also State v. Spencer*, 298 Minn. 456, 464, 216 N.W.2d 131, 136 (1974) (declining to reverse an assault conviction when the jury was erroneously instructed that intent was not an element but controversy at trial centered on identity, not intent, of a shooter). The element omitted from the instruction was that the jury must find that A.O. was at least 13 years old at the time of the incident. Uncontested trial testimony demonstrated that A.O. was 14 years old on March 17, 2008, and appellant does not cite any evidence that raises any doubt about A.O.'s age. We

therefore conclude that there is no reasonable likelihood that a more accurate instruction would have changed the outcome of the case, and appellant has not satisfied the third prong of the *Griller* analysis.

**II.**

Appellant argues that the prosecutor committed misconduct during closing argument by (1) expressing personal opinion about the credibility of appellant and defense witness J.T. and (2) misusing as character evidence a statement that appellant made. Appellant contends that the misconduct was prejudicial and requires reversal.

Appellant did not object to the alleged misconduct at trial. In Minnesota, appellate courts "use the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The *Griller* formulation applies, and the nonobjecting defendant bears the burden of demonstrating that error occurred and that the error was plain. *Id.* at 302. But when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden shifts to the state "to demonstrate the lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* To meet this burden, the state needs "to show that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotations omitted). To determine whether the state has satisfied its burden, a reviewing court considers "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

**A.**

"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). "A prosecutor engages in misconduct if [she] expresses [her] personal opinion on the defendant's credibility as a witness." *State v. Powers,* 654 N.W.2d 667, 679 (Minn. 2003). "When assessing prosecutorial misconduct, the closing argument will be considered as a whole." *Id.* at 678. A prosecutor may draw reasonable inferences from the evidence presented at trial. *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006). And a prosecutor may argue in closing argument that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006).

The prosecutor's closing argument primarily recounted the testimony of each witness who testified at trial and addressed factors about the testimony and the witnesses that the prosecutor wanted the jury to consider when determining which witnesses were credible and which were not. With respect to J.T., the prosecutor said only that J.T. "came in and testified for the Defense. Her testimony offered nothing. Zero. Except to show how deceitful both [appellant] and her are, and all the while trying to convince you what a good parent she is. She offered nothing in this trial." Appellant argues that this statement acted as the prosecutor's personal opinion about the credibility of J.T. and appellant. Appellant contends that J.T.'s testimony was presented as an alibi or quasi-alibi, and the prosecutor used J.T.'s testimony that she had sex with appellant to paint J.T. and appellant as deceitful.

As appellant contends, J.T.'s testimony that appellant was at his apartment with her by 9:00 or 9:15 was apparently offered to present an alibi. The alibi was that appellant could not have committed the offense because he got off work at 8:15, spent ten to fifteen minutes driving R.D. to work, where he visited for about five minutes, then drove ten minutes to get to A.O.'s house, which would not have left enough time to commit the offense and still be at his apartment with J.T. by 9:00 or 9:15.

A reasonable interpretation of the prosecutor's statement is that it asserts that J.T.'s testimony did not establish appellant's alibi. And the prosecutor's statement about J.T. and appellant being deceitful is not an expression of the prosecutor's personal opinion about the credibility of J.T.'s and appellant's testimony; it is a reference to their deceiving R.D. by having an affair while appellant was engaged to R.D. Both statements reflect reasonable inferences drawn from the evidence presented at trial. *See State v. Smith,* 541 N.W.2d 584, 589 (Minn. 1996) (stating that a prosecutor has considerable latitude during closing argument and "has the right to present to the jury all legitimate arguments on the evidence, to analyze and explain the evidence, and to present all proper inferences to be drawn therefrom"). Conflicting testimony about the timeline of events supported an argument that it was possible that the offense occurred during the available time and that J.T.'s testimony did not prove otherwise; and both J.T.'s and appellant's testimony supported an argument that they were deceiving R.D. Including the statements in closing argument was not plain error.

**B.**

During direct examination, appellant testified that when he arrived at A.O.'s house to pick up R.D.'s children, the children

> gave me hugs, said hi, was excited to see me. Then they had already had their shoes on and I grabbed their coats and told them come on, let's go. I said: Papa's got some things he's got to take care of. I said thank you to the babysitter, who, at the time, was [A.O.], and I exited the house with one child in each arm.

During closing argument, the prosecutor stated: "'Papa's got things to attend to,' he said. That's what he told the two children of his fiance. Well, we know what that was, don't we? The things he needed to attend to, he was meeting with [J.T.]."

Appellant concedes that "the evidence that Appellant and [J.T.] had sex on March 17 after meeting at Appellant's apartment was, arguably, admissible as evidence of [J.T.'s] bias," and that there would be no error if the prosecutor had limited the closing argument to pointing out this potential bias. Appellant argues, however, that by juxtaposing his testimony about picking up R.D.'s kids with his meeting J.T. while he was in a relationship with R.D., the prosecutor improperly appealed to the passions of the jury to punish him because he had betrayed R.D. and was not a good person.

But the juxtaposition accurately reflected the testimony at trial. The prosecutor's statement followed an argument that appellant's testimony was not credible and emphasized the fact that appellant, whose credibility the jury needed to evaluate, picked up his fiancé's children and then, a short time later, was meeting with another woman.

This fact suggested that appellant was deceiving R.D., and it was not plain error for the prosecutor to emphasize the fact when challenging appellant's credibility.

**Affirmed.**