STATE OF MINNESOTA
IN COURT OF APPEALS
A09-844

State of Minnesota,
Respondent,

vs.

Kevin Marlen Blomseth,
Appellant.

Filed May 25, 2010
Affirmed
Ross, Judge

Becker County District Court
File No. 03-CR-08-1531

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

ROSS, Judge

Kevin Blomseth appeals from his convictions for assaulting his fiancée's 12-year-old son. The child told several people after the assault, and wrote in his journal, that he

got his black eyes from falling on the deck of his mother's home and hitting a propane tank. But the child told his older brother, and later a jury, that Blomseth had hit him and told him to lie about what happened. The jury convicted Blomseth of malicious punishment of a child and domestic assault. Blomseth argues that the district court plainly erred by allowing improper testimony about a child-protection investigator's maltreatment determination and by allowing the child's psychologist to vouch for the child's credibility, that the district court abused its discretion by overruling his relevancy objection to testimony of the mother's rocky relationship with the child, and that the cumulative effect of these errors denied him a fair trial. Because we conclude that Blomseth suffered no prejudice from trial errors, individually or cumulatively, we affirm.

FACTS

A jury found Kevin Blomseth guilty of felony malicious punishment of a child and felony domestic assault based in part on the testimony of A.H., who was his fiancée's 12-year-old son.

According to A.H.'s testimony, Blomseth woke him in the middle of the night, angry that he took some totes from Blomseth's pickup truck. A.H. explained that he thought he was following Blomseth's instructions. Blomseth hit him on both sides of his face near his eyes and told him to say that he slipped off the deck into a propane tank. A.H. awoke the next morning with two black eyes.

When A.H.'s 23-year-old brother, C.H., arrived at the house for a birthday party for A.H.'s younger brother, C.H. noticed A.H.'s black eyes. A.H. told him he fell off the porch. C.H. doubted the account. He called A.H.'s mother and asked her what had

happened. She asked, "What did he tell you?" C.H. repeated that A.H. claimed that he had fallen off the porch and she replied, "That's what happened." C.H. then called Blomseth and asked what happened. According to C.H., Blomseth admitted that he hit A.H. the night before and that he should not have hit him so hard.

Birthday-party guests asked A.H. about his eyes and he repeated the deck-falling story. But after C.H. again asked him what happened and told him not to fear, A.H. disclosed that Blomseth had hit him. C.H. left the party and contacted police.

A police officer went to A.H.'s home, observed his black eyes, and asked him about what happened. The officer told A.H. that he did not believe that he fell off the deck. A.H. told the officer that he had taken things from Blomseth's truck and that Blomseth had hit him. In addition to telling C.H. and the officer, A.H. later shared the same account with a child-protection investigator, a mental health case manager, and a psychologist. All five testified at Blomseth's trial that A.H. had given them that same explanation.

Blomseth's trial defense was that A.H. fabricated the story to get him into trouble. A.H. admitted at trial that he dislikes Blomseth, that he sometimes likes to get him in trouble, and that he once contrived a story to do so. He also admitted that he wrote in his journal that he had a black eye from slipping on the deck, but he explained that he did this to add credibility to the false story that he fell. A.H.'s mother testified that she did not believe that Blomseth hit A.H. and that A.H. has a reputation for lying.

The jury believed A.H. and convicted Blomseth. Blomseth moved for a new trial, arguing that because the state's witnesses were allowed to bolster A.H.'s credibility,

Blomseth should have been allowed to call witnesses to testify about A.H.'s prior self-inflicted injuries and false accusations. The district court denied the motion, noting that Blomseth had failed to raise the issue during trial and that the court had not prohibited Blomseth from offering witnesses. The district court sentenced Blomseth to 27 months' imprisonment for the malicious-punishment conviction. Blomseth appeals from his conviction.

D E C I S I O N

Blomseth seeks a new trial, arguing that three trial witnesses offered improper testimony against him. Blomseth failed to object to the challenged testimony of two of the witnesses and asks that we find that the district court plainly erred by allowing it. He argues that the district court abused its discretion by overruling his relevancy objections to testimony about A.H.'s relationship with his mother. Finally, Blomseth argues that the cumulative effect of the district court's errors denied him a fair trial. Each argument fails.

I

Blomseth argues that the district court plainly erred by allowing a child-protection investigator to testify that she had determined that maltreatment had occurred and by allowing a psychologist to "vouch" for A.H.'s credibility. Blomseth did not object at trial to these alleged errors. A defendant's failure to object at trial generally forfeits his challenge on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But this court may exercise its discretion to consider unobjected-to errors under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The challenge must

establish that there was an error, that the error was plain, and that the error affected substantial rights. *Id.* An error is plain when it is "clear" or "obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). An error affects substantial rights if it was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. Even if the defendant meets the three-prong test, this court will reverse only "if the fairness, integrity, or public reputation of the judicial proceeding is seriously affected." *State v. Jones*, 678 N.W.2d 1, 18 (Minn. 2004).

Carrie Lake Testimony

Carrie Lake, a Becker County child-protection investigator, spoke with A.H. at his school a few days after the incident. A.H. told Lake that Blomseth had hit him for taking a tote from his truck. The prosecutor asked Lake at trial if she had determined whether maltreatment had occurred. Lake stated that she determined that maltreatment had occurred for physical abuse and neglect. Blomseth did not object to this testimony and now argues that the maltreatment determination was irrelevant and interfered with the jury's determination of whether he committed the assault.

Blomseth asserts that we found similar statements inadmissible in *State v. Myrland*, 681 N.W.2d 415 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004), and *State v. Hogetvedt*, 623 N.W.2d 909 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). In *Myrland*, we held that the district court erred by allowing the child-pornography defendant's human resources director to testify that the defendant's employer placed him on administrative leave when the child-pornography investigation began and that it later terminated him. 681 N.W.2d at 418, 421. We reasoned that the

testimony suggesting that the defendant's employer had concluded that he was guilty was irrelevant to the criminal charges. *Id.* at 421. And in *Hogetvedt*, we reversed a conviction because a police officer essentially told the jury that he believed the defendant was guilty of the charged offense. 623 N.W.2d at 915–16. The officer had offered his opinion even after the district court instructed that it would be "totally improper." *Id.* at 914.

We need not decide whether admitting Lake's testimony about the maltreatment determination was erroneous. Even if we assume that the district court erred by not prohibiting the testimony *sua sponte* and that the error was plain, Blomseth cannot establish that the error affected his substantial rights. Aside from the contested testimony, the jury still heard that A.H.'s case was referred to Lake for investigation and what A.H. told Lake about the incident. And it learned that all the children were removed from the home and placed in foster care with C.H., where they continued to reside at the time of trial. Lake's maltreatment determination of abuse was easily inferable from the rest of her testimony, the admission of which Blomseth has not challenged on appeal.

Additionally, Blomseth's counsel minimized any negative impact of the maltreatment-determination testimony in closing arguments. He argued that Lake's maltreatment determination was wrong. He also highlighted that the standard of proof for a maltreatment determination was merely proof by a preponderance of the evidence while conviction required proof beyond a reasonable doubt.

We hold that in this context the investigator's testimony that she had determined that maltreatment had occurred did not influence the outcome of the trial or affect Blomseth's substantial rights.

Jim Knutson Testimony

Blomseth argues that the district court plainly erred by allowing Jim Knutson, a psychologist working with A.H., to testify that while A.H. discussed the incident "he was very honest appearing" and that most children are unable to maintain a lie consistently over time. Blomseth asserts that Knutson was improperly vouching for A.H.'s credibility.

One witness may not vouch for the credibility of another because it would interfere with the jury's duty to assess credibility. *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Improper vouching testimony is testimony that another witness is telling the truth or testimony that one believes one witness over another. *See State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (holding that police officer did not testify that informant was telling truth or that officer believed one witness over another and therefore officer did not vouch).

Knutson did not expressly testify that he thought A.H. was telling the truth or that he believed A.H. over another witness. Knutson's statement that A.H. "was very honest appearing" was part of his response to the prosecutor's question about A.H.'s demeanor during their discussions. Knutson stated,

> He has been very clear, whether to me, whether he has gone through in great detail or he just brings it up, that that event happened, and *he will be sad*, because he will have maybe a

> good thought about, you know, like mom and then *he will be sad* that oh, you know, there is this event that happened and she is siding with [Blomseth]. And so he, he, you know—throughout, ever since I met him, *it feels like—I observe him as being sad* about this and he has consistently talked about it in those ways. He hasn't changed. When he went into detail about the event, *he was very honest appearing to me and would look me straight in the eye and he has been consistent* for eight months in regards to that. He hasn't wavered. But it has affected him, you know, emotionally he feels sad about it.

Although it was not inappropriate for Knutson to describe his observations of A.H.'s demeanor during the interview, we find merit to Blomseth's concern that Knutson's impression that A.H. was "honest appearing" was more the psychologist's own perception of A.H.'s credibility than an observation of his demeanor.

But at worst, Knutson's statement that A.H. was "honest appearing" was not prejudicial. Blomseth's conviction did not turn merely on a credibility determination between conflicting stories by A.H. and Blomseth. C.H. testified that Blomseth had admitted to hitting A.H. and that he should not have hit him so hard. Multiple photographs depicted A.H.'s injuries to the jury, and the prosecutor argued that they appeared consistent with blows rather than with a fall. And Blomseth was able to rebut Knutson's implied credibility assessment by relying on A.H.'s mother's testimony that A.H. is sometimes dishonest and that she disbelieved his account and on A.H.'s own admission that he had previously falsely accused Blomseth. Blomseth's substantial rights were not affected by Knutson's describing A.H.'s demeanor as "honest appearing."

Blomseth's second allegation of vouching is Knutson's general testimony about a child's ability to maintain a lie. Knutson testified, "I've worked with a lot of kids over

the years and normally, kids will—it will take five minutes, ten minutes, sometimes a day, but they usually—in this, usually would be a high percentage they will come around and be honest about the situation." Knutson was not vouching for A.H.'s credibility. In *State v. Vick*, the supreme court held that a therapist's comment that "lying is not out of the ordinary" for children who have experienced sexual abuse was a comment on the general characteristics of abused children and therefore not vouching. 632 N.W.2d 676, 689 (Minn. 2001). Knutson's comment was similarly explanatory of the general characteristics of children and not of A.H. specifically. The district court did not plainly err by allowing this vague testimony about lying children "normally" abandoning their lies.

II

Blomseth argues that the district court erred by determining that testimony about A.H.'s relationship with his mother was relevant. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. This is a low hurdle. *State v. Ture*, 632 N.W.2d 621, 631 (Minn. 2001). Evidentiary rulings are within the district court's discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Under our review for an abuse of discretion, the appellant has the burden to prove that the ruling was erroneous and that it prejudiced the outcome. *Id.* An erroneous evidentiary ruling that is harmless is not a ground for a new trial. Minn. R. Crim. P. 31.01.

Blomseth challenges as irrelevant the following testimony about A.H.'s mother, offered by A.H.'s mental health case manager, Bridgette Eastman: the mother was "standoffish" towards A.H., she would not acknowledge A.H.'s progress, she focused on A.H.'s prior negative behavior, she would not often make eye contact with A.H. and did not usually touch him, and she seemed pleased that A.H. would have to testify. Blomseth makes the same challenge to the testimony of A.H.'s psychologist, Jim Knutson. Knutson similarly testified about A.H.'s relationship with his mother, saying that the mother focused only on A.H.'s past behavior and is overly critical, that she hugs A.H. too hard, and that A.H. does not want to open up to his mother because she will lecture him.

The district court overruled Blomseth's relevancy objections with the following explanation:

> The evidence in this case has been that the defendant and the child's mother . . . are engaged and under those circumstances, the jury might rightfully question how it is that they can remain together, when her fiancé is accused of assaulting her own son.
>
> So I thought the Court's conclusion was that [the testimony] was relevant to assist the Court or assist the [jury] in explaining that relationship and explaining why it is these folks are together at this juncture. So those are the rulings of the Court.

The district court's relevancy determination and admission of the testimony was not an abuse of its discretion. Blomseth contends that the evidence was irrelevant because it only served to impugn the mother's character, which in turn impugned his own character because of their romantic relationship. But the testimony was clearly relevant because it tended to show the mother's bias. A witness's bias is always relevant to

discredit the witness's testimony or to affect its weight. *State v. Lanz-Terry*, 535 N.W.2d 635, 640 (Minn. 1995). A.H.'s mother was Blomseth's only trial witness, and she sided with Blomseth, testifying that she did not believe A.H.'s story. The quality of her relationship with her son, like the quality of her relationship with her son's attacker, put her assessment of her son's credibility in perspective. Whether partiality toward Blomseth or bias against her son influenced her belief that A.H. was lying was therefore a fact "of consequence." Her troubled relationship with A.H. makes it more probable that her support of Blomseth at trial rested in part on factors other than an objective disbelief of A.H.'s story.

III

Blomseth argues that although no single error may justify a new trial, the combination of errors undercut his right to a fair trial. As discussed above, the challenged evidence was either properly admitted, not so prejudicial as to be plain error, or harmless error. Blomseth requests that, like the supreme court in *State v. Erickson*, 610 N.W.2d 335 (Minn. 2000), we consider whether the cumulative effect of the errors deprived him of a fair trial even if we conclude that none of the errors was prejudicial. The *Erickson* court concluded that the case against the appellant was strong and held that the cumulative effect of trial errors did not deny him a fair trial. *Id.* at 341. We reach a similar conclusion in this case.

A.H. told five people and testified that Blomseth hit him in the face and then told him to lie about how he got the black eyes. C.H. testified that Blomseth admitted to hitting A.H. forcefully. Photographs depicted A.H.'s black eyes and would allow the jury

to consider whether the bruises were more consistent with A.H.'s testimony than with the recanted trip-and-fall account. This significant evidence would have been before the jury even if the testimony challenged on appeal had been excluded. The state presented a strong case against Blomseth, and the cumulative effect of the alleged errors did not deny him a fair trial.

Affirmed.