**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-0912**

State of Minnesota,
Respondent,

vs.

Anthony David Gurneau,
Appellant.

**Filed May 5, 2014**
**Affirmed**
**Kirk, Judge**

Hennepin County District Court
File No. 27-CR-12-34824

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

**KIRK**, Judge

On appeal from his conviction of third-degree criminal sexual conduct, appellant argues that (1) the district court erred by allowing a police officer to testify as an expert witness, and (2) the prosecutor committed misconduct during his closing argument. In his pro se supplemental brief, appellant raises several additional arguments. We affirm.

## FACTS

On October 19, 2012, respondent State of Minnesota charged appellant Anthony David Gurneau with third-degree criminal sexual conduct. The complaint alleged that appellant sexually assaulted I.E., his girlfriend G.E.'s sister, several months earlier.

The district court held a jury trial in January 2013, and I.E. testified that appellant sexually assaulted her early on the morning of July 5. I.E.'s friend, K.W., who lived with her and G.E. at the time and shared a bed with I.E. on the night of the incident, also testified. Appellant testified that K.W. and I.E.'s allegations against him were false. The jury found appellant guilty of third-degree criminal sexual conduct. This appeal follows.

## D E C I S I O N

### I. The district court's admission of a police officer's expert testimony was harmless error.

"The admission of expert testimony is within the broad discretion accorded a [district] court." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). This court will not reverse the district court's admission of expert testimony unless there is clear error. *State v. Koskela*, 536 N.W.2d 625, 629 (Minn. 1995). A district court's erroneous admission

or exclusion of expert testimony is subject to harmless error analysis. *See State v. Bird*, 734 N.W.2d 664, 672 (Minn. 2007). "Reversal is warranted only when the error substantially influences the jury's decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997).

Appellant argues that the district court erred by allowing former Minneapolis Police Sergeant Bernard Martinson, who was the investigator assigned to investigate I.E.'s allegations, to provide expert testimony. After the prosecutor questioned Sergeant Martinson about his training and experience, the following exchange occurred:

> [PROSECUTOR]: [H]ow would you characterize in your vast training and experience a case involving a sister's boyfriend sexually assaulting a younger sister, is there a way you would characterize that in your training and experience?
>
> . . . .
>
> [SERGEANT MARTINSON]: I would characterize this crime as an interfamilial sexual assault.
>
> . . . .
>
> [PROSECUTOR]: Based on your training and experience, is it common or uncommon to have a period of delayed reporting in cases involving interfamilial assault cases?
>
> . . . .
>
> [SERGEANT MARTINSON]: It's quite common in interfamilial sexual abuse on delayed reporting.

Appellant's counsel objected, stating: "He's not an expert witness. He cannot testify to these sorts of things, particularly because they didn't give me notice they would use him as an expert, or else I could have had someone come in to testify about these

issues." Appellant's counsel also objected to the testimony as "more prejudicial than probative." The district court overruled the objections.

Appellant argues that Sergeant Martinson was testifying as an expert when he provided his opinion that it was common for victims of interfamilial sexual abuse to delay reporting. The state concedes that Sergeant Martinson was providing expert testimony when he made the challenged statement but argues that the district court implicitly found that Sergeant Martinson was qualified as an expert. Expert testimony is admissible to "assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. A witness who qualifies "as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." *Id.* A police officer can offer both expert testimony and testimony based on his personal observations. *See State v. Ards*, 816 N.W.2d 679, 682-83 (Minn. App. 2012) (concluding that a police officer's testimony was not "expert opinion testimony" simply because she has specialized training and experience but instead was based on her "personal observations" of the defendant). A police officer may testify as an expert witness if he qualifies as an expert under Minn. R. Evid. 702. *State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987).

The portion of Sergeant Martinson's testimony that appellant challenges was based on the specialized knowledge he obtained through his experience and training, not on his personal experience as an investigator in this case. Thus, it was expert testimony. The state's argument that the district court implicitly found that Sergeant Martinson was qualified as an expert is unpersuasive because the district court specifically overruled

appellant's counsel's objection to Sergeant Martinson testifying as an expert witness, stating that the prosecutor could continue to ask questions "based on his training and experience."

Appellant argues that the district court erred by admitting Sergeant Martinson's expert testimony because the state did not provide appellant with notice that it intended to present expert testimony. Prior to trial, the prosecutor must disclose the name of "[a] person who will testify as an expert but who created no results or reports in connection with the case" to the defense, as well as "a written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." Minn. R. Crim. P. 9.01, subd. 1(4)(c). "Whether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Because the record shows that the state did not provide notice to appellant of its intent to offer Sergeant Martinson's expert testimony and the state concedes that it did not do so, the state violated Minn. R. Crim. P. 9.01, subd. 1(4)(c).

Appellant argues that the erroneous admission of the expert testimony entitles him to a new trial because this case hinged on witness credibility, and Sergeant Martinson's testimony was particularly persuasive on the credibility issue. He also contends that he did not have an opportunity to refute Sergeant Martinson's testimony with his own expert because he did not receive notice of the expert testimony. The state's violation of a discovery rule will generally not result in a new trial unless the defendant was prejudiced by the violation. *Palubicki*, 700 N.W.2d at 489. "Prejudice warrants a new trial only if a

reasonable probability exists that the outcome of the trial would have been different if the evidence" had not been admitted. *State v. Jackson*, 770 N.W.2d 470, 479 (Minn. 2009) (quotation omitted).

The portion of Sergeant Martinson's testimony to which appellant objects was very limited—it was essentially only one sentence during his lengthy testimony—and the jury also heard I.E.'s explanation why she delayed reporting the incident to police. The jury could have relied on I.E.'s testimony in reaching its verdict without taking into account Sergeant Martinson's brief statement about interfamilial abuse victims. Appellant also had the opportunity to challenge Sergeant Martinson's credibility regarding this issue through cross-examination. Because we conclude that there is no danger that the admission of the expert testimony affected the jury's verdict, the district court's erroneous admission of the expert testimony was harmless error.

**II. The prosecutor did not commit misconduct during his closing argument.**

A prosecutor commits misconduct when he or she "violates clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). "To determine whether the state committed misconduct warranting a new trial, we look to the closing argument as a whole, rather than to selected phrases and remarks." *Ture v. State*, 681 N.W.2d 9, 19 (Minn. 2004). The determination of whether a prosecutor committed misconduct during closing argument is within the district court's discretion. *State v. Ray*, 659 N.W.2d 736, 746 (Minn. 2003). Appellate courts review claims of "prosecutorial misconduct to determine whether the conduct, in light of the

whole trial, impaired the defendant's right to a fair trial." *State v. Milton*, 821 N.W.2d 789, 802 (Minn. 2012) (quotation omitted).

**A. K.W.'s testimony.**

Appellant argues that the prosecutor committed misconduct by making the following statement during his closing argument:

> Now let's talk about [K.W.'s] testimony. Ladies and gentlemen, you got an opportunity to see [K.W.]. She is shy, she is meek, she's timid; but what her testimony did is corroborate everything [I.E.] said that [appellant] did to her, about the fact that she woke up with her pants down, her underwear down, him being on top of her and, as she stated on the stand, giving head.

Appellant's counsel objected to the statement because it "misstate[d] the evidence." The district court overruled the objection.

Appellant argues that the prosecutor's statement misstated K.W.'s testimony because K.W. testified that she left the bedroom prior to appellant having any alleged sexual contact with I.E. and, therefore, she could not have corroborated everything that I.E. claimed appellant did to her. It is misconduct when a prosecutor intentionally misstates evidence. *State v. Mayhorn*, 720 N.W.2d 776, 788 (Minn. 2006).

As appellant contends, K.W. did not testify that she was present when appellant sexually assaulted I.E. But corroborating evidence does not necessarily need to support every detail of the evidence it corroborates. Instead, "corroborating evidence" is "[e]vidence that differs from but strengthens or confirms what other evidence shows." *Black's Law Dictionary* 636 (9th ed. 2009); *see also Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986) (stating that strong corroborating evidence in a criminal sexual

conduct case can include "a prompt complaint of the incident, evidence of the victim's physical and emotional condition, or detailed descriptions by the victim of the incidents"), *review denied* (Minn. Dec. 17, 1986). Here, K.W.'s testimony that on the morning of July 5 appellant got into the bed she was sharing with I.E., made sexual advances toward K.W., and was still in the bed with I.E. after she left the bedroom "strengthens or confirms" I.E.'s testimony that appellant sexually assaulted her in the bed that morning. K.W.'s testimony that I.E. texted her later that morning and told her about the assault a few days later also "strengthens or confirms" I.E.'s testimony about her actions after the incident. The prosecutor did not commit misconduct in his closing argument when he stated that K.W.'s testimony corroborated I.E.'s testimony.

**B. Appellant's pro se arguments.**

In his pro se supplemental brief, appellant argues that the prosecutor committed misconduct by: (1) vouching for the testimony of K.W. and I.E.; (2) expressing his personal opinion about appellant's guilt; and (3) disparaging the defense. Appellant's counsel did not object to this testimony during the trial. "On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). This standard requires (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). If a defendant demonstrates plain error in a prosecutorial misconduct case, the burden then shifts to the state to prove lack of prejudice. *Ramey*, 721 N.W.2d at 302. To do so, the state must "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.* (quotation omitted).

**i. Credibility of appellant, K.W., and I.E.**

"A prosecutor may not personally endorse the credibility of a witness or impliedly guarantee a witness's truthfulness." *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). But a prosecutor may argue in closing argument that certain witnesses were or were not credible. *State v. Lopez-Rios*, 669 N.W.2d 603, 614 (Minn. 2003).

Here, the prosecutor began his closing argument with an explanation of the elements of the crime and the state's burden of proof. The prosecutor then explained to the jury why appellant's testimony was not credible and I.E.'s testimony was credible, reminding them that they "are the sole and exclusive judges of the credibility of each witness called to testify in this case and only you determine the importance or weight that their testimony deserves." The prosecutor asked the jury to consider several factors when determining credibility, including each witness's motive to falsify testimony, state of mind, appearance, and manner. The prosecutor then discussed how those factors demonstrated or failed to demonstrate each witness's reliability. Viewing the prosecutor's closing argument as a whole, he did not personally endorse the credibility of K.W. and I.E. Rather, he presented his argument for why the testimony of K.W. and I.E. was credible and appellant's testimony was not credible.

**ii. Disparaging the defense.**

It is improper for a prosecutor to disparage the defense in closing arguments or to suggest that the defense is the type that is offered when "nothing else will work." *State v.*

*Griese*, 565 N.W.2d 419, 427 (Minn. 1997) (quotation omitted). However, "the prosecutor is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular argument." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993).

Appellant argues that several statements the prosecutor made during his closing argument disparaged his defense. We disagree. In the statements appellant identifies, the prosecutor argued that there was no merit to specific arguments that appellant made in support of his defense, appellant's statement to investigators was not credible, and K.W. and I.E. did not have motives to provide false testimony. None of the challenged statements improperly disparaged appellant's defense in the abstract. *See Salitros*, 499 N.W.2d at 818 ("[W]e have cautioned prosecutors against generally belittling a particular defense in the abstract.").

**III. The prosecutor did not fail to timely disclose exculpatory evidence.**

In his pro se supplemental brief, appellant argues that the prosecutor did not disclose the transcript of a police investigator's recorded interview with G.E. until after voir dire had begun. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). To establish a *Brady* violation, the evidence at issue must be favorable to the accused, it must have been suppressed by the state, and the defendant must have been prejudiced by its suppression. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005).

Here, a police investigator interviewed G.E. in October 2012, and a paralegal in the Hennepin County Attorney's Office e-mailed appellant's counsel a recording of the interview on October 29. It is not clear from the record when or if appellant received a transcribed copy of the interview, but appellant does not explain why the recorded version of the interview was insufficient, and the record shows that appellant's counsel never objected to incomplete or late discovery. Moreover, appellant does not explain why G.E.'s statement was exculpatory. Therefore, appellant has not established that the prosecutor failed to timely disclose exculpatory evidence in violation of *Brady*.

## IV. The district court did not err by failing to give a limiting instruction to the jury regarding K.W.'s testimony.

In his pro se supplemental brief, appellant argues that the district court erred by not instructing the jury that K.W.'s testimony that appellant kissed her thigh was admitted for a limited purpose. Before beginning voir dire, the parties discussed the admission of K.W.'s testimony about the events of the morning of July 5. The prosecutor argued that K.W.'s testimony about appellant kissing her thigh was admissible as immediate episode evidence because it was interwoven with the facts of the case and gave context to K.W.'s actions. Appellant's counsel stated that he had no objection to the admission of the testimony as immediate episode evidence unless K.W. did not appear to testify, but he requested that the district court preclude the prosecutor from arguing in his opening or closing argument that the act was a crime.

The district court found that the testimony was admissible as immediate episode evidence, but found that the prosecutor could not refer to the act as a crime in his opening

or closing argument. The district court noted that it might "issue an instruction asking the jury to consider the specific bit of testimony in proper context, and certainly not to confuse the issues and turn it into something that would be used as character evidence, which is clearly inadmissible." However, the district court did not issue a limiting instruction after K.W.'s testimony or in its final instructions to the jury, and appellant's counsel never requested an instruction. Because appellant did not object to the district court's decision not to give a limiting instruction during the trial, we review the district court's failure to do so for plain error. *See Ramey*, 721 N.W.2d at 297. Under that standard, appellant must first demonstrate error that is plain. *See Griller*, 583 N.W.2d at 740. "An error is plain if it was clear or obvious." *Strommen*, 648 N.W.2d at 688 (quotations omitted).

District "courts are advised, even absent a request, to give a cautionary instruction upon the receipt of other-crimes evidence, [but] failure to do so is not ordinarily reversible error." *State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001); *see also State v. Reed*, 737 N.W.2d 572, 585-86 (Minn. 2007) (concluding that the district court's failure to sua sponte instruct the jury about the limited use of evidence of defendant's other bad acts was not plain error in part because the complained-of evidence, "whether or not evidence of criminality by itself, was directly related to the conspiracy alleged by the state"). Here, K.W.'s testimony that she woke to find appellant kissing her thigh provided context to her explanation of the events of the night of July 4 and the early morning of July 5. The evidence was not admitted as evidence that appellant committed

a crime against K.W. Therefore, the district court's failure to give a limiting instruction is not plain error.

## V. The district court did not coerce the jury into reaching a unanimous verdict.

In his pro se supplemental brief, appellant argues that the district court committed reversible error by coercing the jury into reaching a verdict. Appellate courts "give district courts considerable latitude in the selection of the language of the jury charge." *State v. Cox*, 820 N.W.2d 540, 550 (Minn. 2012) (quotation omitted). However, a district court commits reversible error if it coerces a jury toward a unanimous verdict. *Id.* The district court may require the jury to continue to deliberate if it is unable to agree or may repeat an instruction, but it "shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *State v. Buggs*, 581 N.W.2d 329, 338 (Minn. 1998). The district court also may not "inform a jury that a case must be decided, nor allow the jury to believe that a deadlock is not an available option." *Id.* (quotation omitted). This court reviews a district court's charge to the jury to continue deliberating after it has indicated it cannot agree on a verdict for an abuse of discretion. *Cox*, 820 N.W.2d at 550.

Here, the jury began deliberating at approximately 3:15 p.m. on Friday, January 11, 2013. On Monday, January 14, the jury sent a note to the district court stating, "We can't reach a unanimous decision. What now?" The district court judge who presided over the trial was unavailable, so another district court judge instructed the jury as follows:

> Each of you has by now expressed your opinion about this case and no doubt each of you has supported your opinion with argument. This situation makes it very difficult to change your opinion even if it is shown to be wrong because your pride is at stake. Do not let pride of opinion prevent you from listening fairly to the opinions of your fellow jurors. Each of you must decide this case for yourself. Both the State of Minnesota and [appellant] are entitled to your individual opinion. However, you should freely discuss this case with your fellow jurors and make every reasonable attempt to reach an agreement. Remember that you are not partisans or advocates in this case. Do not hesitate to re-examine your views or change your opinion if you become convinced it is wrong or should be changed. On the other hand, you should not change your opinion merely because other jurors disagree with you. So your decision here will ultimately be based on the facts and the law.
>
> With that, I am going to ask you to go back and resume your deliberations as best you can.

The jury reached a verdict the next day at approximately 3:00 p.m.

The instructions that the district court gave to the jury in response to their question are almost identical to the model jury instructions, which the district court read to the jury during its final instructions. *See* 10 *Minnesota Practice*, CRIMJIG 3.04 (2006). The instructions remind the jurors to decide the case for themselves and that the state and appellant are entitled to their "individual" opinions. The instructions cannot be reasonably interpreted to have coerced the jury into reaching a unanimous decision. *Cf. State v. Peterson*, 530 N.W.2d 843, 846 (Minn. App. 1995) (holding it was improper for district court to tell jurors they would be sequestered until they reached a unanimous verdict). Further, the record shows that the district court did not require the jury to deliberate for an unreasonably long time. The jury had been deliberating for less than a

day when it sent the note to the district court stating that it could not reach a unanimous decision. After the district court instructed the jury, the jury returned to deliberations, did not ask any further questions, and delivered the verdict the next day. The district court did not abuse its discretion by instructing the jury to continue deliberating.

## VI. The jury's verdict is supported by sufficient direct evidence.

Finally, appellant argues in his pro se supplemental brief that there is insufficient circumstantial evidence to support the jury's verdict. We disagree that appellant's conviction was based on circumstantial evidence because I.E.'s testimony regarding her personal experience was direct evidence of the offense. *See State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) (stating that "direct evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without interference or presumption" (quotation omitted)). In addition, although corroboration of I.E.'s testimony was not required, I.E.'s testimony was corroborated by K.W.'s testimony. *See State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (quotation omitted) (stating that although a criminal-sexual-conduct victim's testimony does not need to be corroborated, "the absence of corroboration in an individual case . . . may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt"), *review denied* (Minn. Aug. 17, 2004). Accordingly, we conclude that there is sufficient direct evidence to support the verdict.

**Affirmed.**