IN THE COURT OF APPEALS OF IOWA

No. 2-459 / 11-0624
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID MICHAEL POWERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

On appeal, David Powers challenges his convictions for two counts of sexual abuse. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fankman, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

David Powers appeals his convictions for two counts of sexual abuse stemming from allegations by his granddaughter. He challenges the sufficiency of the evidence to support the convictions. He also contends the district court abused its discretion in denying his motion for a new trial and that he was denied the effective assistance of trial counsel. This case rests upon determinations of credibility, which are uniquely for the jury. The complaining witness's credibility was thoroughly tested; the defendant testified in his own defense; and the jury found the defendant guilty as charged. We do not find extraordinary circumstances exist that would counter the deference owed to the jury's findings of fact. Because sufficient evidence supports the convictions, the court did not abuse its discretion in denying the motion for new trial. Defendant has failed to prove trial counsel was ineffective. We therefore affirm.

I. Background Facts and Proceedings.

In about 2002, when K.P. was six or seven years old, she came home from school with a note that the class had discussed "good touch, bad touch" and encouraged parents to continue the discussion. K.P.'s mother, Michelle, talked with K.P. and asked if anyone ever touched her inappropriately. K.P. said something like "I think grandpa did." K.P. told her mother that grandpa blew on her butt. Michelle contacted her husband, Phil. Phil then asked his father, David Powers, who lived next door, to come over to the house. The family had a discussion after which the parents concluded K.P. was referring to Powers' blowing "raspberries" on K.P.'s stomach. Because K.P. was not comfortable with

the activity, K.P.'s parents told Powers to refrain from doing so in the future. Powers continued to provide frequent child care for K.P.[1]

In May 2009, a school friend, H.M., was talking with K.P., stating she did not wish to go on an outing with her family because a relative they would be with "did stuff" to H.M. when she was younger. K.P. began crying and then told her friend that K.P.'s grandfather had been sexually abusing her. The friend suggested K.P. tell the school counselor, but K.P. did not want to. The friend then accompanied K.P. to the school counselor and the friend told the counselor what K.P. had said to her. The counselor talked with K.P. individually, and then contacted the Department of Human Services (DHS).

DHS then conducted child abuse assessments: David Powers was investigated for sexual abuse; K.P.'s parents were investigated for failure to provide adequate supervision. K.P. reported to the DHS investigator and later to a professional interviewer in an interview at a child protection center that for several years, beginning after her grandmother's death in 2001, David Powers had been touching her vagina, having her masturbate him, and having her perform oral sex.

Powers was subsequently charged with one count of sexual abuse in the second degree, alleging that on or about 2002 through 2007, the defendant did commit a sex act with a person under the age of twelve; and one count of sexual abuse in the third degree, alleging that on or about 2007 through 2009, the defendant did commit a sex act while the other person was twelve or thirteen. A

[1] K.P.'s parents divorced in 2005. K.P.'s father remarried in 2009.

jury trial began on February 1, 2011. K.P. testified and was cross-examined extensively. The prosecutor asked K.P. if she told lies, to which she responded, "I have." K.P. said she had lied to her parents about where she was going and who she was with because "sometimes I want to do things that they don't let me do." K.P. testified she had been told that she could stop the process and that she did not have to come to trial.

Several witnesses, including K.P.'s friend (H.M., to whom K.P. disclosed the abuse), and K.P.'s mother, father, and brother, all testified that K.P. had a reputation for lying or being untruthful. K.P.'s brother, D.P., testified K.P. had asked him to tell the abuse investigator that Powers had touched him too, but he said "no." D.P. also testified that K.P. slept in grandpa's bed, "but I didn't see anything happen."[2]

K.P.'s mother, Michele, was asked:

> Q. Now prior to coming into trial and that sort of thing, were you told that you had the option as to how far this case was going to proceed? A. Yes.
> Q. And [K.P.] was told that? A. Yes.
> Q. So that's something that you both knew in advance of yesterday or Tuesday? A. Yes.

K.P.'s elementary school counselor, Erin Gardner, testified that when she talked with K.P. in May 2009, K.P. was crying. K.P. told Gardner that her grandpa had sexually molested her, but when Gardner asked for more detail, K.P. was crying and could not talk. So Gardner asked K.P. to write down exactly what he had been doing. K.P. wrote "things such as touching her inappropriately and oral sex." Gardner then called DHS and an investigator arrived and

[2] A dispute exists whether D.P. actually saw K.P. in grandpa's bed with grandpa.

questioned K.P. On cross-examination, Gardner was asked if she knew if K.P. had a reputation for being truthful or untruthful. She responded, "both I guess. . . . It would depend on the situation."

Stacy Hartsfield, a child protection worker and abuse investigator for DHS, testified about her investigation concerning K.P.'s allegations against Powers, as well as her investigation of K.P.'s parents for failing to adequately supervise K.P. following her 2002 report that Powers put his mouth on inappropriate places on her body. She stated that following her initial meetings with K.P. and her parents, she contacted law enforcement because "in sexual abuse assessments and cases, they are a partner, it's a joint investigation between the two agencies." Hartsfield explained that K.P. was interviewed a few days later at the Child Protective Center (CPC) by Roseanne Matuszek while Hartsfield and police investigator Jeff Tyler viewed the interview through a two-way mirror. Hartsfield testified that K.P.'s statements during the interview with Matuszek were consistent with the information K.P. provided to Hartsfield, though more detailed. She testified that she informed K.P.'s parents of her report findings, and "they expressed not agreeing." Hartsfield also testified that K.P. told Hartsfield about her grandfather being angry with her about talking with some boys "and she thought to herself, he's got some nerve being mad at me for that when he's done what he's done to me."

Detective Jeff Tyler then testified as to his part in the investigation. Defense counsel objected to two of the prosecutor's questions as to whether the information K.P. gave during the CPC interview was consistent with the

information the detective was gathering, contending the questions were improper attempts to vouch for the credibility of the K.P. The court sustained the objections.

Dr. Annie Kontos testified that she began treating Powers in 2007. Kontos testified that Powers had bypass surgery in 1997; cardiomyopathy (enlargement of the heart "and the heart usually does not work as well as a normal heart would) dating back at least to 1997; type II diabetes; hypertension; peripheral vascular disease "due to his combination of his diabetes and his heart not working well"; and erectile dysfunction. She stated that Powers' problem with erectile dysfunction started before 1997 and that for a person with Powers' health conditions it is "highly unlikely" he would be able to achieve or sustain an erection. Dr. Kontos testified that lack of ability to have an erection is independent of one's sex drive. Dr. Kontos and a female companion of Powers both testified that Powers has taken several kinds of erectile dysfunction medication. Powers' companion, Elaine Countryman, testified that despite medication, he is "not able to achieve an erection, period." She acknowledged, however, that his condition did not keep the two of them from engaging in sexual activity other than sexual intercourse.

Powers testified in his own defense. Powers testified he did use medication from 2004 through the present to attempt to achieve an erection. He also testified he had rented numerous adult erotic movies over the years, but stated they were all for bachelor parties. He later acknowledged he sometimes rented the movies for his own viewing, "[t]rying to stimulate myself but it doesn't

work." Powers also testified he had undergone HIV testing twice since his wife's death in 2001. Powers admitted having blown "raspberries" on K.P.'s belly and stated he never did so with her younger brothers. When asked if he had ever put his mouth on K.P.'s butt he responded, "Not that I recall." Powers denied having any sexual contact with K.P. He stated he did not recall ever sleeping with K.P. in the same bed. He acknowledged he referred to K.P. as his "rock" after his wife's death.

Defense counsel moved for judgment of acquittal contending the evidence was insufficient to support a conviction on either count. The court denied the motion stating, "[K.P.]'s testimony, if viewed in the light most favorable to the State, if believed by the jury, does establish all of the elements necessary to convict the defendant of sex abuse in the second and/or sex abuse in the third."

In closing, the prosecutor argued in part,

> In this particular case, if you believe [K.P.], there is no other reason for that contact other than for it to be sexual in nature. There is no benign reason to have child touch a man's penis. There is no benign reason to have a child put her mouth on a man's penis. . . .
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> . . . .
>
> So it all boils down to really do you believe [K.P.] or do you believe the defendant. That's what it boils down to. . . .
>
> Instruction No. 6 is what we call the instruction on the credibility of the witnesses. And that applies to every witness who came in here and testified to you. It's not an exhaustive list, it doesn't mean it's the only things you look at, but it gives you some suggestions or some guidance as to how you decide who is telling the truth from up here. And that you can believe all, part, or none of any witness' testimony. That you use common sense. That you use reason. That you use life experience.
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> . . . .
>
> Let's look at one of the things in Instruction No. 6. What's her motive? . . . There is no motive for her to lie. You went through an entire week of testimony and not one motive was uncovered or

even suggested. In fact, just the opposite. Every single person who came in here and testified said that during all of these years in question [K.P.] and the defendant were very close. Very close. The defendant himself when he testified got up here and told you she does not have reason to say these things about me.

She has no motive. How did she benefit by coming in here? How did she benefit by telling? What positive thing does she get? Let's see. She got to go to a guidance counselor and be so upset she couldn't even talk and had to write on a piece of paper that the defendant was touching her and there was oral sex.

For a 13-year-old girl is that in the fun category? Is that in the positive category? I mean, goodness, you saw [H.M.] on this stand get upset even acknowledging to a group of adults that she had been touched in a situation. She starts crying, and we're not even asking [H.M.] details. . . .

Then she gets to go and she gets to tell a complete stranger at DHS that this happened to here. Then she gets to go to CPC and tell a complete stranger that all of these happened—things happened to her. And then she gets to do a physical. At 13 years old she gets to have a gynecological physical. That's not fun for a woman of any age. Never mind a 13-year old.

Then she gets to come in last May, May 2010 and do a deposition and answer Kevin Engels' questions. At this point she's 14 years old. And she gets to sit in a room and have a man she doesn't know ask her about things to do with oral sex and vaginas and penises. Probably not in the fun category there either.

Then she gets to come in here to trial and she gets to sit here in this chair facing all of those people, all of those family members, all those people supporting the defendant, and she gets to stare straight at them and tell them about the defendant touching her vagina, about putting her hand on his penis and rubbing up and down, about her having to put his penis in her mouth. Any of those things in the fun category? Any of those in things she benefited from?

She gets to have a horrible relationship with her dad. . . . And she gets to sit here and basically have Mr. Engels tell her she's lying. What does she get out of doing any of those things?

You all sat here and looked at her. She sat here, her entire chest was red, her whole face was red. This is [an] embarrassing topic for anybody. So what did she possibly get out of any of this? What motive does she have to make up a story? Absolutely none. If you look at all of those facts. And do you know what? What came out? Both she and her mom knew they could stop this case at any time. At any time they could have pulled the plug. So what does she get out of coming in and telling this information?

> Now, remember, Instruction No. 6 applies to everybody. What motive does the defendant have to come in and deny? Pretty big one, doesn't he? A pretty big motive. . . . Who has the motive here? He does, doesn't he? He's got the most motive in this entire room.
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> . . . .
>
> How about another reason to believe [K.P.] May of 2009 this is reported. [K.P.] says on Mother's Day weekend she's at her father's house, she's talking to some boys in the driveway. The defendant gets mad, says he's going to tell her dad. [K.P.] says she doesn't care. She knows she's not doing anything wrong. But in her mind what's going through her is he's mad at me for talking to some boys in the driveway after what he's been doing to me for the last six years? And that's what kind of gets at her. You and I know the word that she's saying is, that's hypocritical.
>
> Now, Mr. Engels claimed in his opening that that was her motive to make up the story. . . .
>
> And the other part of that theory that's flawed is if for some reason there was a motive to tell, the person she tells is another 13-year-old child. . . .
>
> . . . .
>
> And then think about it. That whole thing on Mother's Day passed almost two full years ago now. And she didn't get in trouble and nothing happened to her. If that was what precipitated her making up lies, why wouldn't she now say, "You know what? I don't want to go forward with this anymore. I'm done. I don't want to have to testify. I don't want to have to answer your questions. I don't want to talk about the embarrassing stuff. I don't want to make my dad any madder than he already is." Because she could have done all of those things. If she was lying because of him getting mad at her for talking to some boys.
>
> . . . .
>
> Another reason? Sort of suggested this before, but [K.P.] and her mom both told you they could stop this case. In opening Mr. Engels said once she told the story it got going and she got on this train and it couldn't be stopped. [K.P.] could have stopped it. Michele could have stopped it. So the defense's opening that this train got started and couldn't be stopped wasn't accurate. They both told you that. Certainly would be easier on both of them to stop. Be easier on the family to stop. But they didn't. . . .

The defense argued in closing that K.P.'s testimony was not to be believed, emphasizing her statements that Powers' penis got harder when she rubbed it. The defense argued of that claim, "It couldn't have happened. She's

telling you something that happened and you know it couldn't have happened. We would submit to you that if she's not telling the truth about this, it should make every single other thing suspect." The defense summarized the case as

> the statements of a 13-year old girl who's angry at her grandfather, and apparently acting in some sort of solidarity with her friend, that is known as untruthful to the people who know her, and that . . . provides no dates or times that can be corroborated and invents places that don't exist and adds different portions of her statement when you talk with her, who describes erections that don't exist and are, from a medical standpoint, very unlikely to exist, who goes and attempts to get her brother to make up similar stories[,]

and ultimately arguing that the convictions were not supported by proof beyond a reasonable doubt.

The jury returned guilty verdicts. In a motion for new trial, the defense argued the verdict was contrary to the weight of the evidence. The defendant also submitted an affidavit of K.P.'s mother, Michele, who stated that Ms. Fangman told K.P. that once the case began it would proceed and would not be dismissed, which Michele contended was contrary to the prosecutor's statements in closing argument. The district court overruled the motion for new trial. The court first noted that "the jury has spoken" as to whom they believed. As for the allegation that the prosecutor misstated the evidence in closing the court stated:

> One thing that is significant as to part two or B of the defendant's motion that discussing the fact that Ms. Powers has made a comment that she did not understand that the prosecution could stop at any time, which, of course, is contrary to what her statement under oath at the time of the trial was. And she was cross-examined to that extent and she brought up nothing at that time.
>
> And I guess the thing that's most telling to the Court at this point is that no one has made any accusations that at any point in time that either the victim or Ms. Powers asked Ms. Fangman to stop the prosecution and she refused to do so. So the fact that they say that they didn't know, they knew from the beginning, and

> at the time of the trial they both testified under oath saying that they knew they could stop it if they wanted to. And no one today is saying that anyone ever said they wanted to. So to that extent that is not a situation where there is new evidence that would raise itself to the level that would call for a new trial.

Powers now appeals. He argues the evidence was not sufficient to sustain the convictions. He also argues the trial court abused its discretion in denying the motion for new trial because the prosecutor intentionally misled the jury, and improperly bolstered the complaining witness's credibility. Finally, Powers contends trial counsel was ineffective in failing to properly object to the police detective's improper opinion that vouched for the credibility of the complaining witness and in failing to move for a mistrial. We will address each in turn.

II. Discussion.

A. *Sufficiency of the evidence*. At the close of the State's case, the defense moved for a judgment of acquittal on the basis of insufficiency of the evidence. Defense counsel urged the court to acquit Powers of both charges because of K.P.'s lack of credibility. Powers claims the court's denial of the motion was in error. Powers also claims the acquittals were necessary to protect Power's constitutional rights of due process, and if not sufficiently preserved by the motion, the failure to properly preserve the issue should be attributed to ineffective assistance of counsel.

Powers argues there was insufficient evidence to sustain the convictions because "[e]very member of K.P.'s family denigrated her credibility"; there was

"nothing to corroborate K.P.'s testimony"; and at no time did the defendant make any admissions against interest.

We review sufficiency-of-the-evidence claims for the correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). We apply a deferential standard and review the evidence in the light most favorable to the State. *Id.* at 213. "We will uphold a verdict if it is supported by substantial evidence." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Substantial evidence is evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

"We uphold the denial of a motion for judgment of acquittal if there is any substantial evidence in the record supporting the charges." *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996). "In determining the correctness of a court's ruling on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence; such matters are for the jury." *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Instead, we determine whether the evidence could convince a rational jury of the defendant's guilt beyond a reasonable doubt. *Id.*

As is often the situation with allegations of sexual abuse, the case hinges upon determinations of credibility. In this case, the jury heard the testimony of both the complaining witness and the defendant. Though no one saw the defendant touch his granddaughter's vagina or K.P. touching the defendant's penis, K.P. testified those acts occurred on more than one occasion over the course of a number of years. K.P. testified the conduct escalated over the years.

When K.P. was younger, "he didn't touch me except for blowing on my butt and then as I got older he stated making me do those things." She explained that after she showered, Powers would rub her vagina, telling her "it's supposed to feel good and that it's supposed to help me when I get older." K.P. testified that later Powers would put her hand on his penis and move her hand up and down. K.P. stated that later still Powers started making her put her mouth on his penis. She never alleged Powers attempted to engage in sexual intercourse.

At trial, Powers acknowledged he did "blow raspberries" on K.P. when she was six or seven and that he never did so with K.P.'s brothers. He testified he had erectile dysfunction, but acknowledged he was still interested in engaging in sexual activity and that his medical condition only prevented him from being able to have sexual intercourse. He testified he did not "have any recollection" of sleeping in the same bed as K.P. K.P.'s brother, D.P., testified that K.P. slept in grandpa's bed, "but I didn't see anything happen."

"Assessment of a witness's credibility is uniquely within a lay jury's common understanding." *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). To reach their verdict, it is the function of the jury to sort out the evidence presented and place credibility where it belongs. *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984); *see also State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006) ("It is not the province of the court . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury."). "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in

its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). But again, such matters are for the jury and we do not pass upon the credibility of the witnesses in determining if the ruling on the motion for judgment for acquittal should be upheld. *Hutchison*, 721 N.W.2d at 780.

Although no evidence directly corroborates K.P.'s accounts, a sex abuse victim's accusations do not require corroboration to uphold a verdict. *See* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."); *State v. Hildreth*, 582 N.W .2d 167, 170 (Iowa 1998); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). Viewing the evidence in the light most favorable to the State, we find substantial evidence to sustain the convictions.

We also decline to conclude directed verdicts were required on the charges to protect Power's constitutional rights, even if properly preserved for our review. K.P.'s testimony was not so inconsistent or contradictory by itself to constitute a nullity or mere guess. *Cf. State v. Smith*, 508 N.W.2d 101,102-06 (Iowa Ct. App. 1993) (finding testimony of defendant's stepdaughters were so self-contradictory so as to border on absurd or surreal resulting in no probative force to sustain a guilty verdict); *State ex rel. Mochnick v. Andrioli*, 249 N.W.2d 379, 380 (Iowa 1933) (noting that only where a witness "so contradicts himself as to render finding of facts thereon a mere guess" may the court invade the jury's province of reconciling conflicting testimony). Here, the validity of K.P.'s testimony was a matter of dispute primarily by the testimony of other witnesses rather than being self-contradictory.

B. Motion for new trial. The defendant presents a claim that the trial court abused its discretion in denying the motion for new trial because the verdict is contrary to the weight of the evidence, and in light of alleged prosecutorial misconduct. Acknowledging that this second claim was not made below, Powers contends trial counsel was ineffective in failing to base the motion for new trial on this ground, rather than the ground of newly discovered evidence.

The district court has broad discretion in ruling on a motion for a new trial. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). On appeal, we review the court's decision for an abuse of discretion. *Id.* "In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997) (internal quotation marks and citation omitted). Our review is limited to "a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *Reeves*, 670 N.W.2d at 203. In reviewing the trial court's decision, we apply the following standard:

> The discretion of the trial court should be exercised in all cases in the interest of justice, and, where it appears to the judge that the verdict is against the weight of the evidence, it is [the court's] imperative duty to set it aside. "We do not mean . . . that [the court] is to substitute [its] own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and, when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, [the court] has no right to disturb the findings of the jury, although [its] own judgment might incline [the court] the other way. In other words, the finding of the jury is to be upheld by [the court] as against any mere doubts of its correctness. But when [the court's] judgment tells [the court] that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury . . . erred, and found

> against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.

Id. (citations omitted).

In ruling on the motion for new trial, the district court observed K.P. "was cross-examined vigorously by Mr. Engels, a defense was made, and the jury looked at the evidence and believed the young lady's testimony beyond a reasonable doubt." The court also noted that similarly, "Powers also testified and the jury may well not have believed him." The court concluded the weight of evidence was not contrary to the verdict "in that in my mind that should change this verdict or a new trial should be granted." We find the trial court did not abuse its discretion.

C. Ineffective assistance of counsel. Powers argues trial counsel was ineffective (1) in failing to ground the motion for new trial on prosecutorial misconduct—the asserted misconduct being the prosecutor's statements in closing argument that "K.P. and her mother could have 'pulled the plug' on going through the trial at any time"; and (2) in failing to object to or move for a mistrial due to Officer Tyler's testimony, which Powers contends improperly vouched for K.P.'s credibility.

We review ineffective-assistance-of-counsel claims de novo. *See Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty, and (2) prejudice resulted from the failure. *Strickland v.*

Washington, 466 U.S. 668, 687 (1984); *State v. Fountain*, 786 N.W.2d 260, 265–66 (Iowa 2010). The claim fails if either element is lacking. *Strickland*, 466 U.S. at 700; *Fountain*, 786 N.W.2d at 266. The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011).

To establish prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *accord Bowman v. State*, 710 N.W .2d 200, 203 (Iowa 2006). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 694; *accord State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008).

Generally, ineffective-assistance-of-counsel claims are preserved for postconviction relief actions to provide the defendant an evidentiary hearing in order to fully develop the record. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). An evidentiary hearing also allows counsel an opportunity to explain the conduct. *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987). However, we may address the claim on direct appeal if the record is adequate. *Fountain*, 786 N.W.2d at 263. If the record on appeal shows the defendant cannot prevail on his claim as a matter of law, we will affirm the conviction without preserving the claim. *Graves*, 668 N.W.2d at 869. If the record establishes both elements as a matter of law, we will reverse the conviction and remand for a new trial. *Id.* We find the record sufficient in this case to address Power's claims.

In *Graves*, our supreme court held it was improper for a prosecutor to ask a defendant at trial whether other witnesses were lying in their testimony at trial. 668 N.W.2d at 873. The court explained:

> [Q]uestions that ask a defendant to comment on another witness's veracity invade the province of the jury. . . . [A]s a general rule, such questions have no probative value and are improper and argumentative because they do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence.

Id. at 871 (citation, internal quotation marks, and additional brackets omitted). The court "laid down a bright-line rule against such questions." *Nguyen v. State*, 707 N.W.2d 317, 323-24 (Iowa 2005) (finding prosecutor violated the rule in asking the defendant if the State's eyewitnesses were "lying or mistaken").

But, a prosecutor, or any attorney, can generally inquire into the credibility of a witness on cross-examination and refer to that credibility in closing argument. *Id*. at 325.

> Thus, the misconduct, and resulting prejudice, does not occur by raising the issue of credibility of a witness, but by the manner in which it is done. The factfinder must resolve conflicts in the testimony of witnesses if possible, and improper prosecutorial tactics can affect the resolution of this issue, especially when the tactics are severe and pervasive. Yet, just as the line between proper and improper questioning in this area depends on the facts, so does the line between prejudicial and nonprejudicial misconduct. The bright-line rule of *Graves* is not a bright-line rule for prejudice. Accordingly, we turn to consider whether the effect of the misconduct in this case was pervasive enough to undermine confidence in the verdict.

Id. at 325-26 (citations omitted).

"It is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Graves*, 668 N.W.2d at 869. Several

factors are considered when determining whether prejudice resulted from the misconduct. The factors include: "(1) the severity and pervasiveness of the misconduct, (2) the significance of the misconduct to the central issues in the case, (3) the strength of the State's evidence, (4) the use of cautionary instructions or other curative measures, and (5) the extent to which the defense invited the misconduct." *Id.* (internal citations omitted).

1) Closing arguments. Powers contends trial counsel was ineffective in failing to move for a new trial based upon prosecutorial misconduct. He contends Michele's affidavit, and the prosecutor's refusal to deny the truth of the affidavit, show the prosecutor's statements in closing argument were false. Michele's affidavit reads in pertinent part:

> At the beginning of this case, [K.P.] and I met with the prosecutor, Linda Fangman. Ms. Fangman indicated that [K.P.] did not have to go through with her claim. However, Ms. Fangman also indicated that once the case began, it would proceed and would not be dismissed.
>
> I do not recall mentioning this issue again. I do not recall Ms. Fangman asking [K.P.] or myself at a later time if we wanted to go forward.
>
> I understand there was testimony at the trial and comments made in the closing statements by Ms. Fangman suggesting [K.P.] could have stopped the prosecution of the case at any time. That was not what we were told. Although we were told [K.P.] did not have to go forward at the beginning of the case, we were led to believe that once the case began, dismissing it was not an option.

The district court found the affidavit was contrary to Michele's testimony at trial, and in any event, there was no claim that anyone wished to stop the case from going forward.

We do not find determinative the fact that during the hearing on the motion for new trial, the prosecutor would not respond to the allegation of making a false statement. Certainly the prosecutor could have responded by way of a professional statement. But whether the statement was factually false is not significant as the comment that the victim and her mother, "[a]t any time could have pulled the plug," is a misstatement of the law. The suggestion made by the comment was that at any time the victim and her mother "could stop this case." However, once the trial information was filed neither the victim, the victim's mother, nor the prosecutor could terminate the case or dismiss the charge. The authority to dismiss was a function of the court's authority. *See* Iowa Rs. Crim. P. 2.5(4), 2.11(6), and 2.33(1).

Later in the prosecutor's closing argument, the prosecutor summarizes one aspect of defense counsel's opening statement as "once she told the story it got going and she got on this train and it couldn't be stopped." In response, the prosecutor stated:

> [The victim] could have stopped it. Michele could have stopped it. So the defense's opening that this train got started and couldn't be stopped wasn't accurate. They both told you that. Certainly would be easier on both of them to stop. Be easier on their family to stop. But they didn't.

Again these comments are best described as misstatements of the law. "The prosecutor may not misstate the law." *State v. Shanahan*, 712 N.W.2d 121, 139 (Iowa 2006) (citing *Graves*, 668 N.W.2d at 880.

However, we do not view the misconduct as severe, one of the five factors to consider in determining if the misconduct is prejudicial. *Graves*, 668 N.W.2d

at 869. A prosecutor is not an advocate in the normal meaning of the word. *Id.* at 870. A prosecutor's primary objective should be to see that justice is done, not to obtain a conviction. *Id.* Yet, the prosecutor is entitled to some latitude during closing argument, and "may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented." *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006). We consider the prosecutor's comments as simply an un-artful way to say that the victim was steadfast in her version of the facts and unwilling to bend to family pressure to forego her testimony. The prosecution is entitled to try and boost the credibility of the State's witnesses so long as the prosecutor does not personally vouch for the witnesses credibility. *Carey*, 709 N.W.2d at 556.

Another factor to consider in determining if prosecutorial misconduct is prejudicial is the extent to which the defense invited the misconduct. *Graves*, 668 N.W.2d at 869. Here, all of the prosecutor's comments are directly responsive to comments made by defense counsel during opening statements and were conclusions drawn from the record. We view these comments as invited and fair comments in light of defense counsel's statements and the testimony. We decline to find that Powers was prejudiced, and thereby deprived of a fair trial as a result of these comments. Moreover, the jury was instructed that arguments of counsel are not evidence and that the jury was to decide the case from the evidence. Consequently, Powers has failed to prove trial counsel breached a duty in failing to contend prosecutorial misconduct as a ground for a

new trial. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (noting counsel has no duty to raise issues that have no merit).

2) Officer Tyler's testimony. Powers contends trial counsel was ineffective in failing to object to "the prosecutor's third attempt to elicit the detective's plainly improper opinion that vouched for K.P.'s credibility." During the testimony of investigating police officer, Jeff Tyler, the following exchange occurred:

> Q. Now during the course of your investigation, do you gather reports from anybody that's been involved in this case? A. Yes.
>
> Q. Do you gather the reports from DHS? A. Yes.
>
> Q. Do you take statements from people who have talked to [K.P.]? A. Yes.
>
> Q. And was the information that [K.P.] gave during that interview at CPC consistent with all of the information that you were gathering? A. Yes.
>
> [Defense counsel] MR. ENGLES: Excuse me. I'm going to object at this point in time. For this witness to characterize that in that fashion is inappropriate. I think it's hearsay. I think it calls for him to essentially do a broad umbrella version of all of the testimony that's come in and I think that's an inappropriate method of characterizing.
>
> THE COURT: Sustained and the answer will be stricken.
>
> Q. I'm not asking you about testimony that's given. I'm asking you about your investigation, everything that you gathered, was it consistent?
>
> MR. ENGLES: Same objection. Same reason, Your Honor.
>
> [Prosecutor] MS. FANGMAN: Judge, it's not hearsay. There's no statements. And he's allowed to give an opinion as to his investigation.
>
> MR. ENGLES: Your Honor, I guess just to add to my objection, I would say I think it unfairly attempts to vouch for the credibility of the witness.
>
> THE COURT: Sustained.
>
> Q. Watching it did you have any concerns? A. No.
>
> Q. Watching that interview did it cause you to go out and question different people? A. *Not as to*, *you know*, *her not telling the truth*, *no*. I did question other people, but it was part of the interview that she had brought up different names, so no.

(Emphasis added.)

We first note that Officer Tyler's statement was not responsive to the question asked by the prosecutor. So, we reject Powers' characterization that the answer was a response to "the prosecutor's third attempt to elicit the detective's plainly improper opinion that vouched for K.P.'s credibility."

In any event, relying upon *State v. Myers*, 382 N.W.2d 91, 97-98 (Iowa 1986), Powers contends Officer Tyler's testimony constituted an improper vouching for K.P.'s credibility, and trial counsel was ineffective in failing to object to the statement and move for a mistrial.

Even if we presume counsel should have objected to the testimony, in order to prevail on his claim that he received ineffective assistance of trial counsel, Powers must establish he was prejudiced. *See Nguyen*, 707 N.W.2d at 324. He must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See id*. (citation omitted). "To determine if the prejudice standard has been met, we look to the totality of the evidence, the factual findings that would have been affected by counsel's errors, and whether the effect was pervasive, minimal, or isolated." *Id*. (citing *Strickland*, 466 U.S. at 695-96). Powers has not met this burden.

K.P.'s credibility was challenged repeatedly. Her reputation as to truthfulness was found to be lacking by her mother and father. K.P. acknowledged she had at times lied to her parents about certain matters. But the jury heard her testimony that Powers touched her genitals and had her touch his

genitals with her hands and mouth. The jury heard K.P.'s testimony as to her statements to her school counselor and to the CPC interviewer and was able to consider whether those statements were consistent and believable. *See* Iowa Unif. Jury Instruction 100.7 (noting factors to consider "in deciding what testimony to believe" including whether "the testimony is reasonable and consistent with other evidence you believe"; whether a witness "has made inconsistent statements"; the witness's "appearance, conduct, age, intelligence, memory and knowledge of the facts"; and the "witness's interest in the trial, their motive, candor, bias and prejudice").

The defense contended K.P. had a motive to lie—that is, that she was angry with her grandfather for his comments about her talking to boys. But, K.P. suffered no consequences from talking with the boys. And the jury could have found K.P.'s explanation that she found her grandfather's comments objectionable in light of his inappropriate conduct with her (i.e., hypocritical) more credible. There is no evidence of any other motive for K.P. to lie.

Our supreme court has stated that "[t]he most important factor under the test for prejudice is the strength of the state's case." *Carey*, 709 N.W.2d at 559. Here, the State's case was not weak, but the truthfulness of K.P.'s testimony was vigorously disputed. Notwithstanding, we are not convinced the one comment by the officer and the prosecutorial comments invited by defense counsel were sufficient to require a new trial. The prosecutorial comments all related to K.P.'s willingness to remain steadfast in her testimony despite the testimony of her family members, a fact that the jury could have easily

recognized themselves. We conclude the defendant has failed to establish prejudice and we therefore reject the ineffective-assistance-of-counsel claim.

III. Conclusion.

Because substantial evidence supports the convictions and the verdicts were not against the weight of the evidence, the court did not abuse its discretion in denying the motion for new trial. The defendant has also failed to establish he was denied the effective assistance of trial counsel. We therefore affirm.

AFFIRMED.