STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1898

State of Minnesota,
Respondent,

vs.

Shawn Michael Peterson,
Appellant.

Filed September 10, 2018
Affirmed
Klaphake, Judge[*]

Chisago County District Court
File No. 13-CR-17-293

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

Janet Reiter, Chisago County Attorney, Beth A. Beaman, Assistant County Attorney, Center City, Minnesota (for respondent)

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

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

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KLAPHAKE, Judge

Appellant Shawn Michael Peterson challenges his conviction for first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2016), arguing that the district court abused its discretion by excluding alternative perpetrator/alternative source-of-knowledge evidence, and that the prosecutor committed prejudicial misconduct during closing argument. Because any abuse of discretion in the exclusion of the evidence was harmless and because the prosecutor did not commit prejudicial misconduct, we affirm.

D E C I S I O N

Exclusion of Evidence

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In a pretrial ruling, the district court excluded Peterson's proffered evidence that D.D.'s husband had sexually assaulted K.O., the mother of the child victim S.O., when K.O. was a child. It also excluded Peterson's proffered evidence that K.O.'s previous boyfriend had been in the apartment before K.O. became romantically involved with Peterson, and the previous boyfriend had "inappropriate" contact with S.O.

Courts may admit evidence of "a victim's past sexual conduct[,] in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*,

397 N.W.2d 337, 341 (Minn. 1986). Accordingly, "[d]espite the prohibition of a rape-shield law or rule, a trial court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." *Id.* Before admitting such evidence, the district court must still "balance the probative value of the evidence against its potential for causing unfair prejudice" and may exclude the evidence based on that determination. *Id.*

The rationale for the district court's exclusion of the evidence is unclear from the district court record. The district court may have determined the proffered evidence was inadmissible under the rape-shield law, Minn. Stat. § 609.347, subd. 3 (2016), which would constitute an abuse of discretion because the exclusion of the evidence would have violated Peterson's constitutional right to present a defense. *Id.* at 341. The existing record also does not establish whether the district court balanced the probative and prejudicial nature of the evidence, as required to properly determine its admissibility. Further, the record suggests that the district court may have erred by addressing only Peterson's alternative-perpetrator argument and failing to address his alternative-source-of-knowledge argument. *See State v. DeLaCruz*, 884 N.W.2d 878, 888 (Minn. App. 2016). Finally, the district court may have misapplied the requirements for admitting reverse-*Spreigl* evidence,[1] which are different from those applicable to alternative-source-of-knowledge evidence. *See Jones*,

[1] Reverse-*Spreigl* evidence is evidence of an alternative perpetrator committing prior bad acts, which tends to show that the alternative perpetrator committed the crime in question. *See State v. Jones*, 753 N.W.2d 677, 696 (Minn. 2008).

753 N.W.2d at 696 (stating that reverse-*Spreigl* evidence is admissible only if the defendant has shown, among other requirements, "clear and convincing evidence" that the alternative perpetrator "participated in the incident").

We determine, however, that any abuse of discretion by the district court in excluding the evidence was harmless. This abuse of discretion is harmless if the reviewing court is satisfied "beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). We are satisfied that such is the case here. S.O. made a spontaneous report of the abuse, the jury received evidence of her repeated and consistent statements to two police officers on two occasions, and S.O. testified at trial. This case is similar to *State v. Kroshus*, in which this court determined that the erroneous exclusion of the victim's alternative-source-of-knowledge evidence was harmless. 447 N.W.2d 203, 205 (Minn. App. 1989), *review denied* (Minn. Dec. 20, 1989). We are confident beyond a reasonable doubt that a reasonable jury would have reached the same conclusion even if Peterson's proffered evidence had been admitted.

Prosecutorial Misconduct

A prosecutor engages in misconduct if her acts "materially undermin[e] the fairness of a trial." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). This may occur when the prosecutor "violates clear or established standards of conduct." *State v. McCray*, 753 N.W.2d 746, 751 (Minn. 2008) (quotation omitted). When evaluating a prosecutor's closing remarks, this court examines "the closing argument as a whole, rather than selected

phrases and remarks." *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009) (quotation omitted). Misstating the presumption of innocence or the burden of proof is misconduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006).

Because Peterson did not object to two alleged instances of prosecutorial misconduct, we review this issue under the modified plain-error test. *Id.* Under this test, the appellant must show both that there was (1) error and (2) that the error was plain. *Id.* Plain error is one that was clear or obvious, which may be the case if the error "contravenes case law, a rule, or a standard of conduct." *Id.* Then, once the appellant has proved the first and second parts of the test, the burden shifts to the state to (3) "demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights." *Id.* 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.* (quotations omitted). "If all three [parts] of the test are met, [this court] may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

At closing, the prosecutor said, "If you believe [S.O.'s testimony] then the [s]tate has proven its case, beyond a reasonable doubt." Peterson argues that the prosecutor "misstated the state's burden of proof." While Peterson concedes that the testimony of a single sexual-assault complainant can be sufficient to convict a defendant, *see* Minn. Stat. § 609.347, subd. 1 (2016), he relies on *State v. Huss* for the proposition that this is not always the case. 506 N.W.2d 290, 292-93 (Minn. 1993). In *Huss*, the supreme court held that the sole inculpatory testimony of a three-year-old victim was insufficient to convict a

defendant of criminal sexual conduct. *Id*. Since *Huss*, the supreme court has clarified that a conviction may be sustained upon uncorroborated testimony unless there are "additional reasons to question the victim's credibility." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). Unlike the child victim in *Huss*, S.O.'s testimony was not obviously unreliable; she gave consistent and detailed testimony. The evidence presented at Peterson's trial did not implicate *Huss*, and the prosecutor did not commit misconduct by arguing to the jury that S.O.'s testimony was sufficient to find Peterson guilty.

We also reject Peterson's assertion that the prosecutor's statement amounted to an impermissible "were they lying" question. *See State v. Caine*, 746 N.W.2d 339, 360 (Minn. 2008). Such questions "are permissible when the defendant holds the issue of the credibility of the state's witnesses in central focus." *State v. Morton*, 701 N.W.2d 225, 233 (Minn. 2005) (quotation and alteration omitted), and this court has approved their use when "the defense expressly or by unmistakable insinuation accuses a witness of a falsehood." *State v. Leutschaft*, 759 N.W.2d 414, 423 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). Here, the defense elicited testimony during trial that S.O. was not truthful.

In the second alleged instance of prosecutorial misconduct, the prosecutor stated that Peterson had "lost that presumption of innocence and you should find him guilty." Peterson argues that this statement had the effect of misstating the proper burden of proof. Again, we disagree. When the state "produce[s] sufficient evidence of [the defendant's] guilt to overcome the presumption of innocence," the prosecutor may make such a statement without altering the state's burden to prove guilt beyond a reasonable doubt. *State v. Young*, 710 N.W.2d 272, 280-81 (Minn. 2006). Further, any error in making such

a statement is "not plain or obvious." *State v. Vue*, 797 N.W.2d 5, 14 (Minn. 2011). Here, the prosecutor's comments were similar to those made by the prosecutors in *Young* and *Vue*, and, accordingly, the prosecutor did not commit misconduct amounting to plain error. Finally, even if the prosecutor did plainly err, the error did not affect Peterson's substantial rights because the evidence against him was strong, any prosecutorial misconduct was not pervasive, and defense counsel was generally able to rebut the misconduct. *See Peltier*, 874 N.W.2d at 806.

Affirmed.