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STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0071

State of Minnesota,
Respondent,

vs.

Eugene Foster Cole,
Appellant.

Filed December 28, 2020
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Clearwater County District Court
File No. 15-CR-18-413

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Al Rogalla, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

LARKIN, Judge

In this appeal from convictions of first- and third-degree criminal sexual conduct, appellant contends that the district court plainly erred by allowing hearsay testimony at his trial, abused its discretion by denying his motion for a downward sentencing departure, and erred as a matter of law by entering judgments of conviction for both first- and third-degree criminal sexual conduct. We affirm in part, reverse in part, and remand.

FACTS

In September 2019, the state charged appellant Eugene Foster Cole with two counts of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct, alleging that he sexually abused his children's babysitter, B.D., from 2012 to 2014, when she was between the ages of 14 and 16.

At trial, the jury heard testimony from several witnesses, including B.D., her godmother, and Cole. B.D. testified that she babysat for Cole's family in 2012, when she was 14 years old. She testified that Cole engaged in ongoing sexual activity with her after she reached out to him on Facebook. The sexual activity included vaginal, anal, and oral penetration. B.D. could not recall specific dates when the sexual abuse occurred, except she was certain that one instance occurred on her 15th birthday. B.D. testified that she initially lied to her godmother about the sexual abuse but later admitted that it had occurred.

B.D.'s godmother testified regarding statements that B.D. had made regarding the sexual abuse. Specifically, she testified that she asked B.D. about her relationship with Cole after hearing a rumor, but B.D. denied any sexual abuse. B.D. later told her

godmother that she had lied and that "it was true that they were sleeping together." B.D. also told her godmother that she was hesitant to have anal sex with Cole, but he insisted.

Cole testified that the sexual abuse never occurred.

The jury found Cole guilty of one count of first-degree criminal sexual conduct and the single count of third-degree criminal sexual conduct. Cole moved for dispositional and durational sentencing departures. The district court entered a judgment of conviction on each of the guilty verdicts. The court did not expressly rule on Cole's departure motion, but it sentenced Cole to a presumptive guidelines sentence of 144 months' imprisonment on the first-degree conviction. The court did not sentence on the third-degree conviction. This appeal followed.

DECISION

I.

Cole contends that the district court plainly erred by permitting B.D.'s godmother to testify about B.D.'s out-of-court statements regarding the sexual abuse. Cole asserts that the godmother's testimony was inadmissible hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. There are numerous exceptions. *See, e.g.*, Minn. R. Evid. 803.

Cole did not object to the alleged hearsay. We therefore review for plain error. *State v. Smith*, 932 N.W.2d 257, 271 (Minn. 2019). To succeed on a claim of plain error, an appellant must establish error, that is plain, and that affects his substantial rights. *Id.*

An error is plain if it is clear or obvious. *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007). Relief will not be granted unless the error "seriously affects the fairness and integrity of the judicial proceedings." *State v. Little*, 851 N.W.2d 878, 884 (Minn. 2014).

Turning to the hearsay challenge, the supreme court has stated:

> The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the trial court's decision-making process in either admitting or excluding a given statement. The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

State v. Manthey, 711 N.W.2d 498, 504 (Minn. 2006). Accordingly, the supreme court has expressed reluctance to conclude that the admission of hearsay evidence is plain error. *See id.* at 504-05 (concluding it was "not clear" that challenged statements were inadmissible hearsay).

Under Minn. R. Evid. 801(d)(1)(B), a prior consistent out-of-court statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility. *State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997). The declarant's trial testimony and prior out-of-court statement need not be identical. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 23, 2000). But the declarant's credibility must be challenged, and the prior statement must bolster the declarant's credibility. *Nunn*, 561 N.W.2d at 909.

B.D. was the state's first witness at trial, and she was subject to cross-examination. After B.D.'s prior out-of-court statements were elicited from her godmother, Cole's trial

counsel did not attempt to recall B.D. for cross-examination regarding those statements. But there is no indication that B.D. was unavailable for further cross-examination.

B.D.'s out-of-court statements to her godmother were consistent with her trial testimony in two respects. First, B.D. testified that she initially lied to her godmother about the sexual abuse but later admitted that it had occurred. Second, B.D. testified that Cole had penetrated her anally.

B.D.'s out-of-court statements were also helpful to the jury in evaluating her credibility. Cole challenged B.D.'s credibility during cross-examination, pointing out alleged inconsistencies in her statements regarding the abuse. B.D.'s out-of-court statements to her godmother bolstered B.D.'s credibility by demonstrating a consistent report regarding the sexual abuse. *See Bakken*, 604 N.W.2d at 109 (stating that a prior consistent statement might bolster credibility by providing meaningful context or demonstrating accuracy of memory); *State v. Sullivan*, 360 N.W.2d 418, 421 (Minn. App. 1985), *review denied* (Minn. Apr. 12, 1985) (upholding conviction, in part, because of consistency in child-victim's recollections of sexual abuse).

On this record, it is not clear or obvious that B.D.'s out-of-court statements to her godmother were not admissible under Minn. R. Evid. 801(d)(1)(B).

Cole argues that the district court failed to make necessary threshold determinations before admitting B.D.'s out-of-court statements. Generally, before admitting a prior consistent statement under rule 801(d)(1)(B), a district court must make a threshold determination that the witness's credibility has been challenged, the prior consistent statement would be helpful to the trier of fact in determining the witness's credibility, and

the prior statement and trial testimony are consistent. *Bakken*, 604 N.W.2d at 109. But because Cole did not object, the district court was not prompted to make those determinations. *See id.* at 108-10 (analyzing district court's admission of prior consistent statements following defense objection). Thus, the issue here is not whether the district court properly analyzed the admissibility of the challenged statements under rule 801(d)(1)(B). Instead, the issue is whether the challenged statements were "clearly or obviously inadmissible hearsay" such that the district court plainly erred by failing to exclude them sua sponte. *Manthey*, 711 N.W.2d at 504. Because B.D.'s out-of-court statements were not clearly or obviously inadmissible, the district court did not plainly err, and Cole is not entitled to relief.

II.

Cole contends that the district court abused its discretion by denying his sentencing-departure motion because the court "failed to consider on the record the reasons for and against departing" and because he was particularly amenable to probation.

The Minnesota Sentencing Guidelines establish presumptive sentences for criminal offenses. Minn. Stat. § 244.09, subd. 5 (2018). The sentencing guidelines seek to "maintain uniformity, proportionality, rationality, and predictability in sentencing" of crimes. *Id.* "Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court may depart from the presumptive sentence only when there exist "identifiable, substantial, and compelling circumstances to support" a departure. Minn. Sent. Guidelines 2.D.1 (2012).

Dispositional departures generally focus on the characteristics of the offender. *Solberg*, 882 N.W.2d at 623. "A defendant's particular amenability to probation justifies a district court's decision to stay the execution of a presumptively executed sentence." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). A "defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Durational departures generally focus on the characteristics of the offense. *Solberg*, 882 N.W.2d at 623. The general issue that faces a sentencing court in deciding whether to grant a durational departure is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question. *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

We review a district court's decision whether to depart from the presumptive guidelines sentence for an abuse of discretion. *Solberg*, 882 N.W.2d at 623; *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). A district court exercises its discretion by "deliberately considering circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). "[A]s long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination," we will not interfere with its decision to impose a presumptive sentence. *Pegel*, 795 N.W.2d at 255 (quotation omitted). A district court is

not required to provide an explanation when it considers reasons for departure but imposes a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

At the sentencing hearing, the district court asked the parties if they disputed any of the information in a presentence-investigation report (PSI) that had been prepared for this case. The parties stated that they did not. The PSI indicated that Cole had a criminal-history score of zero and recommended a 144-month sentence for the first-degree offense, a sentence within the presumptive sentencing range. Minn. Sent. Guidelines 4.B (2012).

Cole did not submit a memorandum in support of his departure request. Instead, he relied on documents, testimony, and oral argument. Cole's attorney presented an extensive argument for departure. She addressed the factors set forth in *Trog*, noting that Cole was "young," had "strong community support," had been respectful in court, and had complied with his pretrial-release conditions. Cole's attorney also presented an argument for a durational departure, asserting that Cole's offenses were "significantly less onerous" because they occurred in the context of a "consensual relationship," free from violence, threats, grooming, coercion, and force. The state responded that there were "no mitigating factors that would justify either durational or dispositional" departure. The state asserted that Cole was not amenable to probation, arguing that Cole maintained his innocence and showed no remorse for his crimes.

The district court did not explicitly rule on Cole's departure motion. Nor did it explain its implicit denial of that motion. The court simply said that it would "impose the guideline sentence." Nonetheless, we are satisfied that the district court adequately evaluated the relevant information before declining to depart from the presumptive

sentence. The record indicates that the district court heard oral arguments for and against departure, considered the PSI, and requested input from the victim and Cole before making its sentencing decision. Again, the district court is not required to explain its decision to impose a presumptive sentence. *Van Ruler*, 378 N.W.2d at 80. We therefore do not view the district court's failure to explain its reasoning as an indication that it failed to carefully evaluate the relevant sentencing information.

As to Cole's argument that he was particularly amenable to probation, our review is not de novo. Moreover, the district court was not required to depart even if there had been substantial and compelling reasons to do so. *See State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009) ("[T]he district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation, but it is not required to do so.").

In sum, we will reverse a district court's refusal to depart from the presumptive sentence only in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This is not such a case.

III.

Cole contends that the district court erred by entering judgments of conviction for both the first- and third-degree criminal-sexual-conduct offenses. The state agrees with Cole. Nonetheless, we analyze the issue because "it is the responsibility of appellate courts to decide cases in accordance with law." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). Whether the district court erred in adjudicating multiple convictions is a

question of law that we review de novo. *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Following a criminal act, a defendant may be convicted of either the crime charged, or an included offense, but not both. Minn. Stat. § 609.04, subd. 1 (2012); *see State v. Wipper*, 512 N.W.2d 92, 94 (Minn. 1994) (explaining that the defendant could not be convicted of both first- and second-degree murder for the same conduct). An included offense may be "[a] lesser degree of the same crime," or "[a] crime necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(1), (4). In determining whether an offense is necessarily proved, a court compares the statutory elements of the relevant offenses. *State v. Coleman*, 373 N.W.2d 777, 780-81 (Minn. 1985). "If . . . a person can[not] commit the greater offense, as legally defined, without committing the lesser offense, as legally defined, the lesser offense is . . . necessarily included within the greater offense." *Id.* at 781 (quotation omitted); *see State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986) ("A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former.").

For two reasons, in this case, the third-degree criminal sexual conduct offense is a lesser-included offense of first-degree criminal sexual conduct. First, it is a lesser degree of the same offense. *See State v. Hart*, 477 N.W.2d 732, 737 (Minn. App. 1991) ("[T]hird degree criminal sexual conduct is an included offense of first degree criminal sexual conduct."), *review denied* (Minn. Jan. 16, 1992). Second, the third-degree offense was

necessarily proved when the first-degree offense was proved.[1] Thus, judgments of conviction for both first- and third-degree criminal sexual conduct are not permitted in this case.

We therefore reverse Cole's third-degree criminal-sexual-conduct conviction and remand for the district court to vacate that conviction while leaving the jury's finding of guilt intact. *See State v. Hallmark*, 927 N.W.2d 281, 300 (Minn. 2019) (setting forth procedure to be followed if a district court erroneously enters judgment of conviction on an offense and a lesser-included offense).

Affirmed in part, reversed in part, and remanded.

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[1] As is relevant here, a perpetrator commits first-degree criminal sexual conduct if he engages in sexual penetration with a victim who is at least 13 years old but less than 16, and the perpetrator "is more than 48 months older . . . and in a position of authority" over the victim. Minn. Stat. § 609.342, subd. 1(b) (2012). A perpetrator commits third-degree criminal sexual conduct if he engages in sexual penetration with a victim who is at least 13 years old but less than 16, and the perpetrator is more than 24 months older than the victim. Minn. Stat. § 609.344, subd. 1(b) (2012).