STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2050

State of Minnesota,
Respondent,

vs.

Alan Lee Keeler,
Appellant.

Filed September 19, 2011
Affirmed
Wright, Judge

Goodhue County District Court
File No. 25-CR-09-2364

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

Stephen Betcher, Goodhue County Attorney, Erin L. Kuester, Assistant Goodhue County Attorney, Red Wing, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Wright, Judge; and Schellhas, Judge.

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

WRIGHT, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct using force or coercion, arguing that the district court erred by not considering his voluntary-

intoxication defense and by admitting in evidence expert testimony on whether the victim was sexually assaulted. Appellant also challenges the district court's imposition of the presumptive sentence of 48 months' imprisonment, contending that there are substantial and compelling reasons for a downward dispositional departure. We affirm.

FACTS

At approximately 4:00 a.m. on June 28, 2009, N.L.H. was awakened by the sound of someone calling her name through her bedroom window. N.L.H. recognized the voice as that of appellant Alan Lee Keeler, the brother of N.L.H.'s fiancé. N.L.H. believed that Keeler had been drinking and invited him inside her apartment because she thought it was unsafe for him to remain outside. Keeler immediately acted "touchy-feely" and attempted to kiss N.L.H. and touch her buttocks. N.L.H. backed away from Keeler, moved her head to avoid his advances, attempted to block his touches, and told him to "stop." N.L.H. directed Keeler to sleep on her living-room couch.

Keeler followed N.L.H. into her living room, removed his clothing, touched his penis, and said "[d]on't you want this?" N.L.H. said, "No. . . . I'm marrying your brother," and "[w]e can't do this." N.L.H. did not yell or fight Keeler because she did not want her five-year-old daughter, who slept in the next room, to awaken or to see Keeler standing naked in the living room. Keeler continued his attempts to kiss N.L.H. and to convince her to have sex with him. N.L.H. pulled away and said "no." Keeler next removed N.L.H.'s pants and underwear, and N.L.H.'s efforts to block Keeler by holding her legs together failed. After several thwarted attempts, Keeler penetrated N.L.H.'s vagina with his penis. Minutes later Keeler asked, "Am I raping you?" N.L.H. replied,

"Well, I told you no." Keeler went into the bathroom, and N.L.H. directed a neighbor via text message to "get" one of N.L.H.'s male friends. She did this because she "didn't know if [Keeler] was going to leave or if he was going to try something again." Keeler emerged from the bathroom approximately 30 seconds later, put his clothing on, and left the apartment.

N.L.H. contacted her fiancé via text message. When he telephoned N.L.H. at approximately 5:45 or 6:00 a.m., N.L.H. advised him that his brother had come to her home intoxicated, removed his clothing, masturbated in front of her, and left. N.L.H. did not tell her fiancé about the sexual assault because she worried that he would not believe her. At approximately 2:00 p.m. that day, after seeking advice from a friend, N.L.H. advised her fiancé that his brother had "forced himself" on her that morning. N.L.H. and her fiancé each separately called the Red Wing Police Department to report the sexual assault. N.L.H. provided a videotaped statement to the police and went to Fairview Red Wing Medical Center, where she was examined by Dr. Michael Giorgi.

Keeler was charged with third-degree criminal sexual conduct using force or coercion, a violation of Minn. Stat. § 609.344, subd. 1(c) (2008). At the bench trial that followed, the state presented evidence of semen collected from N.L.H.'s vagina that the Bureau of Criminal Apprehension analyzed and determined came from a single source that matched Keeler's DNA profile. Dr. Giorgi testified that he found no signs of trauma to N.L.H.'s body during her sexual-assault examination, but she was "fairly distraught" and her condition was "generally consistent with sexual assault." N.L.H. testified regarding the details of the June 28, 2009 incident. She also testified that she and Keeler

engaged in one incident of consensual sexual contact in November 2008, but she subsequently resumed her relationship with her fiancé and advised Keeler in March 2009 that the November incident was a mistake that would not happen again. Keeler testified that he has no memory of encountering N.L.H. on June 28, 2009. He testified that he became intoxicated at a bar with friends, fell down a hill as he walked home, and his next memory is waking up the following morning in bed next to his roommate. Over Keeler's objection, the district court held that Keeler could not assert a voluntary-intoxication defense because third-degree criminal sexual conduct is not a specific-intent offense.

The district court found Keeler guilty of third-degree criminal sexual conduct using force or coercion. The district court denied Keeler's motion for a downward dispositional departure and imposed the presumptive guidelines sentence of 48 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Keeler argues that the district court erred by declining to consider his voluntary-intoxication defense. Minnesota law provides that

> [a]n act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such intent or state of mind.

Minn. Stat. § 609.075 (2008). When determining whether the voluntary-intoxication defense applies, the district court must analyze whether the charged offense has a specific

intent or purpose as an essential element. *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981). "Specific intent means that the defendant acted with the intent to produce a specific result, whereas general intent means only that the defendant intentionally engaged in prohibited conduct." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007). Determining whether an offense requires specific intent or general intent presents a question of statutory interpretation, which we review de novo. *State v. Bjergum*, 771 N.W.2d 53, 55 (Minn. App. 2009), *review denied* (Minn. Nov. 17, 2009).

A person is guilty of third-degree criminal sexual conduct if that person "engages in sexual penetration with another person" and "the actor uses force or coercion to accomplish the penetration." Minn. Stat. § 609.344, subd. 1(c). In *Lindahl*, the appellant argued that he was entitled to assert a voluntary-intoxication defense to first-degree criminal sexual conduct because assault is a specific-intent offense and the criminal-sexual-conduct statute at that time defined "force" by referring to the assault statute. 309 N.W.2d at 767. The Minnesota Supreme Court disagreed, holding that the "force" element of first-degree criminal sexual conduct requires proof of general intent. *Id.* The *Lindahl* court reasoned that "an assault involving infliction of injury of some sort requires no abstract intent to do something further, only an intent to do the prohibited physical act of committing a battery." *Id.* Here, Keeler was charged with third-degree criminal sexual conduct using force or coercion, which contains the same elements as first-degree criminal sexual conduct using force or coercion except that the victim need not suffer personal injury. *Compare* Minn. Stat. § 609.344, subd. 1(c) (third-degree criminal sexual

conduct) *with* Minn. Stat. § 609.342, subd. 1(e)(i) (2010) (first-degree criminal sexual conduct).

In *Bjergum*, when the appellant asserted that he was entitled to a jury instruction on the voluntary-intoxication defense because a crime of terroristic threats is a specific-intent offense, we observed that

> the legislature has indicated that "when criminal intent is an element of a crime," that is, specific intent crimes, "such intent is indicated by the term 'intentionally,' the phrase 'with intent to,' the phrase 'with intent that,' or some form of the verbs 'know' or 'believe.'"

771 N.W.2d at 57 (quoting Minn. Stat. § 609.02, subd. 9(1) (2006)). We then rejected the appellant's contention that the crime of terroristic threats is a specific-intent offense because the terroristic-threats statute does not contain any of these indicators. *Id.* at 57-58. Here, the statute defining third-degree criminal sexual conduct using force or coercion does not contain any of these specific-intent indicators. *See* Minn. Stat. § 609.344, subd. 1(c).

Keeler contends that, because the statutory definition of criminal intent encompasses knowledge or belief, Minn. Stat. § 609.02, subd. 9 (2008), and because the voluntary-intoxication defense may be used to negate a particular intent "or other state of mind," Minn. Stat. § 609.075, the defense is not limited to specific-intent offenses. This argument lacks merit. The statutory definition of third-degree criminal sexual conduct using force or coercion does not require knowledge, belief, or any other state of mind as an essential element of the offense. Minn. Stat. § 609.344, subd. 1(c). Accordingly, the

district court did not err by declining to consider Keeler's voluntary-intoxication defense because third-degree criminal sexual conduct is a general-intent offense.

II.

Keeler asserts that the district court erred by permitting Dr. Giorgi to testify that N.L.H.'s condition was "generally consistent with sexual assault." Keeler did not object to this evidence at trial. Ordinarily, an appellant who fails to object at trial forfeits the right to challenge the admission of the evidence on appeal. *State v. Bauer*, 598 N.W.2d 352, 363 (Minn. 1999). To overcome such forfeiture, an appellant must demonstrate that the district court committed plain error. Minn. R. Crim. P. 31.02 (stating that appellate court may consider plain error affecting substantial rights even if such error was not raised before district court); *Bauer*, 598 N.W.2d at 363 (establishing appellant's burden to demonstrate district court's error); *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (applying rule 31.02). In doing so, we consider whether there is an error, whether such error is plain, and whether it affects the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. If the three plain-error factors are established, we next consider whether the error seriously affected the fairness and integrity of the judicial proceedings. *Id.*

Expert testimony is admissible if it will help the fact-finder understand the evidence or determine a fact in issue. Minn. R. Evid. 702; *State v. Ritt*, 599 N.W.2d 802, 811 (Minn. 1999). Expert testimony is not "helpful" if the expert's opinion is within the knowledge and experience of the fact-finder and the expert's testimony adds no precision or depth to the fact-finder's ability to reach a conclusion. *State v. Sontoya*, 788 N.W.2d 868, 872 (Minn. 2010). "Testimony in the form of an opinion or inference [that is]

otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. But expert opinions involving legal analysis or mixed questions of fact and law ordinarily are not admissible. *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982).

In *Saldana*, the Minnesota Supreme Court held that the admission of an expert's testimony that a sexual assault occurred was error because such testimony was a legal conclusion that was of no assistance to the jury. *Id.* at 231. The expert in *Saldana* was a psychological counselor who never physically examined the victim and did not meet with the victim until 10 days after the sexual assault. *Id.* at 229, 231. The expert testimony was not helpful to the jurors because they were "equally capable of considering the evidence and determining whether a [sexual assault] occurred." *Id.* at 231. In *Saldana*, the danger of unfair prejudice outweighed any probative value of the expert testimony, in part, because the testimony "gave a stamp of scientific legitimacy to the truth of the complaining witness's factual testimony." *Id.* (quotation omitted).

Although Dr. Giorgi is the physician who physically examined N.L.H. on the day of the sexual assault, he found no physical evidence of trauma. The only basis offered for his opinion that N.L.H.'s condition was consistent with a sexual assault is that she was "fairly distraught" when he conducted the examination. This testimony does not add precision or depth to the fact-finder's ability to reach a conclusion. Its limited probative value is outweighed by the danger of unfair prejudice. Thus, the admission of this testimony was error that is plain. But if the defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other plain-error factors. *Id.*

at 873; *Griller*, 583 N.W.2d at 740. An error affects a defendant's substantial rights if it was "prejudicial and affected the outcome of the case." *State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002). The defendant bears a heavy burden of persuasion on this factor. *Griller*, 583 N.W.2d at 741.

The record includes N.L.H.'s detailed, uncontroverted testimony regarding the sexual assault, which the district court credited. Her testimony was corroborated by evidence that N.L.H. reported a sexual assault to her friends, her fiancé, and the police within 12 hours after the sexual assault. DNA evidence contained in semen recovered from N.L.H.'s vagina provided additional corroboration. Moreover, the record reflects that the erroneous testimony was minimal and given limited weight by the district court. The challenged portion of Dr. Giorgi's testimony comprised approximately one page of a transcript in excess of 200 pages. Moreover, Dr. Giorgi was one of 12 witnesses who testified, and the prosecution offered 30 exhibits in evidence. Neither the prosecutor nor defense counsel referred to Dr. Giorgi's testimony in closing arguments, and the district court did not refer to Dr. Giorgi's testimony in its findings. On this record, we conclude that the erroneous admission of expert testimony regarding whether N.L.H. was sexually assaulted did not affect the outcome of the case. Keeler, therefore, is not entitled to relief on this ground.[1]

[1] Because Keeler failed to satisfy the third factor of the plain-error test, we need not address whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *See id.* at 740, 742 (quotation omitted).

III.

Keeler next challenges the district court's decision to deny his motion for a downward dispositional departure and impose the presumptive sentence of 48 months' imprisonment. The district court must impose the presumptive sentence unless there are "substantial and compelling circumstances" that warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "[A] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The decision to depart from the sentencing guidelines rests within the district court's sound discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Ordinarily, we will not disturb the district court's imposition of the presumptive sentence, even when reasons for a downward departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

When considering a downward dispositional departure, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). One relevant factor to consider when determining whether to impose a downward dispositional departure is the defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). If the district court "considers reasons for departure but elects to impose the presumptive sentence," an explanation for denying the downward

departure motion is not necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Keeler argues that the district court abused its discretion because he presented substantial and compelling reasons for a downward dispositional departure, including evidence regarding his age, lack of a criminal history, feelings of remorse, cooperation, attitude while in court, and the support he receives from family and friends. But the existence of mitigating factors does not require the imposition of a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). And the record reflects that the district court considered and rejected these mitigating factors. The district court found that Keeler did not express genuine remorse and his statements during the presentence investigation—that he remembers nothing from the night of the incident, but any sexual contact must have been consensual—belie his "last-minute apology" and reflect an unwillingness to accept responsibility for his actions. The district court concluded that Keeler is not amenable to probation based on information obtained from the presentence investigation, including reports that Keeler became intoxicated and went to a strip club in violation of his conditional release.

The district court properly considered relevant mitigating factors when determining the appropriate sentence. There is ample support for the district court's decision to deny Keeler's motion for a downward dispositional departure. The district court's sentencing decision reflects a sound exercise of its discretion.

Affirmed.