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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1849**

State of Minnesota,
Respondent,

vs.

Judah Stephen McNeilly,
Appellant.

**Filed November 19, 2012
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-10-18053

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Worke,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from convictions of multiple counts of first-degree criminal sexual
conduct, appellant argues that (1) the prosecutor committed misconduct by eliciting

evidence during trial referring to allegations that appellant sexually abused his sisters although the district court had granted appellant's motion in limine to exclude that evidence; (2) the prosecutor's argument that, if the jury believed the victim, then appellant was guilty, was misconduct because it misstated the law and impermissibly shifted the burden of proof; and (3) the exclusion of evidence of the victim's motive to fabricate charges against appellant to divert attention from her own bad acts deprived appellant of his constitutional rights to confrontation and to present a complete defense. We affirm.

FACTS

Appellant Judah Stephen McNeilly was convicted of six counts of first-degree criminal sexual conduct for repeatedly engaging in oral sex with his stepdaughter during a two and one-half year period.

The sexual abuse began during the summer of 2005 at the family's home in Minnetonka when the victim was ten years old. The victim testified at trial that, once or twice when she was not feeling well, appellant told her to come and lie down in bed with him and her mother, who was asleep. The victim described how appellant moved her head down by his penis, took his penis out of his boxers, and forced her head "down there." The victim performed oral sex on appellant "for just a little bit" and then moved her head away. This happened more than once. The last time, the victim's mother woke up when the victim was under the covers with her head near appellant's penis. Initially, the mother was upset with appellant, but she later sided with him. The victim got into trouble, and appellant spanked her with a board.

When the family moved to Burnsville in October 2005, the oral sex continued. The victim testified that appellant also started “making out” with her and “fingering” her, which the victim described as appellant putting his hand down her pants and touching the inside and outside of her vagina. The sexual abuse occurred most often in the victim’s bedroom, sometimes on the couch, and once in appellant’s and the mother’s bedroom when the mother had fallen asleep on the couch. The victim did not tell her mother about the abuse because she was afraid that her mother would not believe her and she would get into trouble again.

In October 2006, the family moved to a house in Delano with a large garage on the property. Appellant had a couch and television in the garage and spent most of his time there. The victim frequently performed oral sex on appellant in the garage, and the “making out” and “fingering” also continued. Twice, once in the garage and once in the victim’s bedroom, appellant tried to have anal sex with the victim, but, the victim testified, “[i]t didn’t exactly fit in” and tore her “butt hole,” causing it to bleed. The victim’s younger brother was not allowed in the garage but saw the victim in there “all the time.”

In April 2008, a Wright County sheriff’s deputy and a child-protection worker interviewed the victim about allegations of sexual abuse. Appellant and the victim’s mother knew about the investigation and told the victim what to say during the interview. The victim followed their instructions and denied that sexual abuse had occurred.

When the victim was 13 or 14 years old, the family moved to Elk River, where the “[o]ral sex, making out, [and] fingering” continued. During the next few months, the family moved two more times, and the sexual abuse continued.

In the spring of 2009, appellant was in jail, and the victim told her mother about the sexual abuse because she felt safe with appellant being in jail. On March 12, 2009, the victim made a statement to Wright County Sheriff’s Deputy Jason Hermansen and told him about some of the sexual abuse that had occurred. On March 18, 2009, the victim’s mother told Hermansen that the victim had more information for him, and Hermansen interviewed the victim again. In the second interview, the victim provided additional details and disclosed additional incidents of sexual abuse. Hermansen testified that it is not unusual for sexual-abuse victims to provide additional information in a second interview. The victim’s statements to Hermansen were consistent with her trial testimony.

One morning after reporting the abuse, the victim came downstairs and found appellant with her mother. Appellant told the victim that he could go to jail for thirty years, started crying, and apologized. Appellant and the victim’s mother both told the victim that there was still time to say that the allegations were untrue, and the victim recanted the allegations of sexual abuse. The victim explained that she was confused because there was another side to appellant “where he was like my dad, where he would do things with us, take us places, and then there was the other side of him where at night he would do these sexual things.”

Within one month after recanting the allegations, the victim began living with her father. In June 2009, after being contacted by the victim's father, Hermansen again interviewed the victim, who stated that she had told the truth in the March 2009 interviews and that she had recanted due to pressure from her mother and appellant.

Child psychologist Jodie Raymaker, who was employed by Midwest Children's Resource Center and had considerable experience in sexual-abuse cases, evaluated the victim. The victim met the diagnostic criteria for post-traumatic stress syndrome, and her testing profile showed that "she was vulnerable to wanting to please people." Raymaker testified that recanting allegations often occurs when a child is pressured to recant or is fearful of retribution consequences. The victim's descriptions of acts of sexual abuse, drug use, and reasons for recanting were consistent with her trial testimony and her statements to Hermansen.

This appeal followed sentencing.

D E C I S I O N

I.

Appellant argues that the prosecutor committed misconduct by eliciting evidence of allegations that appellant had sexually abused his sisters although the district court had granted appellant's motion in limine to exclude that evidence. Violation of established standards of conduct, including "orders by a district court" and "attempting to elicit or actually eliciting clearly inadmissible evidence may constitute [prosecutorial] misconduct." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). "Minnesota law is crystal clear [that] the state has an absolute duty to prepare its witnesses to ensure that

they are aware of the limits of permissible testimony.” *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003).

During direct examination of the victim, the following exchange occurred:

Q: Okay, and at some point when you were living in Hutchinson and [appellant] was in jail, did you try to tell your mom what was going on?

A: Yes.

Q: Why did you tell her at that point?

A: Well, there’s a couple reasons. First off, because [appellant’s] sister . . .

Defense counsel objected, and the prosecutor did not pursue the line of questioning. The prosecutor admitted that she had not advised the victim about the district court’s ruling excluding evidence about the abuse allegations because she did not believe that the issue would come up.

Even if the prosecutor committed misconduct by not advising the victim of the district court’s ruling, the misconduct was minor. The harmless-error test for less-serious prosecutorial misconduct requires the reviewing court to ask “whether the misconduct likely played a substantial part in influencing the jury to convict.” *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (citing *State v. Caron*, 300 Minn. 123, 128, 218 N.W.2d 197, 200 (1974)). The record does not indicate that the prosecutor intended to elicit inadmissible evidence, and no inadmissible evidence was elicited. The victim’s answer did not refer to sexual abuse or to appellant, and the prosecutor did not pursue the line of questioning. Under these circumstances, any misconduct did not likely play a substantial role in influencing the jury to convict and, accordingly, is not a basis for a new trial. *See*

State v. Wilford, 408 N.W.2d 577, 580 (Minn. 1987) (determining misconduct did not substantially influence jury to convict when an improper question was brief and isolated).

Although the district court excluded evidence that appellant had sexually abused his sisters, the court permitted the state to introduce evidence that the victim “spoke to a relative who reported to her about her sexual experiences,” which was relevant as “an explanation as to why [the victim] would feel free to report.” The victim testified:

Q: . . . [Y]ou testified that you got a text from a relative, is that correct?

A: Correct.

Q: And did that relative in that text describe herself being sexually abused?

A: She hadn’t described, but she told me that she was.

Q: And because of that, did you feel like you needed to tell your mom again about what had been happening with [appellant]?

A: Yes.

Appellant argues that the victim’s earlier reference to his sister and the testimony about a text from a relative made it clear “that the abused relative was [appellant’s] sister . . . and [appellant] was her abuser.” Even if the jury assumed the relative who sent the text was appellant’s sister, no details were provided about the abuse or when it occurred. The testimony was provided in the context of explaining why the victim told her mother about appellant sexually abusing her and did not indicate that appellant was the person who had sexually abused the relative who sent the text. The evidence, therefore, was not contrary to the district court’s ruling granting appellant’s motion in limine.

II.

Appellant argues that the prosecutor committed misconduct during closing argument by arguing that, if the jury believed the victim, then appellant was guilty. Prosecutorial misconduct occurs “when the [prosecutor] implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998) (quotation omitted). While a prosecutor must not personally endorse a witness’s credibility, the state may, in closing argument, argue that a witness was or was not credible. *State v. Jackson*, 714 N.W.2d 681, 696 (Minn. 2006). But an argument that shifts the burden of proof to the defendant to prove his innocence is improper. *State v. Carridine*, 812 N.W.2d 130, 148 (Minn. 2012). A reviewing court considers “the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence.” *Id.*

In closing argument, the prosecutor gave reasons why the victim’s testimony was credible, including the details she provided, and explained why the victim did not recall all the incidents of abuse the first time she talked to Hermansen. The prosecutor then stated: “Now, why should you believe [the victim]? Why should you? Because if you believe [the victim], then he’s guilty.” After the district court overruled an objection to the argument, the prosecutor argued that the victim’s testimony was credible despite her recanting.

Appellant argues that the argument misstated the law and improperly shifted and lowered the burden of proof. The argument as a whole went to the credibility of the

victim's testimony and did not misstate the law. *See State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010) (stating that "there is no conclusive statement in our case law prohibiting a prosecutor from stating that a victim's testimony need not be corroborated in a criminal sexual conduct case"). The argument was similar to the argument in *Carridine*, in which the prosecutor argued that the defendant needed the jury to believe the victim had a gun because, if the jury did not believe that, the defendant was guilty of first-degree murder. The supreme court concluded that the argument emphasized the central question in the case and did not improperly shift the burden of proof to the defendant. 812 N.W.2d at 148. Applying *Carridine*, the argument in this case did not improperly shift the burden of proof.

The cases that appellant relies on are not on point because they involved "were they lying" questions on cross-examination. *See, e.g., State v. Morton*, 701 N.W.2d 225, 235 (Minn. 2005). The supreme court has stated that, generally, such questions "have no probative value and are improper and argumentative, because they do nothing to assist the jury in assessing witness credibility." *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). Here, the prosecutor's argument was based on the evidence presented at trial and was helpful to the jury in assessing the victim's credibility.

We recognize that there could be a case in which the jury could believe a witness and still not have a basis to convict because of shortcomings in the witness's testimony. But that is not the case here. The victim's testimony addressed all of the elements of the charged offenses, and, under Minn. Stat. § 609.347, subd. 1 (2010), a victim's testimony

in a criminal-sexual-conduct case need not be corroborated. Consequently, if the victim's testimony is credible, appellant is guilty.

III.

Appellant argues that the district court erred by excluding testimony about the victim's motive to fabricate and that the error deprived him of his constitutional rights to confront the witnesses against him and to present a complete defense. A reviewing court defers to the district court's evidentiary rulings, and they will not be overturned absent a clear abuse of discretion. *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006). The abuse of discretion standard applies "even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). But whether an evidentiary ruling violated a defendant's right of confrontation is a question of law subject to de novo review. *Dobbins*, 725 N.W.2d at 505.

Appellant sought to introduce evidence about two incidents involving the victim that he asserts provided a motive for the victim to fabricate. The first incident occurred on March 25, 2009, when police received a report that four nude photos of the victim had been posted on the Internet. The photos had apparently been taken at a party in December 2008, and the victim sent them to another person by cell phone. The victim's mother claimed that the victim fabricated the allegations against appellant to avoid getting in trouble for the photos.

The second incident "was apparently an incident where some boys were brought over to the home and it's alleged that something happened on Valentine's Day of 2009"

and that the victim's brother "subsequently reported that people were describing his sister . . . in very bad terms."

The district court excluded the evidence under the rape shield law, which prohibits evidence of a victim's previous sexual conduct in a prosecution for criminal sexual conduct. Minn. Stat. § 609.347, subd. 3 (2010); Minn. R. Evid. 412. But "evidence of a victim's past sexual conduct may be admitted where it is constitutionally required by the defendant's right to due process, his right to confront his accuser, or his right to offer evidence in his own defense." *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991).

The investigation regarding the photos did not begin until after the victim made her statements to Hermansen, and nothing in the record indicates that the victim knew about the photos being posted on the Internet before she made the statements to Hermansen. The allegation regarding Valentine's Day was so vague that it did not suggest a motive to fabricate. The case relied on by appellant, *State v. Pride*, involved the jury being misinformed about the relationship between the victim and a witness. 528 N.W.2d 862, 866 (Minn. 1995). The supreme court concluded that excluding evidence of the actual relationship was error because the exclusion had the potential to mislead the jurors about the interest of each witness in the outcome of the case. *Id.* at 866. Here, the jury was not misinformed about the photos or the Valentine's Day incident, and the evidence had little, if any, probative value as to a motive to fabricate. A defendant's right to present evidence is limited by "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," and

evidence that is “only marginally relevant” may be excluded. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003) (quotation omitted). The district court did not err in excluding the evidence about the photos and the Valentine’s Day incident.

Furthermore, even if the district court erred when it excluded the evidence, a new trial will be granted only if the error was prejudicial. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The erroneous exclusion of evidence is harmless if the reviewing court is satisfied beyond a reasonable doubt that, if the evidence had been admitted and its damaging potential fully realized, a reasonable jury would have reached the same verdict. *Id.*

The evidence against appellant was strong. The victim provided consistent, detailed accounts of the sexual abuse. Defense counsel cross-examined her extensively. The victim was also questioned on direct and cross-examination about her statements denying that the sexual abuse had occurred, and the state presented evidence that a child victim often recants allegations when pressured to do so or fearful of retribution consequences. Also, appellant presented evidence of a motive to fabricate. The victim admitted that appellant disciplined her and that she did not like his rules, and defense counsel argued in closing argument that the victim had a motive to fabricate as a way of manipulating where and with whom she lived. We are satisfied beyond a reasonable doubt that, if the evidence about the photos and the Valentine’s Day incident had been admitted and its damaging potential fully realized, a reasonable jury would have reached the same verdict.

Affirmed.