STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2053

State of Minnesota,
Respondent,

vs.

Boyd Dean Beck,
Appellant.

Filed October 15, 2012
Affirmed
Larkin, Judge

Hubbard County District Court
File No. 29-CR-10-565

Donovan D. Dearstyne, Hubbard County Attorney, Erika C. H. Randall, Assistant County Attorney, Park Rapids, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Collins, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

LARKIN, Judge

Appellant challenges his two convictions of second-degree criminal sexual conduct, arguing that the evidence is insufficient to support the convictions, the district court erred by allowing evidence regarding a drool-like substance found in his bed, and the prosecutor committed misconduct by eliciting improper evidence. We affirm.

FACTS

In February 2010, M.H., then nine years old, told her mother, J.H., that she no longer wanted to sleep in the same bed with her step-grandfather, appellant Boyd Dean Beck,[1] because Beck "drool[ed]." M.H. told her mother that the drool was "like snot" and was "down by [her] butt." M.H.'s disclosure came after J.H. asked M.H. not to sleep with Beck anymore because J.H. believed the sleeping arrangement was no longer appropriate given M.H.'s development.

After M.H.'s disclosure, J.H. asked M.H. if Beck had ever touched her. M.H. said that Beck snuggled with her in bed and sometimes touched her chest. M.H. also pointed to indicate that Beck touched her vaginal area. M.H. told J.H. that this happened the last time she stayed with Beck and that it had happened a few other times. J.H. contacted law enforcement, and an investigation ensued.

Hubbard County Sheriff's Office investigator Colter Diekmann interviewed Beck twice regarding M.H.'s allegations. During the first interview, Beck told Diekmann that

[1] When spending the weekends with Beck and his wife at their farm, M.H. occasionally slept in Beck's bed.

when he sleeps, his hands shake and his fingers twitch due to nerve damage from a previous back surgery. Beck denied that he touched M.H. inappropriately, but he conceded that incidental touch may have occurred while he was "floppin' and throwin'" while he slept. When Diekmann asked about the "stuff on the bed," Beck explained that his sinuses drain into his throat and that he drools on the pillows and sheets. Beck denied that the substance on his bed was semen.

The state charged Beck with two counts of second-degree criminal sexual conduct, and the case was tried to a jury. Prior to trial, Beck filed a motion in limine for an "[o]rder excluding testimony regarding an alleged incident where the juvenile M.H. felt a snotty substance by her leg in the bed where she was sleeping with the defendant." Beck argued that because "[t]he juvenile does not claim having been touched by the defendant on this occasion," the testimony "is irrelevant to a finding of whether or not the defendant ever touched the juvenile." Beck also argued that the testimony "would be highly prejudicial and likely to inflame the passions of the jury." The state argued that the testimony was relevant because "it goes to credibility" and that it explains why J.H. asked M.H. if Beck had touched her. The state expressed concern that without the testimony, the jury might view J.H.'s questioning as "putting things in this child's head." The district court denied Beck's motion, but the court noted that it was a "close call" and advised the prosecutor to be careful in her questioning so as to minimize the possibility of unfair prejudice.

Although M.H. testified at trial, she did not mention the substance, but several other witnesses did. J.H. testified regarding M.H.'s statements regarding the substance.

Valerie Evje, a nurse at the Family Advocacy Center who interviewed M.H., testified that J.H. told her about "drool on the sheets." Hubbard County Sheriff Cory Aukes testified that J.H. reported that M.H. disclosed to her that "[M.H.] was sleeping alone one evening with grandpa and grandpa was touching her, which she described down there, touched her, put his arm around her, touches her bra, and left a, what she described, a drool like substance that looked like snot down by her leg." And Diekmann testified that he received a report from Aukes that included reference to "some kind of substance found on the bed by her leg." Beck did not object to any of that testimony. But Beck did object to the admission of a portion of his statement to Diekmann regarding the substance on his bed, arguing that it was unduly prejudicial. The district court overruled the objection and allowed a recording of Beck's first interview with Diekmann to be played in its entirety.

As to the alleged sexual contact, M.H. testified that Beck would sometimes "wrap his arm around [her] and then scoot [her] closer to him," although she did not know if he was sleeping when he did this. M.H. further testified that after Beck pulled her close to him, "[h]e would take his thumb and he would rub it back and forth" on "[her] chest and [her] crotch." M.H. testified that the rubbing occurred over her bra and underwear. She testified that she did not think Beck's actions were an accident, but she could not articulate why she held that belief.

After the state presented its case, Beck moved for judgment of acquittal. The district court denied the motion. The jury found Beck guilty of both counts of second-degree criminal sexual conduct, and the district court sentenced him to a 36-month stayed prison term. Beck appeals his convictions.

D E C I S I O N

I.

Beck first argues that the district court erred by failing to grant his motion for judgment of acquittal and that his convictions should be reversed because the evidence is insufficient to sustain the convictions. Specifically, Beck argues that the state failed to prove the element of intent.

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict "if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Beck was convicted under Minn. Stat. § 609.343, subd. 1(a) and (g), which provide that:

> A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:
>
> (a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the

> act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced;
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> . . . .
>
> (g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; . . . .

Minn. Stat. § 609.343, subd. 1(a), (g) (2008). Sexual contact is defined to include certain enumerated acts committed "with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a) (defining "sexual contact" as used in Minn. Stat. § 609.343, subd. 1(a)), (b) (defining "sexual contact" as used in Minn. Stat. § 609.343, subd. 1(g)) (2008). The enumerated acts include "the intentional touching by the actor of the complainant's intimate parts," or ". . . the touching of the clothing covering the immediate area of the intimate parts." *Id.*, subd. 11(a)(i), (a)(iv), (b)(i), (b)(iv).

The state must "prove that appellant was acting based on sexual desire or in pursuit of sexual gratification ('with sexual intent') and that he intended the touching of the clothing covering the immediate area of intimate parts." *State v. Austin*, 788 N.W.2d 788, 793 (Minn. App. 2010) (construing Minn. Stat. § 609.343, subd. 1(a) to define a specific intent crime), *review denied* (Minn. Dec. 14, 2010). "But a showing of sexual intent does not require direct evidence of the defendant's desires or gratification because a subjective sexual intent typically must be inferred from the nature of the conduct itself." *Id*. at 792.

Beck essentially argues that the evidence was insufficient to prove that his touching of M.H. was not accidental. However, M.H. testified, among other things, that Beck would pull her close to him and then "would take his thumb and he would rub it back and forth" on her chest and crotch. The jury could reasonably infer from M.H.'s description of Beck's conduct that Beck intended to touch M.H.'s intimate parts and that he did so with sexual desire. Moreover, the jury heard and apparently rejected an alternative explanation of Beck's conduct, namely, Beck's claim during his interview with Diekmann that any touching that did occur happened inadvertently while he slept. Which version of events to believe was within the exclusive province of the jury. *See State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006) (explaining that the jury is the exclusive judge of credibility and is free to reject a witness's testimony). Lastly, "corroboration of the testimony of a complainant in sex crime offenses is not required." *State v. Hanson*, 382 N.W.2d 872, 874 (Minn. App. 1986), *review denied* (Minn. Apr. 11, 1986).

Because the evidence was sufficient for the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, to reasonably conclude that Beck intended to touch M.H.'s intimate parts and that he acted with sexual intent, the evidence sustains his convictions of criminal sexual conduct in the second degree. Thus, this court will not disturb the verdict.

II.

Beck next argues that the district court erred by allowing J.H., Evje, Aukes, and Diekmann to testify regarding M.H.'s statements about the substance on his bed. At trial,

Beck argued that these statements were irrelevant and unfairly prejudicial. Beck now argues that the statements were inadmissible hearsay and unfairly prejudicial. Beck also argues that the district court erred by allowing Beck's entire statement to Diekmann to be played for the jury.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). Generally, an issue cannot be raised for the first time on appeal. *State v. Anderson*, 733 N.W.2d 128, 134 (Minn. 2007). Moreover, "[a]n objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Nevertheless, an appellate court can review an issue not raised in the district court if there was plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. . . .
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> . . . .
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> The third prong, requiring that the error affect substantial rights, is satisfied if the error was prejudicial and affected the outcome of the case. The defendant bears the burden of persuasion on this third prong. We consider this to be a heavy burden.

Id. at 740-41. Plain error is prejudicial if there is a reasonable likelihood that the error had a "significant effect on the verdict of the jury." *Id*. at 741 (defining prejudice in the

context of jury-instruction error). If these prongs are met, then the appellate court assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings. *Id*.

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 not admissible except as provided by [the rules of evidence] or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802. Admission of hearsay statements can be plain error if "the statements, by the application of well-settled law, constitute inadmissible hearsay." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). But not every admission of hearsay is plain error. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (holding it was not plain error to admit unobjected-to hearsay testimony because the state did not have the opportunity to establish that some or all of the statements would have been admissible under a hearsay exception).

Because Beck did not object to the challenged testimony on hearsay grounds in district court, this court applies the plain-error standard of review to his hearsay argument. The state argues that the testimony was not offered for the truth of the matter asserted (i.e., to prove sexual contact) but instead to show why J.H. asked M.H. about improper touching. The state's argument has merit. But even if we assume that M.H.'s statements were inadmissible hearsay, Beck has not met his heavy burden to show that admission of the statements had a significant effect on the jury's verdict. In fact, Beck's brief does not acknowledge his failure to object to the challenged testimony on hearsay

grounds and does not discuss the plain-error standard. Nevertheless, we observe that if the jury inferred that the substance was semen and if the jury concluded that the substance was produced during a touching incident, then the statements would tend to show that Beck touched M.H. with sexual intent. But M.H.'s testimony alone provided sufficient evidence of Beck's sexual intent. Thus, the evidence regarding the substance was merely corroborating; it was not necessary to the jury's finding of guilt. Because there is no reasonable likelihood that the statements had a significant effect on the verdict, Beck has not demonstrated plain error.

Beck also argues that admission of the statements regarding the drool-like substance—including those contained in his statement to Diekmann—was unfairly prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." Minn. R. Evid. 403. Unfair prejudice has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Bott*, 310 Minn. 331, 338 n.3, 246 N.W.2d 48, 53 n.3 (1976). Because Beck objected to the challenged testimony in district court on the ground that it was more prejudicial than probative, we review the district court's ruling for an abuse of discretion. *Amos*, 658 N.W.2d at 203 ("Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.").

Beck argues that "the potential prejudice is that the jury infers that the substance, which was never tested, was semen, and that it is therefore more likely that appellant

sexually molested [M.H.], or that any touching was intentional." The state argues, in effect, that the probative value of the statements was substantial enough to justify the testimony because "without it, the jury would have been left to wonder if it was J.H. who planted the idea of appellant Beck touching M.H. in M.H.'s head." We have already concluded that M.H.'s statement regarding the drool-like substance corroborated her statement that Beck inappropriately touched her. "Absent some rule of exclusion or some tendency of the evidence to produce an overbalancing amount of unfair prejudice, corroborating evidence is admissible." *State v. Axford*, 417 N.W.2d 88, 93 (Minn. 1987). We are not persuaded that the district court clearly abused its discretion by concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

III.

Lastly, Beck argues that the prosecutor committed misconduct by attempting to elicit additional hearsay statements regarding the substance on his bed. Beck cites to three incidents of alleged misconduct. First, Beck argues that the prosecutor engaged in misconduct when she asked Evje whether M.H. had discussed the presence of the substance. Beck objected to this question, and the district court sustained the objection. Second, the prosecutor asked Diekmann: "In speaking with [Beck's wife] and Boyd Beck, were you able to confirm any of the allegations made by [M.H.]?" Part of Diekmann's response was that Beck's wife "did recall an instance where she saw or she came into the bedroom and there was a drool like substance. . . ." Beck objected on the basis of hearsay, and the district court sustained the objection. Finally, Beck appears to

suggest that the prosecutor engaged in misconduct by playing the recording of Diekmann's interview of Beck after attempting to solicit testimony regarding the substance from Evje and Diekmann.

The supreme court has previously utilized a two-tier approach for review of prosecutorial-misconduct claims.[2] *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974) (outlining a test for unusually serious misconduct and a different test for less-serious misconduct). In cases involving unusually serious prosecutorial misconduct, the court will reverse unless the misconduct is harmless beyond a reasonable doubt. *Id*. Beck concedes that the alleged misconduct here is less serious. In cases involving less-serious prosecutorial misconduct, the court considers "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id*. at 128, 218 N.W.2d at 200.

> It is unprofessional conduct for the prosecutor to knowingly offer inadmissible evidence in order to bring that evidence to the attention of the judge or jury, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the jury. However asking a question to which an objection is sustained is not by itself evidence of prosecutorial misconduct. Furthermore the jury must be presumed to have followed the court's instructions and to have disregarded any question to which an objection was sustained.

State v. Steward, 645 N.W.2d 115, 122 (Minn. 2002) (citations omitted).

[2] We note that the supreme court recently recognized, in *State v. Nissalke*, that whether the two-tiered test set forth in *Caron* is "still good law has been questioned in some of [their] recent decisions." 801 N.W.2d 82, 105 n.10 (Minn. 2011). But the supreme court in *Nissalke* did not decide the issue, and the issue has not been addressed further by the supreme court. *Id*. Therefore, we apply the two-tiered test.

The prosecutor's questioning of Evje and Diekmann did not constitute misconduct. The prosecutor's questions were consistent with the district court's pretrial order denying Beck's motion in limine, in which the court specifically stated that "the state is not prohibited from asking questions that would solicit testimony about [the drool incident]." As to his recorded statement, Beck objected to its admission, and his objection was overruled. The prosecutor played the statement for the jury only after the district court indicated that the recording was admissible. In sum, there is no basis to conclude that the prosecutor engaged in misconduct.

Affirmed.