STATE OF MINNESOTA
IN COURT OF APPEALS
A11-492

State of Minnesota,
Respondent,

vs.

Dale Channing Casebolt,
Appellant.

Filed March 12, 2012
Affirmed
Peterson, Judge

Clearwater County District Court
File No. 15-CR-10-61

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Richard C. Mollin, Jr., Clearwater County Attorney, Bagley, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, 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

PETERSON, Judge

In this appeal from convictions of two counts of first-degree criminal sexual conduct, appellant argues that the prosecutor committed misconduct when she did not provide a *Spreigl*[1] notice before introducing a video recording that contains allegations that appellant sexually abused other girls about the same age as the criminal-sexual-conduct victim. We affirm.

FACTS

Appellant Dale Channing Casebolt was convicted of two counts of first-degree criminal sexual conduct[2] arising out of an incident that involved appellant's stepdaughter, S.R., who resided with her mother, appellant, and appellant's other children for approximately six years. At some point, S.R.'s mother moved out, and S.R. continued to reside with appellant. One day in February 2010, when S.R. was 12 years old, she was in appellant's bedroom watching television. Appellant came into the bedroom, closed the door, and placed a knife between the door and the door frame to keep the door closed. Appellant removed S.R.'s underwear, removed his clothes, and put his penis in S.R's vagina. According to S.R., appellant started rocking the bed, and, after about ten minutes, white stuff came out of appellant's penis and went all over S.R.'s body. S.R. put her underwear back on.

[1]*State v. Spreigl*, 227 Minn. 488, 139 N.W.2d 167 (1965).
[2]Appellant was also convicted of a lesser-included second-degree criminal-sexual-conduct offense.

Three days later, S.R. wrote a letter to her aunt, L.R., stating that appellant was "beating [her] up" and asking if S.R. could "come and live with" L.R. S.R. gave the letter to L.R.'s daughter, who was S.R.'s classmate and friend, and asked her to give the letter to L.R. That same day, S.R. called L.R. from home, and L.R. came and picked her up. In the car, S.R. told L.R. that appellant had sexually assaulted her.

L.R. called the police, and, the next day, brought S.R. to the department of human services. Social worker Lisa Lindgren interviewed S.R., following the first-witness protocol.[3] S.R. told Lindgren that appellant had had sex with her since she was six years old and that the most recent incident occurred when she was in his room and he came in and put his penis in her pelvis. During the interview, S.R. made the following statement alleging that appellant had touched another person, S.__.:

> S.R.: . . . One time [S.__.] was cooking . . . for us . . . and [appellant] was drunk and . . . [appellant] was rubbing my leg like that and I got so mad and everything. And [S.__.] was outside and [S.__.] was wearing shorts and [appellant] stuck his, [appellant] gave [S.__.] a dollar and [appellant] stuck his hand and it touched [S.__.'s] pelvis.
> Lindgren: Okay
> S.R.: She told me everything.
> Lindgren: You said [appellant] gave [S.__.] a dollar and that touched [S.__.'s] pelvis?
> S.R.: Uh hmm.
> Lindgren: Can you point to me what a pelvis is? Okay. I'm going to write that on here, okay?

S.R. pointed to something on the easel that Lindgren used during the interview, and Lindgren wrote "pelvis" on it. At the end of the interview, a depiction of a female

[3] The first-witness protocol for interviewing children uses open-ended questions based on the child's age and developmental ability.

figure was displayed on the easel, and a circle surrounding the genital area of the depiction was labeled "vagina pelvis."

Later in the interview, Lindgren questioned S.R. as follows:

> Lindgren: . . . [Y]ou told me about some friends that he rubbed a friend's leg?
> S.R.: Yeah, S.__. and B.__.
> Lindgren: Okay, which friend did he rub her leg?
> S.R.: S.__.
> Lindgren: So he rubbed S.__.'s leg?
> S.R.: Yeah
> . . . .
> Lindgren: Okay. And then you told me something else. You told about a couple of friends. What was the other thing you told me?
> S.R.: . . . [T]hat he was giving my friend S.__. a dollar and took his finger and touched her pelvis.
> Lindgren: Okay he was giving S.__. a dollar and took his finger and touched her pelvis?
> S.R.: Yes inside her pocket. And she told me that.
> Lindgren: Were you there when that happened?
> S.R.: No.

Lindgren asked several more questions about the time appellant touched S.__.'s pelvis and established that it was during the summer after S.R. was in fifth grade, S.__. was cooking on the grill at the time, and the incident occurred at appellant's house. Following the discussion about that incident, S.R. disclosed another incident that occurred "in the pantry [when she was] picking out chips." It is not clear who S.R. was referring to when she said "she," but it appears that she was referring to S.__. S.R. gave no details about the incident in the pantry, but the context of the interview implied that inappropriate sexual contact occurred. The discussion about these two incidents lasted approximately three minutes.

Following her interview by Lindgren, S.R. was examined by a sexual-assault nurse examiner who did not see any trauma to S.R.'s vaginal area. S.R. had disclosed to Lindgren that she was wearing the same underwear that she was wearing when appellant assaulted her and that the underwear had not been washed. The sexual-assault nurse examiner collected, bagged, and sealed S.R.'s underwear and took a blood sample from S.R. for DNA analysis. A police officer transported the underwear to the Minnesota Bureau of Criminal Apprehension (BCA) laboratory for examination. BCA scientists concluded that seminal fluid and sperm were present on the underwear and that appellant's DNA matched the DNA of sperm cells found on the underwear. The BCA scientist who examined S.R.'s underwear testified that the sperm appeared crusty and acknowledged that sperm could be transferred from one piece of clothing to another if it was wet and the pieces of clothing were lying in the same laundry basket.

The state filed three witness and exhibit lists, beginning approximately one month before trial, which listed "Disc of forensic interview concerning [S.R.]. The State intends to play the DVD for the jury (40 minutes)." The prosecutor did not give a *Spreigl* notice regarding S.R.'s statements about the incidents with S.__. The video recording of the interview, which was approximately 40 minutes long, was played for the jury. Appellant did not object to the admission of the recording, to any of S.R.'s statements during the interview, or to the failure to give a *Spreigl* notice. The prosecutor did not question any witness regarding S.R.'s allegations about S.__. and did not refer to the allegations during her opening or closing statements. The prosecutor's statements during closing argument regarding the video recording all relate to how "[S.R.'s] testimony [was] corroborated by

her consistent statements she gave . . . to Lisa Lindgren." Other than S.R.'s statements in the recording, nothing in the record refers to S.R.'s allegations about S.__.

D E C I S I O N

I.

Appellant argues that the prosecutor committed misconduct by introducing evidence of prior inappropriate sexual behavior without providing a *Spreigl* notice. But appellant did not object to the prosecutor's failure to provide a *Spreigl* notice. "[A]ppellate courts should use the plain error doctrine when examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). Under the plain-error doctrine,

> before 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. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998) (citation omitted).

The proper legal standard for determining whether unobjected-to prosecutorial misconduct is prejudicial is whether the plain error affected the defendant's substantial rights. *Ramey*, 721 N.W.2d at 299. "Although the *Griller* formulation applies, . . . when prosecutorial misconduct reaches the level of plain or obvious error─conduct the prosecutor should know is improper─the prosecution should bear the burden of demonstrating that its misconduct did not prejudice the defendant's substantial rights." *Id*. at 299-300.

> Under this approach, when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate lack of prejudice; that is, the misconduct did not affect substantial rights. Employing our recent formulation of the prejudice standard in the prosecutorial misconduct context, the state would need to 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. at 302 (quotation and citations omitted)

The first issue to be addressed in our analysis is whether the alleged misconduct committed by the prosecutor was "plain or obvious error," that is, was it "conduct the prosecutor should know is improper." *Id.* at 299-300. "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b); *see also State v. Spreigl*, 272 Minn. 488, 490-91, 139 N.W.2d 168, 169 (1965) (discussing general rule excluding evidence of other crimes and exceptions). "The danger in admitting such evidence is that the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). The evidence may also be used to show "a common scheme or plan." *Ness*, 707 N.W.2d at 685. When offered for these purposes, the state must give notice of its intent to offer the evidence and indicate the purpose for offering the evidence. Minn. R. Evid. 404(b).

The acts alleged by S.R. in the video were that appellant (1) rubbed S.__.'s leg, (2) touched S.__.'s pelvis, and (3) did something inappropriate to S.__. (or another person) in the pantry. Because the incidents described are prior acts within the meaning of rule 404(b), and, thus, required a *Spreigl* notice for the state to introduce them, we conclude that the failure to give a *Spreigl* notice was conduct that the prosecutor should know is improper and, therefore, was plain or obvious error. Accordingly, the state bears the burden of demonstrating that there is no reasonable likelihood that providing a *Spreigl* notice would have had a significant effect on the verdict of the jury. In assessing whether there is a reasonable likelihood that providing a *Spreigl* notice would have had a significant effect on the jury's verdict, the court considers "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

The evidence against appellant was substantial. S.R. testified clearly and in detail about the sexual assault, and her testimony was consistent with her prior statements to Lindgren. But, more importantly, sperm cells that matched appellant's DNA were found on S.R.'s underwear. This physical evidence corroborated S.R.'s testimony.

Although a BCA scientist acknowledged that sperm could be transferred from one piece of clothing to another if it was wet and the pieces of clothing were lying in the same laundry basket, it would have been an extraordinary coincidence for this possibility to have occurred around the same time that S.R. claimed to have been sexually assaulted by appellant. If the prosecutor had provided a *Spreigl* notice, prompting appellant to object

to S.R.'s statements about appellant's acts involving S._ _., and the district court had excluded the statements, the DNA evidence would still have corroborated S.R.'s testimony about the sexual assault. It is not reasonably likely that, with this corroboration by physical evidence, the absence of S.R.'s statements about appellant's acts involving S.__. would have changed the jury's evaluation of S.R.'s credibility. The statements that would have been excluded were S.R.'s own statements, and their potential for bolstering S.R.'s credibility or damaging appellant's credibility was much less than the potential of the DNA evidence to do either. Excluding the statements would not have significantly reduced the strength of the evidence against appellant.

Also, any improper suggestion arising from S.R.'s statements about appellant's acts involving S.__. arose solely from the statements themselves. The prosecutor did not address the statements during opening or closing arguments, ask any witness a question about the statements, or otherwise mention or allude to the statements.

Finally, when the video recording was played at trial, appellant had an opportunity to rebut any improper suggestions by objecting to portions of the recording, cross-examining S.R. about the incidents, or requesting a curative instruction. We recognize that choosing any of these options involved the risk of drawing the jurors' attention to the improper suggestions presented by the evidence, which could have been avoided by providing a *Spreigl* notice. But the fact that no effort was made to rebut the improper suggestions indicates that their potential for affecting the verdict was not great. Based on our consideration of all of these factors, we conclude that the state has met its burden of

showing that there is no reasonable likelihood that providing a *Spreigl* notice would have had a significant effect on the jury's verdict.

II.

In a pro se supplemental brief, appellant raises "issues of coaching and tampering with the witnesses and allowing them to [perjure] themselves on the stand." Citing the testimony of S.R., Lindgren, M.C. (S.R.'s sister), and the statements S.R. made to Lindgren in the first-witness interview, appellant argues that the witnesses' statements changed and that S.R. needed to be prompted to answer questions. Appellant states that the issue of coaching and tampering was brought up at a hearing on September 23, 2010.

At the September 23, 2010 hearing, the case was set for a jury trial and several discovery issues were discussed. Regarding a recent disclosure by S.R.'s sister, M.C., appellant's counsel stated: "And as we all know regarding these issues, is the influence of coaching throughout this process." In requesting that the court order disclosure of social service notes made in a related CHIPS case, which contained information about the recent disclosure by M.C., appellant's counsel stated:

> I know the schedules and everything else going on, we are prepared to proceed but we want to be able to look at [those] notes because part of that defense and part of the overall issues, you know that we know when we deal with children, is those elements of coaching and what's going on – on with that. And now we've got a witness that we notified originally just in regards their original statements, but it's clear, something's going on, Judge. Because these statements have changed.

Because of the recent disclosures, the district court continued the trial and ordered that all discovery be completed by September 30, 2010. M.C. testified at trial and was cross-examined by appellant's trial counsel.

> It is the province of the fact-finder to determine the weight and credibility to be afforded the testimony of each witness. This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the fact-finder. As the sole judge of credibility, a fact-finder is free to accept part and reject part of a witness's testimony.

State v. Kramer, 668 N.W.2d 32, 38 (Minn. App. 2003) (quotation and citations omitted), *review denied* (Minn. Nov. 18, 2003).

The issues that appellant raises regarding coaching and tampering with witnesses are issues that appellant could have raised, and in many instances did raise, during cross-examination of the witnesses at trial. Ultimately, the jury made credibility determinations based on the evidence presented. This is the "exclusive function" of the jury in its fact-finding capacity and its determinations will not be disturbed on appeal. *Id*.

As part of his argument that there was "coaching and tampering," appellant asserts that S.R. "needed to be prompted to answer." This assertion appears to be based on questions that the prosecutor asked during S.R.'s testimony. During the prosecutor's direct examination of S.R., appellant's trial counsel objected five times that a question was leading. All of the objections were overruled. The questions were: (1) "You just don't want to remember, do you?" (2) "And then you went home from school that day?" (3) "Do you remember that it happened just a couple of days before you wrote the note?"

(4) "[W]hat happened when his penis went into your vagina hole? What did it feel like?"

(5) "[D]id anything come out of his penis?"

"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). A question is leading if it "suggests the answer to the person being interrogated." *Black's Law Dictionary* 1824 (9th ed. 2009). The prosecutor's questions did not suggest the answers to S.R. The district court did not abuse its discretion in overruling the objections.

Appellant also argues "that evidence was not collected or tested proper and gave false positives." Admissibility of physical evidence does "not depend on the prosecution negativing all possibility of tampering. . . . Contrary speculation may well affect the weight of the evidence accorded by the factfinder but does not affect its admissibility." *State v. Johnson*, 307 Minn. 501, 505, 239 N.W.2d 239, 242 (1976).

The sexual-assault nurse examiner who examined S.R. testified that she took S.R.'s underwear and placed them in a sealed bag. A police officer testified that he picked up the underwear from the hospital and transported them to the BCA. A BCA scientist testified that she received the underwear from the police officer and that laboratory procedures require all evidence received to be sealed.

All of the persons involved in the chain of custody for the underwear testified at trial and were subject to cross-examination. All of the persons responsible for testing the

evidence testified and were subject to cross-examination. Determining the weight to be given their testimony regarding the chain of custody and the validity of the testing procedures and results is the exclusive function of the fact-finder and will not be disturbed on appeal. *See Kramer*, 668 N.W.2d at 38 (stating that determining weight and credibility of testimony is exclusive function of fact-finder).

Affirmed.