STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0127

State of Minnesota,
Respondent,

vs.

Clinton Erick Broin,
Appellant.

Filed December 24, 2012
Affirmed in part and reversed in part
Kalitowski, Judge

Mower County District Court
File No. 50-CR-11-1830

Lori Swanson, Attorney General, Robert A. Plesha, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Appellate Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

On appeal from his two convictions of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(i), (iii) (2004), appellant Clinton Erick Broin argues that (1) the district court abused its discretion when it denied his motion for a mistrial after a state's witness referred to evidence of other acts that the court had excluded and (2) one sentence must be vacated because both convictions arose from a single behavioral incident. We affirm the denial of a mistrial but reverse and vacate appellant's sentence for Count I.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion when it denied his motion for a mistrial because a witness's references to events previously ruled inadmissible caused him prejudice. We disagree.

We review a district court's denial of a motion for mistrial for an abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). "The trial judge is in the best position to determine whether an outburst creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted." *Id.* The appellant has the burden to prove that the district court abused its discretion and that the appellant was prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A mistrial should be granted if there is a reasonable probability that the outcome of the trial would have

differed had the event prompting the motion for mistrial not occurred. *Manthey*, 711 N.W.2d at 506.

Prior to trial, the district court granted appellant's motion to exclude evidence of prior acts. The court found that such evidence was "clearly highly prejudicial and is in the nature of other crimes evidence and would be virtually impossible for the jury to divorce from the alleged offense."

At trial, a state's witness testified that after witnessing sexual contact between complainant and appellant, she spoke with appellant and that for "some reason it seems like by that time he had already told me that he, umm, had an incident from earlier when he was younger so I told him that --." Defense counsel immediately made an objection that the court sustained.

The same witness later testified that after appellant moved out of the family home, she spoke with and asked complainant, "Did that really happen in – in Germany and – ." Defense counsel again objected and, at the bench and outside of the hearing of the jury, moved for a mistrial. The court denied the motion but advised the jury that "based on a ruling of the court you will disregard anything that was said in response to the last question by the prosecutor. So that answer should be totally disregarded by you and is not a part of the evidence." The court reiterated this instruction in the final jury instructions, stating, "If I . . . instructed you to disregard [a question], you don't speculate on what that answer might have been and if I told you to disregard the evidence you do not consider it."

When the prohibited testimony is of a passing nature, a new trial is not warranted because it is extremely unlikely that the outcome of the trial was affected by the testimony at issue. *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992); *State v. Ebert*, 346 N.W.2d 350, 351 (Minn. 1984). While brief, uncontrolled comments, "inadvertently or carelessly made, are unfortunate and have no place in a lawsuit, courts are reluctant to reverse a conviction or grant a new trial solely on the basis that prejudicial error has been committed by such statement or statements." *State v. Johnson*, 291 Minn. 407, 415, 192 N.W.2d 87, 92 (Minn. 1971). Even though such comments may be prejudicial, they must be viewed in the context of the full testimony. *Id.*

Here, we conclude that the outcome of the trial would not have been different had the outbursts not occurred. The first reference to a prior incident was vague, and did not even imply that appellant did something inappropriate. The jury could not have drawn a prejudicial conclusion from this comment. *See Ebert*, 346 N.W.2d at 351 (concluding that a witness's reference to "Nazi paraphernalia" in defendant's home was improper but brief and the jury may well have reached a nonprejudicial conclusion).

The witness's second comment was also brief and incomplete, and the jury was immediately instructed to disregard it. Furthermore, this witness testified that she witnessed sexual contact between appellant and complainant, and that complainant admitted to her that there were more instances of sexual abuse. Thus, the passing reference to what happened in Germany is a minor, fractured phrase compared to the rest of the witness's testimony.

Moreover, "any error which may occur by reason of the erroneous admission of evidence is cured when that evidence is stricken from the record and accompanied by a clear instruction to disregard so that the evidence is not put to use by the jury." *Johnson*, 291 Minn. at 415, 192 N.W.2d at 92 (quotations omitted). The burden is on defense counsel to request that evidence be stricken and that a specific curative instruction be given. *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005). Here, the district court immediately instructed the jury to disregard the reference to prior acts and reiterated this curative instruction prior to jury deliberations.

Finally, a mistrial is not warranted if the evidence of guilt is overwhelming because it is unlikely that the testimony at issue affected the verdict. *Clark*, 486 N.W.2d at 170. Here, evidence of appellant's guilt was overwhelming. Complainant's testimony was clear, consistent, and detailed. She described four specific incidents of sexual abuse and testified that there were other incidents. The jury found complainant credible and could have based its conviction on her testimony alone. *See* Minn. Stat. § 609.347, subd. 1 (2010) (stating that in prosecutions for second-degree criminal sexual conduct, "the testimony of a victim need not be corroborated"); *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (stating that a jury may convict based on the uncorroborated testimony of a single witness); *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002) ("[W]eighing the credibility of witnesses is a function exclusively for the jury."). We conclude that appellant was not prejudiced by the comments, and therefore, the district court did not abuse its discretion by denying appellant's motion for mistrial.

II.

Appellant and respondent agree that both offenses for which appellant was charged and convicted arose out of a single behavioral incident, and that therefore one sentence must be vacated.

When facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law reviewed de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012).

"[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat. § 609.035, subd. 1 (2010). This statute protects criminal defendants from multiple prosecutions and multiple sentences for offenses resulting from the same behavioral incident. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). Courts are prohibited from imposing "multiple sentences . . . for two or more offenses that were committed as part of a single behavioral incident." *State v. Norregaard,* 384 N.W.2d 449, 449 (Minn. 1986). "[A] court may only sentence a defendant once for a single behavioral incident even though it results in multiple crimes." *State v. Williams,* 608 N.W.2d 837, 841 (Minn. 2000).

Appellant and respondent assert that both convictions were based on conduct that occurred during the same time period (between 2005 and 2008), at the same place (the family home), and involving the same complainant. The parties assert that because Count I did not allege that force or coercion was used during any particular instance of sexual contact, but rather that force was used generally between 2005 and 2008, it arose out of the same behavioral incident as Count II. Because both counts were charged for

the same continuous time period and there were no distinguishing facts, we agree that both convictions arose from a single behavioral incident. We therefore reverse and vacate appellant's sentence for Count I.

Affirmed in part and reversed in part.