STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1302

State of Minnesota,
Respondent,

vs.

Jacob Comes Flying,
Appellant.

Filed June 17, 2013
Affirmed
Halbrooks, Judge

Traverse County District Court
File No. 78-CR-12-2

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

Matthew P. Franzese, Traverse County Attorney, Alexandria, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

HALBROOKS, Judge

On appeal following his conviction of false imprisonment and three counts of first-degree criminal sexual conduct, appellant argues that the state failed to prove beyond a

reasonable doubt that he committed first-degree criminal sexual conduct. Alternatively, appellant asserts that evidentiary errors warrant a new trial. We affirm.

FACTS

In early 2011, appellant Jacob Comes Flying lived with his mother, his younger half-sister, V.H., and several other family members in a two-bedroom house in Browns Valley. V.H. was then 14 years of age and Comes Flying was 23. While living together, Comes Flying physically abused V.H. on a routine basis and became increasingly protective of her. Comes Flying sought to keep V.H. near him at all times and would even lay "right beside [her]" while she slept. The ongoing physical abuse of V.H. entailed hair pulling, shoving, grabbing, slapping, and hitting, and would often leave bruises on V.H.'s body. V.H. never told her mother about the abuse because she did not think that her mother would believe her.

In November 2011, after both V.H. and Comes Flying moved out of their mother's home, V.H. reported to school officials and law enforcement that Comes Flying had sexually assaulted her in March and May of that year. In connection with the March allegation, Comes Flying was charged with three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g), (h)(i), (h)(ii) (2010); false imprisonment in violation of Minn. Stat. § 609.255, subd. 2 (2010); and terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2010); and, based on the May allegation, three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g), (h)(i), (h)(ii); false imprisonment in violation of Minn. Stat. § 609.255, subd.

2; and terroristic threats in violation of Minn. Stat. § 609.713, subd. 1. Comes Flying pleaded not guilty to each count, and a jury trial was held.

At trial, V.H. testified that Comes Flying had sexually assaulted her only once, on May 21, 2011, and that she reported an additional incident in order to be more believable. She explained that on the evening of May 21, Comes Flying arrived home while she was asleep on the living-room couch with her sister, D.H. Comes Flying entered the living room, dragged D.H. off the couch by her hair, and yelled at V.H. to go to her bedroom. V.H.'s mother called the police because of this altercation. Comes Flying left the house when the police arrived, but returned later that night. Upon returning home, Comes Flying entered V.H.'s bedroom and got into bed with her. According to V.H., Comes Flying refused to leave and removed V.H.'s shorts and underwear, pulled his pants down, and got on top of V.H. V.H. testified that when she tried to push Comes Flying off of her, he pushed her down and hit her several times. She explained that she did not cry for help or scream during the assault "because [Comes Flying] was just going to hit [her]" if she did. When V.H. stopped resisting, Comes Flying sexually penetrated her. At the close of V.H.'s testimony, the prosecutor dismissed the charges associated with the alleged March incident.

Comes Flying testified in his own defense. He admitted that on May 21, 2011, he ordered V.H. and D.H. out of the living room and left the house after his mother called the police. But he stated that he did not sexually assault V.H. after returning home.

The jury convicted Comes Flying of three counts of first-degree criminal sexual conduct and one count of false imprisonment. The district court sentenced Comes Flying

to 187 months' imprisonment for first-degree criminal sexual conduct and stayed imposition of the sentence for false imprisonment. This appeal follows.

D E C I S I O N

I.

Comes Flying challenges the sufficiency of the evidence in support of his conviction of first-degree criminal sexual conduct. In considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In conducting that review, we 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). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

First-degree criminal sexual conduct occurs when (1) a person engages in sexual penetration with another person; (2) the actor has a significant relationship to the complainant; and (3) the complainant was under 16 years of age at the time of the sexual penetration. Minn. Stat. § 609.342, subd. 1(g). Penetration includes any intrusion,

however slight, into the genital opening of the complainant's body by another. Minn. Stat. § 609.341, subd. 12(2) (2010).

Comes Flying argues that the state failed to prove the sexual-penetration element of first-degree criminal sexual conduct. He concedes that the evidence proves the remaining elements of the offense. Although V.H. testified that Comes Flying penetrated her vagina with his penis, Comes Flying argues that this evidence is insufficient because (1) V.H. was not credible and (2) corroborative evidence was required.

A. Witness credibility

In arguing that the jury should not have believed V.H.'s testimony, Comes Flying invites us to reweigh the jury's credibility findings. We decline to do so. The task of weighing witness credibility is solely for the jury, not the appellate courts. *State v. Reichenberger*, 289 Minn. 75, 79-80, 182 N.W.2d 692, 695 (1970). Because we are ever mindful to defer to the jury's credibility determinations, *see State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002), we disagree with Comes Flying's contention that V.H. could not have been deemed credible because of (1) inconsistencies between her report to law enforcement and her trial testimony, (2) her failure to promptly report, and (3) the lack of physical evidence or eyewitnesses in this case.

It is without dispute that V.H.'s trial testimony was inconsistent with her report to law enforcement in two respects. When Jerard Hoeger, Special Agent with the Bureau of Indian Affairs, interviewed V.H. concerning her allegations of sexual assault, V.H. stated that Comes Flying sexually assaulted her in March 2011 and on May 21, 2011. She also stated that during the latter incident, her mother entered the room and yelled at Comes

Flying. At trial, V.H. explained why she gave a false report to law enforcement—she did it in order to be believed. She could not explain, however, why she told Agent Hoeger that her mother entered the room during the assault. But "inconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event." *State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). Minor inconsistencies as to collateral details are insufficient to render a child-victim's testimony not credible. *State v. Levie*, 695 N.W.2d 619, 627 (Minn. App. 2005) (citing *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987)). The jury was fully apprised of the discrepancies between V.H.'s testimony and her initial reporting. And while the jury could have discredited V.H. because of those discrepancies, it was equally permitted to credit her testimony.

Comes Flying also asserts that V.H. could not have been deemed credible because she waited five months to report the sexual assault and because there was no physical evidence and no eyewitnesses testified. But Comes Flying offers no supporting argument or legal authority for the proposition that these circumstances required the jury to discredit V.H.'s testimony. And we disagree that these facts demand that the jury's finding on the veracity of V.H.'s testimony be reversed on appeal.

B. Corroboration

Comes Flying argues that the lack of evidence in this case requires reversal of his conviction. A sexual-abuse victim's testimony need not be corroborated to sustain a conviction. Minn. Stat. § 609.347, subd. 1 (2010). A conviction can rest on the uncorroborated testimony of a single credible witness. *State v. Foreman*, 680 N.W.2d

536, 539 (Minn. 2004). "Corroboration of an allegation of sexual abuse of a child is required *only* if the evidence otherwise adduced is insufficient to sustain conviction." *State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984) (emphasis added). A determination that the complainant's testimony is legally sufficient to support the verdict disposes of any necessity for corroboration. *Id.* V.H.'s testimony, credited by the jury, establishes the elements of the charged crime and is therefore sufficient to support the jury's verdict without corroboration.

The cases that Comes Flying cites to support his argument that corroborating evidence is required to sustain his conviction are distinguishable. In *State v. Huss*, the testimony of a victim of alleged child abuse was deemed insufficient to sustain a conviction because the child had been exposed by the state to a "highly suggestive book" about sexual abuse prior to trial. 506 N.W.2d 290, 292-93 (Minn. 1993). The *Huss* court noted that the child's testimony, which was even "contradictory as to whether any abuse occurred at all," might have been sufficient to sustain the conviction on appeal, absent her exposure to the suggestive book. *Id.* at 292. In *State v. Langteau*, the supreme court ordered a new trial based on the unique circumstances of the trial reflected by the jury's deliberations. 268 N.W.2d 76, 77 (Minn. 1978). In *State v. Gluff*, the victim's identification of appellant from a line-up was deemed insufficient because, among other deficiencies, the line-up procedures were tainted and unfairly prejudicial. 285 Minn. 148, 152, 172 N.W.2d 63, 65 (1969).

Finally, Comes Flying argues that V.H.'s testimony concerning her Facebook exchanges with Comes Flying support reversal. V.H. testified that when Comes Flying

expressed remorse in a message for "what he did," she thought that he was referring to his ongoing physical abuse of her. When asked whether Comes Flying might have also been referring to sexual assault, she replied, "Yeah." Comes Flying rightly points out that this testimony does not necessarily corroborate the allegation of sexual assault. But corroboration is not required. Comes Flying fails to persuade us that the lack of corroboration in these Facebook exchanges requires reversal.

II.

Comes Flying argues, alternatively, that the district court committed several evidentiary errors that warrant a new trial. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion and that appellant was prejudiced as a result. *Id.*

If the district court erred in admitting evidence over an objection, we must determine whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If so, then the error is prejudicial. *Id.* But where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. Minn. R. Crim. P. 31.02. "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). An error is "plain" when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles.

State v. Brown, 792 N.W.2d 815, 823 (Minn. 2011). An error affects a defendant's substantial rights when "there is a reasonable likelihood that the error substantially affected the verdict." *Id.* at 824 (quotation omitted). If the three-part test is met, we may correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (quotation omitted).

Comes Flying asserts three evidentiary errors on appeal: admission of (1) V.H.'s testimony about attempting suicide; (2) Agent Hoeger's opinion testimony about the behavior of sexual-abuse victims and sex offenders; and (3) an audio-recorded police interview with V.H.'s mother.

A. Suicide attempts

Over a relevance objection, V.H. testified that after the sexual assault, she harmed herself by cutting her wrists and attempting to hang herself. She further indicated that she cut her wrists at other times as well, including "every time [Comes Flying] would hit" her. Comes Flying argues that this testimony is irrelevant and, therefore, inadmissible. In the alternative, he argues that the evidence's probative value was outweighed by the risk of unfair prejudice. Because defense counsel objected to this testimony, any error in the admission of that testimony is subject to review under the harmless-error standard. *See Post*, 512 N.W.2d at 102 n.2.

Evidence must be relevant to be admissible. Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. The district court may in its discretion exclude

relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403; *see also State v. Olkon*, 299 N.W.2d 89, 101 (Minn. 1980) ("[R]ulings on evidentiary matters rest within the sound discretion of the [district] court."). "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

The evidence that V.H. tried to harm herself after the alleged sexual assault meets the liberal relevancy standard for admissibility because it tends to make it more likely, however minimally, that she suffered a trauma, such as a sexual assault, that compelled her to harm herself. We disagree with Comes Flying's assertion that the probative value of this evidence is outweighed by the risk of unfair prejudice. V.H.'s testimony about her attempts at suicide was brief and non-descriptive—consisting of short, even one-word, answers. Neither the prosecutor nor defense counsel belabored the issue; rather, they quickly moved on to other topics after establishing that V.H. had attempted suicide both after the alleged assault and at other times. Because this evidence did not invite the jury to decide the case on an improper basis, exclusion of that evidence under rule 403 was not warranted. We therefore conclude that the district court acted within its discretion by refusing to bar testimony about V.H.'s suicide attempts.

B. Agent Hoeger's opinion testimony

Victim-demeanor testimony

Agent Hoeger testified that, during his interview with V.H., she was withdrawn and scared "[a]s with most victims with this are." Comes Flying asserts that admission of this statement warrants reversal because Agent Hoeger was not qualified to testify as to the behavior of sexual-abuse victims. Because defense counsel objected to this statement, we review any error in the admission of this testimony under the harmless-error standard. *Post*, 512 N.W.2d at 102 n.2 (reviewing for the reasonable possibility that the evidentiary error "significantly affected the verdict").

"Expert testimony" broadly includes testimony in "all areas of specialized knowledge," the admissibility of which is governed by rule 702. *See* Minn. R. Evid. 702 1977 comm. cmt. Non-scientific expert testimony satisfies rule 702 only if (1) the witness is a qualified expert, (2) the expert's opinion has foundational reliability, and (3) the expert's opinion is helpful to the jury. *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). The district court has discretion in determining whether a witness is sufficiently qualified as an expert in a given subject area to justify admission of his opinion on that subject. Minn. R. Evid. 702 1977 comm. cmt.

There is no indication in the record that the prosecutor planned to call Agent Hoeger as an "expert witness" on the general behavior of sexual-abuse victims or that the district court deemed him qualified to offer an opinion on that subject. Nor is there any record evidence—no testimony, no curriculum vitae, or the like—concerning Agent Hoeger's experience working with sexual-abuse victims. Because Agent Hoeger's

testimony involved an area of specialized knowledge without any showing that he was qualified to offer an opinion in that area, the district court erred by admitting this testimony.

Although Agent Hoeger's statement was erroneously admitted, we cannot conclude that it was likely to have significantly affected the jury's verdict. Only a few words ("as with most victims with this are") tainted Agent Hoeger's otherwise admissible statement. And after he made the gratuitous statement, the prosecutor moved on without any follow-up on the topic of victim demeanor. We therefore conclude that the error was harmless.

Predator-offender testimony

For the purposes of impeaching both Agent Hoeger and V.H., defense counsel asked Agent Hoeger whether it struck him that V.H.'s two reported incidents were "remarkably similar." Agent Hoeger replied that it did not. Immediately following that testimony, the prosecutor asked on re-direct examination why it was not striking to Agent Hoeger that the reported events were similar. Agent Hoeger replied: "From my training a sexual predator usually does the same thing over and over . . . consistent with their acts." Defense counsel did not object. Therefore, any error in the admission of that statement is reviewed for plain error. Minn. R. Crim. P. 31.02; *see Strommen*, 648 N.W.2d at 686 (requiring proof of a plain error that affects substantial rights).

On appeal, the state argues that defense counsel "opened the door" to Agent Hoeger's otherwise inadmissible statement about predatory behavior. The opening-the-door doctrine applies when one party introduces evidence that allows the opposing party

to respond with otherwise inadmissible evidence. *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007). A party opens the door by either gaining an unfair advantage or by presenting the fact-finder with a misleading or distorted representation of reality. *Id.* Here, the prosecutor's question concerning Agent Hoeger's recollection of V.H.'s reports was permissible because defense counsel "opened the door" to that evidence by attacking Agent Hoeger's credibility on cross-examination. Agent Hoeger's response was permissible to restore his credibility.

Even if defense counsel had not invited Agent Hoeger's testimony, the admission of his objectionable statement did not affect Comes Flying's substantial rights. An error affects a defendant's substantial rights only when "there is a reasonable likelihood that the error substantially affected the verdict." *Brown*, 792 N.W.2d at 824 (quotation omitted). Agent Hoeger's testimony on predatory behavior was brief, rather vague, and undeveloped. Furthermore, it was not inflammatory. On these facts, it was unlikely to have substantially affected the jury's verdict.

C. Audio-recorded interview with V.H.'s mother

On May 21, 2011, Officer Joshua Gareis responded to the emergency call from Theresa Hawk, V.H.'s mother, following Comes Flying's altercation with V.H. and D.H. After Hawk testified, the prosecutor re-called Officer Gareis as a rebuttal witness and offered into evidence the audio recording of that interview. The recording was admitted and played for the jury without objection. *See Strommen*, 648 N.W.2d at 686 (triggering plain-error analysis).

During that interview, Hawk stated that Comes Flying came home that night and "started jerking [V.H. and D.H.] out of the bed and started hollering at them." Hawk repeated throughout the interview that she was "scared" and unable to "stop shaking." Comes Flying contends that the district court erred by allowing the state to play the portion of the interview in which Hawk explained that she was scared because Comes Flying "is mean when he gets drunk." Comes Flying argues that this was inadmissible character or past-act evidence. The state asserts that the audio recording was admitted as "relationship evidence."

"Relationship evidence," refers to "[e]vidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members." Minn. Stat. § 634.20 (2010). "Similar conduct" includes, but is not limited to, evidence of domestic abuse, violation of an order for protection, and violation of a harassment restraining order. *Id.* Evidence is admissible pursuant to section 634.20 unless the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* "[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

Nothing in the record supports the conclusion that the district court admitted the audio recording as relationship evidence under section 634.20. The state's pretrial notice of its intent to admit relationship evidence makes no reference to Officer Gareis's interview with Hawk. There was no discussion on the record concerning which "similar

conduct" the state sought to admit pursuant to the relationship-evidence statute. And the district court did not pass on the issue of relationship evidence generally or on the admissibility of the audio recording specifically, because those issues were never raised. Contrary to the state's assertion, the district court did not admit the recorded interview pursuant to section 609.34.

Therefore, we must resolve whether Hawk's statement about Comes Flying being "mean" when intoxicated was inadmissible character or past-act evidence. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Minn. R. Evid. 404(a). Likewise, evidence of a past act is inadmissible "to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). But past-act evidence may be admissible if offered for other purposes. *Id.*

The prosecutor offered the audio recording for the purposes of impeaching Hawk. Hawk testified that 11 people were staying at her house and were present at the time the alleged sexual assault occurred. But in her interview with Officer Gareis that evening, Hawk did not mention the presence of anyone other than V.H., D.H., herself, and Comes Flying. There is no indication in the record that the prosecutor sought to admit the interview without redaction for the purpose of proving a conforming act—i.e., that because Comes Flying had been mean in the past, he was mean on May 21, 2011. As such, we are not persuaded that the audio-recorded interview contains inadmissible character or past-act evidence.

Comes Flying also challenges the district court's decision to grant the jury's request to hear the recorded interview after the close of evidence, again arguing that the interview contains inadmissible character evidence. The district court replayed the recorded interview in open court upon notice to both parties, pursuant to Minn. R. Crim. P. 26.03, subd. 20(2), because the evidence was not unduly prejudicial and was relevant to the question of whether Hawk had been impeached. Because the recorded interview was offered for a permissible purpose—impeachment—the district court neither abused its discretion nor committed error by replaying the interview in open court.

III.

In his pro se supplemental brief, Comes Flying asserts that the district court prohibited him from calling defense witnesses and stated that there was no time for his witnesses. There is no evidence whatsoever in the record to support this assertion.

Affirmed.