STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0944

State of Minnesota,
Respondent,

vs.

Vanlenzeo Delrentrus Brent,
Appellant.

Filed May 13, 2013
Affirmed in part, reversed in part, and remanded
Hooten, Judge

Hennepin County District Court
File No. 27-CR-11-5977

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, 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; Ross, Judge; and Smith, Judge.

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

HOOTEN, Judge

Appellant challenges his convictions and 360-month sentence after a jury found him guilty of six counts of first-degree criminal sexual conduct, one count of attempted

first-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct involving multiple minor victims. Appellant argues that: (1) the district court erred by permitting the prosecutor to ask a young victim leading questions about the incidents of abuse; (2) it was error to allow the jury to view videos of the victims' CornerHouse interviews; (3) the prosecutor committed prejudicial misconduct by appealing to the jurors' passions and prejudices by encouraging them to convict based on sympathy for the victims; (4) the district court judge did not have the legal authority to preside over his trial; (5) the record is insufficient to support one of the charges for which he was found guilty; and (6) the district court erroneously sentenced him for the lesser included offenses of second-degree criminal sexual conduct and attempted first-degree criminal sexual conduct when the charges arose from the same course of conduct as his conviction for first-degree criminal sexual conduct.

Because the district court did not err by permitting limited leading questions to a young victim-witness exhibiting hesitance in providing testimony or by permitting introduction of the victims' CornerHouse interviews, and because appellant is not entitled to relief based on any other aspect of the trial proceedings, we affirm all of the convictions, but reverse and remand for resentencing.

FACTS

K.H. was 14 years old at the time of trial. She moved to Minneapolis in 2003, when she was six years old, along with her younger brother, N.H., and her older sister. In Minneapolis, K.H. and N.H. lived with their aunt and their cousins, including appellant, who was an adult. K.H. testified that appellant began molesting her sometime around her

seventh birthday. When she first moved into her aunt's home, appellant would give her candy in the basement of the residence without asking for anything in return, but eventually appellant began asking for sex in exchange for the candy. The first instance of abuse occurred when she and appellant were walking to the store and he touched her buttocks while she was eating candy. When they got home, she went into the basement where appellant laid her on the floor in the laundry room, removed her pants, "put [her] legs over [her] head and then he put his private part [inside her]" for "[m]aybe five minutes or so."

Similar incidents of abuse continued through 2008. K.H. explained that appellant touched her chest over and under her clothes, touched her buttocks over her clothes with his hands, touched his "private part" to her private parts "on [her] bare skin," and stated that his private part went inside her private part more than ten times. K.H. also saw appellant "feeling on [N.H.] when [N.H.] was laying down, like bending over" and not wearing boxers. K.H. did not disclose the abuse right away because she was scared and because she did not think her aunt would believe her. She planned on disclosing the abuse after moving out of the house "[b]ecause I wouldn't want to stay in the house because . . . people might look at me different in the house if I told on their family."

N.H., who was 13 years old at the time of trial, also testified that appellant touched him in ways he did not like, beginning when he was five or six years old and continuing until he was about nine or ten years old. He stated that appellant "usually put his hands on me and rubbed around me and everything," but initially denied that appellant touched his chest, buttocks, or private parts. However, after being shown a picture of the front

and back side of a male body, N.H. circled the penis, buttocks and back, and answered in the affirmative when asked if the parts he circled were where appellant touched him and the part of appellant's body that touched him. N.H. explained that he and K.H. had to let appellant touch them in order to receive candy and stated that appellant touched his buttocks with his private part and that appellant put his private part inside his buttocks on one or two occasions.

K.H. and her sister eventually left to live with a neighbor after her aunt "put [them] out of her house" for touching her camera. The neighbor first came to know K.H. and her siblings through their charter school. After the neighbor punished K.H. for a suspension from school in late 2010, K.H. wrote a letter to the neighbor in which she explained that she had been "doing badly in school" because she was thinking about appellant. She wrote that appellant "put his penis in me" when she was seven, and that he told her he would give her candy if she agreed not to tell anyone. She also wrote that she did not tell her aunt because she did not think she would believe her and that she felt bad about the sexual encounters. When the neighbor confronted her about the specifics of the abuse, K.H. disclosed more details about appellant's abuse towards her and N.H. After this conversation, the neighbor called child protection.

At the request of child protection and law enforcement, N.H. participated in a CornerHouse interview on November 3, 2010. During the interview, N.H. admitted that another cousin came to see him at school, and, after telling him that his sister had been sexually abused by appellant, asked if anyone had been touching him inappropriately. He acknowledged that in response to this, he denied that appellant had touched him or that he

touched appellant's private parts. However, during the CornerHouse interview, he stated that appellant told him to take off his clothes on a couple of occasions in exchange for candy. While he initially stated that appellant did not want him to do anything once his clothes were off, N.H. later stated that on one occasion, appellant tried to touch his "stomach and stuff and down lower [over his clothes]." He explained that he tried to tell his aunt, but she would not listen.

The next day, K.H., in an interview at CornerHouse, stated that during the time that she and N.H. lived with her aunt, appellant was "trying to feel" on her and N.H., but she did not feel comfortable disclosing the acts until she moved in with the neighbor. In describing the abuse that occurred between 2004 and 2008, she stated that appellant touched her "everywhere," including her chest, vagina, and buttocks. She stated that he touched her chest over and under her clothes while at the same time telling her that it would help the breasts grow, that appellant would lift her clothes off and put his hands in her pants and in her vagina, and that appellant "stuck his penis" in her vagina more than ten times over the course of four years, perhaps as often as once a day. K.H. also disclosed that appellant abused her brother, N.H., both in and out of her presence. She stated that she saw appellant tell her brother "to bend over and then he stuck his fingers in my brother's butt and then he put ice on . . . his penis and stuck it in my brother's butt," that he used the ice so it would not hurt, and that appellant took N.H. to get candy while his penis was still in N.H.'s buttocks.

After these interviews, N.H. was removed from his aunt's home. After his interview, N.H. informed K.H. that he did not disclose everything. Upon receiving this

information, the sergeant investigating the sexual abuse allegations met with N.H. at school and asked him to participate in another interview and to write something down if that made him feel more comfortable. The next day, when the sergeant picked up N.H. from a children's shelter to transport him to the second interview, N.H. gave him a note stating that appellant "tried to force me to kiss him and he tried to have sex with me. I was like no."

During his second CornerHouse interview on November 5, 2010, N.H. admitted that he was not ready to talk about certain things during the first interview. He referenced his written note, said that appellant asked him to kiss him and attempted to solicit sex, and also affirmed that he had wanted to speak with his sisters because they may have remembered things that he did not. He also stated that appellant touched his back and made his hand touch appellant's buttocks, and described an occasion on which appellant walked around the basement naked in the morning in a manner that made him think that appellant wanted him to look at him. He denied that appellant tried to rub against him but stated that appellant tried "to put his thing in my face" when soliciting sex. At trial, N.H. explained that he was better able to disclose the abuse at his second CornerHouse interview. He explained that the cameras at CornerHouse made him uncomfortable because he was afraid that his aunt, with whom he was still residing at the time of his first interview, would see the video and think he was gay.

A jury found appellant guilty of five counts of first-degree criminal sexual conduct relative to his sexual abuse of K.H. for each successive year from 2004 to 2008. Relative to his sexual abuse of N.H., the jury found appellant guilty of one count of first-degree

criminal sexual conduct, one count of attempted first-degree criminal sexual conduct, and one count of second-degree criminal sexual conduct. Appellant was sentenced on each count, with each sentence to be served concurrently, for a 360-month prison sentence.

D E C I S I O N

I.

Appellant argues that the district court erred by permitting the prosecutor to ask N.H. a series of leading questions regarding sexual contact and penetration. "The trial court's decisions with respect to when leading questions will be permitted will not be reversed in the absence of a clear abuse of discretion." *Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 679 n.7 (Minn. 1977).

During direct examination, after N.H. described how appellant eventually "started telling us to do things for the candy," the following exchange occurred:

> Q. Did you find out what you had to do to get the candy?
> A. Yes.
> Q. Was that to let [appellant] touch you?
> A. Yes.
> Q. Was that to let [appellant] touch your butt?
> A. Yes.
> Q. Was that to let [appellant] touch your butt with his private part?
> A. Yeah.
> Q. Was that to let his private part go into your butt?

Appellant's trial attorney objected to this last question as leading, and the district court overruled the objection. N.H. answered in the affirmative and confirmed that it happened "[o]nce or twice."

Minn. R. Evid. 611(c) states that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness testimony." "Generally, leading questions should not be permitted when the witness is sympathetic to the examiner." Minn. R. Evid. 611(c) cmt. "However, for preliminary matters and the occasional situation in which leading questions are necessary to develop testimony because of temporary lapse of memory, mental defect, immaturity of a witness, etc., the court may permit inquiry by leading questions on direct examination." *Id.* There is limited authority permitting the use of leading questions by the state where a young victim of sexual abuse exhibits hesitancy to describe alleged abuse during trial. *See State v. Newman*, 93 Minn. 393, 394, 101 N.W. 499, 500 (1904) (finding that trial court did not abuse its discretion by permitting county attorney to ask leading questions, in a prosecution for "the crime of carnally knowing a female child more than ten and under fourteen years of age," to the witness who "was in some particulars an unwilling witness," and noting that "very few of them were answered"); *see also United States v. Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983) (concluding that district court did not abuse its discretion in permitting leading questions to victims of sexual assaults who were "hesitant to answer questions regarding the sexual assaults," noting their testimony that defendant "threatened to kill them if they told anyone what had occurred"); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980) (finding that trial court did not abuse its discretion by permitting the government prosecutor to ask leading questions, noting that "[t]he victim's hesitancy to testify concerning this matter was understandable").

In support of his argument that the district court erred in allowing the prosecutor to ask N.H. leading questions, appellant asserts that "[b]efore trial, N.H. had never alleged that [appellant] engaged in sexual penetration or sexual contact as defined for purposes of first-degree criminal sexual conduct," and suggests that these leading questions improperly suggested testimony concerning appellant's alleged abuse. While N.H. did not specifically describe an act of sexual penetration during his interviews at CornerHouse, K.H. had provided a very graphic description of appellant penetrating N.H. with his penis. Also, N.H. had written a note to the investigating police sergeant that appellant tried to force him to have sex with him.

Throughout the investigation and at trial, N.H. displayed reluctance or unwillingness to either talk or testify about the abuse. The prosecutor asked N.H. if anyone touched him in a way that he did not like. After answering in the affirmative, the prosecutor asked who did that, and N.H. identified appellant. N.H. initially denied that appellant touched his chest, buttocks, or private parts, but also, without specific prompting, stated that appellant "touched [him] sometimes with his hands and sometimes with other parts." While he answered "no" when asked if it was hard for him to talk about the abuse, he said it would be easier if he was shown a picture of a male, which in turn led to his identifications of the body parts touched by appellant. He also explained, without specific prompting, that he had been afraid to talk about what had occurred because he did not want people to think he was gay.

It was only after this portion of his direct testimony and his clear hesitancy to explain the details of the alleged abuse that the prosecutor began asking him "yes" and

"no" questions regarding how appellant touched N.H. Based upon his use of the exhibit depicting the male body and these simpler questions, N.H. appeared to become more comfortable testifying. Appellant claims that these measures were not necessary because N.H. indicated at one point that the sexual abuse was not difficult to discuss. However, this statement was contradicted by N.H.'s reluctance to discuss the details of sexual abuse and his demonstrated need for prompts in the form of an exhibit of a male body and simpler questions. Under these circumstances, we conclude that the district court did not abuse its discretion by allowing the prosecutor to ask N.H. limited leading questions on direct examination.

II.

At trial, appellant objected to the district court's decision to permit the jury to watch the victims' videotaped CornerHouse interviews. The state argued that the videotaped interviews were admissible as prior consistent statements under Minn. R. Evid. 801(d)(1)(B) and as probative evidence under Minn. R. Evid. 807.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). "But even if a trial court errs in an evidentiary ruling, we will not reverse unless the error substantially influenced the jury to convict." *State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

A. Minn. R. Evid. 801(d)(1)(B)

> An out-of-court statement is not hearsay, and is admissible as substantive evidence if (1) the declarant testifies at the trial or hearing; (2) the declarant is subject to cross-examination concerning the statement; (3) the statement is consistent with the declarant's testimony; and (4) the statement is helpful to the trier of fact in evaluating the declarant's credibility as a witness.

State v. Zulu, 706 N.W.2d 919, 924 (Minn. App. 2005) (citing Minn. R. Evid. 801(d)(1)(B)). "[B]efore the statement can be admitted, the witness' credibility must have been challenged, and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged." *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). "[A] prior consistent statement might bolster credibility by showing a fresh complaint, obviating an improper influence or motive, providing a meaningful context, or demonstrating accuracy of memory." *Bakken*, 604 N.W.2d at 109 (concluding that district court properly exercised discretion by deciding that a witness's prior consistent statement bolstered credibility given that witness's "sketchy recollection at trial"). "The trial testimony and the prior statement need not be identical to be consistent, and admission of a videotaped statement that is 'reasonably consistent' with the trial testimony is not reversible error." *Zulu*, 706 N.W.2d at 924 (citation omitted) (quoting *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998)).

As a key issue in the case, appellant challenged the credibility of N.H. and K.H., both of whom testified about appellant's abuse and were cross-examined by appellant's attorney. During his first CornerHouse interview, N.H. denied being touched on his private parts or touching another person's private parts. But he also claimed that

appellant told him to take off his clothes in exchange for candy and on one occasion tried to touch him on his stomach "and down lower." After the first interview, N.H. gave the investigating sergeant a note which explained that appellant tried to have sex with him. At the second CornerHouse interview, he was more forthcoming in providing details of sexual abuse, including allegations of sexual touching and appellant putting his penis into his face when soliciting sex. At trial, N.H. was even more specific and, using the diagram of a male body, answered "yes" to questions asking whether appellant penetrated him.

Appellant argues that the details of abuse set forth in both victims' CornerHouse interviews are inconsistent with their testimony at trial regarding whether there was penetration of N.H., and that the district court abused its discretion in allowing the interviews into evidence.[1] Appellant, citing *Bakken*, argues that because the inconsistencies in the minor victims' statements in the interviews and their trial testimony affect the elements of the criminal charge, such statements are inadmissible under Rule 801(d)(1)(B). 604 N.W.2d at 110. In *Bakken*, the defendant was charged with third-degree criminal sexual conduct for "alleged penetration of a victim at least 13 years of age when the [defendant] was more than 24 months older," and two counts of first-degree criminal sexual conduct for alleged "penetration under circumstances causing the victim to fear imminent great bodily harm, and penetration when the [defendant] was armed with a dangerous weapon." 604 N.W.2d at 107–08. This court noted that the victim's

[1] Appellant makes no such argument regarding the use of these videotaped interviews with regard to the sexual abuse of K.H.

"trial testimony and his videotaped interview were sufficiently consistent as to the general location of the assault, the identity of the perpetrator, and the nature of the acts of penetration." *Id.* at 110. However, "Bakken's alleged threat, use of a knife, cutting of [the victim's] arm, and ripping off of [the victim's] clothes" was included in the videotaped interview and was inconsistent with testimony at trial, where the victim made no such allegations. *Id.* This court found the discrepancies to be "significant because, if the jury believed the inconsistent videotaped statements, the criminal conduct would legally escalate from third-degree to first-degree." *Id.* We declared that "where inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule." *Id.* Notwithstanding our determination that the trial court erred in admitting the videotaped interviews in *Bakken*, we found that the error did not substantially affect the jury's verdict as evidenced by the fact that the jury did not find the defendant guilty of first-degree criminal sexual conduct. *Id*.

Unlike *Bakken*, where the only evidence of first-degree criminal sexual conduct was the victim's videotaped interview, here there was testimonial evidence of first-degree criminal sexual conduct with regard to N.H. both at trial and during the videotaped interviews. While scrutiny of N.H.'s videotaped interviews establish that he disclosed far less and spoke of the alleged abuse in far more general terms than his testimony at trial, N.H. was nonetheless consistent in his claims that appellant engaged in inappropriate sexual touching and solicitation of sex. K.H., who provided a more graphic description

of the incident with N.H. in her CornerHouse interview, explained at trial that appellant was "feeling on him" when N.H., while naked, was bending over like a person would bend over to tie his shoes. Appellant asserts that, during trial, K.H. never stated that any sexual penetration occurred. But K.H. testified that she knew appellant was touching N.H. during this incident because he was standing so close to N.H. during the time N.H. was in this position. Thus, K.H.'s description of the incident with N.H. is reasonably consistent with her description of the incident at trial, the latter version being a more general, but less graphic, description of the incident. The evidence as a whole establishes that N.H. and K.H. generally described the same occurrence of abuse, going into more or less detail as their memory, surroundings, and level of comfort would permit.[2] Thus, we conclude that the district court did not abuse its discretion by admitting videotaped CornerHouse interviews of N.H. and K.H. to assist the jury in assessing their credibility.

B. Minn. R. Evid. 807

The district court also admitted the videotaped CornerHouse interviews under Minn. R. Evid. 807, concluding that it would be helpful to the trier of fact to hear and observe the victims during the time period in which the incidents were reported. Appellant argues that none of the statements "were more probative than other evidence available through reasonable efforts," and that both victims were available to testify at trial.

[2] K.H. also testified that her memory about the incident was better during her CornerHouse interview than at trial.

The state argues that the interviews were offered as corroborative evidence of the material facts regarding the sexual abuse, and that the recorded interviews were more probative than any other corroborative evidence available, particularly in light of the passage of time between appellant's criminal acts and the trial. While the state cites no authority in support of the notion that evidence may be admissible under rule 807 because it is more corroborative than any other available evidence, this assertion is consistent with the text of rule 807, which states, in relevant part, that "the statement [must be] more probative *on the point for which it is offered* than any other evidence which the proponent can procure through reasonable efforts." (Emphasis added.) Given the general consistency between the interviews and the trial testimony as discussed above, it is not unreasonable to describe the CornerHouse interviews as corroborative of K.H. and N.H.'s testimony at trial. While a "victim's testimony need not be corroborated in all sex crime cases[,] . . . the testimony of the complainant and the evidence put forth by the defense may necessitate reversal absent corroboration." *State v. Blair*, 381 N.W.2d 908, 910 (Minn. App. 1986) (citation omitted), *review denied* (Minn. Apr. 11, 1986); *see also State v. Campa*, 390 N.W.2d 333, 335 (Minn. App. 1986) (concluding that prior consistent statements of a victim of a sex crime identifying her abuser were admissible to corroborate her testimony), *review denied* (Minn. Aug. 27, 1986). Because the CornerHouse interviews were more probative relative to the credibility of K.H. and N.H. than any other evidence that may have been procured through reasonable efforts and were helpful to the trier of fact, the interviews were admissible under rule 807.

III.

Appellant argues that the evidence was insufficient to establish guilt on count two: first-degree criminal sexual conduct against K.H. in 2004. "When reviewing a claim for sufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably find that the defendant was guilty of the charged offense." *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted). "In reviewing a jury verdict, we view the evidence in the light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved contrary evidence." *Id.*

"[I]nconsistencies in the state's case will not require a reversal of the jury verdict." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980); *see also State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) ("Minor inconsistencies and conflicts in evidence do not necessarily render testimony false or provide the basis for reversal."), *review denied* (Minn. Aug. 17, 2004). "This is especially true when the testimony goes to the particulars of a traumatic and extremely stressful incident." *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983). The jury is in the best position to evaluate the credibility of a witness. *State v. Henderson*, 620 N.W.2d 688, 705 (Minn. 2001).

Appellant asserts that the state did not satisfy its burden of proof relative to this count because K.H. was unable to positively state whether the abuse began in 2004 or 2005. K.H. testified that she was born on February 24, 1997, and turned seven on February 24, 2004. She testified that appellant began abusing her starting with her seventh birthday, but that she did not quite remember because she was young; she

testified that she had to do things for the candy when she was seven, but does not remember if this happened when she was six; when asked how many times appellant put his private part into her private part, she testified that she did not want to guess, but that it was probably "from [her] being seven to 11"; and when asked about the first time appellant abused her, she testified that appellant put his private part in her after walking to the store when she was "[l]ike seven. I'd say seven—seven or eight." During her CornerHouse interview, K.H. stated that abuse began in 2004. At another point during the interview, she stated that she tried to tell her aunt that appellant tried to kiss her when she was six or seven.

Thus, it is clear that K.H. did not have precise recollection of the time at which appellant's abuse began, but she consistently stated that it began approximately when she was seven years old. This is consistent with the timeframe in which she and her siblings moved to Minnesota in 2003 and with her recollection that appellant was nice to her when she first arrived and only required sexual acts in return for candy "as time passed." Since K.H. turned seven shortly into the calendar year of 2004, there was a substantial amount of time over which the abuse may have occurred throughout the remainder of the year. Given K.H.'s testimony, a jury could reasonably conclude that appellant committed first-degree criminal sexual conduct against K.H. in 2004.

IV.

Appellant argues that the prosecutor committed plain error by reiterating the children's background during every phase of the trial, by eliciting testimony regarding the children's feelings, by concentrating on K.H.'s statement that she felt like "a nasty

ho" and on N.H.'s anxiety that people might think he was gay during closing arguments, by emphasizing the role of candy in the alleged abuse, and by ending her closing argument with an emotional plea. Appellant did not object to any of these aspects of the state's argument at trial.

"Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial, no matter how strong the evidence of guilt." *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). "For claims of prosecutorial misconduct to which a defendant did not object, we apply a modified plain-error test." *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009). Appellant must first "show that the misconduct is error and that it is plain." *Id.* "The burden then shifts to the State to demonstrate that the error did not affect the defendant's substantial rights." *Id.*

"A 'prosecutor must avoid inflaming the jury's passions and prejudices against the defendant.'" *State v. Morton*, 701 N.W.2d 225, 236 (Minn. 2005) (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)). "When credibility is a central issue, we pay special attention to statements that may inflame or prejudice the jury." *Id.* "While the state's argument need not be colorless, it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *Id.* at 237 (quotation omitted). "Because sexual-abuse cases generally evoke emotional reactions, an attempt by the prosecutor to exacerbate such reactions by making 'any emotive appeal' to the jury 'is likely to be highly prejudicial.'" *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008) (quoting *State v. Danielson*, 377 N.W.2d 59, 61 (Minn. App. 1985)), *review denied* (Minn. Sept. 23, 2008).

Appellant does not argue that the information about the children's background, as well as the victims' feelings about the abuse or the "candy-for-sex" aspect of the evidence, were not reasonable inferences from the evidence. Rather, he argues that this information was not relevant to the elements of the charges and that the prosecutor's "overemphasis" constituted misconduct. The prosecutor provided an overview of the children's background during opening argument and as part of her direct examination of K.H. and N.H. She also focused on the alleged use of candy to entice abuse. A victim's background and relationship with a defendant is a proper area of inquiry by the state. *See State v. Scales*, 518 N.W.2d 587, 593 (Minn. 1994) (concluding that the district court did not err in admitting photos of murder victim for purposes of providing background information about the family and to personalize the victim); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (concluding, in a homicide prosecution, that "[t]he state was entitled to provide the jury with a brief amount of information identifying the victims, so long as it did not try to create undue sympathy or arouse the passions and prejudices of the jurors"); *State v. Waukazo*, 374 N.W.2d 563, 565 (Minn. App. 1985) (finding no error in admission of evidence concerning defendant's prior assaults and forced sexual intercourse against victim-wife "to illuminate their relationship and place the incident with which Waukazo was charged in proper context"), *review denied* (Minn. Nov. 1, 1985).

Moreover, while the state may have presented more than a "brief amount of information" about the children's background, this information was relevant to explain N.H. and K.H.'s reluctance to fully disclose the allegations of abuse given K.H.'s

testimony that she did not think her aunt would believe her allegations, as well as N.H.'s apprehension that his aunt would see his CornerHouse interview. The same may be said of N.H.'s apprehension that people would think he was gay and K.H.'s assertion in her note to the neighbor that she felt like "a nasty ho." Discussion of appellant's use of candy to entice the abuse was relevant because N.H. and K.H. were mostly consistent in explaining that appellant gave them candy to participate in the abusive acts. The state also highlights the fact that appellant's trial attorney attempted to cast K.H. and N.H.'s allegations as a ploy to prevent them from being relocated to another state. We conclude, based on our close scrutiny of the record, that the prosecutor did not unduly emphasize the emotional aspects of the children's background or their experiences disclosing the abuse apart from what was necessary to present the facts necessary for a conviction.

Likewise, during closing arguments, the prosecutor recounted the children's background, their problems while living with their aunt, and the use of candy to entice the abuse, but did so in a manner connecting these issues to the question of whether appellant committed the abuse. The prosecutor also detailed the facts surrounding the disclosures, all of which were admitted into evidence during trial. In concluding her closing argument, the prosecutor stated:

> I'll leave you with candy. Think about how everyone says, "Don't take candy from strangers." [K.N. and N.H.] learned that not only can you not take candy from strangers, but you can't take candy from an otherwise trusted, loving, caring cousin because of what he would use that candy for.

During her rebuttal, the prosecutor stated:

> We tell children to tell when someone touches them in a way that is inappropriate. We tell them to go to the first adult. We tell them to go to their teacher. We tell them to go to their family members. We tell them to tell someone. All so that we don't believe them now?

While these statements appear somewhat calculated to stir up emotional reaction when considering appellant's actions, they were partially based on facts established at trial, and the comment on rebuttal was made in context of addressing appellant's theory that the allegations resulted from a desire to react against authoritative figures and to keep them from being relocated out of state. Aside from these statements, the closing arguments focused on the evidence from trial and their application to the elements of the criminal charges. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (focusing on "the closing argument as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence"). Thus, the prosecutor did not improperly encourage the jury to convict based on their emotions or passions. Because there was no error, we need not consider the remaining aspects of the plan-error analysis.

V.

Appellant argues that his convictions must be reversed because the district court judge who presided over his trial, the Honorable Patricia Kerr Karasov, resided outside of her judicial district. The supreme court concluded that "Judge Karasov did not reside in her judicial district from July 1, 2009, to September 30, 2009, in violation of Minn. Const. art. VI, § 4." *In re Conduct of Karasov*, 805 N.W.2d 255, 268 (Minn. 2011).

Judge Karasov was censured and suspended from judicial duties for six months without pay. *Id.* at 275.

"We review de novo whether a judicial officer has authority to preside over a felony trial." *State v. Irby*, 820 N.W.2d 30, 34 (Minn. App. 2012), *review granted* (Minn. Nov. 20, 2012). In *Irby*, this court addressed the argument that Judge Karasov "was neither a de jure judge nor a de facto judge because she violated Minn. Const. art. VI, § 4, and Minn. Stat. § 351.02(4) [(2010)] by residing outside of her judicial district." 820 N.W.2d at 33–34. "A de jure judge is a judge who exercises the duties of the judge's judicial office for which the judge has fulfilled all the qualifications." *Id.* at 34 (quotation and alteration omitted). While a constitutional defect in a judicial officer's authority to preside over a felony trial requires a new trial when the defects arise from an "unconstitutional delegation of authority to the judicial officer," "reversal and a new trial are not required when a defect in a judge's authority is merely technical and the judge remains a de facto judge." *Id.* (quotations and alteration omitted).

After noting the supreme court's decision not to remove Judge Karasov from office, this court concluded that Judge Karasov remained a de facto judge even if she was no longer a de jure judge due to the violation of the statutory residency requirement, and noted that the acts of a de facto judge are valid. *Id.* at 34–36. In doing so, the court highlighted the policy behind the de facto judge doctrine, namely:

> [T]o protect the interests of the public and individuals where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It would be a matter of almost intolerable inconvenience, and be productive of many instances of

> individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy.

Id. at 35 (quoting *Burt v. Winona & St. Peter R.R. Co.*, 31 Minn. 472, 476, 18 N.W. 285, 286–87 (1884)).

Appellant cites no binding authority for his argument that a de facto judge acts under color of law only because the procedural deficiency has not yet been discovered. Appellant argues that, as of his trial in October 2011, "[Judge Karasov] and the general public were fully aware of the violation of the Minnesota Constitution's residency requirement," and that findings addressing Judge Karasov's residency were published as early as March 2011. While the record does not reflect whether this particular argument was presented to the *Irby* panel, this court plainly concluded that Judge Karasov remained a de facto judge, if not a de jure judge, for purposes of a jury trial held in June 2011. *Id.* at 36. This is consistent with the rationale behind the de facto judge doctrine, which

> springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.

Ryder v. United States, 515 U.S. 177, 180, 115 S. Ct. 2031, 2034 (1995) (quotation omitted). The doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that *the legality* of that person's appointment or election to office is deficient." *Id.* (emphasis added).

As such, appellant's emphasis on the public's knowledge of a possible defect in Judge Karasov's authority is supportive of the application of the de facto judge doctrine to this particular matter. As of October 2011, Judge Karasov, as well as the Hennepin County Attorney's Office, appellant, and the general public, had no decisive knowledge of the legality or deficiency of her capacity to preside over appellant's jury trial. The disciplinary decision of the supreme court in *Karasov* was not issued until November 16, 2011. The state reasonably asserts that both Judge Karasov and the Minnesota Board on Judicial Standards appealed from the recommendations issued by the disciplinary panel, and Judge Karasov appealed from the panel's findings; the supreme court also noted that it had "not previously interpreted the residency requirement for district court judges in the Minnesota Constitution." *Karasov*, 805 N.W.2d at 264. Therefore, appellant's argument that his convictions must be reversed because of Judge Karasov's failure to reside within her judicial district for a period of time in 2009 is meritless.

VI.

Finally, appellant argues that his sentences for second-degree criminal sexual conduct and attempted first-degree criminal sexual conduct relative to N.H. must be reversed because they constitute lesser-included offenses and stem from the same course of conduct for his first-degree criminal sexual conduct conviction against N.H. The state concedes that it was error for the district court to sentence appellant for second-degree criminal sexual conduct and attempted first-degree criminal sexual conduct, and agrees that these sentences should be reversed. Therefore, in light of the parties' agreement on

appeal that these charges were part of a single behavioral incident, we reverse appellant's sentences and remand this matter for resentencing.

Affirmed in part, reversed in part, and remanded.