STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1331

State of Minnesota,
Respondent,

vs.

Bobby E. Jefferson,
Appellant.

Filed October 21, 2008
Affirmed
Minge, Judge

Dakota County District Court
File No. K1-06-2530

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 445 Minnesota Street, 1800 Bremer Tower, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Lansing, Judge; and Connolly, Judge.

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

MINGE, Judge

Appellant challenges his convictions for criminal sexual conduct, kidnapping, and terroristic threats on numerous grounds, including: (1) the admission of his statement to police and prosecutorial misconduct deprived him of a fair trial; (2) the examining nurse's testimony was inadmissible; (3) he was deprived of his right to a speedy trial; (4) the evidence was insufficient to support his convictions; and (5) he was deprived of effective assistance of counsel. We affirm.

FACTS

On August 4, 2006, C.B. told her mother that she was going to sleep over at a friend's house. At the friend's home, she and a few others took methamphetamine and smoked marijuana. When the friend's father discovered them smoking marijuana, he threatened to call the police. C.B. left and looked for a place to sleep because she did not want to arrive home in the middle of the night and face questions from her mother. Although another friend offered to let her stay at his house, she was unwilling to let that friend's mother see her "tweaked out." Instead, she walked through a Hastings mobile home park and planned to go home in the morning.

C.B. encountered appellant Bobby Jefferson and two other men as she wandered in the mobile home park. C.B. hinted to them that she was using drugs. The men were having a party and invited her to join them inside a mobile home. Jefferson offered her some cocaine and half of an ecstasy pill. After the party started to thin out, Jefferson and C.B. went to the bedroom to watch a movie. Eventually, Jefferson asked C.B. to show

him her breasts, but she told him "no." Jefferson told C.B. that she owed him something for the drugs and she replied that she would pay him $500 for them, but that she was not going to "give [herself] up like that."

C.B. went into the bathroom, where Jefferson cornered her and again asked to see her breasts. C.B. asked whether she could leave if she complied and Jefferson told her that she could. C.B. pulled down her top and demanded to be allowed to leave. Instead of allowing her to go, Jefferson told C.B. to remove the rest of her clothes. Jefferson said that, if C.B. did not perform oral sex on him, he would get a gun and force her to do it.

Afraid of getting hurt, C.B. undressed. When she tried to run out of the house naked, Jefferson pushed her onto the bed. Despite C.D.'s repeated requests to stop, Jefferson forced her to submit to several acts of vaginal and anal intercourse. C.B. testified that she left the bedroom between the incidents, but that Jefferson did not allow her to dress and that she was too frightened to leave. Around 10:30 the next morning, C.B. left the mobile home and walked home. She called a friend, who came over to console her. Her mother overheard what happened and called the police.

Jefferson was charged with first-degree criminal sexual conduct, third-degree criminal sexual conduct, kidnapping, false imprisonment, and terroristic threats. A jury found him guilty of third-degree criminal sexual conduct, terroristic threats, and kidnapping; Jefferson was found not guilty of first-degree criminal sexual conduct and false imprisonment. This appeal follows.

D E C I S I O N

I.

The first issue is whether the admission at trial of appellant Jefferson's statement to police constitutes plain error that requires a new trial.

Jefferson did not object to admission of the statement. In general, the failure to object to the admission of evidence constitutes a waiver of the issue on appeal. *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001). But "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02; *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "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) (citing *Griller*, 583 N.W.2d at 740). "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted) (citing *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)). "A defendant who claims the trial court erred in admitting evidence bears the burden of showing the error and any resulting prejudice." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

Jefferson asserts that the admission of his recorded statement was impermissible because it was irrelevant and prejudicial. "The relevant statements made during a police interview may be admissible, unless precluded by the constitution, statute or the rules of evidence." *State v. Tovar*, 605 N.W.2d 717, 725 (Minn. 2000). 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. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "When balancing the probative value of evidence against its prejudicial impact, 'unfair prejudice' is not merely damaging evidence, nor is it severely damaging evidence. Evidence satisfies the unfair-prejudice test when it persuades by illegitimate means and gives one party an unfair advantage." *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008); *see also State v. Townsend*, 546 N.W.2d 292, 296 (Minn. 1996). *"[A]ssuming a proper objection*, immaterial and irrelevant portions of an extrajudicial interrogation of a defendant should generally not be received in evidence. . . . [T]he defendant's references in a confession to prior crimes . . . should be excised unless there is some good reason for not doing so." *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979) (emphasis added) (citation and quotation omitted).

Here, after waiving his *Miranda* rights, Jefferson gave police officers a lengthy statement. Transcribed, it is 89 pages long and consists of two parts. In the initial part, Jefferson first denied that he was in Hastings and claimed that he was with his family the weekend the incident occurred. Jefferson next contradicted himself by saying that he would not say whether he was in Hastings or not. Jefferson then stated that he had learned that C.B. had made up a rape story because she was in trouble for being out all night. Jefferson still denied doing anything criminal. The officers stopped the interview.

The second part of the interview started three minutes after the first ended. Again, an officer read Jefferson his *Miranda* rights, which again Jefferson waived. During the

second part of the interview, Jefferson admitted being at the trailer park, that the victim walked up to a trailer in which he was attending a party, that they eventually watched a movie, and that ultimately they engaged in consensual sex. He also stated that when C.B. left, she gave him a pack of cigarettes and her phone number. C.B. confirmed that she left a pack of cigarettes with Jefferson.

The recorded statement was relevant evidence. It showed his shifting story, and constituted an admission of sexual acts with the victim on the night that she claimed to have been raped. However, Jefferson did not present himself favorably in the statement. He used excessively vulgar language, spoke depreciatingly of women, referred to the victim as a b-tch, and claimed he would never rape anybody because he can have sex whenever he wants. This reflected his personality and his attitudes. Jefferson also mentioned that he used to be a drug dealer. Had Jefferson objected, the admission of Jefferson's reference to his drug history would have been error. *See Hjerstrom*, 287 N.W.2d at 627. But defense counsel consented to minor editing of the statement and did not request redaction of this reference. Even if, on proper objection, some of Jefferson's statements should have been redacted, we conclude that on this record failure to exclude the statement was not plain error.

Furthermore, any questionable comments were fleeting, oblique references in a lengthy statement submitted to police officers. Jefferson has not directed our attention to any part of the transcript that identifies the prosecutor commenting on the statements for improper purposes, such as to establish a history as a drug dealer. Therefore, the

likelihood that the statement caused the jury to rely on improper considerations in convicting the defendant did not substantially outweigh its probative value.

II.

The second issue is whether Jefferson was deprived of a fair trial by prosecutorial misconduct. The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions. *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). Unobjected-to prosecutorial misconduct is analyzed under the plain-error standard. *Id.* at 299, 302. When plain error is established, the burden shifts to the state to establish that the misconduct did not prejudice the defendant's substantial rights. *Id*. at 302. The state meets this burden if it can show that there is no reasonable likelihood that the misconduct had a significant effect on the jury's verdict. *Id*.; *Griller*, 583 N.W.2d at 741. Where the credibility of the defendant and his explanation of events is at issue, we carefully evaluate allegations of prosecutorial misconduct. *See State v. Ashby*, 567 N.W.2d 21, 27 (Minn. 1997) (noting that reviewing courts "will pay special attention" to prosecutorial misconduct "where credibility is a central issue").

A. Racial Comment

Prosecutorial error is clear or obvious if the prosecutor's conduct contravenes case law, a rule, or a standard of conduct. *Ramey*, 721 N.W.2d at 302. "In cases where race should be irrelevant, racial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible." *State v. Paul*, 716 N.W.2d 329, 339 (Minn. 2006). Although a prosecutor's remarks that are

demeaning or that refer to race and the "real world" of the defendant are misconduct, comments that are brief, that summarize the evidence in the case, that are not demeaning, that do not mention race, culture, neighborhoods, or any particular community, and that are not intended to appeal to the passions of the jury are permissible. *Id.* at 339-40. "[I]t is improper to inject race into a closing argument when race is not relevant." *State v. Cabrera*, 700 N.W.2d 469, 474 (Minn. 2005).

Here, *defense* counsel brought up race in his closing argument when he stated:

> Now I'm not saying the Hastings police or [C.B.] or the State of Minnesota or anybody else has any racial agenda as far as this case is concerned, but the racial makeup of the people involved in this case is something that you must consider. And [Jefferson's] initial reluctance to be completely straight and forthcoming with the police is understandable under those circumstances.

In rebuttal, the prosecutor stated:

> [T]here's only one thing I have to say about the race issue. [Jefferson] brought this up with the police, too. Playing the race card is just a sign of somebody who is desperate and has nothing else to say, nothing else to rely on.

The prosecutor's statement does not refer to racial issues in a manner that constitutes prosecutorial misconduct. The prosecutor did not make a statement that is racially demeaning or invite the jurors to consider the "world" or "neighborhood" of the defendant and compare it to their own; nor did he make any oblique or derogatory reference to race, or attempt to interject race or to incite the prejudices or passions of the

jury. He simply tried to neutralize the comment by defense counsel. We conclude the prosecutor's statement is not plain error.[1]

B. Belittling the Defendant

It is misconduct for a prosecutor to belittle a defendant. *State v. Washington*, 725 N.W.2d 125, 134 (Minn. App. 2006). Nevertheless, the prosecutor's argument may be vigorous and adversarial so long as it is fair. *State v. Moseng*, 379 N.W.2d 154, 156 (Minn. App. 1985). In this case, the prosecutor pointed out Jefferson's verbal tics and their comparative regularity throughout the recorded statement. He indicated to the jury that the verbal tics might be relevant in assessing the defendant's credibility. This does not rise to the level of belittling the defendant or his credibility.

C. Reference to Jefferson's Criminal History

The prosecutor's arguments "must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Young*, 710 N.W.2d 272, 281 (Minn. App. 2006) (quoting *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995)). In *Young*, a prosecutor's misstatement of a material date was considered to be a basis for prosecutorial misconduct because "absent the incorrect date, the prosecutor's argument becomes implausible." *Id.*

Here, in his opening statement, the prosecutor said that C.B. would testify that Jefferson had told C.B. that if she did not cooperate he would put a gun to her head and

[1] While prosecutors may not disparage a defense, they are free to argue that a particular defense has no merit. *State v. Griese*, 565 N.W.2d 419, 428 (Minn. 1997). Jefferson does not raise the issue of disparagement on appeal, and on this record it does not appear that it would support a reversal.

that he had a prior gun offense. In a pretrial statement, C.B. had recounted such a claim by Jefferson. When C.B. testified, she did not mention Jefferson's reference to his prior gun offense. During his opening statement, the prosecutor did not know how C.B. would testify regarding Jefferson's reference to a prior offense. Thus, this brief misstatement of C.B.'s anticipated testimony is understandable. However, during closing arguments, the prosecutor again stated:

> [C.B.] told you she thought [Jefferson] might kill her. He said, "I've got a gun, don't make me get it. I'll put it to your head. *I've gone to prison for a gun offense before*." And I am not trying to make this person as a criminal or a bad person. You think, oh, well, he's done something, he's going to do it again. No. The whole point of that is he told her "I've got a gun." It doesn't matter if he had a gun or not. The police never found a gun. I don't care. The fact is he told her "I've got a gun, don't make me use it." She made the decision then, I'm not going to call his bluff. That is a pretty dangerous gamble to take.

(Emphasis added.) The prosecutor's second reference to a purported admission by Jefferson of a prior offense was not consistent with the trial record and constituted plain error. The question is whether this plain error was prejudicial.

The prosecutor's closing argument and rebuttal spanned 36 transcribed pages, and the impermissible argument is only two sentences. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (considering the relative length of a transcribed passage in determining whether, in the context of the entire closing argument, a comment deprived the defendant of a fair trial). Additionally, C.B. took the stand and accused Jefferson of the crime at issue in detailed and lengthy testimony. Jefferson's story changed during the course of the lengthy statements he gave to the police, and he admitted to sex acts with C.B. The

misstatement was not pivotal to the outcome of the case; it was not a "material" fact. The prosecutor made the misstatement in passing, in order to show that C.B. feared Jefferson would act on his threat to use a gun to force her to engage in sexual intercourse with him, not to influence the jury to convict Jefferson because of the offense. We conclude that based on this record, the error in referring to a prior gun offense did not compromise Jefferson's right to a fair trial, and there is no reasonable likelihood that the verdict was attributable to the prosecutor's improper statements.

III.

The third issue is whether expert testimony submitted at trial was an impermissible "ultimate conclusion" and whether an examining nurse was properly qualified as an expert. District courts have broad discretion in admitting expert testimony, and this court will only reverse if it finds abuse of that discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999); *see also State v. Grecinger*, 569 N.W.2d 189, 194 (Minn. 1997). Expert witnesses are allowed to give testimony in the form of opinion or inference if it is helpful to the fact-finder. Minn. R. Evid. 704; *State v. Chambers* 507 N.W.2d 237, 238-39 (Minn. 1993). "Expert opinion testimony is not helpful if the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject which is within their experience." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005). Additionally, experts may not give "ultimate conclusion testimony which embraces legal conclusions or terms of art." *Id.*

In *State v. Saldana*, 324 N.W.2d 227, 230-31 (Minn. 1982), the court ruled that testimony of a doctor as to a whether a woman had been raped was erroneously admitted because it amounted to an "ultimate conclusion" that should have been left to the jury. However, if a hypothetical question is properly constructed, an expert witness may answer the question with a statement of his/her opinion. *Sandhofer v. Abbott-Nw. Hosp.*, 283 N.W.2d 362, 366 (Minn. 1979). A hypothetical question may simply refer to other testimony, rather than explicitly stating the facts on which it is based. *McGrath v. Great N. Rwy. Co.*, 80 Minn. 450, 457-58, 83 N.W. 413, 415 (1900); *Johnson v. Quinn*, 130 Minn. 134, 136, 153 N.W. 267, 268 (1915).

Here, Jefferson complains of the following testimony, arguing the nurse gave an ultimate conclusion:

> PROSECUTOR: Would tenderness in the rectum, tenderness in the vagina be consistent with someone having consensual intercourse?
> NURSE: No.
> PROSECUTOR: Why not?
> NURSE: When you have consensual intercourse the body adapts and is able to lubricate itself and stretch itself to allow for consensual intercourse.
> PROSECUTOR: Was the physical examination of [C.B] consistent with what she told you happened?
> NURSE: Yes.

The complained-of testimony was not objected to and is analyzed under the plain-error doctrine. The nurse's opinion did not express the legal conclusion that C.B. was raped, but only that her physical examination of C.B. was consistent with her story. She did not use terms of art or tell the jury what result to reach. The presence of pain and the body's response to nonconsensual intercourse is not necessarily within the personal

experience of the jury members; it was therefore helpful and admissible testimony. Therefore, the failure of the court to *sua sponte* strike the testimony was not plain error.

Jefferson also argues in his pro se brief that the nurse was not qualified to present expert testimony regarding sexual assault. Minnesota Rule of Evidence 702 allows helpful "scientific, technical, or other specialized knowledge" to be presented to the jury through an expert witness qualified by "knowledge, skill, experience, training, or education." Here, the record indicates that the witness is a registered nurse who worked as an emergency room nurse and as a forensic nurse examiner. She worked in seven area hospitals around Dakota County. As a forensic nurse investigator, she is called in to collect evidence from alleged victims of sexual assault. She had training consistent with her job positions and testified in similar situations on prior occasions. She has worked as an investigative nurse for three years and conducted approximately 24 examinations of alleged rape victims. The nurse examined C.B. after the incident at issue. We conclude that the nurse was qualified to testify regarding sexual assault victims through education, training, knowledge, and experience.

IV.

Jefferson raises several issues in his pro se supplemental brief. Some have already been considered. Others are briefly addressed in this part of our opinion. Those not discussed have been fully considered by the court, and we conclude that they are meritless.

A. Speedy trial

Jefferson claims he was denied his right to a speedy trial. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; Minn. Const. art. I, § 6. In Minnesota, when a criminal defendant demands a speedy trial, the trial must commence within 60 days of the demand unless good cause is shown. Minn. R. Crim. P. 11.10. Delay beyond the 60-day period raises a presumption that a defendant's speedy-trial rights have been violated and requires a district court to inquire further into whether a violation has indeed occurred. *State v. Friberg*, 435 N.W.2d 509, 513 (Minn. 1989).

Jefferson demanded a speedy trial at his omnibus hearing on September 11, 2006. His trial was originally set for November 7, 2006, which was within 60 days. On the date of trial, Jefferson requested a continuance to obtain test results on blood and urine draws. The trial was reset to February 6, 2007 without objection from Jefferson or his counsel, and the trial commenced on that date. Because the district court and the prosecution were ready for trial on November 7, 2006, and because Jefferson requested the continuance, he waived his right to a speedy trial and that right was not violated.

B. Sufficiency of the Evidence

In deciding whether there is sufficient evidence to sustain a conviction, we carefully examine the record to determine whether a fact-finder could reasonably conclude that the defendant was guilty of the offense charged. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). The determination must be made under the assumption that the fact-finder believed the state's witnesses and disbelieved any contrary evidence, and must

be made in the light most favorable to conviction. *Id.* Despite the foregoing, the fact-finder must have acted with due regard for the presumption of innocence and the necessity of overcoming that presumption by proof beyond a reasonable doubt. *State v. Combs*, 292 Minn. 317, 320, 195 N.W.2d 176, 178 (1972).

Jefferson was convicted of third-degree criminal sexual conduct, kidnapping, and terroristic threats. "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor uses force or coercion to accomplish the penetration." Minn. Stat. § 609.344, subd. 1 (2006). A person is guilty of kidnapping when he "confines or removes from one place to another, any person without the person's consent" for the purpose of facilitating a felony, causing great bodily harm or to terrorize the victim, or to hold in involuntary servitude. Minn. Stat. § 609.25, subd. 1 (2006). A person who "threatens . . . to commit any crime of violence with the purpose to terrorize another" is guilty of terroristic threats. Minn. Stat. § 609.713, subd.1 (2006).

Here, C.B. identified Jefferson and stated that Jefferson threatened her and forced oral, vaginal, and anal sex upon her. She testified that she was "cornered" in the bathroom, not allowed to leave when she requested to do so, and forced onto the bed when she attempted to leave the bedroom. She stated that Jefferson threatened to put a gun to her head if she did not do as he demanded. We conclude that in this case the clear and unequivocal testimony of the victim witness is sufficient evidence to support Jefferson's convictions.

C. Ineffective Assistance of Counsel

Jefferson claims he was deprived of the effective assistance of counsel at trial. Such claims are mixed questions of fact and law and are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Effective assistance of counsel forms a part of the Sixth Amendment right to a fair trial under the United States Constitution. *Id.* (citations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 2063-64 (1984). A defendant must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

"To act within an objective standard of reasonableness, an attorney must provide his or her client with the representation that an attorney exercising the customary skills and diligence . . . [that a] reasonably competent attorney would perform under similar circumstances." *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (alteration in original) (quotation omitted). We consider the totality of the evidence to determine whether counsel was ineffective. *Rhodes*, 657 N.W.2d at 842 (citation omitted). We do not review matters of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *see Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (discussing the reluctance of appellate courts to second guess trial strategy, including what investigation to undertake). A strong presumption exists "that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Jefferson claims that he did not receive competent legal representation because his attorney failed to undertake certain investigatory measures by contacting additional witnesses. Appellate courts do not second guess trial strategy, including what investigation to undertake. *Opsahl*, 677 N.W.2d at 421. We conclude that because there is no indication that failure to pursue the investigatory avenues identified constituted a failure to provide competent legal representation, Jefferson was not denied effective legal representation.

The second basis for Jefferson's claim that he received ineffective assistance of counsel is his claimed violation of the right to a speedy trial. Jefferson's trial counsel asked for a continuance in the apparent hope that test results would provide exculpatory evidence. This delayed the trial for three months. There is no indication the delay was prejudicial. In addition, the delay was incident to counsel's decision regarding what investigation to undertake, a matter which this court does not review. *Opsahl*, 677 N.W.2d at 421; *Jones*, 392 N.W.2d at 236.

Affirmed.

Dated: