STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1216

State of Minnesota,
Respondent,

vs.

Kevin Deshon Ellis,
Appellant.

Filed July 31, 2017
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CR-14-3171

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Smith, Tracy M., Judge.

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

PETERSON, Judge

In this appeal from a conviction of first-degree criminal sexual conduct, appellant argues that the district court erred by (1) excluding evidence of the victim's past sexual

abuse, which appellant argues was relevant to establishing prior sources of her sexual knowledge; and (2) failing to specifically instruct the jury that it must unanimously agree that the state proved beyond a reasonable doubt one incident of sexual conduct. We affirm.

FACTS

The nine-year-old victim, A.B., initially told a friend that appellant Kevin Deshon Ellis, who was A.B.'s mother's boyfriend, had been sexually assaulting her. Later, A.B. disclosed the sexual abuse to her school's vice principal and described some of the sexual acts Ellis had done. The vice principal called the police, who brought A.B. to a temporary shelter.

A CornerHouse forensic-services director conducted a forensic interview of A.B. A video recording of the interview was played for the jury. During the interview, A.B. gave detailed descriptions of several sexual assaults. A.B.'s responses were age appropriate, and her body language changed from engaged during the initial rapport-building questions to less engaged when discussing the sexual assaults. When A.B. was later examined by a nurse, she described the same sexual acts that she had described to the vice principal and the forensic-services director.

Ellis was charged with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2012). The case was tried to a jury, which found Ellis guilty. This appeal followed sentencing.

D E C I S I O N

I.

"[Appellate courts] review a district court's evidentiary rulings for abuse of discretion." *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009). When a district court erroneously excludes evidence in violation of the defendant's constitutional rights, the conviction must be reversed if "there is a reasonable possibility that the verdict might have been different if the evidence had been admitted." *Id.* (quotation omitted).

Ellis sought to admit evidence that A.B. was sexually abused by her father, who pleaded guilty to sexually assaulting her three to four years before she made the allegations against Ellis. Ellis argues that, because the evidence provided an alternative basis for A.B.'s sexual knowledge, it was relevant to his defense that A.B. fabricated the allegations against him.

Except in specified circumstances that are not present in this case, the rape-shield law prohibits admission of evidence of a victim's previous sexual conduct. Minn. Stat. § 609.347, subd. 3 (2012); *see also* Minn. R. Evid. 412. But, "[d]espite the prohibition of a rape-shield law or rule, a [district] court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the jury otherwise would likely infer that the defendant was the source of the knowledge." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). The evidence is admissible "in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *Id.* "In making this determination, the court must balance the state's interest

in guarding the victim's privacy and protecting her from harassment against the accused's constitutional right of confrontation." *Jackson v. State*, 447 N.W.2d 430, 435 (Minn. App. 1999). Also, the court must "balance the probative value of the evidence against its potential for unfair prejudice." *Id.*

The district court addressed whether admission was constitutionally required and balanced the probative value against the potential for unfair prejudice. The district court did not err in finding that the evidence lacked probative value because, although there were some similarities between Ellis's alleged acts and the father's acts, there were also significant differences. Because the evidence lacked probative value, its admission was not constitutionally required, and the district court did not abuse its discretion in excluding it.

But even if excluding the evidence was error, Ellis is entitled to a new trial only if the error was prejudicial. *See State v. Kroshus*, 447 N.W.2d 203, 205 (Minn. App. 1989) (concluding that error in excluding evidence of victim's earlier sexual-abuse allegation was not prejudicial when the victim spontaneously reported sexual abuse, provided repeated consistent accounts of abuse by the defendant, provided a higher level of detail in allegations against the defendant compared to earlier allegations, and medical evidence supported allegations against the defendant), *review denied* (Minn. Dec. 20, 1989). Here, as in *Kroshus*, A.B. spontaneously reported the sexual abuse to her friend; A.B.'s trial testimony was consistent with her statements to the friend, the vice principal, the CornerHouse forensic-services director, and the nurse; and, during the forensic-services

director's interview, A.B. provided detailed descriptions of sexual acts, including sensory details and details about how and where Ellis committed the acts.

In addition to the factors present in *Kroshus*, A.B.'s credibility was bolstered by her demeanor during the interview with the forensic-services director and when telling the friend about the sexual abuse and by evidence about an incident that occurred when the friend spent the night at A.B.'s house. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (stating that sexual-assault victim's demeanor after assault occurred corroborated her testimony), *review denied* (Minn. Mar. 16, 1990). Also, Ellis's credibility was undercut because his version of events changed over time. Initially, he told an investigator that A.B. was sexually provocative and aggressive. At trial, Ellis testified that he was the disciplinarian in the household and that A.B. fabricated the allegations about him because she did not want him around.

Because there is not a reasonable possibility that the verdict might have been different if the prior-abuse evidence had been admitted, Ellis is not entitled to a new trial.

II.

"The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). "[T]he jury must unanimously agree on which acts the defendant committed if each act constitutes an element of the crime." *State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001). "But a jury verdict need not agree unanimously with respect to the alternative means or ways in which a crime can be committed." *State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

At trial, Ellis did not request a unanimity instruction or object to the jury instructions. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). Despite appellant's failure to object, this court may review the jury instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, this court examines the jury instructions to see if there was (1) error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012) (reviewing unobjected-to instructions for plain error).

Ellis argues that the district court erred in failing to instruct the jurors that they had to reach a unanimous verdict because the state "presented evidence of multiple distinct acts that allegedly took place on different dates, spanning a six-month time period." Ellis relies on *Stempf*, in which the state charged the defendant with one count of possession of a controlled substance but introduced evidence of two "separate and distinct" acts of possession, possession of methamphetamine at his office and possession of methamphetamine in his truck. 627 N.W.2d at 354, 358-59. The defendant had separate defenses for each act. *Id.* at 354. This court concluded that because the state failed to identify the act of possession upon which it relied, some jurors could have convicted the defendant for possession of the methamphetamine in his office, and others could have convicted him based on possession of the methamphetamine in his truck. *Id.* at 359. Because the jury instructions did not preclude this possibility, this court held that the defendant was denied his right to a unanimous jury verdict. *Id.* The *Stempf* court declined

to address the issue of whether a different result would have been warranted if a continuing course of conduct had been alleged. *Id.* at 358-59.

In *Rucker*, the defendant was charged with first-degree criminal sexual conduct and second-degree criminal sexual conduct involving two victims over a two-year period. 752 N.W.2d at 544. The court concluded that a unanimity instruction was not required. After noting that "[g]enerally, specific dates need not be proved in cases charging criminal sexual conduct committed over an extended period of time," the court explained:

> [A]ppellant was convicted of one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct as to each victim whom he was alleged to have abused over a two-year period, and the jury was instructed only to find whether the acts occurred between August 2003 and August 2005. Unlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents, and appellant did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact with either child-victim. The victims referred to a few specific dates in their testimony on which incidents of abuse occurred, but with respect to their testimony and the state's case as a whole, these recollections served as examples of appellant's conduct and not distinct allegations of sexual abuse. Based on the particular facts of this case, we conclude that the district court did not err in not instructing the jury that it must unanimously agree on which specific incidents formed the basis of appellant's convictions.

Id. at 547-48; *see also State v. Day*, 501 N.W.2d 649, 653 (Minn. App. 1993) (holding that defendant's right to a unanimous verdict was not violated when the jury instructions allowed the jury to convict for first-degree criminal sexual conduct if the victim either suffered personal injury or submitted due to a threat of bodily harm); *State v. Hart*, 477

N.W.2d 732, 737 (Minn. App. 1991) (holding that the "either/or" instruction allowing the jury to consider personal injury or submission to a threat of bodily harm under a charge of first-degree criminal sexual conduct did not violate appellant's right to a unanimous jury verdict), *review denied* (Minn. Jan. 16, 1992).

Although the complaint alleged, and this case was tried under, the theory that Ellis committed multiple acts of sexual abuse over a six-month period, Ellis was not charged under the statutory provision specifying multiple acts over an extended period of time. *See* Minn. Stat. § 609.342, subd. 1(h)(iii) (2012) (element of offense is multiple acts committed over extended period of time). Similarly, Rucker was accused of committing sexual abuse over a two-year period, and the opinion does not indicate that he was charged under a statutory provision that required proof of multiple acts committed over an extended period of time.[1] Consequently, it is not clear under *Rucker* that the unanimity instruction was required because the state presented evidence of multiple distinct acts that allegedly took place on different dates.

An error is plain if it "contravenes case law, a rule, or a standard of conduct." *State v. Hayes*, 831 N.W.2d 546, 555 (Minn. App. 2013). Because the law on when a unanimity instruction is required is unsettled, any error in not giving a unanimity instruction was not plain. *See Rucker*, 752 N.W.2d at 548; *see also State v. Ayala-Leyva*, 848 N.W.2d 546,

[1] In addressing whether the defendant was in a position of authority over the victim, *Rucker* refers to Minn. Stat. § 609.342, subd. 1(b), which does not require proof of multiple acts over an extended period of time. 752 N.W.2d at 545 n.1.

555 (Minn. App. 2014) (ruling that district court's chosen jury instruction was not plain error when state of the law was "cloudy" or "unsettled").

Even if the district court erred in not giving a unanimity instruction, Ellis is not entitled to a new trial because he has not satisfied the plain-error standard.

Affirmed.