STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1472

State of Minnesota,
Respondent,

vs.

Charles Anthony Tong,
Appellant.

Filed October 2, 2017
Affirmed
Kirk, Judge

Isanti County District Court
File No. 30-CR-14-644

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Anders J. Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

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

KIRK, Judge

Appellant challenges his four third-degree criminal sexual conduct (psychotherapist-deception) and one third-degree criminal sexual conduct (force or coercion) convictions,

arguing that: (1) there was insufficient evidence to support his four third-degree criminal sexual conduct (psychotherapist-deception) convictions because there was no evidence that he "purported" to provide "professional" treatment[1]; and (2) the prosecutor committed "unusually serious" and prejudicial misconduct that entitles him to a new trial. Because we conclude that there was sufficient evidence to support appellant's psychotherapist-deception convictions, and that the prosecutor's misconduct was harmless error, we affirm.

FACTS

Appellant Charles Anthony Tong was charged with four counts of third-degree criminal sexual conduct (psychotherapist-deception), in violation of Minn. Stat. § 609.344, subd. 1(j) (2014), and one count of third-degree criminal sexual conduct (force or coercion), in violation of Minn. Stat. § 609.344, subd. 1(c) (2014). Appellant was convicted on all counts following a six-day jury trial.

J.M., the victim, testified at trial that she struggles with drug and alcohol addiction and has fetal alcohol syndrome (FAS). In the past, J.M. received inpatient and outpatient treatment for her addictions, where counselors helped her with coping skills and also ran A.A. and N.A. programs. J.M. described her counselors as knowledgeable and helpful and said that they helped her set goals.

In 2014, J.M. and appellant attended Spirit River Community Church (Spirit River). Appellant and J.M. were acquaintances who had attended community college together. Appellant led a recovery group, Together in Recovery (TIR), at Spirit River. J.M. started

[1] Appellant does not challenge the sufficiency of the evidence supporting his conviction on count 5, third-degree criminal sexual conduct (force or coercion).

attending TIR in early 2014 and shared with the group that she had alcohol and opiate addictions, as well as "a problem with sex." J.M.'s grandmother, who also attended Spirit River, testified that she asked appellant to help J.M. quit drinking and doing drugs, and that she told appellant that J.M. had FAS. Starting in March or April of 2014, after J.M. disclosed her problem with sex at TIR, appellant began meeting with J.M. one-on-one.

The first time appellant met with J.M. alone, they met at her apartment and appellant explained his similar problem with sex. Appellant told J.M. that he previously attended a sex-addiction group and offered to help J.M. with her addictions. Appellant told J.M. that he knew how sex-addiction treatment was handled at other treatment facilities. J.M. explained that appellant spoke like counselors speak and that he set the goal of eliminating J.M.'s constant need for sex. They discussed that it would be helpful for J.M. to have someone "safe" to meet her sexual needs so she would not act on her addiction with other people. Appellant told J.M. that having sex with him would help her control her sex addiction and that they would discuss her addiction to find its cause. Appellant led J.M. to believe that sex with him would be therapeutic, otherwise she would not have had sex with him.

J.M. testified that appellant told her that he could be her counselor, and she felt like he wanted to help her. J.M. believed that appellant was treating her for sex addiction and chemical dependency, and that having sex with appellant would help her recover from her sex addiction. J.M. would not have had a problem paying appellant, but thought he did not ask her for payment because he was her friend and was doing her a favor. At the end of their first one-on-one meeting, appellant and J.M. engaged in sexual intercourse.

Appellant met with J.M. alone a second time at her apartment where they had a conversation about "counseling stuff" and her sex addiction. Appellant again presented himself "like a counselor," and "like he knew what he was talking about." They discussed fixing J.M.'s sex addiction and how she felt about the process. Appellant and J.M. had sexual intercourse at the end of the second meeting because appellant told her that "it was part of the program." J.M. believed that the sexual contact "was part of the treatment."

After the first two meetings, J.M. moved in with her grandparents and started meeting appellant at a local coffee shop. There were two meetings at the coffee shop that included discussions about J.M.'s sex-addiction treatment and that concluded with sexual intercourse between appellant and J.M. in a private meeting room. All four meetings that concluded with sexual intercourse occurred before July 2014.

Investigator Kevin Carlson of the Isanti County Sheriff's Office investigated J.M.'s allegations and as a result interviewed her on multiple occasions. Investigator Carlson described J.M. as impressionable. J.M. referred to appellant as her counselor and reported that she did not believe she had a sex addiction until appellant told her she did, and that he also told her that having sex with him would be therapeutic and could help cure her sex addiction. J.M. explained that TIR did not cover sex addiction, so appellant "made an exception" to help her privately. J.M. reported that before each sexual encounter, appellant would counsel her for her sex addiction.

Pastor James Crecelius of Spirit River testified at trial that TIR was an informal peer recovery group loosely based on A.A. Appellant began leading TIR in late summer or fall of 2013 and was very engaging and helpful at the meetings. Appellant was professional and

there was a sense that he knew what he was doing. Pastor Crecelius testified that J.M. is very impressionable, easily manipulated, and has very low self-esteem.

At trial, the prosecutor sought to introduce a statement that appellant made following a pretrial hearing to a courtroom bailiff. The bailiff believed that the statement was an admission of guilt. The prosecutor indicated that she would not ask the bailiff her interpretation of the statement, and would only ask her about the statement itself and the context in which appellant made it. Appellant objected to the bailiff's testimony. The district court ruled that the bailiff's testimony about the statement was admissible, but that the bailiff would not be permitted to testify about her interpretation of the statement.

The bailiff testified during direct examination that she was working as the courtroom bailiff during a June 22, 2015 hearing for appellant's case and that his charges, including those for "impersonating a therapist," were discussed. Then the following testimony was elicited by the prosecutor:

> Q: Did anything happen after this hearing in relation to the defendant and yourself?
>
> A: Yes.
>
> Q: And please describe that for the jury.
>
> A: He made a statement to me that sounded like a confession.

Appellant objected to the bailiff's testimony and a recess was taken.

Outside of the hearing of the jury, appellant's attorney argued that the bailiff should have been better prepared. He continued, "I think the remedy at this point would be to instruct the jury to disregard the remark and to preclude the rest of the [bailiff's] testimony." The

prosecutor agreed that the bailiff's statement should be stricken, but argued that precluding all of the bailiff's testimony about appellant's statement was not an appropriate remedy because a jury instruction would be sufficient.

The district court asked the prosecutor, "Did you prepare the witness? Because I specifically, when I allowed the statement to come in, informed everyone . . . that I was excluding any interpretation of the statement. Did you inform [the witness] that that was excluded?" The prosecutor responded that before the court made its ruling she informed the bailiff that she would not ask about her interpretation of appellant's statement, but said that she had not spoken with the bailiff since the court's ruling. The prosecutor noted that the court's ruling was consistent with her prior instructions to the bailiff. The prosecutor explained that she prepared the bailiff by providing her with a transcript from a previous hearing with notations regarding the portions of her testimony that would and would not be elicited. The prosecutor also noted that the bailiff said that she remembered being told not to talk about her interpretation of appellant's statement, but said that she blurted it out because she was nervous.

The district court decided to instruct the jury to disregard the bailiff's last testimony, but determined that excluding the rest of her testimony would be more prejudicial than allowing it. The court was concerned that excluding all of the bailiff's testimony would only serve to further highlight her improper statement and would allow the jury to speculate on what the stricken testimony referred to, even if the court instructed the jury not to. The court denied appellant's request to exclude further testimony from the bailiff and allowed her to

testify only about the content of appellant's statement. The court noted that although it would instruct the jury to disregard the bailiff's last testimony, it would not repeat her statement.

When the jury returned, the court instructed, "You are to disregard the witness's last answer and testimony. It is not evidence and may not be considered by you in any way, shape or form as evidence in this case. I expect that you will follow this . . . ruling." The bailiff then testified that after the June 22, 2015 hearing, appellant said to her either, "I tell people . . ." or "I can tell people . . ." or "I can tell everybody . . . that's a warning to never play doctor." During final instructions, the district court also instructed the jury "to disregard all evidence I have ordered stricken or I have told you to disregard." The bailiff's testimony was not referenced in closing arguments.

The jury found appellant guilty on all four counts of third-degree criminal sexual conduct (psychotherapist-deception), and of count 5, third-degree criminal sexual conduct (force or coercion).[2] This appeal follows.

D E C I S I O N

I. There was sufficient evidence presented to the jury to establish beyond a reasonable doubt that appellant purported to provide professional treatment, assessment, or counseling to J.M. for her sex addiction.

When a sufficiency-of-the-evidence claim involves the question of whether the defendant's conduct meets the statutory definition of an offense, an appellate court is presented with a question of statutory interpretation that is reviewed de novo. *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). In considering a claim of insufficient evidence,

[2] For count 5, appellant was convicted of forcing and coercing J.M. to perform oral sex on him in a church basement on July 4, 2014.

this court's review is limited to a thorough 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). The reviewing court assumes that "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). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Minn. Stat. § 609.344, subd. 1(j) (2014), provides that "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception." A "patient" is "a person who seeks or obtains psychotherapeutic services." Minn. Stat. § 609.341, subd. 16 (2014). A "psychotherapist" is "a person who is or purports to be a physician, psychologist, nurse, chemical dependency counselor, social worker, marriage and family therapist, licensed professional counselor, or other mental health service provider; or any other person, whether or not licensed by the state, who performs or purports to perform psychotherapy." *Id.*, subd. 17 (2014). "Psychotherapy" is "the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition." *Id.*, subd. 18 (2014). "Therapeutic deception" is "a representation by a psychotherapist that sexual contact or sexual penetration

by the psychotherapist is consistent with or part of the patient's treatment." *Id.*, subd. 20 (2014).

"Professional" and "purport" are not defined in Minn. Stat. § 609.341 (2014), nor are they defined in relation to Minn. Stat. § 609.344 (2014) in caselaw. To determine the plain and ordinary meaning of an undefined term, the court turns to dictionary definitions. *State v. Thonesavanh*, ___ N.W.2d ___, ___, 2017 WL 3880768, at *3 (Minn. Sept. 6, 2017). *Black's Law Dictionary* 1403 (10th ed. 2014), defines "professional" as "[s]omeone who belongs to a learned profession or whose occupation requires a high level of training and proficiency." *The American Heritage Dictionary of the English Language* 1406 (5th ed. 2011) defines "professional" as: "1. A person following a profession, especially a learned profession[;] 2. One who earns a living in a given or implied occupation . . . [;] 3. A skilled practitioner; an expert." "Purport" is defined as "[t]o profess or claim, esp[ecially] falsely; to seem to be . . . ." *Black's Law Dictionary* 1431. Or as "[t]o have or present the often false appearance of being or intending; claim or profess. . . ." *American Heritage Dictionary* at 1431.

Appellant argues that the state failed to present sufficient evidence to prove beyond a reasonable doubt that he "purported" to J.M. that he was performing "professional" treatment, assessment, or counseling for her sex addiction, or that he told J.M. that he was a professional sex-addiction counselor. Appellant contends that because he did not purport to be providing *professional* treatment, assessment, or counseling to J.M., it was not a crime for him to have sex with J.M. or to suggest to J.M. that having sex with him would alleviate her sex addiction. Appellant asks this court to reverse his four third-degree criminal sexual conduct (psychotherapist-deception) convictions.

The state argues that there was sufficient evidence presented to the jury to support its conclusion that appellant purported to be a psychotherapist and to provide professional treatment to J.M. The state argues that the legislature's use of the word purport only requires the state to prove that appellant claimed to be performing professional treatment, assessment, or counseling, not that he claimed to have a formal degree or license. The state argues that in addition to claiming to treat J.M.'s sex addiction, the evidence also established that appellant purported to provide a professional assessment and diagnosis of J.M. by telling her that she had a sex addiction. In support of its argument, the state notes that J.M. testified about a number of ways in which appellant made himself appear to be a counselor who was providing her with counseling services.[3] The state asks this court to affirm appellant's convictions.

At trial, the jury heard testimony from J.M. that appellant appeared to be a professional and offered to help her overcome her sex addiction based on his experience and familiarity with sex-addiction treatment. J.M. testified that appellant told her that he could be her counselor and could help her control her sex addiction. The jury also heard about the structured meetings between appellant and J.M. that included conversations resembling counseling sessions that were followed by sexual contact that appellant characterized as therapeutic.

[3] In its appellate brief, the state mischaracterizes J.M.'s testimony by claiming that J.M. testified at trial that appellant diagnosed her with a sex addiction and that he told her having sex with him would be therapeutic. Although J.M.'s testimony indicated that appellant led her to believe that having sex with him would be therapeutic, it was Investigator Carlson's testimony about J.M.'s statements to him that contained this information.

Viewing the record in the light most favorable to the verdicts, and assuming that the jury believed J.M., there is sufficient evidence for the jury to have reasonably concluded that appellant presented himself as a chemical-dependency counselor with experience and familiarity with sex-addiction treatment. There is also sufficient evidence that appellant purported to assess J.M. by telling her that she suffered from a sex addiction, and that he purported to provide counseling and therapeutic services to her. The fact that the record is void of appellant affirmatively claiming to have professional credentials or using the word "professional" to describe his treatment of J.M. did not preclude the jury, on this record, from reasonably concluding that he purported to provide professional treatment. We conclude that there was sufficient evidence presented to the jury to support appellant's four third-degree criminal sexual conduct (psychotherapist-deception) convictions.

II. The prosecutor committed misconduct, but it was harmless error.

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Acts that "have the effect of materially undermining the fairness of a trial" may constitute prosecutorial misconduct. *Id.* A prosecutor may not intentionally elicit, or try to elicit, inadmissible evidence at trial. *State v. Harris*, 521 N.W.2d 348, 354 (Minn. 1994). The "asking of improper questions" will only be excused "where they are brief, not repeated, and unlikely to have had a substantial effect on the jury." *Id.* at 354 n.9 (citing *State v. Wilford*, 408 N.W.2d 577, 580 (Minn. 1987)). "Minnesota law is crystal clear . . . [that] the state has an absolute duty to prepare its witnesses to ensure that they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). The

state must prepare its witnesses so that they "will not blurt out anything that might be inadmissible and prejudicial." *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). A violation of a district court order is also misconduct. *Fields*, 730 N.W.2d at 782.

There are two harmless-error standards of review for objected-to prosecutorial misconduct, taken from *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974).[4] The harmless-error test for "unusually serious" misconduct requires an analysis of whether the misconduct was "harmless beyond a reasonable doubt." *State v. Nissalke*, 801 N.W.2d 82, 105 (Minn. 2011) (quotation omitted). The harmless-error test for less serious prosecutorial misconduct requires an analysis of "whether the misconduct likely played a substantial part in influencing the jury to convict." *Id.* (quotation omitted). An error is harmless beyond a reasonable doubt "only if the verdict rendered was surely unattributable to the error." *Id.* at 105-06 (quotation omitted). A new trial will only be granted based on objected-to prosecutorial misconduct if the misconduct, "viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005) (quotation omitted).

Appellant argues that the prosecutor committed misconduct by failing to adequately prepare the bailiff and by asking open-ended questions that elicited testimony that violated

[4] The supreme court has questioned whether this two-tier approach is still viable, but has not yet ruled on the issue. *See State v. Whitson*, 876 N.W.2d 297, 304 n.2 (Minn. 2016); *State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010); *see also State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012) (applying standard for unusually serious misconduct without deciding the continued application of the *Caron* test).

the district court's order. Appellant asserts that the standard for unusually serious prosecutorial misconduct applies here because the misconduct was deliberate and violated the court's order. Appellant claims that the bailiff's testimony that appellant made a statement that sounded like a confession is inherently prejudicial and requires reversal of his convictions and remand for a new trial. Appellant asserts that the bailiff's testimony was particularly harmful because appellant did not testify at trial and because the most "damning evidence against a defendant is a confession," so the district court's curative instruction could not effectively mitigate its prejudicial effect.

Appellant also argues that testimony by law enforcement professionals can be particularly impactful, so the district court's curative instruction could not have ensured that the bailiff's statement did not affect the verdict. Appellant cites to *State v. Hogetvedt*, 623 N.W.2d 909, 915-16 (Minn. App. 2001), *review denied* (Minn. May 29, 2001), to support his claim that an officer's testimony may unduly influence a jury and require a new trial. In *Hogetvedt*, in violation of a court order, the prosecutor elicited testimony from an officer that the officer believed that the defendant was guilty of the charged offense. *Id.* at 915. Hogetvedt was granted a new trial. *Id.* at 916. Although the circumstances here have some similarities to *Hogetvedt*, this case is distinguishable. First, *Hogetvedt* involved significant conflicting testimony and a recanting victim, neither of which are present on this record. *Id.* at 911-12. Second, here the bailiff did not testify that she believed appellant was guilty, rather she testified that he made a statement to her that sounded like a confession.

Appellant asks this court to reverse his convictions on counts 1-4 and to remand for a new trial. He also asks this court to reverse and remand on count 5, arguing that because there

was no context given for the bailiff's improper testimony, the jury could have reasonably interpreted it as relating to all five charges.

The state asserts that the prosecutor did not intentionally elicit the improper testimony, and that the bailiff was instructed not to testify about her interpretation of appellant's statement. The state argues that any misconduct committed was not "unusually serious," and that appellant did not demonstrate that the bailiff's testimony "likely played a substantial part in influencing the jury to convict." *See Caron*, 300 Minn. at 128, 218 N.W.2d at 200. The state argues that the improper testimony did not substantially influence the jury's verdict and concludes that, even if the standard for unusually serious misconduct applied, eliciting the bailiff's statement was harmless error because of its minimal impact and because of the strong evidence of appellant's guilt.

This record does not support the conclusion that the prosecutor intentionally elicited the improper testimony, but she did violate the district court's order and also failed to adequately prepare the bailiff. The prosecutor informed the bailiff before the court's ruling that she would not be asked to testify about her interpretation of appellant's statement, but she was not informed that the testimony was excluded by court order. The prosecutor then unintentionally elicited the improper testimony by asking open-ended questions of the ill-prepared witness.

The prosecutor committed misconduct. But, even if this court agrees with appellant that the misconduct was "unusually serious," the error was harmless beyond a reasonable doubt. Appellant's trial spanned six days, the bailiff's testimony was brief, the offending testimony was one sentence, the district court twice instructed the jury to disregard the

offending testimony, and the prosecutor did not reference the bailiff's testimony or appellant's statement in her closing argument. After reviewing the entire record, which contains significant evidence of appellant's guilt and numerous other incriminating statements attributed to him, we conclude that the five guilty verdicts were surely unattributable to the error caused by the prosecutor's misconduct.

Although the prosecutor should have better prepared the bailiff, and likely should have structured her direct examination differently, the prosecutorial misconduct here was not so serious or prejudicial so as to materially undermine the fairness of appellant's trial. The error here was harmless beyond a reasonable doubt, and appellant is not entitled to reversal of his convictions or to a new trial.

Affirmed.