STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1710

State of Minnesota,
Respondent,

vs.

Christian David-Robert Wille,
Appellant.

Filed August 21, 2017
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CR-15-7793

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HALBROOKS, Judge

Appellant challenges his convictions of third-degree criminal sexual conduct, arguing that the state committed prosecutorial misconduct by referencing a controversial

rape case in her rebuttal argument. In his pro se supplemental brief, appellant also argues that (1) the district court erred by failing to instruct the jury on the definition of intent, (2) the state's evidence is insufficient to sustain his convictions, (3) the district court erred in sentencing him to consecutive prison terms, and (4) his constitutional right to effective assistance of counsel was violated. We affirm.

FACTS

C.P.-H., C.D., L.D., A.B., and R.A are college friends. In September 2015, C.D., L.D., and R.A. moved into a new home. To celebrate the move, appellant Christian David-Robert Wille, A.B., and C.P.-H., joined them for drinks on September 30, 2015. C.P.-H. met Wille, who was C.D.'s friend, in March or April 2015. A.B. met Wille for the first time on September 30, 2015. Neither A.B. nor C.P.-H. had ever been in a romantic relationship with Wille. After spending time at one bar, L.D., R.A., and A.B. went back to the new home. C.P.-H., C.D., and Wille went to another bar and then returned to the new home. The group continued to drink at the house.

A.B. went to bed first because she had to wake up early to go to work. She fell asleep on a cot in the basement. C.P.-H. and Wille went to bed around 2:00 a.m. C.P.-H. fell asleep on one end of a large, L-shaped sectional sofa in the living room. Wille fell asleep on the other end of the sofa. After they fell asleep, both C.P.-H. and A.B. woke up at different times that evening to Wille sexually assaulting them.

A.B. woke up at one point to use the bathroom. When she returned, Wille was sleeping on her cot. Because her alarm clock was in the room, she decided to sleep on the

floor. A.B. woke up again to her pajama pants pulled down past her buttocks and Wille's fingers inside her vagina.

At a different point that evening, C.P.-H. woke up with her sweat pants pulled down to her thighs and Wille on top of her with his penis inside her vagina. She was able to get out from under him, went to the kitchen for some water, returned to the room, and fell asleep again. As the sun was coming up, C.P.-H. woke again to Wille's fingers inside her vagina.

A.B. and C.P.-H. reported the incident to law enforcement, and the state charged Wille with two counts of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (2014). In addition to other witnesses, Wille, C.P.-H., and A.B. testified at trial. Wille testified that he believed the sexual intercourse with C.P.-H. was consensual because she initiated it. C.P.-H. testified that she did not initiate or consent to have sex with Wille, and she was asleep when he started having sex with her. Wille denied touching A.B. A.B. testified that she woke up to Wille's fingers inside her vagina. The jury found Wille guilty on both counts, and the district court sentenced him to two consecutive 48-month prison sentences. This appeal follows.

D E C I S I O N

I.

Wille argues that the state committed prosecutorial misconduct by referencing a highly publicized rape case that was in the national news at the time and urging jurors "to do the right thing." He did not object to these references at trial. We review prosecutorial misconduct under a modified plain-error standard when a defendant fails to object at trial.

State v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006). "[T]here must be (1) error, (2) that is plain, and (3) the error must affect substantial rights." *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). Under the modified plain-error standard, the state bears the burden of proving that the error did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. "An error is plain if it was clear or obvious." *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). This generally means that "the error contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302.

A criminal defendant's case shall be "decided not on the basis of extraneous matters but on the basis of evidence relevant to the issues raised and the legitimate inferences from that evidence." *State v. Salitros*, 499 N.W.2d 815, 816 (Minn. 1993). And a "prosecutor must not appeal to the passions of the jury." *Mayhorn*, 720 N.W.2d at 786-87. Additionally, the prosecutor may talk about accountability and what the victim suffers but "should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt." *Salitros*, 499 N.W.2d at 819 (quotation omitted). The prosecutor may not "inject[] issues broader than the guilt or innocence of the accused under the controlling law." *Id.* at 817-18 (quotation omitted).

At the end of her closing argument, the prosecutor stated, "There's no defense for what [Wille] did that night, and there can be no question that he did it. I'm urging you to do the right thing today and find him guilty. Thank you." Then, at the end of her rebuttal argument, the prosecutor stated, "Ladies and gentlemen, this was not a few minutes of action. That was sexual assault, and you should find him guilty." Wille contends that the

prosecutor plainly erred by "draw[ing] a comparison between [his] case and a case involving a grave injustice," which inflamed the passions of the jury, injected issues broader than his guilt or innocence, and diverted the jury from its duty to decide his case on the evidence.

Days before Wille's trial, in an unrelated matter in California, Brock Turner was a Stanford University student who was sentenced to six months in jail and three years of probation following his conviction of sexually assaulting an unconscious or intoxicated person. *See People v. Turner*, No. B1577162, 2016 WL 3440260 (Cal. Super. Ct. Mar. 9, 2016). The Brock Turner rape case received national media attention, in part, because Turner received a lenient sentence and his father characterized Turner's conduct as only "20 minutes of action." Bill Chappell, *Brock Turner Freed from Jail after Serving Half of 6-Month Sentence*, National Public Radio (Sept. 2, 2016, 10:42 AM), http://www.npr.org/sections/thetwo-way/2016/09/02/492390163/brock-turner-freed-from-jail-after-serving-half-of-6-month-sentence.

The state contends that the record does not clearly establish that the prosecutor referred to the Brock Turner rape case in her rebuttal argument because there is no description of that case in the record. But the Brock Turner rape case was mentioned at least twice during the trial—once during voir dire and once in defense counsel's closing argument. During voir dire, the prosecutor stated:

> There's been a lot of attention in the news lately to a case that happened in Stanford, and I want to know if anyone here is going to let that affect the way that they look at the case that we're dealing with here. To be clear, the instructions are that

> you have to decide this case based only on the evidence that comes in on this case.

In the defense's closing argument, the defense counsel said:

> So we have this scenario where people are using drugs, or smoking pot and drinking and people are intoxicated. As [C.P.-H.] said, she was not outrageously intoxicated. She, by her estimation, had five beers, and that can get you buzzed. Whether she was smoking pot or not really hardly matters. Because we know that she was impaired. When you're impaired, as she said she never blacks out, but I asked her is it possible she did this and she said it was. And if you will recall, I asked Investigator Eggers that do people fabricate these allegations and they do. They do because they regret having sex. They do because they want attention or sympathy. There are a number of reasons these allegations are fabricated. Is it common that people fabricate? No. I mean, we have this horrible case out in Stanford where the swimmer attacked a woman who was passed out behind a dumpster, and there are two witnesses not related came upon the Swimmer and he was arrested and now there's great outrage as the disposition of that case. And sadly that case would appear now during this trial.

Although the prosecutor did not directly draw a comparison between her statement on rebuttal and the comment that Brock Turner's conduct was "20 minutes of action," we conclude that the prosecutor's statement at the end of her rebuttal argument referred to the Brock Turner rape case because it responded to the defense counsel's reference to that case in his closing argument.

In closing arguments, a prosecutor cannot suggest "that the jury represent[s] the people of the community and that their verdict would determine what kind of conduct would be tolerated on the streets." *State v. Threinen*, 328 N.W.2d 154, 157 (Minn. 1983). We assess alleged prosecutorial misconduct during a closing argument by "look[ing] to the

closing argument as a whole, rather than to selected phrases and remarks." *State v. Graham*, 764 N.W.2d 340, 356 (Minn. 2009).

At issue in *Graham* was whether a prosecutor committed misconduct during closing arguments by stating, in part, that it was "very tempting at times to go for a compromise but this is not the time for compromise. . . . [T]his is the time to *do the right thing* . . . ." *Id.* (alteration in original) (emphasis added) (quotation marks omitted). The Minnesota Supreme Court concluded that the state did not commit prosecutorial misconduct because the statements sought justice "based on the evidence and did not pursue an improper purpose." *Id.* at 357; *see also State v. Atkins*, 543 N.W.2d 642, 648 (Minn. 1996) ("[W]e conclude that the prosecutor was merely expressing the view that justice could only be achieved by convicting Atkins of first-degree murder, due to the overwhelming evidence establishing his guilt.").

Wille argues that his case is distinguishable from *Graham* because the prosecutor here urged the jury "to do the right thing," then improperly linked his case to the Brock Turner rape case. We disagree.

We first note that the prosecutor's questioning during voir dire demonstrates that she was attempting to guard against any prejudice that may exist as a result of the Brock Turner rape case. Additionally, the "prosecutor has the right to fairly meet the arguments of the defendant." *State v. Jackson*, 773 N.W.2d 111, 123 (Minn. 2009). Here, the prosecutor's statement that Wille's conduct "was not a few minutes of action" came in her rebuttal argument, after *defense counsel* mentioned the Brock Turner rape case in his closing argument. We conclude that the prosecutor did not improperly respond to

defendant's argument or link her earlier statement that the jury "do the right thing" to her statement on rebuttal.

Because the prosecutor did not inflame the passions of the jury or inject issues broader than Wille's guilt or innocence and because the prosecutor supported her closing and rebuttal arguments with evidence from Wille's case, we conclude that the state did not plainly err by referencing the Brock Turner rape case in her rebuttal argument.

II.

In his pro se supplemental brief, Wille also argues that (1) the district court erred by failing to instruct the jury properly, (2) the evidence is insufficient to convict him of third-degree criminal sexual conduct, (3) the district court erred by ordering that his sentences be served consecutively, and (4) his constitutional right to effective assistance of counsel was violated. We address each of these arguments in turn.

A.

Wille argues that the district court plainly erred by failing to instruct the jury on the meaning of intent, but he did not object to the jury instructions at trial. A district court has "considerable latitude" in the selection of jury instruction language. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). We review unobjected-to jury instructions for plain error. *State v. Robinson*, 699 N.W.2d 790, 799 (Minn. App. 2005), *aff'd on other grounds*, 718 N.W.2d 400 (Minn. 2006). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and

adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

A district court may explain the elements of the crime, "but detailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979); *see also Robinson*, 699 N.W.2d at 799-800 (declining to instruct a jury on the definition of intent was not plainly erroneous).

Here, the district court's jury instruction is nearly identical to Minnesota's standard jury instruction. *See* 10 *Minnesota Practice*, CRIMJIG 12.23 (2016). It instructed the jury to find that Wille "intentionally sexually penetrated" the victims and "knew, or had reason to know" that the victims were physically helpless. The district court also stated, "If I have not defined a word or phrase, you should apply the common ordinary meaning of that word or phrase." And although Wille argues that criminal sexual conduct is a specific-intent crime, only the general intent to sexually penetrate another is required for criminal-sexual-conduct offenses. *See State v. Lindahl*, 309 N.W.2d 763, 766-67 (Minn. 1981); *see also State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012) ("[G]eneral intent only requires an intention to make the bodily movement which constitutes the act which the crime requires." (quotation omitted)).

Because the district court instructed the jury on every element of the crime and did not mislead the jury, we conclude that it did not plainly err.

B.

Wille contends that the evidence is insufficient to convict him of third-degree criminal sexual conduct because the state failed to prove his intent beyond a reasonable doubt. When reviewing a claim of insufficient evidence, we conduct a thorough "analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Here, both A.B. and C.P.-H. testified that Wille was sexually penetrating them when they woke up. Because the uncorroborated testimony of a victim is sufficient to sustain a criminal-sexual-conduct conviction, we conclude that this testimony alone is sufficient evidence. *See* Minn. Stat. § 609.347, subd. 1 (2016); *State v. Berrios*, 788 N.W.2d 135, 141-42 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010).

Wille also maintains that his defense at trial was that he engaged in consensual sex with A.B. and C.P.-H. while he was intoxicated. But the defense of voluntary intoxication is unavailable in general-intent crimes. Minn. Stat. § 609.075 (2016); *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001) (stating, among other requirements, that a defendant must "be charged with a specific-intent crime" to receive a voluntary-intoxication jury instruction). And this argument contradicts his own testimony. At trial, Wille testified that only C.P.-H. consented to sex; he claimed that he never touched A.B. We conclude that the evidence is sufficient to sustain his convictions of third-degree criminal sexual conduct.

C.

Wille argues that the district court erred by sentencing him to consecutive prison terms. When the facts are not in dispute, the decision of whether multiple offenses are part of a single behavioral incident presents a question of law that this court reviews de novo. *State v. Ferguson*, 808 N.W.2d 586, 590 (Minn. 2012); *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

Wille argues that his sentence is improper because the jury found no aggravating circumstances, but we have concluded that permissive consecutive sentences do not violate *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Senske*, 692 N.W.2d 743, 744 (Minn. App. 2005), *review denied* (Minn. May 17, 2005).

A district court may impose "multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). Because Wille does not challenge either of these requirements, we conclude that the district court did not err in sentencing him to two consecutive prison terms.

D.

Wille argues his constitutional right to effective assistance of counsel was violated because his trial counsel failed to raise any of the issues in this appeal. We review a claim of ineffective assistance of counsel de novo because it involves a mixed question of law and fact. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

"The Sixth Amendment right to counsel is the right to effective assistance of counsel." *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006). "To demonstrate ineffective assistance of counsel, appellant must show that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Yang*, 774 N.W.2d 539, 564-65 (Minn. 2009). We consider "the totality of the evidence before the judge or jury in making this determination. We need not address both the performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842 (citation omitted).

Under the prejudice prong, "a defendant must show that counsel's errors actually had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Id.* (quotations omitted). Because Wille cannot show any errors that adversely affected the jury's verdicts, his ineffective-assistance-of-counsel claim is without merit.

Affirmed.