STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1833

State of Minnesota,
Respondent,

vs.

Clayton Francis Marshalek,
Appellant.

Filed October 8, 2018
Affirmed
Schellhas, Judge

Anoka County District Court
File No. 02-CR-17-1400

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Stauber, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SCHELLHAS, Judge

Appellant challenges his convictions of one count of first-degree criminal sexual conduct, and two counts of second-degree criminal sexual conduct, arguing that insufficient evidence exists to support his first-degree criminal-sexual-conduct conviction, that the district court erroneously instructed the jury on first-degree criminal sexual conduct, and that the district court erred at trial requiring reversal of all of three criminal-sexual-conduct convictions. We affirm.

FACTS

Appellant Clayton Marshalek and H.M. are married and have three daughters: K.M.; victim M.M., born June 16, 2002; and A.M. On March 1, 2017, M.M. told personnel at her school that she did not want to go home because Marshalek had been sexually touching her. School personnel contacted law enforcement, and M.M. gave investigating officers a recorded statement. Based on M.M.'s statements, respondent State of Minnesota charged Marshalek with two counts of second-degree criminal sexual conduct (CSC) under Minn. Stat. § 609.343, subds. 1(b), (h) (2016), and subsequently amended its complaint to add one count of first-degree CSC under Minn. Stat. § 609.342, subd. 1(b) (2016).

Before trial, the state moved the district court to admit K.M.'s testimony that Marshalek had previously filmed her in the bathroom and her bedroom. The court granted the motion. At Marshalek's jury trial, M.M. testified that Marshalek touched her "inappropriately" on her "private parts," her "boobs, butt, [and] vagina." M.M. also testified that Marshalek "finger[ed]" her through her clothing by pressing his fingers

against her vagina. M.M. also recounted an incident on February 27, 2017, when Marshalek "started fingering" her "and stuff . . . he was pushing. Trying to get in," and that she kept telling him to "stop . . . [i]t hurts . . . I still have my virginity." M.M. testified that this occurred more than ten times and resulted in her getting "a wedgy, but in front." M.M. also testified that Marshalek once came into the bathroom while she showered to film her with his phone.

M.M.'s school counselor, the school's resource officer, two child-protection workers, K.M., A.M., the school social worker, and the two investigating officers, including Detective Strusinski, also testified for the state. And the district court admitted numerous exhibits into evidence, including recordings of M.M.'s prior out-of-court statements to investigating officers, and a call from Marshalek to M.M., urging her to recant her statement and not to testify. At the close of the state's case, Marshalek moved for judgment of acquittal, arguing that the state failed to prove the element of sexual penetration. The court denied the motion.

Marshalek testified on his own behalf. He claimed that he put a camera in the bathroom and in K.M.'s bedroom to catch her in the act of taking inappropriate photos of herself on her cellphone. He denied inappropriately touching M.M. and claimed that he only tickled her. He testified that on February 27, 2017, M.M. had been upset with him for scolding her about her outfit.

The jury found Marshalek guilty on all three counts and found the presence of three aggravating factors. The district court sentenced Marshalek to 172 months' imprisonment,

a top-of-the-box presumptive sentence, with ten years of conditional release for the first-degree CSC count.

This appeal follows.

D E C I S I O N

I. Insufficiency of the evidence

Marshalek argues that his conviction of first-degree CSC "must be reversed and vacated" because the state did not establish the element of penetration. An appellate court examining a sufficiency-of-the-evidence challenge determines whether the evidence, viewed in a light most favorable to the verdict, was sufficient to allow the fact-finder to reach a guilty verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). "When a sufficiency-of-the-evidence claim turns on the meaning of the statute under which a defendant has been convicted, we are presented with a question of statutory interpretation that we review de novo." *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018).

To convict Marshalek of first-degree CSC, the state had to prove, in part, that he engaged "in sexual penetration with another person." *See* Minn. Stat. § 609.342, subd. 1(b) (listing the elements of first-degree CSC). "Sexual penetration" includes "any intrusion however slight into the genital or anal openings . . . by any part of the body of another person." Minn. Stat. § 609.341, subd. 12 (2016).

In *Auringer v. State*, a defendant argued that he could not be guilty of first-degree CSC because '"inserting his finger into [the victim] through her clothing' does not fall within the definition of 'sexual penetration.'" 695 N.W.2d 640, 643 (Minn. App. 2005), *review denied* (Minn. July 19, 2005). After reviewing the CSC statutes, we disagreed,

noting that the CSC statutes demonstrate "the legislature's ability to precisely describe prohibited acts" and the plain meaning of the statutory definitions. *Id*. at 644. We concluded that "[i]f the presence of clothing were a relevant factor justifying distinct treatment in cases of penetration, there is no question that the legislature would have so stated." *Id*. at 645.

Marshalek argues that "this case is factually distinguishable from *Auringer* . . . [M.M.] did not claim [that] [he] put his finger into her vagina through clothing." Marshalek is wrong. As noted above, M.M. stated that Marshalek "would finger me . . . he would press his fingers against my vagina." M.M. also testified about an incident when Marshalek pushed his fingers into her "bare vagina" so much so that she repeatedly told him that "it hurts." She testified that after he finished pushing his fingers over her underwear and inside her vagina, she would be left with a "wedgy, but in front." M.M.'s testimony shows that Marshalek made an "intrusion, however slight" of M.M.'s "genitals" with his fingers. Because M.M.'s testimony supports a finding that Marshalek sexually penetrated her, we conclude that the evidence was sufficient to sustain his conviction of first-degree CSC. *See State v. Duncan*, 608 N.W.2d 551, 558 n.1 (Minn. App. 2000) (stating that a district court did not err when it instructed the jury on sexual penetration as "[p]enetration includes rubbing of the fingers between the folds of the vagina"), *review denied* (Minn. May 16, 2000).

II. Jury instructions

Marshalek argues that the district court erroneously instructed the jury on the penetration element, defining penetration as "any object *held*," not "any object *used*."

(Emphasis added.) Marshalek argues that the court committed reversible error regarding his first-degree-CSC conviction because "the jury could have plausibly believed [he] held M.M.'s underwear while touching her genitals, while also plausibly believing that [he] did not use the underwear for the purpose of penetrating M.M.'s vagina." We disagree.

Appellate courts review a district court's jury instructions for an abuse of discretion. *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). "The district court enjoys considerable latitude in selecting jury instructions, including the specific language of those instructions." *Id*. Jury instructions must "fairly and adequately explain the law of the case and not materially misstate the law." *Id.*; *see also State v. Onyelobi*, 879 N.W.2d 334, 353 (Minn. 2016) ("A district court has broad discretion in formulating jury instructions; however it abuses its discretion if the jury instructions confuse, mislead, or materially misstate the law" (quotations omitted)).

Because Marshalek did not object to the jury instructions, this court has discretion to consider his claim of error on appeal only if there was plain error. *See Peltier*, 874 N.W.2d at 799 (analyzing unobjected-to jury instructions for plain error). Under a plain-error analysis, an appellant must show "(1) error, (2) that is plain, and (3) that affects [the defendant's] substantial rights." *Id*. (quotation omitted). A "plain error contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). Criminal Jury Instruction Guide (CRIMJIG) 12.05 "generally provides a sufficient definition of 'sexual penetration.'" *Duncan*, 608 N.W.2d at 558 n.1 (citing 10 *Minnesota Practice*, CRIMJIG 12.05 (1999) (providing the same definition of "sexual penetration" as CRIMJIG 12.05 (2017))).

Here, the district court gave the following jury instructions entitled "Criminal Sexual Conduct in the First Degree—Sexual Penetration—Complainant Underage—Elements" from CRIMJIG 12.05:

> The elements of the criminal sexual conduct in the first degree are: First, the defendant intentionally sexually penetrated M.M. Any intrusion, however slight, of any part of one's body (or of *any object held by one person*) into the genital or anal openings of another person's body constitutes sexual penetration . . . .

(emphasis added). The definition here of "sexual penetration" matches the definition of "sexual penetration" provided by Minn. Stat. § 609.341, except the instructions use the phrase "any object *held*," whereas the statute uses the phrase "any object *used*." *See* Minn. Stat. § 609.341, subd. 12 (defining "sexual penetration"); CRIMJIG 12.05 (2017) (defining "sexual penetration").

Because this court has already decided that "sexual penetration" occurs when a person puts his or her finger into a victim's vagina through her underwear, we conclude that the district court did not abuse its broad discretion in using the CRIMJIG 12.05 jury instructions and therefore did not plainly err. *See Auringer*, 695 N.W.2d at 645 (rejecting argument that penetration excludes insertion of finger into genitals through clothing). Because the court did not plainly err, we need not analyze Marshalek's arguments regarding the other elements of the plain-error test. *See State v. Guzman*, 892 N.W.2d 801, 812–13 (Minn. 2017) (instructing courts to proceed with a plain-error analysis only after defendant establishes that the district court plainly erred). And even if the district court erred with its jury instructions by using "object held" rather than "object used" when defining "sexual penetration," the error did not affect Marshalek's substantial rights

because the evidence presented at trial was that he used his finger to sexually penetrate M.M.'s vagina, not an "object".

III. Improper relationship evidence

Marshalek argues that the district court committed reversible error regarding all three CSC convictions. He argues that the court erred by admitting K.M.'s testimony that he had filmed her while in the bathroom and in her bedroom because it represents improper evidence of "domestic conduct," under Minn. Stat. § 634.20 (2016). We disagree.

"Evidence of domestic conduct by the accused against . . . family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice." Minn. Stat. § 634.20. "'Domestic conduct' includes, but is not limited to evidence of . . . violation of section 609.749 [the stalking statute]." *Id*. We review the admission of evidence of similar conduct under Minn. Stat. § 634.20 for an abuse of discretion. *State v. Beane*, 840 N.W.2d 848, 851 (Minn. App. 2013), *review denied* (Minn. Mar. 18, 2014). "A defendant challenging a district court's decision to admit evidence must show that the decision was both erroneous and prejudicial." *Id*. at 851–52 (citing *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008)). "Evidence admitted under section 634.20 need not meet the clear-and-convincing standard required for admission of character or *Spreigl* evidence, but need only be more probative than prejudicial." *Id.* at 852.

At trial, K.M. testified about how Marshalek filmed her while she was changing in the bathroom and in her bedroom. The district court concluded that the state could admit "similar conduct that involved . . . K.M., as relationship evidence" under Minn. Stat. § 634.20, and because it constituted "domestic conduct."

Without citing to legal authority, Marshalek argues that his filming of K.M. in her bedroom and in the bathroom does not meet the definition of "domestic conduct" because "a proper construction of Minn. Stat. § 634.20 would exclude invasion of privacy behaviors." The state argues that Marshalek's conduct meets the definition of "stalking" under the stalking statute. We agree.

This court reviews a statute de novo. *See Henderson*, 907 N.W.2d at 625 (stating that appellate courts review a statute de novo). If a statute is unambiguous, we "apply its plain meaning." *Id*. Minnesota law defines "stalking" as "conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim." Minn. Stat. § 609.749 (2016). "Stalking" includes "monitor[ing] . . . another, whether in person or through any available technological or other means." *Id*., subd. 2(2).

Here, Marshalek "monitored" K.M. with "available technological or other means" by videotaping her while she was in the shower and in her bedroom under circumstances he had reason to know would cause his daughter to "feel frightened," or "intimidated," and K.M. testified that she told Marshalek that she "didn't like [the filming] and that [the filming] shouldn't have been done." Based on the plain meaning of the terms in the stalking statute, Marshalek's filming of K.M. meets the definition of "domestic conduct," because it is evidence of a violation of the stalking statute. Moreover, the district court properly instructed the jury twice with cautionary instructions regarding K.M.'s testimony. *See State v. Fardan*, 773 N.W.2d 303, 320 (Minn. 2009) (stating that courts presume that jurors follow jury instructions).

The district court admitted K.M.'s testimony as relationship evidence because it constituted "domestic abuse" under Minn. Stat. § 518B.01, subd. 2(a)(3) (2016), which includes in its definition "criminal sexual conduct, within the meaning of section 609.342 [or] 609.343." Even if Marshalek's filming of K.M. does not meet the definition of "criminal sexual conduct," it nonetheless meets the definition of stalking and is therefore admissible. *See State v. Ali*, 855 N.W.2d 235, 250 n.13 (Minn. 2014) (applying rule of multiple admissibility and concluding that testimony that "was actually inadmissible" under one theory of admissibility, "was properly admissible for the purpose of providing context"). We conclude that the district court did not err by admitting K.M.'s testimony as domestic conduct under Minn. Stat. § 634.20.

Marshalek also argues that the district court erroneously admitted this evidence as improper *Spreigl* evidence. Because the court did not err in admitting this evidence as relationship evidence under Minn. Stat. § 634.20, we need not decide the *Spreigl* issue. *See Ali*, 855 N.W.2d at 250 n.13 (declining to address argument against admission of evidence where district court did not abuse its discretion by admitting it under a different theory of admissibility).

IV. Erroneous admission of other evidence

Marshalek argues that the district court plainly erred by "allowing the state to introduce irrelevant and prejudicial evidence that (1) M.M. reported to a school counselor that she was depressed and had thoughts of harming herself; and that (2) Marshalek had viewed teen-themed pornography videos." Marshalek argues that these errors affected his

substantial rights, and that this court must reverse all three CSC convictions and remand for a new trial. We disagree.

Marshalek did not object to the admission of this testimony and therefore has forfeited review of the issue. *See State v. Fraga*, 898 N.W.2d 263, 276 (Minn. 2017) ("Because Fraga did not object to the admission of this evidence at trial, he forfeited review of his claims."). "But the plain-error rule provides a limited power to correct certain errors that a defendant has forfeited." *Id*. (quotation omitted).

This court reviews unobjected-to evidentiary errors under the plain-error standard. *Guzman*, 892 N.W.2d at 814. Under a plain-error analysis, as stated above, an appellant must show "(1) error, (2) that was plain, and (3) that affected the defendant's substantial rights." *Id*. (quotation omitted). "Each prong of the plain error test must be met before we will correct the error." *State v. Gutierrez*, 667 N.W.2d 426, 433 (Minn. 2003). The defendant bears the burden of "establishing that the [district] court abused its discretion and that the error was prejudicial." *State v. Vance*, 714 N.W.2d 428, 436 (Minn. 2006).

"Rulings on evidentiary matters rest within the sound discretion of the district court." *Guzman*, 892 N.W.2d at 812. Relevant evidence is any evidence "having 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 evidence." Minn. R. Evid. 401. Relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. Unfair prejudice in the *Spreigl* context refers to "the unfair advantage that results from the capacity of the evidence

to persuade by illegitimate means." *State v. Montgomery*, 707 N.W.2d 392, 399 (Minn. App. 2005) (quotation omitted).

The school social worker testified that she met with M.M. who disclosed how she felt depressed, considered self-harm, and that her family had stopped trusting her. Detective Strusinski, one of the investigating officers, testified that Marshalek admitted to watching teen-themed pornography, asking "[w]hat 30-some-year-old man wouldn't watch teen porn?"

We conclude that both the social worker's testimony and Detective Strusinski's testimony are relevant because the testimony helped corroborate M.M.'s testimony of what occurred. *See State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (concluding that victim's emotional condition was relevant as it "tended to corroborate the victim's testimony"); *see also Fraga*, 898 N.W.2d at 274 (concluding evidence of erectile-dysfunction medication relevant in murder and sexual assault trial to counter defendant's claim that he could not have assaulted the victim due to issues of sexual performance). Marshalek's defense focused on discrediting M.M., claiming that she fabricated her story to combat his strict rules. This case therefore largely turned on credibility determinations by the jury. *See State v. Watkins*, 840 N.W.2d 21, 31 (Minn. 2013) ("[I]t is the function of the finder of fact . . . to make credibility determinations."). The social worker's and Detective Strusinski's testimony corroborate M.M.'s testimony against Marshalek's defense that she was fabricating the events, and is therefore relevant.

We also conclude that the probative value of the challenged evidence outweighed its potential for unfair prejudice. Unfair prejudice is not established where evidence is

simply highly damaging; rather, unfair prejudice occurs when evidence "persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). Marshalek cites to no legal authority to support his argument, and we have found no authority that would lead us to conclude that the evidence here "persuaded by illegitimate means." The district court did not plainly err in admitting the evidence, and we therefore affirm Marshalek's first-degree CSC conviction and two second-degree CSC convictions.

Affirmed.