STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1976

State of Minnesota,
Respondent,

vs.

Pao Choua Xiong,
Appellant.

Filed November 26, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Ramsey County District Court
File No. 62-CR-17-1995

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, Jenna Yauch-Erickson, Assistant Public Defender (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

RODENBERG, Judge

Appellant Pao Choua Xiong appeals after he was convicted of first-degree criminal sexual conduct, arguing that the district court erred by failing to administer an oath to the

testifying eight-year-old sexual-assault victim and admitting evidence of appellant's drug and alcohol use as relationship evidence. Appellant further claims that the state failed to prove that an out-of-state conviction should be used as a felony point in appellant's criminal history score, and that his resulting sentence was erroneous. We affirm in part, reverse in part, and remand.

FACTS

In March 2017, N.L., the mother of K.X., called police to report that appellant, K.X.'s father, had sexually assaulted K.X. N.L. told police that K.X. was crying and bleeding from her vagina. Police came to N.L.'s apartment, and K.X. was transported by ambulance to Children's Hospital. At the hospital, K.X. told a nurse that she was taking a shower and that appellant came into the bathroom and lifted her onto a counter. K.X. stated, "My dad raped me, he tried to rape me." K.X. said that appellant had his hand over her mouth and told her not to say anything; she told him to stop. A medical examination revealed that K.X. had a small, painful, bleeding rupture of the tissue at the entrance to her vagina.

Later that day, police arrested appellant and he was charged with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2016).

Before trial, the district court held a competency hearing to determine K.X.'s competency to testify at trial. At the hearing, the district court asked K.X., among other things, whether she knew the difference between the truth and a lie. Based on K.X.'s responses, the district court concluded that she was competent to testify at trial. Both the state and appellant's trial counsel agreed.

The district court also determined pretrial that it would allow N.L. to testify about appellant's history of domestic physical and verbal abuse under Minn. Stat. § 634.20 (2016). The state also argued that evidence of appellant's drug and alcohol use should be admitted during N.L.'s testimony as general relationship evidence because it explained the context of N.L. and appellant's relationship. The district court concluded that it would allow N.L. to testify about appellant's chemical use because it was relationship evidence.

At trial, K.X. was the first witness to testify. Before she testified, the district court told her to speak into the microphone and to "use [her] outdoor voice," but did not administer an oath. K.X. testified that, on March 19, 2017, she had been playing in the next-door apartment with her cousins. When appellant unexpectedly arrived at the apartment building, he told K.X. to go home and to take a shower. K.X. testified that she went to take a shower, but appellant "put [her] on the counter and then started raping [her]." K.X. described that appellant was in the bathroom with her while she was taking off her clothes. She testified that appellant told her to "stay in front of him" and that she asked appellant, "What are you doing daddy?" K.X. testified that appellant "raped" her and that she began to bleed. She explained that appellant "put his private parts in [her] private part" and that appellant had his hand over her mouth.

Two witnesses testified after K.X., and court adjourned for the day. The district court later realized that K.X. had not been sworn before she testified. The next day, the district court notified both appellant's counsel and the prosecutor of this omission. Appellant moved for a mistrial. The district court denied the mistrial motion. Instead, it proposed to give a curative instruction to the jury and recalled K.X. to affirm, after an oath

was administered, that her previous testimony had been true. Appellant objected to this process. The district court then explained to the jury that the court had failed earlier to administer an oath to K.X., and that it was the court's error and no fault of the lawyers. K.X. was sworn and she testified that her testimony from the previous day had been truthful. The state then proceeded with its remaining case in chief.

Appellant testified in his defense at trial. He admitted that his marriage with N.L. included "rough times" and that he had struggled with drug and alcohol use. He denied touching K.X. inappropriately.

The jury found appellant guilty of first-degree criminal sexual conduct. The district court sentenced appellant to 156 months in prison, using a Wisconsin felony conviction as a felony point in computing appellant's criminal history score.

This appeal followed.

D E C I S I O N

I. The district court did not abuse its discretion by denying appellant's motion for a mistrial after having failed to administer an oath before K.X. testified, where K.X. was sworn and verified her earlier testimony.

Appellant argues that the district court abused its discretion when it denied his motion for a mistrial after K.X. had testified without first having taken an oath. Appellant claims that the district court's remedy of recalling K.X. to affirm that her previous testimony was truthful was insufficient and prejudicial.

We review the denial of a mistrial motion for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "A mistrial should not be granted unless there is a reasonable possibility that the outcome of the trial would be different if the event

that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). The trial judge is in the best position to determine whether the event creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted. *Id.*

A witness who testifies at trial is required to take an oath or to affirm her intent to testify truthfully. Minn. R. Evid. 603. But district courts have flexibility in the oath administered to child witnesses. When a child testifies, it is sufficient for a district court to impress upon the child the importance of telling the truth, because "the absence of an oath [is] not prejudicial given the child's recognition of the difference between truth and falsity." *State v. Ross*, 451 N.W.2d 231, 236 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990).

Similarly, before a child testifies, courts should determine whether the child is competent. In determining whether a child is competent to testify, a district court must first determine "whether the child remembers or can relate events truthfully." *State v. Scott*, 501 N.W.2d 608, 613 (Minn. 1993). The district court must ask questions of the child to ascertain whether the child understands the obligation of the oath and is capable of narrating the events about which the child will testify. *State v. Sime*, 669 N.W.2d 922, 926 (Minn. App. 2003).

The circumstances in *Ross* are similar to those here. In *Ross*, the district court asked a four-year-old sexual-assault victim whether she knew the difference between the truth and a lie. *Ross*, 451 N.W. 2d at 236. The district court found that the child was competent to testify based on her ability to remember and relate events truthfully. *Id.* at 233. The

district court did not administer an oath to the child before her trial testimony. Ross did not object. On appeal, we concluded that the absence of an oath was not prejudicial because the child understood the difference between truth and falsity and because her testimony added little to her pretrial statements. *Id.* at 236.

Here, like in *Ross*, the district court determined that K.X. knew the difference between a truth and a lie and the importance of telling the truth before she testified. At the competency hearing, K.X. testified that if she told a lie, she "would get in trouble." The district court asked K.X. if she would tell the truth whenever she was sitting in the witness chair, and she replied "yes." The district court also asked, "If you came back to court again, if you came back here later today or later this week, I might ask you to raise your hand and to tell the truth. If I did that, would you tell the truth?" K.X. responded "yes." Appellant does not challenge K.X.'s competence.

In denying appellant's mistrial motion, the district court noted that it was "mindful of the fact that we have a child witness here, a complainant. And declaring a mistrial and having to try the case over is challenging for any witness but particularly child witnesses." The district court decided that, "[o]bviously, she's got to come back to court today." The district court considered the difficulty to K.X. should a mistrial be declared and a second trial be needed, and considered the delay that a mistrial would occasion. It concluded that the process of administering an oath to K.X. and having her verify that her earlier testimony had been truthful would adequately remedy the earlier error.

The district court gave the jury thorough instructions concerning the mistake and its correction. It told the jury that it was the court's own error that the child had not been

sworn. When K.X. was again called as a witness, sworn, and testified, she assured the district court that she knew the difference between a lie and telling the truth, that she had promised to tell the truth when she came to court, and that she had been telling the truth when she testified the previous day. The district court's proper and careful process adequately corrected the error.

Appellant also argues that, because K.X.'s testimony was the most damaging trial evidence, her unsworn testimony should be regarded as having had a significant effect on the verdict. But the failure to give an oath did not compromise the jury's ability to assess the credibility of K.X. during her testimony.

Moreover, KX.'s testimony was consistent with previous statements that she made to her mother, her sister, and medical professionals. The district court had impressed on K.X. before her testimony the importance of telling the truth. There was also other strong evidence against appellant. Thirteen witnesses testified, and, other than appellant's testimony, the evidence at trial was consistent with K.X.'s account. Therefore, K.X.'s unsworn testimony, later verified under oath, did not have a significant effect on the jury's verdict. On this record, the district court acted within its discretion when it denied appellant's mistrial motion.

II. The district court erroneously admitted testimony of appellant's drug and alcohol use at trial as general relationship evidence, but the error was harmless.

Appellant argues that the district court erred by allowing N.L. to testify about appellant's drug and alcohol use during their marriage. He contends that his drug and alcohol use was not relevant and that any probative value this evidence might have had was

outweighed by its prejudicial effect. The state argues that evidence of appellant's drug and alcohol use was admissible because it was not introduced as Minn. Stat. § 634.20 evidence, but instead was introduced as general relationship evidence.

We review a district court's evidentiary rulings for abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). On appeal, an appellant has the burden of establishing "that the district court abused its discretion in admitting the evidence at issue . . . , and that [appellant] was prejudiced by its admission." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016).

Here, appellant timely objected to the admission of his drug and alcohol use. Therefore we review for harmless error. *Id.* Under the harmless-error standard, one "who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Id.*

"Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). Such evidence may be admissible for another purpose, such as evidence of past abuse or threats against the victim in order to show a strained relationship. *State v. Bauer*, 598 N.W.2d 352, 365 (Minn. 1999). Evidence of a defendant's prior acts may be relevant for the purpose of illuminating the relationship of defendant and complainant and "to place the incident for which defendant was charged into proper context." *State v. Loving*, 775 N.W.2d 872, 880 (Minn. 2009) (quotation omitted).

Under Minn. Stat. § 634.20, "[e]vidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible." Minn. Stat. § 634.20 (2016). But relationship evidence under Minn. Stat. § 634.20 is only "a subtype of general relationship evidence." *State v. Bell*, 719 N.W.2d 635, 638 n.4 (Minn. 2006). Outside of the Minn. Stat. § 634.20 exception, "Minnesota caselaw has established a basis for the introduction of relationship evidence independent of Minn. Stat. § 634.20, the *Spreigl*/rule 404(b) process, or the immediate-episode doctrine." *State v. Hormann*, 805 N.W.2d 883, 890 (Minn. App. 2011), *review denied* (Minn. Jan. 17, 2012). Minnesota courts have applied the *Spreigl* analysis to relationship evidence by requiring the district court to find by clear and convincing evidence that the defendant committed the prior bad act and that the probative value of the prior act outweighs any unfair prejudice. *Id.*

The district court concluded, before trial, that this claimed relationship evidence would "provide proper context" because "the alleged drug and alcohol use [has] continued to the present." At trial, N.L. testified that, "throughout my whole marriage, [appellant was] abusive. Drinking a lot." N.L. also testified that appellant used other drugs. While evidence of appellant's domestic abuse was properly admitted under section 634.20, the evidence of appellant's drug and alcohol abuse was more prejudicial than it was probative, and was not relevant to the sex crimes with which appellant was charged, and of which he was convicted. Instead, the testimony of alcohol and other drug use was generalized evidence of appellant's bad behavior. And appellant's drug and alcohol use only tended to explain the strained relationship between N.L. and appellant. It was not relevant to the

charges relating to crimes committed against K.X. *Cf. State v. Anderson*, No. A12-1707, 2013 WL 6223399, at *6 (Minn. App. Dec. 2, 2013), *review denied*, (Minn. Feb. 18, 2014) (concluding that the defendant's acts of providing alcohol and cigarettes to a sex-abuse victim were properly admitted as relationship evidence where it tended to show grooming behavior). The charges here did not arise from appellant's relationship with N.L. The district court abused its discretion in allowing N.L. to testify about appellant's drug and alcohol use unrelated to the charges.

When determining whether the erroneously admitted evidence significantly affected the verdict, we consider whether the state presented other evidence on the issue for which the other-crime evidence was offered, and whether the district court gave a limiting instruction. *State v. Benton*, 858 N.W.2d 535, 541 (Minn. 2015). "Other relevant considerations are whether the State dwelled on the evidence in closing argument and whether the evidence of guilt was overwhelming." *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009).

The district court made efforts to minimize the possible prejudice of this chemical-use evidence by giving the jury a limiting instruction concerning the permissible use of this evidence. *See Bauer*, 598 N.W.2d at 365 (stating that the district court should instruct the jury regarding the proper use of relationship evidence). The district court also restricted testimony about appellant's drug and alcohol use to generalities and prohibited evidence concerning specific acts or incidents. N.L.'s testimony concerning appellant's chemical use was limited to three sentences during a two-day jury trial. Although appellant briefly

mentioned his drug and alcohol use during his testimony, N.L.'s testimony on the subject was isolated and brief.

Moreover, the state provided strong evidence of appellant's guilt. At trial, K.X.'s testimony was corroborated by evidence of vaginal injury, DNA test results, and the testimony of multiple witnesses, which included family, medical professionals, and law-enforcement officers. We conclude that the district court's error was harmless.

III. The district court abused its discretion when it sentenced appellant using a criminal history score that included a criminal history point for a Wisconsin felony conviction without having first ascertained that the Wisconsin offense would qualify as a felony conviction in Minnesota.

Appellant argues that the district court abused its discretion by including a Wisconsin felony conviction in his calculated criminal history score, because the state failed to prove that the Wisconsin conviction would be a felony in Minnesota. The state concedes that the Presentence Investigation Report (PSI) on which the court and the parties relied at sentencing does not satisfy the burden of proof placed on the state concerning inclusion of an out-of-state conviction in a defendant's criminal history score.

"The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). If a criminal defendant does not object to the calculation of his score at sentencing, he may still challenge the score on appeal because he "may not waive review of his criminal history score calculation." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

"[T]he district court may not use out-of-state convictions to calculate a defendant's criminal-history score unless the state lays foundation for the court to do so." *Maley*, 714 N.W.2d at 711. "The state . . . has the burden at a sentencing hearing of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score." *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.[1] *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). "The designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law." *State v. Hahn*, 799 N.W.2d 25, 36 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Aug. 24, 2011).

This record lacks adequate evidence to support appellant's criminal-history-score calculation. The district court sentenced appellant to a 156-month prison term based on the PSI recommendation, which included one criminal-history-score point for a Wisconsin felony conviction. The record indicates that the district court relied on the PSI that included appellant's out-of-state conviction and a sentencing worksheet created from that PSI. The PSI lists the out-of-state conviction, but does not identify the statute under which appellant

[1] The Minnesota Supreme Court has rejected the "absolute requirement" that the state present certified copies of prior convictions, but adopted Minn. R. Evid. 1005 as the appropriate standard to document a conviction. *Maley*, 714 N.W.2d at 711. Documentation, official records, and witness testimony relating to the contents of official records are sufficient to document a conviction. Minn. R. Evid. 1005.

was convicted. As noted, the state agrees that remand is appropriate to create an adequate record.

We reverse appellant's sentence and remand to the district court for further proceedings concerning appellant's proper criminal history score.

Affirmed in part, reversed in part, and remanded.