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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0039

State of Minnesota,
Respondent,

vs.

Michael Paul Valentine Jaros,
Appellant.

Filed November 13, 2018
Affirmed
Jesson, Judge

Otter Tail County District Court
File No. 56-CR-16-1830

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

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Melissa Sheridan, Eagan, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Michael Jaros challenges his convictions of first-degree criminal sexual conduct and false imprisonment and sentences, arguing that he was deprived of a fair trial when a detective improperly testified about pornographic images on Jaros's phone, stating

that the images corroborated the complainant's allegations. Jaros also argues that his false-imprisonment conviction must be reversed because the confinement was merely incidental to the commission of the criminal sexual conduct. We affirm.

FACTS

On a June evening in 2016, 22-year-old T.H. attended a street dance in Fergus Falls. She ran into an older man, T.F, whom she had met the previous evening at the VFW, and started talking to him. Appellant Michael Jaros and his girlfriend, Stephanie HoldingEagle, approached T.H. and T.F. and joined them at a picnic table. They all talked and drank alcohol and eventually drove together to another bar. When T.H. asked HoldingEagle whether she was involved with Jaros, HoldingEagle indicated they were just friends, but T.H. heard from other people at the bar that they were actually in a relationship.

At about 12:30 a.m., after T.F. went home, T.H. drove with Jaros in her car back to Jaros's house, where HoldingEagle joined them. They drank some more and played cards, and T.H. engaged in mild flirting with Jaros. After an hour or so, T.H. said she wanted to go home, but Jaros and HoldingEagle encouraged her instead to stay and sleep on the couch. T.H. testified that while she was lying on the couch, HoldingEagle rubbed against her leg, but she said she was "not into women" and asked Jaros for help. She testified that Jaros came over and pushed up against her, and HoldingEagle pulled off Jaros's boxers to reveal his penis.

T.H. then left and started to drive away in her car, but she testified that she returned because she had left her cell phone in the house. She retrieved the phone and tried to leave

the house again, but Jaros grabbed her by the arm and threw her on the couch. She told him to get off, but he slapped her, pulled off her jeans and underwear, and penetrated her vagina. She testified when she tried to get up, he partially choked her and held her down, which gave her bruises. According to T.H., whenever she tried to speak, he told her to call him "sir," and every time she answered a question "wrong" he slapped her. Jaros told HoldingEagle to perform oral sex on her, which occurred. He then told T.H. to perform oral sex on him, and when she refused, he penetrated her vagina again.

T.H. testified that Jaros then pulled her off the couch, removed her t-shirt and bra, held her by the arm, and pulled her into the bedroom. There, he sexually penetrated her vagina again and pinned her down with his hands and knees. She was scared and repeatedly told him to stop. T.H. testified that at one point, Jaros asked HoldingEagle to bring him a glass of water, which he drank. T.H. testified that she tried to leave about five times, but he kept holding her down. Eventually he allowed her to leave. The whole episode from the couch to the bedroom lasted from two to two-and-one-half hours.

As T.H. was leaving, she surreptitiously grabbed a piece of Jaros's mail. She went directly to a hospital, where a sexual-assault examination revealed injuries, including arm and wrist bruises and internal vaginal tearing. Police were called, and Fergus Falls Police Detective Matthew Shirkey interviewed T.H. at the hospital. Police located Jaros using the mail that she took from the house, and T.H. identified Jaros and HoldingEagle in a photo lineup. Jaros admitted in a police interview that T.H. had been at his home that evening but denied that sexual intercourse occurred. DNA profiling showed that Jaros could not be excluded as a source of material recovered from T.H.'s sexual-assault-kit swabs.

Both Jaros and HoldingEagle were charged with first-degree criminal sexual conduct and false imprisonment. The district court consolidated their jury trials under Minnesota Rule of Criminal Procedure 17.03, subdivision 2.[1] At trial, Shirkey testified that as part of a search authorized by warrants, a forensic analysis of Jaros's cell phone was performed. The phone contained no calls, text messages, photos, or videos of the incident. But Shirkey testified that it contained a number of pornographic photographs "that showed violence towards women or violent acts of a sexual nature occurring, some of which corroborated [T.H.'s] story about what had happened." He testified that the images had captions placed on the photographs that "showed either a dominance or a violence towards women, speaking angrily, being in a dominant position over them," which in his opinion "corroborat[ed T.H.'s] statement about being told to call [Jaros] 'sir.'" He observed that a number of the photographs "talked about a male having sex with a female and then it being another female's job to clean things up afterwards. Which corroborated the penile vaginal intercourse and then [HoldingEagle] performing oral sex on her." He testified that he noted these photographs in a report.

The defense did not initially object to these remarks. But at the end of Shirkey's direct testimony, during a recess, defense counsel told the court that the state had not provided the defense with Shirkey's report until earlier that day. The defense moved for a

[1] The jury found HoldingEagle not guilty of criminal sexual conduct and guilty of false imprisonment.

mistrial, arguing that the report had not been timely provided, and Shirkey's testimony was fatally prejudicial to the defense.[2]

The district court reviewed Shirkey's report and denied the motion for a mistrial. The district court found that, although there was a discovery violation, it was not purposeful and did not rise to the level of a constitutional violation. The court provided immediate cautionary instructions to the jury. The judge instructed the jury that Shirkey did not qualify as an expert, that the basis of Shirkey's opinion was not evidence and should be ignored, and that the jury was not to consider character testimony regarding the photographs as bearing on whether the defendant acted in conformity with that character. The district court also directed the state not to refer to the photographs or Shirkey's opinion going forward or in closing argument.

Jaros testified in his defense that he kissed T.H. at one of the bars that evening and believed that she was interested in him. He testified that T.H. showed him bruises on her arm and told him that a man had tried to drag her out of a bar the previous evening. He testified that he and T.H. had sex at his home, but that it was consensual. He stated that when he began referring to HoldingEagle as his girlfriend, T.H. became angry, stopped having sex with him, and left.

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[2] The prosecutor told the court that the underlying data had been provided; she believed that Shirkey's report had been included in a supplemental disclosure; and there had been no initial objection to the testimony. Defense counsel stated she had not seen the report, and the photographs did not include Shirkey's commentary.

HoldingEagle testified that she and Jaros had an open relationship. She denied performing oral sex on T.H. She testified that when T.H. was having sex with Jaros, T.H. said once that it hurt, but that T.H. wanted to continue sexual activity until she discovered that HoldingEagle and Jaros were in a relationship. HoldingEagle testified that when T.H. left the house the first time, she saw T.H. talking on her cell phone in the car, and T.H. returned because she wanted to.

When cross-examining HoldingEagle, the prosecutor stated, "So he's telling you what to do; he's telling you to clean up, that kind of thing . . . ." This language was similar to Shirkey's testimony based on the report. HoldingEagle replied that he wasn't telling her to "clean up anything."

Before deliberations, the district court instructed the jurors that if the court had asked them to disregard something they had seen or heard, they must do so. While deliberating, the jury sent back a question: "What from Detective Shirkey or his testimony are we not to take into consideration?" The district court responded, "Detective Shirkey testified to conclusions he drew from viewing images on Mr. Jaros's phone. These images were not entered into evidence, and you should disregard any conclusion he expressed based on viewing them."

The jury found Jaros guilty of both counts. The district court imposed a guidelines sentence of 144 months for first-degree criminal sexual conduct and a concurrent sentence of 15 months for false imprisonment.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Jaros's motion for a mistrial.

Jaros first argues that he was deprived his constitutional right to a fair trial with an impartial jury when the district court declined to declare a mistrial based on improper opinion testimony relating to the photographs on his phone. At the outset, we note that the parties disagree on the proper standard for reviewing the district court's decision not to declare a mistrial based on Shirkey's testimony about the photographs. We first discern the proper standard and then review the district court's decision under that standard.

The United States and Minnesota Constitutions guarantee the right to a trial by an impartial jury. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The Minnesota Supreme Court has set forth a test that, in certain situations, requires examining whether a defendant's constitutional rights to a fair trial have been implicated by a jury's exposure to unfairly prejudicial material. *See State v. Cox*, 322 N.W.2d 555, 558 (Minn. 1982) (stating that exposing a jury "to potentially prejudicial material creates a problem of constitutional magnitude because it deprives a defendant of the right to an impartial jury"). Whether a criminal defendant has been denied a fair trial presents a constitutional question that this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). Generally, however, this court reviews the district court's denial of a motion for a mistrial for an abuse of discretion. *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). The state argues that this general standard, rather than the standard for constitutional error enunciated in *Cox*, controls in this case.

To determine "the appropriate standard of review," we examine *Cox* and its subsequent application. In *Cox*, the supreme court addressed whether the district court abused its discretion by determining that a defendant could still obtain a fair trial despite a remark in the presence of jurors by a sheriff acting as bailiff that he believed, when the state rested its case, that it was "all over." *Cox,* 322 N.W.2d at 557-58; *see also Zimmerman v. Witte Transp. Co.*, 259 N.W.2d 260, 262 (Minn. 1977) (addressing purpose of a *Schwartz* hearing, which is held when a losing party raises an issue of jury misconduct). The supreme court enunciated four factors to apply in determining whether a defendant's right to a fair trial was denied: the source and nature of the prejudicial matters, the number of jurors that were exposed to the influence, the weight of the evidence that is properly before the jury, and the likelihood that curative measures were effective to reduce the prejudice. *Cox*, 322 N.W.2d at 557-58.

Jaros argues that the district court erred by failing to apply the *Cox* factors in this case, citing this court's opinion in *State v. Hogetvedt*, 623 N.W.2d 909, 914 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). In *Hogetvedt*, this court applied the *Cox* factors and concluded that a defendant was denied his constitutional right to an impartial jury when a police officer, disregarding the district court's express instructions, testified as to his personal opinion that the defendant was guilty. *Id*. at 915-16.

But based on a review of Minnesota Supreme Court cases, we discern that the supreme court intended the *Cox* factors to apply only when "outside influences" are brought to bear on a jury, not when a witness testifies improperly, as in this case. *Cox*, 322 N.W.2d at 559. For instance, in *State v. Erickson*, 610 N.W.2d 335 (Minn. 2000),

the supreme court held that the state met its burden under *Cox* to establish that a verdict was not tainted by the bailiff's improper conduct of exposing a deliberating jury to a diagram that was not admitted into evidence. *Erickson*, 610 N.W.2d at 339. In *State v. Richards*, 552 N.W.2d 197, 209-10 (Minn. 1996), the supreme court, citing *Cox*, held that a brief conversation between the defendant and a friend of a juror's husband did not deprive the defendant of a fair trial. And in *State v. Wilford*, 408 N.W.2d 577, 581 (Minn. 1987), the supreme court concluded that when two men were talking in an elevator in the presence of jurors and said it "[did not] look too good" for the defendant, defendant's right to a fair trial was not violated under *Cox*. We endorsed this limited application of the *Cox* factors in a case involving a *Schwartz* hearing. *See State v. Hanke*, 712 N.W.2d 211, 214 (Minn. App. 2006) (citing *Cox* and explaining that "[t]he supreme court has set forth a four-part test to weigh whether prejudicial communications between jurors and a court official merit a new trial").

Based on our review, we conclude that the district court did not err by declining to apply the *Cox* factors when denying a mistrial in this case. For instance, one of the *Cox* factors directs consideration of how many jurors heard the questioned material, which is inapplicable when the prejudicial remarks are presented in testimony before the entire jury. *Cox*, 322 N.W.at 559. Here, the improper material was Shirkey's testimony from his report, rather than any outside influence brought to bear on the jurors. Therefore, the

district court did not err by failing to apply the *Cox* factors relating to constitutional error when it denied Jaros's motion for a mistrial.[3]

Even if the district court properly declined to apply the *Cox* factors, we must still examine whether the district court abused its discretion by denying the motion for a mistrial under the correct standard for assessing non-constitutional trial defects. When, as here, the defendant moves for a mistrial, the correct legal standard directs the district court to grant a mistrial "if there is a reasonable probability in light of the entirety of the trial including the mitigating effects of a curative instruction, that the outcome of the trial would have been different had the incident resulting in the motion not occurred." *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). We note that, here, the district court improperly applied the standard of manifest necessity, which has been applied when a district court granted a mistrial sua sponte against the defendant's wishes. *See State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (noting that in such a situation, the district court examines whether a "manifest necessity" existed—in other words, an error had occurred that was so significant that it could not be cured with an intervention less drastic than granting a mistrial).

Nonetheless, even if a district court has applied the wrong standard, if its ruling was warranted under the proper standard and no prejudice results, reversal is not required. *State v. Fox*, 868 N.W.2d 206, 215 n.1 (Minn. 2015). We therefore assess the district court's

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[3] We further note that, even if we were to determine that the *Cox* factors did apply here, the facts in this case do not rise to the level of the "egregious" conduct of the officer in *Hogetvedt*, who testified as to the ultimate issue of the defendant's guilt in direct disregard of the district court's cautionary instruction. *Hogetvedt*, 623 N.W.2d at 915.

ruling by examining whether its decision is supported under the correct standard. *See Griffin*, 887 N.W.2d at 262.

Applying that standard, we conclude that the district court did not abuse its discretion by denying the motion for a mistrial, because there is no reasonable probability that the outcome of the trial would have differed if the jury had not heard Shirkey's improper testimony. *See id.* We acknowledge that Shirkey's testimony referring to pornographic photos found on Jaros's cell phone, specifically the captions referencing sexual violence, was propensity evidence, which had a strong potential to influence the jury to improperly convict him on the basis of bad character. *See* Minn. R. Evid. 404(a) (providing that generally, character evidence is not admissible to prove that a person acted in conformity with that character).

Nonetheless, the state's case against Jaros was strong. Immediately after the incident, T.H. went directly to the hospital for an examination, which showed injuries consistent with sexual assault and largely inconsistent with Jaros's theory of consensual sex. She testified consistently with her statement to police, which she gave within hours after the incident. Although Jaros challenged her credibility, he placed his own credibility at issue when he acknowledged that he had initially denied to police that he had sex with T.H. In addition, the district court gave instructions to the jury to disregard the evidence on two separate occasions. Although the prosecutor referred once to "cleaning up," which was noted in Shirkey's testimony, the reference was brief and not repeated. And during deliberations, at the jury's request, the district court clarified which portion of Shirkey's testimony jurors were to disregard. The law presumes that jurors follow instructions. *State*

v. McCurry, 770 N.W.2d 553, 558-59 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009).

The district court remains in the best position to evaluate whether any prejudice to the defendant warrants a mistrial. *State v. Marchbanks*, 632 N.W.2d 725, 729 (Minn. App. 2001). On this record, we cannot conclude that a reasonable probability exists that, if jurors had not heard Shirkey's testimony, the result of the trial would have been different. *See Griffin*, 887 N.W.2d at 262. Therefore, the district court's decision to deny the defense motion for a mistrial was not an abuse of discretion.

II. The evidence is sufficient to sustain Jaros's conviction of false imprisonment.

Jaros also argues that the evidence is insufficient to sustain his conviction of false imprisonment. When reviewing a challenge to the sufficiency of the evidence, this court is limited to ascertaining whether the fact-finder could have found, after giving due regard to the presumption of innocence and the requirement of reasonable doubt, that the defendant was guilty of the charged offense. *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007). We must determine if the evidence, taken in the light most favorable to the conviction, was sufficient to permit the jury to convict. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). In making this determination, we assume that the jury credited the state's witnesses and drew all reasonable inferences in favor of the state. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

A conviction of false imprisonment requires that the defendant must have "intentionally confine[d] or restrain[ed]" another person without authority and without that person's consent. Minn. Stat. § 609.255, subd. 2 (2014). For the purpose of false

imprisonment, confinement or restraint means depriving a person of freedom of going where he or she wishes to go or preventing that person from leaving a location. *State v. Dokken*, 312 N.W.2d 106, 108 (Minn. 1981). Jaros argues that T.H. went willingly to his house. But the jury could have determined that his false-imprisonment conviction does not relate to her initial visit, but rather to the time period when she returned to Jaros's house to get her phone, and even more specifically, when she was pulled by the arm into the bedroom, where Jaros held her down and would not let her leave, despite her efforts to do so. Therefore, we reject Jaros's argument on this point.

Jaros also contends that the evidence is insufficient to support his false-imprisonment conviction because the state failed to prove that his confinement of T.H. was more than incidental to the criminal-sexual-conduct offense. In making this argument, he relies on two kidnapping cases, *State v. Welch*, 675 N.W.2d 615, 621 (Minn. 2004), which relies on *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003) *overruled on other grounds by State v. Leake*, 699 N.W.2d 312 (Minn. 2005). In *Smith*, the supreme court held that "where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." *Smith*, 669 N.W.2d at 32. Thus, there was insufficient evidence of confinement to support a conviction of first-degree murder while committing kidnapping when the only confinement that occurred during the murder was the victim's momentary confinement when a doorway was blocked during the attack. *Id*. at 32-33. And in *Welch*, the supreme court held that the defendant's act of throwing the victim to the ground during a sexual assault was completely incidental to the criminal sexual conduct and therefore did not support a conviction for kidnapping.

Welch, 675 N.W.2d at 620. The supreme court noted that in such a case, a kidnapping conviction would unfairly exaggerate the criminality of the defendant's conduct. *Id*. at 621; *see also State v. Swanson*, 707 N.W.2d 645, 659-60 (Minn. 2006) (stating that "[i]f a kidnapping is completely incidental to another offense and the imposition of a separate conviction for kidnapping unfairly exaggerates the criminality of a defendant's conduct, the kidnapping conviction and sentence may be vacated").

Jaros argues that his conviction of false imprisonment unduly exaggerated the criminality of his conduct because T.H.'s false imprisonment was "completely incidental" to the criminal sexual conduct offense. *Smith*, 669 N.W.2d at 33. We reject this argument for two reasons. First, it is unclear whether the reasoning in *Smith* and *Welch* applies equally to this case involving false imprisonment. The decisions in *Smith* and *Welch* reflect, in part, a concern with the possibility of lengthy incarcerations resulting from a kidnapping conviction when other, more serious offenses are committed at the same time. *See Smith*, 669 N.W.2d at 33 (noting that a person convicted of committing first-degree murder in the course of a kidnapping may be sentenced to life without the possibility of release); *Welch*, 675 N.W.2d at 621 (Hanson, J., concurring in part, dissenting in part) (noting that consecutive sentencing in that case exaggerated the criminality of a kidnapping conviction based on minimal confinement). This concern does not exist with respect to a conviction of false imprisonment, which is not subject to a lengthy sentence based on its commission during another more serious crime. Here, Jaros received a lesser sentence on his conviction of false imprisonment, concurrent to that on the first-degree criminal-sexual-conduct offense.

Second, even if we were to determine that *Smith* and *Welch* may apply to a false-imprisonment case, we disagree with Jaros that the conduct forming the basis of his false-imprisonment conviction was "completely incidental" to his criminal-sexual-conduct offense. The record shows that Jaros forcibly removed T.H. from the living room to the bedroom of his home and pinned her down on the bed. He even continued to hold T.H. down while he drank a glass of water. She attempted to leave multiple times, and he did not allow her to do so. Although this behavior facilitated Jaros's sexual assault, it is not merely incidental to the sexual assault and constitutes "purposeful behavior in its own right." *See State v. Earl*, 702 N.W.2d 711, 723 (Minn. 2005) (holding that the "confinement or removal" of burglary victims by awakening them and moving them to another room, "although [it] may have been necessary to commit the burglary, it was not merely incidental," but "purposeful behavior in its own right"). Under these circumstances, the conduct forming false imprisonment was not completely incidental to the criminal sexual conduct, and this argument does not provide grounds for reversal.

In a pro se supplemental brief, Jaros raises additional sufficiency-of-the-evidence arguments. He challenges T.H's credibility, arguing that, based on the testimony of two other witnesses, she may have been lying. Specifically, he notes that T.F. and another bar patron who met T.H. at the VFW the evening before the assault both contradicted T.H.'s testimony about where she went that night after leaving the VFW. He points to his own testimony that T.H. originally told him and HoldingEagle that she had received bruises on her arm from the other bar patron, who also changed his story about what happened after leaving the VFW. Jaros further alleges that T.H. lied when she testified that he slapped her

on the face because no hospital or police reports contain that information, and no photographic evidence showed marks on her face.

"Inconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006). (quotation omitted). In our review, we assume that the jury disbelieved testimony that conflicts with the verdict. *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). And a jury is free to accept part of a witness's testimony and reject another part. *Id*. Resolution of inconsistencies between eyewitnesses' testimony is the exclusive function of the jury, who has the opportunity to observe witness demeanor and weigh credibility. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984). Here, the jury had ample opportunity to weigh all of the evidence, observe the witnesses, and resolve any inconsistent testimony. *Id*. The evidence is sufficient to sustain Jaros's conviction.

Affirmed.