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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0482**

Travis Lee Keller, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 24, 2018
Affirmed
Jesson, Judge**

Washington County District Court
File No. 82-CR-15-2158

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

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Travis Lee Keller was convicted of third-degree criminal sexual conduct for sexually assaulting A.H. in her home. Keller now challenges the district court's denial

of his postconviction petition for relief in which he alleges prosecutorial misconduct. Specifically, Keller contends that the prosecutor circumvented the district court's evidentiary rulings preventing the suggestion that A.H. was drugged before the assault. Because the prosecutor complied with the district court's evidentiary rulings and no misconduct occurred, we affirm.

FACTS

In celebration of a new job, 40-year-old A.H. had dinner and drinks in downtown Minneapolis with a group of friends. The group, consisting of some of A.H.'s girlfriends and their significant others, also included appellant Travis Lee Keller, who was dating one of A.H.'s acquaintances. Some members of the group were drinking. A.H. estimated that she drank wine at dinner, one beer at a brewery, and possibly a drink at a third bar.

By the time the group reached their final destination of the night, a dance club, the group consisted of A.H., Keller and his girlfriend, and another couple. Keller and his girlfriend were arguing, and Keller discussed the argument and his relationship with A.H. This made A.H. uncomfortable, as she had only met Keller a few times previously and did not know him well. According to A.H., she did not drink any alcohol at the dance club and drank two bottles of water.¹

On the way home from the dance club, A.H. was dizzy, exhausted, and felt like something was wrong. Keller and his girlfriend were dropped off at the girlfriend's home first, and then the remaining couple took A.H. to her home. A.H.'s friend helped her inside,

¹ A.H. testified that Keller gave her one of the bottles of water, but Keller denied ever giving her water.

put her in bed, and got her water. A. H. fell asleep immediately. After taking care of A.H., the couple left, but they were unable to lock A.H.'s front door because it was a deadbolt that could only be locked from the inside or with a key, which the couple did not have.

Meanwhile, Keller and his girlfriend continued arguing at her house, and Keller decided he did not want to stay there. Keller left his girlfriend's house and went to A.H.'s house. Keller testified that A.H. told him earlier in the evening that he could stay there. But after arriving at her home, Keller knocked on the door and called for A.H., and did not get a response. Since the front door was unlocked, he went in and proceeded downstairs to A.H.'s bedroom.

What happened next is disputed. A.H. testified that she was sleeping and awoke to Keller on top of her having sex with her. Keller testified that he tapped A.H. on the shoulder and she acknowledged him, so he got into bed with her to "make a move." According to Keller, the two then had a consensual sexual encounter in which they made out, he performed oral sex on her, and then A.H. "grabbed [his] penis" and put it inside of her. A.H. testified that the encounter was not consensual and described feeling panicked and unable to move during the encounter. When A.H. was able to, she told Keller to get off of her and leave, which he did. A.H. heard Keller's car drive away, and she crawled up her stairs to lock her front door.

A.H.—who testified she was in shock about what happened—did not immediately call the police. After speaking with her sister, A.H. reported the incident to the police two days after the encounter with Keller. The following day, A.H. went to the hospital, where a sexual assault exam was performed, and DNA from vaginal and cervical swabs matched

a sample given by Keller. During the exam, A.H. told the nurse that she felt like she was drugged, which the nurse noted in the medical record. Police investigated A.H.'s report, and the state charged Keller with one count of third-degree criminal sexual conduct where the victim is physically helpless.

Before trial, defense counsel moved to prevent any testimony that A.H. was drugged. The district court ruled that A.H. could testify about what she experienced and what happened, but that she could not “speculate or claim that she was drugged in some fashion” and that if that information came into the record, it would result in a mistrial.

At trial, A.H. testified, describing how she woke up to Keller having sex with her, that she never invited him to her home, and that the encounter was nonconsensual. The state also presented the testimony of A.H.'s two girlfriends who were with her the night of the encounter, A.H.'s sister, the sexual assault nurse examiner, two officers who worked on A.H.'s case, and the laboratory scientist who performed testing on samples from A.H.'s medical exam.

Before the Bureau of Criminal Apprehension (BCA) scientist testified, the state requested that the district court permit testimony about BCA protocol for testing for alcohol and a date-rape drug and what is done in a standard case in order for the jury to understand why no testing for those substances was performed in this case. The district court permitted the testimony, but emphasized to the parties that suggesting to the jury that A.H. was drugged would result in a mistrial. The BCA scientist then testified that the BCA policy is to not analyze blood or urine samples for alcohol or a drug called GHB—commonly

referred to as a date-rape drug—in criminal sexual assault cases if the samples were collected more than 24 hours after the incident occurred.

Keller also testified, describing that he never gave A.H. any water, that he asked A.H. for permission to stay at her house and she agreed, and that the sexual intercourse was consensual.

The jury found Keller guilty, and the district court sentenced him to 60 months in prison and 10 years of conditional release. Keller did not directly appeal his conviction but instead filed a timely motion for postconviction relief. In his petition, Keller alleged that the prosecutor committed reversible misconduct by eliciting testimony from witnesses in a way that circumvented the district court’s ruling that prohibited the suggestion that A.H. was drugged. The district court summarily denied Keller’s postconviction petition. Keller appeals.

D E C I S I O N

Keller challenges the denial of his postconviction petition on the basis that the prosecutor committed misconduct during his trial. Keller contends that the prosecutor—in violation of the district court’s evidentiary ruling—elicited testimony from the state’s witnesses in a manner which strongly implied that he drugged A.H. Keller argues that this resulted in a deprivation of his right to an impartial jury such that a new trial is warranted, and that the district court abused its discretion by summarily denying his postconviction petition.

We review the summary denial of a petition for postconviction relief for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). But we review legal

issues de novo and factual determinations to determine if they are supported by sufficient evidence in the record. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). This court will not reverse a denial of a petition for postconviction relief unless the district court “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Id.*

In this case, the postconviction court, applying the modified-plain-error standard of review used for allegations of unobjected-to prosecutorial misconduct, determined that no error occurred. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (establishing that the defendant must establish (1) error and (2) that the error was plain, and if established, that (3) the burden then shifts to the state to show that the misconduct did not affect the defendant’s substantial rights).²

On appeal, Keller argues that the prosecutor committed misconduct by circumventing the district court’s evidentiary order prohibiting the suggestion that A.H. was drugged. Specifically, Keller identifies four instances that he alleges amounted to misconduct: the elicitation of testimony from A.H. that Keller gave her a water bottle and she did not feel well after, the introduction of the medical report from A.H.’s sexual assault exam, the decision to question police officers about how A.H. said she felt during the assault, and the prosecutor’s undue emphasis during the BCA scientist’s testimony on why testing for a date-rape drug was not performed. Keller is correct that a prosecutor is

² If all three elements of the test are met, this court corrects the error “only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *State v. Peltier*, 874 N.W.2d 792, 804 (Minn. 2016) (quotations omitted).

obligated to follow a court's evidentiary orders, and the intentional violation of an evidentiary order amounts to misconduct. *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984). Accordingly, we address each of Keller's evidentiary challenges in turn.

A.H.'s testimony

The district court permitted A.H. to testify about how she felt and her experience but not to reach the conclusion that she was drugged. This is precisely what A.H. did. A.H. testified about not being well and feeling like something was wrong, but nowhere in her testimony did she mention feeling like she was drugged.

But Keller contends that the prosecutor unduly emphasized the fact that Keller allegedly gave A.H. a water bottle by asking about the water bottle immediately before asking A.H. about how she was feeling on her way home. Keller argues that this implied that Keller giving A.H. the water resulted in her not feeling well.

The record, however, does not support Keller's contention that the prosecutor placed undue emphasis on Keller giving A.H. a water bottle. The prosecutor asked A.H. what she drank at the dance club, and A.H. responded by saying that Keller and the other male significant other in the group gave her bottles of water to drink. What A.H. was drinking was relevant to her perception of the events of the evening, and nothing in A.H.'s testimony indicated that she thought Keller drugged her. Similarly, the prosecutor asked A.H. if she remembered drinking two bottles of water and if Keller gave her one of those bottles of water, to which A.H. responded affirmatively. The prosecutor followed that question with questions regarding whether A.H. had Keller's phone number, talked to him without his girlfriend around, or would have had a reason to invite him to stay at her house. This

question about the water bottle was in the context of the extent of A.H.'s interaction with Keller and did not imply that he drugged her or that the water was the reason why A.H. did not feel well.

A.H.'s testimony complied with the district court's ruling that she could testify about how she felt and her experience but not reach the conclusion she was drugged, and the prosecutor complied with the district court's evidentiary ruling. Accordingly, it was not an abuse of discretion for the postconviction court to conclude that it was not misconduct for the prosecutor to elicit this testimony.

Medical report from the sexual assault exam

The district court expressly permitted the introduction of the medical report from A.H.'s sexual assault exam but ordered counsel to redact a phrase where A.H. indicated that she felt like she was drugged. Counsel complied exactly with the district court's order, and showed the redacted proposed exhibit to the court and defense counsel before it was introduced into evidence.

Despite the prosecution's compliance with the district court's order, Keller argues that the order of the statements in the medical report attached significance to the fact that Keller gave A.H. a water bottle. The portion of the report that Keller challenges reads as follows:

I started not feeling well in the car on the way home. [Redacted.] I wasn't drinking towards the end. I had a couple bottles of water. The second bottle of water was from this guy (Travis). I haven't felt like that before. I just got so tired so fast. I just kept thinking while we were driving "I gotta go to sleep."

Presumably, these statements are ordered in the manner that A.H. recounted her experience to the nurse. Again, A.H. was describing how she felt and her experiences, which the district court expressly permitted her to do. Further, Keller's counsel saw this report before it was admitted into evidence and participated in discussions about which portions to redact and did not raise any concerns about the passage he now challenges. Because the prosecutor complied exactly with the district court's order to redact the document, it was not an abuse of discretion for the postconviction court to conclude that introducing the medical record was not misconduct.

Police officer testimony

Two police officers involved with A.H.'s case testified at trial. The prosecutor asked the first police officer if A.H. told him how she was feeling after Keller left her home, and the police officer responded that A.H. told him that she felt like she was paralyzed. During cross-examination, the second police officer testified that A.H. made a comment about whether she unknowingly invited the assault. On redirect, the prosecutor asked the second officer if A.H. described how her body was feeling during the assault, and the police officer testified that A.H. said she felt paralyzed. This testimony is directly related to how A.H. was feeling and what she experienced, again directly complying with the district court's evidentiary ruling.

Keller's argument that this testimony from the police officers implied that Keller drugged A.H. is not persuasive. The testimony was relevant to the issue of whether A.H. was physically helpless—an element the state was required to prove—and these prior consistent statements served to corroborate A.H.'s testimony about how she was feeling.

Further, the statements were directly related to how A.H. felt during the assault, a topic the district court permitted testimony about. Accordingly, the postconviction court's conclusion that the prosecutor's decision to elicit this testimony was not misconduct was not an abuse of discretion.

BCA scientist's testimony

After a lengthy discussion about the scope of permissible testimony from the BCA scientist, the district court ruled that the expert could testify about the protocol for testing for alcohol and a date-rape drug and what is done in a standard case, but emphasized to the parties that suggesting to the jury that A.H. was drugged would result in a mistrial. The BCA scientist then testified that BCA policy is to not analyze blood or urine samples for alcohol or a drug called GHB in criminal sexual assault cases if the samples were collected more than 24 hours after the incident occurred, as in this case. The scientist noted that an analysis for a "date rape" drug was requested on the samples from A.H., but no testing for GHB was done per the BCA policy. The state emphasized multiple times that no testing for GHB was performed. Facially, all of the questions focused on what the BCA policy was with regards to testing for GHB and why no testing for that drug was done in this case. Although the prosecutor asked about GHB testing multiple times in the context of establishing the BCA protocol, the prosecutor never suggested that Keller drugged A.H.

Although Keller is correct that GHB was mentioned by the scientist several separate times in her somewhat brief testimony, the prosecutor's actions do not rise to the level of misconduct. The prosecutor confined the questioning to the BCA policy, the scientific reasons behind the policy, and why—in conformance with that policy—no testing was

done in this case. Further, both the district court and Keller's trial counsel were acutely aware of the evidentiary ruling preventing the suggestion that A.H. was drugged, but counsel did not object to the testimony or move for a mistrial. Because the prosecutor complied with the district court's evidentiary ruling, it was not an abuse of discretion for the postconviction court to conclude that eliciting testimony about GHB testing procedures was not misconduct.

Finally, we note that throughout the trial, the district court and the parties were proactive about addressing any evidentiary issues that could have violated the district court's ruling preventing the suggestion that A.H. was drugged. All parties were involved in discussions about the scope of permissible testimony from various witnesses and discussed any concerns about evidence before it was admitted. Further, the district court advised parties that violating the ruling could result in a mistrial. The diligence of the district court judge indicates that had the prosecution presented evidence or testimony in a way which circumvented the evidentiary ruling, the district court would have addressed it during the trial.

Each of Keller's identified instances of alleged prosecutorial misconduct were in compliance with the district court's evidentiary rulings. Because the prosecutor's actions complied with the evidentiary rulings, no error occurred. Accordingly, Keller is not entitled to any postconviction relief. Therefore, the district court did not abuse its discretion by summarily denying his petition for postconviction relief.

Affirmed.