STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1567

State of Minnesota,
Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,
Appellant.

Filed August 5, 2019
Affirmed
Schellhas, Judge

Lyon County District Court
File No. 42-CR-14-600

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and Jesson, Judge.

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, and sentences for, two counts of first-degree criminal sexual conduct, arguing that (1) the charges are barred by the statute of

limitations and (2) the district court erred by imposing two consecutive 144-month sentences on remand after his successful appeal. Appellant also raises several issues in his pro se supplemental brief. We affirm.

FACTS

Respondent State of Minnesota charged appellant Adolfo Avila with two counts of first-degree criminal sexual conduct on July 3, 2014. The complaint alleged that in July 2011, Lyon County Sheriff's Office Investigator Tony Rolling received a report indicating that M.H. named Avila, her step-father, as the father of her nine-year-old child. Investigator Rolling interviewed M.H., who stated that Avila had sexually assaulted her between 15 and 18 times before she became pregnant. The complaint alleged that based on the birth date of M.H.'s child, the likely date of conception was sometime during June 2001, when M.H. was 15 years old.

Avila moved to dismiss the charges under Minn. Stat. § 628.26(e) (2018), which requires the state to bring a criminal-sexual-conduct charge within the later of nine years of the commission of the offense, or three years after the offense was reported to law enforcement.[1] The district court denied the motion, finding that nothing in the record indicated that the 2001 offenses "had been previously reported to law enforcement," and that the complaint was filed "within three years of the incident being reported" to law

[1] We cite the current version of the statute because, although renumbered, the substance of the current statute for purposes of this case is the same as the statute in effect at the time of the commission of the offense. *Compare* Minn. Stat. § 628.26(e) (2018) *with* Minn. Stat. § 628.26(d) (2000).

enforcement. Avila requested reconsideration based on allegedly new evidence relevant to the statute of limitations. The court denied the motion.

Avila continued to pursue his statute-of-limitations defense but eventually pleaded guilty to one count of first-degree criminal sexual conduct in September 2015. One month later, he moved to withdraw his plea. The district court denied his motion and sentenced him to 144 months in prison. Avila appealed, claiming that his guilty plea was invalid and that his counsel provided him ineffective assistance. This court concluded that the plea was unintelligently entered, and reversed and remanded to allow Avila to withdraw his guilty plea. *State v. Avila*, No. A16-0516 (Minn. App. May 22, 2017).

On remand, Avila waived his right to counsel and proceeded pro se. He continued to pursue his statute-of-limitations defense, claiming that because Investigator Rolling heard about the alleged sexual misconduct in 2003, when Rolling was employed with the Tracy Police Department, the statute of limitations expired three years later in 2006. Avila also claimed that even if the statute of limitations did not expire in 2006, it expired in 2010, three years after a paternity action was filed against him alleging that he was the father of M.H.'s child.

The district court re-opened Avila's omnibus hearing on March 14, 2018. Investigator Rolling testified that while he was a police officer in Tracy in 2003, he "heard" a "rumor" from R.H., the town baker, that "Avila had gotten his daughters pregnant." Investigator Rolling testified that "[i]t was just a rumor," with no "facts, dates, . . . anything to substantiate that rumor," and that he therefore did not investigate the rumor. The court denied Avila's motion, concluding that an "unsubstantiated rumor is not a report to law

enforcement that would trigger the statute of limitations," that "[n]either the paternity testimony nor the affidavit clearly identif[ied] all necessary elements" of the alleged first-degree criminal-sexual-conduct offense, and that the filing of the paternity action by Lyon County in 2007 therefore did not constitute "a report to law enforcement."

A jury found Avila guilty of two counts of first-degree criminal sexual conduct. The district court imposed 144-month sentences on both counts, to be served consecutively. This appeal follows.

D E C I S I O N

I. Statute of limitations

Avila challenges the district court's denial of his motion to dismiss on the grounds that the charges against him were time-barred under the applicable statute of limitations. We review the construction and application of a statute of limitations de novo. *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. App. 2014), *review denied* (Minn. June 17, 2014).

The applicable statute of limitations provides:

> Indictments or complaints for violation of sections 609.322 and 609.342 to 609.345, if the victim was under the age of 18 years at the time the offense was committed, shall be found or made and filed in the proper court within the later of nine years after the commission of the offense or three years after the offense was reported to law enforcement authorities.

Minn. Stat. § 628.26(e). The purpose of a statute of limitation is: (1) to protect defendants from defending themselves against crimes when the facts "may have become obscured"; (2) to minimize the danger of official punishment for acts in the distant past; and (3) to encourage law enforcement to promptly investigate suspected criminal activity. *State v.*

Danielski, 348 N.W.2d 352, 355 (Minn. App. 1984) (quotation and emphasis omitted), *review denied* (Minn. July 26, 1984).

The district court denied Avila's motion to dismiss under the second part of Minn. Stat. § 628.26(e), finding that M.H. first reported the offense to law enforcement in July 2011, and that the state filed its complaint within three years of M.H.'s report. Avila argues that the court erred because R.H. first reported the offense to law enforcement in 2003, that the statute of limitations therefore expired in 2006,[2] and that the court should have dismissed the complaint as time-barred.

Avila's argument requires the construction of Minn. Stat. § 628.26(e). "The objective of statutory interpretation is to ascertain and effectuate the Legislature's intent." *State v. Struzyk*, 869 N.W.2d 280, 284 (Minn. 2015). "When interpreting a statute, the first question is whether the language of a statute is ambiguous." *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). "The plain language of the statute controls when the meaning of the statute is unambiguous." *State v. Boecker*, 893 N.W.2d 348, 351 (Minn. 2017). If a statute does not define a phrase, that phrase is given "its plain and ordinary meaning." *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019) (quotation omitted). And "[s]tatutory words and phrases must be construed according to the rules of grammar and common usage." *Id*. (quotation omitted).

[2] We note that even if R.H.'s statement constituted a report to law enforcement authorities, the statute of limitations would not have expired under Minn. Stat. § 628.26(e) in 2006, it would have expired in 2010, nine years after the commission of the offense.

Minn. Stat. § 628.26(e) unambiguously states that the three-year charging deadline is triggered when the offense is "reported to law enforcement authorities." In *State v. Soukup*, this court stated that "by 'reporting,' the statute means notifying law enforcement authorities." 746 N.W.2d 918, 922 (Minn. App. 2008), *review denied* (Minn. June 18, 2008). Because the term "reported" is not defined by the statute, we look to dictionary definitions to ascertain the common and ordinary meaning of this term. *See State v. Thonesavanh*, 904 N.W.2d 432, 436–37 (Minn. 2017) (looking to dictionary definitions to determine common and ordinary meaning of undefined terms in statute).

One dictionary defines "reported" as "[t]o make or present an official or formal account of," or "[t]o tell about the presence or occurrence of," or "[t]o relate or tell, especially from personal experience." *The American Heritage Dictionary of the English Language* 1490 (5th ed. 2018). Similarly, another dictionary defines "reported" as to "make a formal statement or complaint about (someone or something) to the necessary authority." *New Oxford American Dictionary* 1481 (3rd ed. 2010). Based on the common and ordinary meaning of "reported," we conclude that an offense is "reported" to law enforcement if the report provides law enforcement with actual notice of sufficient facts that form the basis of notice to law enforcement that a specific criminal offense may have occurred.

Moreover, while "[w]e recognize that we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive." *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010), *review denied* (Minn. Jun. 29, 2010). And we note that our interpretation of "reported" is consistent with foreign caselaw. *See People v. Quinto*, 964 N.E.2d 379, 384–85 (N.Y. 2012) (concluding that "the phrase 'the offense is

reported' as used in [the statute of limitations] would mean a communication that, at a minimum, describes the offender's criminal conduct and the particular harm that was inflicted on the victim" because "[i]nformation of this nature provides the police with actual notice that a specific criminal offense has occurred, allowing them to conduct a prompt investigation"); *State v. Harberts*, 108 P.3d 1201, 1209 (Or. Ct. App. 2005) (explaining that offense is "reported" under Oregon statute of limitations when "there has been actual communication of the facts that form the basis for the particular offense reported" (quotation omitted)); *State v. Green*, 108 P.3d 710, 721 (Utah 2005) (stating that something qualifies as "report of the offense" under Utah statute of limitations when there is (1) a discrete and identifiable oral or written communication; (2) that is "intended to notify a law enforcement agency that a crime has been committed"; and (3) that "actually communicates information bearing on the elements of a crime as would place the law enforcement agency on actual notice that a crime has been committed").

Here, the rumor that R.H. relayed to Investigator Rolling in 2003 was insufficient to put Rolling on actual notice that a specific criminal offense may have occurred. R.H.'s statement described general conduct rather than conduct that would constitute a specific criminal offense. For example, the actual charged offense involved Avila's step-daughter, M.H. In contrast, R.H. relayed a rumor that Avila got his "daughters pregnant." Moreover, R.H.'s relayed rumor contained no information about the age of Avila's daughters when Avila was rumored to have impregnated them. The age of Avila's daughters at the time of the rumored conduct would dictate the specific offense for which Avila could be charged. Moreover, R.H.'s statement was vague and made with no formality, and Investigator

Rolling characterized R.H.'s statement as more of a "rumor" or town gossip, than a report. A "rumor" or "town gossip" is inconsistent with the dictionary definitions of "reported." We therefore conclude that the district court properly determined that R.H.'s statement to Investigator Rolling in 2003 did not constitute a report to law enforcement authorities for purposes of Minn. Stat. § 628.26(e).

In his pro se supplemental brief, Avila contends that M.H.'s report to a social worker in 2006, which precipitated the filing of Lyon County's paternity action, constituted a report to law-enforcement authorities for purposes of Minn. Stat. § 628.26(e). We disagree. Minn. Stat. § 628.26(e) specifically requires the offense to have been "reported *to law enforcement authorities*." (Emphasis added.); *see Soukup*, 746 N.W.2d at 922 (stating that "by 'reporting' [Minn. Stat. § 628.26(e)] means notifying law enforcement authorities"). Neither the Lyon County Attorney nor the county human services constitute law enforcement. This conclusion is supported by statute. *See* Minn. Stat. § 388.051 (2018) (defining duties of county attorney, which do not include investigation); Minn. Stat. § 626.556, subd. 10a(a) (2018) (distinguishing between local welfare agencies and law-enforcement agencies for purposes of investigating allegations of sexual abuse). We conclude therefore that the district court properly determined that the filing of a paternity action did not constitute a report to law enforcement.

In sum, neither Lyon County's filing of the paternity action nor R.H.'s statement to Investigator Rolling in 2003 constituted a report to law enforcement for purposes of Minn. Stat. § 628.26(e). Instead, based on the record, M.H. first reported Avila's offense to law enforcement on July 20, 2011, and the state filed its complaint against Avila on July 3,

2014, within three years after the offense was first reported to law enforcement. Accordingly, the district court properly concluded that the statute of limitations under Minn. Stat. § 628.26(e) had not expired and the charges against Avila therefore were not time-barred.

II. Consecutive sentences

Avila challenges the district court's imposition of consecutive sentences following his convictions of two counts of first-degree criminal sexual conduct on the bases that the sentence penalized him for a successful appeal and is excessive. We disagree.

Consecutive sentences are permissible punishment for criminal sexual conduct committed in violation of Minn. Stat. § 609.342, subd. 1. Minn. Sent. Guidelines II.F. (2000). "We review a district court's decision to impose consecutive sentences for an abuse of discretion." *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017). We will not interfere with a district court's discretion unless the sentence is disproportionate to the crime or unfairly exaggerates the criminality of the defendant's conduct. *Id*.

The supreme court has held that it was improper for a district court "to impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received." *State v. Holmes*, 161 N.W.2d 650, 652 (Minn. 1968). In concluding that this decision was based on public policy, and not on constitutional grounds, the court explained that "as a matter of law . . . any increase in penalty upon a retrial inevitably discourages a convicted defendant from exercising his legal rights." *Id.* at 653. The supreme court later expanded on *Holmes* and held that "procedural fairness and principles of public policy" prohibit a district court from imposing a more severe sentence for the same crime after a

case has been remanded for resentencing. *State v. Prudhomme*, 228 N.W.2d 243, 246 (Minn. 1975).

After remand, the district court's sentence of Avila on count I is the same sentence that followed Avila's guilty plea. Although the aggregate total of Avila's sentence is longer after remand, the sentence includes a sentence for first-degree criminal-sexual conduct, a conviction Avila avoided by pleading guilty. Because Avila's sentence on count I is the same after remand as was imposed following his guilty plea, his sentence for count I is not more onerous, and Avila therefore cannot demonstrate that his sentence violated his due-process rights.

Avila also contends that his total aggregate sentence of 288 months is "excessive" and "a product of the charging decision to create two counts." But "a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion" absent special circumstances. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). Avila cannot show that special circumstances exist here. Moreover, consecutive sentences are permissible under the sentencing guidelines, even when the offenses involve a single victim. *See* Minn. Sent. Guidelines II.F.; *see also State v. Perleberg*, 736 N.W.2d 703, 706 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007). The record reflects that Avila sexually assaulted his step-daughter several times over a seven-month period, which ultimately resulted in her pregnancy. Under the circumstances, Avila's sentence is not excessive, particularly when compared to sentences imposed in similar cases. *See State v. Suhon*, 742 N.W.2d 16, 23 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008)

(affirming imposition of consecutive sentences totaling 278 months in prison for three counts of criminal sexual conduct based on 832 acts of abuse over 11 years); *see also Perleberg*, 736 N.W.2d at 707 (affirming imposition of three consecutive sentences of 144 months, which totaled 432 months in prison when defendant was convicted of six counts of first-degree criminal sexual conduct involving one victim). We conclude that the district court did not abuse its discretion by sentencing Avila consecutively on the two counts of first-degree criminal sexual conduct.

III. Pro se arguments

In addition to the statute-of-limitations arguments addressed above, Avila argues in his supplemental brief that (A) a *Brady* violation occurred; and (B) the prosecutor committed misconduct.

A. Brady violation

The state has an affirmative duty in criminal cases to disclose evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). To constitute a *Brady* violation, the following three requirements must be established:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
>
> (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
>
> (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Zornes v. State, 903 N.W.2d 411, 417 (Minn. 2017) (quotation omitted). "Because a *Brady* materiality analysis involves a mixed question of law and fact, [appellate courts] review a district court's materiality determination de novo." *Id*. (quotation omitted).

Avila asserts that in the redacted portion of an affidavit signed by M.H. in May 2006, M.H. stated that she believed she got pregnant in July 2001, which is inconsistent with the charges brought by the state that alleged in count I that Avila committed first-degree criminal sexual conduct in June 2001, and in count II that the sexual abuse occurred in January-April 2001. Avila contends that because M.H. was unable to read the redacted portion of the affidavit, he was unable to impeach her with the May 2006 affidavit. Avila argues that the redaction of the affidavit constitutes a *Brady* violation.

Assuming, without deciding, that Avila's construction of the affidavit is correct, the first two *Brady* requirements are satisfied because the evidence could have been used to impeach M.H.'s testimony on the elements of count I, and the redaction of the affidavit appears to indicate intent by the state. As a result, Avila's arguments turn on the third element, materiality.

Evidence is considered material for purposes of a *Brady* violation "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 418 (quotations omitted). A "reasonable probability" is defined as one that is sufficient to undermine confidence in the verdict. *Id*.

Here, no reasonable probability exists that, had the affidavit not been redacted, the result of the proceeding would have been different. As Avila acknowledges in his main brief, M.H. testified at trial that (1) Avila sexually assaulted her more than ten times and

that these assaults occurred between January and April 2001, and in the summer of 2001; (2) she became aware that she was pregnant around July 2001, which is not completely inconsistent with her May 2006 affidavit; (3) the baby was born on March 6, 2002; (4) she had no other sexual partners; and (5) Avila was adjudicated the father of her daughter based on DNA testing. Avila's claim that a *Brady* violation occurred therefore fails.

B. Prosecutorial misconduct

Avila contends that the Lyon County Attorney committed prosecutorial misconduct by "not authorizing the release" to the Lyon County Sheriff the 2006 report M.H. made to human services regarding the sexual abuse. To support his claim, Avila cites Minn. Stat. § 626.556, subd. 3(b) (2018), which provides that a person "*may* voluntarily report to the local welfare agency, agency responsible for assessing or investigating the report, police department, [or] county sheriff . . . if the person knows, has reason to believe, or suspects a child is being or has been . . . subjected to . . . sexual abuse." (Emphasis added.) But "may" is "permissive." Minn. Stat. § 645.44, subd. 15 (2018). And Avila cites no legal authority to support his prosecutorial-misconduct claim. We need "not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). Moreover, Avila was not prejudiced by the alleged prosecutorial misconduct. He therefore is unable to demonstrate that he is entitled to relief from the claims raised in his pro se supplemental brief.

Affirmed.