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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0004

State of Minnesota,
Respondent,

vs.

Mario Antonio Burciaga,
Appellant.

Filed December 30, 2019
Affirmed
Connolly, Judge

Mower County District Court
File No. 50-CR-17-1272

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct, arguing that (1) the evidence was insufficient to prove beyond a reasonable doubt that he committed the charged offenses; (2) the prosecutor committed misconduct by appealing to the passions and prejudices of the jury during closing argument; and (3) the $20,000 fine imposed on him was an abuse of discretion. Because the evidence was sufficient, there was no prosecutorial misconduct, and the fine was within the district court's discretion, we affirm.

FACTS

When appellant Mario Burciaga and F.A. began their relationship, F.A. had two children, a son, J.A., then four or five, and a daughter, A.A., then one or two years old. A.A.'s biological father is believed to be in California; he is not and has never been part of her life. From April 2013 to March 2014, the four of them lived in Austin, Minnesota.

Child protection became involved with A.A. after an incident in February 2014, when a friend of F.A., K.T.-J., was caring for A.A. in her home. When A.A., then about three and a half, saw an older man, she put her hand to her crotch and said "Dad put it in here." K.T.-J. did not know whom A.A. meant by "Dad" because A.A. had never met her biological father, who was in California; the only male involved with A.A. was her maternal grandfather, D.A., and K.T.-J. did not know that appellant was then living with F.A. and the children or that A.A. called appellant "Dad."

A child protection assessment worker (CPAW) met A.A. and took her to the Midwest Children's Resource Center (MCRC), but A.A.'s speech problems precluded an effective interview. A doctor examined A.A. and determined that a healed injury to her hymen had been caused by accidental injury or sexual abuse. F.A. could recall no injury to A.A. The CPAW learned that A.A. went to D.A.'s house on Fridays, but that appellant and F.A., not D.A., cared for her there, and determined that sexual abuse of A.A. by an unknown perpetrator had occurred.

In July 2016, a detective interviewed A.A., who was then almost six and was speaking more clearly. A.A. answered "My dad" when asked if anyone except her mother, her brother, and her sisters had lived with her in Austin, and she answered "Mario" when asked who her dad was. When asked what Mario did to her, she answered "he went in my privates."

In June 2017, appellant was charged with three counts of first-degree criminal sexual conduct: (1) sexual contact with someone under 13, in violation of Minn. Stat. § 609.342, subd. 1 (2016); (2) sexual penetration of someone under 13 by a person more than 36 months older, in violation of Minn. Stat. § 609.342, subd. 1(a); and (3) sexual penetration by a person with a significant relationship to the complainant, the complainant is under 16, and the complainant suffers personal injury, in violation of Minn. Stat. § 609.342, subd. 1(h)(ii). Appellant pleaded not guilty to the three counts.

At his trial, A.A., then seven, testified that (1) a "bad touch" was "[w]hen a person put their private in my private"; (2) her private was her vagina and the other person's

private was a wee-wee; (3) the person who did this to her was Mario; (4) he lived with her and her mom; and (5) Mario was in the courtroom wearing a gray shirt.

F.A. testified that: (1) in July 2013, when she came home from work, appellant sent her out for cigarettes; (2) when she returned, she saw blood on the floor next to the couch; (3) appellant was coming downstairs after a shower; (4) A.A. was in the shower, shaking, but unable to tell F.A. what had happened; (5) appellant told F.A. that he had kicked A.A.; and (6) the next day, F.A. found blood on A.A.'s diaper. F.A. said she did not report the incident to the police because she was then using methamphetamine and had methamphetamine in the house.

The physician who examined A.A. testified that she found a transection, or an area that had been cut through or broken through and then healed; that this area went "all the way down to the base of the hymen"; that this is something occurring in "probably less than five percent of children evaluated for sexual abuse"; and that it "had to have been caused by some trauma."

Appellant testified that: (1) he and F.A. were in and out of jail during the relevant time; (2) he did not put his penis into A.A. or kick A.A. in the vagina; (3) he watched the children on and off while F.A. was at work; and (4) A.A. "could have possibly started calling [him] dad." He asserted an alternative-perpetrator defense.

The jury found appellant guilty on all three counts. He was sentenced on count 1 to 360 months in prison and a ten-year conditional-release period, with a $20,000 fine. Appellant challenges his conviction, arguing that the evidence was insufficient to permit the jury to conclude that appellant was guilty beyond a reasonable doubt of the three counts

of first-degree criminal sexual conduct and that he is entitled to a new trial based on the misconduct committed in the prosecutor's closing argument; he also argues that the fine imposed on him was an abuse of the district court's discretion.[1]

DECISION

1. Sufficiency of the Evidence

> When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted. The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict. The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State's burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.

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[1] In his pro se supplemental brief, appellant does not raise or argue legal issues: he merely lists 9 items he regards as examples of prosecutorial misconduct: (1) "Coerced Witnesses," (2) "Witness Tampering," (3) "Failed to follow court instructions,"(4) "Insufficient evidence of guilt," (5) "Time of limitations exceeded" (6) "Improper evidence entered," (7) "Officer misconduct," (8) "Witness misconduct," and (9) "Incomplete Transcripts," and 13 items he regards as "attorney misconduct": (1) "Failed to object at trial," (2) "Failed to introduce witnesses," (3) Failed to get evidence that was known," (4) "Did not disclose all discovery materials," (5) "Failed to challenge evidence," (6) "Failed to introduce evidence," (7) "Did not challenge the jury selection and approach," (8) "Failed to have the courtroom empty while in cuffs," (9) "Did not challenge the identification issues," (10) "Did not ask to challenge prosecutors past of reprimand"(sic), (11) "Failed to challenge venue," (12) "Ineffectiveness of counsel," and (13) "Failed to preserve timely" (sic). It is not clear if appellant regards these items as relevant to this appeal: he refers to them as "a form as a reservation on future arguments I may bring up." In any event, issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). The pro se brief presents nothing for this court to review.

State v. Griffin, 887 N.W.2d 257, 263 (Minn. 2016) (quotation and citations omitted).

Appellant relies on *State v. Huss*, 506 N.W.2d 290, 292-94 (Minn. 1993) (reversing criminal-sexual-conduct conviction where child victim's "testimony was contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts") to argue that A.A.'s testimony was "insufficient evidence." But "a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969).

Moreover, *Huss* is distinguishable on two grounds. First, in *Huss* there was no physical evidence that the child had actually been abused, while A.A.'s injury was supported by the physician's testimony and is undisputed. Second, in *Huss*, the victim had been repeatedly exposed to "a highly suggestive" book on sexual abuse and this was "key to [the defendant's] claim of insufficiency of the evidence;" moreover, a licensed consulting psychologist "testified that the book was suggestive and that he would not use it in his private practice" and that "use of the book might cause a child to make false statements about being abused." *Huss*, 506 N.W.2d at 293.

Appellant's argument that A.A. implicated him in sexual assault because both K.T.-J. and A.A.'s maternal aunt in California encouraged her to do so is counter to the evidence: first, A.A. repeatedly and consistently named appellant as her abuser while she was living with K.T.-J., which was before she lived with her aunt in California, and second, K.T.-J. did not know, when A.A. first spoke of appellant's abuse, that appellant had been living with A.A. and F.A. Moreover, F.A.'s testimony corroborates A.A.'s testimony: F.A. said

she saw blood on the floor and A.A. shaking in the shower after appellant had been caring for her.

Based on the evidence presented, the jury could reasonably have found appellant guilty of first-degree criminal sexual assault of A.A.

2. The Prosecutor's Closing Argument

Appellant did not object to the prosecutor's closing argument at trial, but argues on appeal that two paragraphs concerning F.A. were misconduct. Those paragraphs were:

> You saw [F.A.] testifying. She was an absolute mess. She's a meth addict. She admitted that. She's been to jail, prison. She had meth in her house when the sexual assault occurred. She had a child protection investigation going on when she spoke to [the detective.] She put on the prettiest lie that she could. She put on the prettiest lie about how her kids came first. We know that wasn't true. Poor [A.A.] bounced from one house to another. Meth was first for [F.A.]. She didn't want the status quo upset. Yeah, she told two different stories. At the time she didn't want her kids taken. She wanted everything status quo. It didn't matter what had happened to her daughter. So she went about preserving what she could.
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> We think about [F.A.]. We think about [A.A.] and all the homes that she lived with and the places she had bounced, and what [F.A.] was into and what [F.A.] was doing and continues to do. You think about who are the most vulnerable children to this type of incident. One of the things I learned doing family law mediations when I was in private practice is that tens don't marry ones. [F.A.] was hooked up to the man who abused sexually her three-year-old daughter.

When the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing (1) error (2) that is plain, but the burden then shifts to the state to prove that (3) the misconduct did not prejudice the defendant's

substantial rights, or that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id*. Once these three prongs are met, the court decides whether the error must be remedied to ensure fairness and the integrity of the judicial proceedings. *State v. Parker*, 901 N.W.2d 917, 926 (Minn. 2017).

Appellant argues that the prosecutor committed misconduct by appealing to the jury's passions and prejudices and by improperly attacking appellant's character. A reviewing court must consider the state's argument as a whole, not focus on a particular phrase or remark by taking it out of context or giving it undue prominence. *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008).

Specifically, appellant argues that the prosecutor "appealed to the jury's sympathies for A.A.'s home life." But appellant himself had testified that A.A., as a small child, "was dropped off all over the place all the time," and that both he and F.A. had been in jail during this time. F.A. testified that A.A. was "bouncing around a lot" during her early childhood. Thus, the jury had already heard about A.A.'s home life during her early childhood from F.A. and appellant; the prosecutor added nothing to what the jury had already been told.

Appellant also argues that the prosecutor asked the jury to conclude that appellant must be the abuser because: (1) F.A. was a bad person (a "one"); (2) bad people become involved only with other bad people ("tens" don't get involved with "ones"); and (3) F.A. was "hooked up" or involved with appellant. Appellant argues that this was an "uncalled for" attack on his character and was therefore plain error.

For this argument, he relies on *State v. McCray*, 753 N.W.2d 746, 753-54 (Minn. 2008) (reversing this court's reversal of the defendant's conviction of second-degree criminal sexual conduct with a seven-year-old victim after concluding that the prosecutor's closing-argument references to penetration were not misconduct) and *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (concluding that, while some of the state's unobjected-to questions were misconduct and plain error, their cumulative effect did not deprive the defendant of a fair trial and affirming his conviction).

Neither case supports appellant's position; *McCray* is distinguishable and *Dobbins* affirmed a conviction despite prosecutorial misconduct. In *McCray*, the victim's pretrial statement was that penetration occurred, but at trial she testified that it did not occur, and the charge of first-degree criminal sexual conduct was dropped. *McCray*, 753 N.W.2d at 749. The prosecutor's closing-argument references to sexual penetration were held not to violate either a district court instruction that facts pertaining to the first-degree charge were to be omitted or American Bar Association (ABA) standards. *Id.* at 753-54. Here, there was no suggestion that the prosecutor violated a district-court instruction or an ABA standard, so the conclusion that there was no misconduct in *McCray* is irrelevant.

Dobbins concluded that (1) the state's questions as to whether the defendant was the father of his girlfriend's son and was faithful to his girlfriend "were not relevant to the issue of [the defendant's] guilt or innocence [and] impermissibly questioned [his] character" and (2) the state's reference to the defendant's "world" and subsequent failure, after the defendant said he lived in the same world as the prosecutor, to attempt "to clarify to the jury that its 'your world' comment was not a reference to [the defendant's] racial or

socioeconomic background" was prosecutorial misconduct. *Dobbins*, 725 N.W.2d at 512; *see also State v. Ray*, 659 N.W.2d 736, 746-47 (Minn. 2003) *cited in Dobbins*, 725 N.W.2d at 512, for the proposition that it is improper for the state to highlight a defendant's racial or socioeconomic status as a way to put evidence in context. Here, there were no racial or socioeconomic implications about appellant: the challenged statements referred to F.A.'s lifestyle choices, her criminal background, and her relationship with appellant.

Moreover, the jury had already heard from appellant that (1) he had been in and out of jail and had a significant criminal history; (2) there was physical evidence of significant sexual abuse of A.A. when she was two and a half or three; and (3) as A.A. grew older and her ability to communicate improved, she repeatedly identified appellant as the abuser. While the prosecutor's implication that appellant was "bad" because he was married to the "bad" F.A. may have been, as appellant suggests, "uncalled for," appellant provides no support for the view that an uncalled-for remark is misconduct.

Even if the remark were misconduct, it would not entitle appellant to a new trial because there is "no reasonable likelihood that [its] absence . . . would have had a significant effect on the verdict of the jury." *Ramey*, 721 N.W.2d at 302 (citation and quotation omitted). The district court instructed the jury that the attorneys' closing arguments were "not evidence." The language to which appellant objects amounts to three short sentences of a 13-page argument. The jury had heard testimony supporting its finding of appellant's guilt from other witnesses as well as from A.A. Omitting the objected-to language would not have had a significant effect on the jury's verdict.

3. The $20,000 Fine

The statutory maximum fine for appellant's Severity Level A offense is $40,000; the statutory minimum is 30% of that, or $12,000. *See* Minn. Stat. §§ 609.342, subd. 2(a) (2012); 609.101, subds. 2, 5(b) (2012). The state asked for the maximum; appellant asked for ten percent, or $4,000, on the ground that he is indigent and entitled to a public defender. The district court imposed a fine of 50%, or $20,000, saying "[Y]ou're going to be incarcerated, so that's not going to be an easy thing to collect, but I think that there should be something because of the severity of this. I don't think ten percent is enough."

Fines within the statutory limits are reviewed for an abuse of discretion. *State v. Madden*, 910 N.W.2d 744, 750 (Minn. App. 2018), *review denied* (Minn. Apr. 9, 2018). A sentencing court may, but is not required to, reduce a fine based on a defendant's inability to pay. *Id.* (holding that a fine of $9,000 for third-degree criminal sexual conduct involving a 15-year-old victim was not grossly disproportional to the offense in light of the harm caused to the victim and to society, the fines imposed for other sex crimes in Minnesota, and the fines imposed for the same crime in other jurisdictions).[2] Given the facts that A.A., the victim here, was much younger that the victim in *Madden* and was severely injured by the abuse, a fine of $20,000 for first-degree criminal sexual conduct was not an abuse of discretion.

Affirmed.

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[2] These factors, taken from *Solem v. Helm*, 436 U.S. 277, 290-92, 103 S. Ct. 3001, 3010 (1983) are known as the *Solem* factors.