STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1486

State of Minnesota,
Respondent,

vs.

Kenneth Raynold Sleen,
Appellant.

Filed January 6, 2020
Affirmed
Reyes, Judge

St. Louis County District Court
File No. 69VI-CR-16-1274

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

Mark S. Rubin, St. Louis County Attorney, Karl G. Sundquist, Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

REYES, Judge

In this direct appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court (1) committed plain error affecting his substantial

rights by failing to give a specific unanimity instruction to the jury when the state alleged two separate acts of sexual penetration; (2) plainly erred by instructing the jury that it could find appellant guilty of acts committed after the victim turned 13 when the only charged offense required her to be under 13 at the time of the act; and (3) abused its discretion by admitting an out-of-court statement as a prior consistent statement. We affirm.

FACTS

On August 31, 2016, respondent State of Minnesota filed a complaint charging appellant with four counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2014),[1] against four different alleged victims occurring during four different time periods. The district court granted appellant's motion to sever the counts for separate trials. This appeal involves count 3, appellant's sexual abuse of his granddaughter, G.S. The district court held a jury trial on count 3 but at that time, the district court had not yet held a trial on counts 1, 2, or 4.

The conduct at issue in count 3 occurred between January 1, 2008, and December 31, 2014. G.S. testified that appellant touched her genitals multiple times when she was between the ages of six and 13. G.S. also testified that appellant sexually penetrated her at the age of 12, inserting his penis into her vagina while they were in his car (the car incident). At the age of 15, G.S. first mentioned these incidents to her aunt, P.S., who called the police. G.S. then participated in an interview with social services and initially stated that appellant inserted his fingers into her vagina. She later visited a physician, which she

[1] The state charged appellant under this version of the statute, and the statute has not changed since 2006, but the alleged conduct occurred from 2008 to 2014.

testified "was a game changer" that brought up a lot of memories. After the physician visit, G.S. disclosed more of the car incident to her aunt, who brought her to the police for a second interview. G.S. told the police that appellant inserted his penis, as opposed to his fingers, into her vagina. G.S. testified about the difficulty in talking about being sexually abused and that it became easier for her to disclose information as time went on. P.S. testified that after the physician visit, G.S. "started to break down crying because this exam had brought back some more difficult memories for her that she had not shared yet." P.S. testified that "[G.S.] recapped the story that she had already told me, and continued it by saying that [appellant] actually raped her . . . [t]hat he put his penis inside of her." The district court admitted G.S.'s out-of-court statements to social services and police over appellant's objections.

After a three-day trial, the jury found appellant guilty of first-degree criminal sexual conduct. The district court sentenced appellant to 144 months in prison. Appellant filed a timely notice of appeal from his judgment of conviction. Seeking to avoid piecemeal appellate review, a special term panel of this court concluded that appellant filed a premature appeal on unresolved counts 1, 2, and 4. The Minnesota Supreme Court disagreed and reinstated the appeal because the district court's final judgment on count 3 did not resolve counts 1, 2, or 4, and the statute allows a defendant to "appeal as of right . . . any adverse final judgment." Minn. R. Crim. P. 28.02, subd. 2(1) (2018); *State v. Sleen*, No. A18-1486 (Minn. Dec. 19, 2018) (order); *see also State v. Tomlinson*, ___ N.W.2d ___ (Minn. App. Dec. 24, 2019). This appeal follows.

D E C I S I O N

I. The district court did not commit plain error affecting appellant's substantial rights by not giving the jury a specific unanimity instruction.

Appellant argues that the district court erred by not providing a specific instruction clarifying that the jury had to unanimously agree on whether they were convicting appellant on the basis of one instance of sexual penetration or the other.[2] We disagree.

Appellant neither requested a unanimity instruction nor objected to the jury instructions. As a result, he forfeits this issue on appeal. *See State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998); *see also State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (clarifying that "forfeiture" describes failure to make timely assertion of a right). But, we may still review the jury instructions for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error test, we examine the instructions to determine whether there was (1) error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). Moreover, "[a]n error is plain if it is clear or obvious," meaning that "the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted).

Minnesota requires a jury to agree unanimously that the state proved each element of the offense in criminal trials. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Pendleton*, 725 N.W.2d 717, 730-31 (Minn. 2007). Verdict unanimity is relevant to two scenarios and

[2] Before deliberation, the district court instructed the jury that "to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous."

required in only one. *See State v. Stempf*, 627 N.W.2d 352, 355-56 (Minn. App. 2001); *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). First, when the state presents two different factual scenarios as alternatives for proving a single element of a crime, the state must "elect the act upon which it will rely for conviction or instruct[] the jury that it must agree on which act the defendant committed." *Stempf*, 627 N.W.2d at 356. In the other scenario, which we have interpreted as applying to Minn. Stat. § 609.342, subd. 1, when the facts are relatively undisputed, the statute establishes alternative means of satisfying an element, and the jury need not unanimously agree on one means. *State v. Hart*, 477 N.W.2d 732, 737-39 (Minn. App. 1991), *review denied* (Minn. Jan. 16, 1992).

Even though section 609.342 allows for alternative means,[3] the district court did not present them to the jury because the state charged appellant under only subdivision (a). Instead, the district court presented the jury with two different factual scenarios: appellant inserting his penis into 12-year-old G.S.'s vagina while in the car, and appellant inserting his fingers into G.S.'s vagina multiple times when she was between approximately six and 13. Either of these factual scenarios, if believed by the jury, would have met the sexual-penetration element of the crime. *See* Minn. Stat. § 609.341, subd. 12(2)(i) (2018)

[3] Minn. Stat. § 609.342 subd. 1 (2018), provides several different means by which someone could be found guilty of first-degree criminal sexual conduct. In relevant part, "[a] person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists: (a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant . . . (b) the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a current or recent position of authority over the complainant . . . (g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the act . . . ."

(defining "sexual penetration" to include "any intrusion . . . into the genital or anal openings: (i) of the complainant's body by *any part* of the actor's body") (emphasis added).

Alternative factual scenarios are at issue here, indicating that the district court erred by not providing a specific unanimity instruction. *See Stempf*, 627 N.W.2d at 356 (acknowledging that "the jury must unanimously agree on which acts the defendant committed if each act itself constitutes an element of the crime"). However, this error is not plain because we have upheld a sufficiently similar situation without a specific unanimity instruction when the error did not affect the defendant's substantial rights. *See Webster*, 894 N.W.2d at 787 (describing plain-error standard as requiring error to contravene caselaw) (quotation omitted). In *Rucker*, we considered several factors to determine that the jury did not need a unanimity instruction: (1) the appellant did not present separate defenses for each incident of alleged sexual assault; (2) the state did not distinguish as to the proof of some incidents compared to others; (3) the state did not encourage the jury to find certain incidents more likely to have occurred than others; (4) the state did not emphasize certain incidents; and (5) the dates on which the abuse occurred served as examples of the appellant's conduct and not distinct allegations of sexual abuse. *State v. Rucker*, 752 N.W.2d 538, 548 (Minn. App. 2008) (concluding, by examining prosecutor's presentation of evidence, that error did not affect substantial rights), *review denied* (Minn. Sep. 23, 2008).

These factors apply similarly here. First, appellant provided the same defense for each incident of alleged sexual abuse by categorically denying any wrongdoing. By convicting appellant, the jury made a credibility determination and rejected his sole

defense to any of the abuse incidents. Second, the state did not distinguish between proof of separate incidents, simply citing appellant's testimony as corroborated by those to whom she recounted the incidents. Third, the state did not encourage the jury to find certain incidents more likely to have occurred than others. The state questioned G.S. about the car incident and the older series of abuse, and it recounted both in its opening and closing arguments.

The state did emphasize the car incident over the series of abuse that occurred when G.S. was between six and 13. However, the state passingly referenced the incidents of abuse occurring before the car incident in general terms without distinguishing between them and devoted the majority of trial to elaborating on the car incident.

Finally, most of the dates on which the abuse occurred served as examples of appellant's conduct as opposed to distinct allegations of sexual abuse. Though the state emphasized the car incident, it referred to the series of abuse occurring from when appellant was six to 13 as "times that he did touch her," and referred to that period of time as abuse occurring "during those years." We conclude that appellant cannot establish error that is plain from the lack of a specific unanimity instruction because this case is sufficiently analogous to *Rucker* and therefore does not contravene caselaw. *See Webster*, 894 N.W.2d at 787.

II. The district court did not commit plain error by instructing the jury that it could find appellant guilty for an act committed after G.S. turned 13 because its instruction did not affect appellant's substantial rights.

Appellant argues that the district court's failure to instruct the jury on a time period stopping when G.S. turned 13 prejudiced appellant because we cannot determine whether

the jury convicted appellant on the basis of his sexual abuse of G.S. before or after she turned 13. We are not persuaded.

We review jury instructions for an abuse of discretion. *State v. Huber*, 877 N.W.2d 519, 522 (Minn. 2016). Because appellant did not object to the jury instruction at trial, we review appellant's challenge under the plain-error standard. *State v. Watkins*, 840 N.W.2d 21, 27-28 (Minn. 2013).

Appellant's argument appears to be based on G.S.'s first interview, when she told the social worker that there was an instance when appellant sexually touched her after she turned 13. But neither party mentioned this incident at trial, the state did not base its argument on it, and G.S. did not elaborate on it. The state instead focused on the other instances of abuse. It is reasonable to assume that the jury based its verdict on the arguments set forth at trial, which did not include the allegation of abuse after G.S. turned 13. As such, any alleged error did not affect appellant's substantial rights because there is no reasonable likelihood that instructing the jury on a date range that included an extra year had a significant effect on its verdict. *See State v. Gomez*, 721 N.W.2d 871, 880 (Minn. 2006) (holding that error affecting substantial rights requires reasonable likelihood that jury instruction significantly affects jury's verdict); *see also State v. Shamp*, 427 N.W.2d 228, 231 (Minn. 1988) (concluding "no reasonable likelihood that the jury somehow discredited the victim's testimony relating to abuse occurring after [the limitations period] but credited her testimony concerning abuse occurring before [the limitations period]"). Appellant's claim fails.

III. The district court did not abuse its discretion by admitting G.S.'s out-of-court statement as a prior consistent statement.

Appellant argues that the district court erred in admitting G.S.'s videotaped out-of-court statement because it differed materially from her testimony. We disagree.

We review a district court's decision to admit evidence for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Even if the district court abused its discretion, an appellant has no right to a new trial if the error is harmless. *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006). To avoid a finding of harmless error, appellant must establish prejudice. *See State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009). Prejudice occurs when an erroneously admitted statement substantially influences the jury to convict the appellant. *See State v. Brown*, 455 N.W.2d 65, 70 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). Furthermore, admitting an out-of-court statement that is "cumulative, and merely corroborate[s] other [evidence]" is harmless. *State v. Washington*, 521 N.W.2d 35, 42 (Minn. 1994).

Hearsay is a generally inadmissible out-of-court statement offered "to prove the truth of the matter asserted." Minn. R. Evid. 801(c), 802. But a prior out-of-court statement is not hearsay if "[t]he declarant testifies . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility." Minn. R. Evid. 801(d)(1)(B). The trial testimony and the prior statement need not be verbatim, *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000), so long as they

are "reasonably consistent." *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998).

In her video statement, G.S. reported that appellant penetrated her vagina with his fingers, but at trial, she testified that he penetrated her vagina with his penis. However, G.S. testified that her story changed over time because the visit to the doctor brought up a lot of memories, implying that she provided a more accurate recounting of the event the second time. Moreover, she testified about the difficulty of being explicit and comprehensive when first discussing being raped. On these facts, there is nothing inconsistent with G.S.'s testimony at trial and her version of events in her videotaped out-of-court statement.

Even if we were to assume the inconsistency of the statements, the admission of the prior statement is harmless because the distinction between digital and penile penetration is immaterial under the statute. *See* Minn. Stat. § 609.341, subd. 12(2)(i). Minn. Stat. § 609.342, subd. 1, defines criminal sexual conduct in the first degree to include "a person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age." The district court gave the jury instructions covering both penile and digital penetration, consistent with the statute. Its admission of the prior statement did not substantially influence the jury to convict appellant because both actions described at trial and in the statement provide equal grounds for finding appellant guilty. Appellant therefore cannot show prejudice, and any error would be harmless. *See Brown*, 455 N.W.2d at 70.

Affirmed.