STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0702

State of Minnesota,
Respondent,

vs.

Demarlo Lashawn Vetaw-Cage,
Appellant.

Filed July 13, 2020
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-18-2024

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Reyes, Judge.

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

SEGAL, Chief Judge

In this direct appeal from final judgment, appellant argues that his convictions of first- and second-degree criminal sexual conduct must be reversed and remanded for a new

trial because the prosecutor committed misconduct and the district court abused its discretion in certain evidentiary rulings. Appellant also challenges the district court's imposition of lifetime conditional release because the convictions for first- and second-degree criminal sexual conduct were entered simultaneously. We affirm in part, reverse in part, and remand.

FACTS

In September 2017, nine-year-old K.B. (the child) reported to her mother that appellant Demarlo Lashawn Vetaw-Cage had sexually abused her. Vetaw-Cage and mother had previously been involved in a romantic relationship and have four children together. Vetaw-Cage is not the biological father of the child, but acted as her stepfather during his relationship with mother. At the time the child made the disclosure, mother had just confronted the child and one of her sisters because mother discovered them "messing" with the diapers of one of their younger twin siblings. Mother called the police and told the girls that people who behave like that go to jail. When she asked the girls what was going on, she was told "[t]hat they were, like, basically touching each other's private parts and taking off the diapers." Mother asked the child who taught her that behavior, and the child became upset and said that Vetaw-Cage raped her.

Mother took the child for an interview at CornerHouse, which conducts forensic interviews of child-abuse victims. During the interview, the child reported that Vetaw-Cage had touched her "in a bad way" and that he used to touch her "in the bottom private part." She stated that he was "digging" in her private part and that it hurt. She indicated that the abuse happened when she was seven or eight years old and lived at a brown house.

Mother and the children lived in a brown house from November 5, 2014, until mid-March 2015. Vetaw-Cage was a frequent guest at the home and left personal items there.

Respondent State of Minnesota charged Vetaw-Cage with two counts each of first-degree and second-degree criminal sexual conduct. The state alleged that between January 5, 2014, and October 26, 2015, Vetaw-Cage sexually abused the child on multiple occasions and that he had a significant relationship with the child due to his romantic relationship with mother and the fact that he acted as her stepfather. Vetaw-Cage waived his right to a jury trial and proceeded to a court trial.

Both Vetaw-Cage and the state brought pretrial motions. The pretrial motions relevant to this appeal include a motion by Vetaw-Cage to admit evidence to show that the child could have acquired knowledge of sexual activities from other sources. The state moved to admit relationship evidence under Minn. Stat. § 634.20 (2018) concerning Vetaw-Cage's history of committing violence against mother and allegations by two of the child's siblings that they had also been sexually abused by Vetaw-Cage.

The district court denied Vetaw-Cage's motion to admit evidence of the child's potential alternative source of sexual knowledge, but granted the state's motion to admit relationship evidence regarding Vetaw-Cage's physical abuse of mother and testimony from one of the two siblings, a sister, about being sexually abused by Vetaw-Cage. The district court determined that testimony from the other sibling, a brother, about being sexually abused by Vetaw-Cage was not admissible because the brother had recanted the allegation.

Following a court trial, the district court found Vetaw-Cage guilty of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2014) (sexual contact with a child under 13) and second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2014) (sexual contact), but acquitted Vetaw-Cage of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (sexual penetration) and second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2014) (multiple acts). The district court sentenced Vetaw-Cage to 360 months for first-degree criminal sexual conduct and imposed a lifetime conditional-release period. This appeal follows.

D E C I S I O N

I. The prosecutor did not commit misconduct.

Vetaw-Cage alleges that the prosecutor engaged in misconduct by eliciting testimony concerning sexual abuse of the child's brother. Vetaw-Cage asserts that the testimony was ruled inadmissible by the district court in its pretrial order.

The contested questioning involves testimony by the child. At the trial, the prosecutor asked the child if Vetaw-Cage hurt her siblings. Defense counsel objected to the question on the basis of "foundation as [to] how the witness observed this or whether she was told this." The district court indicated that it would rule on the admissibility when the child explained how she knew this information. The child then testified that she had seen Vetaw-Cage touch her siblings' private parts with his on more than one occasion. Defense counsel made no further objections to the testimony during the trial.

Vetaw-Cage asserts on appeal that the prosecutor intentionally violated the court's order by questioning the child about sexual abuse of her brother. Since the objection at trial was only on the basis of foundation, we treat Vetaw-Cage's claim of prosecutorial misconduct as unobjected-to error. We review unobjected-to claims of prosecutorial misconduct under a modified plain-error standard, considering whether there is "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Error is plain if it "contravenes case law, a rule, or a standard of conduct." *Id.* Even where misconduct occurs, this court will reverse only when the defendant was denied a fair trial. *State v. Porter*, 526 N.W.2d 359, 365 (Minn. 1995).

Vetaw-Cage argues that the prosecutor failed in her duty to adequately prepare the child to testify and elicited testimony from the child that had been ruled inadmissible. Under Minnesota caselaw, "the state has an absolute duty to prepare its witnesses to ensure they are aware of the limits of permissible testimony." *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003); *see also State v. Ray*, 659 N.W.2d 736, 744 (Minn. 2003) (noting that the court was "troubled" by the prosecutor's repeated attempts to elicit testimony that had been ruled inadmissible). It appears, however, that the pretrial ruling concerned potential testimony *by the brother*, not the child, and that the question, thereby, did not contravene the district court's order.

The district court's pretrial order states that "potential testimony of the male sibling . . . is excluded due to his recantation." At the pretrial hearing, the court summarized its ruling as follows: "it does not appear that [the child's brother] has information that is admissible. [The child's sister] might if she testifies first and that it's a consistent

statement." The court's ruling thus related to testimony by the brother. The challenged testimony, however, was not from the brother, but rather from the child about an incident she witnessed and about which she had firsthand knowledge.

We also note that the prosecutor was not aware of the potential testimony of the child until the day before trial when the child disclosed for the first time to the prosecution that she had seen Vetaw-Cage engage in sexual abuse of her brother. In addition, Vetaw-Cage had the opportunity to cross-examine the child at trial about inconsistencies in her statements regarding whether she had witnessed sexual abuse of her brother.

Because the district court's order only explicitly excluded the brother's testimony, the prosecutor did not intentionally attempt to elicit inadmissible evidence when questioning the child about what she had personally observed. We therefore conclude that the prosecutor's questioning of the child did not constitute plain error.

II. The district court did not abuse its discretion by admitting relationship evidence under Minn. Stat. § 634.20.

Vetaw-Cage argues that the district court abused its discretion by admitting relationship evidence under Minn. Stat. § 634.20, because the evidence had little probative value and was unfairly prejudicial. Under Minn. Stat. § 634.20, a district court may admit evidence of "domestic conduct" by a defendant unless the probative value of the evidence is "substantially outweighed by the danger of unfair prejudice" to the defendant, "or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Such evidence is admissible to illuminate the relationship between an accused

and an alleged victim and provide context for the alleged incident. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

We review a district court's admission of relationship evidence for abuse of discretion. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). To be entitled to relief, an appellant must show that the district court abused its discretion by admitting the evidence and that he was prejudiced as a result. *Id.*

Vetaw-Cage claims the relationship evidence resulted in unfair prejudice by influencing "the district court to convict because of the prior bad acts." The relationship evidence presented at trial included testimony about the physical abuse of mother by Vetaw-Cage, including incidents that occurred in front of and threats made to the children. Mother testified that Vetaw-Cage would beat her in front of the children, show up at the house without permission and damage the property, and that she had to call the police on several occasions. The evidence also included testimony that mother had previously accused Vetaw-Cage of sexually abusing the child when she was five years old, but the police took no action in response to the report. Additionally, the child's younger sister testified that Vetaw-Cage had touched her on her "butt."

The district court's written findings of fact at the close of the court trial acknowledge the relationship evidence but explicitly state that Vetaw-Cage "is not on trial for these events and has already been punished for these actions. They are only cited to explain they had an impact on the children, including [the child], and affected her reaction to the incidents involved in this case." Specifically, the district court noted that, due to mother's

relationship with Vetaw-Cage, mother "did not indicate through her actions before September 2017 [that] she believed her daughter was being abused or was willing to protect her from" Vetaw-Cage. Thus, the evidence was used for the proper purpose of providing context for the alleged incident, including how the relationship between mother and Vetaw-Cage influenced the child's reaction to the incidents involved in the case. The court found that the evidence was important, among other reasons, to understand "why there was a delay in reporting." The evidence therefore had probative value.

Moreover, we note that Vetaw-Cage's case was tried to the court and not a jury. When a defendant has a court trial, "the risk of unfair prejudice is lessened." *State v. Burrell*, 772 N.W.2d 459, 467 (Minn. 2009). The district court also acquitted Vetaw-Cage of two of the four criminal sexual conduct charges against him. This supports the state's argument that the district court weighed the evidence of the charged crimes and was not improperly influenced by the relationship evidence. *See State v. DeWald*, 463 N.W.2d 741, 745 (Minn. 1990) (observing that acquittal of one charge indicated that the jury was "not unduly inflamed" by an improper use of evidence).

On this record, the district court did not abuse its discretion by admitting the relationship evidence under Minn. Stat. § 634.20.

III. The district court did not violate Vetaw-Cage's right to present a complete defense.

Vetaw-Cage claims that the district court abused its discretion by denying his motion to allow evidence that the child had alternative sources of sexual knowledge.

Vetaw-Cage based this on prior allegations that the child was sexually abused by both her biological father and school principal.

A criminal defendant has a constitutional right to "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). That right encompasses, among other things, "the right to present the defendant's version of the facts . . . to the [fact-finder] so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). But in presenting a defense, the defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Evidentiary rulings will not be reversed absent a clear abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997).

Pursuant to Minn. R. Evid. 412, "[i]n a prosecution for acts of criminal sexual conduct . . . evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in Rule 412." "Despite the prohibition of a rape-shield law or rule, a [district] court has discretion to admit evidence tending to establish a source of knowledge of or familiarity with sexual matters in circumstances where the [fact-finder] otherwise would likely infer that the defendant was the source of the knowledge." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986). But in determining whether to admit such evidence, the district court "ought to balance the probative value of the evidence against its potential for causing unfair prejudice." *Id.* The district court should also consider "the

state's interest in guarding the victim's privacy and protecting her from harassment against the accused's constitutional right of confrontation." *Jackson v. State*, 447 N.W.2d 430, 435 (Minn. App. 1989).

Vetaw-Cage argues that he made a sufficient showing to support the admission of the evidence and that the district court's decision violated his constitutional right to present a complete defense. But the right to present a complete defense is "subject to the limitations imposed by the rules of evidence." *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014). Those limitations include a requirement that the proffered evidence has more probative value than potential for unfair prejudice and is not purely speculative. *State v. Olsen*, 824 N.W.2d 334, 340-41 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013); *see also Benedict*, 397 N.W.2d at 341 (considering whether the proffered evidence "tend[s] to establish a different source for the victim's [sexual] knowledge").

Here, the district court analyzed Vetaw-Cage's proposed evidence and concluded that Vetaw-Cage failed to make a sufficient offer of proof. With respect to the allegation concerning the child's biological father, the court reviewed the CornerHouse records[1] and found that they were based on multiple layers of hearsay and, more importantly, the child reported no abuse when she was interviewed. With regard to the allegation involving the school principal, no records from the school contained any reference to the allegation and Vetaw-Cage acknowledged that it was based on "hearsay." Moreover, the proffered evidence had very little probative value because the source of the evidence was unclear

[1] CornerHouse had conducted an interview of the child in connection with this allegation.

and it contained very little detail. We therefore conclude that the district court did not abuse its discretion by denying Vetaw-Cage's motion to admit the evidence.

IV. The district court did not abuse its discretion in conducting the in camera review.

We next consider Vetaw-Cage's request for this court to review the child's confidential medical, therapy and school records. The district court reviewed these records in camera and authorized release of some of the records, but determined that the balance of the records were not relevant to the defense and did not authorize their release. When a defendant requests disclosure of protected, confidential records, the district court may conduct an in camera review of the records to "balance the right of the defendant to prepare and present a defense against the rights of victims and witnesses to privacy." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012) (applying *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)). When conducting an in camera review, the district court is tasked with reviewing the protected information for "all relevant evidence that might help [the defendant's] defense." *Paradee*, 403 N.W.2d at 642. "On appeal, we review the limits placed by the district court on the release and use of protected records for an abuse of discretion." *Hokanson*, 821 N.W.2d at 349.

In this case, the district court disclosed medical records from early 2014, a medical record from December 2017 that relates to the sexual-abuse allegations, and a packet of notes from a therapy session in April 2017. The district court also disclosed a portion of a record from CornerHouse from 2011 related to the allegation of sexual abuse by the child's biological father. The district court did not disclose the recorded CornerHouse interviews

related to that alleged incident, however, because it determined that the child did not say anything relevant that might be helpful to the defense during the interviews and reported no abuse by the biological father. The district court sealed the recorded interviews along with the remaining records.

Our own review of the sealed records confirms that they do not contain any information that is relevant to Vetaw-Cage's defense. We, therefore, conclude that the district court did not abuse its discretion in sealing the remaining records.[2]

V. The district court erred by imposing a lifetime conditional-release term.

The final issue involves Vetaw-Cage's claim that the district court erred by imposing a lifetime conditional-release term. Under Minn. Stat. § 609.3455, subd. 7(b) (2014), the district court must impose a lifetime conditional-release term if defendant has a "prior sex offense conviction." The first- and second-degree criminal sexual conduct convictions in this case are Vetaw-Cage's only sex-offense convictions. Vetaw-Cage argues that the convictions were entered simultaneously and, therefore, he does not have a "prior sex offense conviction" and should have received a ten-year conditional-release term, rather than lifetime conditional release. *See* Minn. Stat. § 609.3455, subd. 6 (2014).

This court recently addressed this issue in *State v. Brown*. 937 N.W.2d 146, 155-57 (Minn. App. 2019), *review denied* (Minn. Feb. 18, 2020). In *Brown*, the defendant was

[2] Vetaw-Cage also argues that cumulative error entitles him to a new trial. A new trial may be granted when the cumulative effect of the errors, none of which alone might have been sufficient to warrant reversal, deprived a defendant of an unbiased fact-finder. *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989). Because we discern no error, there is no cumulative error.

similarly convicted of first- and second-degree criminal sexual conduct and received a lifetime conditional-release term. *Id.* at 152. This court reversed and held that the defendant should receive a ten-year conditional-release term because the offenses were adjudicated simultaneously. *Id.* at 157. The court observed that "[w]ith no temporal gap whatsoever between a district court's adjudication of offenses, no conviction is entered 'before' the other, and no conviction is prior to the other." *Id.* Because the defendant did not have any earlier convictions that would subject him to a lifetime conditional-release term, this court remanded to vacate the lifetime conditional-release term and resentence the defendant. *Id.*

Here, the parties agree that Vetaw-Cage's convictions were entered simultaneously. The record supports this assertion. The district court's order finding Vetaw-Cage guilty states that "[g]uilty verdicts and convictions are entered on Counts I and IV." At the verdict hearing, the district court judge stated, "So Count 1 is guilty, Count II not guilty, Count III not guilty, and Count IV guilty. The verdicts and convictions will be entered and I'll get you . . . the findings and verdicts." Thus, as in *Brown*, the district court entered convictions in the same statement with no temporal gap, and the convictions were thereby entered simultaneously. Because the convictions were entered simultaneously, and Vetaw-Cage did not have any earlier sex-offense convictions, Vetaw-Cage did not have a "prior sex offense conviction" that would subject him to a lifetime conditional-release term under Minn. Stat. § 609.3455, subd. 7(b). The district court therefore erred by imposing a lifetime conditional-release term, and we reverse and remand for resentencing.

Affirmed in part, reversed in part, and remanded.