STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0095

State of Minnesota,
Respondent,

vs.

David Ronald Anderson,
Appellant.

Filed December 28, 2020
Affirmed
Reyes, Judge

Hennepin County District Court
File No. 27-CR-18-15998

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

Michael O. Freeman, Hennepin County Attorney, Linda Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas, 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 a conviction of first-degree criminal sexual conduct, appellant argues that the prosecutor committed misconduct by arguing facts not in evidence

and inflaming the passions and prejudices of the jury in closing argument. Appellant also makes several pro se arguments, including that (1) his conviction is supported by insufficient evidence; (2) trial counsel provided ineffective assistance; (3) the district court erred in sentencing; (4) the district court erred by failing to provide him a second court-appointed attorney; (5) the district court exhibited bias against him; (6) trial counsel exhibited bias against him; and (7) additional claims of prosecutorial misconduct. We affirm.

FACTS

Appellant David Ronald Anderson met D.R.'s grandmother, S.P., in 2004, and they began a relationship which lasted the rest of S.P.'s life. D.R. met appellant at around age ten, and, several years later, appellant was at the hospital when D.R gave birth to her daughter A.R. After S.P.'s death, appellant maintained a relationship with her family and helped care for D.R.'s children. Appellant often stayed at D.R.'s apartment because of his housing instability. A.R. knew appellant as "grandpa David."

On February 24, 2018, D.R.'s cousin J.M. watched D.R.'s children while D.R. was at work. Appellant came to visit, and J.M. noticed that appellant smelled like alcohol. Appellant eventually lay down on the kitchen floor, while J.R. remained in another room. Later, J.M. entered the kitchen to find six-year-old A.R. lying on the kitchen floor on her back with her shirt pulled up above her stomach and her pants unbuttoned. J.M. saw appellant lying on the kitchen floor facing A.R., rubbing her stomach.

J.M. sent a text message to D.R., who was still at work, alerting D.R. to what she had seen. D.R. called A.R. and directed A.R. to go to the bathroom and speak with D.R.

there. After asking if she would get in trouble, A.R. stated that appellant licked her vagina. A.R. later stated in a forensic interview with W.K. at CornerHouse that "grandpa David" licked her vagina, using anatomical dolls for demonstration. A.R. made similar statements at trial.

Respondent State of Minnesota charged appellant with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2018). The district court convicted appellant following a jury trial and sentenced him to 144 months imprisonment, with credit for 475 days served. This appeal follows.

D E C I S I O N

I. The prosecutor did not commit misconduct in closing arguments.

Appellant argues that the prosecutor committed misconduct in closing arguments by arguing facts not in evidence when discussing "typical" challenges in proving child sexual-abuse cases, and "psychological and behavioral dynamic[]" reasons why children's statements alleging abuse can be inconsistent. We are not persuaded.

Appellant's counsel did not object at closing arguments, so we apply modified plain-error review. *See State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). Appellant bears the initial burden of proving that the prosecutor committed an error which is plain. *State v. Carridine*, 812 N.W.2d 130, 146 (Minn. 2012). An error is plain if it is "clear or obvious," *State v. Waiters*, 929 N.W.2d 895, 901 (Minn. 2019) (quotation omitted), or contrary to caselaw or standards of conduct. *Ramey*, 721 N.W.2d 294 at 302. If appellant meets his burden, the state must then show that the plainly erroneous conduct did not affect appellant's substantial rights. *Carridine*, 812 N.W.2d at 146. An error affects appellant's

substantial rights if there is a reasonable likelihood that the conduct significantly affected the jury's verdict. *Ramey*, 721 N.W.2d at 302.

This court examines a prosecutor's closing arguments as a whole, rather than examining selective phrases "that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). Prosecutors may present legitimate arguments based on the evidence and argue reasonable inferences based on that evidence, but may not speculate without factual basis or "misstate the evidence." *State v. Peltier*, 874 N.W.2d 792, 804-05 (Minn. 2016). Neither may they make arguments that "inflame the passions or prejudices of the jury." *State v. Duncan*, 608 N.W.2d 551, 556 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). We hold prosecutors to the highest ethical standards in sexual-abuse cases. *State v. Jahnke*, 353 N.W.2d 606, 611 (Minn. App. 1984).

A. The prosecutor did not introduce evidence outside of the record.

1. The first challenged argument

Appellant first alleges error in a series of arguments by the prosecutor discussing the "typical" case of sexual abuse and what the "best evidence" in that case may look like.

In closing, the prosecutor noted, "[c]ases involving the sexual abuse of children can be particularly challenging to prove. Abuse like this usually takes place in secret, behind closed doors, without witnesses around." She argued that this is a "unique" case because the jury heard from witness J.M., who ultimately alerted D.R. that the interaction between appellant and A.R. "wasn't right." The prosecutor added that this "is the best evidence you're ever going to get in a case like this."

In alleging error, appellant takes the prosecutor's arguments out of context. The prosecutor noted that A.R. consistently stated that appellant licked her vagina, immediately before his argument that this case has the "best evidence." The prosecutor limited her argument discussing the "best evidence" to the evidence from A.R. describing appellant's actions. The prosecutor therefore clearly argued that the victim's statements identifying sexual abuse provided the best evidence in this case. The supreme court has found that a victim's identifying statement can be "the most powerful evidence of [] guilt." *State v. Valtierra*, 718 N.W.2d 425, 438 (Minn. 2006). We find no error in the prosecutor noting that child abuse usually occurs without witnesses and subsequently arguing that this case is "unique" in that respect.

2. The Second Challenged Argument

Appellant next argues that the prosecutor's argument regarding manipulating children discusses children generally and cites evidence outside the record.

The prosecutor argued:

> Kids are easily confused, they are easily manipulated. Kids want to please adults most of the time and they're intimidated by strangers and strange environments. That's what makes them vulnerable *and that's why the CornerHouse protocol includes that ongoing process of building a rapport with kids. That's why forensic interviewers don't ask leading questions that suggest the answer that end in words like right, because if they did kids would just agree with what the adults want them to say*. Kids will adopt information that adults are suggesting to them, especially if the adult is unknown to them or seems authoritative.

(emphasis added). Appellant's recitation of error omits the italicized portions of the prosecutor's argument. When read as a whole, the prosecutor tied this to forensic

interviewer W.K's trial testimony discussing CornerStone's interview protocols. W.K discussed interviewing practices with children and how narrative approaches elicit more accurate information from children. He discussed how asking for information from children in an authoritative manner can lead to poor answers and that research shows that interviewing children in a less-authoritative manner leads to information that "seems to be more accurate." Based on W.K's testimony, the prosecutor did not speculate without a factual basis on the nature of children generally. We therefore find no error by this argument.

B. The prosecutor did not inflame the passions or prejudices of the jury.

Appellant next argues that the prosecutor committed misconduct by making repeated appeals to the jury's passions in closing argument that were likely prejudicial.

Appellant rests his argument on the prosecutor's statement that:

> On February 24, 2018, A.R. was victimized by a person she loved and trusted, a person whose senses and inhibitions and judgment had likely been dulled by being hammered, as he put it, to use his word. She's a kid. She is easily confused, she is easily dismissed. He is counting on that. He's counting on you dismissing her because she thinks and talks and remembers and answers questions like a kid.

Appellant contends that this language is similar to that used in a number of cases (the Hennepin County cases) in which this court determined that certain language repeatedly used by the Hennepin County Attorney's office in child sexual-abuse cases constituted plain error. (citing *Garcia v. State*, No. A18-1907, 2019 WL 3545814 (Minn. App. Aug. 5, 2019), *review denied* (Minn. Oct. 29, 2019); *State v. Danquah*, No. A18-1581, 2019 WL 3293790 (Minn. App. July 22, 2019), *review denied* (Minn. Oct. 15, 2019); *State v.*

Ciriaco-Martinez, No. A18-1415, 2019 WL 2999783 (Minn. App. July 1, 2019).) Appellant's reliance on these cases is misguided.

It is true that, in the closing arguments of each of the Hennepin County cases, the words "dismiss" and "counting on" were used. However, in each case the prosecutor argued that men who sexually assault children count on children's silence as a reason they prey on and abuse children and that children are victimized because it is easy to dismiss the word of a child. *Garcia*, 2019 WL 3545814 at *2-3. We determined that these arguments improperly appealed to the juries' prejudices by referring to "men who prey on children," and that the statement "we need to listen [to children]" improperly appealed to the passions of the jury by discussing the need for broader societal protections against child abuse. *Garcia*, 2019 WL 3545814 at *3 (discussing all three Hennepin County cases.)

Viewing the prosecutor's statement in context, the prosecutor only asked that the jury not dismiss A.R.'s testimony. The prosecutor's statement "[h]e's counting on you dismissing her because she thinks and talks and remembers and answers questions like a kid" immediately followed a discussion of other statements given by A.R. These other statements include that, when asked when her brother would turn five, A.R. stated, "on his birthday." When asked "how are your jeans" she responded that "they were blue." The prosecutor's statement told the jury that appellant was "counting on" the jury disbelieving A.R.'s testimony of sexual abuse to obtain an acquittal. This is distinct from the Hennepin County cases in which the prosecutors argued that men who prey on children chose child-victims because they were "counting on" those children's silence, and the prosecutor's

arguments sought broad societal protection for children. We therefore find no error in the prosecutor's statement.

II. Appellant's pro se claims are forfeited and meritless.

As an initial matter, we note that appellant cites no caselaw in support of his arguments. His arguments are therefore forfeited. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015). Nevertheless, we have carefully reviewed each claim and conclude that none have merit.

A. Appellant's conviction is supported by sufficient evidence.

Appellant argues that there is no evidence of a crime because J.M. did not hear A.R. resist or ask for help. However neither resistance, nor a witness to such resistance, is an element of first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1(a) (requiring only that state prove beyond reasonable doubt that appellant engaged in sexual penetration or contact with complainant under 13 years of age with appellant more than 36 months older than complainant). This argument therefore fails.

B. Appellant received effective assistance of counsel.

Appellant argues that he received ineffective assistance of counsel because counsel did not request a change of venue and did not assert a proper defense.

Ineffective-assistance-of-counsel claims are subject to de novo review. *Griffin v. State*, 883 N.W.2d 282, 287 (Minn. 2016). Appellant has the burden to prove that: (1) counsel's conduct fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Petersen v. State*, 937 N.W.2d 136, 139-140 (Minn. 2019) (quoting

Strickland v. Washington, 466 U.S 668, 688, 104 S. Ct. 2052, 2064, (1984)). A claim of ineffective assistance of counsel may be disposed of on one prong of the *Strickland* analysis without reviewing the other. *Petersen*, 937 N.W.2d at 140.

Requesting a change of venue is a matter of trial strategy that this court will generally not review. *State v. Ali*, 855 N.W.2d 235, 260 (Minn. 2014). While appellant does not argue what defense counsel should have offered at trial instead, the determination of which witnesses to call and what evidence to present are also matters of unreviewable trial strategy. *Carridine v. State*, 867 N.W.2d 488, 494. Appellant's ineffective-assistance-of-counsel claim fails.

C. The district court did not err in sentencing appellant to the presumptive sentence.

Appellant argues that the district court incorrectly sentenced him when it did not consider that appellant's actions may have been unintentional and did not consider appellant's "mental health status as a 'vulnerable' adult."

This court does not generally interfere with sentences within a presumptive range, even if grounds exist to justify departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). A district court is not required to explain imposing the presumptive sentence after considering reasons for departure. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

First, appellant's intent is irrelevant. First-degree criminal sexual conduct is not a specific-intent crime. *See* Minn. Stat. § 609.342, subd. 1(a). Second, Minnesota also does not recognize a diminished-capacity doctrine. *Cuypers v. State*, 711 N.W.2d 100, 105

(Minn. 2006). Third, the district court denied appellant's motion for a downward dispositional departure, finding appellant not particularly amenable to probation, and sentenced him to a presumptive sentence of 144 months. Counsel argued for a dispositional departure based on appellant's age, community support, and mental illness. Appellant and the state argued on the record, and the district court specifically noted that counsel raised appellant's mental-health status "mak[ing] [him] more vulnerable" as a basis for departure. The court therefore considered appellant's mental-health status before imposing the presumptive sentence.

D. The district court did not abuse its discretion by not providing appellant with a subsequent court-appointed attorney.

Appellant argues that he did not know that dismissing his first court-appointed attorney could prevent him from obtaining subsequent court-appointed counsel. A person's right to "counsel does not give [them] the unbridled right to be represented by counsel of [their] own choosing." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). A district court has discretion to appoint substitute representation if the request is reasonable and exceptional circumstances are shown. *Id.* Exceptional circumstances include "those that affect a court-appointed attorney's ability or competence to represent the client." *Id.* It does not include a defendant's general dissatisfaction with representation or "personal tension" between a defendant and counsel before trial. *Id.*

Appellant dismissed his first court-appointed public defender and acquired representation through the Legal Rights Center. Before trial, he sought to dismiss his Legal Rights Center attorney and requested substitute counsel from the court. Appellant told the

district court his Legal Rights Center attorney "exasperated" him and had not "lived up to his promises this month." Appellant's arguments show personal tension between counsel and appellant. Absent a showing of exceptional circumstances, the district court did not abuse its discretion in not appointing a second public defender.

E. The district court did not exhibit bias against appellant.

Appellant alleges that the district court demonstrated bias against him when he requested corrections to his sentence. When reviewing a claim of judicial bias we presume that a judge "discharged his or her judicial duties properly." *State v. Munt*, 831 N.W.2d 569, 580 (Minn. 2013). Appellant does not allege what actions the court took that stemmed from bias. Broadly, "adverse rulings are not a basis for imputing bias to a judge." *Agric. Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236-37 (Minn. App. 2005).

The district court sentenced appellant to the presumptive sentence. A review of the sentencing transcript shows that the district court considered appellant's sentencing arguments, noted appellant's age at the time of sentencing and encouraged his continued support in the community. Appellant's arguments do not overcome the presumption that the district court discharged its duties properly.

F. Appellant's trial counsel did not exhibit bias against him.

Appellant argues his trial attorney showed biased against him. However, appellant cites no caselaw and makes only conclusory assertions without support from the record indicating bias. Appellant's claim is unsupported by facts or caselaw.

G. Appellant's additional claims of prosecutorial misconduct fail.

Appellant argues that the prosecutor committed misconduct by: calling D.R. to testify at trial because D.R. had prior felony convictions; by introducing the "fraudulent" forensic CornerHouse video; and by failing to charge witness J.M. with child endangerment.

The prosecutor did not commit misconduct by calling D.R. as a witness. Individuals with felony convictions are not prevented from testifying before a court solely on the basis of their prior convictions. Appellant filed a notice to impeach D.R. based on those convictions, and the jury learned of them at trial.

The prosecutor also did not commit misconduct by introducing the CornerHouse video at trial. The jury heard the entire one-hour video and received its transcript. A.R.'s CornerHouse interviewer W.K testified as to the video's contents at trial. Appellant cross-examined him on the video's length exceeding recommended guidelines and as to the time between the interview and A.R. reporting sexual abuse to D.R. The jury heard evidence to weigh the video's credibility and later received instruction on how to do so.

Finally, appellant argues that the prosecutor committed misconduct by failing to charge J.M. with child endangerment for leaving A.R. with appellant. Charging J.M. would neither exonerate appellant nor warrant a new trial. This argument fails.

Affirmed.