STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1117

State of Minnesota,
Respondent,

vs.

Melvin Louis Allen,
Appellant.

Filed July 5, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-38072

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct, arguing that he was deprived of his constitutional right to a fair trial and that the evidence is insufficient to support the verdict. We affirm.

FACTS

On July 31, 2009, appellant Melvin Louis Allen was charged with three counts of first-degree criminal sexual conduct. The complaint alleged that appellant had sexually abused his then nine-year old daughter, M.A., in July 2009. At that time, appellant lived in Minneapolis with his wife, Victoria Brown, and their four children. During that time, Brown's sister, LaTonya Turner and her three daughters were living with appellant and Brown. Appellant also has a 17-year old daughter from a previous relationship, T.A.

In mid-July, Turner and Brown had an altercation and Brown threw Turner out of the house. According to Turner, after they moved out, Turner's daughter, N.S., told her that something had happened concerning M.A. N.S. testified that M.A. told her that appellant "was just touching on her private parts." Turner asked T.A. to speak with M.A. about these allegations.

T.A. testified that she asked M.A. if appellant had touched her inappropriately. M.A. said yes. T.A. took M.A. to their neighbor A.P.'s house after their conversation. A.P. testified that she also spoke with M.A. that day and that M.A. told her that "[appellant] made her put his stuff in her mouth" and that "he put his thing between her booty and he put his finger up her vagina."

The next morning, Turner picked up M.A. from A.P.'s house and took her to a park in St. Paul. M.A. told Turner that appellant had been touching her inappropriately. Turner stayed with M.A. for a few hours, and eventually M.A. decided that she wanted to tell police. M.A. told police that "my daddy been touching on me" and then began crying. Police arranged to have M.A. go to Midwest Children's Resource Center (MCRC), where she talked to Beth Carter, an MCRC nurse. M.A.'s interview with Carter was videotaped and played for the jury at trial. During this interview, M.A. discussed the sexual abuse.

Carter also conducted a physical exam of M.A. Carter testified that she did not observe any physical evidence of sexual or physical assault, but that the lack of physical findings was actually consistent with what M.A. described had happened. Carter testified that she did not expect to see any physical findings during the exam.

M.A. testified at trial that appellant touched her "butt," her "privacy part" and her mouth with "[h]is privacy part" on more than one occasion. M.A. further testified that appellant put his "privacy" in her mouth on another occasion in his room. The state elicited testimony that appellant had also sexually assaulted M.A. while they lived in Chicago and that the first time appellant assaulted M.A., she was six years old.

Sergeant Charles Green of the Minneapolis Police Department testified that he was assigned the case involving appellant and M.A. Sergeant Green testified that he did not attempt to obtain any physical evidence from appellant's home because the sexual abuse occurred nearly a week before he received M.A.'s report of abuse. Sergeant Green

analyzed the sexual-assault kit provided from the hospital and testified that there was no physical evidence demonstrating the occurrence of a sexual assault.

Ralph Faville, M.D., reviewed M.A.'s physical-examination report and testified for appellant. Dr. Faville stated that the results of the physical exam did not include the "sorts of trauma that [he] would expect to find" in a sexual-assault victim. Appellant also introduced a videotape of a Cornerhouse interview of M.A.'s then five-year-old sister, A.A. During the interview, A.A. implies that appellant sexually abused her. But then, A.A. tells the interviewer that appellant did not touch her and that her "auntie lied." When asked further, A.A. stated that "[m]y mommy didn't do nothing" and "Daddy didn't do nothing." She then stated that "[my auntie] said daddy touched me . . . [r]ight here and right here."

The jury found appellant guilty of all three counts of criminal sexual conduct. Following the verdict, appellant moved for a new trial, judgment of acquittal, and a mistrial due to prosecutorial misconduct. Appellant asserted, among other errors, on the ground that the state improperly withheld A.A.'s videotaped interview. The district court denied appellant's motions, reasoning that the videotape was "not necessarily *Brady* material" and that appellant was not prejudiced by the "tardy disclosure" of the videotape. The district court sentenced appellant to 144 months in prison. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by denying his motion for a new trial because the state (1) failed to disclose the recording of A.A.'s interview before trial and (2) failed to disclose that one of its witnesses would be offering opinion testimony. We review the district court's denial of a motion for a new trial for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008). A district court abuses its discretion by making findings unsupported by the evidence or by improperly applying the law. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009).

A. Recording of A.A.'s interview

Appellant contends that the state's failure to timely provide him with a copy of the videotape of A.A.'s Cornerhouse interview violated rules of discovery and the constitutional rule requiring the state to disclose possible exculpatory information.[1] We review constitutional issues raising due-process concerns de novo. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). In a criminal case, the state has an affirmative duty 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); *see also* Minn. R. Crim. P. 9.01, subd. 1(2), (6) (requiring that the state disclose to the defense relevant written or recorded statements and information that tend to negate or reduce defendant's guilt). To constitute

[1] Appellant originally raised this issue with respect to M.A.'s recorded MCRC interview. Following the state's brief and motion to supplement the record, appellant conceded this issue on appeal.

a *Brady* violation, "[f]irst, the evidence at issue must be favorable to the accused, either because it is exculpatory or it is impeaching. Second, the evidence must have been suppressed by the state, either willfully or inadvertently. Third, prejudice to the accused must have resulted." *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citations omitted).

1. Favorable Evidence

The Cornerhouse interview contains evidence that is favorable to appellant. A.A.'s interview suggests that Turner told A.A. to lie about the allegations against appellant, casting doubt on Turner's testimony regarding M.A. as well. Impeachment evidence is considered favorable evidence for purposes of *Brady*, and therefore the first element is satisfied. *See id.* at 460 (noting that impeachment evidence falls under the *Brady* requirement).

2. Suppressed by the State

But a *Brady* violation occurs only when the favorable evidence is suppressed by the state. *Id.* at 459. And while due process requires the state to provide the defendant with exculpatory information, federal courts have recognized that *Brady* "does not require the prosecution to disclose information in a specific form or manner." *United States v. Wooten*, 377 F.3d 1134, 1142 (10th Cir. 2004); *see* 25 James Wm. Moore et al., *Moore's Federal Practice* § 616.06[2] at 81 (3d ed. 2011) ("A *Brady* violation will not occur, in spite of the prosecution's suppression of evidence, if the defense possessed information before trial from which the substance of the undisclosed evidence could have been determined.")

We find these federal authorities to be persuasive in this instance. While appellant did not receive the videotape of A.A.'s interview until the middle of trial, appellant admitted that he received a police report containing a summary of A.A.'s Cornerhouse interview in October or November during the discovery process. Appellant also acknowledged that the summary contained A.A.'s statements that her "auntie lied." In some cases, a summary of a witness interview may be insufficient to satisfy *Brady* because the context of the statements may be an integral part of the interview. But on this record, we conclude that the state's disclosure of the exculpatory statements by A.A. in a police report prior to trial combined with the disclosure of the videotape at trial satisfied the *Brady* disclosure requirements.

3. Prejudice

Appellant's argument also fails on the prejudice element of the *Brady* analysis. *Brady* requires appellant to demonstrate that the suppressed evidence was material, meaning that there is a reasonable probability that the state's failure to disclose the videotape of A.A.'s interview affected the outcome of appellant's trial. *See State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Likewise, a non-*Brady* violation of a discovery rule generally does not mandate a new trial without "a showing of prejudice to the defendant." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Whether there exists a reasonable probability that the state's failure to disclose the evidence affected the outcome of the case presents a mixed question of fact and law, which is reviewed de novo. *Pederson*, 692 N.W.2d at 460.

Appellant asserts that he was prejudiced by the late disclosure in two respects. First, appellant argues that proper disclosure would have allowed him to more effectively craft his opening statement and witness examinations. But appellant knew of A.A.'s exculpatory statements prior to trial because he had received the police report that contained a summary of A.A.'s interview. Appellant acknowledged at trial that the summary contained the exculpatory information. Therefore, appellant's arguments that his opening statement and witness questioning could have been altered are not persuasive.

Second, appellant argues that he was prejudiced by the lack of an opportunity to prepare an argument for the partial admissibility of A.A.'s statements, such that the jury would not have been able to hear A.A.'s statements referring to possible abuse. But the record reflects that appellant's counsel, the prosecutor, and the district court discussed the possibility of admitting only the helpful portion of A.A.'s statement, but that all agreed that Minn. R. Evid. 106 would permit the state to introduce the balance of the interview in order to provide context. And the district court stated that if appellant moved to admit only part of the statement, it would grant a motion to introduce the remainder of the videotape pursuant to rule 106.

We also note that the district court informed appellant that, given his late receipt of the videotape, he could be provided additional time in which to view the videotape. Appellant did not request additional time, and appellant was able to introduce the videotape, re-call certain witnesses to inquire about the videotape's contents, and use A.A.'s statements from the videotape in closing arguments.

Therefore, we conclude that the failure of the state to disclose the videotape of A.A.'s Cornerhouse interview before trial does not implicate *Brady*. Because the late disclosure did not affect the outcome of the case, there is no prejudice to appellant such that a new trial is necessary to correct any discovery violations. As such, the district court did not abuse its discretion by denying appellant's motion for a new trial.

B. Witness Testimony

Appellant argues that the state violated discovery rules related to expert witness testimony. Minn. R. Crim. P. 9.01, subd. 1(4)(c), requires the state to disclose a "written summary of the subject matter of the expert's testimony, along with any findings, opinions, or conclusions the expert will give, the basis for them, and the expert's qualifications." A violation of a discovery rule generally does not mandate a new trial without "a showing of prejudice to the defendant." *Palubicki*, 700 N.W.2d at 489.

At the close of jury selection, the state notified appellant of its intent to call Carter as a witness and provided an on-the-record summary of Carter's findings. The on-the-record summary did not disclose that Carter would testify about the percentage of sexual-assault cases that involve physical findings. On appeal, appellant argues that he was "prejudiced by the prosecutor's failure to disclose its plan to offer the expert opinion of [Carter] that '95% of sexual assaults do not involve physical findings with children.'" Appellant argues that the failure to disclose this opinion prior to trial allowed the state to refer to the percentage during opening argument even though the actual testimony of that witness as to the percentage was later precluded.

After the prosecutor made those remarks in her opening statement, the district court instructed the jury that a lawyer's comments are not evidence and that "if a lawyer should say anything in the opening statement . . . that doesn't actually come into evidence as you recall it, then you disregard what the lawyer or I said." Reviewing courts presume that jurors follow the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Carter did *not* testify to the percentage that appellant objects to; therefore to the extent that the state failed to timely disclose its plan to have Carter testify that 95% of sexual assaults do not involve physical findings, we conclude that there was no prejudice to appellant requiring a new trial.

II.

Appellant contends that Carter's testimony violated his right to a fair trial. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Spann*, 574 N.W.2d 47, 52 (Minn. 1998). The state has an obligation to caution its witnesses against making prejudicial statements. *See State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979) (stating that to avoid the problem occasioned by a witness blurting out objectionable testimony, the state has a duty to properly prepare its witnesses prior to trial). The district court is in the best position to determine whether a witness "outburst creates sufficient prejudice to deny the defendant a fair trial such that a mistrial should be granted." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006). A mistrial should not be granted unless there is a reasonable probability that the trial outcome would have been different had the witness outburst not occurred. *Id.*

The district court ruled prior to Carter testifying that she would not be permitted to testify to percentages or to an opinion that the abuse did or did not occur, absent the proper foundation. Carter attempted to testify in response to three of the prosecutor's questions that 95% of sexual-assault cases involving children do not result in physical findings. Specifically, the exchanges were as follows:

> Prosecutor: What type of evidence might you see related to a sexual assault?
> Carter: Actually, in 95 percent of the kids—
> . . . .
> Prosecutor: Was that lack of physical findings in [M.A.]'s case consistent with what she told you in her interview?
> Carter: Yes.
> Prosecutor: Why is that?
> Carter: Because in 95 percent of children—
> . . . .
> Prosecutor: [B]ased on your training and experience . . . do you expect those same types of physical findings with respect to sexual abuse cases?
> Carter: No.
> . . . .
> Prosecutor: And why is that?
> Carter: Because in 95 percent of the children that we—

Each time that Carter attempted to testify to the percentage, she was interrupted before completing the sentence, and the jury was specifically instructed to disregard the partial statement. The district court denied appellant's mid-trial motion for a mistrial, concluding that "there's no reason to believe that [the state] deliberately elicited these statements."

We note that the district court's ruling did not specifically prohibit this testimony; it simply required proper foundation which the state may or may not have supplied. And the record clearly reflects that Carter was never able to actually testify to that opinion.

Her testimony was interrupted by an objection on each occasion that the district court sustained. And the district court provided a curative instruction to the jury advising them to not consider Carter's statements, lessening the prejudicial effect of her partial testimony. *See Miller*, 573 N.W.2d at 675 (noting that reviewing courts presume that the jury followed the district court's instructions). We therefore conclude that the district court did not abuse its discretion by denying appellant's motion for a mistrial on this ground.

III.

Appellant contends that the evidence is insufficient to support his criminal-sexual-conduct convictions. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough review of the record to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

The thrust of appellant's argument is not that the state failed to prove an essential element of his criminal-sexual-conduct offenses, but that the lack of eyewitnesses and physical evidence casts doubt on the veracity of M.A.'s testimony. A guilty verdict may

be sustained based solely on the testimony of a single witness. *State v. Burch*, 284 Minn. 300, 313, 170 N.W.2d 543, 552 (1969). And in a criminal-sexual-conduct case, the victim's testimony need not be corroborated, Minn. Stat. § 609.347, subd. 1 (2008), although the absence of corroboration may be indicative of insufficient evidence, *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977).

Appellant argues that the lack of witnesses to the claimed abuse and the lack of physical evidence support his argument that the evidence is insufficient to support the verdict. But the state introduced testimony from Carter that the lack of physical signs of abuse was expected due to the nature of the abuse and the lapse of time between the abuse and the examination. Further, appellant claims that he has an alibi for the evening of the alleged abuse. He argues that individuals were also at the home that evening and the abuse "could not have happened when [M.A.] said it did." But the fact that other individuals were at the home at the time of the assault does not negate M.A.'s testimony. Appellant did not introduce any evidence demonstrating an actual alibi for the entire evening; he simply introduced evidence that others were in the home on the date of the assault. And finally, appellant relies on A.A.'s statement that her "auntie lied." While this evidence was certainly damaging to the state's case, it is the role of the jury to weigh the credibility of Turner and M.A. in light of this revelation, and the conviction demonstrates that the jury found M.A.'s testimony to be credible. *See State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998) (stating that it is the jury that "determines the weight and credibility of individual witnesses").

In order to grant appellant's requested relief, we would have to reweigh the testimony of the state's witnesses and afford more weight to A.A.'s Cornerhouse interview than the jury apparently did. Because that is not the role of this court and because there is sufficient evidence in the record to support the jury's verdicts, we affirm appellant's convictions.

Affirmed.