STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1271

State of Minnesota,
Respondent,

vs.

Eric Dean Krieger,
Appellant.

Filed May 3, 2011
Affirmed as modified
Klaphake, Judge
Concurring specially, Larkin, Judge

Mille Lacs County District Court
File No. 48-CR-09-1004

Lori Swanson, Attorney General, Kimberly Ross Parker, Assistant Attorney General, St. Paul, Minnesota; and

Janice Jude, Mille Lacs County Attorney, Milaca, 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 Larkin, Presiding Judge; Klaphake, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

KLAPHAKE, Judge

Appellant Eric Krieger challenges his 2009 conviction of two counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(b) (2008), and one count of second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(b) (2008), for sexually assaulting a 13-year-old victim. He claims that (1) the district court abused its discretion by determining that the victim's child-protection file contained information that was not material and favorable to the defense; (2) a new trial is necessary because the state twice implied that appellant had previously abused the victim; and (3) at sentencing, the district court abused its discretion by imposing a durational departure for impermissible reasons and erred by imposing a 520-month sentence for the second count of first-degree criminal sexual conduct that exceeds the 360-month statutory maximum sentence. Because (1) exclusion of the relevant information contained in the child-protection file was harmless error; (2) at trial, the states' allusion to a previous sexual assault examination of the victim did not implicate appellant as the perpetrator; and (3) the psychological and emotional harm suffered by the victim supported a durational departure, we affirm on those issues. However, because the sentence exceeds the statutory maximum sentence, we modify appellant's sentence to 360 months.

D E C I S I O N

I.

A criminal defendant has a broad right to prepare and present a defense, which includes a right to discovery of exculpatory evidence. *State v. Paradee*, 403 N.W.2d 640,

642 (Minn. 1987); *see State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (stating that every criminal defendant has a right to be treated with fundamental fairness and given an opportunity to present a complete defense). However, this right is not unfettered and must be balanced against the privacy rights of victims and witnesses. *Paradee*, 403 N.W.2d at 642. To determine the relevance and materiality of confidential documents, a district court conducts in camera review of the records, *id.*, and the district court's determination is reviewable on appeal as a discretionary decision. *State v. Reese*, 692 N.W.2d 736, 742-43 (Minn. 2005).

At issue here is whether confidential information from the victim's 2003 child protection file, which included evidence of prior scarring of her hymen, should have been admissible to show that appellant did not sexually penetrate the victim. Generally, under Minnesota's rape shield statute, a victim's previous sexual conduct may not be used as evidence in a prosecution for criminal sexual conduct. Minn. Stat. § 609.347, subd. 3 (2008); Minn. R. Evid. 412. "The term 'sexual conduct' as used in Minn. Stat. § 609.347 includes 'allegations of sexual abuse.'" *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). An accused may offer evidence of the victim's prior sexual conduct only if "the prosecution's case includes evidence of semen, pregnancy or disease at the time of the incident . . . [and the] evidence . . . show[s] the source of the semen, pregnancy or disease." Minn. R. Evid. 412 (1)(B). But "evidence of a victim's past sexual [conduct] may be admitted where it is constitutionally required by the defendant's right to due process, his right to confront his accuser, or his right to offer evidence in his own defense." *Kobow*, 466 N.W.2d at 750.

Here, the district court granted appellant's motion for an in camera review of the victim's 2003 child protection file after the state indicated that it planned to introduce testimony from the victim's treating doctor that she suffered a transection, or injury to her hymen, which the doctor in this case discovered during an examination after the reported abuse. After its in camera review, the district court informed the parties about the nature of the information in the 2003 file, stating that the file contained a substantiated report of sexual abuse of the victim by a person other than appellant. However, inexplicably, the district court also ruled that the report was not relevant because it did not contain evidence of penetration and was therefore inadmissible under the rape shield statute.

This court has reviewed the confidential file and concludes that the substantiated report clearly shows that the victim's 2003 sexual abuse involved penetration. Appellant's counsel specifically asked the district court whether there was any indication that either digital or penile penetration had occurred during the 2003 incident. The district court denied that it had, and proceeded to grossly mischaracterize the nature of the incident. Yet, the confidential file shows that the district court even appears to have underlined the part of the report indicating that penetration had occurred. The district court's flagrant mischaracterization of this evidence constitutes a clear abuse of its discretion.

However, as the state argues, even if the district court did abuse its discretion by failing to disclose such relevant information, we also must consider whether the error was harmless in this case. *See State v. Pride*, 528 N.W.2d 862, 867 (Minn. 1995) (stating that "Confrontation Clause errors are subject to harmless error analysis"). In *State v.*

Wildenberg, 573 N.W.2d 692, 697-98 (Minn. 1998), the supreme court applied a harmless error analysis to determine whether a district court's decision not to admit relevant evidence after a *Paradee* in camera review created a "reasonable probability" that the complained-of error contributed to the conviction. *Id*. at 698.

We conclude that appellant was not prejudiced by the exclusion of the information contained in the 2003 confidential file because there was strong evidence that appellant's sexual assault of the victim also included penetration. The victim testified that she bled "for the first time" after appellant penetrated her, that the bleeding scared her, and that appellant gave her a menstrual pad for the blood. The testimony of the examining physician was consistent with the victim's testimony, and she testified that she could not determine when the victim's hymen was transected. Further, in appellant's taped statements to a police investigator, which were admitted into evidence, appellant stated that the victim bled after he penetrated her with a dildo. On these facts, there is no reasonable probability that evidence of the victim's prior sexual penetration would have changed the trial outcome. We therefore conclude that although the district court abused its discretion in ruling that the 2003 report was not relevant, such error was harmless, and a new trial is not warranted.

II.

Appellant argues that the state impermissibly suggested to the jury that appellant was previously suspected of abusing the victim when the prosecutor asked two witnesses from the county child protection agency and the Midwest Children's Resource Center whether their encounter with the victim in 2009 was the first time they had seen her.

Because appellant did not object to these alleged errors, they are reviewed under the plain error standard. *See* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered . . . on appeal even if it was not brought to the trial court's attention."). "To establish plain error, an appellant must show that a district court's ruling (1) was error, (2) that the error was plain, and (3) that the error affected appellant's substantial rights." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002) (citations omitted). If these three prongs are met, the appellate court assesses whether it should consider the error to ensure fairness and the integrity of the judicial proceedings. *Id*. The third prong is satisfied if the error was prejudicial and affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). Plain error is prejudicial if there is a "reasonable likelihood that [the erroneously admitted evidence] substantially affected the jury verdict." *State v. Glidden*, 455 N.W.2d 744, 747 (Minn. 1990).

During direct examination, the prosecutor asked the Midwest Children's Resource Center nurse if April 22, 2009 was the first time that she had met the victim, and the nurse answered: "I don't recall if it is the first time I met [the victim]. I – I know that [she] was seen as a young child in our center." After the prosecutor initiated a bench discussion, the prosecutor struck the question, and defense counsel made no objection.

Also during direct examination, the prosecutor asked the child protection social worker: "[P]rior to receiving that report [in February 2009, that appellant sexually touched the victim], . . . have you ever had contact with [her] before?" The social worker responded: "No, not directly me. I said that wrong. No, I have not."

Appellant argues that this testimony requires a new trial because it was a "prejudicial innuendo [that] deprived [appellant] of his constitutional right to due process and a fair trial," because it left the impression that appellant had been suspected of prior abuse of the victim. *See State v. Strommen*, 648 N.W.2d 681, 684, 685, 688-89 (Minn. 2002) (reversing criminal conviction when witness testified that defendant told her he had been previously charged for killing someone, and police officer testified that he knew the defendant "from prior contacts and incidents"); *State ex rel. Black v. Tahash*, 280 Minn. 155, 157, 158 N.W.2d 504-06 (1968) (reversing criminal conviction when police officer mentioned defendant's prior incarceration during testimony, stating that defendant had reported seeing the accomplice only once "since leaving Stillwater").

The testimony in this case differs considerably from the cases in which an appellate court has determined that the defendant's substantial rights have been so affected as to require a new trial. In those cases, it was clear that the testimony was about the defendant's prior bad acts. Here, by contrast, the testimony dealt exclusively with the victim's history of being seen by child protection. She could have been seen by child protection for any number of reasons, so the "innuendo" or "inference" that would be necessary to connect the testimony with appellant does not exist here. We conclude that no plain error affecting appellant's substantial rights occurred to require a new trial.

III.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines

II.D. (2008). "'Substantial and compelling' circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). We review a district court's decision to depart from a presumptive sentence for abuse of discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009).

At sentencing, the court found that multiple forms of penetration, the number of times of penetration, and the emotional or psychological harm to the victim warranted departure from the presumptive sentences. Appellant argues that these facts may not be used as aggravating factors because they were necessary to prove elements of the charged offenses, were facts underlying separate charged or uncharged offenses, or were facts of a typical offense of this kind and were already considered by the legislature and reflected in the sentencing guidelines. Respondent concedes that multiple forms and occurrences of penetration are not permissible grounds for the double departure in this case. However, respondent argues that a durational departure was warranted based on the psychological and emotional harm suffered by the victim. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985) (stating that only a single aggravating factor is necessary to support a durational departure); *State v. Allen*, 482 N.W.2d 228, 233 (Minn. App. 1992) ("psychological and emotional injury may justify upward departure"), *review denied* (Minn. Apr. 13, 1992).

Here, the victim suffered severe emotional and mental trauma from her prolonged sexual abuse. She was diagnosed with a brief psychotic disorder, which occurred for a two-week period in the fall of 2008, before any sexual abuse allegations against appellant

were made, but during the period in which the victim eventually indicated that abuse had occurred. The victim reported having hallucinations, seeing a dead boy and bugs, and hearing voices; she was said to have incoherent speech, been in a trance-like state, and chanted. The victim was also diagnosed with post-traumatic stress disorder (PTSD), and she continued to have symptoms of PTSD, which can re-emerge at any time in her life. A clinical social worker described the victim as full of embarrassment, guilt, and shame, and stated that she will likely need to continue counseling and therapy for the rest of her life. Given the psychological and emotional harm suffered by the victim, the district court did not abuse its discretion in imposing sentences that constituted double durational departures from the presumptive sentence. *See, e.g.*, *State v. Norton*, 328 N.W.2d 142, 146 (Minn. 1982) (affirming upward durational departure when defendant snatched five-year-old victim from her backyard, took her to a secluded cornfield, threatened her with death and forced her to commit fellatio, and victim needed counseling as a result of the experience); *State v. Patterson*, 511 N.W.2d 476, 478 (Minn. App. 1994) (affirming upward durational departure when victim needed future psychological counseling as result of offense), *review denied* (Minn. Mar. 31, 1994); *Allen*, 482 N.W.2d at 233 (affirming upward durational departure based on psychological harm where victim experienced depression, worsening relationships, trouble sleeping, lost trust in others, and needed professional psychological therapy).

IV.

Even when severe aggravating circumstances are present, a sentence may not exceed the statutory maximum provided by the legislature in defining the offense. *State*

v. Mortland, 399 N.W.2d 92, 95 (Minn. 1987). With limited exceptions, the maximum penalty for first-degree criminal sexual conduct is 360 months. Minn. Stat. § 609.342, subd. 2 (2008). A reviewing court may correct an illegal sentence at any time. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007).

Here, the district court imposed concurrent sentences of 336 and 520 months for the first and second counts of first-degree criminal sexual conduct, and 280 months for the count of second-degree criminal sexual conduct. Because the 520-month sentence exceeds the 360-month statutory maximum for first-degree criminal sexual conduct, we modify appellant's sentence on that count to 360 months, the statutory maximum for that offense.

V.

Appellant raises several arguments pro se which we address briefly.

Coerced Confession

Appellant argues that his voluntary taped statement to the police investigator was coerced and that allowing such a confession at trial "was prejudicial and an abuse of discretion," warranting "a new trial or outright acquittal."

First, appellant argues that the investigator should have warned him of his right not to incriminate himself. Here, appellant was not in custody when he gave his statement to the police investigator, so no *Miranda* warning was required. *See State v. Larson*, 346 N.W.2d 199, 201 (Minn. App. 1984) ("*Miranda* warnings are required only for custodial interrogations," which consist of "questioning initiated by law enforcement

officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.")

Second, appellant argues that it was inappropriate for the investigator to tell him that police had new evidence of appellant's guilt and to make various statements designed to elicit his confession. In the context of determining the voluntariness of a statement, the supreme court has stated that it is not inappropriate for police to persuade suspects to talk. *See State v. Patricelli*, 357 N.W.2d 89, 93 (Minn. 1984) (ruling that even after *Miranda* warning officer could "simply persuade[] defendant in a perfectly proper way to talk" when defendant had not clearly refused to talk); *see also Williams*, 535 N.W.2d at 285 (stating that police may inform a suspect of the possible charges or evidence against him). The investigator obtained appellant's statement voluntarily.

Third, appellant complains that when he spoke with the investigator he was under the influence of prescription medication. But the investigator testified that during their hour-and-a-half interview he observed no signs of intoxication in appellant, that he did not suspect that appellant was intoxicated, and that appellant said nothing to the investigator about being under the influence of alcohol or a controlled substance. The audiotape of appellant's confession supports the investigator's testimony.

For these reasons, the district court did not abuse its discretion in denying appellant's motion to suppress his confession.

Notice of Intent to Seek Aggravated Sentence

Appellant argues that the state's notice of intent to seek an aggravated sentence was inadequate because it did not include statutes or contain a summary statement of the

factual basis supporting the aggravating factors, and a new trial is required based on the "biased and unfair" notice of intent.

Minn. R. Crim. P. 7.03 provides that the notice must include the "grounds or statutes" relied upon and "a summary statement of the factual basis supporting the aggravated sentence." The notice here cites to six cases and contains the following bases for seeking an aggravated sentence: "[t]he victim was exposed to multiple forms of penetration including oral, vaginal, and digital"; "the victim was exposed to multiple penetrations"; and "defendant's actions caused emotional and psychological harm to victim." The notice comports with the rule.

Hearsay and Testimonial Statements

Appellant argues that the district court impermissibly allowed the victim's mother to testify about her daughter's allegations of abuse without personal knowledge of the abuse. But the record indicates that the victim initially reported the abuse to her mother and discussed the abuse with her. Even if this evidence was impermissibly admitted, such error was harmless because ample testimony from key witnesses was properly admitted to support the jury verdicts.

Appellant also complains that the testimony from the police investigator based on information contained in his police reports was hearsay. But this testimony was elicited during appellant's own counsel's cross-examination of the investigator, which was intended to show the investigator's bias. The prosecutor objected to the questions as beyond the scope of direct examination, and the district court expressed concerns that the

testimony elicited by *appellant's* counsel was hearsay. Appellant's argument is without merit.

Ineffective Assistance

Appellant seeks a new trial on the ground that his trial counsel was ineffective. To obtain relief, appellant must allege facts that would "demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). Trial counsel's performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007).

Appellant complains that his trial counsel failed to object to the state's motions in limine and did not call an expert medical witness. "What evidence to present to the jury, what witnesses to call, and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). Furthermore, appellant does not explain how, absent these alleged failures, the outcome of the trial would have been different.

Appellant also argues that his trial counsel should have argued "exceptions to the rape shield law." But appellant neither explains what evidence should have been admitted under an exception to the rape shield statute nor how the admission of such evidence would have changed the trial outcome. As discussed in Section I, appellant's

trial counsel moved for a *Paradee* hearing, which the district court granted. Appellant has not met the legal standard for demonstrating ineffective assistance of his trial counsel.

Prosecutorial Misconduct

Appellant claims that the prosecutor committed misconduct in her closing argument when she referred to the first time that appellant abused the victim. Appellant argues that these allegations were unfounded, the conduct was uncharged, and the reference was prejudicial. Before trial, defense counsel objected to the admission of this evidence. The prosecutor responded that the evidence was admissible under Minn. Stat. § 634.20 (2008) as "evidence of similar conduct by the accused against the victim of domestic abuse." The state intended to show evidence of when the victim first observed vaginal bleeding to establish the loss of her virginity. The district court allowed the evidence, with a cautionary instruction, and warned the state not to mention any other evidence of uncharged conduct. The prosecutor did not commit misconduct in closing argument by referring to admissible evidence.

Sentencing

Appellant argues that when a district court imposes both a dispositional and a durational departure, each departure requires written explanation. Here, however, appellant's sentence did not include a dispositional departure. Appellant's argument has no merit.

Insufficient Evidence

Appellant argues that the evidence was insufficient to convict him, claiming that the victim's testimony was not credible. But we must presume that the jury concluded

that the victim's testimony was sufficiently credible, and this court must defer to the jury's assessment of that credibility. *See State v. Green*, 719 N.W.2d 664, 673-74 (Minn. 2006) (stating that "it is within the jury's exclusive province to assess the credibility of a witness"). In addition to the victim's testimony about the abuse, a taped statement given by appellant to the police investigator contained a confession regarding the abuse, and medical evidence of the victim's physical trauma were introduced at trial. The record contains more than sufficient evidence to support appellant's convictions. *See, e.g., State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998) (stating that sexual-assault victim's testimony alone is sufficient to establish proof beyond a reasonable doubt).

Judicial Misconduct and Newly Discovered Evidence

We also reject appellant's vague arguments about alleged judicial misconduct and newly discovered evidence because they are not supported by either citation to the record or citation to authority. Pro se litigants are generally held to the same standards as attorneys. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). When a brief does not contain citations to the record or to legal authority in support of the issues raised, those issues are deemed waived. *Id*. Because appellant fails to cite the record or any legal authority in support of these arguments, they fail.

Cumulative Effect of Alleged Trial Errors

Finally, appellant argues that he was denied a fair trial by the cumulative effect of perceived trial errors. An "[a]ppellant is entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Keeton*, 589

N.W.2d 85, 91 (Minn. 1998). Appellant has not shown multiple errors that could be aggregated to warrant a new trial.

Affirmed as modified.

LARKIN, Judge (concurring specially)

I concur in the majority's opinion. But I write separately to address an overarching concern regarding errors in this case. It appears that relevant information from the victim's confidential records was not disclosed after the in camera review, even though the district court acknowledged that the substance of the information (i.e., penetration) was relevant. And as conceded by the state, two improper aggravating factors were relied on to support the upward durational departure and the sentence imposed impermissibly exceeded the statutory maximum. Although the first error does not necessitate reversal of Krieger's conviction, it is possible to imagine another set of circumstances in which an erroneous failure to disclose relevant information obtained during an in camera review could very well require reversal and a new trial. And although the sentencing errors can be corrected on appeal or on remand, these processes also involve significant time and effort.

Given the number of cases that the district court must process, often without adequate time or the necessary resources, perhaps these seemingly inexplicable errors should come as no surprise. Nevertheless, if we are to maintain public trust and confidence in the judiciary, we all must strive to do better.