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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1636

State of Minnesota,
Respondent,

vs.

Don Newcome Conley,
Appellant.

Filed August 22, 2011
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-09-16555

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.[*]

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[*] 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

BJORKMAN, Judge

Appellant challenges his three convictions of aiding and abetting second-degree criminal sexual conduct, arguing that (1) the district court abused its discretion by admitting two graphic photographs, (2) the prosecutor committed misconduct in closing argument, and (3) the district court plainly erred by failing to instruct the jury on the lesser-included offense of fourth-degree criminal sexual conduct. We affirm.

FACTS

At approximately 9:15 p.m. on October 21, 2009, 26-year-old T.J. was in the entryway of her mother's apartment building. While she waited to be admitted to the building, two men, Swenson Keeler and appellant Don Conley, came into the entryway. Keeler turned to T.J. and told her that she was sexy, that her "ass . . . made his dick hard," and that "he wanted to f--k her." He then showed T.J. two pictures of his penis that he had on his cell phone. Meanwhile, Conley grabbed T.J.'s hair and smelled it. When a resident opened the door to the building shortly thereafter, T.J. entered the building and the two men followed.

In the lobby, T.J. pushed the button for the elevator. When the doors opened, Conley put his arm around T.J.'s neck and pulled her into the elevator, followed by Keeler. In the elevator, Conley stood behind T.J. and held her with his arm around her neck, preventing her from moving. He reached into her shirt and rubbed her breasts, scratching her. Keeler attempted to pull T.J.'s pants down while Conley continued to hold her from behind. Keeler unfastened but was unable to remove T.J.'s pants because

she was wearing suspenders. Keeler then reached into T.J.'s pants and underwear and touched the top of her vaginal area. Conley held T.J. and attempted to pull off her shirt.

When the elevator door opened on the third floor, T.J. kneed Keeler and elbowed Conley, who released her. She then ran down the hallway to her mother's apartment and called 911. Responding police officers located and arrested Conley and Keeler at the apartment building.

Conley was charged with three counts of aiding and abetting first-degree criminal sexual conduct and three counts of aiding and abetting second-degree criminal sexual conduct.[1] After trial, the jury found Conley guilty on all three second-degree counts and acquitted him of the other charges. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting enlarged prints of the photographs that Keeler showed to T.J.

Conley argues that the district court abused its discretion by admitting as evidence 8½ x 11 prints of the two photographs that Keeler showed to T.J. on his cell phone. We review a district court's evidentiary ruling for abuse of discretion. *State v. Bolstad*, 686 N.W.2d 531, 541 (Minn. 2004).

Conley first argues that the photographs themselves are not relevant to any material issue because T.J. and the officer who seized the cell phone could have testified about them and Conley offered to stipulate to the fact that Keeler's cell phone contained photographs of his penis. We disagree. "Photographs are generally admissible where

[1] Keeler was referred to as a co-defendant at Conley's trial, but the two men had separate trials.

they accurately portray anything which is competent for a witness to describe orally, and [where] they are relevant to some material issue." *State v. Durfee*, 322 N.W.2d 778, 785 (Minn. 1982); *see also* Minn. R. Evid. 401 (defining relevant evidence). And the availability of other means for presenting the evidence that Keeler displayed photographs of his penis to T.J. does not make admission of the photographs themselves an abuse of discretion. *See State v. Hahn*, 799 N.W.2d 25, 34-35 (Minn. 2011) (concluding that the district court did not abuse its discretion by admitting pornographic photographs that defendant took of child victim, even though a witness could have testified to their existence).

Conley next argues that even if the photographs are relevant, their probative value is far outweighed by the potential for unfair prejudice. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Minn. R. Evid. 403. "Evidence that is probative, though it may arouse the passions of the jury, will still be admitted unless the tendency of the evidence to persuade by illegitimate means overwhelms its legitimate probative force." *State v. Schulz*, 691 N.W.2d 474, 478-79 (Minn. 2005). Photographs in particular "are not rendered inadmissible just because they vividly depict a shocking crime or incidentally tend to arouse the passions and prejudices of the jurors." *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005).

Evidence that Keeler showed T.J. graphic photographs is highly probative on the issue of whether Conley and Keeler acted with sexual or aggressive intent. *See* Minn. Stat. § 609.341, subd. 11 (2008) (defining "sexual contact," an element of second-degree

criminal sexual conduct, to require "sexual or aggressive intent"). The existence of the photographs is only one aspect of their probative value; the graphic nature of the photographs—which can be communicated fully only by seeing them—most readily illustrates the intent of the men. And the photographs also bear on T.J.'s credibility because they confirm part of her testimony, which further enhances their probative value. *See Hahn*, 799 N.W.2d at 34 (concluding that pornographic photographs that defendant took of child victim were admissible in trial on first-degree criminal sexual conduct in part because they corroborated the victim's testimony). While admission of the photographs may be prejudicial, the state did not use the photographs to persuade by illegitimate means.

Finally, Conley argues that the district court abused its discretion by admitting the photographs because their enlargement to 8½ x 11 prints rendered them inaccurate. We disagree. First, there is no indication in the record that Conley objected based on the size of the photographs. Second, although the prints admitted are larger than the cell-phone photographs presented to T.J., they are the same size as almost all the other photographs admitted as evidence in this case, there is no evidence that the images were distorted, and the jury was informed that the photographs were on a cell phone and only briefly presented to T.J. Under these circumstances, we conclude that the district court did not abuse its discretion by admitting the prints of the photographs.

II. The prosecutor did not commit prejudicial misconduct in closing argument.

Conley argues that he is entitled to a new trial because of several instances of prosecutorial misconduct during closing argument, some of which Conley objected to and

some of which he did not. We consider closing arguments in their entirety in determining whether prejudicial misconduct occurred. *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993). But our standard of review depends on whether the defendant objected at trial. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).

A. Objected-to arguments

We review objected-to errors or misconduct under a two-tiered harmless-error test: "For cases involving claims of unusually serious prosecutorial misconduct, there must be certainty beyond a reasonable doubt that misconduct was harmless. We review cases involving claims of less-serious prosecutorial misconduct to determine whether the misconduct likely played a substantial part in influencing the jury to convict." *Yang*, 774 N.W.2d at 559 (citing *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974)); *see also State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010) (stating that the continued viability of the two-tiered *Caron* approach has not yet been decided). Conley argues that the prosecutor committed misconduct by (1) providing her personal opinion about Conley's credibility and (2) commenting on facts not in evidence. We consider each argument in turn.

Personal opinion

Conley first asserts that the prosecutor improperly offered her personal opinion on Conley's credibility during closing argument by using a PowerPoint presentation that characterized various statements that Conley made to police as lies. We disagree. Prosecutors may not give their opinion as to any witness's credibility. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). But if supported by reference to the evidence, it is not

misconduct to argue that a witness "lied." *State v. Anderson*, 720 N.W.2d 854, 865 (Minn. App. 2006), *aff'd*, 733 N.W.2d 128 (Minn. 2007). The challenged statements were made in the context of discussing the evidence, and the prosecutor supported each assertion that Conley lied with a reference to the evidence such that the jury could independently determine whether Conley was untruthful. For example, the prosecutor argued, "And then he lied [to police] when he said he did not pull . . . [T.J.] into the elevator. You saw it with your own eyes [in the surveillance video]." On this record, we discern no misconduct.

Facts not in evidence

Conley next argues that the prosecutor committed misconduct by commenting that Conley cried during trial—a fact not in evidence. Although a prosecutor may not make statements in closing argument that are not supported by the evidence, *State v. Kirvelay*, 311 Minn. 201, 202, 248 N.W.2d 310, 311 (1976), comment on a defendant's behavior in the courtroom may be appropriate, *State v. Buckhalton*, 296 N.W.2d 881, 883-84 (Minn. 1980). In *Buckhalton*, the supreme court stated that "comments on the conduct of the defendant during the trial in the presence of the jury would sometimes be permissible" because otherwise the defendant "could put on a real show for the jury without taking the stand and without ever actually putting his character in issue." *Id.* at 884. Here, Conley does not dispute that he was crying, so the prosecutor's argument did nothing more than comment on something that was readily observable in the courtroom. Based on *Buckhalton*, we conclude that the prosecutor's brief comment about Conley crying was not misconduct.

B. Unobjected-to arguments

We review claims of prosecutorial misconduct based on unobjected-to argument under a modified plain-error standard. Minn. R. Crim. P. 31.02; *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). To establish plain error based on a claim of prosecutorial misconduct, an appellant must demonstrate that the prosecutor's unobjected-to argument was erroneous and the error was plain. *Ramey*, 721 N.W.2d at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The burden then shifts to the state to prove that the error did not affect the appellant's substantial rights. *Id.*

Conley argues that the prosecutor committed misconduct by (1) commenting on his challenges to T.J.'s testimony and (2) encouraging the jury to hold Conley accountable. We address each argument in turn.

Commenting on Conley's challenges to T.J.'s testimony

Conley asserts that the prosecutor implicated his constitutional right to confront his accuser by arguing that he attacked and revictimized T.J. by challenging her testimony. A defendant has a constitutional right to confront witnesses against him. *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003), *review denied* (Minn. June 25, 2003). "It is misconduct for a prosecutor to attack a defendant for exercising his right to a fair trial and to encourage the jury to punish him for what the prosecutor perceives as further victimization of the victim." *Id.*

Conley relies on six excerpts from the prosecutor's closing argument in which the prosecutor stated that the defense "attacked," "beat up on," or otherwise disparaged T.J. Some of these arguments are similar to the type of argument this court criticized in

McNeil. But several factors distinguish this case from *McNeil* and indicate that the prosecutor's argument was not improper.

First, all of the prosecutor's references to "attacks" on T.J. appropriately concerned credibility, a central issue in this case. *See State v. Lopez–Rios*, 669 N.W.2d 603, 614 (Minn. 2003) (stating that an attorney may argue the credibility of witnesses in final argument if the argument is tied to the evidence). Second, unlike in *McNeil*, most of the prosecutor's references were warranted by the strong language that defense counsel used in describing T.J.'s credibility, such as arguing that T.J. should be "taken to task" for inconsistencies in her statements. Finally, the overall focus of the prosecutor's argument was on the evidence, particularly the significant evidence corroborating T.J.'s testimony, rather than the defense's "attacks" on T.J. This is in direct contrast to *McNeil*, in which the prosecutor's closing argument not only characterized the defense as revictimizing the victim but also baldly invited the jury to punish the defendant for taking the eight-year-old victim's virginity. *See McNeil*, 658 N.W.2d at 234-35. Based on our review of the record, we conclude that the prosecutor's references to defense "attacks" on T.J. did not infringe on Conley's right to confront his accuser at trial.

Encouraging the jury to hold Conley accountable

Conley also argues that the prosecutor improperly encouraged the jury to hold him accountable for what happened to T.J. A prosecutor is not permitted to "appeal to the passions of the jury" during closing argument. *State v. Mayhorn*, 720 N.W.2d 776, 786-87 (Minn. 2006). But these restrictions do not preclude all arguments relating to the impact of the crime or accountability. *Nunn v. State*, 753 N.W.2d 657, 662 (Minn. 2008).

A prosecutor may talk about accountability but "should not emphasize accountability to such an extent as to divert the jury's attention from its true role of deciding whether the state has met its burden of proving [the] defendant guilty beyond a reasonable doubt." *State v. Montjoy*, 366 N.W.2d 103, 109 (Minn. 1985).

The prosecutor made two references to accountability during closing argument. The prosecutor first commented:

> There is something fundamentally wrong when a woman is visiting her mother and she is accosted by two men, two defendants, who scream vulgarities at her and who show her penises on a photo and who then pulled her into an elevator against her will and touch her breasts and get into her genitalia, into her lady parts. There is something wrong when that occurs to a woman, and when that happens, the assailants must be held accountable. . . . I am asking you to find him guilty and to hold him accountable.

Then, toward the end of the argument, the prosecutor asserted that "the actions of Defendant Conley and Defendant Keeler must be held accountable."

Conley's argument that these two references to accountability deprived him of a fair trial is not persuasive. The statements were not pervasive or inflammatory, and were presented in the context of the argument that Conley should be found guilty based on the evidence. And the discussion of accountability for improper and illegal conduct was arguably responsive to defense counsel's arguments that minimized the impact on T.J. and suggested that T.J. may have invited or consented to the conduct of Conley and Keeler. *See id.* (permitting discussion of victim's suffering and accountability to persuade the jury not to return a verdict based on sympathy for the defendant). On this

record, the prosecutor's two brief references to accountability during a closing argument that comprised more than 25 pages do not amount to plain error.

Finally, although we discern no error or misconduct with respect to the prosecutor's closing argument, we consider whether the argument, as a whole, prejudiced Conley. *See Walsh*, 495 N.W.2d at 607. Even considered cumulatively, the challenged portions of the prosecutor's closing argument amount to a small portion of the argument, which primarily concerned T.J.'s testimony and the evidence corroborating her testimony. *See State v. Powers*, 654 N.W.2d 667, 679 (Minn. 2003) (refusing to grant new trial when objectionable statements consisted of two sentences in a closing argument covering 20 pages in transcript). The district court also appropriately instructed the jury that the prosecutor's arguments were not evidence. *See McDaniel*, 777 N.W.2d at 750 (finding erroneous closing argument harmless in part because the district court instructed jury that arguments are not evidence that should be considered).

Moreover, the evidence against Conley was strong. T.J.'s overall story was consistent and was corroborated by her torn clothing, photographs of the scratches on her torso, responding officers' testimony as to her emotional state after the incident, and video and still photographs from the apartment building's surveillance cameras providing a contemporaneous record of some of the interactions between T.J., Conley, and Keeler. *See McNeil*, 658 N.W.2d at 236 (declining to reverse for misconduct because "given the extraordinary weight of the evidence, we cannot say appellant did not receive a fair trial"). Accordingly, we conclude that Conley is not entitled to relief based on the prosecutor's closing argument.

III. Conley waived any challenge to the district court's jury instructions.

Conley also argues that the district court committed plain error by failing to sua sponte instruct the jury on the lesser-included offense of fourth-degree criminal sexual conduct after he told the district court that he did not want such an instruction to be given. We disagree. Conley did not fail to request a lesser-included-offense instruction; he knowingly relinquished any right he had to such an instruction. When a defendant affirmatively requests that an instruction not be given, that request is an express waiver of his right to the instruction and precludes the defendant from raising the issue on appeal. *State v. Sessions*, 621 N.W.2d 751, 757 (Minn. 2001). Accordingly, we conclude that Conley has waived this argument.

Affirmed.