STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1813

State of Minnesota,
Respondent,

vs.

James Donald Dahl,
Appellant.

Filed September 26, 2011
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CR-07-14970

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Larkin, 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 two counts of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. He argues that (1) there

is insufficient evidence to support the jury's verdict; (2) the prosecutor committed misconduct requiring a new trial; and (3) the district court abused its discretion by denying him access to the victim's school, court, and medical records. Because we conclude that there is sufficient evidence to support the jury's verdict, a new trial is not warranted, and the district court did not abuse its discretion by denying appellant access to the victim's records, we affirm.

FACTS

On December 27, 2007, the St. Cloud Police Department responded to a report of an assault. During the ensuing investigation, then-14-year-old C.L. reported that appellant James Donald Dahl had sexually assaulted her. She told the police that appellant had taken her and her mother, P.M., to a Holiday Inn in August and that appellant had "raped" her. C.L. also reported that appellant forced her into having sex with him on multiple occasions after C.L. and her mother moved in with appellant. Appellant was charged with two counts of first-degree criminal sexual conduct.

In October 2008, appellant moved for an in-camera review of all medical, school, court, and social-work records involving C.L. Appellant argued in his memorandum in support of his motion that "[t]he requested records may negate his guilt and will assist the court in assessing the credibility, truthfulness and, most importantly, the motivation to fabricate of the critical witness against him." The district court granted appellant's motion for an in-camera review, but denied appellant's motion to make any of the reviewed records available through discovery.

In June 2009, the state amended its complaint and added, among other counts, a count of first-degree criminal sexual conduct with a dangerous weapon. Based on the new charges, appellant renewed his motion to access C.L.'s records. He claimed that the new charges arose because C.L.'s recollection of events changed and that C.L.'s credibility was "even more crucial." The state again opposed the motion. The district court granted appellant's second motion for in-camera review of C.L.'s records in August 2009. But in an October 2009 order, the district court again denied appellant's motion to disclose any of the reviewed records.

A jury trial was held in January 2010, and appellant was found guilty on all counts. Appellant moved for a new trial, alleging that the prosecutor engaged in misconduct by asking appellant whether he had had sex with P.M. The district court denied the motion. Appellant was sentenced to 173 months with credit for 59 days served on his conviction of count three: first-degree criminal sexual conduct with a dangerous weapon. This appeal follows.

D E C I S I O N

I.

Appellant argues that there is insufficient evidence to support the jury's verdict. 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. *See 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

will assume that the jury believed the state's evidence 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).

A conviction may be upheld on the testimony of a single credible witness. *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998). It is the "exclusive role" of the fact-finder to determine witness credibility. *In re Welfare of A.A.M.*, 684 N.W.2d 925, 927 (Minn. App. 2004), *review denied* (Minn. Oct. 27, 2004). And in a criminal-sexual-conduct case, the victim's testimony need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2010). But we may reverse a criminal conviction if "the evidence to overcome the presumption of innocence is so completely dependent upon a single witness whose testimony, considered in the light of the record as a whole, is of dubious veracity." *State v. Kemp*, 272 Minn. 447, 450, 138 N.W.2d 610, 612 (1965); *see also State v. Huss*, 506 N.W.2d 290, 292–93 (Minn. 1993) (concluding that a three-year-old child's testimony was insufficient to support a conviction of criminal sexual conduct when a highly suggestive book was repeatedly used with the three-year-old complainant of sexual abuse and the child's testimony was contradictory).

A.

Appellant argues that C.L.'s testimony is generally insufficient to support the guilty verdicts because there was no physical evidence of assault, "C.L.'s conduct during and after the abuse . . . did not support the allegations," and because "C.L.'s testimony

was inconsistent, vague, and contradicted by other evidence." C.L. described the sexual assaults at trial. She stated that in the summer of 2007, appellant brought her and her mother to the Holiday Inn and gave her Bailey's Irish Cream. C.L. testified that her mom "passed out really quick" in one of the two beds in the hotel room. She testified that she went to sleep in the same bed as her mother, but that she woke up "in the other bed" and "[appellant] was on top of [her]." She testified that "[h]e had his penis in [her] vagina" and that the next morning he said, "Don't be ashamed."

C.L. also testified that after she and her mother moved in with appellant, he "would just come up to [her], tell [her] to go in his room." C.L. said that appellant would "rape" her and that he sometimes put his penis inside her mouth as well as her vagina. C.L. testified that appellant had a "9-millimeter, black, small handgun" and that "[h]e said that if [she] open[s] her mouth [he would] kill [her]." She also testified that one time appellant put the gun "against [her] skull."

On cross-examination, appellant's counsel questioned C.L. about a previous statement in which C.L. said that she really did not know what was happening when appellant assaulted her because she was always either asleep or passed out and that she had initially reported that she went to sleep in the other bed in the hotel room, not in the same bed as her mother. Appellant's counsel also noted that C.L. provided more details during her testimony, "details about the oral sex, the details about what [she was] wearing," than she had previously. C.L. responded that she was not asked about those details earlier. C.L. testified that appellant had an erection every time he assaulted her.

Appellant's arguments that (1) physical evidence is necessary to support the verdict or (2) C.L.'s "conduct" does not support the allegations are unavailing. The jury can convict based on a single credible witness; no additional evidence is needed. *See Miles*, 585 N.W.2d at 373. Appellant's assertion that C.L.'s testimony is not sufficiently credible to support the verdict is similarly unpersuasive. In support of his assertion that C.L. is not credible, appellant points to C.L.'s changing account of which bed she was in when she went to sleep at the Holiday Inn and to the fact that she did not immediately report that appellant had once put a gun to her head. But these inconsistencies are minor in light of her otherwise consistent account of multiple acts of sexual assault. *See State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) ("Minor inconsistencies and conflicts in evidence do not necessarily render testimony false or provide the basis for reversal."), *review denied* (Minn. Aug. 17, 2004). In addition, some of the inconsistencies that appellant focuses on may be attributable to the traumatic nature of being sexually assaulted on multiple occasions. *See State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) ("[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event."), *review denied* (Minn. Mar. 16, 1990); *see also State v. Blair*, 402 N.W.2d 154, 157-58 (Minn. App. 1987) (upholding criminal-sexual-conduct conviction despite inconsistency between child complainant's testimony and prior statement).

Appellant also asserts that C.L.'s testimony about the assaults was "contradicted by other evidence"—most notably the evidence that appellant suffers from erectile dysfunction. But the only evidence offered of appellant's sexual function was his own

testimony, which the jury was entitled to disregard. We therefore conclude that there is sufficient evidence to uphold the jury's conclusion that appellant is guilty of criminal sexual conduct.

B.

Appellant argues more specifically that there is insufficient evidence to support his conviction of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(d) (2006) (sexual assault with a dangerous weapon). The statute provides that a person is guilty of this crime if: "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit." Appellant argues that because he did not "display[], brandish[] or . . . refer to the gun during the alleged assaults" he cannot be convicted of violating this statute.

Appellant relies on the unpublished opinion of *State v. Boswell*, No. C7-00-1229, 2001 WL 436093 (Minn. App. May 1, 2001), to support his position. In *Boswell*, a woman was sexually assaulted in the appellant's car after having seen him holding a gun in his lap earlier in the evening. 2001 WL 436093, at *1. This court concluded that because Boswell "did not say that he had a gun, refer to the gun, or brandish the gun," the evidence was insufficient to support his conviction of first-degree criminal sexual conduct with a dangerous weapon. *Id.* at *3. Besides being unpublished and therefore not precedential, Minn. Stat. § 480A.08, subd. 3(c) (2010), we find this case to be distinguishable.

The statute requires that the actor use a weapon to cause the complainant to submit. Minn. Stat. § 609.342, subd. 1(d). C.L. testified that appellant had placed the gun against her skull and said, "Be quiet or I'll shoot you." Even if appellant was not holding the gun or brandishing it while he was sexually assaulting C.L., she testified that the gun was present and used by appellant to threaten her before he assaulted her. This case therefore falls within the statute. We conclude that there is sufficient evidence to support the jury's verdict that appellant is guilty of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(d).

II.

Appellant claims that he was denied a fair trial due to prosecutorial misconduct. The standard of review for a claim of prosecutorial misconduct depends on whether the defendant objected at trial. *State v. Yang*, 774 N.W.2d 539, 559 (Minn. 2009).

Objected-to errors

Appellant claims that the prosecutor's references to him as a predator during her opening statement constituted error. During the opening, the prosecutor stated: "This case is about a predator. It's about a human predator. [Appellant] selected [C.L.] when she was 14 years old. She was the perfect prey. . . . [Appellant] took [C.L.] and her mother to that hotel room. That was the first night that he raped her." Appellant objected and argued that "terms like predator and rape are inappropriate and prosecutorial misconduct." The district court cautioned the prosecutor to "[u]se the word that applies in this case . . . [a]nd as far as predator, that's a closing argument kind of thing, so I would caution you about making conclusions like that, okay?" The prosecutor then

resumed her opening by stating, "[l]adies and gentlemen, that was the first night he sexually assaulted her."

Objected-to errors or misconduct are reviewed 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." *Id.* (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).

Without determining whether calling appellant a predator during opening statement was a more- or a less-serious error, we conclude that the prosecutor's statements in her opening were harmless beyond a reasonable doubt. The district court cautioned the jury that the attorneys' statements were not evidence; the prosecutor's predator-prey analogy was brief; the district court instructed the jury to not allow "sympathy, prejudice, or emotion to influence [their] verdict"; and finally, the evidence to support the conviction was strong.

Unobjected-to errors

Appellant claims three unobjected-to errors: the prosecutor's question to appellant as to whether he had sex with P.M. (which appellant raised in his posttrial motion), the prosecutor's alleged misstatement of the presumption of innocence during closing arguments, and the prosecutor's statement during closing argument that the only question

for the jury to decide was whether C.L. was telling the truth. Unobjected-to errors are reviewed for plain error. *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005). To establish plain error based on a claim of prosecutorial misconduct, (1) the prosecutor's unobjected-to argument must be erroneous, (2) the error must be plain, and (3) the error must affect the appellant's substantial rights. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if it is "clear" or "obvious," meaning that it "contravenes case law, a rule, or a standard of conduct." *Id.*

Cross-examination

The prosecutor asked appellant if he had had sex with P.M. Appellant claims that it was prosecutorial misconduct to ask this question because there was no factual basis for it and it was prejudicial. In responding to appellant's posttrial motion, the district court concluded that it was error for the prosecutor to ask this question without an independent factual basis to believe that appellant and P.M. had a sexual relationship. We disagree.

Appellant's defense to C.L.'s allegations of sexual abuse was that he suffered from erectile dysfunction. His ability or inability to perform sexually was therefore relevant to the state's case. P.M. is a consenting adult with whom appellant lived. There was nothing prejudicial about the prosecutor's single question as to whether P.M. and he had a sexual relationship. Appellant answered the question and the prosecutor moved on. We do not find any prosecutorial misconduct.

Presumption of innocence

The prosecutor stated during her closing argument that "[t]he witnesses have testified and the evidence has come in, and [appellant's] presumption of innocence is gone." Appellant argues that this statement constitutes plain error requiring a new trial. "Typically, a plain error contravenes case law, a rule, or a standard of conduct." *State v. Vue*, 797 N.W.2d 5, 13 (Minn. 2011). Appellant contends that the prosecutor misstated the presumption of innocence. But in *Vue*, the supreme court considered similar comments and concluded it was not plain error. *Id.* at 13-14. In *Vue*, the prosecutor stated that "the Defendant is presumed innocent, just like any defendant in any criminal case, presumed innocent until—unless and until proven guilty beyond a reasonable doubt. The Defendant has now lost that presumption of innocence as a result of the evidence that you have heard in this case." *Id.* at 13. The supreme court stated that "[w]e need not, and do not, decide whether the prosecutor erred in her description of the State's burden of proof because any alleged error was not plain or obvious." *Id.* at 14. Based on the similarity between the prosecutors' statements in this case and in *Vue*, it follows that any error in the prosecutor's statements here was also not "clear and obvious."

Closing statement

Appellant argues that the prosecutor gave the jurors a "false choice" by arguing that they could only acquit appellant if they concluded that C.L. was lying. The prosecutor stated in closing that "[C.L.]'s testimony alone is enough to satisfy each and every element of the charges. . . . And if you accept what I say as accurate, then the only question that you need to answer before you convict him is do you believe this young

woman was telling the truth . . . ?" The prosecutor followed this statement with a detailed description of each element of the charges. The prosecutor correctly stated the jury's duty to assess the credibility of the witnesses and determine if the elements of the charged crimes had been met. We conclude that the prosecutor accurately stated the law and that there was no prosecutorial error.

Because the prosecutor's reference to appellant as a predator in her opening statement was harmless beyond a reasonable doubt and because there were no other "clear and obvious" errors, we conclude that appellant is not entitled to a new trial.

III.

Appellant claims that the district court abused its discretion by denying him access to C.L.'s records. When a criminal defendant seeks discovery of privileged material, the district court should screen the confidential material in camera to determine whether the defendant's constitutional right to confront his accusers trumps the privilege asserted. *State v. Evans*, 756 N.W.2d 854, 871 (Minn. 2008). Evidentiary rulings lie within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

The rules of criminal procedure allow for broad discovery. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (stating that the supreme court's decision in that case is "fully consistent with the broad discovery allowed by Minn. R. Crim. P. 9").

Nonetheless, "discovery rules are not meant to be used for fishing expeditions." *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. App. 1984) (quotation omitted).

After thoroughly reviewing the records at issue, the district court concluded that they did not contain discoverable information and denied appellant access to them. We have also reviewed the disputed records. Our independent review has led us to the conclusion that the district court acted well within its discretion by denying appellant access to C.L.'s records.

Affirmed.