STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1837

State of Minnesota,
Respondent,

vs.

Leonard Darrell Petty,
Appellant.

Filed December 5, 2011
Affirmed
Peterson, Judge

Mille Lacs County District Court
File No. 48-CR-09-2440

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

Janice S. 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 Stoneburner, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

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

PETERSON, Judge

In this appeal from convictions of 14 counts of criminal sexual conduct and a 30-year sentence, which is a double durational departure from the presumptive sentence,

appellant argues that (1) the district court erred in finding that defense counsel failed to show a sufficient basis for his claim that the victim's confidential files contained relevant and material information and by refusing to conduct an in camera review of those files; (2) if the court's *Paradee* ruling that the victim's Asperger's Syndrome/autism were not relevant to her credibility was correct, the court erred by allowing the state to present evidence to explain the victim's answers and bolster her credibility; (3) it was reversible error for a child-protection social worker to testify that she was "sure" that the victim was sexually abused by appellant based on her determinations of the victim's credibility; (4) the cumulative effect of a variety of erroneous evidentiary rulings deprived appellant of his constitutional right to due process and a fair trial; and (5) the court erred by imposing a durational departure. We affirm.

FACTS

Appellant Leonard Darrell Petty was charged with 13 counts of criminal sexual conduct, three of which were dismissed on the state's motion before trial. The victim was the 14-year-old daughter of appellant's live-in girlfriend. The charges were tried to a jury.

The victim and her father had a conversation about appropriate behavior, during which father told the victim that it is inappropriate to change clothes or be naked in front of another person. In response, the victim stated that she had seen appellant naked from the waist down, that appellant had walked in on her when she was bathing, and that she had asked him to leave several times. She also stated or implied that appellant had

sexually abused her. Father brought the victim to the Princeton Police Department, where father gave a recorded statement to an officer.

The next day, Margaret Carney interviewed the victim at Midwest Children's Resource Center (MCRC). The victim stated that the sexual abuse sometimes occurred in the bedroom appellant shared with her mother and sometimes in the basement. The first incident occurred in the basement on a summer afternoon on a weekend while the victim's mother was at work. The victim stated that appellant came downstairs and said something that made her scared or confused and then he "[p]retty much took my clothes off." When asked what happened next, the victim said "[s]ex" and stated that only her back was involved that time. Using an anatomically correct drawing of a girl, Carney asked the victim to point to the body part on the back that the victim was talking about. The victim pointed to a body part, which she referred to as a "butt," and stated that appellant put his penis in the crack part, which hurt her. The victim stated that appellant sometimes used lotions on his penis before putting it in her butt and that she had seen him use something black, which he kept in a dresser drawer, on his penis.

The victim stated that appellant also had put his penis between her breasts and that it felt "[w]eird" and "uncomfortable" but did not hurt her. The victim also stated that appellant "like[d] to hold onto my breasts and stuff and just move them around" and that it felt "[k]ind of weird and I guess kind of good." The victim stated that appellant licked her breasts with his tongue and that it felt "[k]ind of good I guess. I kind of like that." The victim stated that appellant asked her "to lick one spot on his penis," but she refused.

When asked about appellant's clothes, the victim said that he always removed his pants and sometimes removed all of his clothing.

Princeton Police Officer Todd Frederick executed a search warrant for the victim's home. Numerous lotions or lubricants were found in dresser drawers in the bedroom appellant shared with the victim's mother.

Mille Lacs County Child Protection Investigator Jessy Vittum investigated the allegations of abuse. With Vittum present, the victim and her mother participated in a written conversation, in which the mother wrote down questions, and the victim responded. The victim disclosed that she had had anal sex with appellant. The victim described having her head on the couch and kind of standing up during the incident. The victim stated that appellant had touched her boobs and butt with his penis on repeated occasions and that sometimes all of her clothes were off. Mother testified that, a few weeks before the abuse allegations arose, she found in her dresser drawer an empty black bottle that had contained lubricant, and she threw it away.

At trial, the victim testified that appellant touched her "[c]hest and butt" with his penis. Drawing a picture, the victim identified two circles as boobs and a square in between the circles as the chest. The victim testified that appellant touched her chest with his penis and that he also touched her boobs with his mouth and his hands. The victim testified that it "kinda felt good" when appellant touched her boobs with his hands but that it felt weird and hurt when he put his penis in her butt.

The victim identified a couch and a chair in the basement and the bedroom her mother shared with appellant as the locations where the abuse occurred. The victim

described having her knees on the couch and the front of her head on the edge of the couch when an incident of abuse occurred. Another time, she sat on a chair while appellant touched her chest with his penis. In the bedroom, appellant touched her butt with his penis and touched her chest. The victim recalled appellant using a towel to clean up something wet after the abuse occurred. The victim testified that appellant asked her to "suck one spot on his penis," but she did not do it. The victim testified that the abuse occurred when her mother was at work and that appellant told the victim not to tell her mother about it.

The victim's homeroom teacher testified that the victim was late for school two times in September 2009 and six times in October 2009. Normally, the victim arrived at school five or ten minutes early. The school-bus driver testified that, at the beginning of October 2009, the victim stopped riding the school bus. For the first week or so, appellant would come to the door and tell the bus driver that the victim was not home.

The jury found appellant guilty of 14 counts of criminal sexual conduct and not guilty on four counts.[1] The district court denied appellant's new-trial motion. Following a sentencing trial, the district court found that five aggravating factors existed and sentenced appellant to an executed term of 360 months in prison, a double upward durational departure from the presumptive sentence. This appeal followed.

[1] Although appellant was initially charged with 13 counts and three counts were dismissed on the state's motion before trial, the jury returned verdicts on 18 counts because eight counts were each divided into two counts to permit the jury to separately consider acts in the basement and acts in the master bedroom. These 16 counts and the two remaining counts that were not divided resulted in a total of 18 counts.

D E C I S I O N

I.

Appellant argues that the district court erred in declining to conduct an in camera review of the victim's confidential records.

Medical records are generally protected from disclosure by the physician-patient privilege. Minn. Stat. § 595.02, subd. 1(d), (g) (2010). But this privilege "sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984). District courts are encouraged to review medical records in camera to determine whether the privilege must give way. *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005). But a defendant requesting in camera review "must make at least some plausible showing that the information sought would be material and favorable to his defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted). The district court's decision to limit its review of confidential medical records is reviewed for an abuse of discretion. *State v. Evans*, 756 N.W.2d 854, 873 (Minn. 2008).

Appellant sought information from the victim's confidential school and medical records regarding her Asperger's Syndrome. In support of the request for in camera review, appellant stated:

> It is understood, and was reported by both the child's parents, that [the victim] has been diagnosed with Asperger's Syndrome, which is often considered a mild form of autism. At least according to [the victim's] father, she is a special needs child in school, and her issues sometimes make it difficult to "get information from her clearly." No other medical information has been disclosed from the state. So, in fact, it is unknown whether the child has any other

> developmental or emotional issues, nor how the diagnosed syndrome actually manifests itself in [the victim].

The request also stated that appellant's burden to make a "plausible showing" that the information was relevant was "met by the fact of [the victim's] disability." At a hearing addressing appellant's request for in camera review, defense counsel stated, "I don't remember everything that was mentioned [in support of the request], but there was some, at least some clear indication that the child had some disabilities, and we simply wanted to find out about the child."

The district court found that appellant failed to show "that the victim's medical condition calls into question her cognitive ability to relate accurately what she alleges happened to her." Appellant argues that because "*Paradee*[2] only required that the information be relevant and material to the defense," the district court applied the wrong standard in ruling "that any information in [the victim's confidential] records was irrelevant because there was no showing of any connection between Asperger's and credibility." But in *Evans*, the supreme court upheld the denial of in camera review when the defendant made no showing that the records "would have been material and favorable to [the defendant's] ability to cast doubt on [the victim's] credibility" and "offered only argument and conjecture" to support his request for in camera review. 756 N.W.2d at 872-73. As in *Evans*, appellant offered only argument and conjecture in support of his request for in camera review.

[2] *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987).

Appellant argues that "critical to defense and trial were [the victim's] ability to perceive, understand, and convey full and accurate events and all matters relating to those abilities were relevant" and that "[the victim] had a diagnosis of a significant developmental delay that might impact the questions at issue in the trial." But as the district court explained, appellant failed to "demonstrate a connection between the victim's condition and her ability to relate with the requisite degree of accuracy her allegations of sexual abuse" and failed to present any evidence "that a child with Asperger's Syndrome is inclined to fabrication or is incapable of accurately perceiving events." Nothing in the record indicates that the Asperger's diagnosis or any information in the confidential records was relevant to the victim's ability to perceive, understand, and relate events. Although the victim had Asperger's, the record does not support the contention that it resulted in "a significant developmental delay."

The district court did not abuse its discretion in denying appellant's request for in camera review.

II.

"Generally, a reviewing court defers to the district court's evidentiary rulings and will not overturn the rulings absent a clear abuse of discretion." *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006). The appellant bears the burden to show that the district court abused its discretion and that the error was prejudicial. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Appellant argues that, because the district court denied in camera review of the victim's confidential records, it erred in allowing the state to present evidence regarding

the victim's developmental disabilities to bolster her credibility. A police officer testified that the victim sat quietly and showed little emotion while her father related the allegations of abuse and that father explained to the officer that the victim has special needs and a mild form of autism. And Vittum testified that the victim's thought process is lower than that of a child her age; the victim has literal comprehension, meaning that, if you told her to go fly a kite, she would understand that she was supposed to go fly a kite; and Vittum sometimes had to modify the way she asked questions of the victim.

The officer's and Vittum's testimony was limited to behavior by the victim that occurred in their presence and was relevant in that it provided the jury a context within which to evaluate that behavior. It did not address whether the victim was inclined to fabricate or her ability to accurately perceive and relate events. The district court did not abuse its discretion in admitting the evidence.

III.

Appellant argues that the district court erred by allowing Vittum to testify that she was "sure" that the victim was sexually abused. "[T]he credibility of a witness is for the jury to decide." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn.1995). Accordingly, it is improper for a witness to "vouch for or against the credibility of another witness." *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Vouching includes expressing a personal opinion about a witness's credibility. *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998).

On direct examination, Vittum testified that, "through my investigation I have substantiated sexual abuse of the victim." On cross-examination, defense counsel asked

about the agency's standard for determining whether sexual abuse occurred, and Vittum responded that the agency applied a preponderance-of-the-evidence standard, meaning 51% or more likely than not. On redirect examination, Vittum testified that her personal standard for substantiating abuse was that she was "sure it happened." On recross examination, Vittum testified that her standard was the same as the agency's standard and explained that what she meant by sure was a preponderance of the evidence.

The erroneous admission of evidence does not warrant reversal if the error was harmless. *State v. Blasus*, 445 N.W.2d 535, 540 (Minn. 1989). When a district court has erred in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). If there is a reasonable possibility that the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *Id.*

Even if the district court erred in allowing Vittum's testimony that she was "sure" that sexual abuse occurred, the error was harmless. Appellant did not object to Vittum's testimony that she substantiated abuse, and it was defense counsel who asked about the agency's standard for substantiating abuse. Vittum testified that the agency standard was by a preponderance of the evidence, which she understood to mean 51%. On recross examination, Vittum explained that her standard of being "sure" was the same as the agency's preponderance-of-the-evidence or 51% standard. Considering Vittum's testimony in its entirety, there is no reasonable possibility that the verdict would have

been more favorable to appellant without Vittum's testimony on redirect about her personal standard.

IV.

Video recording of appellant's statement

"Generally, a reviewing court defers to the district court's evidentiary rulings and will not overturn the rulings absent a clear abuse of discretion." *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006). The appellant bears the burden to show that the district court abused its discretion and that the error was prejudicial. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Appellant sought to introduce the video recording of his statement to police to contradict Vittum's testimony that appellant had a flat affect and showed little emotion during the interview. Even if excluding the evidence was erroneous, a new trial will be granted only if the error was prejudicial. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). This court applies a harmless-error analysis to determine whether a defendant was prejudiced by the erroneous exclusion of evidence. *Id.* The erroneous exclusion of evidence is harmless only if we are satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict. *Id.* If there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, the erroneous exclusion of the evidence is prejudicial. *Id.*

The jury had the opportunity to evaluate appellant's demeanor and assess his credibility through his trial testimony, and appellant had the opportunity to counter

Vittum's testimony through cross-examination of her and through his own trial testimony. The evidence against appellant was very strong. In her statements to Carney and Vittum and at trial, the victim provided detailed, consistent descriptions of the sexual acts committed and requested by appellant, and she consistently described the locations in the house where the abuse occurred, how it felt, and when it happened. The victim's statement that appellant sometimes used lotions and that she had seen him use something black on his penis was corroborated by the lubricants found in the dresser drawer and by the mother's testimony that she had thrown away an empty black bottle that had contained lubricant that she found in her dresser drawer a few weeks before the abuse allegations arose. The victim's statement and testimony that the abuse occurred when her mother was at work was corroborated by the change in the victim's school routine. Finally, the mother was surprised by the victim's level of sexual knowledge and did not know its source. We conclude that even if the recording had been admitted, there is no reasonable possibility that the verdict might have been different.

School attendance records

Appellant argues that the victim's school attendance records were irrelevant and, therefore, the district court erred in admitting them. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Appellant argues that "[t]he only evidence of when the alleged acts took place was contained in the [victim's] statement at MCRC" when "she said that she was abused on a weekend, afternoon, during the summer." But in the MCRC statement, the

victim stated that the first incident took place on a weekend afternoon in the summer, and in both the statement and in her trial testimony, she reported that there were multiple incidents of abuse. The victim's homeroom teacher testified that the victim was uncharacteristically late two times in September 2009 and six times in October 2009, and the victim's bus driver testified that the victim stopped riding the school bus in October 2009 and that appellant would come out and wave the bus on or say that the victim was not at home. The attendance records were relevant to appellant's opportunity to commit sexual abuse because the victim reported that the abuse occurred when her mother was at work, and her mother worked in the morning. The district court did not abuse its discretion in admitting the attendance records.

Prosecutor's questions to police officer

The prosecutor asked Frederick whether, based on his experience, he got "a feel" from appellant as to whether appellant was providing accurate information. After the district court sustained an objection to the question, the prosecutor asked whether, based on Frederick's experience, he had encountered cooperative people who "do not necessarily provide you all the information that you're seeking." The district court sustained an objection to the question, and the prosecutor did not further pursue that line of questioning.

Relying on *Maurer v. Dep't of Corr.*, 32 F.3d 1286 (8th Cir. 1994), appellant argues that "the attempt to introduce vouching evidence constituted misconduct." In *Maurer*, the district court allowed four witnesses to testify that the victim was sincere in her allegations of criminal sexual conduct, and, during closing argument, the prosecutor

repeatedly emphasized the witnesses' opinions that the victim was sincere. *Id.* at 1290. Here, in contrast, the district court sustained appellant's objections to the two questions, and the prosecutor did not pursue the line of questioning. Because no vouching testimony was elicited and the prosecutor did not pursue the line of questioning, no misconduct occurred.

Parents' testimony

Before trial, the victim's mother declined to talk to defense counsel's investigator. After the defense witnesses testified, appellant sought to recall the mother and made an offer of proof that the mother would testify that the victim's father had made sexual comments about the victim and that the victim had repeatedly caught him masturbating. Mother also stated that father had taken "modeling" pictures of the victim, in which the victim was "supposed to look sexy" and that father had taken the victim to a "gay" movie. The district court excluded the evidence, finding that mother's proffered testimony was "very distant from the facts in this case."

> [A] defendant may seek to introduce evidence that a third person, not the defendant, committed the crime of which defendant is accused. . . . However, before the defendant can introduce such evidence he must lay a foundation consisting of additional evidence which has an inherent tendency to connect such other person with the actual commission of the crime. . . . In other words, in addition to evidence connecting a third party to the victim, the threshold also requires a foundation consisting of evidence connecting that third party to the crime of which the defendant is accused.

Woodruff v. State, 608 N.W.2d 881, 885 (Minn. 2000) (citations and quotations omitted).

Appellant offered the theory that father sexually abused the victim and had attempted to direct suspicion away from himself. The district court found that the offer of proof was insufficient to support that theory, noting that there was no evidence that father had sexually abused the victim or that the victim was subject to father manipulating her into falsely accusing appellant. The district court also noted that mother had never previously disclosed this information to police or social services. Absent any evidence supporting the theory that father sexually abused the victim, the district court did not abuse its discretion in excluding mother's proffered testimony.

V.

This court reviews a sentence to determine if it was an abuse of the sentencing judge's discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). An appellate court is authorized to review and modify a sentence that is "unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact." Minn. Stat. § 244.11, subd. 2(b) (2010).

The district court sentenced appellant on one conviction, first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2008), to an executed statutory-maximum term of 360 months in prison, a double upward durational departure from the presumptive sentence for an offender with appellant's criminal-history score of three. The district court sentenced appellant under Minn. Stat. § 609.1095, subd. 2 (2008), which states:

> Whenever a person is convicted of a violent crime that is a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment

> sentence, the judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence if the offender was at least 18 years old at the time the felony was committed, and: . . .
>
> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) the fact finder determines that the offender is a danger to public safety. The fact finder may base its determination that the offender is a danger to public safety on the following factors: . . .
>
> (ii) the fact that the present offense of conviction involved an aggravating factor that would justify a durational departure under the Sentencing Guidelines.

Appellant does not dispute that he was at least age 18 and that he had two prior convictions of violent crimes. An aggravating factor found by the district court was that the current conviction is for criminal sexual conduct and appellant has a prior conviction for a felony in which the victim was injured. Appellant does not dispute that this was a proper factor supporting the departure under Minn. Sent. Guidelines II.D.2.b.(3) (2008) but argues that the district court did not specifically cite this factor as a ground warranting departure at the sentencing hearing.

The district court stated at the sentencing hearing, "I gave reasons [supporting the upward departure] with my verdict and I also elaborated by reference in the motion for a new trial." The district court also specifically cited Minn. Stat. § 609.1095, subd. 2. In the special verdict, the district court found:

> The State has proven beyond a reasonable doubt that in addition to [appellant's] current multiple convictions for criminal-sexual conduct, [appellant] had previously been convicted of an offense in which [appellant's] victim was injured. Based upon an incident that occurred on December 7, 1998 in Ramsey County, [appellant] was convicted of

committing third-degree assault resulting in substantial bodily harm in violation of Minn. Stat. § 609.223, Subd. 1.

The district court's statements at the sentencing hearing and its findings in the special verdict are sufficient to show that it relied on Minn. Stat. § 609.1095, subd. 2, and the aggravating factor of the current conviction being for criminal sexual conduct and appellant has a prior conviction for a felony in which the victim was injured is sufficient to support the departure in this case. The district court did not abuse its discretion in sentencing appellant to 360 months in prison. Because the departure is authorized by Minn. Stat. § 609.1095, subd. 2, we need not address the other aggravating factors found by the district court. *See State v. Dillon*, 781 N.W.2d 588, 595 (Minn. App. 2010) (stating that "even when some reasons are improper or inadequate, we will affirm the sentence if we conclude that the district court would have departed based on other aggravating factors supported by its findings").

Affirmed.