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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-790**

State of Minnesota,
Respondent,

vs.

Bobby Jerome Roberts,
Appellant.

**Filed April 26, 2011
Affirmed
Shumaker, Judge**

Hennepin County District Court
File No. 27-CR-09-26302

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant
County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Following a jury trial, appellant was found guilty of third-degree criminal sexual
conduct and domestic assault by strangulation. He was charged after T.R. reported to

police that appellant had threatened her with a baseball bat, strangled her, and physically and sexually assaulted her in his apartment on the evening of May 22, 2009. Appellant claimed T.R. consented.

On appeal, appellant challenges a number of the district court's evidentiary rulings, which he claims prejudiced his ability to present a complete defense. Appellant further claims there was prosecutorial misconduct and that the cumulative effect of the errors prevented him from receiving a fair trial. Because the district court's evidentiary rulings did not prejudice appellant's ability to present a complete defense, the prosecutor's conduct did not result in prejudicial error, and appellant received a fair trial, we affirm.

FACTS

Appellant Bobby Jerome Roberts and T.R. had a volatile relationship, plagued by domestic violence committed by both Roberts and T.R., and the couple's crack-cocaine use. On the evening of May 22, 2009, Roberts and T.R. were drinking beer on the porch of the apartment building where they both lived in separate units. When Roberts asked to speak to T.R. inside, she agreed; but once inside, Roberts would not let her leave. Roberts threatened T.R. with a baseball bat, strangled her, and physically and sexually assaulted her. She returned to her own apartment a few hours later and told her children what happened. T.R.'s daughter called the police after T.R. refused to do so. Roberts claimed T.R. consented.

Before trial, the district court admitted as *Spreigl* evidence Roberts' August 2007 disorderly-conduct conviction and his conviction for violating an order for protection in

November 2007. T.R. was the victim in the 2007 offenses. The district court held that the two convictions were also admissible as prior-relationship evidence under Minn. Stat. § 634.20 (2010).

The district court allowed impeachment evidence against T.R. based on her convictions of felony aggravated robbery, providing a false name to police, check forgery, and theft by swindle. The court also admitted evidence of T.R.'s May 6, 2009 charge of domestic assault against Roberts, to show motive for fabrication or bias. But the court denied admission of evidence that T.R. was being evicted from her apartment, offered to demonstrate motive or bias.

A jury found Roberts guilty of third-degree criminal sexual conduct and domestic assault by strangulation. He was sentenced to 74 months imprisonment for the third-degree criminal sexual conduct conviction and 10 years conditional release. He received a stayed sentence of one year and one day for the domestic assault by strangulation conviction. This appeal followed.

D E C I S I O N

Roberts challenges the district court's evidentiary rulings regarding T.R.'s eviction, relationship evidence, and T.R.'s crack-cocaine use. He claims the district court's adverse rulings prejudiced his ability to present a complete defense. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

T.R.'s eviction

Roberts argues that he should have been allowed to present evidence of T.R.'s eviction from her apartment and to cross-examine her regarding the eviction to show motive for fabrication or bias. T.R. was being evicted from her apartment around the time of the charged offenses. Roberts was the building's caretaker and also lived there. He claims that the eviction showed T.R.'s motive to fabricate the assault because she believed Roberts was partly to blame for her eviction. However, the evidence showed that T.R. was evicted for nonpayment of rent. The district court offered to admit other evidence that showed T.R. believed Roberts was responsible for her eviction but Roberts did not offer any further evidence. As a result, the district court excluded the evidence that was offered, finding that T.R. was evicted for nonpayment of rent and that, other than Roberts' assertion, there was no support for his theory that T.R. blamed him for her eviction.

Roberts claims the district court failed to explain why the evidence was inadmissible and "its decision deserves no discretion." But at the evidentiary hearing and in its corresponding order, the district court stated it excluded the evidence because it was irrelevant and did not show that T.R. believed Roberts was responsible for her eviction. The correct standard of review is abuse of discretion. *See id.*; *see also State v. Parker*, 585 N.W.2d 398, 406 (Minn. 1998) (stating that the scope of cross-examination is left largely to the district court's discretion and will not be reversed absent a clear abuse of discretion).

Roberts relies on *State v. Pride* and *State v. Elijah* to support his claim that the evidence was admissible to show T.R.'s motive for fabrication or bias. *See State v. Pride*, 528 N.W.2d 862 (Minn. 1995); *see also State v. Elijah*, 206 Minn. 619, 289 N.W. 575 (1940). These cases are distinguishable. *Pride* and *Elijah* involve the motives and biases of witnesses corroborating the victims' stories. In *Elijah*, the supreme court held that, in a prosecution for sexual assault, the trial court's refusal to permit the state's witness to be cross-examined concerning alleged intimate and illicit relations between the witness and the victim of the crime is an abuse of discretion and constitutes reversible error. 206 Minn. at 626 289 N.W. at 579. The supreme court in *Pride* ruled that prohibiting a defendant charged with criminal sexual conduct from cross-examining the victim and a witness about their romantic relationship was error. 528 N.W.2d at 867.

Without the cross-examination testimony of the witnesses in *Pride* and *Elijah*, the defendants were unable to expose ulterior motives of the witnesses or significantly question their credibility in front of the jury. Consequently, the witnesses appeared to be neutral third parties and the jury would have had little reason to question their versions of events. *See id.* at 866 (stating that the cross-examination should have been permitted because the "jury might have received a significantly different impression of [their] credibility"). T.R. was the victim, not a corroborating witness, so the danger that existed in *Elijah* and *Pride*, of an uninformed jury merely assuming the credibility of a witness, was not as great. And we note that T.R. was impeached with prior convictions, including convictions for crimes of dishonesty. Therefore, Roberts' reliance on these cases is misplaced.

Further, “not everything tends to show bias, and courts may exclude evidence that is only marginally useful for this purpose.” *State v. Cram*, 718 N.W.2d 898, 904 (Minn. 2006). Because Roberts failed to present evidence, other than his own surmise, that T.R. believed Roberts was at fault for her eviction, the district court did not abuse its discretion when it excluded evidence of her eviction and prohibited cross-examination of T.R. about the same.

Roberts’ testimony regarding relationship evidence

Next, Roberts argues that he should have been permitted to testify about the circumstances surrounding his August 2007 charge of disorderly conduct, admitted as relationship evidence at trial. T.R. testified the incident arose from an argument with Roberts, who was trying to give her van to crack dealers. When Roberts testified that it was actually T.R. who attempted to pawn the van, the state objected, and the district court struck his testimony from the record.

“Evidentiary rulings concerning materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence are within the [district] court’s sound discretion and will only be reversed when that discretion has been clearly abused.” *Johnson v. Wash. Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994). The state correctly asserts that, contrary to Roberts’ claim, the district court allowed Roberts to testify extensively about the incident. While some of the state’s objections were sustained, Roberts testified at length to his version of the events of August 2007. The district court did not abuse its discretion in limiting some of Roberts’ testimony based on lack of relevance.

T.R.'s crack-cocaine use

Roberts also argues that he should have been allowed to testify about T.R.'s crack-cocaine use during the May 22 incident that led to the current charges. The district court sustained the state's objection when Roberts attempted to testify that he saw T.R. smoking crack immediately before the incident. He asserts that, because T.R.'s drug impairment was relevant to her ability to recollect that night, the district court erred by prohibiting his testimony.

Roberts cites *State v. Frank* and *State v. Hawkins* to support his contention that generally, a party may show through cross-examination and extrinsic evidence that the opposing party's witness was intoxicated at the time to which her testimony relates because "the evidence bears on the witness' capacity to observe and recollect the events in question." See *State v. Frank*, 364 N.W.2d 398, 400 (Minn. 1985) (citing *State v. Hawkins*, 260 N.W.2d 150, 158 (Minn. 1977)). Both cases provide authority for allowing Roberts to ask T.R. about her drug use during the incident on cross-examination, but he did not cross-examine T.R. on this point. On direct examination, T.R. admitted to drinking beer that night but denied using drugs. She testified the last time she smoked crack was two days before the assault.

The state argues that any error in excluding Roberts' testimony regarding T.R.'s crack-cocaine use was harmless. If the district court has erred in excluding defense evidence, the error is harmless only if this court is "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."

State v. Post, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted). But if there is a reasonable possibility that the verdict might have been different had the evidence been admitted, the error is prejudicial. *Id.*

In addition to T.R.'s admission that she was drinking alcohol the night of the incident, a forensic scientist testified that T.R. had used cocaine within a 72-hour period that included the time of the assault. This testimony ameliorated whatever impact the exclusion of Robert's testimony might have had because it provided definitive evidence of T.R.'s crack cocaine use near the time of the incident. This was the very point Roberts was attempting to establish.

Because Roberts claims he saw T.R. smoking crack in his bedroom that night, the court should have allowed Roberts to attempt to refute T.R.'s contention that she did not use drugs the night of the incident, but the error was harmless. Testimony from the forensic scientist showed that T.R.'s drug test revealed she had used cocaine within a 72-hour period encompassing the incident. Further, the jury was already aware of T.R.'s frequent crack-cocaine use. And, from T.R.'s own admission, the jury knew she had smoked crack two days before the incident and consumed alcohol that night. The district court's exclusion of Roberts' testimony was not prejudicial because there is not a reasonable probability the jury would have returned a different verdict had it been admitted.

Prosecutorial misconduct

Next, Roberts argues that the prosecutor committed misconduct by improperly introducing statistical testimony from a witness and by improper closing argument.

When the appellant objects to prosecutorial misconduct, a new trial will not be granted if the conduct was harmless beyond a reasonable doubt. *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006). Prosecutorial misconduct is harmless beyond a reasonable doubt if the verdict was surely not attributable to the error. *See id.* An appellant who fails to object to prosecutorial misconduct at trial will be granted a new trial if the misconduct was plain error and affected substantial rights. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

The state called as a witness the Sexual Assault Resource Service (SARS) nurse who examined T.R. after the assault. The prosecutor did not qualify the SARS nurse as an expert, but the nurse testified that she had been a nurse since 1980 and a SARS nurse since 2007 and had received specialized SARS nurse training in addition to standard nurse training. Since becoming a SARS nurse, she testified that she had examined about 135 patients who reported being sexually assaulted. On direct examination, the nurse stated she did not observe any genital injuries on T.R. The prosecutor asked her if that was surprising. She responded it was not and began to recite a statistic, presumably about the frequency of observable genital injuries in sexual-assault victims. The district court sustained the defense's objection and limited the SARS nurse's testimony to her own experience.

Roberts contends that the nurse's testimony that a lack of genital injuries is common in sexual-assault victims improperly suggested to the jury that T.R. must have been sexually assaulted because she did not have any genital injuries. This argument is unpersuasive. The state was clearly trying to explain that the absence of genital injuries

did not mean that T.R. was not sexually assaulted. But the prosecutor did not solicit statistical evidence from the nurse, who offered the statistic in response to a more general question. And the district court sustained the defense's objection before the nurse could finish. Further, the nurse did not imply that T.R. was sexually assaulted because she did not have genital injuries. Her testimony as a whole was relevant to the issue of whether or not T.R. was sexually assaulted, but that particular implication was not offered. Roberts' claim that the nurse's response constituted prosecutorial misconduct is without merit.

Roberts also argues that the prosecutor committed misconduct in closing argument by reciting the previously stricken statistic regarding sexual-assault victims with genital injuries. Claims of prosecutorial misconduct arising out of a prosecutor's closing argument require examination of the closing argument as a whole. *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000).

The district court sustained Roberts' objection to the statistic about genital injuries and directed the jury to disregard references to statistical percentages. The prosecutor went on to reiterate the SARS nurse's testimony that, in her experience, the absence of genital injuries in rape victims is not uncommon. The state concedes the prosecutor's statement was error, but contends it was not prejudicial. We agree.

When viewed in its entirety, the prosecutor's statement about statistics was harmless. The state's closing argument was lengthy, consisting of almost 50 transcript pages. The comment was brief and, as the state notes, Roberts' objection was sustained, which "significantly reduced the impact" of the remark on the jury's verdict. *See State v.*

Dobbins, 725 N.W.2d 492, 508 (Minn. 2006). The statement, even if improperly considered by the jury, was not so significant that it reasonably could have led the jury to its decision to convict Roberts. The misconduct was harmless beyond a reasonable doubt and is therefore not reversible error.

Roberts also argues that the prosecutor committed misconduct during closing argument by inviting the jury to punish Roberts for exercising his right to a jury trial. “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.” *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003).

In closing argument, the prosecutor told the jury: “[T.R.] came before you. She sat just 20 feet from [Roberts], facing him for the first time since he raped her. She had to relive the horrific ordeal that she was subjected to at the hands of this man.” Roberts argues this improperly blamed Roberts for exercising his right to a jury trial because it implied that his insistence on a trial burdened T.R. Roberts also claims the prosecutor’s statements that T.R.’s son and daughter were required to testify constituted misconduct. The prosecutor stated that “[T.R.] had nothing to gain[] [b]y bringing her son in to court to make him testify,” and “by making her daughter come into court to testify that her mother had been raped.” Finally, Roberts takes issue with the prosecutor’s statement that “[T.R.] had to go through that and then come into court and tell a room full of strangers all about it all over again.”

To support his argument, Roberts relies on *McNeil*. In *McNeil*, the prosecutor told the jury: “To come in here and put her through this, shamed her for never telling anyone,

[victimize her] all over again.” *Id.* The court held the statement was improper but decided that in light of the great weight of the evidence against McNeil, the prosecutorial misconduct did not deny him a fair trial. *Id.* at 236. Roberts asserts that because of the prosecutor’s multiple improper references, unlike the single statement in *McNeil*, the prosecutor’s remarks amount to reversible error.

The state denies that the statements were made to invite the jury to punish Roberts for exercising his right to a jury trial, but rather were made to address T.R.’s credibility. The state’s explanation for the statements is plausible. The statements counter Roberts’ theory of the case that T.R. was angry at him and accused him of sexual assault as revenge by showing T.R. had nothing to gain by reporting the incident. The remarks focused on the difficulty of testifying about such personal and intimate details and how it is unlikely T.R. would go through such an ordeal for vengeance, as Roberts alleges. Although it is possible the statements could be construed as an invitation to punish Roberts for exercising his right to a jury trial, the implication is much weaker than in *McNeil*, where the only significance of the statement was chastisement of the defendant for re-victimizing the complainant.

Even if the statements were arguably improper, they do not outweigh the compelling evidence of Roberts’ guilt and therefore did not unduly prejudice the jury against him or deprive him of his right to a fair trial. Moreover, Roberts did not object to these statements at trial. Where a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “The plain error standard requires that the

defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights.” *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). “If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* The prosecutor’s statements, even if arguably improper, were harmless beyond a reasonable doubt. Accordingly, the statements cannot meet the heightened standard of review of plain error, which is applicable here because Roberts failed to object to the statements at trial.

Cumulative effect of trial errors

Roberts argues that the cumulative effect of the trial errors compels reversal. He claims that the jury found T.R. unbelievable but convicted him because of the SARS nurse’s testimony. Roberts offers no basis for this claim, nor does he show what evidence the jury relied upon. He also argues that if the court would have allowed testimony regarding T.R.’s eviction and her crack use the night of the incident, the jury would have been able to fully discredit her. As discussed, the exclusion of the eviction evidence was not error, and the jury heard neutral scientific evidence of T.R.’s crack use. Further, T.R. was impeached with her prior convictions. And finally, either there was no prosecutorial misconduct or it was so insignificant that it was not unduly prejudicial. Any trial errors were harmless, and their cumulative effect did not deprive Roberts of a fair trial and are not grounds for reversal.

Roberts’ supplemental pro se brief

In his supplemental pro se brief, Roberts argues that the district court erred by charging him with multiple offenses arising out of the same incident; the prosecutor

committed misconduct by charging him with multiple offenses arising out of the same offense; and he received ineffective assistance of trial counsel. These arguments are without merit.

Roberts' first argument fails because the district court did not charge Roberts with any crimes, the prosecutor did. His second argument fails because the prosecutor is allowed to charge a defendant with multiple offenses arising out of the same behavioral incident. "When the defendant's conduct constitutes more than one offense, each such offense may be charged in the same indictment or complaint in a separate count." Minn. R. Crim. P. 17.03, subd. 1. Roberts' reliance on Minn. Stat. § 609.035, subd. 1 (2010), in support of his first two claims is misplaced. Minn. Stat. § 609.035, subd. 1, states that if a person's conduct constitutes more than one offense, the person may only be *punished* for one of the offenses. It does not limit the number of charges a prosecutor may bring when conduct constitutes more than one offense. Even if Roberts meant to argue that he was punished for more than one offense arising out of the same incident, his argument still fails because there is an exception for criminal sexual conduct offenses. *See* Minn. Stat. § 609.035, subd. 6 (2010) (stating that a conviction of first-, second-, third-, or fourth-degree sexual conduct "is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct").

Finally, we reject Roberts' claim of ineffective assistance of trial counsel. Roberts bases his claim on his trial attorney's use of objections, cross-examination, questions concerning a trial exhibit, and the attorney's failure to raise the issue of charges for multiple offenses arising out of the same incident. Roberts' ineffective-assistance-of-

counsel claim is based exclusively on counsel's trial strategy, which this court does not review. "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Affirmed.