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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1964

State of Minnesota,
Respondent,

vs.

Randall James Thole,
Appellant.

Filed December 2, 2013
Affirmed
Hudson, Judge

Dakota County District Court
File No. 19HA-CR-11-2676

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

James C. Backstrom, Dakota County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Melissa V. Sheridan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Hooten, Judge.

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

HUDSON, Judge

On appeal from his convictions of four counts of first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion in precluding the

admission of certain evidence, depriving him of the right to present a complete defense; and (2) the evidence was insufficient to support his convictions because his conduct did not meet the required statutory elements. In his pro se supplemental brief, appellant also argues that he received ineffective assistance of trial counsel. Because the district court's evidentiary ruling was not an abuse of discretion, the evidence was sufficient to support appellant's convictions, and appellant did not receive ineffective assistance of counsel, we affirm.

FACTS

A.D. is a female born on March 9, 1997. At age seven, A.D. went to live with L.S., her mother's sister. L.S. became A.D.'s legal guardian. Around 2002, appellant married A.D.'s grandmother. A.D.'s grandmother passed away in approximately 2009, but appellant still spent time with the family.

On August 6, 2011, L.S. took A.D. to E.D.'s house; E.D. is L.S.'s sister and A.D.'s aunt. L.S. testified that she took A.D. to E.D.'s house because she needed a babysitter for A.D. That evening, E.D. took her 13-year-old son J.G. and A.D. to appellant's house, where they were all going to spend the night. A.D.'s 8-year-old half-sister and appellant's 10-year-old son were also at appellant's house. Around 9:30 or 10:00 p.m., E.D. left appellant's house to go out with a friend. Appellant was the only adult left in the house with the kids. At the time, appellant was 50 years old and A.D. was 14 years old.

After E.D. left, A.D. and appellant went into appellant's bedroom because they were drinking alcohol and did not want A.D.'s sister to see them. Both of them had shots

of liquor from a bottle. At some point, the two decided to watch a movie. Appellant got a pornographic movie out of a dresser drawer in the bedroom. A.D. testified that there were people having sex in the movie. A.D. testified that she was lying on the bed and appellant touched her vaginal area with his hand. A.D. told him no, but he continued to rub the area with his hand over her clothing. Appellant lay down next to A.D., and she rolled away from him so they were both lying on their sides with appellant's front facing A.D.'s back. A.D. testified that appellant "started to get forceful," got on top of her and ripped off her pants. She testified that appellant removed her tampon and had oral and vaginal sex with her. A.D. testified that appellant was on top of her and at some point one of appellant's hands was on her chest and one was holding her legs. After appellant ejaculated, A.D. got up, went in the bathroom, and then to the living room and told J.G. that appellant had raped her. A.D. sent several text messages to E.D. telling her what happened and asking when she was coming home.

E.D. arrived shortly at appellant's house to pick up A.D. and J.G., who came out of the residence as soon as they saw her car. E.D. testified that appellant also came out to the car, and his demeanor "was odd." Appellant called E.D. seven times that evening after she left with A.D. and J.G. A.D. complained to E.D. that her vaginal area hurt, and E.D. got her an icepack. The following morning, L.S. picked up A.D. from E.D.'s house. L.S. testified that A.D. told her "[appellant] put in a porn movie . . . pushed her on the bed, took out her tampon, and forced himself inside of her." L.S. took A.D. to a hospital, but A.D. was angry and refused to talk to anyone. When L.S. and A.D. got home, L.S. called the police and A.D.'s mental-health social worker. After speaking with her social

worker and a police officer, A.D. agreed to go back to the hospital. A.D. was examined by a Sexual Assault Nurse Examiner (SANE). The SANE noticed that A.D.'s vaginal opening was tender, and also observed redness and abrasions. The nurse took swabs of A.D.'s mouth, perineal area, vagina, and her tampon. Sperm and semen were discovered on the vaginal, perineal, and tampon swabs. The DNA from the sperm cells on the vaginal swab matched that of appellant. A lab analyst testified that the DNA profile obtained from the vaginal swab "would not be expected to occur more than once among unrelated individuals in the real world population." The analyst also testified that appellant was among .00008 percent of the population that could not be excluded as a contributor to the sperm cells on the perineal swab or the tampon.

The jury found appellant guilty of four counts of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(b), (e)(i), (g), and (h)(i) (2010). Appellant was sentenced to 360 months' incarceration. This appeal follows.

D E C I S I O N

I

Previous Sexual Conduct Evidence

Before trial, the state moved in limine for "[a]n order precluding the admission of any evidence concerning the victim's prior sexual conduct or any opinions about her prior sexual conduct and her reputation as to prior sexual conduct." At a pre-trial hearing, defense counsel stated that he had "no objection to not going into specific instances of conduct." However, defense counsel wanted to introduce evidence that A.D. had a previous sexual relationship with an adult male who was convicted of criminal

sexual conduct and that, as a result of his disclosure of this relationship to A.D.'s family, the sexual relationship had ended. Defense counsel argued that this evidence provided the motive for A.D. to fabricate her claim that appellant raped her. The district court ruled that defense counsel could introduce evidence that appellant had broken up A.D.'s relationship with the man, but that no evidence regarding the sexual nature of the relationship or the criminal sexual conduct conviction could be presented. Appellant argues that this ruling violated his constitutional right to present a complete defense because the evidence showed that A.D. had a motive to fabricate the rape allegations against him.

Evidentiary rulings rest within the sound discretion of the district court and will not be overturned absent a clear abuse of discretion. *State v. Pendleton*, 706 N.W.2d 500, 510 (Minn. 2005). The appealing party has the burden to establish both an abuse of discretion and prejudice resulting from the error. *Id.* This court first determines whether an error occurred, and, if so, whether that error was harmless. *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). An error is harmless and does not require reversal 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, a [reasonable] jury would have reached the same verdict." *Id.* (quotation omitted).

Minn. Stat. § 609.347, subd. 3 (2010), commonly called the rape-shield statute, generally precludes the introduction of a sexual assault victim's previous sexual conduct. Such evidence is only admissible if its probative value is not substantially outweighed by

its inflammatory or prejudicial nature and "either the victim's consent is a defense or the prosecution introduces evidence of semen, pregnancy, or disease." *State v. Carroll*, 639 N.W.2d 623, 626–27 (Minn. App. 2002), *review denied* (Minn. May 15, 2002). Neither exception is applicable in this case. Accordingly, the evidence of A.D.'s prior sexual conduct is only admissible if constitutionally required. *Jackson v. State*, 447 N.W.2d 430, 435 (Minn. App. 1989). Criminal defendants have the constitutional right to present a complete defense and to confront the witnesses against them, which includes the right to "expose to the jury the facts from which [it] . . . could appropriately draw inferences relating to the reliability" of witnesses. *Delaware v. Van Ardsall*, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436 (1986) (quotation omitted); *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

In determining whether evidence is constitutionally required, the district court must balance the state's interest in guarding the victim's privacy with the accused's constitutional rights. *Jackson*, 447 N.W.2d at 435. The district court must also balance the probative value of the evidence against its potential for unfair prejudice. *Id*. For example, "[a]ny evidence tending to establish a predisposition to fabricate a charge of rape" is admissible, "unless its potential for unfair prejudice outweighs its probative value." *Olsen*, 824 N.W.2d at 340 (quotation omitted).

Here, the district court properly applied the balancing test and permitted appellant to present evidence that he had interfered with A.D.'s past relationships, but precluded evidence regarding the sexual nature of those relationships. In support of its decision, the district court stated: "[p]rior sexual conduct is clearly excluded, but . . . sometimes we

have to balance . . . the probative value versus whether or not there is prejudice," and allowed the question "so long as it is limited and does not talk about prior sexual conduct." The district court later clarified its ruling, stating that the sexual conduct and conviction evidence was not "material as to whether or not this specific act occurred," and its "prejudicial value outweighed the probative value." The district court acknowledged that its decision "was right on the fence and was an appropriate decision, which let [appellant] bring forth the defense and make some arguments later without violating the prejudicial value of the rape shield."

Appellant argues that, pursuant to *State v. Pride*, 528 N.W.2d 862 (Minn. 1995), a defendant must be able to provide evidence of a witness's motivation to fabricate charges. In *Pride*, the Minnesota Supreme Court held that it was error for the district court to exclude evidence that the complainant in a criminal-sexual-conduct case had a romantic relationship with the police officer who took the complaint, because testimony that the two were "merely friends" had the potential to mislead jurors and did not reveal potential ulterior motives of the complainant and officer. 528 N.W.2d at 866. Importantly, the defendant in *Pride* was prohibited from mentioning any existence of a romantic relationship and was not seeking to introduce evidence regarding the sexual nature of the relationship. *Id*. at 867 n.5.

Here, in contrast, appellant was permitted to present evidence about A.D.'s other romantic relationships and her anger toward appellant because he interfered in those relationships. At trial, E.D. testified that A.D. had a relationship with a male when she was 13 or 14 and the male was 23 and that A.D. spent the night with him on more than

one occasion. A.D. testified that she had lived with that individual. A.D. also testified that a second male had lived in her basement, that he was older than she was, and that they were "never officially dating." She further testified that appellant told her mother about the situation and that neither male was around anymore. L.S. testified that A.D. was angry with appellant for over one year because he had revealed A.D.'s relationship with one of the males to her family. In closing argument, appellant argued that this evidence gave A.D. the motive to lie about the rape allegations:

> [A.D.] had a couple of boyfriends. The boyfriends were much older than she was. [Appellant] didn't think that was appropriate. He mentioned that to family members of hers and they're no longer boyfriend/girlfriend. You heard one of the aunts testify that [A.D. has] been mad at . . . [appellant] for over a year because of this.

Thus, appellant was permitted to introduce enough evidence about his interference with A.D.'s past relationships for the jury to conclude that A.D. had a motive to fabricate the rape allegation, even though they were not told that A.D.'s relationships with the men were sexual or that either of the men had been convicted of criminal sexual conduct. The district court properly balanced the interests of A.D.'s privacy with appellant's constitutional rights and concluded that the probative value of the sexual-conduct and conviction evidence was outweighed by potential prejudice. This conclusion was not an abuse of discretion.

State's Witness

Appellant argues that because a witness for the state later opened the door, he should have been allowed to introduce evidence of A.D.'s sexual conduct and the

criminal-sexual-conduct convictions of her prior boyfriends. E.D. testified that A.D. did not want anyone to know what had happened with appellant because she was worried it was "going to hurt Matt's case and Matt was her boyfriend at the time." This was a reference to one of the men who was convicted of criminal sexual conduct following his relationship with A.D. The district court stated that E.D. had "kind of, with her testimony, opened the door to what happened to that individual," but reaffirmed its earlier ruling that no evidence regarding either man's sexual relationship with A.D. or their convictions could be admitted into evidence.

"Opening the door occurs when one party by introducing certain material . . . creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (quotation omitted). The doctrine is "essentially one of fairness and common sense, based on the proposition that one party should not have an unfair advantage . . . and that the factfinder should not be presented with a misleading or distorted representation of reality." *Id*. (quotation omitted). Thus, the issue is whether E.D.'s testimony gave the state an "unfair advantage" or whether it allowed the state to present "a misleading or distorted representation of reality." *Id*. No such unfair advantage or distorted reality exists in this case. E.D.'s comment was brief and did not refer to any details of the man's case, nor did it reveal that the case had anything to do with his relationship with A.D. or his sexual conduct with A.D. Thus, the district court did not err in concluding that this testimony did not open the door for appellant to present the sexual conduct and conviction evidence.

II

Appellant next challenges the sufficiency of the evidence supporting his conviction of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(b), arguing the evidence did not show beyond a reasonable doubt that he was in a "position of authority" over A.D.

When the sufficiency of evidence is challenged, this court reviews the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient" to support the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The verdict should not be disturbed "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004) (quotation omitted). Interpretation of a criminal statute is a question of law subject to de novo review. *State v. Rucker*, 752 N.W.2d 538, 545 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). "We construe the words and phrases in a statute in accordance with their plain and ordinary meaning." *Johnson v. State*, 820 N.W.2d 24, 26 (Minn. App. 2012). Any "reasonable doubt concerning legislative intent should be resolved in favor of the defendant." *State v. Colvin*, 645 N.W.2d 449, 452 (Minn. 2002).

A person may be convicted of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(b), if that person "engages in sexual penetration with

another person" and "the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant."

A "person of authority" includes, but is not limited to

> any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.

Minn. Stat. § 609.341, subd. 10 (2010).

The statute "does not contain an exclusive list of persons in a position of authority." *State v. Larson*, 520 N.W.2d 456, 461 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994). Our caselaw has identified a variety of relationships that qualify a defendant as a "person of authority." *See State v. Hall*, 406 N.W.2d 503 (Minn. 1987) (parent who hired complainant as baby-sitter); *State v. Bird*, 292 N.W.2d 3 (Minn. 1980) (uncle who occasionally watched complainant); *State v. Waukazo*, 269 N.W.2d 373 (Minn. 1978) (adult son of complainant's foster parents); *State v. Mogler*, 719 N.W.2d 201 (Minn. App. 2006) (police officer).

Appellant argues that he was not "charged with" any of a parent's responsibilities nor any duty or responsibility for the health, welfare, or supervision of A.D.; thus he does not meet the statutory definition of "person of authority." Because the phrase "charged with" is not defined by statute, we apply its plain and ordinary meaning. *Johnson*, 820 N.W.2d at 26. "Charge" is defined as "[t]o impose a duty, responsibility, or obligation

on." *The American Heritage Dictionary* 312 (5th ed. 2011). Here, appellant was the only adult left with A.D. and several other children. E.D. testified that she told appellant she was leaving the residence because she knew "the kids were going to be there," and that it was "pretty much" her intention that appellant watch them. A.D. testified that appellant was the only adult watching the kids, and she "guess[ed]" he was responsible for babysitting. Appellant had been involved in A.D.'s life for several years, and A.D. considered appellant to be her grandfather. Thus, the evidence was sufficient to support a conclusion that, at the time of the sexual assault, appellant was a person of authority because he had a "duty, responsibility, or obligation" to supervise A.D.

III

Appellant also challenges the sufficiency of the evidence supporting his other three convictions. Specifically, appellant argues there was insufficient evidence to prove that he had a "significant relationship" with A.D., a required element of his convictions pursuant to Minn. Stat. § 609.342, subd. 1(g), (h)(i), or to prove that he used force to accomplish penetration, an element of his convictions pursuant to Minn. Stat. § 609.342, subd. 1(e)(i), (h)(i).

Significant Relationship

> "Significant relationship" includes any situation in which the actor is:
>
> (1) the complainant's parent, stepparent, or guardian;
> (2) any of the following persons related to the complainant by blood, marriage, or adoption: brother, sister, stepbrother, stepsister, first cousin, aunt, uncle, nephew, niece, grandparent, great-grandparent, great-uncle, great-aunt; or

> (3) an adult who jointly resides intermittently or regularly in the same dwelling as the complainant and who is not the complainant's spouse.

Minn. Stat. § 609.341, subd. 15.

Appellant argues that he is not included in the category of individuals with a significant relationship with A.D. because the statute explicitly lists stepbrothers, stepsisters, and stepparents, but does not list stepgrandparents. However, the statute does include grandparents "related to the complainant by marriage." *Id.*, subd. 15(2). A grandparent by marriage is commonly known as a stepgrandparent; thus we conclude that appellant has a "significant relationship" with A.D.

Appellant also argues that even if stepgrandparents are included in the statutory definition, his "significant relationship" with A.D. ended upon the death of her grandmother. This argument is unpersuasive. Under appellant's theory, a stepgrandparent who was married to a complainant's biological grandparent for only one day could be prosecuted under this subdivision, but a stepgrandparent who was married to a complainant's biological grandparent for 30 years could avoid the "significant relationship" label by committing a sexual assault the day after the biological grandparent passed away. Courts may presume that "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. § 645.17(1) (2010). Accordingly, there was sufficient evidence to conclude that appellant, as a stepgrandparent, is properly included in the statutory definition of those persons having a "significant relationship" with A.D.

Use of Force

"Force" is defined by statute as

> the infliction, attempted infliction, or threatened infliction by the actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit.

Minn. Stat. § 609.341, subd. 3 (2010).

At issue is whether "bodily harm" was inflicted upon A.D. "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2010).

Here, a police officer trained in interviewing abuse victims testified that A.D. told her appellant performed oral sex on her and "it hurt," that appellant held her arms down during the assault, and that the sex was "very aggressive" and it hurt. Following the incident, A.D. told E.D. that she was in pain, and A.D. used ice on her vaginal area. The SANE testified that A.D. had abrasions around her vagina that could be consistent with forceful intercourse. The SANE also observed that A.D.'s vaginal area was tender to the touch. Thus, there was sufficient evidence to prove that appellant inflicted "bodily harm" upon A.D..

IV

Appellant argues in his pro se supplemental brief that he received ineffective assistance of trial counsel because: (1) his attorney failed to ask important questions to prove that appellant did not commit the crimes and (2) his attorney was extremely biased

against him. In order to prevail on his claim of ineffective assistance of counsel, appellant is required to show both that his counsel's representation "fell below an objective standard of reasonableness" and, second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Decisions about what evidence to present to the jury and whether to cross-examine witnesses are considered trial strategy and are generally not reviewable on a claim of ineffective assistance of counsel. *Andersen v. State*, 830 N.W.2d 1, 10–13 (Minn. 2013). Even so, appellant's first claim fails because his bare allegations do not establish that, if the questions had been asked, the result of the proceeding would have been different. *Gates*, 398 N.W.2d at 561. In addition, appellant provides no factual basis for his second claim that his attorney was biased against him, and we find none upon review of the record. Accordingly, appellant has not met his burden under either prong of the *Strickland* test.

Affirmed.