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STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2462

State of Minnesota,
Respondent,

vs.

John Eric Simon,
Appellant.

Filed May 6, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge

Cass County District Court
File No. CR-05-1566

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 445 Minnesota Street, 1800 Bremer Tower, St. Paul, MN 55101-2134; and

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Mary M. McMahon, McMahon & Associates Criminal Defense, Ltd., 2499 Rice Street, Suite 140, Roseville, MN 55113-3724 (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

MINGE, Judge

Appellant challenges two convictions of first-degree criminal sexual conduct and concurrent 144-month sentences imposed for those convictions, alleging that (1) the

prosecutor committed misconduct by eliciting vouching testimony from witnesses and improper prejudicial testimony from an expert witness; (2) the district court erred by admitting evidence of similar acts; and (3) his conviction for count one (first-degree criminal sexual conduct: single act, position of authority) is an included offense of count two (first-degree criminal sexual conduct: multiple acts, significant relationship). We affirm with respect to the evidentiary questions. However, because we conclude that, as charged, appellant's conviction for count one (single act) was included in count two (multiple acts), we reverse and vacate appellant's conviction for count one and remand for resentencing.

FACTS

On November 9, 2005, appellant John Eric Simon's thirteen-year-old daughter R.S. told her school counselor that Simon was sexually abusing her. R.S. later testified that her father first sexually molested her in the basement of their home when she was six years old, that the molestation continued until R.S. told her mother about this conduct when she was nine years old, and that the abuse then stopped for about three years. R.S. further testified that her father began sexually abusing her again in 2004, when she was twelve. R.S. recounted two specific incidents and testified that Simon had sexual intercourse with her twice per week or more until she reported the abuse. R.S. later agreed that Simon sexually abused her more than ten but less than 50 times from age twelve until she reported the conduct to her school counselor.

Simon was charged with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(b) (2004) (at least one act/position of

authority) and one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2004) (multiple acts/significant relationship) (referred to hereinafter as "count one" and "count two" respectively). At trial, the jury was instructed it had to find that count one (single act) took place in October or November 2005, and that count two (multiple acts) occurred between February 2004 and November 9, 2005. The jury found Simon guilty on both counts. The district court sentenced Simon to concurrent 144-month sentences for each conviction and conditional-release terms of five years on count one and ten years on count two.

D E C I S I O N

I.

The first issue is whether Simon is entitled to a new trial on the ground that the prosecutor engaged in misconduct by eliciting vouching testimony from state witnesses.

Vouching testimony occurs when one witness states that another witness is telling the truth or that one believes one witness over another. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) ("[O]ne witness cannot vouch for or against the credibility of another witness."). "The concern . . . is that the credibility of a witness is for the jury to decide, not a witness." *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). It is acceptable, however, to testify about the truthfulness of another witness if the other party "opens the door" to such evidence. *See State v. Maurer*, 491 N.W.2d 661, 662 n.1 (Minn. 1992).

The standard for reviewing prosecutorial misconduct depends on whether the defendant objected to the alleged misconduct. If the misconduct was not objected to at

trial, the objection is typically waived on appeal. *State v. Darris*, 648 N.W.2d 232, 241 (Minn. 2002). But this court may review unobjected-to conduct under a three-part, plain-error analysis. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). That analysis is: (1) whether error is present; (2) whether the error is plain; and (3) whether the error affected the defendant's substantial rights. *Id*. at 298. Error affects a defendant's substantial rights if there is a reasonable likelihood that the misconduct had a significant affect on the verdict of the jury. *Id*. at 302.

Simon alleges misconduct because the prosecutor repeatedly asked R.S. if she was being truthful and asked state witnesses leading questions about whether R.S. asked them to "make anything up." Although defense counsel repeatedly objected to the prosecutor's direct examination of state witnesses on the ground that the questions were leading, the record does not show a specific objection to what Simon characterizes on appeal as "vouching" testimony. *See* 11 Peter N. Thompson, *Minnesota Practice* § 103.05 (3rd ed. 2001) ("When making objections, counsel must clearly state the underlying basis for the objection or the issue is not preserved for review."); *see also Paine v. Crane*, 112 Minn. 439, 441, 128 N.W. 574, 575 (1910) ("The object of an objection to the admission of evidence is to enable the [district court] to rule intelligently thereon, and, if it is not sufficiently specific for such purpose . . . the correctness of the ruling cannot be reviewed in this court."). Accordingly, we conclude that Simon's claim of prosecutorial misconduct is reviewed under the plain-error standard.

Here, the state witnesses bolstered their *own* testimony by stating that R.S. did not ask them to "make anything up." None of the witnesses asserted that R.S. was telling the

truth or that they believed R.S.'s testimony over the testimony of other witnesses. Furthermore, Simon clearly opened the door to such testimony by attacking R.S.'s credibility at trial. Simon's entire theory of defense was that R.S. was making everything up because she did not like the rules she had to follow at home and because she wanted to live with her aunt instead of her parents. This theory was presented to the jury during Simon's opening argument and developed extensively through the testimony of R.S.'s family members throughout the trial. Accordingly, we conclude that Simon has not shown that impermissible vouching testimony was elicited by the prosecution.

II.

The second issue is whether the district court erred by admitting the testimony of pediatric nurse practitioner Karen Opp and subsequently denying Simon's motion for a mistrial on the ground that the testimony was irrelevant and unfairly prejudicial.

Evidence is generally admissible if relevant. Minn. R. Evid. 402. 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. Relevant evidence is inadmissible, however, if the probative value of the evidence is substantially outweighed by the potential for unfair prejudice. Minn. R. Evid. 403. "'[P]rejudice' does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985) (quotation omitted). Denial of a motion seeking a mistrial is reviewed for an abuse of

discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). "The [district] court is best situated to decide whether, for compelling reasons, 'the ends of substantial justice cannot be attained without discontinuing the trial.'" *State v. Long*, 562 N.W.2d 292, 296 (Minn. 1997) (quotation omitted).

During direct examination, nurse Opp testified that she conducted a pelvic examination on R.S. the day after R.S. reported the sexual abuse to her school counselor. Nurse Opp stated that her exam identified an abnormal pap as the result of a low-grade squamous intraepithelial lesion and that this indicates the presence of the human papillomavirus (HPV), a sexually-transmitted disease contracted through sexual intercourse. The prosecutor asked "[w]ould the lesion be consistent with someone having had intercourse?" Nurse Opp responded, "[t]hat's how you get it, sexual intercourse." The prosecutor followed with "you wouldn't know who they had intercourse with at all . . . ?" Nurse Opp stated "[n]ot by the test results. Just that they had sex."

Simon argues that nurse Opp's testimony was irrelevant because the state could not show that Simon passed HPV to his daughter. He also contends that the evidence was unfairly prejudicial because Simon did not have an opportunity to show other possible sources of the disease. Addressing Simon's first contention, it is clear that the evidence was relevant. Simon was charged with two counts of first-degree criminal sexual conduct, both of which required the state to prove the act of penetration beyond a reasonable doubt. Other than the testimony of R.S., the state had no direct evidence that she had engaged in sexual intercourse. Furthermore, Simon attacked the credibility of his daughter's testimony throughout the trial. Although nurse Opp's testimony that R.S.

tested positive for a virus contracted solely through sexual intercourse did not implicate Simon, the testimony corroborated R.S.'s testimony that she had had sex.

Furthermore, because the evidence was not offered to persuade through illegitimate means, it does not appear that its probative value was substantially outweighed by the risk of unfair prejudice. Following nurse Opp's testimony, the district court conducted a careful examination of Simon's motion for a mistrial outside the presence of the jury. Simon asked for a continuance or mistrial because he stated that he needed more time to develop a response to the testimony that R.S. tested positive for a virus that could only be contracted through sexual intercourse. Simon wanted to raise the possibility that R.S. could have contracted the virus through sexual activity with a different person.

The district court noted, however, that Minn. R. Evid. 412(1) prohibits evidence of a victim's past conduct unless specific incidents of conduct can be used to show the source of a disease. Nurse Opp testified that HPV cannot be tested in males. Thus, Simon had no way of showing another source for the disease, even if Simon could have located evidence that R.S. had been sexually active with a different person. The district court therefore found it highly unlikely that Simon could offer anything admissible to support his contention that the disease originated from another source. However, the district court allowed Simon to recall nurse Opp. On direct examination, Simon established that R.S. tested negative for HPV in subsequent exams.

Simon also claims that nurse Opp's testimony was a prejudicial surprise. The prosecution has a duty to prepare its witnesses to avoid inadmissible or prejudicial

statements. *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978). The *Carlson* court stated that a "prosecutor has some responsibility for preparing . . . witnesses in such a way that they will not blurt out anything that might be inadmissible and prejudicial." *Id.* The record indicates that Simon's defense counsel was aware of the HPV evidence prior to trial and requested the authority to cross-examine R.S. and medical professionals about other possible sources for the disease. The prosecutor also made it clear during his opening statement that the jury would hear evidence that R.S. had a lesion that was consistent with "some type of sexual penetration." Simon has not shown that the probative force of the evidence was substantially outweighed by the potential of the evidence to persuade by illegitimate means.

In sum, nurse Opp's testimony was relevant, the district court allowed Simon to counter the testimony by recalling her, and the probative value of her testimony was not substantially outweighed by the risk of unfair prejudice or offered to persuade by illegitimate means. Accordingly, we conclude that the admission of the evidence was not error and that the district court did not abuse its discretion by denying Simon's motion for a mistrial.

III.

The third issue is whether the district court erred by admitting the other-bad-acts testimony of Simon's niece, A.K., who recounted two prior instances of inappropriate sexual advances by Simon.

The admission of other-acts (*Spriegl*) evidence lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Spaeth*, 552 N.W.2d 187, 193 (Minn. 1996). Minn. R. Evid. 404(b) states that

> [e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation [or] plan . . . . In a criminal prosecution, such evidence shall not be admitted unless . . . the other crime, wrong, or act . . . [is] proven by clear and convincing evidence . . . .

Bad-acts evidence will only be admitted when (1) the state gives notice of its intent to admit the evidence; (2) the state indicates what the evidence will be offered to prove; (3) there is clear and convincing evidence that the defendant committed the prior acts; (4) the evidence is relevant and material to the state's case; and (5) the probative value of the evidence is not outweighed by the potential for prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006). To prevail on an evidentiary challenge, an appellant must show both error and the prejudice resulting from the error. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Simon contests only the fifth *Ness* factor. Simon argues that the prior-bad-act testimony offered by A.K. immediately followed by nurse Opp's testimony about the HPV detected in R.S.'s pelvic exam painted an unfairly prejudicial image of him as a sexual predator who transmits disease.

Before allowing A.K. to testify, the district court carefully reviewed the state's offer of proof outside the presence of the jury. The district court ultimately ruled that A.K.'s testimony was relevant and not unfairly prejudicial, stating that

> this is a situation where there is a family relationship with the alleged victim whereby the defendant was in a position of authority over the alleged victims. The initial incidents have a great deal of similarity that is relevant to the charges, and the general time frame was in proximity to the allegations alleged in the complaint.

The district court also issued a limiting instruction before A.K. testified and again when instructing the jury. A.K. then testified that when she was 13 or 14 years old, Simon told her she was beautiful, grabbed her around her rib cage, lifted up her shirt, exposed her in front of his bedroom mirror, and touched her breasts. A.K. also stated that when she was 17 years old, she found herself alone with Simon at her mother's house during deer hunting season. A.K. testified that Simon repeatedly asked her to take a shower with him. A.K. stated that she was scared, and she called a friend to talk to her on the phone until Simon went to bed.

Although we note that prior-bad-act evidence can be highly prejudicial, prejudice only refers to the unfair advantage that results from the capacity of evidence to persuade by illegitimate means. *Cermak*, 365 N.W.2d at 247 n.2. While the testimony presented by A.K. was certainly prejudicial to Simon, our supreme court allowed this type of evidence in a similar criminal-sexual-conduct case. In *State v. Wermerskirchen*, the defendant was charged with criminal sexual conduct in the second degree for touching his 9-year-old daughter. 497 N.W.2d 235, 236 (Minn. 1993). The *Wermerskirchen*

district court allowed the testimony of three *Spriegl* witnesses—the defendant's stepdaughter and two nieces—recounting similar instances of sexual molestation. *Id.* at 237-38. The supreme court upheld the admission of the testimony as showing a common scheme or plan in child-sexual-abuse cases, particularly because the evidence was "highly relevant in that it showed an ongoing pattern of opportunistic fondling of young girls within the family context, and, therefore, tended to disprove the defense that [the victim] was fabricating or imagining the occurrence of sexual contact." *Id.* at 242.

Here, as in *Wermerskirchen*, A.K.'s testimony was relevant in that it showed Simon had made a previous inappropriate sexual advance toward a young girl within his family, which tended to disprove Simon's defense that R.S. was fabricating the allegations of abuse. Accordingly, we conclude that the district court did not clearly abuse its discretion by allowing A.K.'s testimony.

IV.

The fourth issue is whether Simon was improperly convicted of both a greater and lesser-included offense in violation of Minn. Stat. § 609.04, subd. 1(4) (2004), because count one (single act) was included in Simon's conviction for count two (multiple acts).

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). A defendant may not be convicted of both the crime charged and a lesser-included offense, which includes "[a] crime necessarily proved if the crime charged were proved . . . ." Minn. Stat. § 609.04, subd. 1(4). A court examines the elements of an offense rather than the facts to determine whether an offense is a lesser-included offense falling under section 609.04.

State v. Bertsch, 707 N.W.2d 660, 664 (Minn. 2006). "An offense is 'necessarily included' in a greater offense if it is impossible to commit the greater offense without committing the lesser offense." *Id.* The protections of section 609.04 do not apply, however, if the offenses constitute separate criminal acts. *Id.* (citing *State v. Kemp*, 305 N.W.2d 322, 326 (Minn. 1981)).

To prove count one, the state needed to show a single act of sexual penetration with a person at least 13 years of age but less than 16 years of age by an actor at least 48 months older and in a position of authority over the complainant. Minn. Stat. § 609.342, subd. 1(b) (2004). Proving count two required a showing of "multiple acts committed over an extended period of time" by a person having a significant relationship with a complainant under 16 years old at the time of the sexual penetration. *Id.*, subd. 1(h)(iii). The record shows that R.S. turned 13 on February 11, 2005. The jury was instructed to find that the single act referenced in count one occurred "on or about October or November 2005, in Cass County" and the multiple acts referenced in count two occurred "during February 2004 through November 9, 2005."

Simon argues that because the jury instruction for count one uses dates that are included in the time frame for count two, count one (single act) necessarily contributed to proving count two (multiple acts) and, as a result, he was convicted of both a greater and lesser-included offense, in violation of section 609.04.

Comparing the elements that the state needed to show to convict Simon for counts one and two, it is apparent that all the elements necessary to convict Simon of a single act of penetration were met when the state proved the elements needed to convict Simon of

multiple acts occurring within the same time frame. The state did not identify a single, separate sexual offense that somehow warranted a separate conviction. Nor did the state charge the offenses or ask for instructions that laid a basis for separate convictions. Similarly, because the role of a parent constitutes both a "significant relationship" and a "position of authority," the differing statutory language is immaterial. *See Bertsch*, 707 N.W.2d at 666 (noting that the manner in which the state charges separate counts may determine whether Minn. Stat. § 609.04 applies where it becomes impossible to distinguish one count from another).

Because the overlapping dates used in the jury instructions do not enable us to conclude that the jury convicted Simon for multiple acts occurring before October 2005 and for a single act—separate from the multiple acts—occurring between October and November 9, 2005, we reverse and vacate Simon's conviction on count one and remand for resentencing. On remand, the district court may consider any conditional release or other sentencing adjustments that may be warranted as a result of vacating the conviction.

Affirmed in part, reversed in part, and remanded.

Dated: