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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1101**

State of Minnesota,
Respondent,

vs.

Daniel Howard Loye,
Appellant.

**Filed June 16, 2009
Affirmed
Ross, Judge**

Isanti County District Court
File No. 30-CR-07-1232

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Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

This case arises from Daniel Loye's physical and sexual attack on his former girlfriend. Loye challenges his convictions of first- and third-degree criminal sexual conduct, first-degree burglary, two counts of domestic assault, and fifth-degree controlled substance crime (possession). He contends that the district court improperly admitted expert testimony and excluded relevant evidence, that the prosecutor committed misconduct, that his trial counsel was constitutionally inadequate, and that the evidence is insufficient to support his convictions. Because we identify no trial error warranting reversal, we affirm.

FACTS

Loye's convictions stem from a September 2007 incident. After fighting with R.B., his on-again, off-again girlfriend of more than a decade, Loye entered her home and raped her. R.B. did not immediately report the attack to police, but after being encouraged by a neighbor, she told Isanti Police Officer Rodrick Barrows about it. Police arrested Loye the evening of R.B.'s report and discovered he was carrying a cylinder containing a white powdery residue. Chemical analysis revealed that the powder was methamphetamine.

Loye presented no witnesses at trial. He relied instead on a strategy of challenging R.B.'s credibility as the only witness to the assault. The jury believed R.B. and convicted Loye on all counts. Loye moved for a new trial, and the district court denied the motion. Loye now appeals.

DECISION

Loye challenges his convictions on several grounds. He contends that the district court committed two evidentiary errors, that the evidence was insufficient to support his convictions, that the prosecutor committed misconduct during the trial and during closing arguments, and that his trial counsel did not adequately defend him.

I

We first consider the evidentiary rulings. Loye argues that the district court should have admitted evidence offered by the defense, and that the district court should have excluded expert testimony regarding battered woman syndrome. We review a district court's evidentiary rulings for abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Loye can prevail on appeal only if he shows that the district court exceeded the bounds of its discretion in a manner that prejudiced him. *Id.*

Text Messages

Loye argues that the district court erroneously excluded evidence of the contents of text messages sent from R.B.'s cellular telephone after the assault, contending that the evidence was relevant and qualified as an exception to the hearsay rule. We conclude that the district court committed no error.

The district court allowed some evidence of the contents of the text messages. The messages revealed that shortly after the assault, R.B. claimed to love Loye. Loye's counsel sought first to introduce a purported handwritten transcript of the actual text messages. But no witness testified to the authenticity of the writing. The state therefore successfully objected to admission of the document itself, but Loye's trial counsel used

the document to refresh R.B.'s recollection about the contents of her text messages, without objection. R.B. then read the messages aloud to the jury. Loye's trial counsel then reoffered the exhibit, and the district court accepted it as a court exhibit only and did not allow it to go to the jury.

Loye argues that the district court "should have found that the handwriting or cell phone had adequate foundation," but even now he offers no authority to support the argument. No witness authenticated the handwritten document, and Loye offered no cellular phone or a phone-service transcript of the text messages. Authenticity is a precondition to the admissibility of evidence. Minn. R. Evid. 901(a). The district court has "considerable discretion" to decide whether evidence meets the authenticity requirements of the rules of evidence. *State v. Dulak*, 348 N.W.2d 342, 344 (Minn. 1984). Because Loye could not authenticate the document through any foundation evidence, the district court properly sustained the state's objection.

Loye argues, alternatively, that the district court misapplied the rules of evidence and should have *excluded* any evidence about the text messages. He argues oddly that his trial counsel did not lay a proper foundation to use the handwritten documents as he did, which was as a recorded recollection under rule 803(5) of the Minnesota Rules of Evidence: "The court erred by letting defense counsel cross-examine the alleged victim with the evidence without an accurate record that could be entered into evidence." He contends that because the jury had to "rely on their own memories of the testimony," rather than having the actual text-message transcript in hand, Loye was improperly prejudiced. Loye fails to explain how this prejudiced him, and the notion is facially

implausible. Jurors commonly rely on testimony about communications without a transcript of the communication.

The state did not object to the evidence being introduced as Loye presented it, and of course Loye's trial counsel did not object to his own trial practice. The district court's decision to accept the testimony but to exclude the handwritten document as lacking foundation was neither erroneous nor improperly prejudicial.

Expert Testimony

Loye's second evidence related challenge concerns expert testimony. He argues that the district court should have excluded the state's substitute expert on battered woman syndrome when the state's scheduled expert suffered a death in her family, and that the expert's testimony was irrelevant and unduly prejudicial. We review a district court's admission of expert testimony for an abuse of discretion. *State v. Grecinger*, 569 N.W.2d 189, 194 (Minn. 1997). We defer to the district court's determination of the relevance and foundation of expert testimony. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999).

Minnesota Rule of Criminal Procedure 9.01 requires the prosecution to disclose to the defendant the names and addresses of witnesses before trial. A district court may, in its discretion impose sanctions for failure to comply with criminal discovery requirements. Minn. R. Crim. P. 9.03(8); *State v. Lindsey*, 284 N.W.2d 368, 373 (Minn. 1979). The district court is particularly situated to evaluate how a discovery violation might prejudice a party, and how the prejudice may be avoided or alleviated. *Lindsey*, 284 N.W.2d at 373. To determine the appropriate response to a failure to comply, a

district court should consider the reason for the nondisclosure, prejudice to the objecting party, whether the prejudice can be remedied by a continuance, and any other relevant concern. *Id.*

On the day the state's expert was scheduled to appear at trial, the prosecutor informed Loye's counsel that the state planned to call a different witness than the one disclosed before trial. Loye's counsel objected to the substitution, arguing that he had not been able to review the witness's qualifications and that the defense would be prejudiced. The district court gave Loye's counsel an opportunity to read the substitute's curriculum vitae. Loye objected on the ground that the witness was not qualified to testify as an expert about battered woman syndrome. The district court overruled the objection, finding that the new witness had "extensive experience, 14 years in the field," and that "any deficiencies in training or . . . knowledge that are brought . . . on cross-examination would go to the weight and not to the admissibility of the testimony."

Although the district court did not expressly discuss the *Lindsey* factors, the district court acted within its discretion by allowing the substitute expert to testify. The state could not comply with the discovery requirements because its scheduled and disclosed expert lost a family member and was unable to testify. The district court considered the possible prejudice to Loye, directed the state to share the substitute expert's resumé with Loye, and briefly continued the proceedings while Loye reviewed the document. Loye could then make any objection to the expert's qualifications, which he did. The district court overruled the objection. The record reflects that the district

court addressed the relevant considerations and did not abuse its discretion by not imposing a sanction.

Loye contends that the expert's testimony was also irrelevant, overly prejudicial, and constituted improper character evidence. Whether evidence is relevant rests in a district court's discretion. *Ritt*, 599 N.W.2d at 810. Relevant evidence may be excluded by a district court when its prejudicial effect substantially outweighs its probative value. Minn. R. Evid. 403; *State v. Meyer*, 749 N.W.2d 844, 849 (Minn. App. 2008). Unfair prejudice results when evidence "persuades by illegitimate means and gives one party an unfair advantage." *Meyer*, 749 N.W.2d at 849. An expert's testimony must help the jury "to understand the evidence or to determine a fact in issue." *Ritt*, 599 N.W.2d at 811 (quoting Minn. R. Evid. 702). The state may elicit expert testimony on the subject of battered woman syndrome to explain a victim's counterintuitive behavior and exculpatory testimony. *Grecinger*, 569 N.W.2d at 195–96.

Loye asserts that "[t]he main purpose for the expert witness[']s testimony was to attack Mr. Loye and make Mr. Loye appear as an habitual abuser. The testimony . . . was the State's attempt to introduce otherwise inadmissible character evidence about Mr. Loye." He argues essentially that in the absence of direct evidence that Loye abused R.B. in the past, the expert testimony could only lead the jury to conclude improperly that Loye was a "bad person" and had, in fact, abused R.B. in the past.

The record directly contradicts Loye's premise. R.B. testified that this incident was not the first time Loye abused her and that she had previously complained to police about the abuse. The record clearly provides a basis for expert testimony on battered

woman syndrome, and the jury had ample basis to conclude that Loye abused R.B. independent of any inference that the expert testimony might have elicited.

Loye contends that the expert testimony on battered woman syndrome was improper without testimony establishing that R.B. was a battered woman or suffering from battered woman syndrome. But to avoid prejudicing defendants, *Grecinger* precludes expert testimony that a victim is a battered woman or is suffering from battered woman syndrome. 569 N.W.2d at 197. R.B.'s testimony concerning her history of abuse at Loye's hands was sufficient foundation for the expert testimony. The district court did not abuse its discretion by allowing it.

II

Loye asserts that the prosecutor committed misconduct "during the closing statement and during the course of the trial." He identifies no specific instance of misconduct during the trial, but he argues that the prosecutor improperly vouched for R.B.'s credibility three times in her closing argument. Loye concedes that his trial counsel did not object to the statements. Unobjected-to statements by the prosecutor in closing arguments are reviewed under a plain-error test. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006).

Because the prosecutor did not vouch for R.B.'s credibility, the statements Loye identifies were not error. A prosecutor may not personally vouch for the credibility of a witness. *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). Loye points to three statements in the prosecutors closing argument as improperly vouching for a witness's credibility. The prosecutor said, "The defendant wants you to think [R.B. is] lying";

“[R.B.]’s words alone [are] enough for you to convict the defendant, if you believe her”; and “Never once did [R.B.] waver in her assertions the defendant assaulted and raped her.”

None of these statements express the prosecutor’s personal opinion about R.B.’s credibility. They merely argue on behalf of R.B.’s credibility. The first statement simply previewed for the jury what they would hear in Loye’s closing argument. The prosecutor’s second statement was an accurate statement of the law, *See State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990) (the testimony of a single witness is sufficient to convict), and expressly acknowledges that the jury must decide whether to believe R.B. And the third statement was an accurate characterization of the record and expresses no personal opinion.

None of the statements express the prosecutor’s evaluation of R.B.’s credibility, and they do not constitute prosecutorial misconduct. The district court therefore did not err by allowing the argument.

III

Loye asserts that his trial counsel was constitutionally inadequate. We review ineffective-assistance-of-counsel claims using a two-part test. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Loye must prove that his trial counsel’s performance was objectively unreasonable and that if his trial counsel performed reasonably, the trial outcome would have been different. *Id.* Matters of trial strategy, such as “[w]hich witnesses to call at trial and what information to present to the jury” properly rest within the discretion of the trial counsel. *Id.* An attorney’s performance is presumed

reasonable. *Id.* Loye argues that his trial counsel's assistance fell below the standard of reasonableness because he failed to call any witnesses, failed to assert a defense, and failed to properly introduce exculpatory evidence. On our record, none of these claims support the accusation that his counsel provided objectively unreasonable representation that prejudiced Loye.

Loye contends that his trial counsel should have called witnesses to provide an alibi, and should also have used the defense of consent to challenge the charges of criminal sexual conduct. Because the decision whether to call witnesses and what defense to assert amount to discretionary strategic decisions, *Voorhees v. State*, 627 N.W.2d 642, 651 (Minn. 2001); *Jones*, 392 N.W.2d at 236, Loye's argument fails. Even a decision to call no witnesses at all can constitute objectively reasonable trial strategy. *Jones*, 392 N.W.2d at 236.

Loye's counsel argued with some force that R.B.'s testimony was not credible, and he introduced evidence that implied that R.B. had consented to having sex with Loye. This strategy does not seem unreasonable, and we do not review it. Arguing both that R.B. consented and that Loye was not actually present would tend to confuse a jury to a defendant's disadvantage. That Loye now argues that his trial counsel should have asserted two seemingly contradictory defense theories reinforces our decision to defer to trial counsel's strategic decisions. Most unsuccessful defenses can be criticized easily with the benefit of hindsight. Loye's defense was capably handled by trial counsel, who stuck to one reasonable theory.

Loye also contends that his trial counsel unreasonably failed to introduce the best evidence of the text messages. The record establishes that Loye's trial counsel performed competently. When the court ruled the handwritten documents lacked the necessary foundation, counsel first attempted to authenticate them, and, failing that effort, he managed to introduce the substance of the messages by having the witness read them into the record. The oral recitation achieved the strategic aim, which was not to prove the contents of the messages but to call into doubt R.B.'s accusation by illustrating her state of mind after the assault. The jury undoubtedly understood the force of the evidence.

We are not persuaded that the evidence would have been more compelling had Loye's counsel offered a cell phone containing the text messages or phone company records, rather than reading of the handwritten documents. And even if we were, we would nevertheless conclude that Loye's trial counsel's performance with regard to the text message evidence was objectively reasonable. The jury found R.B. credible and convicted Loye, and Loye gives us no convincing reason to believe this result had anything to do with the manner in which the jury learned about the text messages.

IV

Loye asserts that new evidence presented to the district court should have resulted in a new trial. The district court may grant a new trial if the interests of justice require it. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008). We review the decision for an abuse of discretion. *Id.* Loye contends that since the conviction, R.B. admitted to fabricating the assault. Loye presented this information to the district court in his second motion for a new trial on November 12, 2008, eight days after the state filed its response brief in this

appeal and more than ten months after the time allowed for new trial motions following a guilty verdict.¹ Minn. R. Crim. P. 26.04, subd. 1(3). Loye did not seek a stay of this appeal pending consideration of his motion. The district court ruled on the motion on December 11, 2008, and Loye filed a separate appeal from that order on February 9, 2009. The issue of the new evidence brought in Loye's motion for a new trial is not properly before this court because it was not made part of the record on this appeal. *See* Minn. R. Crim. P. 28.02, subd. 4(4) (providing that a defendant may seek a stay of a direct appeal pending consideration of postconviction proceedings).

V

Loye also maintains that the evidence was insufficient to sustain his convictions. We review the record and determine whether, when viewed in the light most favorable to conviction, the evidence and any legitimate inferences are sufficient for a reasonable jury to convict. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). Loye's arguments have little merit.

First- and Third-Degree Criminal Sexual Conduct

Third-degree criminal sexual conduct occurs when a person uses “force or coercion to accomplish penetration.” Minn. Stat. § 609.344, subd. 1(c) (Supp. 2007). First-degree criminal sexual conduct occurs when a person causes personal injury while committing third-degree criminal sexual conduct. Minn. Stat. § 609.342, subd. 1(e)(i)

¹ Loye's second motion for a new trial purported to invoke Minn. R. Civ. P. 60.02 as authorization to move to vacate the judgment or for a new trial on the basis of newly discovered evidence, rather than the postconviction relief statute. Minn. Stat. § 590.01 (2006).

(2006). Loye argues that because no physical evidence supports the conclusion that Loye used force or coercion, he should not have been convicted of these charges. The jury saw photographs of R.B.'s bruises. Even if there were no photographs, "[i]t is well established that a conviction can rest upon the testimony of a single credible witness." *Bliss*, 457 N.W.2d at 390. R.B. testified to the sexual attack and the jury found her testimony credible. There is sufficient evidence to support the jury's verdict on these counts.

First-Degree Burglary

Entering or remaining in a building without consent with the intent to commit a crime, such as assaulting a person in the building, constitutes first-degree burglary. Minn. Stat. §§ 609.581, subd. 4 (2006), 609.582, subd. 1(c). Loye argues that there is not sufficient evidence that he entered the building without consent, but R.B. testified that after she told him to leave he remained and assaulted her. This testimony constitutes sufficient evidence to support the jury's guilty verdict for burglary.

Domestic Assault

Loye argues that his convictions for domestic assault were based on insufficient evidence because it was not established that R.B. was a "family or household member" as required by the statute. Minn. Stat. §§ 518B.01, subd. 2 (2006), 609.2247, subd. 1(b). Specifically, Loye argues that "there was no significant romantic or sexual relationship because Mr. Loye and the alleged victim were in the process of ending the relationship." R.B. testified that she had been in a romantic relationship with Loye for over 10 years. Loye's description alone belies his argument; that the relationship was "in *the process* of

ending” establishes that the relationship had not yet ended. There is sufficient evidence in the record to support the jury’s verdict on this count.

Fifth-Degree Controlled Substance Crime (Possession)

Loye argues that a trace amount of methamphetamine is insufficient to support a conviction for possession of a controlled substance under Minnesota Statutes section 152.025, subd. 2(1) (2006). This contention contradicts established caselaw. *See, e.g., State v. Traxler*, 583 N.W.2d 556, 562 (Minn. 1998) (stating that the state need not prove any specific quantity of drugs and holding that a trace amount of methamphetamine is sufficient to support a fifth-degree controlled substance conviction). Evidence that police found trace amounts of methamphetamine on Loye at his arrest was sufficient to prove possession and support the jury’s verdict on this count.

Because sufficient evidence supports his convictions, and because no error at trial warrants reversal, we affirm.

Affirmed.