STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1637

State of Minnesota,
Respondent,

vs.

Ryan Scott Reischauer,
Appellant.

Filed September 7, 2010
Affirmed
Peterson, Judge

Dakota County District Court
File No. 19-K2-07-4040

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

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Cheri A. Townsend, Assistant County Attorneys, Hastings, Minnesota (for respondent)

Deborah K. Ellis, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Lansing, 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 two counts of first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion in excluding a

portion of the victim's 2006 videotaped interview, which undermined her credibility; (2) the prosecutor improperly took advantage of the district court's ruling; and (3) the district court's decision to preclude defense counsel from using a paper towel during closing argument to demonstrate his point regarding transference of DNA was an abuse of discretion. We affirm.

FACTS

Appellant Ryan Scott Reischauer was charged by complaint with one count each of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006) (sexual penetration with victim under age 13); and first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2006) (multiple acts of sexual penetration committed over extended time period when defendant had significant relationship to victim and victim was under age 16). The charges were tried to a jury.

Appellant met the victim's mother, S.R., in 2003, and they married in 2004. When appellant and S.R. met, S.R. and her daughter, L.R., were living in Florida with S.R.'s mother and brother. After appellant and S.R. were married, appellant adopted L.R. In December 2004, while appellant, a naval officer, was deployed for training, S.R. and L.R. moved to Minnesota.

A.T., L.R.'s first-grade teacher, testified that during the 2007-08 school year, on days when L.R. did not take medication, she behaved in a disruptive manner and engaged in inappropriate behavior, including peeking under stalls in the boys' bathroom, shaking her rear in other students' faces, tickling and touching other students, and making

"comments like it's take your shirt off time." A.T. testified that L.R.'s behavior began improving in about March and continued to improve during the rest of the school year.

As L.R. was getting ready for school on December 14, 2007, she told S.R. that "daddy kissed my privates." S.R. described L.R. as very sad, very weepy, and scared when she said this. S.R. remained calm and told L.R. that she still needed to go to school. After bringing L.R. to school, S.R. called her mother, who advised S.R. that she needed to determine whether the allegation was true. S.R. was uncertain whether to believe L.R. because L.R. was known to make up "wild stories." S.R. contacted L.R.'s school and was referred to school social worker P.R.

L.R. told P.R. that "my daddy kissed me in my privates last night." P.R. questioned L.R. only briefly before contacting child-protection services.

Child-protection worker Jennifer Dockter interviewed L.R. later that day. When L.R. was talking about touches that she likes, she pointed to her crotch and told Dockter that appellant touched her there. She said that she had touched appellant's privates the previous night and described them as "squishy" and looking like a "big thumb." L.R. said that she sat on appellant's head, and he put his tongue in her privates, "[r]ight where I go pee pee," and moved his tongue around. L.R. also said that she put appellant's private in her mouth and that it tasted "icky." Later in the interview, L.R. stated bizarre facts, including that the "ickiest," "really unacceptable" thing that happened was that appellant went naked down a hall that was a trap, and then he drove his car. L.R. also talked about boiling water in the toilet and/or bathtub and appellant sticking his feet in L.R.'s mouth and L.R. biting appellant's feet and him falling over.

After the interview, registered nurse Sara Wirkkala performed a physical examination of L.R. A videotaped deposition of Wirkkala was admitted into evidence at trial. When Wirkkala asked L.R. where appellant's private part had gone, L.R. pointed to her anal opening. Wirkkala found no physical signs of sexual abuse. But she testified that a slight tear from anal penetration could heal within 24 hours. When Wirkkala asked L.R. where appellant's lips had gone, L.R. pointed to the labia majora or lips of the vaginal area, the clitoris, and the anal opening.

L.R. testified at trial that appellant took his clothes off and made her take her clothes off and then touched her private part with his tongue. L.R. testified that she touched appellant's private part with her mouth and her fingers. L.R. testified that the sexual abuse occurred repeatedly, sometimes happening in her bedroom, which later became her parents' bedroom, and sometimes in the living room. L.R. testified that appellant told her "to keep it a secret" and that she tried but "couldn't hold it in anymore one morning and I—I screamed it all out."

Clothing belonging to L.R. and appellant was sent to the Bureau of Criminal Apprehension (BCA) for chemical testing. Sperm was found on two pairs of L.R.'s underwear. Sperm was also present on swabs taken from L.R.'s rectal and perineal areas. DNA profiling was performed on the perineal swabs and one pair of L.R.'s underwear. The sperm on the underwear matched appellant's DNA. The amount of DNA on the perineal swabs was insufficient to obtain a DNA profile match.

At trial, over the prosecutor's objection, appellant sought to introduce a videotape of a 2006 interview of L.R., in which she talked about sexual contact by an uncle and

appellant. The district court ruled that the videotape was admissible to show an alternative source of sexual knowledge. But the district court ruled that references to fantasy would be redacted because the interview had occurred one and one-half years before the allegations against appellant and more than two years before trial and because the interview was not being admitted for the purpose of determining L.R.'s credibility.

The jury found appellant guilty as charged. The district court sentenced appellant to a stayed term of 144 months. This appeal followed.

D E C I S I O N

I.

"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) (citation omitted). "Even when a defendant alleges that his constitutional rights were violated, evidentiary questions are reviewed for abuse of discretion. Whether an evidentiary ruling violates a criminal defendant's rights under the Constitution is a question of law this court reviews de novo." *State v. Peterson*, 764 N.W.2d 816, 821 (Minn. 2009) (citation omitted).

Appellant argues that the exclusion of the part of the videotape relating to fantasy violated his right to present a complete defense and to confront and cross-examine the witnesses against him. A criminal defendant has a constitutional right to present a complete defense, but this right is limited by the rules of evidence. *See Crane v.*

Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 2146 (1986) (acknowledging reluctance to impose constitutional limits "on ordinary evidentiary rulings" and noting power of states to exclude evidence through application of evidentiary rules). A defendant has a right to confront adverse witnesses to show a disposition to lie. *State v. Crims*, 540 N.W.2d 860, 865 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). Evidence is relevant if it tends to make the existence of a fact that is of consequence more probable or less probable than it would be without that evidence. Minn. R. Evid. 401. But relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. Minn. R. Evid. 403.

The redacted part of the interview relating to fantasy stated:

> Interviewer: Did this part of him, his private, ever touch your private?
> L.R.: Yeah. First he put his private behind my butt. And then, after that we touch each other's eyes with blood in our hands. Because you know what? One time I got banished and I went to the Pirate Caribbean, then they cut my hand right on the finger, right there.
> Interviewer: Okay.
> L.R.: And then I, then I put blood all over my human body and my daddy's body because he was there with me.
> Interviewer: Is this—okay. Is this something you're thinking of, like a story, or is this something that really happened?
> L.R.: It really happened, when I was a kid, when I was a baby kid.

Defense counsel sought to introduce the videotape of the 2006 interview to show an alternative source of sexual knowledge, and the district court ruled that it was admissible for that purpose. But the district court ruled that the part of the videotape relating to fantasy was inadmissible as to L.R.'s credibility. The district court

specifically adopted the prosecutor's argument that because one and one-half to two years is a long time for a child L.R.'s age, the videotape was not relevant to the jury's determination of L.R.'s credibility at trial in 2009. The district court had a balancing decision to make and did not abuse its discretion in finding that the risk of unfair prejudice substantially outweighed the probative value due to the passage of time.[1]

Appellant argues that without the redacted part of the interview, "[t]he jury was not fully apprised of the scope and breadth of L.R.'s imagination." We disagree. Not only was any probative value limited due to the passage of time, but also L.R. testified at trial and was available for cross-examination, and considerable evidence relating to L.R.'s credibility near the time of the allegations against appellant was admitted. S.R. testified that L.R. was known to make up "wild stories." During cross-examination of a therapist who had treated L.R. in 2008, defense counsel questioned the therapist about a report noting that L.R. was "exaggerating some of the details as well as using her imagination excessively." The entire 2007 interview was played to the jury. During that interview, L.R. stated bizarre facts, including that the "ickiest," "really unacceptable" thing that happened was that appellant went naked down a hall that was a trap, and then he drove his car. L.R. also talked about boiling water in the toilet and/or bathtub and appellant sticking his feet in L.R.'s mouth and L.R. biting appellant's feet and him falling over.

[1] The prosecutor properly represented that L.R. made references to fantasy during the 2006 interview, and it was not necessary for the district court to review the videotape to determine the relevancy of such references to L.R.'s credibility.

Even if the exclusion of 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.* But if there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the erroneous exclusion of the evidence is prejudicial. *Id.* This test applies when evidence is excluded in violation of a defendant's constitutional right to present a defense. *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004).

As already stated, the jury had the opportunity to assess L.R.'s credibility through her trial testimony and the evidence relating to her credibility. The jury also had the opportunity to evaluate appellant's credibility through his trial testimony. Finally, the presence of sperm matching appellant's DNA on L.R.'s underwear and the presence of sperm on L.R.'s rectal and perineal areas provided very strong physical evidence of appellant's guilt. We conclude that even if the part of the 2006 interview relating to fantasy had been admitted, there is no reasonable possibility that the verdict might have been different.

Appellant also argues that the prosecutor took unfair advantage of the district court's ruling by referring to the redacted part of the interview during his opening statement and then arguing during closing argument that "importantly, every time [L.R.]

was asked or confronted about [something seemingly incredible], she acknowledged, that part didn't really happen." In the opening statement, the prosecutor stated:

> [D]uring that interview, [L.R.] went off into fantasy to the point that she was saying when she was doing things with [her uncle], [he] would touch her eye and blood would come out and they're smearing blood all over each other's bodies, and the next thing you know she's talking about Pirates of the Caribbean.

Appellant did not object to the opening statement or closing argument, so plain-error analysis applies. "[A]n unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights." *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). "For unobjected-to prosecutorial misconduct, we apply a modified plain error test." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007). Under this test, appellant must establish that the alleged prosecutorial misconduct constitutes error and that the error was plain. *See id.* at 393. Error is plain if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. The burden then shifts to the state to show that the error did not affect appellant's substantial rights. *See id.*

Substantial rights are affected if the error affected the outcome of the case and was prejudicial. *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998). To determine this, we consider "the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions." *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

The state does not dispute that the reference to the redacted part of the videotape was plain error. The prosecutor made only a single reference to the redacted part of the

videotape. The opening statement occurred five days before closing argument. The district court instructed the jury that counsel's arguments are not evidence and that the jury should disregard "any statements as to what the evidence is which differs from your recollection of the evidence." It is presumed that a jury follows the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). Considering the strength of the evidence against appellant, the single reference to the redacted part of the interview did not affect appellant's substantial rights.

The closing argument accurately stated the evidence that was presented at trial and was not plain error. The argument did not take advantage of the district court's ruling. Rather, L.R.'s acknowledgment in 2007 and 2008 that she was describing events that had not occurred could reflect a higher maturity level due to the passage of time.

II.

Parties have considerable latitude in determining the content of their closing arguments and are free to make all legitimate arguments on the basis of all proper inferences from the evidence introduced. *State v. Smith*, 541 N.W.2d 584, 589 (Minn. 1996). Demonstrative aids are permissible as part of counsel's argument when used to "dramatize counsel's own words or to suggest counsel's inferences about the substantive evidence." 2 Charles T. McCormick, *McCormick on Evidence* § 214, at 16-17 (Kenneth S. Broun, et al. eds., 6th ed. 2006).

Defense counsel sought to use a paper towel to demonstrate the defense theory of DNA transference. Defense counsel intended to make marks on a paper towel to show how DNA could be transferred from one object, such as a person's fingers, to another

object. In making a record of the proposed demonstration after the fact, the prosecutor stated:

> My recollection is that [defense counsel] had a paper towel similar to what you would find in a rest room. It was folded up in three parts and he started unfolding it and then he had a black marker, I believe it was a Sharpie marker, and what he was proposing to do was to somehow demonstrate the idea of transference using the ink from that marker and the paper towel. My objection was that essentially [defense counsel] was going to be creating additional evidence in the case, that he would be testifying, he would become a witness in the case, and that was highly improper . . . .

Appellant cites to no evidence in the record indicating that the proposed demonstration would have accurately depicted the concept of DNA transference that a BCA witness testified about during cross-examination by defense counsel. The district court, therefore, did not err in sustaining the prosecutor's objection to the proposed demonstration.

Affirmed.