STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2319

State of Minnesota,
Respondent,

vs.

Charles Todd Bragg,
Appellant.

Filed December 21, 2010
Affirmed
Crippen, Judge[*]

Mille Lacs County District Court
File No. 48-CR-08-1964

Lori Swanson, Attorney General, Kimberly Ross Parker, Assistant Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney's Office, Milaca, Minnesota (for respondent)

Rory P. Durkin, Giancola Law Office, PLLC, Anoka, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Johnson, Chief Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Following his conviction on eight counts of felony criminal sexual conduct, appellant Charles Bragg asserts that he did not receive a fair trial. Having reviewed his claim of ineffective trial counsel and several additional claims of error advanced by appellant, we affirm.

FACTS

Appellant, age 46, was convicted for offenses against K.H. and D.H., his 16 and 15-year-old daughters. During six summer weeks in 2008, K.H. spent weekdays at a camp and stayed with appellant on weekends. She disclosed to her friends at camp that appellant was abusing her. On July 10, after being encouraged by her friends, K.H. told a camp counselor about some of the incidents, describing appellant's touching and reporting that he had "raped her twice" during the 2007-2008 winter break from school. K.H. also told the counselor that appellant had also raped her sister, D.H., at least twice and that he "took nude . . . pictures of them." The counselor informed the camp director and contacted social services.

The next day, both K.H. and D.H. were taken to the sheriff's office to be interviewed separately by a social worker. They described the abuse in greater detail, and also discussed their concerns about photographs of them on appellant's computer. After the interviews, police placed both girls in foster care and, based on the information the girls provided, police executed a search warrant at appellant's home. During the search, police photographed the scene and seized condoms, lotion, cameras, and three computers.

Approximately 140 images of both girls were recovered from the computers, including photographs of K.H. and D.H. in various stages of undress, some taken while one of the girls was in a bathtub.

Appellant was charged with eight counts of first- and second-degree criminal sexual conduct. After a five-day trial in February 2009, the jury found appellant guilty of all eight counts. Subsequently, the district court denied appellant's new trial motion that was filed by substitute counsel. Late in 2009, the court sentenced appellant to 360 months in prison.

D E C I S I O N

1. Ineffective Assistance of Counsel

Appellant argues that he is entitled to a new trial because he was denied the effective assistance of counsel. The district court rejected this claim, which was raised in appellant's motion for new trial. An ineffective assistance of counsel claim involves mixed questions of law and fact, and district court decisions on this issue receive de novo review. *See Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004) (addressing postconviction claim).

A defendant seeking a new trial on the basis of ineffective assistance of counsel must demonstrate that counsel's representation fell below an objective standard of reasonableness, and 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) (recognizing test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). An attorney provides effective

representation if he or she "exercise[s] the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances." *Marhoun v. State*, 451 N.W.2d 323, 328 (Minn. 1990) (alteration in original) (quotation omitted). Appellate courts generally do not review matters of trial tactics or strategy. *State v. Doppler*, 590 N.W2d 627, 633 (Minn. 1999). Judicial scrutiny of counsel's performance is highly deferential, and there is a "'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Dukes v. State*, 660 N.W.2d 804, 811 (Minn. 2003) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065).

Concessions of Guilt

Addressing his claim of ineffective assistance of counsel, appellant first argues that trial counsel conceded appellant's guilt without his permission. Prejudice is presumed when counsel concedes defendant's guilt without the client's consent or acquiescence. *Id.* at 812; *see also State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (stating that decision to admit guilt "can only be made by the defendant"). If the alleged concessions are implied, counsel's statements "must be reviewed in the context of the totality of the circumstances of the trial." *Dukes*, 660 N.W.2d at 813. Caution must be taken with implied concessions to ensure that "the semantics of every questioned word, statement or misstatement of counsel by inadvertence, negligence or perhaps cleverness" do not become "an automatic ground for a new trial." *Id.* at 812.

Appellant first asserts that trial counsel improperly credited the testimony of one of his daughters. During the cross-examination of K.H., trial counsel asked if others were present when appellant "molested" her, following the answer with questions as to

whether K.H. yelled out or objected to others. Appellant argues that by referring to the molestation as "actual incidents which occurred" instead of allegations, trial counsel credited K.H.'s testimony and conceded appellant's guilt.

When viewed in the totality of the circumstances, omitting the word "alleged" when referencing these incidents during cross-examination does not amount to a concession of guilt. This case is distinguishable from *Wiplinger*, where defense counsel impliedly admitted defendant's guilt during cross-examination by choosing a line of questioning that conceded contested facts critical to the defendant's position. *See Wiplinger*, 343 N.W.2d at 861. It is evident from the context of the cross-examination that trial counsel's questioning did not concede that the crimes occurred or admit contested facts; trial counsel was attempting to challenge the veracity of K.H.'s testimony by pointing out that other people were in the house. Focusing on the omission of one word from this series of questions runs contrary to our practice of exercising caution to prevent such statements from becoming an "automatic ground for a new trial." *See Dukes*, 660 N.W.2d at 812.

Appellant also argues that trial counsel conceded his guilt to the jury on at least two occasions during closing argument. He highlights several lines from a 29-page transcript of the argument in which counsel said that he would not be able to convince the jury that appellant was "innocent" or "not guilty." Appellant's argument ignores trial counsel's overall theme that this was a tough case, and appellant did not have to prove his own innocence. Throughout the closing argument, appellant's trial counsel challenges the credibility of the state's witnesses, emphasizes the absence of corroborating medical

evidence, and attempts to minimize the significance of the photos found on appellant's computer. Trial counsel also reiterated throughout the argument that, even though the allegations are "horrible," that "doesn't mean that they're true," and he asked the jury to find that the crimes "did not happen" and that "the girls are lying." Taken in the context of the entire closing argument, these statements do not rise to the level of an implied admission of guilt. *See State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001) (holding that defense counsel's comments in closing argument that the prosecutor's arguments "make perfect sense" were not concessions of guilt when viewed in the context of the whole argument).

In sum, trial counsel did not concede appellant's guilt during the trial.

Conceding Elements of the Crime

Appellant also contends that his trial counsel conceded at least two elements of the charged offenses: that appellant was in a position of authority over his daughters and that he was at least 48 months older than the girls. Counsel may not concede guilt, even impliedly, without the permission of his client. *Wiplinger*, 343 N.W.2d at 861. But a defendant may acquiesce to these concessions when defense counsel uses the strategy of conceding the defendant's guilt throughout trial and the defendant fails to object. *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992). A defendant also acquiesces when admitting guilt was an "understandable" strategy, and the defendant was present at the time the concessions were made and admits that he understood that his guilt was being conceded, but did not object. *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991).

Appellant contends that, even if there is an understandable reason to concede these facts or elements, trial counsel did not obtain his permission to do so and "did not follow the procedure prescribed by law." But appellant never disputed that he is the girls' father, in a position of authority over them, and more than 48 months older than his daughters, and he never objected to trial counsel's discussion of these facts at trial. Appellant testified at trial that D.H. and K.H. are his daughters and that he had custody of them during the period in question. At the motion hearing after the trial, appellant also admitted that it was never his intention to dispute that he was the girls' father or his age.

The record makes evident a strategic judgment that it would be incredible to dispute his paternity or his age. And because appellant admitted to his age and that he was the girls' father, he acquiesced to trial counsel's strategy and any concessions to these two elements were not improper under the circumstances.

Burden of Proof

Appellant next argues that his trial counsel improperly shifted the burden of proof to the defense. Misstatements of the state's burden of proof in criminal cases are highly improper. *State v. Jackson*, 773 N.W.2d 111, 122 (Minn. 2009). Arguments that an attorney has improperly shifted the burden of proof to the defense usually arise in the context of prosecutorial error or misconduct. *See, e.g.*, *State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) (stating that prosecutors "improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence"). If statements of counsel on the applicable law conflict with those instructions on the law given by the

court, the error can be "cured by proper instructions by the trial court." *State v. Race*, 383 N.W.2d 656, 664-65 (Minn. 1986).

Appellant argues that trial counsel made several improper burden shifting statements. First, he highlights statements made during trial counsel's opening statement, when counsel acknowledged that he wouldn't be offering any affirmative evidence, such as an alibi, but would only be claiming that the defendant "didn't do it." Trial counsel also said, "it's hard to, to prove a negative. And as I indicated in jury selection, he doesn't have to prove that negative."

Appellant then highlights statements made during closing argument, when his counsel told the jury that they could find there was "some question" on guilt, whether the state had "gone past that magical line" that "removes sufficient doubt from your mind about guilt." Again, he argued that he could not prove innocence or alibi, that he would have a "difficult burden" to "prove the negative"; but counsel added that "we don't have that obligation to do that." Counsel later repeated the statement about this burden but that it was not appellant's obligation to disprove guilt. Finally, near the end of the argument, counsel explained that the jury could think appellant "might be guilty" but still bring back a verdict of "not guilty"; he told the jury they did not have to find that appellant was innocent. Counsel reiterated that appellant could not be convicted if the jury had a "reasonable doubt that he may not be guilty"; he urged that the jury had to expunge from their mind "all reasonable possibility of doubt" that appellant was guilty.

Counsel's argument, even if in these quoted portions are not fully clear and consistent, correctly state the burden of proof throughout the trial; this was true during

voir dire, in the opening statement, and throughout the closing argument. When referencing the eight separate counts, trial counsel told the jury, "You have to give [appellant] the presumption of innocence each time." He reminded the jury that guilt beyond a reasonable doubt means "convinced to a moral certainty," and that the jury should find that "[appellant] is not guilty . . . unless the State has convinced you that they've . . . met their burden . . . that you have no reasonable doubt left in your mind." These numerous correct statements by defense counsel throughout the course of the trial contradict appellant's assertion that "the entire record . . . shows a single uninterrupted and fundamental misunderstanding of the presumption of innocence." Finally, the district court also instructed the jury on the burden of proof and reminded the jury to disregard the attorneys' statements of law that differed from the court's instructions.

Any potential confusion in quoted argument was remedied by the overarching themes used by trial counsel and the clear instructions of the district court. Appellant is not entitled to relief on this ground.

Inadequate Communication

Appellant next argues that his trial counsel provided ineffective assistance by failing to discuss the sentencing guidelines with him. Although trial counsel admitted that he did not discuss the sentencing guidelines with appellant when he communicated a plea offer from the state, appellant admitted that he never intended to plead guilty. In its order denying appellant's motion for a new trial, the district court noted that there were no "active plea negotiations" because appellant "wanted a trial."

On this record, appellant cannot show that trial counsel's assistance fell below an objective standard of reasonableness or that he was prejudiced by any lack of communication. Because appellant admitted that he never wanted to plead guilty, there is no reasonable probability that, but for counsel's conduct, the result of the proceeding would have been different. Accordingly, he cannot meet either prong of the *Strickland* test for ineffective assistance of counsel on this basis.

Failure to Request a Mistrial

Appellant contends that his trial counsel failed to properly request a mistrial on two occasions during the proceedings.[1] He asserts that counsel should have requested a mistrial when the district court prohibited two defense witnesses from testifying because of sequestration violations, and again when he learned about alleged juror misconduct. Review of trial counsel's performance does not include reviewing attacks on trial strategy. *Opsahl*, 677 N.W.2d at 421. Counsel's decision not to move for a mistrial is a matter of trial strategy. *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006).

Finally, appellant claims that his counsel's failure to request a mistrial was based on counsel's "personal concerns" and not "any legal reason." Appellant points to his trial counsel's testimony at the motion hearing, in which he stated that he "wanted to see it through to the end" and that he considered judicial economy, his schedule, and his financial situation. He also emphasizes that trial counsel failed to bring to the court's attention appellant's concern about a juror. Trial counsel testified that he "thought that

[1] The state argues that this issue should be barred and that appellant is raising the issue for the first time on appeal. But appellant did raise this issue in his motion for a new trial, and the district court addressed his arguments in its order denying the motion.

the trial was going well" and that he "did not" see a legal basis for making a motion for a mistrial. Moreover, the two problems appellant recites as grounds for a mistrial are not error, as will be explained later in the opinion. Ultimately, deciding whether or not to request a mistrial was a matter of strategy. Because this court generally does not review attacks on counsel's strategic decisions, appellant cannot show he received ineffective assistance of counsel on this basis.

Appellant has not demonstrated that he received ineffective assistance of counsel on any of the alleged grounds. Accordingly, he is not entitled to a new trial on this issue.

2. Prohibition of Defense Testimony

The district court prohibited two defense witnesses from testifying because of sequestration violations. Appellant does not deny that the violations occurred. He only claims that the court improperly prohibited the witnesses from testifying. Because appellant did not object to the court's chosen remedy at trial or in his motion for a new trial, we review this issue for plain error. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). On plain-error review, the defendant must show that there was error, the error was plain, and the error affected his substantial rights. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). An error is plain if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006), and it affects substantial rights if there is a reasonable likelihood that its absence would have had a significant effect on the jury's verdict. *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). If the three plain-error factors are established, we then consider whether the error seriously affected the fairness and integrity of the judicial proceedings.

See Griller, 583 N.W.2d at 740 (explaining that a court may exercise its discretion to correct a plain error only if such error seriously affected the fairness and integrity of judicial proceedings).

A sequestration order is intended "to remove any possibility that a witness waiting to testify may be influenced consciously or subconsciously by the testimony of other witnesses and to afford opposing counsel the opportunity of bringing out in cross-examination any discrepancies in the testimony of the various witnesses." *State v. Miller*, 396 N.W.2d 903, 906 (Minn. App. 1986) (quotation omitted). A party seeking relief based on a violation of a sequestration order must show prejudice resulting from the violation. *State v. Erdman*, 383 N.W.2d 331, 334 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986).

The district court questioned the witnesses out of the presence of the jury and determined that two of them violated the sequestration order. One of the witnesses was excluded after she admitted that she spoke to other witnesses about their testimony; another witness, appellant's son, had discussed the case with her, including substantive details about testimony that day and his opinion about the girls' case. The second witness denied talking to anyone about the testimony, but it was determined later that she had been asking questions of other witnesses and discussing the dates of the abuse. After discovering these violations, the district court excluded the two witnesses' testimony.

It was well within the district court's discretion to exclude the testimony of the two witnesses after they discussed the case with other witnesses. Although appellant is alarmed that the record shows little deliberation on the choice of sanctions, the record

also shows that the court's order was directly and repeatedly violated by the witnesses whose testimony was precluded.

Appellant also cannot show that this exclusion violated his substantial rights. Thirteen witnesses testified on behalf of the defense at the trial. Although appellant claims that the testimony of these two particular witnesses would have changed the verdict, he presented no evidence to justify this assertion other than the claim that one of the witnesses would testify that the girls had "a desire for revenge" against appellant and offer other "important testimony." There were other like witnesses, and strong evidence contradicted their testimony. The district court did not err when it excluded the testimony of two witnesses for violating the sequestration order.

3. *Schwartz* Hearing

Appellant contends that he was entitled to a *Schwartz* hearing to investigate alleged juror misconduct. A defendant may make a post-trial motion for a *Schwartz* hearing when the defendant suspects a guilty verdict was tainted by jury misconduct. *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000); *see also Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). A defendant must establish a prima facie case of jury misconduct before a motion for a *Schwartz* hearing must be granted. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). The denial of a *Schwartz* hearing is reviewed for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

Appellant asserts that one of the seated jurors had an "antagonistic relationship" with his family and that the juror did not disclose that he knew appellant's family, or that

appellant's father was the reason this juror had lost his job.[2] Appellant asserts that he discovered this alleged bias only after the panel was passed for cause, and the issue was not raised until the trial was complete.

The district court correctly concluded that appellant failed to make a prima facie case for his claim of juror misconduct. Appellant's testimony referred to an alleged event that occurred "several years" prior to the trial and was based only on his own vague memory of some contact between his father and the juror. Appellant had had no contact with the common employer since his father's death, and evidence in the record contradicts his testimony that his father took the juror's job. Moreover, appellant testified that he personally recognized the juror but admitted that none of the jurors stated that they knew him. As the district court determined, there was an "absence of some actual evidence of jury misconduct." The assertions in appellant's motion, combined with the hearing testimony "standing alone and unchallenged," are insufficient to establish a prima facie case that jury misconduct occurred. *See Larson*, 281 N.W.2d at 484. The district court did not abuse its discretion by denying appellant's request for a *Schwartz* hearing.

[2] These allegations are contradicted by information in the record. Although the record confirms that appellant's father and the juror in question worked for the same employer, the record also shows that the juror resigned from his position more than two years after appellant's father's death.

4. Other Exercises of Discretion

Exclusion of Prior False Allegations

Appellant argues that the district court abused its discretion by excluding evidence of prior false allegations of sexual abuse and that this exclusion violated his right to put on a defense. Every criminal defendant has a right to be treated with fundamental fairness and to be afforded a meaningful opportunity to present a complete defense. *State. v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). A district court's evidentiary rulings will not be disturbed on appeal absent a clear abuse of discretion. *State v. Jackson*, 770 N.W.2d 470, 482 (Minn. 2009). Even if the exclusion of evidence violates a defendant's right to present a defense, appellate courts will not reverse the decision if the error is harmless beyond a reasonable doubt. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989).

Appellant argues that the district court should have allowed evidence from a 1999 order for protection filed by K.H.'s mother when K.H. was six years old. The order and accompanying affidavit contained allegations of sexual abuse of K.H. by appellant. An investigation by a guardian ad litem revealed that the mother's husband at the time, not appellant, was actually molesting K.H. Prior to trial, the district court ruled that the evidence was inadmissible under Minn. Stat. § 609.347 (2008), and that due process did not require its admission.

In response to appellant's motion for a new trial after the jury verdict, the district court found that the evidence was "properly excluded" because the "fact situation [in this case] is substantially different" from the circumstances giving rise to the 1999 order for

protection. The court emphasized that the 1999 report did "not suggest that the girl was intentionally making false accusations."

Evidence of a victim's sexual history is admissible "[w]hen consent of the victim is a defense in the case" or "[w]hen the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident . . . ." Minn. Stat. § 609.347, subd. 3; Minn. R. Evid. 412.[3] Evidence of prior false accusations of sexual abuse are admissible to attack the credibility of other statements. *Goldenstein*, 505 N.W.2d at 340. In *Goldenstein*, a new trial was required where the state's case rested on out-of-court statements of children; we noted that "prior accusations of rape are relevant only to the victim's propensity to be truthful if there has been a determination that the prior accusations were indeed fabricated." *Id.*; *see also State. v. Gerring*, 378 N.W.2d 94, 96-97 (Minn. App. 1985) (holding that evidence was properly excluded when the defendant could not prove the falsity of the accusations).

Here, as the district court notes, the state's case included no evidence of semen, pregnancy, or disease, and appellant was charged with sexually abusing his two minor daughters, so consent was not available as a defense. More importantly, the allegations to which appellant refers were made by K.H.'s mother in the request for an order for protection when K.H. was about six years old, and the district court concluded that there was insufficient evidence to suggest that these claims were fabricated. Also, the evidence in this case included corroborating evidence, including the photos on appellant's

[3]Rule 412 is superseded to the extent of its conflict with Minn. Stat. § 609.347. Minn. Stat. § 609.347, subd. 7.

computer. This case is distinguishable from *Goldstein*. On this record, the district court did not abuse its discretion.

Admission of Photographic Evidence

Appellant contends that the district court abused its discretion in admitting photographs of K.H. and D.H. that were found on his computer. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. The admission of photographs is a matter left to the discretion of a district court. *State v. Morton*, 701 N.W.2d 225, 237 (Minn. 2005). Photographs are not rendered inadmissible just because they vividly depict a shocking crime or incidentally tend to arouse the passions and prejudices of the jurors. *Id.*

Approximately 140 images of both girls were recovered from the computers, including some photographs of the girls in various stages of undress, some while one of the girls was in a bathtub, and others depicting a male finger near or touching female genitalia. The district court concluded that the photographs were relevant because they corroborated the girls' statements that appellant "took nude . . . pictures of them," and were relevant to the element of sexual intent. Appellant argues that admitting the photographs was unfairly prejudicial because they "confused" the jury and turned the trial into a case about "possessing/creating pornographic works."

The district court properly concluded that the photographs were relevant evidence, and that their probative value was not substantially outweighed by the danger of unfair prejudice. Both K.H. and D.H. expressed concern to their social worker about nude photographs of themselves found on appellant's computer. The photographs serve

to corroborate the testimony of K.H., D.H., and the social worker. Moreover, because the charges against appellant included the element of intent, the photographs were relevant to demonstrate that he had the requisite sexual intent when he committed the acts. The court did not abuse its discretion in admitting the photographs.

5. New Trial

An appellant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying appellant a fair trial." *State v. Jackson*, 714 N.W.2d 681, 698 (Minn. 2006) (quotation omitted). Appellant asserts that the errors alleged on appeal had the cumulative effect of denying him a fair trial. Because we discern no error on this record, the argument fails. Appellant was not denied a fair trial, and he is not entitled to relief on this basis.

Affirmed.