STATE OF MINNESOTA
IN COURT OF APPEALS
A10-415

State of Minnesota,
Respondent,

vs.

Frankie Earl Miller,
Appellant.

Filed February 15, 2011
Affirmed
Worke, Judge

Otter Tail County District Court
File No. 56-CR-09-1000

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

David Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges the sufficiency of the evidence supporting his criminal-sexual-conduct convictions and argues that cumulative error warrants a new trial. We affirm.

D E C I S I O N

Sufficiency of Evidence

Appellant Frankie Earl Miller was convicted of first- and second-degree criminal sexual conduct committed against E.H., the seven-year-old daughter of appellant's live-in girlfriend, D.H. Appellant argues that the evidence was insufficient to support his convictions. In considering a claim of insufficient evidence, review by this court is limited to a thorough review of the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court "cannot retry the facts, but must take the view of the evidence most favorable to the state." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1990); *see also State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985) (reviewing circumstantial evidence). An appellate court must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And the reviewing court will not disturb the

verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of three counts of first-degree criminal sexual conduct, specifically: (1) sexual penetration of a victim under the age of 13 by an actor more than 36 months older than the victim; (2) sexual penetration of a victim under the age of 16 by a person with a significant relationship to the victim; and (3) sexual penetration of a victim under the age of 16 involving multiple acts over an extended period of time. Minn. Stat. § 609.342, subds. 1(a), (g), (h)(iii) (2008); *see also* 10 *Minnesota Practice*, CRIMJIG 12.04, .08, .10 (2008). Appellant was also convicted of three counts of second-degree criminal sexual conduct: (1) sexual contact with a victim under the age of 13 by an actor more than 36 months older than the victim; (2) sexual contact with a victim under the age of 16 by a person with a significant relationship to the victim; and (3) sexual contact with a victim under the age of 16 involving multiple acts over an extended period of time. Minn. Stat. § 609.343, subds. 1(a), (g), (h)(iii) (2008); *see also* CRIMJIG 12.14, .16, .18 (2008).

E.H. testified at trial. E.H. nodded affirmatively when asked if someone touched her on her "private." E.H. indicated that appellant touched her private part with his hand, and explained that the touches occurred when she was sleeping on her bed in the living room when nobody else was home. The prosecutor then asked E.H. to better explain the touching by circling the parts on a male diagram that appellant touched her with. E.H.

circled the "private" on the male diagram and indicated that appellant touched her private with his private. E.H. also indicated that she touched appellant's private with her mouth and that his private went inside her mouth.

E.H. said that the touching happened only at the house in Fergus Falls and that it occurred more than once, "kind of" more than five times. When the prosecutor asked for reassurance that the touching happened around five times, E.H. replied, "more, different." E.H. then said that the abuse also occurred in her upstairs bedroom, indicating that appellant removed her pants and his clothes, got on top of her, and moved his body around. E.H. explained that the touching in the upstairs bedroom was similar to the touching that occurred on the bed in the living room, including touching appellant's private with her mouth and appellant's private touching her private. E.H. agreed that something came out of appellant's private when he touched his private to hers, describing it as "this white stuff."

Appellant contends that E.H.'s testimony is the only evidence supporting his guilt. Appellant argues that E.H.'s story was inconsistent and changed each time she told it. During an initial interview with social services, E.H. claimed that appellant hit her in the face, watched her take baths while hiding in the bathroom, and molested both her and her sister, T.H., while living in Louisiana; E.H. described in detail appellant's abuse of a neighbor girl; and E.H. also recounted an extensive relationship with her father, M.H. At trial, E.H. either denied or did not recall making each claim. Appellant also asserts that there was no evidence corroborating E.H.'s allegations of sexual penetration or contact.

But testimony by a victim in a criminal-sexual-assault case "need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2008). In *State v. Haala*, for instance, this court upheld a criminal-sexual-conduct conviction over the defendant's assertion that the ten-year-old victim's testimony was not credible due to inconsistencies in her testimony. 415 N.W.2d 69, 71, 78-79 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987). This court concluded that the testimony of the ten-year-old victim was sufficient to support the conviction, and noted that "[i]n light of the conflicting testimony, it was the exclusive function of the jury to weigh the credibility of the [victim]." *Id.* Similarly, the jury in appellant's case was entitled to credit the testimony of E.H., and the jury convicted appellant based on this testimony. *See State v. Voorhees*, 596 N.W.2d 241, 252 (Minn. 1999) (stating that inconsistencies must be resolved in favor of the jury's verdict). Thus, E.H.'s testimony of sexual contact and penetration was sufficient for the jury to reach guilty verdicts.

Furthermore, E.H.'s testimony was corroborated by other witnesses. Dr. Lawrence Eisinger testified at trial. Dr. Eisinger explained that he examined E.H. after being alerted that there may have been inappropriate sexual contact. Dr. Eisinger testified that E.H. told him that appellant touched her private with his hand on numerous occasions and that it hurt. Dr. Eisinger explained that a genital exam revealed that E.H.'s hymen was missing, which was consistent with multiple penetrations. Dr. Eisinger opined that E.H. "certainly experienced inappropriate sexual contact with fondling and penetration, vaginal penetration." Dr. Eisinger testified that E.H's condition was atypical

for a seven-year-old child and "was very consistent with what [E.H.] said about this [abuse] happening numerous times and that the touching had hurt."

Miriam Maples testified at trial. Maples testified that she is employed at Cornerhouse Interagency Child Abuse Evaluation and Training Center in Minneapolis and that she conducted the initial interview with E.H. after the alleged sexual abuse was reported. During Maples' testimony, the video recording of her interview with E.H. was played for the jury. During the interview, Maples asked E.H. to demonstrate appellant's touching with anatomically correct male and female "showing dolls." Using the dolls, E.H. showed how appellant took her underwear off, pulled his pants off, and got on top of her. E.H. indicated that appellant touched her vagina with his hand, penetrated her vagina with his fingers, and licked her nipples and vagina. E.H. stated that, "Then, he will pull his underpants down and get on top of me and he will . . . ," but grew inaudible as she finished the sentence. Maples asked E.H. if she said "rape," and E.H. denied saying that. E.H. then indicated that appellant grabbed her hand and made her touch and lick his penis. Maples testified that using visual aids is helpful in these scenarios and that E.H. was able to use the "showing dolls" in a way that was consistent and spontaneous, providing verbal detail and distinguishing different things about appellant's behavior. Maples explained that E.H. was clear about her own personal experience, who abused her, and the acts that occurred. Maples testified that she made a finding that sexual abuse occurred based on E.H.'s consistency and disclosure and the content and demeanor of E.H.'s interview.

P.D., E.H.'s grandmother, testified at trial. She testified that she first learned of the allegations involving appellant when E.H.'s sister, T.H., told her that they called their father, M.H., and informed him that "[E.H.] had been raped" by appellant. P.D.'s version of the children's report of appellant's abuse of E.H. was corroborated by M.H., who also testified at trial.

Dr. Eisinger's medical testimony corroborates E.H.'s accusations. *See State v. Love*, 350 N.W.2d 359, 360-61 (Minn. 1984) (determining that a criminal-sexual-conduct victim's testimony was corroborated by "[t]he medical testimony . . . that her hymen was not intact and that her vaginal opening was larger than normal for one her age"); *State v. Coulthard*, 379 N.W.2d 623, 625-26 (Minn. App. 1985) (concluding that a criminal-sexual-conduct victim's testimony was partially corroborated by the testimony of an examining doctor that the victim had a recently ruptured hymen), *review denied* (Minn. Jan. 31, 1986). Testimony by P.D., M.H, Maples, and Dr. Eisinger also demonstrated that E.H. previously made allegations of sexual abuse by appellant similar to her testimony provided at trial. *See State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. App. 1993) (concluding that a criminal-sexual-conduct victim's statements to others about the sexual assault can corroborate her testimony). Accordingly, the evidence was sufficient to support appellant's convictions.

Cumulative Error

Appellant also argues that his constitutional right to a fair trial was violated by cumulative error. A defendant is "entitled to a new trial if the errors, when taken cumulatively, had the effect of denying [the defendant] a fair trial." *State v. Jackson*, 714

N.W.2d 681, 698 (Minn. 2006). When determining whether the cumulative effect of the errors denied a defendant's right to a fair trial, a reviewing court also considers the strength of the evidence presented against the defendant. *See State v. Erickson*, 610 N.W.2d 335, 340-41 (Minn. 2000).

Testimony of Failure-to-Register Charge

Appellant argues that the district court erred by not granting a mistrial after his failure-to-register charge was mentioned by a witness. "A mistrial should not be granted unless there is a reasonable possibility that the outcome of the trial would be different if the event that prompted the motion had not occurred." *State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (quotation omitted). An appellate court reviews the denial of a motion for a mistrial for an abuse of discretion. *Id.*

During trial, the state called social worker Heather Pollard to testify. Pollard was responsible for locating E.H. after police notified the county of the sexual-abuse allegations. Pollard described her initial difficulty locating E.H.'s mother, D.H., and the children, as well as the trouble that law enforcement had trying to locate appellant, stating that "[appellant] was located at a later date. I believe there was eventually a warrant put out for his arrest for failing to register." Appellant's counsel immediately objected and asked that Pollard's testimony be stricken. The district court sustained the objection and gave a limiting instruction informing the jury that the testimony should be disregarded. Appellant's counsel eventually moved for a mistrial, arguing that "failure to register" was commonly associated with sex offenders, allowing the jury to infer that appellant was a

sex offender. The court denied the mistrial motion, concluding that there was no actual prejudice due to the timely objection and curative instruction.

Regardless of whether this testimony prejudiced appellant, appellant fails to advance an argument that the outcome of the trial would have likely been different were it not for Pollard's testimony. Accordingly, appellant fails to adequately demonstrate that the district court abused its discretion by denying his motion for a mistrial.

Sexually-Transmitted-Disease Evidence

Appellant argues that the district court made two evidentiary errors: first, by denying his motion in limine to redact portions of Dr. Eisinger's report referring to sexually transmitted diseases; and second, by permitting Dr. Eisinger to testify about his concern that E.H. had contracted a sexually transmitted disease. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Minn. R. Evid. 403. Under this rule, evidence should be excluded if it persuades the jury by illegitimate means and gives one party an unfair advantage. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). "Appellate courts largely defer to the [district] court's exercise of discretion in evidentiary matters and . . . . [a]bsent a clear abuse of discretion, the ruling will stand." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989) (citations omitted). A defendant claiming error "bears the burden of proving the admission was erroneous and prejudicial." *State v. Lee*, 645 N.W.2d 459, 465 (Minn. 2002).

The state sought to introduce Dr. Eisinger's medical report, and appellant brought a motion in limine seeking to redact the following excerpt: "There is some vaginal

discharge [] which could represent evidence [of] sexually transmitted disease." Appellant argues that because Dr. Eisinger's cultures came back negative for chlamydia and gonorrhea, there was no evidence that E.H. contracted a sexually transmitted disease. Appellant, therefore, asserts that the report's reference to sexually transmitted diseases lacked probative value and was unduly prejudicial.

As the state argues, however, only two tests were performed and the presence of the discharge could still signify various other sexually transmitted diseases besides chlamydia and gonorrhea. Moreover, Dr. Eisinger considered the discharge to be a significant medical finding which was uncommon for a seven-year-old child and, thus, was probative of whether sexual contact had occurred. The probative value of Dr. Eisinger's report was not outweighed by the prejudice to appellant, and the district court did not abuse its discretion in denying appellant's motion.

Appellant also argues that the district court erred in permitting Dr. Eisinger to testify about testing E.H. for sexually transmitted diseases. Dr. Eisinger testified that he believed the tests were necessary after discovering a milky discharge in E.H.'s vagina during his physical examination of E.H.:

> EISINGER: . . . You don't typically see that in healthy [vaginal] tissue. You can see it in tissue that's irritated. It could have been the result of infection, and that's why I did the cultures, to rule out infection.
> PROSECUTER: And in fact, they were done, and the particular ones you did, was it true that they were negative?
> EISINGER: Yes.
> PROSECUTER: And what exactly was tested?
> EISINGER: Well, the most common pathogens that are transmitted would be chlamydia and gonorrhea.

> PROSECUTER: And are there other sexually transmitted diseases that are potential?
> EISINGER: Oh, yes. There are viral infections like venereal warts, herpes, syphilis, HIV.
> PROSECUTER: And do we put a child through all of those types of testing and procedures?
> EISINGER: Not necessarily. Typically, if you can't see the wart – I could not see a wart. I could not see a herpes lesion. A herpes lesion looks like a real bad blister, oozing blister. The skin is disrupted. I didn't see any evidence [of] that.

Appellant argues that this testimony lacked any probative value and was unduly prejudicial.

Appellant did not object to this testimony during trial. This court "may review and correct an unobjected-to, alleged error only if: (1) there is error; (2) the error is plain; and (3) the error affects the defendant's substantial rights." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). An error is plain if the error is clear or obvious. *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002). "Usually [plain error] is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A plain error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. If those three prongs are met, this court may correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 742.

Similar to his report, Dr. Eisinger's testimony ruled out only two possible sexually transmitted diseases and was probative of whether sexual contact occurred. Additionally, appellant questioned Dr. Eisinger on cross-examination about whether rashes could occur

in the vaginal area and if such rashes could be the byproduct of poor hygiene, and Dr. Eisinger conceded that this explanation was possible. The probative value of this testimony was not outweighed by the prejudice to appellant; accordingly, appellant fails to demonstrate plain error required for this court to take corrective action.

Speculative Evidence

Appellant next argues that during rebuttal argument the state improperly encouraged the jury to speculate about whether appellant committed other bad acts. Appellant acknowledges that he failed to object during the state's rebuttal; therefore, we first review for plain error. *Crowsbreast*, 629 N.W.2d at 437.

During closing argument, counsel for appellant accused D.H., E.H.'s mother, of being "one of the pointers at [appellant]" and asserted that D.H., P.D., and M.H. had an agenda to present appellant "in the worst possible light" to the jury. In rebuttal, the state argued that it did not make sense for family members to tell E.H. to lie, especially for D.H., who admitted during testimony to being the subject of an ongoing child-protection proceeding alleging that she was aware of appellant's abuse of E.H. and failed to protect her. The prosecutor argued: "[D.H.] had no agenda. In fact, [D.H.] could have said a lot of things about [appellant] here the other day, but she didn't. In fact, she tried to protect herself most of the time, which is what she's done by not cooperating in this whole case."

Appellant claims that this assertion constituted prosecutorial misconduct because the state may not base an argument on facts not in evidence. *See State v. Steward*, 645 N.W.2d 115, 122 (Minn. 2002) (stating that it is prosecutorial misconduct to purposefully reference inadmissible evidence in order to bring the evidence to the attention of the

jury). "But a prosecutor is free to make legitimate arguments on the basis of all proper inferences from the evidence introduced." *State v. Outlaw*, 748 N.W.2d 349, 358 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). A prosecutor may argue that a defense has no merit but may not denigrate or belittle the defense itself. *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993); *see also State v. Johnson*, 616 N.W.2d 720, 730 (Minn. 2000) (concluding that a prosecutor who argued that a defense theory is implausible by highlighting certain evidence did not commit prosecutorial misconduct); *State v. Romine*, 757 N.W.2d 884, 893 (Minn. App. 2008) (allowing a prosecutor to refute a defendant's defense with evidence produced by the state), *review denied* (Minn. Feb. 17, 2009).

Here, part of appellant's defense was that D.H. encouraged E.H. to fabricate the accusations against appellant out of a personal vendetta against him. In response, the state essentially argued that appellant's defense theory was flawed because D.H. was currently in danger of losing her children due to the child-protection proceeding, and thus had no motivation to encourage her daughter to embellish or fabricate accusations of sexual abuse. This is a fair argument based on the evidence. Appellant fails to show prosecutorial misconduct constituting the plain error needed for this court to take corrective measures.

As illustrated above, appellant fails to demonstrate any error in the district court's admission of the sexually-transmitted-disease evidence, the testimony about his failing-to-register charge, or the prosecution's rebuttal argument. Moreover, the evidence presented against appellant was quite strong: E.H. testified about the abuse, and Dr.

Eisinger, Maples, P.D., and M.H. corroborated this testimony. Accordingly, there is no cumulative error warranting a new trial.

Affirmed.