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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1103**

State of Minnesota,  
Respondent,

vs.

Michael Scott Osterkamp,  
Appellant.

**Filed August 6, 2012  
Reversed and remanded  
Hudson, Judge**

Ramsey County District Court  
File No. 62-CR-10-717

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

Anthony C. Palumbo, Anoka County Attorney, Robert Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

Howard Bass, Bass Law Firm, PLLC, Burnsville, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Hudson, Judge.

**UNPUBLISHED OPINION**

**HUDSON**, Judge

Appellant argues that he was deprived of a fair trial when the district court judge who conducted his bench trial failed to disqualify himself under rule 2.11 of the Minnesota Code of Judicial Conduct, which requires disqualification if a judge's

impartiality could reasonably be questioned. Because we conclude that, under the particular circumstances of this case, the code requires recusal, and the failure to have appellant's case heard by an unquestionably impartial tribunal impaired his substantial rights, we reverse and remand for a new trial. But we reject appellant's challenge to the sufficiency of the evidence to support his conviction.

## **FACTS**

The state charged appellant Michael Scott Osterkamp with two counts of second-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.343, subd. 1(g), .343, subd. 2(a) (2008), alleging that appellant engaged in sexual contact with his four-year-old granddaughter, R.M. Appellant initially agreed to plead guilty to one count, with imposition of sentence stayed. The district court judge informed appellant that he would not approve a stay of imposition because appellant had a previous criminal sexual conduct conviction, but that he would consider a stay of execution. However, the judge stated that he would need to review the presentence investigation report (PSI) and would allow appellant to withdraw his plea agreement and proceed to trial if the judge was unable to approve the agreement based on the contents of the PSI.

The judge established a factual basis for appellant's plea:

PROSECUTOR: Mr. Osterkamp, when you touched her in the vaginal area you did that with sexual intent; is that correct? It was not an accident?

A.: (No response.)

DEFENSE COUNSEL: You knew you touched her in the sexual—in the vaginal area?

A.: I knew it happened, yes.

COURT: Okay, wait. Why don't you just answer her question?

PROSECUTOR: You did—you did so with—with a sexual intent or purpose; is that correct?

DEFENSE COUNSEL: Could I ask it another way?

COURT: I think that's as clear as it can be to be honest with you and I think he needs to answer that question.

A.: It wasn't—excuse me, your Honor, if I may?

COURT: Yes.

A: I wasn't quite aware that it would be asked like that.

COURT: Why don't you—

A.: Yes.

COURT: —explain what your intention was.

A.: We were playing and spinning around.

COURT: That's not sexual intent.

A.: Okay. Yes, I was aware that sexually it was—it was touching.

COURT: No, we need—Mr. Osterkamp, I mean, I've heard you say that you were playing and spinning around then you say you were aware that it was sexual touching or words to that effect. The question that the prosecutor asked you, and I think it was a proper question, was did you do this with a sexual intent? Is that the word you used?

PROSECUTOR: Correct, your honor, and I believe that's the way the sexual contact is defined under the statute. It's sexual or aggressive intent.

COURT: What this—you're looking at the definition contained in—

PROSECUTOR: I am, 609.341 subd. 11.

DEFENSE COUNSEL: It's my understanding he could have had two or three intents but one of the intents could have been sexual, your Honor, but he could have had other intents for the touching as well.

COURT: Okay. Well, we're not concerned here, Mr. Osterkamp, with your intent to do anything other than your sexual intent. That's the only concern we have here right now. Sexual contact includes the intentional touching by the actor of the complainant's intimate parts . . . where—when it's done with sexual intent. On this occasion when you touched your granddaughter in her vaginal area, did you do so with a sexual intent?

DEFENSE COUNSEL: It is my understanding, Mr. Osterkamp—

COURT: Why don't you let him answer?

A.: I'll say, yes, sir.

COURT: No, I don't want you to just say, "I'll say yes," I want to know what—what you're feeling—did you do so with a sexual intent?

A.: Yes, sir.

COURT: All right.

The judge then reviewed the PSI, which contained additional inculpatory statements by appellant. At a sentencing hearing, the judge informed the parties that he had reviewed the PSI and was unable to accept appellant's plea under the plea agreement. The matter was scheduled for trial before the same judge.

The day of trial, appellant requested a continuance, stating that he wished to discharge his private attorney and obtain substitute counsel. The district court judge stated that appellant could discharge his present attorney and represent himself or hire a new attorney, who would need to be prepared for trial the next day, but no continuance would be granted. When informed that substitute counsel would not then be available, appellant chose to retain his current attorney. Appellant waived his right to a jury trial. The record does not show that the judge asked appellant whether he wished to have a different judge preside over his court trial.

After appellant challenged R.M.'s competency to testify, the judge held a competency hearing and ruled that R.M. was competent to testify. Appellant also challenged evidence of R.M.'s out-of-court statements in (1) a videotaped interview conducted by a nurse at the Minnesota Children's Resource Center (MCRC) and (2) an audiotaped interview made by R.M.'s father after the charged incident. Both recordings were admitted.

The judge conducted appellant's bench trial. At the bench trial, R.M. testified that she remembered being alone with appellant in the garage at his home for about ten minutes when he asked her to help hang Christmas lights. She testified that he was spinning her around and then stuck his hand in her pants and touched her "pee-pee." She testified that when she told him what he was doing, he said, "Oops." She testified that when she returned to her father's house, her vagina started to hurt, and she told her father about the incident.

R.M.'s father, who shares custody informally with R.M.'s mother, who is appellant's daughter, testified that when R.M. returned from visiting her grandparents, she told him that her vagina hurt because appellant had touched it. He testified that R.M. told him that appellant had given her an airplane ride with one hand between her legs and then touched her vagina. He testified that he confronted appellant, who acknowledged that he had given R.M. airplane rides but denied that sexual contact occurred. R.M.'s father informed appellant's probation officer, who suggested that he call police, and he was referred to child protection and eventually to MCRC, where a nurse/case manager conducted the videotaped interview with R.M. R.M.'s father also testified that he made his own audiotaped interview with R.M. at about the same time as the MCRC interview because police informed him that, with taped interviews, R.M. may not have to testify in court.

The nurse/case manager who interviewed and examined R.M. testified that she saw no evidence of trauma in R.M.'s vaginal area, but R.M. was able to show where the

touching occurred on her body. Appellant's probation officer, who referred the matter to child protection, testified that appellant told him that being alone with R.M. was "dumb."

R.M.'s mother testified that appellant stated that he gave R.M. an airplane ride but denied any sexual contact. She testified that R.M. had a urinary tract infection before the incident, as she had other times before, but R.M. was finished with antibiotics at the time of the MCRC interview. She testified that R.M. did not seem upset immediately after the incident. She stated that R.M.'s father had harassed her when they broke up several years ago, but that she had no reason to think that he was a bad parent.

One of appellant's family members testified for the defense that, when R.M.'s mother and father broke up, an altercation occurred between appellant and R.M.'s father. Appellant's son, who was at appellant's home the day of the incident, testified that R.M. appeared normal that day. Appellant's sister, who accompanied R.M.'s parents to speak with appellant that day, testified that she believed appellant was telling the truth and that R.M. seemed to change her story. Appellant's wife testified that twice before the incident, R.M. had complained that her vagina hurt. Appellant did not testify.

The judge found appellant guilty of both counts. At sentencing, the prosecutor argued for a sentence of 84 months, the high end of the presumptive guidelines sentence. The defense argued for 60 months, the low end of the sentencing guidelines range. The judge spoke to appellant on the record:

When . . . you first thought that you might plead guilty to this case I had some questions about accepting your plea because it seemed to me that you, quite frankly, were not really pleading guilty, that you were kind of going part way. And when I got a presentence investigation back I was not—

partly because of your answers, partly because of other things that I read, I was not willing to go along with the plea agreement in this case. You then determined that you wanted to have a trial and I do not ever punish anybody for having a trial. That's your absolute constitutional right and I would never punish anybody for doing that and I'm not having any intention of doing that today in the sentence I impose. I would point out even that you spared the victim some measure of trauma by having a court trial rather than a jury trial.

At the same time, I don't get the sense—I'm still getting the sense from you of—of denial. I'm looking—I'm listening to what you're hearing—what you just said a few minutes ago about in that first offense that you had several years ago how it was—your doctor took you off of medications and then you say that accounts for why you did that. That's not what accounted—that's not why it happened. It happened because you made a decision that you were going to do that, not because of being taken off medication against your wishes, but because you made a determination that you were going to engage in a certain activity.

*In this particular case, I understand, again, that you have a right to a trial, but I also am quite aware of the surrounding circumstances in this case. I'm aware of several things that you have said and that is the reason that I am confident in [sic] the decision that I reached was correct. I still have the sense—and you don't have to say anything in response to this—but I still have the absolute—the sense that you do not believe that you are responsible, that you do not believe that you committed this offense. And, again, I stress I'm not asking you to answer me at this time because I understand that you may wish to appeal this case. That, however, is something that I must take into consideration in making a decision, if a person is owning up to what they did.*

I don't really feel that you have owned up to your involvement in this case. I believe—I believe that you're in a state of denial about what you—what you did. I don't however, think that the—I will—I should properly give you the—the high end of the box but I certainly don't believe that you're entitled to receive the low end of the box in this case.

(Emphasis added.)

The district court imposed a sentence of 75 months. This appeal follows.

## DECISION

### I

Appellant argues that he is entitled to a new trial because, under the circumstances of this case, the Minnesota Code of Judicial Conduct required the judge to disqualify himself from presiding over appellant's bench trial because the judge's impartiality could reasonably be questioned. A criminal defendant has a constitutional right to a fair trial. *See* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. The right to a fair trial includes the right to an impartial judge. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). We review de novo the legal question of whether a defendant has been deprived of the right to a fair trial before an impartial judge. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

The state argues that, because appellant did not seek recusal before the district court, he is precluded on appeal from raising the issue of the judge's disqualification. But the Minnesota Supreme Court has reviewed the issue of disqualification based on a judicial-code violation for plain error when no objection was made below. *See State v. Schlienz*, 774 N.W.2d 361, 365 (Minn. 2009) (addressing failure to recuse based on alleged judicial-code violation under plain-error standard, when error was not raised before district court); *see also* Minn. Code Jud. Conduct, 2.11, cmt. 2 (stating that “[a]

judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed").

Under the plain-error standard, an unobjected-to error is addressed by examining whether there is error that is plain and affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is "clear" or "obvious," contravening "case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. If plain error is established, this court determines whether imposition of a remedy will ensure fairness and the integrity of the judicial proceedings. *Id.* at 740.<sup>1, 2</sup> We therefore consider whether the district court judge's failure to disqualify himself from conducting appellant's bench trial amounted to plain error that affected appellant's substantial rights.

The Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct, 2.11(A); *see also* Minn. R. Crim. P. 26.03, subd. 14(3) (stating that "[a] judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct"). The term "impartiality" refers to the

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<sup>1</sup> The Minnesota Supreme Court has concluded that, when a judge's failure to recuse based on a judicial-code violation amounts to plain error that affects a defendant's substantial rights, an appellate court need not address whether the presence of a judge who is not impartial amounts to structural error. *Schlienz*, 774 N.W.2d at 365.

<sup>2</sup> The state also maintains that appellant's waiver of his jury-trial right precludes him from challenging his decision to have a court trial. But we reject this argument because appellant's jury-trial waiver did not equate to his agreement that this particular judge would be the judge presiding over appellant's bench trial.

“absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.” Minn. Code Jud. Conduct, Terminology. We presume that a judge will “approach cases with a neutral and objective disposition,” making decisions solely on the merits of the evidence presented. *Dorsey*, 701 N.W.2d at 248–49 (quotation omitted).

The rule of conduct states the grounds for disqualification broadly and “does not provide a precise formula that can automatically be applied,” *Powell v. Anderson*, 660 N.W.2d 107, 115 (Minn. 2003), but it does not require a litigant to show actual bias. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993) (citing earlier version of Minnesota Code of Judicial Conduct). When reviewing a judge’s decision not to disqualify himself or herself, an appellate court objectively examines whether the judge’s impartiality could reasonably be questioned by a reasonable examiner. *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011). The Minnesota Supreme Court has defined a “reasonable examiner” as “an objective, unbiased layperson with full knowledge of the facts and circumstances.” *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quotation omitted).

Appellant argues that because he previously admitted guilt before the judge, who rejected the plea agreement after reviewing a PSI containing inculpatory statements, a reasonable examiner could conclude that the judge’s impartiality in presiding over appellant’s bench trial could be questioned. A district court may postpone acceptance of a guilty plea by making a record of a factual basis for the plea and reserving its decision as to the appropriateness of the plea pending the results of a PSI. *State v. Thompson*, 754

N.W.2d 352, 356 (Minn. 2008). Nonetheless, “[i]f the defendant has made factual disclosures tending to disclose guilt of the offense charged, the judge should disqualify himself or herself from the trial of the case.” Minn. R. Crim. P. 15.04, adv. comm. cmt. (2006); *cf. State v. Pero*, 590 N.W.2d 319, 326–27 (Minn. 1999) (concluding that a district court judge did not abuse discretion by failing to recuse after presiding over a plea hearing and rejecting a defendant’s proposed plea agreement, when defendant retained right to jury trial).

We recognize that judicial disqualification is not required simply because a judge has considered and then rejected a guilty plea after reviewing a PSI. *Thompson*, 754 N.W.2d at 356. But we conclude that the particular circumstances in this case warrant a recusal. Here, the district court judge was the fact-finder in appellant’s bench trial after having elicited a factual basis for appellant’s plea that included appellant’s admission that he touched R.M. with sexual intent, an element contested at trial. *See* Minn. Stat. § 609.341, subd. 11(b) (Supp. 2009) (stating relevant definition of sexual contact).<sup>3</sup> Furthermore, the PSI contained appellant’s express admission to the intent element of the offense, as well as additional inculpatory statements. On this record, the judge’s comments at sentencing appear to reflect on the judge’s impartiality at trial.

Of course, a judge, in explaining a sentencing decision, may appropriately refer to a defendant’s admission of guilt. But in the context of these proceedings, the judge’s

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<sup>3</sup> We acknowledge and appreciate the fact that appellant was represented throughout the proceedings, and the record does not contain a request for the judge’s recusal. Nonetheless, our decision reflects the paramount importance of maintaining an unquestionably impartial tribunal. *See Schlienz*, 774 N.W.2d at 367 (stating that a defendant has a right to an impartial tribunal).

comments, although ambiguous, more likely referred to the judge's decision to find appellant guilty. Notably, the judge spoke in the past tense, and the finding of guilt was the decision that had already been made. Moreover, fairness dictates interpreting that ambiguity in favor of appellant. *See, e.g., State v. Cromey*, 348 N.W.2d 759, 760–61 (Minn. 1984) (concluding that, when it could not be discerned from ambiguous jury-verdict form whether defendant was convicted of felony murder or intentional murder, fairness dictated sentencing defendant for lesser offense).

Here, we conclude that, taken in the light most favorable to appellant, the judge's comments could have led "an objective, unbiased layperson with full knowledge of the facts and circumstances" to believe that the judge may have convicted appellant based on his previous inculpatory statements at the plea hearing or in the PSI, rather than solely on the evidence produced at trial. *Pratt*, 813 N.W.2d at 876 n.8 (quotation omitted); *see Dorsey*, 701 N.W.2d at 249–50 (stating that "[a]n impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court"). Therefore, we conclude that, measured by the applicable standard, the circumstances present here cast doubt on whether the judge acted in accordance with the presumption to "approach cases with a neutral and objective disposition." *Dorsey*, 701 N.W.2d at 248–49 (quotation omitted). And because the judge's failure to disqualify himself from presiding over appellant's trial violated rule 2.11, it constituted plain error. *See Ramey*, 721 N.W.2d at 302 (noting that clear violation of a standard of conduct amounts to plain error).

We also conclude that the error affected appellant's substantial right to have his case heard by an unquestionably impartial decision maker. *See Schlien*, 774 N.W.2d at 367 (stating that a defendant has a right to an impartial tribunal, "who does not appear to favor one side"). A presiding judge must "avoid the appearance of impropriety" by "act[ing] to assure that parties have no reason to think their case is not being fairly judged." *Pederson v. State*, 649 N.W.2d 161, 164–65 (Minn. 2002). Under the particular circumstances of this case, we conclude that the judge did not take appropriate steps to avoid the appearance of impropriety by handling the case in such a manner that an objective layperson would have no reason to believe that appellant's case was not being fairly judged.

Finally, we conclude that we must correct the error to ensure the fairness and integrity of the judicial proceedings. *Griller*, 583 N.W.2d at 740. "Justice requires that the judicial process be fair and that it appear to be fair; it necessarily follows that a presiding judge must be impartial and must appear to be impartial." *Pratt*, 813 N.W.2d at 878. Because the judge's actions and comments, taken as a whole, could have led an objective, unbiased layperson to question the judge's impartiality, reversal is required to maintain the integrity of the judicial system, and appellant is entitled to a new trial.

## II

When a criminal conviction is reversed because of trial error, we must nonetheless consider an argument that the evidence is legally insufficient because, if it is, a defendant's retrial would be barred by double jeopardy. U.S. Const. amend. V; Minn. Const. art. I, § 7; *State v. Cox*, 779 N.W.2d 844, 853 (Minn. 2010). Evidence is legally

insufficient if “the government’s case was so lacking that it should not have even been submitted to the [fact-finder].” *Id.* (quotation omitted). In deciding whether retrial is permissible under the Double Jeopardy Clause, a reviewing court considers all evidence admitted, “whether erroneously admitted or not.” *Id.*

The same standard of review of the sufficiency of the evidence applies to bench trials, in which the district court is the trier of fact, and to jury trials. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999). When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the verdict and assume that the fact-finder rejected any evidence inconsistent with the verdict. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). We will not disturb the verdict if the fact-finder, 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 argues that his conviction is not supported by the evidence because R.M.’s statements were inconsistent and unreliable. Appellant points out that R.M. initially did not want to discuss the incident, that one relative testified that her story appeared to change, and that, during the MCRC interview, she at first denied that sexual touching occurred. Appellant also notes that R.M. was unable to state the date of her birthday or what time she gets up in the morning.

But minor inconsistencies and conflicts in evidence do not necessarily render testimony false or compel a reversal. *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983). “[I]nconsistencies are a sign of human fallibility and do not prove testimony is

false, especially when the testimony is about a traumatic event.” *State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). The record shows that R.M. reported the incident to her father the same day it occurred, and, after she overcame an initial reluctance to speak to a stranger, she provided a consistent account of the abuse during the MCRC interview and the court proceedings. *See State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (holding that, despite inconsistencies, a child victim’s testimony was sufficient to support the verdict). And the fact-finder was entitled to conclude that R.M.’s apparent limited memory about unrelated events, such as her birthday, was not determinative of her ability to recall the incident of sexual contact. *See Pendleton*, 759 N.W.2d at 909 (stating that “[a]ssessing witness credibility and the weight given to witness testimony is exclusively the province of the [fact-finder]”). Therefore, sufficient evidence exists upon which a fact-finder could reasonably conclude that appellant had sexual contact with R.M. as defined by statute.

Because we reverse and remand for a new trial, we do not consider appellant’s additional arguments that the district court abused its discretion by denying his motion for a continuance to obtain substitute counsel and made erroneous evidentiary rulings.

**Reversed and remanded.**