STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0739

Kofi Yeboah, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 13, 2008
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 02092496

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Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Shumaker, Presiding Judge; Willis, Judge; and Poritsky, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SHUMAKER, Judge

Appellant challenges his conviction of criminal sexual conduct in the third degree and the district court's denial of his petition for postconviction relief. Appellant argues that the district court erred in admitting certain expert testimony and DNA evidence and that respondent committed prosecutorial misconduct in its closing argument. We affirm.

FACTS

Appellant Kofi Yeboah was charged with third-degree criminal sexual conduct for an incident occurring on October 29 and 30, 2002. The state alleged that Yeboah sexually penetrated the nineteen-year-old complainant, J.W., whom he knew or had reason to know was physically helpless. *See* Minn. Stat. § 609.344, subd. 1(d) (2002) (defining criminal sexual conduct in the third degree).

According to J.W., she met Yeboah at a dance club in October 2002. Later, they arranged a date. Sometime during the night of October 29, Yeboah picked up J.W. at her house and they drove to a dance club. Before they arrived at their destination, Yeboah told J.W. that he had to get something at his house. J.W. did not object and went into the house with him.

Shortly after they entered Yeboah's house, J.W. asked Yeboah to pour her a Coke, which he did in the kitchen while J.W. either sat in the living room or stood in the kitchen doorway. They then went upstairs to Yeboah's bedroom where they listened to music. J.W. sat on Yeboah's bed, drank all of her drink, and "maybe 10 minutes after," she "started feeling dizzy," "the room was spinning," and she "blacked out." The next thing

J.W. remembers is waking up the next morning next to Yeboah in his bed. Both she and Yeboah were naked. J.W. felt like she "couldn't move," and was "nauseated, real shaky."

Yeboah drove J.W. home during the morning of October 30. In the car, Yeboah asked J.W. if she "ever had anybody that big before." By the time J.W. arrived home, she concluded that she had been drugged and raped because she had no memory of what happened to her after she lost consciousness, her vagina "was sore," and she "was nauseated and dizzy."

When J.W. returned home she showered and used the bathroom, then fell asleep until her father woke her up for work. At work, J.W. told her friend and her boss that she had been raped. She eventually told her mother, who later that evening took J.W. to the hospital where a nurse examined her and a police officer interviewed her.

The state later charged Yeboah with third-degree criminal sexual conduct.

At the jury trial, Yeboah asserted that he and J.W. had consensual sex and denied administering any "date-rape" drug to facilitate their sexual encounter. Yeboah attacked J.W.'s credibility by emphasizing her difficulty on the stand answering questions regarding times, dates, and conversations. J.W. countered with testimony that she suffers from Attention Deficit Hyperactivity Disorder (ADHD), which affects her memory.

Although J.W.'s toxicology tests did not reveal any controlled substances, both the bureau of criminal apprehension (BCA) chemist and the expert on drug-facilitated sexual assault testified that, because of the speed at which date-rape drugs exit a person's system, a negative test result does not necessarily mean that no drug was ingested. The

nurse who examined J.W. testified that she observed new tears at the base of J.W.'s vagina, an injury found "[i]n 70 percent of assault cases," and abrasions and swelling of J.W.'s vaginal wall. The state also presented DNA evidence implicating Yeboah, and two prior inconsistent statements that Yeboah had made to police officers.

The jury found Yeboah guilty and the district court sentenced him to 48 months in prison. Yeboah later petitioned for postconviction relief, which the district court denied. This appeal followed.

D E C I S I O N

1. *Expert testimony*

Yeboah contends that the district court erred in admitting expert testimony on drug-facilitated sexual assault. A district court has broad discretion to admit expert testimony. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). "A reviewing court will not reverse a trial court's determination unless there is an apparent error." *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984).

Dr. Stephen Smith, an emergency-room physician, testified as an expert on the effects of Gamma Hydroxybutyrate (GHB) and related substances used in drug-facilitated sexual assaults. Dr. Smith explained the hallmarks of drug-facilitated sexual assault:

> [S]urreptitious dosing is common. Frequently the victim describes having symptoms before becoming unconscious . . . [which] may include dizziness, nausea or vomiting, . . . [o]r they may just feel sedated or sleepy. Alternatively, the victim may remember no symptoms at all.
>
> But in virtually all cases, the victim wakens later, usually some hours later, with no memory of what happened. He or she finds herself undressed or partially dressed. She may have no symptoms at all when she wakes up, or she may

> have symptoms such as nausea, confusion, or disorientation. And, again, they frequently describe that they're lying there and unable to move . . . their arms and legs.
>
> And another hallmark that is nearly universal in these cases is some degree of amnesia . . . [where t]hey can't remember anything about what happened in the last 5 to 7 hours . . . .

Dr. Smith briefly described the various drugs used to facilitate sexual assault, which "have very rapid onset," come in pill form, and "may be odorless or colorless or disguised by the taste and drink." Dr. Smith testified that "[u]sually the victim presents too late for the [toxicology] test to be positive." He explained that GHB is "always gone by 12 hours from either urine or blood" and can only be detected in "the first catched urine," and that other drugs "won't be picked up [by testing] unless you look for the metabolites."

Yeboah argues that Dr. Smith's testimony was irrelevant and unfairly prejudicial because no evidence was presented that J.W. ingested, or that Yeboah administered or possessed, a date-rape drug. We disagree. First, the state alleged that Yeboah put a date-rape drug in J.W.'s drink which rendered her unconscious, and J.W. exhibited symptoms of that usage. Second, the Minnesota Rules of Evidence provide that an expert may testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. "If the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject . . . , then the testimony does not meet the helpfulness

test." *Myers*, 359 N.W.2d at 609 (quoting *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980)).

Because Yeboah admitted having sex with J.W., the dispositive issues in this case were whether J.W. was physically helpless during the sexual contact, making the encounter therefore nonconsensual, and whether Yeboah knew or had reason to know that J.W. was physically helpless. Dr. Smith's expert testimony helped the jurors understand the symptoms and effects of date-rape drugs, which in turn gave the jurors a context for J.W.'s physical reaction, memory loss, and the absence of controlled substances in her system. Thus, Dr. Smith's testimony satisfies the helpfulness test under rule 702.

Yeboah argues that *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982), applies to exclude Dr. Smith's testimony.[1] In *Saldana*, a sexual-assault counselor testified as an expert in what the court labeled "rape trauma syndrome," explaining typical post-rape symptoms and behavior and opining that the complainant had in fact been raped. *Id*. at 229. The supreme court concluded that this testimony did not assist the jury and was unfairly prejudicial because the only issue to determine was whether sexual intercourse was consensual. *Id*. The victim "need not display the typical post-rape symptoms and behavior of rape victims to convince the jury that her view of the facts is the truth." *Id*.

[1] Yeboah also cites for support *State v. Sansotta*, 769 A.2d 1108 (N.J. Super. Ct. App. Div. 2001) (holding that officer did not have probable cause to seize appellant's water bottle, which was later found to contain GHB), and *State v. Mee Hui Kim*, 139 P.3d 354 (Wash. Ct. App. 2006) (concluding that no evidentiary basis existed to support appellant's argument that her boyfriend gave her a date-rape drug which caused her to drive the wrong way, resulting in a head-on collision). Although both cases reference date-rape drugs, neither involve the admission of expert testimony as challenged here.

The supreme court further concluded that the testimony was reversible error because the expert stated her opinion that a rape had in fact occurred. *Id*. at 231.

Saldana is distinguishable from this case because the pivotal issue before the jury here was whether J.W. was physically helpless and, therefore, could not consent to sexual contact. J.W. testified that she felt dizzy after drinking the Coke, lost consciousness until the next morning, woke up naked in bed next to Yeboah and could not move her limbs, and felt vaginal pain. Dr. Smith's testimony helped explain J.W.'s experience, but left the final decision on the issue to the jury. The record shows that Dr. Smith was not permitted to opine whether J.W.'s reported symptoms were consistent with drug-facilitated sexual assault or whether Yeboah administered a date-rape drug.

We are guided by the supreme court's holding in *State v. Grecinger*, which upheld the admissibility of expert testimony on battered-woman syndrome, as long as it is

> introduced after the victim's credibility has been attacked by the defense, *see* Minn. R. Evid. 608(a), if it helps the jury understand the victim's inconsistent statements or delay in seeking prosecution of the batterer, *see* Minn. R. Evid. 702, and if the expert merely describes the syndrome and its characteristics and does not offer an opinion as to whether the victim suffers from it, thereby reducing the risk of unfair prejudice to the defendant, *see* Minn. R. Evid. 403.

569 N.W.2d 189, 197 (Minn. 1997). In this case, J.W.'s credibility was attacked on cross-examination when she had difficulty answering questions concerning certain details. Dr. Smith's testimony helped the jury understand J.W.'s inconsistent recall of events and several-hour-long memory loss. And Dr. Smith described drug-facilitated sexual assault without opining on the likelihood that J.W. actually was a victim of a date-

rape drug. The district court did not abuse its discretion in admitting this expert testimony.

2. *DNA evidence*

Yeboah next contends that the district court failed to require a sufficient chain of custody of the DNA evidence and failed to hold a *Frye-Mack* evidentiary hearing on the proposed Y-STR DNA evidence before admitting it at trial. Although we conclude that the DNA evidence is irrelevant to this case because Yeboah did not deny having sexual intercourse with J.W., we briefly address Yeboah's arguments.

a. *Chain of custody*

The purpose of the chain-of-custody rule, which requires that the proponent of the evidence "account for the whereabouts of physical evidence . . . from the time of its seizure to its offer at trial," is to show that "the evidence offered is the same as that seized" and that "it is in substantially the same condition." *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976). The Minnesota Rules of Evidence provide that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a). Foundation for admissibility, however, need not eliminate "[a]ll possibility of alteration, substitution, or change of condition." *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982). Rather, the district court views the evidence as a whole "most favorably to the proponent," and "determines [whether] the evidence is sufficient to support a finding by a reasonable juror that the matter in question is what its proponent claims." *Id.*

In this case, a lengthy voir dire examination held outside the jury's presence established that the nurse who prepared and sealed J.W.'s sexual assault kit gave the container to the Wright County Sheriff's Office, which mistakenly sent the container to the kit manufacturer instead of the BCA. The container eventually arrived at the BCA for testing, with a letter from the manufacturer that reported "[t]he kit arrived with the evidence seals broken."

Megan Ulland, the BCA forensic scientist who conducted the DNA analysis, testified that "[e]ach kit comes with the inner kit—not the mailing kit, but the sexual assault kit has the address of the manufacturer on it." She explained that

> the swabs are packaged into envelopes which are sealed. The envelopes are then put into the sexual assault evidence collection kit, which is a little box. That is typically sealed. If it's being mailed to us from an agency, it is often put into a mailing box or just an outer box that has our address preprinted onto it.

Ulland testified that J.W.'s kit was in an outer, main box that was sealed and did not appear to be tampered with. Ulland admitted that she did not know what happened to the box or the kit inside when it was at the manufacturer. Ulland examined the four white envelopes enclosed in the kit, explained that she opened these envelopes in a different place so as not to break the original seal, and confirmed that each original seal had not been tampered with. The nurse also examined each of the four white envelopes and confirmed that she had sealed and labeled each one and that each appeared intact and unaltered.

At the conclusion of this testimony, the district court concluded that "something happened with the seal on the box," but was "satisfied there has not been any tampering with" the envelopes inside the box. On this record it appears that the critical evidence was unaltered, as the district court found. Although Yeboah argues that no person has accounted for who, when, why, and how long the seals were broken on the box, he has not presented any evidence that the critical envelopes inside the box were tampered with or otherwise affected. *See Berendes v. Comm'r of Pub. Safety*, 382 N.W.2d 888, 891 (Minn. App. 1986) (concluding that it was reasonably probable that no tampering occurred even though "there was no evidence as to who transported the sample," because seals on the evidence "were intact at the time the criminal laboratory analyst received the sample by mail"). The district court did not abuse its discretion in admitting this DNA evidence.

b. *Y-STR DNA evidence*

Ulland also testified regarding the BCA's use of STR (short tandem repeats) testing. Ulland explained that because a weak DNA type was detected in J.W.'s sample, she conducted Y-STR testing to identify any male DNA, which revealed that "the Y chromosomal DNA profile obtained from . . . [J.W.'s sample] matches the Y chromosomal DNA profile obtained from the known sample of Mr. Yeboah," and that this particular profile "was observed once in a population of 1,676 people." Upon Yeboah's repeated objections to this testimony, the district court conducted extensive foundational examinations in the jury's presence. Yeboah argues on appeal that he was entitled to a *Frye-Mack* evidentiary hearing on the proposed Y-STR DNA evidence

before it was admitted at trial, because such testing is novel and not generally accepted or scientifically reliable.

Before scientific evidence may be admitted in Minnesota courts, a two-pronged standard known as *Frye-Mack* must be satisfied. *State v. Roman Nose*, 649 N.W.2d 815, 818 (Minn. 2002). The district court must determine "first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls." *Id*. at 819. Under the general-acceptance prong of this standard, the district court "defers to the scientific community's assessment of a given technique," which "ensures that the persons [namely, scientists] most qualified to assess scientific validity of a technique have the determinative voice." *State v. Traylor*, 656 N.W.2d 885, 891 (Minn. 2003).

The Minnesota Supreme Court has previously held DNA testing and PCR-STR (polymerase chain reaction-short tandem repeat) DNA testing to be generally accepted scientific techniques that no longer require a *Frye-Mack* hearing under the first prong. *State v. Jobe*, 486 N.W.2d 407, 419-20 (Minn. 1992) (DNA testing); *Traylor*, 656 N.W.2d at 893 (PCR-STR testing). The Y-STR testing method used here, however, has not been considered by the supreme court. Because the district court did not hold an evidentiary hearing, this record is limited to Ulland's testimony, which cannot speak to whether other experts in the field share her view that Y-STR testing is generally accepted or scientifically reliable. Moreover, Ulland testified that the BCA has applied Y-STR testing procedures to open cases only since June 2003, and contrary to the state's

argument on appeal, we do not find Ulland's testimony regarding the similarities between PCR- and Y-STR techniques clear or persuasive.

"Without an evidentiary hearing on the views of the relevant scientific community, trial and appellate judges become scientists, an approach we [have] clearly rejected." *Roman Nose*, 649 N.W.2d at 819 n.3. The district court took on the role of scientist when it declined to hold an evidentiary hearing prior to admitting Ulland's testimony, when it concluded that "there was nothing new and novel in the testing procedures" based only on Ulland's testimony and counsel's arguments, and when it permitted Ulland's testimony to continue in the jury's presence. Thus, the district court erred in admitting the Y-STR DNA evidence without first holding an evidentiary hearing outside the presence of the jury.

Although we conclude that the district court erred, the error was harmless because the Y-STR evidence was irrelevant to the verdict finding Yeboah guilty of third-degree criminal sexual conduct. When scientific evidence is erroneously admitted, an appellant is entitled to a new trial if he suffered prejudice; that is, unless the jury's verdict is "surely unattributable" to the error. *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996). In this case, Yeboah previously admitted to sexual intercourse with J.W. and asserted at trial that it was consensual. DNA evidence indicating that Yeboah indeed had sex with J.W. did not help the jury determine whether J.W. consented to sexual intercourse and whether Yeboah knew or had reason to know she was physically helpless during the encounter. The jury's verdict is not attributable to the Y-STR DNA evidence, and Yeboah suffered no prejudice because of its admission.

3. *ADHD testimony*

Yeboah next contends that the state failed to timely disclose its "intention to have [J.W.] cite her ADHD to explain her questionable judgment and memory." The state counters that it had disclosed its "intent to explore the victim's preexisting mental condition" in a 50-page document provided to Yeboah before trial, and that it was not obligated to "disclose a detailed outline of its trial strategy." Yeboah did not object before trial to J.W.'s testimony,[2] and does not dispute on appeal that he received the state's document six days before trial, or that it revealed J.W.'s ADHD diagnosis. We conclude that this evidence is not of the type that the state must disclose, and in any event, that Yeboah had sufficient time before trial to prepare his case.

Under the Minnesota Rules of Criminal Procedure, the state must disclose to the defense "any relevant written or recorded statements . . . [and] the substance of any oral statements which relate to the case." Minn. R. Crim. P. 9.01, subd. 1(2). The state is not required to disclose work product, which constitutes "legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the" prosecution. *Id.*, subd. 3(1).

Yeboah asserts that the state "undoubtedly" developed its "line of questioning … as a result of speaking on the subject of ADHD with [J.W.] before trial" and that the state should have reduced J.W.'s statements to writing. Yeboah provides no support for this assertion. Rule 9.01 requires only that the state disclose the substance of any related oral

[2] The only on-the-record discussion regarding J.W.'s ADHD occurred pre-trial while the parties and the district court were debating a separate issue.

statements. *Id*., subd. 1(2); *see also State v. Colbert*, 716 N.W.2d 647, 655 (Minn. 2006) ("The rules do not require that disclosure take any particular form."). Clearly "[a] prosecutor cannot circumvent the requirement of open-file discovery by not taking notes or by not putting things in the file that belong in the file." *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992). But there is no indication on this record that the state withheld evidence or attempted to subvert rule 9.01. The state permissibly used J.W.'s known medical condition to explain her memory lapses and infer vulnerability.

Even if there was a discovery violation, relief is typically granted only if the defendant was prejudiced. *Id.* Yeboah had six days from the time he learned of the state's intention to present ADHD evidence to prepare his cross-examination or to request a continuance of the trial. He made no such request. And Yeboah fails to show how earlier disclosure would have made any difference to his case. He was not prejudiced by the state's conduct, and the district court did not err in admitting the ADHD evidence.

4. *Closing argument*

Yeboah next contends that the state committed prosecutorial misconduct in its closing argument, even though he did not object to it at trial. On appeal, an unobjected-to error can be reviewed only if there is an error, that is plain, and that affects substantial rights. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). The non-objecting defendant has the burden to show that a plain error occurred. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "Usually this is shown if the error contravenes case law, a rule, or a standard of conduct." *Id.* If the defendant satisfies his burden, the state must then demonstrate that "there is no reasonable likelihood that the absence of the

misconduct in question would have had a significant effect on the verdict of the jury." *Id.* (quotation omitted). If the plain-error test is satisfied, this court "will correct the error only if the fairness, integrity, or public reputation of the judicial proceedings is seriously affected." *State v. Dobbins*, 725 N.W.2d 492, 508 (Minn. 2006) (quotation omitted).

Yeboah first asserts that the state improperly argued that Yeboah gave J.W. a date-rape drug when no evidence established the drug's presence. Yeboah cites *State v. Streeter*, 377 N.W.2d 498 (Minn. App. 1985), for the proposition that a prosecutor may not base her argument on facts not in evidence. But *Streeter* is distinguishable because there, the prosecutor erred by telling the jury that the state possessed certain drivers' licenses, when the officer testified that he did not have the licenses. 377 N.W.2d at 502. In this case, the state did not misstate the evidence, but rather permissibly argued its theory of the case. The state presented evidence from which the jury could reasonably infer, without speculating, that J.W. ingested a drug that made her physically helpless. Yeboah has not carried his burden to show that the state committed plain error.

Yeboah next asserts that the state misstated the burden of proof. "Misstatements of the burden of proof are improper and constitute prosecutorial misconduct." *State v. Bailey*, 677 N.W.2d 380, 402 (Minn. 2004). The state argued that

> [t]he defendant has the most to lose here and the greatest reason to avoid telling the truth. If you believe him instead of all the other evidence, he's not guilty. If you don't believe him, because he gave you no reason to believe him when he testified this morning, and you look at all of the evidence in this case, it points to his guilt and you must find him guilty.

These statements, while not complete or clear expositions of the law of burden of proof, do not constitute an improper misstatement of the burden, and were nonetheless remedied by the district court's subsequent jury instruction on the correct burden and standard, namely, proof beyond a reasonable doubt. *See Bailey*, 677 N.W.2d at 403 (concluding that the prosecutor's confusing statements did not constitute an improper misstatement of the burden of proof, and regardless, "would be superceded by the court's jury instructions").

Yeboah last asserts that the state committed misconduct by calling Yeboah a liar. While the state repeatedly attacked Yeboah's testimony, it did so within the context of two previous inconsistent statements introduced at trial:

> The defendant is free to make up any story he wants, and he did on three different occasions. [In two statements to the police, a]nd this morning in this courtroom when he testified. You heard the variations of his three different stories.
>
> . . . .
>
> The defendant changed his story at least three times since the incident. He's had the benefit of listening to all of the testimony in this case and fashioning his testimony accordingly.
>
> . . . .
>
> There is an important question here, and that question is did the defendant tell you the truth or did he tailor his testimony to what he knew the State could prove . . . .
>
> . . . .
>
> But as you saw here a couple of hours ago, he ran into trouble mixing up his lies, didn't he?

. . . .

> The defendant, in his efforts to shade the truth—no; in fact, to outright lie to you . . . gets his story to you wrong . . . .

"[T]he prosecution cannot use a defendant's exercise of his right of confrontation to impeach the credibility of his testimony, at least in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Mayhorn*, 720 N.W.2d at 790 (quotation omitted) (concluding that the prosecutor's argument that the defendant had the opportunity to tailor his testimony was misconduct because it had no basis in the evidence). Here, the state's remarks were proper argument on credibility because they were based on the evidence that Yeboah gave three different and contradictory versions of events, inviting the inference that he either lied to the police or perjured himself at trial. We conclude that this was a proper credibility argument and does not constitute plain error.

5. *Other issues*

Yeboah raises a number of pro se issues. These arguments were not raised in or considered by the district court, and we decline to review them on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts "generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure).

Affirmed.