STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0403

State of Minnesota,
Respondent,

vs.

Bryant Alan Rhodes,
Appellant.

Filed November 25, 2008
Affirmed in part and remanded
Kalitowski, Judge

Dakota County District Court
File No. K2-05-1327

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Cheri A. Townsend, Assistant County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, MN 55033 (for respondent)

Barry V. Voss, Barry V. Voss, P.A., 527 Marquette Avenue South, Suite 1050, Minneapolis, MN 55402 (for appellant)

Considered and decided by Hudson, Presiding Judge; Toussaint, Chief Judge; and

Kalitowski, Judge.

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

KALITOWSKI, Judge

Appellant Bryant Alan Rhodes challenges his convictions for criminal sexual conduct in the first and third degrees, second-degree criminal sexual conduct, and false imprisonment, and the district court's resentencing for his conviction of second-degree criminal sexual conduct. Appellant contends that (1) the district court erred when it resentenced appellant to 90 months' imprisonment for second-degree criminal sexual conduct; (2) the evidence was insufficient to support the verdict; (3) the prosecutor committed prejudicial misconduct by eliciting rape trauma syndrome evidence during trial; and (4) the prosecutor committed prejudicial misconduct by misstating the burden of proof during final arguments. We affirm appellant's convictions and sentence for second-degree criminal sexual conduct, but remand to vacate appellant's sentence for attempted criminal sexual conduct in the first degree.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion in resentencing appellant from his initial sentence of 72 months for his conviction of attempted first-degree criminal sexual conduct to a sentence of 90 months for his conviction of second-degree criminal sexual conduct. We disagree.

This court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the

district court. Minn. Stat. § 244.11, subd. 2(b) (2004). "Statutory construction and interpretation of the sentencing guidelines are subject to de novo review by this court." *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

Where a defendant's conduct constitutes more than one offense, he may be sentenced on only one offense and a conviction for any one of them is a bar to prosecution of any other of them. Minn. Stat. § 609.035 (2004). Section 609.035 contemplates that a defendant will be punished for the "most serious" of the offenses arising out of a single behavioral incident. *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006). To determine which offense is the most serious, a reviewing court should look to the length of the sentences imposed by the district court, leaving the longest sentence in place. *Id.* For a conviction of second-degree criminal sexual conduct, the "court shall presume that an executed sentence of 90 months must be imposed on an offender" convicted of violating subdivision 1(e). Minn. Stat. § 609.343, subd. 2 (2004).

Appellant argues that the district court erred in concluding that second-degree criminal sexual conduct is the more serious offense for sentencing purposes. We disagree. The district court initially sentenced appellant to 72 months' imprisonment for attempted first-degree criminal sexual conduct. Subsequently, it resentenced appellant to 90 months' imprisonment for criminal sexual conduct in the second degree. We reject appellant's argument that attempted first-degree criminal sexual conduct is the more serious offense. Pursuant to *Kebaso*, the more serious offense is criminal sexual conduct in the second degree because it provides for the longer sentence. Additionally, appellant's second-degree conviction is more serious because it is for a completed crime,

not an attempt. Therefore, we conclude that the district court did not err in resentencing appellant to the presumptive 90-month sentence.

Furthermore, regardless of which offense is considered more serious, the sentencing guidelines dictate a 90-month sentence. "When an offender is convicted of two or more offenses, and the most severe offense is a conviction for attempt . . . the presumptive sentence duration shall be the longer of (1) the duration for the attempt . . . conviction, or (2) the duration for the next more severe offense of conviction." Minn. Sent. Guidelines cmt. II.C.06. Consequently, even if appellant is correct that attempted first-degree criminal sexual conduct is the more serious offense, the presumptive duration of his sentence is 90 months.

Finally, appellant argues, and the state agrees, that the district court erred by not vacating the initial 72-month sentence for attempted first-degree criminal sexual conduct. Thus, we remand to the district court to vacate this sentence.

II.

Appellant argues that there was insufficient evidence to support the verdict. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v.*

Pieschke, 295 N.W.2d 580, 584 (Minn. 1980). 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of second-degree criminal sexual conduct. Criminal sexual conduct in the second degree includes sexual contact with another person by force or coercion that causes personal injury to that person. Minn. Stat. § 609.343, subd. 1(e)(i). Sexual contact includes any of the following acts committed without the complainant's consent:

> (i) the intentional touching by the actor of the complainant's intimate parts, or
> (ii) the touching by the complainant of the actor's . . . intimate parts . . . by coercion . . . , or
>
> . . . .
>
> (iv) in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts.

Minn. Stat. § 609.341, subd. 11(a) (2004).

Appellant argues that there was no sexual contact. In the alternative, appellant contends that if there was sexual contact, it was consensual. Thus, appellant claims the evidence was insufficient to sustain his conviction of criminal sexual conduct in the second degree. We disagree.

Here, the state's witnesses established sufficient evidence for the jury to find appellant guilty. The complainant testified that she met appellant while at a bar with a

friend. The three returned to the complainant's apartment and after some time, the complainant's friend left, leaving appellant and the complainant alone in her apartment. Appellant appeared to fall asleep and the complainant went to her room, closed the door, and lay down on top of the bedding wearing her clothes. Appellant entered the complainant's bedroom and lay next to her. The complainant told appellant he could not sleep there. Then, appellant moved on top of the complainant and said, "No more Mr. Nice Guy." The two struggled and appellant pinned the complainant to the bed. During the struggle the complainant realized appellant was naked below the waist. The complainant testified that appellant removed her pants and underwear while holding her down. The complainant faked an asthma attack and appellant escorted her to the kitchen for medication at which time she fled into her bathroom and locked the door. Appellant unsuccessfully attempted to enter the bathroom. A short time later, appellant left the complainant's apartment. The complainant then wrapped a towel around herself, left her apartment, and knocked on several neighbors' doors until one answered and let her inside. Once inside, complainant called 911 and two officers were dispatched to answer the call.

At trial, one of the responding officers testified that the complainant told him she had grabbed appellant in the groin and that appellant was not wearing pants at the time. In addition, at trial appellant admitted touching the complainant's breast but claimed it was consensual. Appellant also admitted he had his pants off and that his penis was exposed, but said the complainant did not touch his penis. In addition, the state presented several photographs at trial showing bruises and other injuries to the complainant's body.

We conclude that these facts are sufficient for the jury to find that sexual contact occurred. The complainant's testimony that appellant removed her pants and underwear satisfies the definition of sexual contact of touching clothing covering the immediate area of the intimate parts. *See* Minn. Stat. § 609.341, subd. 11(a). Also, appellant admits touching the complainant's breast. Finally, the jury could reasonably conclude that contact with the complainant's intimate parts occurred when appellant, naked from the waist down, lay on top of her while removing her pants and underwear. We conclude that the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that appellant was guilty of second-degree criminal sexual conduct.

A reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *Moore*, 438 N.W.2d at 108. And the jury has the exclusive role of resolving conflicting testimony because the jury has the opportunity to observe the demeanor of the witnesses and weigh their credibility. *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984). Consequently, this court must assume that the jury did not accept appellant's statement that the contact was consensual and that the jury resolved conflicting testimony in favor of the state. Therefore, appellant's argument that the contact was consensual fails.

Appellant also challenges his convictions of attempted first- and third-degree criminal sexual conduct and false imprisonment. But because we conclude that the evidence supports the verdict of appellant's conviction for second-degree criminal sexual

conduct and because we conclude that the district court properly sentenced appellant for this conviction, we need not reach these arguments.

III.

Appellant argues that the prosecutor committed prejudicial misconduct by eliciting rape trauma syndrome evidence during trial. We disagree.

If a defendant fails to object to the prosecutorial misconduct, a new trial will be granted only if the misconduct is plain error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006). The plain error doctrine has three components: (1) error, (2) that is plain, and (3) that affects substantial rights. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006) (citation omitted). An error is plain if it is clear or obvious under current law. *Id.* Usually that is shown if the error contravenes caselaw, a rule, or standard of conduct. *Ramey*, 721 N.W.2d at 302. A prosecutor's misconduct affects substantial rights if there is a reasonable likelihood that it had a significant effect on the jury's verdict. *Id.*

At trial, appellant did not object to the testimony he now claims constitutes reversible misconduct. Appellant argues the admission was plain error under *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982). Appellant argues that the officer's testimony explaining that in his experience, he has observed that victims of traumatic events do not always describe the traumatic incident the same way every time constituted prohibited rape trauma syndrome evidence. We disagree.

Saldana is distinguishable. Unlike the police officer who testified here, in *Saldana*, the objectionable testimony came from the state's expert witness who was a counselor for sexual assault victims. 324 N.W.2d at 229; *see State v. McGee*, 324

N.W.2d 232, 233 (Minn. 1982) (holding doctor's opinion that complainant's behavior consistent with rape trauma syndrome inadmissible). And in *Saldana*, the expert's testimony explained the typical stages that a rape victim goes through before rendering her opinion about the complainant. 324 N.W.2d at 229. Here, the officer did not discuss the typical stages that a rape victim goes through. In *Saldana*, the supreme court determined that it was error for the prosecutor to ask the expert, "do you have an opinion . . . , as to whether or not this incident actually took place?" *Id.* at 230 n.4. Here, the prosecutor asked whether the officer was surprised that the complainant's relation of the details of the incident exhibited some differences on the three occasions he spoke with her. Defense counsel objected to this question on foundation grounds, thus inviting the prosecutor to lay foundation for the officer's response to the question.

In sum, the *Saldana* court ruled it unfairly prejudicial to permit an expert to suggest that because the complainant exhibited some of the symptoms of rape trauma syndrome, the complainant was therefore raped. 324 N.W.2d at 229-31. Here, when looking at the context in which the question occurred, the record shows that the purpose of the questioning of the officer was to bolster the complainant's credibility after it had been attacked on cross-examination. *See State v. Dunkel*, 466 N.W.2d 425, 429 (Minn. App. 1991) (concluding deputy's opinion that it was not unusual for victims of sexual attack to delay reporting the crime did not constitute rape trauma syndrome evidence). We conclude that the prosecutor did not elicit rape trauma syndrome evidence and that there is no error constituting prosecutorial misconduct.

IV.

Appellant argues that the prosecutor committed prejudicial misconduct by misstating the burden of proof during final arguments by analogizing reasonable doubt to the sort of prudence one has when purchasing a house. We disagree.

If a defendant fails to object to alleged prosecutorial misconduct, a new trial will be granted only if the misconduct is plain error. *Washington*, 725 N.W.2d at 133. Here, because appellant did not object to the statement at closing argument the plain error standard applies.

Once an appellant demonstrates that the prosecutor's conduct constitutes plain error, the burden shifts to the state to demonstrate that the misconduct did not affect substantial rights. *Ramey*, 721 N.W.2d at 302. A prosecutor's misconduct affects substantial rights if there is a reasonable likelihood that it had a significant effect on the jury's verdict. *Id.* Misstatements of the burden of proof are "highly improper" and, if demonstrated, constitute prosecutorial misconduct. *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985).

"When reviewing claims of prosecutorial misconduct during closing argument, we consider the argument as a whole, rather than focusing on particular phrases or remarks that may be taken out of context or given undue prominence." *State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005). Furthermore, proper instructions by the district court tend to mitigate any improper statements of the burden of proof. *See State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001) (stating prosecutorial error often nonprejudicial and harmless where district court clearly and thoroughly instructed

regarding burden of proof); *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) (stating prosecutorial error is curable by corrective instructions); *Coleman*, 373 N.W.2d at 782-83 (holding district court's proper instruction and strength of the state's case mitigated any improper remark).

Here, the house-purchase analogy constituted a single statement by the prosecutor. Moreover, defense counsel described the burden of proof as that taken in one's most prudent affairs and analogized it to decisions such as getting married or divorced, taking a loved one off of life support, or participating in an experimental medical procedure. And the record indicates that the district court properly instructed the jury on reasonable doubt and the burden of proof. The court also instructed the jury to ignore any attorney's statement of the law that differs from its instructions. On this record we conclude that the prosecutor's statement was neither plain error nor was it prejudicial to appellant.

Affirmed in part and remanded for resentencing.