STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1516

State of Minnesota,
Respondent,

vs.

Christopher Dale Cromwell,
Appellant.

Filed November 18, 2008
Affirmed
Worke, Judge

Jackson County District Court
File No. CR-06-198

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Robert O'Connor, Jackson County Attorney, Jackson County Courthouse, 405 Fourth Street, Jackson, MN 56143 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

WORKE, Judge

On appeal from convictions of first- and second-degree criminal sexual conduct, appellant argues that (1) the district court's failure to redact portions of appellant's statement to police was plain error affecting his substantial rights; (2) the district court's failure to instruct the jury not to use evidence pertaining to the other victim when deciding his guilt of the offenses of which he was convicted was plain error affecting his substantial rights; and (3) the prosecutor committed misconduct during closing argument constituting plain error affecting his substantial rights. We affirm.

FACTS

Appellant Christopher Dale Cromwell was charged with two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct for sexually abusing three-year-old A.C.M.D. and six-year-old B.M.P. The girls were examined at a hospital and the allegations were reported to the police department. During his interview with police, appellant admitted touching B.M.P.'s vaginal area and stated that he fondled her "relatively quickly" before he realized where his hand was. Appellant also stated that "it might have happened" when he was tickling B.M.P. and lifting her off the ground. Appellant said that he stopped when B.M.P. told him to stop and he apologized, that it lasted approximately 10 to 15 seconds, and that he touched B.M.P. before touching A.C.M.D. Appellant gave several different explanations for what happened when he fondled A.C.M.D.'s vaginal area—it occurred when she was crawling on him when he was sitting on the couch and it occurred when he picked her up.

B.M.P. stated during her CornerHouse interview that appellant touched her private area with two fingers, that appellant put his fingers inside her and "wiggled them inside there." She said that appellant's fingers hurt and made her feel uncomfortable and unsafe. She said that she asked appellant to stop twice, and he stopped the second time she asked. A.C.M.D. cried during her interview when she was asked if appellant had touched her inappropriately. Both girls used dolls to show how appellant touched them. Following a competency hearing, the district court determined that B.M.P. was competent to testify, whereas A.C.M.D. was not competent to testify.

Before trial, the district court granted appellant's motion to exclude the recording of the interview of A.C.M.D. and any statements she made to her mother. The court also granted the state's motion to allow certain hearsay statements B.M.P. made to her mother and to allow the recording of B.M.P.'s interview. Appellant did not object when the prosecutor informed the court that the recording of appellant's statement to the police would be played for the jury. After the state rested, appellant moved to dismiss the two counts pertaining to A.C.M.D. and the first-degree criminal-sexual-conduct charge pertaining to B.M.P. The district court dismissed the two charges pertaining to A.C.M.D., but denied the motion to dismiss the first-degree charge with respect to B.M.P. The jury found appellant guilty of first- and second-degree criminal sexual conduct with respect to B.M.P. This appeal follows.

D E C I S I O N

Failure to Redact Appellant's Statement

Appellant argues that the district court committed plain error affecting his substantial rights by failing to redact portions of his statement to the police regarding A.C.M.D. Prior to trial, the district court ruled that A.C.M.D. was not competent to testify, and A.C.M.D.'s statements made to her mother and the recording of her CornerHouse interview were not admissible. Appellant concedes that he did not request a redaction of the recording and did not raise any objections at trial.

When a defendant fails to object to the admission of evidence, our review is under the plain-error standard. Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). "If those three prongs are met, we may correct the error only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

"The relevant statements made during a police interview may be admissible, unless precluded by the constitution, statute or the rules of evidence." *State v. Tovar*, 605 N.W.2d 717, 725 (Minn. 2000); *see also* Minn. R. Evid. 402. The supreme court has held that "*assuming a proper objection*, immaterial and irrelevant portions of an extrajudicial interrogation of a defendant should generally not be received in evidence." *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979) (emphasis added). Appellant did not

object when the prosecutor informed the court prior to trial that appellant's statement to the police would be played for the jury. As previously stated, appellant also did not request a redaction of any portion of the recording.

Appellant's argument is based on the claim that the officer's mention of A.C.M.D.'s allegations was inadmissible hearsay. Hearsay is an out-of-court statement offered in evidence for the truth of the matter asserted. Minn. R. Evid. 801(c). During the interview, the officer asked appellant if he had spoken to his mother the night before about the allegations made by B.M.P. and A.C.M.D. The officer's statements on the tape were not offered to prove the truth of the matter asserted but were merely to give context to appellant's responses and admissions on the tape. *See Tovar*, 605 N.W.2d at 726 (holding no plain error because statements made by the police were not hearsay because they were not offered for their truth, but rather to give context to the defendant's responses and admissions on the tape.)

Appellant has failed to meet the first prong of the *Griller* test—that there was error. Even if the district court's failure to redact portions of the recorded statement was in error, appellant has failed to show that the error was plain. "An error is plain if it was clear or obvious." *Strommen*, 648 N.W.2d at 688. Because each prong of the *Griller* test has to be met or the claim fails, we need not address the third prong of the test. *See id.* at 686.

Jury Instructions

Appellant next argues that the district court's failure to instruct the jury not to consider the evidence pertaining to A.C.M.D. when deciding his guilt of the offenses against B.M.P. was plain error affecting his substantial rights. The jury was informed that they would not be considering the charges pertaining to A.C.M.D. during the prosecutor's closing argument. Following closing arguments, the district court instructed the jury on the charges pertaining only to B.M.P. Appellant concedes that he did not request such an instruction and did not object to the jury instructions.

District courts are allowed "considerable latitude in selecting the language of jury instructions." *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "Ordinarily it is not plain error for the [district] court to fail to *sua sponte* give an instruction." *State v. Vance*, 714 N.W.2d 428, 442-43 (Minn. 2006). In the absence of a request for a cautionary instruction, district courts are hesitant to sua sponte give an instruction because an instruction may draw additional attention to potentially prejudicial issues. *See, e.g., McCollum v. State*, 640 N.W.2d 610, 617 (Minn. 2002) (stating that a no-adverse inference instruction regarding a defendant's decision not to testify draws attention to defendant's silence and should not be given absent a request). "Moreover, a defendant may choose not to request an instruction for strategic reasons." *Vance*, 714 N.W.2d at 443.

Appellant first argues that the district court should have instructed the jury to consider the charges separately. District courts are required to instruct the jury to consider each of the charges separately. *See State v. Kates*, 610 N.W.2d 629, 631 (Minn.

2000) (holding "for trial of all offenses joined under Minn. R. Crim. P. 17.03, subd. 1, the jury must be instructed to consider each of the charges separately"). The jury instruction established as a result of *Kates* states:

> In this case, the defendant has been charged with multiple offenses. You should consider each offense, and the evidence pertaining to it, separately. The fact that you may find defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.

10 *Minnesota Practice*, CRIMJIG 3.23 (2006). Appellant's argument fails for several reasons. First, appellant did not request this instruction, and the fact that he did not request it may have been strategic on his part. *Vance*, 714 N.W.2d at 443. Therefore, the district court should not have given the instruction sua sponte. Second, although the cases were joined for trial, the district court dismissed the charges pertaining to A.C.M.D. following the state's case leaving only the charges pertaining to B.M.P. for the jury's consideration. Even though the cases were joined for trial, they were essentially severed by the district court's actions. To instruct the jury at that point that it had to consider the charges pertaining to B.M.P. separately would have only confused the jury because the second-degree charge was a lesser-included offense of the first-degree charge, and the evidence did not differentiate between the two charges.

Appellant also argues that the district court should have instructed the jury to disregard the evidence involving A.C.M.D. after it dismissed those charges. Appellant cites *State v. Wakefield* in support of his argument that once an individual has been

acquitted of a charge, evidence of that offense is not admissible. 278 N.W.2d 307 (Minn. 1979). The supreme court has held that

> under *Wakefield*, the acquittal must have occurred before the trial at which the evidence is being sought to be introduced. If there has been no acquittal before the state attempts to introduce evidence related to a separate offense at the trial of another offense, *Wakefield* is not a bar to its admission. Nor does [this court's] decision in *Kates* bar its admission.

State v. Ross, 732 N.W.2d 274, 281 (Minn. 2007). Because the acquittal occurred after the trial began, appellant's argument fails. At the time the evidence was admitted, there was no objection by appellant and no valid basis for an objection. Appellant has also failed to show that the evidence was retroactively inadmissible. *See Ross*, 732 N.W.2d at 281, n.6 (stating that "evidence of conduct that has been properly admitted as *Spreigl* evidence at trial would become retroactively inadmissible if a person was later tried and acquitted for the conduct that had given rise to the *Spreigl* evidence"). Appellant has failed to show that the district court's failure to sua sponte instruct the jury not to consider the evidence pertaining to A.C.M.D. when deciding his guilt of the offense against B.M.P. was plain error affecting his substantial rights.

Prosecutorial Misconduct

Finally, appellant argues that the prosecutor's statement during closing argument informing the jury that they would not be considering charges pertaining to A.C.M.D. was plain error affecting his substantial rights. The prosecutor stated during his closing argument, "I would note you are not seeing any charges for [A.C.M.D.]. [A.C.M.D.] was too young to testify and we are not going to do anything about [A.C.M.D.]. You are

aware of what was going on here too because that was involved." Appellant did not object to the prosecutor's remarks at trial.

"If the defendant failed to object to the misconduct at trial, he forfeits the right to have the issue considered on appeal, but if the error is sufficient, this court may review." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). Only when the misconduct is unduly prejudicial will relief be granted absent an objection at trial or request for a cautionary instruction. *State v. Whittaker*, 568 N.W.2d 440, 450 (Minn. 1997). When the defendant fails to object, prosecutorial misconduct is reviewed under the plain-error standard. *See Griller*, 583 N.W.2d at 740. The supreme court has also expressed concern regarding defense attorneys failing to object at trial to secure reversible error. *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (cautioning defense counsel that failure to object to improper closing argument may waive a claim of prosecutorial misconduct on appeal). In reviewing a prosecutor's statements, this court looks at the argument "as a whole, rather than just selective phrases or remarks that may be taken out of context or given undue prominence." *State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993).

Based on the record, there was ample evidence in this case to convict appellant of the charges pertaining to B.M.P. Even if the brief comments made during the prosecutor's closing argument rose to the level of misconduct, it is unlikely that the comments had a substantial impact on the jury. *See, e.g.*, *Powers*, 654 N.W.2d at 679 (noting that the improper statement in closing argument was only two sentences in an argument that amounted to over 20 transcribed pages). Here, the statement is only several sentences in a closing argument that consists of over 9 transcribed pages. Taken

in the context of the closing argument considered as a whole, the prosecutor's remarks about A.C.M.D. did not prejudice appellant's right to a fair trial.

Affirmed.