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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1836

State of Minnesota,
Respondent,

vs.

Jeffrey A. Bauer,
Appellant.

Filed January 20, 2009
Affirmed
Schellhas, Judge

Anoka County District Court
File No. K0-06-8015

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, 2100 Third Avenue, 7th Floor, Anoka, MN 55303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions and consecutive sentences on two counts of first-degree criminal sexual conduct, arguing that (1) the district court abused its discretion when it refused to remove a juror for cause, (2) the district court abused its discretion when it excluded testimony about the victim's purported prior false allegations of sexual abuse, (3) the prosecutor committed misconduct, and (4) the district court abused its discretion when it imposed consecutive sentences on appellant's convictions. We affirm.

FACTS

Appellant Jeffrey Bauer was charged with four counts of first-degree criminal sexual conduct. In counts one and two, respondent State of Minnesota alleged that in December 2004 and March 2005, respectively, appellant violated Minn. Stat. § 609.342, subd. 1(a) (2006), which prohibits sexual penetration with a person under the age of 13 if the actor is more than 36 months older than the complainant. In counts three and four, respondent alleged that on September 1, 2005 and November 23, 2005, respectively, appellant violated Minn. Stat. § 649.342, subd. 1(b) (2006), which prohibits sexual penetration with a person at least 13 but less than 16 years of age when the actor is more than 48 months older than the complainant and is in a position of authority over the complainant. A.E.B., the victim in each of the four counts, was born in July 1992.

A.E.B. testified extensively. Appellant had been A.E.B's neighbor and lived with K.O., A.E.B.'s friend. A.E.B. spent a great deal of time in appellant's home. A.E.B.

described four specific instances of sexual abuse and penetration by appellant. A.E.B. testified that on December 10, 2004, she sat on appellant's lap while watching a movie, appellant rubbed the zipper of her jeans and her vaginal area with his thumb, and touched her vaginal area underneath her underwear with his fingers. In February or March 2005, appellant had intercourse with A.E.B. in his home office. During Labor Day weekend 2005, appellant had intercourse multiple times with appellant. In anticipation of the weekend, A.E.B. bought "a lingerie thingie," which was admitted into evidence as Exhibit 2. Appellant had intercourse twice with A.E.B. while she was wearing the lingerie. During the second act, appellant ejaculated on A.E.B.'s stomach and his semen touched the lingerie. Appellant's DNA matched DNA found on A.E.B.'s lingerie. The day after Thanksgiving 2005, appellant again had intercourse with A.E.B., after giving her alcohol, which he had previously done on one other occasion. A.E.B. testified that appellant sometimes had problems getting an erection, that his penis would "never get hard," and that he told her that he was taking Cialis and had Viagra. A.E.B. and her mother also testified that A.E.B. and appellant had telephone conversations.

Appellant testified. When asked if A.E.B. had ever sat on his lap, he said, "[o]n my knee." Appellant denied ever being alone in his house with A.E.B., denied having intercourse with A.E.B., and denied all other alleged sexual contact with A.E.B. Appellant acknowledged that he had experienced erectile dysfunction since suffering a heart attack nine years ago but had sex with his fiancée, C.P., two to three times a month. Appellant testified that he took several prescription medications, including nitroglycerin, after sexual intercourse with C.P. and if he otherwise overexerted himself. Appellant

admitted that he is able to cut wood. Appellant also admitted speaking with A.E.B. on the telephone.

C.P. also testified. During her testimony, the prosecution asked her about a prior conviction. She admitted she had a welfare-fraud conviction and that the amount stolen was over $13,000.

The jury found appellant (1) guilty of count one, the charge based on penetration in December 2004; (2) not guilty of count two, the charge based on sexual penetration in February or March 2005; (3) guilty of count three, the charge based on penetration on or about September 1, 2005; and (4) guilty of count four, the charge based on penetration on or about November 23, 2005.

At sentencing, the prosecutor argued for consecutive sentencing on the basis that "one act of penetration with a minor is 144 months" and this was a "much more significant pattern of conduct." The district court imposed consecutive sentences of 144 months' imprisonment on each of counts one and three, for a total sentence of 288 months' imprisonment. The court stated that it was "impossible to measure all the boundaries that were broken by [appellant] in [his] relationship" with A.E.B., that 12-year-old girls "aren't friends with 44-year-old men," and noted that the phone calls were violation of boundaries "beyond all practical thought and mature thought." The court noted that although appellant testified that A.E.B. must hate him to accuse him of sexual abuse, the court's assessment of A.E.B. was that she testified like someone who was in love with appellant, and was reluctant, afraid, and worried about testifying against

appellant. The district court denied appellant's motion for a new trial. This appeal follows.

D E C I S I O N

I.

We first address appellant's argument that the district court abused its discretion in refusing to strike Juror 42. The district court denied appellant's motion to strike Juror 42 for cause, and the defense then exercised a peremptory challenge. Appellant did not exhaust his peremptory challenges.

"In an appeal based on juror bias, an appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from failure to dismiss, and that appropriate objection was made by appellant." *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983). Here, the defense did not exhaust all of its peremptory challenges in the selection of the jury. "More than 100 years ago [the supreme court] ruled that the defendant who did not exhaust his peremptory challenges was not prejudiced by the necessity to use a peremptory challenge to remove a juror who should have been excused for cause." *State v. Barlow*, 541 N.W.2d 309, 312 (Minn. 1995) (citing *State v. Lawlor*, 28 Minn. 216, 217, 9 N.W. 698, 699 (1881)). Because appellant was not prejudiced, we need not address whether Juror 42 should have been excluded for cause.

II.

We next address appellant's argument that the district court abused its discretion when it refused to allow witnesses to testify that A.E.B. had made prior false allegations

of sexual abuse. This argument relates to appellant's pretrial request that the district court conduct an in-camera review of documents, including police and social services files, which the defense thought contained evidence related to the alleged prior false allegation of A.E.B. of sexual abuse by her father and brother. The court conducted the in-camera review and determined that the documents contained no evidence of prior false allegations.

Despite the district court's pretrial determination based on its in-camera review, the defense sought to ask A.E.B. and several of her peers whether A.E.B. had made prior false allegations of sexual abuse against her father and brother. The issue arose at trial when the prosecutor sought to prevent witnesses, K.O. and T.M., from testifying about the alleged prior false allegation of A.E.B. of sexual abuse by her father and brother.

The defense argued that the testimony could be elicited to impeach A.E.B. The district court concluded that to admit prior allegations of sexual abuse consistent with the rape-shield rule, the defense had the burden to show that the prior allegations were false. The defense argued that it had met this burden because the documents reviewed by the court in camera contained "no reference whatsoever to any sex assault investigation, allegation, anything of the sort involving [A.E.B.] and her father, her brother, this neighbor, any of these folks." The defense argued that "the absence of notation inherently means that these are not credible allegations." In other words, the defense argued that the omission in the reports of any reference to A.E.B.'s allegations of sexual abuse by her father and brother shows that A.E.B.'s prior allegations were false. Appellant's argument rests, at least in part, on an assumption that A.E.B. actually

reported allegations of sexual abuse by her father and brother to the people that prepared the documents. The prosecutor argued that the reason the reports do not contain any allegations about prior sexual abuse by A.E.B.'s father and brother is not because they were made and not believed but, rather, because they were never made at all. The prosecutor emphasized that A.E.B. denies ever making any allegations against her father and brother.

The district court, reiterating that its in-camera review of the documents revealed no evidence of false allegations, ruled that the alleged prior false allegations of sexual abuse could not be admitted under the rape-shield rule because the defense had not shown that any prior allegations were false. After the district court's ruling, defense counsel submitted a memorandum about whether the court should allow the impeachment of A.E.B., and the testimony of other witnesses, regarding A.E.B.'s alleged prior false allegations of sexual abuse by her father and brother. Noting that the arguments of the parties had not changed and that the defense had not shown that any alleged prior allegations were false, the court again ruled that the witnesses could not testify about A.E.B.'s alleged prior false allegations of sexual abuse by her father and her brother. Appellant's argument on appeal appears to be both (1) that there was sufficient evidence of falsity because the allegations were not taken seriously by officials, and (2) that the rape-shield rule does not prohibit impeachment with prior allegations of sexual abuse when the victim denies making the allegations because the allegations are then prior inconsistent statements.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appealing party has the burden of establishing that the district court abused its discretion. *Id.* "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). To determine if any error was harmless, we ask "whether the jury's verdict [was] surely unattributable" to the error. *State v. King*, 622 N.W.2d 800, 811 (Minn. 2001) (quotation omitted).

Admission of evidence of prior sexual conduct of the victim in a criminal sexual conduct case is governed by Minn. R. Evid. 412, which is commonly known as the rape-shield rule. Minnesota also has a rape-shield statute, Minn. Stat. § 609.347, subd. 3 (2006). If any conflict is found, the rule controls. Minn. Stat. § 480.0591, subd. 6 (2006) ("If a rule of evidence is promulgated which is in conflict with a statute, the statute shall thereafter be of no force and effect."). Under rule 412, evidence of prior sexual conduct of the victim "shall not be admitted nor shall any reference to any such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412." Minn. R. Evid. 412(1). Prior sexual conduct includes allegations of sexual abuse. *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991.)

The district court concluded that the rape-shield rule prevented the defense from eliciting testimony about prior allegations of abuse unless the defense could prove the prior allegations were false. This relies on an exception to the rape-shield rule that allows

admission of evidence of prior false allegations of sexual abuse. *See State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993) ("We agree with appellants that the trial court's exclusion of evidence of the prior false allegations violated their constitutional right to present a defense."), *review denied* (Minn. Oct. 19, 1993). In *Goldenstein*, this court concluded that "prior false accusations are admissible to attack the credibility of the children's other statements." *Id.* This court applied the rule that "prior accusations of rape are relevant only to the victim's propensity to be truthful if there has been a determination that the prior accusations were indeed fabricated." *Id.* "Before evidence of prior false accusation is admissible . . . the trial court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Id.*

Appellant argues that the district court incorrectly placed the burden on him to show falsity of the past allegations and, alternatively, that "it should have been sufficient that the allegations were ignored." But the burden is on a defendant to show that a victim's sexual history is relevant and should be admitted despite the rape-shield rule. *State v. Crims*, 540 N.W.2d 860, 868 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). Under the false-allegations exception to the rape-shield rule, the district court did not err in ruling that the defense had the burden of producing evidence that the allegations were false for the allegations to be admitted.

Appellant's argument that he produced sufficient evidence to show that the past allegations were false fails. The defense produced no evidence at trial that A.E.B. reported the allegations to the authors of the reports reviewed in camera by the district

court before trial. The district court did not err in refusing to assume that A.E.B. had reported past abuse by her father and brother to officials and to infer that because the reports contained no reference to the abuse, the officials had deemed them to be false. The district court did not abuse its discretion in ruling that the past allegations were not admissible under the false-allegations exception to the rape-shield rule.

Appellant argues in his brief that "the nature of impeachment is that the declarant has made inconsistent statements and denies one." Evidence that a complainant made prior allegations of abuse can be admitted for impeachment purposes as prior inconsistent statements when the victim denies ever making the allegations. In *Kobow*, this court concluded that prior allegations of sexual abuse were covered by the rape-shield rule, but were admissible if a complainant testified that she had never before alleged sexual abuse. 466 N.W.2d at 751 ("Had T.L.H. testified that she had never alleged sexual abuse before, *then* appellant may have had grounds to present evidence of her prior allegations to impeach her veracity as a witness."). *Kobow* did not require falsity to use prior inconsistent statements for these purposes.

Here, the district court was incorrect in its ruling that required falsity to use the statements for impeachment purposes as prior inconsistent statements, but the error was harmless because under the holding in *Kobow*, prior inconsistent statements of this type are only allowed when the victim first testifies that she never made prior allegations. *Kobow* does not support the argument that appellant could elicit testimony from A.E.B. about prior statements regarding abuse when A.E.B. did not testify about prior allegations

during her direct examination. The district court therefore did not err in disallowing the impeachment testimony through A.E.B's prior inconsistent statements.

III.

We next address appellant's argument that the prosecutor committed misconduct warranting a reversal of appellant's conviction. Appellant claims that several statements made by the prosecutor amounted to prosecutorial misconduct. Appellant objected contemporaneously to only one of the statements, objecting to the others in his motion for a new trial. Different standards apply to objected-to and unobjected-to errors. Because an objection must be contemporaneous, *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006), only the alleged error to which an immediate objection was made is considered objected-to error.[1] The harmless-error standard applies to the objected-to statement and the plain-error standard applies to the unobjected-to statement. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (applying rule that harmless-error standard generally applies to misconduct, but if no objection was made, plain-error standard applies).

"When reviewing claims of prosecutorial misconduct, [appellate courts] reverse only if the misconduct, when considered in light of the whole trial, impaired the defendant's right to a fair trial." *Id.* (quoting *State v. Swanson*, 707 N.W.2d 645, 658 (Minn. 2006)). If objected-to misconduct is present, a new trial will not be granted if the

[1] "When a defendant does not make a contemporaneous objection, the district court does not have the opportunity to rule on the misconduct or make a determination as to whether a corrective instruction is required or appropriate." *Ramey*, 721 N.W.2d at 298-99. Because objections provide trial courts opportunities to prevent or cure defects, defendants are encouraged to object at trial. *Id.* Appellant's objection in a motion for a new trial was not contemporaneous and did not provide the district court with the opportunity to prevent or cure defects at trial. It is therefore unobjected-to error.

misconduct is harmless beyond a reasonable doubt. *Id.* An error is harmless beyond a reasonable doubt only if the verdict was surely unattributable to the error. *Id.*

Here, the harmless-error analysis applies to the prosecutor's statement in rebuttal closing argument:

> [Defense counsel] talked about it would be physically impossible for the defendant to have done these things as described because of his health issues, but keep in mind, that having sex with your fling, your 13-year-old girlfriend, is your thing, perhaps, your body responds differently to what it used to do.

Appellant argues that this statement improperly inflamed the passions of the jury, and that it was an improper inference because there was no evidence from which the jury could infer that someone with heart problems may be able to have sex with a child but not an adult. Respondent argues that the statement was made in response to statements made during defense counsel's closing argument:

> Wasn't it a relief when you finally realized that what she is saying isn't possible. She had sex with a 45-year-old man with a heart condition who can't maintain an erection. He ejaculated inside of me. Twenty minutes later he is ready to go again and then he ejaculates again. Then less than an hour later he is ready to go again. You are going to be asked to use your reason and your common sense. And I would submit to you as jurors, does that sound reasonable with your understanding of male sexuality? What is possible for a 45-year-old man who needs to take nitroglycerin.

Generally, "[a] prosecutor's closing argument should be based on the evidence presented at trial and inferences reasonably drawn from that evidence." *State v. DeWald*, 463 N.W.2d 741, 744 (Minn. 1990). But, a prosecutor "is free to specifically argue that there is no merit to a particular defense in view of the evidence or no merit to a particular

argument." *State v. Salitros*, 499 N.W.2d 815, 818 (Minn. 1993). And appeals to common sense are not prohibited. *State v. Starkey*, 516 N.W.2d 918, 927 (Minn. 1994) (concluding a prosecutor did not commit misconduct in arguing that the defense would try to divert the jury's attention "from the real facts, the real logic and the real common sense of this case"). The prosecutor's argument was a permissible argument that there was no merit to the defense's argument regarding appellant's inability to engage in the conduct alleged. The district court did not err in allowing the prosecutor's argument.

The plain-error analysis applies to two aspects of the prosecutor's impeachment of C.P. with her prior conviction of theft over $2,500 by wrongfully obtaining public assistance. First, the prosecutor asked C.P., appellant's fiancée, about the facts underlying her welfare-fraud conviction, including that the actual amount stolen was over $13,000, and, second, the prosecution emphasized the underlying facts during closing argument.

"[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights." *Ramey*, 721 N.W.2d at 302. An error is plain if it is clear or obvious. *Id.* An error is usually plain "if the error contravenes case law, a rule, or a standard of conduct." *Id.* The burden is "on the nonobjecting defendant" to demonstrate that plain error occurred. *Id.* Once the first two prongs are established by a defendant, the burden shifts to the state to show that "there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict." *Id.* (quotation omitted).

A witness, such as C.P., may be impeached with a prior felony or crime involving dishonesty or a false statement. Minn. R. Evid. 609(a). But the facts underlying the conviction should not be used to impeach the witness's credibility. *State v. Edwards*, 343 N.W.2d 269, 273 (Minn. 1984). Because the dollar amount is a fact underlying the conviction, appellant is correct that the prosecutor should not have elicited the dollar amount or emphasized it during closing argument. Appellant has therefore met the first two prongs of the plain-error test: there was error and it is plain because it contravenes a rule. Respondent argues that even if there was error, substantial rights were not affected, under the third prong of the plain-error test, because the case included very damaging DNA evidence and the witness being impeached was not the defendant. We conclude that the verdict is surely unattributable to this portion of the prosecutor's argument, and conclude that any error in the argument is therefore harmless. We therefore refuse to reverse based on the prosecutor's error.

IV.

We next address the district court's imposition of consecutive presumptive sentences for each conviction, resulting in a total sentence of 288 months' imprisonment. The presumptive sentence for each conviction was 144 months' imprisonment. Consecutive sentences on multiple first-degree criminal sexual conduct convictions is permissive and not a departure from the guidelines. Minn. Sent. Guidelines II.F.2. "A district court's decision to impose consecutive sentences generally falls within its broad discretion." *State v. Perleberg*, 736 N.W.2d 703, 705 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007). This court will not interfere with the district court's discretion

unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct. *Id.* Review is "guided by sentences imposed on other similarly situated offenders, acknowledging that a district court has a unique perspective . . . and is in the best position to evaluate the offender's conduct and weigh sentencing options." *Id.* (quotation and citation omitted).

Appellant argues that his consecutive sentences exaggerate the criminality of his conduct. Appellant makes this argument by attacking the prosecutor's charging decision, relying on sentencing statistics, and arguing that the purposes of the sentencing guidelines are not served by consecutive sentencing in this case. Appellant also argues that the facts of the offense do not support consecutive sentencing because his conduct was one course of conduct, not separate crimes, and he presents a moderately low risk for continued criminal sexual conduct.

Similar arguments have been rejected in two recent cases from this court in which we affirmed consecutive sentences imposed on multiple first-degree criminal sexual conduct convictions involving the same victim. In *State v. Suhon*, 742 N.W.2d 16, 22, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008), we rejected the defendant's argument that the prosecutor improperly charged him with three separate offenses for three separate extended periods of time of sexual abuse rather than a single offense for one very long extended period of time, and that consecutive sentencing was inappropriate because his conduct constituted a single behavioral incident. We noted that offenses separated in time and place do not constitute a single behavioral incident and that the guidelines allow permissive consecutive sentencing for multiple criminal sexual conduct

convictions even when the offense involves a single victim and a single course of conduct. *Id.* at 24. In *Perleberg*, 736 N.W.2d at 706, we again affirmed consecutive sentences imposed on multiple first-degree criminal sexual conduct convictions. The defendant in *Perleberg* also attacked the prosecutor's charging decision and argued that his sentence exaggerated the criminality of the conduct. *Id.* We rejected the defendant's argument that charging him with six counts rather than a single count led to a sentence that exaggerated the criminality of his conduct, concluding that the argument is premised on a false assumption that the district court was unaware of its authority to impose concurrent sentences. *Id.* We also rejected the offender's argument that the sentence was too severe based on sentencing statistics and the purposes of the guidelines. *Id.* And we noted that the statistics did not provide details about the nature of the offenses and the circumstances of the conviction and that while urging caution, the guidelines allow for consecutive sentencing for multiple offenses of this type. *Id.*

Although the facts of *Suhon*, 742 N.W.2d at 24-25, and *Perleberg*, 736 N.W.2d at 706, reflect more severe conduct on the part of the defendants than appellant in this case, because Suhon and Perleberg abused their daughters for long periods of time with many acts of abuse, we similarly reject appellant's arguments that the prosecutor's charging decisions improperly influenced his sentence, that his consecutive sentences exaggerate the criminality of his conduct, that sentencing statistics indicate that the total sentence exaggerates the criminality of his conduct, and that his total sentence is contrary to the purposes of the guidelines. We also reject appellant's argument that his actions did not amount to separate crimes. The incidents of sexual abuse committed by appellant were

separated in time and, accordingly, appellant's conduct was not a single behavioral incident. *See Suhon*, 742 N.W.2d at 24 ("Multiple acts against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place.").

Because consecutive sentencing was permissive, and no aggravating factors or particularly severe conduct was required in this case, we conclude that the district court did not abuse its discretion in imposing permissive consecutive sentences and we will not disturb the consecutive sentences.

Affirmed.