STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2223

State of Minnesota,
Respondent,

vs.

Braden Randy Conrad,
Appellant.

Filed January 13, 2009
Affirmed
Huspeni, Judge[*]

St. Louis County District Court
File No. 69DU-CR-06-5733

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

Melanie Ford, St. Louis County Attorney, 100 North Fifth Avenue West, #501, Duluth, MN 55802 (for respondent)

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Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

HUSPENI, Judge

In this appeal from his convictions of criminal sexual conduct and burglary, appellant Braden Conrad argues that the district court improperly admitted evidence and inappropriately imposed consecutive sentences. We affirm.

FACTS

On September 13, 2006, then-19-year-old K.E.D. and four girlfriends were in her Duluth apartment—the upstairs unit of a duplex—preparing to go dancing at a nightclub. They were later joined by K.E.D.'s female downstairs neighbor, J.J., and some of J.J.'s male acquaintances. The two groups went to the nightclub independently, where they remained separate. K.E.D.'s group left the nightclub at approximately 2 a.m. Before going to bed, K.E.D. locked her windows and doors.

K.E.D. awoke to a hand around her neck and a man's voice telling her not to scream. The man raped her vaginally, anally, and orally. The assault lasted 20–30 minutes, and the assailant stayed in the apartment for another ten or 15 minutes before leaving. K.E.D. put on the t-shirt and pajama pants she had been wearing before the assault and drove to her parents' house and then the hospital. Though K.E.D. complained of soreness or pain in and around her neck, vagina, and rectum, the emergency-room physician who treated her observed no obvious signs of trauma.

In response to a 911 call from K.E.D.'s father, Duluth police officers went to the duplex, where they awoke J.J. The officers told J.J. that K.E.D.'s apartment had been broken into, prompting J.J. to say she had a surveillance system. Officers Cha Vang and

Kevin Tomlin began reviewing the video, though Officer Vang was summoned away by a radio report of two men in a car outside the duplex. J.J. told Officer Vang the men were part of her group and had stayed in her apartment overnight. Officer Vang approached the men and asked for identification; one was appellant Braden Conrad. Officer Tomlin had completed his review of the video; on it, he observed a man in a black t-shirt with white sleeves leave the duplex running. As Officer Tomlin approached the car, he noticed appellant was wearing a black sweatshirt with flames on the sleeves. Officer Tomlin asked appellant to exit the vehicle and inquired whether appellant had been in K.E.D.'s apartment. Appellant denied being in K.E.D.'s apartment; after Officer Tomlin said the video suggested otherwise, appellant acknowledged he had been there briefly.

Officer Tomlin placed appellant in the back of his squad car and drove him to police headquarters. Officer Tomlin did not ask appellant any questions during the trip, though appellant asked where they were going and why. Officer Tomlin replied that there had been a sexual assault and the investigators wanted to talk to appellant. Officer Tomlin briefed the investigators and left appellant with them. As part of standard procedure before an interview in a major investigation, Investigator Anthony Radloff offered appellant a breath or urine test. Appellant accepted the offer of a urine test, and as Investigator Radloff was escorting him to the bathroom, appellant said, "I can see a B and E, . . . but not a rape." Investigator Radloff testified he was not questioning appellant at the time, but simply walking with him to the bathroom.

After the urine sample was collected, Investigator Radloff and Officer Jared Blomdahl interviewed appellant for about 80 minutes. At the outset of the interview,

Investigator Radloff provided appellant with a *Miranda* warning and appellant indicated that he wished to talk to the officers. Appellant told the officers he entered K.E.D.'s apartment to retrieve a pack of cigarettes. He acknowledged that he did not have permission to enter K.E.D.'s apartment, but stated that he "was probably welcome" because he and others had been in her apartment earlier that night. At one point Investigator Radloff, in an apparent attempt to understand how appellant thought he was welcome to enter a locked apartment in the middle of the night, said "it's a little bit irrational."

Appellant told the officers that once he was inside the apartment, he retrieved his cigarettes and then reclined on the living-room couch and fell asleep. He claimed he never had any contact with K.E.D. while in her apartment. Appellant repeatedly said he was never in K.E.D.'s bedroom. He also denied having sex with her or that his DNA would be found on her sheets.

But about halfway through the interview, appellant changed his story and admitted to having sex with K.E.D. He said that while he was in her apartment, he knocked on her bedroom door and asked her in a roundabout way if she wanted to have sex, to which she assented. Appellant said that he never identified himself by name, but that he assumed K.E.D. recognized his voice. Investigator Radloff told appellant he was having difficulty understanding how this voice-recognition story played out, and said "I'm just trying to understand. Help me. Help me." As the interview progressed, the officers returned to the voice-recognition issue several times. Officer Blomdahl said appellant's story was

"hard to believe," and Investigator Radloff presented the same facts as a hypothetical, saying it "seem[s] unreasonable."

During the interview, another investigator prepared a search-warrant application that included some of appellant's comments made before he was provided a *Miranda* warning. Pursuant to the warrant, officers took a DNA sample, photographed appellant, and seized his clothing.

Appellant was charged with two counts of first-degree criminal sexual conduct, one count of third-degree criminal sexual conduct, and two counts of first-degree burglary. He moved to suppress the statements he made to officers before he was provided a *Miranda* warning, the videotaped interview, and the evidence gathered pursuant to the search warrant. The district court denied the motion in its entirety.

Appellant's trial lasted four days. The jury heard from numerous witnesses, including several police officers, the emergency-room physician, J.J., K.E.D., and appellant himself. There were also 61 exhibits, including the surveillance tape, the interview videotape, and photographs of K.E.D., appellant, the duplex, and K.E.D.'s clothing and sheets. The defense sought to exclude from the interview videotape the officers' comments on appellant's story. The district court denied the motion, noting that the statements were part of the "give and take" of an interview, not improper opinion testimony.

In his closing argument, the prosecutor suggested that, to streamline their deliberations, jurors should focus on whether K.E.D. consented. In deciding whether there was consent, he said, the jury would have to evaluate appellant's and K.E.D.'s

testimony. Part of the evaluation would focus on their credibility, which he argued would include an analysis of each person's interest in the outcome of the case. The prosecutor first discussed K.E.D.'s credibility and interest: "Well, obviously [K.E.D.] has an interest in what happens here. This man raped her. . . . [S]he wants you to find him guilty." After an immediate objection, the district court held a bench conference. Appellant's counsel said the statement was improper argument, while the prosecutor explained he was merely commenting on K.E.D.'s credibility and interest in the outcome. The district court overruled the objection.

The jury returned guilty verdicts on all counts, and the district court imposed consecutive sentences of 48 months on the burglary offense and 144 months on the first-degree sexual-conduct offense. This appeal follows.

D E C I S I O N

I.

Appellant first argues that his motion to suppress should have been granted because his pre-warning statements were made while he was in custody and as the result of interrogation.

We review the district court's findings of fact "relating to the circumstances of the interrogation" for clear error. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). But we make "an independent review of the [district] court's determination regarding custody and the need for a *Miranda* warning." *Id.*

Both the federal and state constitutions protect individuals against compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art. I, § 7. The right not to be

compelled to incriminate oneself is protected by requiring law-enforcement officers to read *Miranda* rights to suspects who are "in custody" and subject to "interrogation." *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966)).

If a suspect has not been arrested, then he is not "in custody" unless "a reasonable person in the suspect's position would have believed he was in custody to the degree associated with arrest." *Id.* Generally, on-the-scene questioning, where officers are trying to understand the situation, does not present a custodial-interrogation setting requiring *Miranda* warnings. *State v. Walsh*, 495 N.W.2d 602, 604–05 (Minn. 1993).

"Interrogation," for *Miranda* purposes, refers to express questioning and "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689 (1980). It is a situation that "reflect[s] a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300, 100 S. Ct. at 1689. Spontaneous, unsolicited statements made to police officers are not the product of custodial interrogation. *State v. Edrozo*, 578 N.W.2d 719, 726 (Minn. 1998).

Here, appellant complains of two pre-warning situations in which he made statements: the conversation with Officer Tomlin outside the duplex, and the statement made to Investigator Radloff on the way to the police-station bathroom. With regard to the first situation, Officer Tomlin was trying to make sense of the situation—who was whom and who had been where. This is on-the-scene questioning to which *Miranda* generally does not apply. Further, a reasonable person standing next to a friend's car—

without being under arrest or other physical restraint and without being unduly separated from his cohort—and knowing that a crime had possibly been committed in or near an acquaintance's home would not believe that he was in custody to the degree associated with arrest. *Cf. Walsh*, 495 N.W.2d at 605 (concluding that on-the-scene questioning may occur even when a suspect is physically restrained); *State v. Herem*, 384 N.W.2d 880, 883 (Minn. 1986) (discussing situation where separation of suspect from his cohort, among other facts, did not amount to custody). Rather, a reasonable person would believe he was being asked for information to help the police understand the situation. Appellant was not in custody when he spoke to Officer Tomlin.

As for the statement made on the way to giving the urine sample, appellant was not interrogated. The statement was unsolicited and voluntary. While appellant may have felt the level of compulsion inherent in being in police custody, no additional pressure was brought to bear.

Thus, appellant was twice in situations where only half of the *Miranda* predicate was present: interrogation without custody, and custody without interrogation. Because neither of the pre-interview statements was made during custodial interrogation, appellant cannot avail himself of *Miranda*'s protections. The district court properly denied the motion to suppress.

II.

Appellant next takes issue with two evidentiary rulings. Evidentiary rulings are within the district court's sound discretion and are reviewed for a clear abuse of that

discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). We conclude that the district court did not abuse its discretion in admitting the complained-of evidence.

A. Police officers' interview commentary

First, appellant argues that the district court should have redacted the interview videotape to exclude officers' commentary on his statements, such as stating that his story was "hard to believe." Appellant characterizes these statements as opinion testimony, while the district court considered them part of the normal "give and take" of a police interview.

A witness who "is not testifying as an expert" may only offer opinions that are rationally based on the witness's perception. Minn. R. Evid. 701. A lay witness who offers non-permissible opinion testimony intrudes on the jury's domain. *Pierson v. Edstrom*, 281 Minn. 102, 106, 160 N.W.2d 563, 565–66 (1968). We conclude the key word in the rule to be *testifying*. Here, the officers were not testifying during the interview. They were conducting a police interview and obtaining appellant's story. The statements, when made, were not meant to influence a jury. Nor was the videotape offered for the purpose of introducing the officers' opinions; it was offered to show how the investigation proceeded. *See State v. Vance*, 714 N.W.2d 428, 443 (Minn. 2006) (stating that statements by police during interviews are generally admissible to provide context). Because the statements on the videotape are not testimony, they do not fall within the rule's ambit and were therefore properly admitted.

B. Photographs

The second evidentiary ruling appellant assigns as error is the admission of two photographs of K.E.D.'s pajama bottoms. In one photograph, a ruler had been placed near a stain on the pants; in the other photograph, the ruler was absent. Appellant argues that the admission of both photographs was cumulative and that only one should have been admitted.

The admission of photographs is in the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Daniels*, 361 N.W.2d 819, 828 (Minn. 1985). Photographs need only be relevant, rather than necessary, in order to be admitted. *State v. Walen*, 563 N.W.2d 742, 748 (Minn. 1997). Multiple photographs of the same subject taken from different perspectives or with added measuring devices are generally relevant and not prejudicially cumulative. *State v. Drieman*, 457 N.W.2d 703, 711 (Minn. 1990).

Rather than establish that the photographs were not relevant, appellant argues that their cumulative effect was prejudicial—overemphasizing K.E.D.'s alleged injuries. But as appellant acknowledges, the emergency-room physician who examined K.E.D. testified about the lack of signs of trauma. Appellant merely asserts that two photographs of K.E.D.'s pajama bottoms were more convincing than the testimony of the emergency-room doctor who described in detail his medical examination of K.E.D. Absent any indication that the photographs were unusually disturbing in their content, and because they were relevant, we conclude that there was no prejudice in their admission.

The district court did not abuse its discretion in admitting both photographs.

III.

Whether a prosecutor's closing argument amounts to misconduct "is generally within the sound discretion of the [district] court." *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quotation omitted). When evaluating a closing argument for alleged misconduct, we focus on the argument as a whole, not just selected phrases or passages. *Id.* An isolated statement may be insufficient "to divert the jury from its role of deciding whether the State proved . . . guilt beyond a reasonable doubt." *Id.* at 662 (discussing a three-line remark in a 37-page closing argument).

Prosecutors must not appeal to the jury's passions or seek to inflame its prejudices. *State v. Mayhorn*, 720 N.W.2d 776, 786–87 (Minn. 2006). A prosecutor must not make arguments that "divert the jury from its duty to decide the case on the evidence." *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quotation omitted).

Appellant argues that a seven-word remark in a 28-page closing argument is prosecutorial misconduct. Taken alone, the phrase "she wants you to find him guilty" might well seem like an appeal to the jury's passions. But when placed in context, the phrase was proper. The prosecutor was applying the general jury instruction given regularly in order to assist the jury in weighing the credibility of witnesses. Interest in the outcome of a case is an important factor in determining a witness's credibility. As the prosecutor explained during the bench conference, his statement was made to show that K.E.D. had an interest in the outcome, just as he later argued that appellant had an interest. The prosecutor was not diverting the jury from its responsibility to decide the case on the evidence; he was helping the jury evaluate the evidence and its sources.

Even if we were to assume for the sake of further analysis that the challenged language was inappropriate, this isolated phrase was but seven words in a closing argument of 28 pages. The prosecutor did not repeat the seven words or rely on them in the remainder of his argument. We reject the possibility that the jury was swayed.

IV.

Finally, appellant challenges his sentence as an abuse of the district court's discretion. He argues the abuse was two-fold: first, in the denial of his motion for a downward departure, and second, in the imposition of consecutive sentences for the burglary and sexual-conduct offenses.

"[A] departure from the sentencing guidelines . . . is an exercise of judicial discretion." Minn. Sent. Guidelines II.D. Only in a "rare" case will a reviewing court reverse the district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Here, appellant does not articulate what qualifies this case as the rare one meriting reversal, and nothing in the record draws us to that conclusion.

We review the imposition of consecutive sentences for a clear abuse of discretion and generally refrain from interfering "unless the sentence is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). The sentencing guidelines permit consecutive sentencing for multiple current convictions of first-degree burglary and first- and third-degree criminal sexual conduct. Minn. Sent. Guidelines II.F., VI.

Appellant argues that his sentence unfairly exaggerates the criminality of his conduct. But, as the jury found, he entered K.E.D.'s locked home, entered her bedroom and forced her to engage in oral, anal, and vaginal sex. The district court's statements at sentencing indicate that it had thoughtfully considered the nature of the offenses and what consecutive sentences would mean—a young man spending his twenties in prison. The record does not suggest a district court given to hyperbole or exaggeration; it reveals a district court sympathetic to both victims and offenders. The sentence imposed here is not an abuse of discretion.

Affirmed.