STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0654

State of Minnesota,
Respondent,

vs.

David Edward Nikko,
Appellant.

Filed May 19, 2009
Affirmed in part, reversed in part, and remanded
Minge, Judge

Carlton County District Court
File No. 09-CR-06-1976

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

Thomas A. Pertler, Carlton County Attorney, 204 Carlton County Courthouse, P.O. Box 300, Carlton, MN 55718 (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Connolly, Judge.

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

MINGE, Judge

Appellant David Nikko was convicted of three counts of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subds. 1(a), 1(g), and 1(h)(iii) (2000), and

was given a 94-month executed prison sentence. Appellant challenges his conviction, arguing that the district court denied him a fair and impartial trial when the judge questioned witnesses and discussed witness testimony with the attorneys in the presence of the jury. Appellant also challenges his sentence, arguing that the district court impermissibly increased his sentence after the original sentencing and failed to exercise reasonable discretion when it declined to impose a downward dispositional departure. Because we conclude that appellant was not denied a fair trial or improperly denied a downward sentencing departure, we affirm in part. However, because we conclude that the district court erred when it modified the sentence, we reverse and remand for reinstatement of the original sentence.

FACTS

Appellant's convictions stem from allegations that he sexually abused R.N., his daughter. At trial, R.N. testified that on two separate instances in 2000 and 2001, when she was five-and-a-half years old and six years old, appellant touched her vaginal area through her clothing. R.N. was living with appellant at the time of the incidents and continued to live with him until she was eight years old. In 2005, when R.N. was 10 years old, R.N. first reported that she had been sexually assaulted by appellant. At that time, R.N. told a youth-home social worker about the incidents and used the word "rape" to describe appellant's conduct. R.N. testified that she waited to report these incidents because she had been afraid.

Both sides presented substantial testimony about the interview techniques used when R.N. first reported the conduct and about delayed reporting of sexual assault. The

state's expert testified that the method of interviewing R.N. was not ideal, but was in accordance with established protocol. Appellant's expert was critical of the method used to interview R.N. Appellant attempted to demonstrate at trial that the victim was led by the interviewer to talk about sexual abuse and that the interviewer "put words into the child's mouth." In closing, appellant's counsel characterized the case as a "battle of experts" and told the jury that it had to determine which was more credible. Most of the complained-of court intervention took place during the testimony by appellant's expert. Attorneys for the defense did not object to the district court's questions or general conduct at trial.

The jury found appellant guilty of three counts of second-degree criminal sexual conduct. At sentencing, a therapist testified that appellant would not benefit from incarceration, but could benefit from out-patient treatment. Although the district court acknowledged the therapist's testimony, it denied the request for a downward dispositional departure. The district court imposed a 67-month prison sentence for one of the counts of second-degree criminal sexual conduct.

Five days after the initial sentencing, the district court determined that, because the sentencing-guideline grid on which it had relied was not in effect in 2000-2001 when the criminal conduct occurred, it should not have been used to determine appellant's sentence. The district court then imposed a 94-month prison sentence in conformity with the guideline grid in place in 2000-2001. This appeal follows.

D E C I S I O N

I.

The first issue raised by appellant is whether the district court denied appellant a fair and impartial trial when the judge questioned witnesses and talked with the attorneys in the presence of the jury. Appellant does not argue that the judge was biased, but instead argues that the judge's statements and conduct compromised his duty to maintain a neutral and disinterested role and undermined the defense. Because appellant did not object to the judge's conduct at trial, seek recusal of the judge during the trial, or raise the issue in a posttrial motion, this court reviews such unobjected-to errors under the plain-error analysis. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error analysis, a defendant must show: (1) an error; (2) that is plain; and (3) that the error affected the defendant's substantial rights. *Griller*, 583 N.W.2d at 740. Even if these three prongs are met, an appellate court will not reverse unless fairness and the integrity of the judicial proceedings require reversal. *Id.*

"An error is plain if it is clear or obvious." *State v. Jones*, 753 N.W.2d 677, 694 (Minn. 2008). Generally, this degree of error "is shown if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). "[A]n error affects substantial rights if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007).

The district court has "discretion in managing the trials before [it]," and clarifying comments do not necessarily "disparage defense counsel and thereby undermine his

credibility with the jury." *State v. Erickson*, 610 N.W.2d 335, 341 (Minn. 2000). Moreover, the Minnesota Rules of Evidence expressly permit the court to question witnesses. Minn. R. Evid. 614(b). The comments to this rule note that such district court questioning should be undertaken with great caution. *Id.*; *see also State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980). Such questioning is generally proper when done to clarify testimony. *See Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985).

On appeal, "[t]here is the presumption that a judge has discharged his or her judicial duties properly." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). A defendant must assert allegations of impropriety sufficient to overcome this presumption. *See McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998) ("When evaluating the impartiality of a judge presiding over a criminal jury trial, this court . . . look[s] to whether the judge's conduct has prejudiced the jury.").

Appellant cites nine instances of prejudicial judicial comment during the five-day trial. These exchanges occurred primarily incident to the testimony regarding the interview technique used in obtaining the initial statement by the victim. The judge was apparently questioning expert witnesses and making comments to clarify the testimony.

The district court's most troublesome interjections came in the context of testimony by the defense expert regarding studies that show that, when children are asked directly whether they have been sexually abused, most report that they have been abused. The judge expressed confusion, asked multiple questions, and posed hypotheticals in an apparent attempt to clarify that expert witness's testimony regarding the distinction

between two different topics: (1) delayed reporting; and (2) studies showing that, when directly questioned, children tend to report abuse. Both the expert witness and defense counsel attempted to clarify the distinction, but the judge persisted in questioning the witness and expressed confusion. After the defense explained what the line of questioning was meant to illustrate, the judge stated that he believed that the court was being "misled" through the confusion in the testimony. The judge then undertook to summarize what he thought the expert witness had been saying in her testimony. The exchange concluded with the witness agreeing with the judge's characterization and stating:

> THE WITNESS: That's—that's right, except in the studies in which they have been really careful to make sure that the ones they're looking at really were abused. Some studies that have done this have [included], within the sample, children who are probably not abused, so when they don't disclose, it may be because they weren't abused.
>
> But the good studies that make as sure as they can that the children truly were abuse[d], these studies show that when they're interviewed, they overwhelmingly tell.
>
> THE COURT: Yeah, and that's a separate point about the reporting thing, delay in reporting versus, if you do get interviewed, you tend to disclose.
>
> MR. SKARE [Defense Counsel]: Yes.
>
> THE COURT: And I certainly understand the logic that, if you capture a sample, including people that have never been abused, their delay

in reporting is not a delay in reporting, it's just they have nothing to report.

THE WITNESS: Or their denial in the formal interview is they're telling the truth.

THE COURT: Yes. So interviews are interviews, delays are delays. There's two separate things. And I don't think yesterday she was referring to that about the interviews themselves then are not good or bad, or anything. She's just relaying that we referred to that study about delayed reporting.

MR. SKARE: And I had Miss Wakefield clarify that just now.

THE COURT: Well, I hope it's clarified. I was misled, or I didn't understand what she was saying. I think I do now, what she is getting at.

In this appeal, appellant argues that the cumulative effect of this and other exchanges in the presence of the jury prejudicially interrupted the flow of the examination. Appellant also argues that the district court's participation led the jury to believe that the court disagreed with witnesses, misunderstood witness testimony, and, in the instance cited above, created confusion which tainted the credibility of the testimony of the defense's expert witness. For the reasons claimed and because of the number of times the judge interjected himself into the examination of witnesses, we conclude that the district court's aggregate participation constituted plain error.

This leaves us with the question of whether the questions and comments affected appellant's substantial rights. The trial transcript itself is voluminous, and the challenged

incidents make up only a small fraction of the proceedings. Although the judge's interjections were disruptive to the attorney's examination, both the state and the defense were allowed to conduct full direct and cross-examinations of all witnesses. Defense counsel's argument that the investigators of the sex abuse claims used improper interview techniques is apparent in the record. We conclude that this argument was clearly conveyed to the jury. Although the judge's question and comments were not helpful, they do not suggest that the judge had formed an opinion about the merits of the case. In the aggregate, the judge's participation was not serious enough to influence or confuse the jury regarding the basic argument being advanced by defense counsel. Accordingly, we conclude that appellant has failed to demonstrate that the error deprived him of a fair trial or affected his substantial rights.

While we hold that the judge's conduct did not deprive appellant of a fair trial and does not, therefore, require a new trial, we caution judicial restraint in examining witnesses. This is normally the task of counsel. *See State v. Sandquist*, 146 Minn. 322, 324, 178 N.W. 883, 884 (1920). In a jury trial, the district court's prerogative to examine witnesses should be exercised with great caution, particularly where the credibility of witnesses is at issue. *See id*.; *State ex rel. Hastings v. Denny*, 296 N.W.2d 378, 379 (Minn. 1980). The need for caution is based on the recognition that, because the judge commands the attention and respect of the jury, "[j]urors are prone to look for an indication as to which litigant ought to prevail in the attitude and remarks of the trial judge." *I.J. Bartlett Co. v. Ness*, 156 Minn. 407, 412, 195 N.W. 39, 41 (1923); *accord Hansen v. St. Paul City Ry. Co.*, 231 Minn. 354, 361, 43 N.W.2d 260, 264-65 (1950).

Here, because we conclude that the judge's conduct did not prejudice appellant or affect his substantial rights, we affirm appellant's conviction.

II.

The second issue is whether the district court impermissibly increased appellant's sentence when it increased appellant's 67-month sentence to a 94-month sentence five days after the original sentence. Under the Minnesota Rules of Criminal Procedure, a district court may, at any time, correct a sentence not authorized by law. Minn. R. Crim. P. 27.03, subd. 9. A criminal sentence is unauthorized by law when it is contrary to the requirements of the applicable sentencing statute. *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998).

Sentencing *guidelines* are not the same as statutory sentencing requirements. The statutes allow a great range in the length of sentences. The guidelines and the sentencing grids in the guidelines establish standards for exercising discretion. Minn. Stat. § 244.09, subd. 5 (2008). In addition to the sentencing guidelines and the grids set forth in the guidelines, before sentences are imposed, the criminal history of a person who has been convicted is evaluated using forms and worksheets established pursuant to the guidelines. *Id.* This analysis produces a criminal history score that is a key factor in determining a presumptive sentence.

This court has concluded that a sentence which is authorized by the statutes and guidelines cannot be increased simply because the district court was acting on the basis of incorrect information in a sentencing worksheet when the sentence was pronounced. *See State v. Walsh*, 456 N.W.2d 442, 444 (Minn. App. 1990) (holding an error in the

sentencing worksheet did not permit postsentencing increase under the Rules of Criminal Procedure); *cf. State v. Borrego*, 661 N.W.2d 663, 667 (Minn. App. 2003) (holding an unintended and unsupported downward departure according to the sentencing guidelines is not a sentence unauthorized by statute). Once a district court has imposed a sentence within the range allowed by law, it cannot on its own initiative or by motion of the prosecutor increase the sentence because of what is considered an ill-advised downward departure from the sentencing guidelines. *Borrego*, 661 N.W.2d at 677; *see also* Minn. R. Crim. P. 27.03, subd. 9.

A sentence is authorized by statute if it comports with statutory requirements. *Borrego*, 661 N.W.2d at 677. The statutory requirements governing appellant's sentence are as follows: "[A] person convicted . . . may be sentenced to imprisonment for not more than 25 years or to a payment of a fine of not more than $35,000, or both." Minn. Stat. § 609.343, subd. 2 (2000). There is no mandatory minimum under section 609.343. Appellant's original 67-month sentence is well above the mandatory minimum for a repeat offense.[1] *See* Minn. Stat. § 609.109, subd. 2 (2000) (repealed 2006).

The appropriate remedy for an improper downward departure from the guidelines is an appeal by the state; not a new sentence. *Walsh*, 456 N.W.2d at 444. Even though the district court may have initially used the wrong version of the sentencing guidelines and imposed a lesser sentence than called for by earlier guidelines, because the district court imposed a sentence authorized by law, we conclude that the district court erred

[1] At trial the state introduced evidence of appellant's prior guilty plea to fourth-degree criminal sexual conduct.

when it increased the sentence five days later. We therefore reverse the district court and remand for reinstatement of the original 67-month sentence.

III.

The third issue on appeal is whether the district court improperly failed to exercise discretion when appellant requested a dispositional departure. Appellant argues that the district court did not properly evaluate relevant factors in considering appellant's request for a dispositional departure.

The sentencing guidelines provide that the district court is to impose the guideline sentence unless the case involves substantial and compelling circumstances that warrant a departure. Minn. Sent. Guidelines II.D. A district court's decision not to depart will not be disturbed absent a clear abuse of that discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). In determining a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But a defendant's amenability to probation does not require that a district court depart from the presumptive sentence. *State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

Here, appellant presented testimony of a therapist indicating that appellant could benefit from ongoing treatment rather than incarceration. The record indicates that the district court was aware of the testimony of the therapist. However, the fact that appellant may be amenable to probation does not compel a downward dispositional departure. Because the district court has discretion in determining whether a

dispositional departure is appropriate and because the district court considered the testimony of the therapist, we conclude the district court's decision not to grant a dispositional departure did not constitute an improper exercise of discretion.

Affirmed in part, reversed in part, and remanded.

Dated: