STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0073

State of Minnesota,
Respondent,

vs.

Jason Dean Ligtenberg,
Appellant.

Filed June 16, 2009
Affirmed
Stauber, Judge

Olmsted County District Court
File No. K043970

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

Mark A. Ostrem, Olmsted County Attorney, Lisa Renee Swenson, Sr. Assistant Olmsted County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Charles F. Clippert, Caplan Law Firm, P.A., 525 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

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

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

STAUBER, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that his conviction must be reversed because (1) the jury heard testimony through

the investigating officer that appellant invoked his right to an attorney; (2) the jury was presented with improper expert testimony; (3) the district court erred in its jury instructions; and (4) the court improperly denied his postconviction petition without an evidentiary hearing on his claim of ineffective assistance of counsel. We affirm.

FACTS

Appellant Jason Ligtenberg is the father of S.N., born May 14, 1986. S.N.'s mother was never married to appellant, and S.N. had very little contact with her father until she was 12 years old. In 1999, when S.N. was 13 years old, she stayed for one month with her father, stepmother, and brothers in their Maplewood home. During this visit, appellant touched her breasts. S.N. told no one about this contact.

In 2000, S.N. again stayed with appellant and his family in Maplewood for one month. During this stay, S.N. endured many incidents of sexual conduct short of penetration by appellant. Consequently, S.N. began experiencing physical symptoms, including stomach and pelvic pain. However, she did not tell her mother or stepfather, because she wanted to continue seeing her brothers. Instead, she told her two friends, S.N.G. and M.C., about the abuse.

In 2001, S.N. stayed with appellant and his family in Maplewood, again for one month. The abuse continued as it had the summer before. In September 2001, S.N. went to Rochester for a funeral. Appellant also came to Rochester and suggested that she stay in his room because the other room was crowded with her mother, sister, and other relatives. During this visit, penetration occurred. Police investigation showed that appellant had stayed at a Rochester motel on September 29, 2001.

After the incident in Rochester, S.N.'s physical symptoms worsened; she became depressed, and her school grades fell. S.N. also started drinking, smoking, and using marijuana. In December 2001, S.N. spent Christmas vacation at appellant's home in Maplewood. During the visit, appellant digitally penetrated S.N. S.N. continued to remain silent about the abuse.

In either December 2001 or 2002, appellant offered to purchase a car for S.N., who had received her South Dakota driver's license at age 15. Appellant took her to a Rapid City hotel, gave her alcohol, and attempted to sexually touch her, but S.N. refused.

S.N.G. testified that S.N. told her about the abuse when she was 13 years old. Later, at an uncertain date, S.N. told S.N.G. that appellant had raped her once in a hotel and that something had happened in Rochester.

S.N.'s mother, D.P., testified that she noticed a change in S.N.'s school grades beginning in 7th and 8th grades; D.P. homeschooled S.N. for 9th and 10th grades. Just before returning to public school, S.N. had a number of health problems, including migraines and stomach pains. She also began having behavioral issues. D.P. finally asked S.N. if appellant had sexually touched her and S.N. admitted it. S.N. did not want to report the abuse because she did not want to lose contact with her brothers. Since her mother reported the abuse to police, S.N. has not seen her brothers, and her paternal grandparents have terminated all contact with her.

Appellant was charged with two counts of first-degree criminal sexual conduct pursuant to Minn. Stat. § 609.342, subd. 1(b), (g) (2000), and one count of second-degree criminal sexual conduct pursuant to Minn. Stat. § 609.343, subd. 1(h)(iii) (2000).

At trial, the state presented testimony from S.N., D.P., S.N.G., Rochester police officer Julie Claymon, Maplewood police officer Sally Dunn, and Pennington County, South Dakota investigator Misty Walker. The state also offered general expert testimony about the effects of sexual abuse on children from licensed psychologist Mindy Mitnick. Appellant, his wife, and his son testified for the defense.

A jury found appellant guilty of the charged offenses, and the district court sentenced appellant to the presumptive sentences of 48 months on the second-degree charge, and 144 months on the first-degree charge, to be served consecutively. This court stayed appellant's direct appeal to permit him to pursue postconviction relief. After the district court denied his petition without an evidentiary hearing, this appeal was reinstated.

D E C I S I O N

I.

Appellant argues that he was denied a fair trial because the prosecution elicited testimony from Officer Dunn pertaining to appellant's request for an attorney. But appellant did not object at trial, so admission of this testimony is subject to plain error analysis. Minn. R. Crim. P. 31.02. A plain error is "clear" or "obvious" or one that "contravenes case law, a rule, or a standard of conduct." *State v. Vance*, 734 N.W.2d 650, 658 (Minn. 2007) (quotations omitted); *see also State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) (analyzing prosecutorial misconduct for plain error and concluding error is plain if clearly contrary to existing law at time of appeal).

The prosecution may not elicit or comment on a defendant's post-arrest silence or request for counsel. *Dobbins*, 725 N.W.2d. at 509. The Minnesota Supreme Court has held that even testimony about a statement as equivocal as "I'm gonna have to get a lawyer next" is a plain-error violation of this principle. *State v. Juarez*, 572 N.W.2d 286, 288, 291 (Minn. 1997). According to the supreme court, the issue is not so much the legal significance of that statement, but the potential for prejudicial effect on the jury, which could infer that a defendant's need for counsel suggests a wish to conceal guilt. *Id.* at 291.

Here, the prosecutor asked Officer Dunn the following question at trial: "After you then interviewed [appellant], what did you do then with your investigation?" Officer Dunn responded by stating: "[Appellant] started to hesitate and sounded like he wanted an attorney and I told him that I couldn't talk to him anymore once he wants an attorney because I didn't want to violate his rights." Because Officer Dunn's statement references appellant's request for an attorney, we conclude that the statement falls within the ambit of plain error as set forth in *Juarez*.

Once it determines that plain error has occurred, the reviewing court must decide whether the error was prejudicial and affected the outcome of the trial. *Vance*, 734 N.W.2d at 659. Plain error is prejudicial if there is a reasonable likelihood that the error significantly affected the jury's verdict. *State v. Young*, 710 N.W.2d 272, 280 (Minn. 2006).

Appellant argues that this plain error was prejudicial. To support his claim, appellant cites *State v. Roberts*, where the supreme court determined that testimony by

the interrogating officer that the defendant requested counsel when asked if he had committed the crime was prejudicial error. 296 Minn. 347, 349–52, 208 N.W.2d 744, 745–47 (1973). Appellant argues that because the facts here closely parallel the facts in *Roberts*, his conviction should be reversed.

We conclude that this case is distinguishable from *Roberts*. The record reflects that Officer Dunn's testimony was limited and offhand, the prosecutor immediately changed the subject, and the remark (or anything similar) was not repeated at any time during the trial. Moreover, Officer Dunn testified that (1) appellant voluntarily appeared at the police station; (2) she did not inform appellant ahead of time of why she wanted to talk to him; (3) appellant seemed concerned that he might be in trouble because he gave S.N. alcohol; and (4) appellant never directly invoked his right to counsel. Because it is unlikely that this one unsolicited comment significantly affected the jury's verdict, we conclude that the statement, although improper, was not prejudicial error.

II.

The district court's decision on whether to admit expert testimony is reviewed for a clear abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). Expert testimony is permitted if the expert's specialized knowledge will assist the factfinder to "understand evidence or to determine a fact in issue." Minn. R. Evid. 702. Expert testimony is usually admissible if it is helpful, relevant, reasonable, and its probative value outweighs its prejudicial effect. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998).

Appellant argues that the district court erred by permitting two instances of expert testimony: (1) Officer Claymon's testimony that juveniles rarely fabricate allegations of sexual abuse by family members and (2) psychologist Mitnick's testimony about the effects of sexual abuse on children.

A. Claymon's Testimony

In response to defense counsel's cross-examination as to whether S.N. could have made "this whole thing" up, the prosecutor asked Claymon on re-direct examination: "In your experience as a police officer have you ever had or do you have an opinion as to whether or not juveniles make up these type of stories?" The district court overruled defense counsel's objection, stating that he had "opened the door" by questioning S.N.'s credibility. Claymon then responded that it was "very rare."

We conclude that this question concerns allegedly improper vouching testimony, rather than expert testimony. Generally, the prosecution is not permitted to offer testimony to support the truthful character of the complainant in a criminal sexual conduct case. *State v. Maurer*, 491 N.W.2d 661, 662 (Minn. 1992). But "[o]nce the defense has attacked the complainant's character, then it is not objectionable for the prosecutor to elicit general opinion testimony as to the victim's truthful character." *Id.* Here, the focus of appellant's cross-examination of Claymon was an attempt to show that S.N. could have fabricated her testimony. Moreover, the officer's testimony was narrow and limited. Therefore, the follow-up question and response were not improper. *See id.* at n.1 ("In certain cases it may be proper for the prosecutor to elicit opinion testimony,

expert or otherwise, on the specific issue of whether the complainant's testimony is truthful if the defense "opens the door" to such evidence.").

B. Mitnick's Testimony

Minnesota courts generally have permitted expert testimony on the effects of sexual abuse on child victims. *See, e.g.*, *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987) (permitting testimony about common emotional and behavioral characteristics of sexually abused children); *K.A.S.*, 585 N.W.2d at 76; *State v. Jones*, 500 N.W.2d 492, 494 (Minn. App. 1993), *review denied* (Minn. June 9, 1993). Here, Mitnick, an acknowledged expert in the area of sexual abuse of children, testified on behalf of the state. Mitnick testified about behaviors exhibited by child victims of sexual abuse. She stated that she knew nothing about the facts of the case, had not interviewed S.N., and offered no opinion as to whether or not S.N. had been the victim of abuse.

Appellant argues that the district court abused its discretion by permitting Mitnick to testify about the effects of sexual abuse on children. To support his claim, appellant cites *State v. Morales-Mulato*, 744 N.W.2d 679 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). In that case, the expert offered an opinion as to whether or not the child victim had been sexually abused, and lacked the credentials to qualify her as an expert on the effects of sexual abuse on children. *Id.* at 688-89. Here, unlike in *Morales-Mulato*, Mitnick's testimony was confined to general characteristics of sexually abused children, she was qualified as an expert in that area, and she offered no opinion about S.N.

The Minnesota Supreme Court has acknowledged that "an indirect effect of that portion of [the expert's] testimony was to bolster the complainant's credibility. Much

expert testimony tends to show that another witness either is or is not telling the truth. That fact, by itself, does not render the testimony inadmissible." *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984). Here, S.N.'s psychological and physical symptoms, including the delay in reporting, were important pieces of evidence that may not be readily understood by a lay juror without expert explanation. Accordingly, we conclude that the the district court did not abuse its discretion by admitting Mitnick's testimony.

III.

This court reviews the district court's jury instructions for an abuse of discretion. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). The district court has considerable discretion in its choice of language, so long as the instructions adequately and fairly explain the law. *Id.* An instruction is only erroneous if it materially misstates the law. *Id.*

Appellant argues that the district court erred by instructing the jury that they did not have to determine the precise date on which the offenses occurred. Appellant contends that this error was compounded when the district court sentenced him consecutively on two convictions. Appellant claims that by not allowing the jury to determine the day of the offense, the court wrongfully sentenced him to multiple sentences for a single behavioral incident. Again, because appellant did not object to the jury instruction, the court's action is reviewed for plain error. *See State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (stating that the plain error standard applies to unobjected-to jury instructions).

As to Count 1, the district court instructed the jury that one element they had to determine is whether the offense of first-degree criminal sexual conduct (penetration) occurred on or about September 29 through October 1, 2001, in Olmsted County. As to Count 3, the court instructed the jury that they must determine whether the offense of second-degree criminal sexual conduct (sexual contact) occurred between May 1998 and August 2001in Ramsey County. The court included the following instruction: "It is not necessary to prove the commission of a crime on the precise day or even year stated in the complaint except where time is a material ingredient of the offense, as where the act done is unlawful only during certain seasons, on certain days, or at certain hours of the day."

The district court's instruction was not a misstatement of the law. In criminal sexual conduct cases, the complaint must set forth a specific time period during which the abuse was alleged to have occurred, but need not set forth specific dates, because a particular time is not an element of the offense. *State v. Williams*, 363 N.W.2d 911, 914 (Minn. App. 1985), *review denied* (Minn. May 1, 1985). Time is essential to the charges here only insofar as S.N. was less than 16 years old, and she was less than 16 years old during the entire time periods alleged. Thus, the court did not abuse its discretion by giving this instruction.

Appellant's contention that he received multiple sentences for a single behavioral incident is not supported by the record here. *See* Minn. Stat. § 609.035, subd. 1 (2000) (generally prohibiting punishment for multiple offenses arising out of a single course of conduct). The district court determines as a factual matter whether multiple offenses

form a single behavioral act and this determination is reviewed for clear error. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). If the facts are undisputed, this court reviews the determination de novo. *Id.*

Factors of time, place, and whether the defendant was motivated by a single criminal objective are the most important considerations in determining whether offenses arose from a single behavioral incident. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Here, although there is overlap in the specific time periods alleged, the offenses are distinct and different. Accordingly, we conclude that district court did not err by imposing sentences for both Counts 1 and 3.

IV.

Appellant argues that the district court abused its discretion by dismissing his postconviction petition without an evidentiary hearing on his claim of ineffective assistance of trial counsel. The postconviction court's findings are reviewed for clear error and its decision will not be overturned absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). The petitioning party must raise more than mere argumentative assertions and provide factual support for the allegations. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). If the petitioner fails to allege facts sufficient to entitle him to relief, an evidentiary hearing is unnecessary. *Id.*

Appellant contends that he was deprived of his right to a fair trial due to the ineffective assistance of his trial counsel. In order to prove this claim, appellant must demonstrate by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, such that he failed to exercise the

customary skills and diligence of a reasonably competent attorney and (2) appellant was so prejudiced thereby that but for the error, a different outcome would have resulted. *Dukes*, 621 N.W.2d at 252. It is presumed that an attorney acted competently. *Id.*

According to the district court's June 10, 2008 postconviction order, appellant raised seven examples of ineffective assistance of counsel. The court concluded that four of these allegations involved trial tactics: (1) failure to call character witnesses; (2) failure to present third-party perpetrator evidence; (3) failure to effectively cross-examine S.N.; and (4) failure to object to certain questions during S.N.'s direct examination. What evidence to present, which defenses to raise, and which witnesses to call are matters of trial tactics or strategy that are not reviewed later for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). The district court did not abuse its discretion by refusing to hold an evidentiary hearing on those allegations.

Appellant also argues that his trial counsel was ineffective because he failed to hire a psychological expert. The district court found that appellant failed to set forth the evidence he sought to obtain from an expert or how he was prejudiced by the absence of this testimony and concluded that he failed to demonstrate why he was entitled to an evidentiary hearing or relief because of this. *See Leake*, 737 N.W.2d at 535 (petitioner must provide factual support for allegations in postconviction petition). In his affidavit supporting his postconviction petition, appellant merely states that his attorney promised to hire an expert "if necessary," but failed to do so. There is no indication of what testimony appellant sought from an expert.

Appellant further argues that trial counsel failed to investigate S.N.'s medical, telephone, and work records. According to appellant's supporting affidavit, this information would have proved the time that S.N. left work on November 23 and 24, 2002. This time period roughly corresponds with the abuse that occurred in Rapid City, South Dakota, which was not charged in this complaint, and occurred after the offenses charged in the complaint. Appellant does not explain why lack of this information would prejudice his case or affect its outcome.

Finally, appellant argues that trial counsel demonstrated his incompetence by confusing the last names of Pennington County investigator Misty Walker and M.C., S.N.'s friend. This momentary lapse does not indicate trial incompetence. Because appellant has not provided factual support for his assertions nor indicated how he was prejudiced by trial counsel's actions, we conclude that the district court did not abuse its discretion by dismissing appellant's postconviction petition without an evidentiary hearing.

Affirmed.