STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0376

State of Minnesota,
Respondent,

vs.

Luis M. Vargas,
Appellant.

Filed June 16, 2009
Affirmed
Bjorkman, Judge

Nicollet County District Court
File No. 52-CR-07-116

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

Michael K. Riley, Sr., Nicollet County Attorney, 326 South Minnesota Avenue, P.O. Box 360, St. Peter, MN 56082 (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 Stoneburner, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions and sentences for multiple counts of first- and second-degree criminal sexual conduct, arguing that (1) he was denied a fair trial because the complaining witness's mother, acting as a support person during trial, spoke to the witness in Spanish three times during his testimony; (2) the district court erred by refusing to give a cautionary instruction regarding vouching testimony by a social worker; (3) the district court abused its discretion in admitting *Spreigl* evidence; and (4) the district court erred in imposing consecutive sentences. We affirm.

FACTS

Following allegations that appellant Luis Vargas sexually abused his stepbrother, B.P., on several occasions between 2003 and 2007, the state charged appellant with three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342 (2002), and two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343 (2002).

B.P. was ten years old at the time of appellant's jury trial in August 2007. B.P. testified that he "[g]ot sexually abused" by appellant, and that appellant had touched him on "the butt" and "penis." B.P. testified about three specific instances of abuse. One occurred when B.P. went into appellant's room to watch television, and appellant used his hand to touch B.P.'s butt inside his underpants. Another occurred when B.P. woke up in appellant's bed after having gone to sleep in the room he shared with his parents; B.P. testified that when he woke up his pants and underpants were around his knees, and

appellant was touching his penis. The third incident occurred after B.P.'s stepfather had fumigated the home and B.P., his stepfather, and mother decided to sleep out in the family's Ford Expedition. Appellant slept in the house. During the night, B.P. went in to use the bathroom and encountered appellant, who told him to go into the bedroom. B.P. testified that appellant pulled down B.P.'s pants and underpants and asked B.P. to kneel down by the bed. Appellant stood behind B.P. and "put his penis in [B.P.'s] butt." B.P. asked appellant to stop, then B.P. pulled up his pants and returned to the car.

The jury found appellant guilty on all five counts. The district court formally convicted appellant only on counts three and four—one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The district court sentenced appellant to permissive consecutive sentences of 144 months on count three and 21 months on count four. This appeal follows.

D E C I S I O N

I. The support person's comments to B.P. during his testimony did not deprive appellant of a fair trial.

Appellant argues that his right to a fair trial was violated when B.P.'s mother, serving as his support person, spoke to B.P. in Spanish three times during his testimony. This occurred during both B.P.'s direct testimony and on cross-examination. In each instance, the transcript reflects that "[t]he support person comments to the witness in Spanish"; the record does not indicate what B.P.'s mother said to him. After the third occurrence, the prosecutor asked the district court for a recess. Outside the hearing of the

jury, the district court expressed concern about B.P.'s mother's comments and the prosecutor indicated that she would instruct her not to talk to B.P.

Defense counsel did not object to B.P.'s mother's comments during trial, and therefore we review this claim for plain error. "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 *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). Error affects substantial rights if it is "prejudicial and affect[s] the outcome of the case." *Griller*, 583 N.W.2d at 741. And even if an appellant can establish plain error affecting substantial rights, we must affirm unless the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Strommen*, 648 N.W.2d at 686 (alteration in original) (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

Minnesota law permits a child-abuse victim to have "a parent, guardian, or other supportive person" present during the child's testimony at trial. Minn. Stat. § 631.046, subd. 1 (2008). The statute provides that if the support person is also a witness for the state, the district court shall grant the state's request to have the support person present unless "information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony." *Id.*

Appellant does not challenge the district court's decision to allow B.P.'s mother to be present as a support person. Instead, he argues that "as soon as [she] began talking to, and possibly coaching, the witness, the court should have disallowed her attendance

because her presence clearly posed 'a substantial risk of influencing or affecting the content of [B.P.'s] testimony.'" Appellant's argument is unavailing.

First, there is no controlling authority that holds that *any* comment by a support person to a child witness is so prejudicial as to automatically warrant a new trial. *See State v. Jones*, 753 N.W.2d 677, 684, 689 (Minn. 2008) ("When no binding precedent exists and the law is unsettled, an error cannot be deemed plain."). Appellant cites several cases from other jurisdictions that generally hold that a district court's decision to allow the presence of a support person was not prejudicial where there was no indication in the record that the support person attempted to communicate with the witness. *See, e.g.*, *United States v. Grooms*, 978 F.2d 425, 429 (8th Cir. 1992) (concluding there was no error in allowing "adult attendant" where "the record is void of anything to suggest that [attendant] prompted [witness] in any way"); *People v. Kabonic*, 223 Cal. Rptr. 41, 47 (Cal. Ct. App. 1986) (state's failure to comply with procedural requirements for support person was not prejudicial error where the record was void of evidence showing improper influence of support person over witness). But these cases do not support the proposition that any communication by a support person to a witness during testimony automatically prejudices the defendant.

Second, the record does not indicate what B.P.'s mother said. Appellant uses this fact to suggest that "[b]ecause there is no way of knowing what she said, or how [B.P.] reacted, it is imperative to grant [appellant] a new trial." But appellant has the burden of demonstrating prejudice that warrants a new trial. Absent any evidence as to what B.P.'s mother said and whether her comments influenced B.P.'s testimony, appellant cannot

establish that any error affected his substantial rights. Moreover, B.P.'s testimony following each of his mother's comments was unremarkable and consistent with his prior statements. After one of the interjections, B.P. asked the prosecutor to clarify the question, but the record does not indicate that his mother prompted him to change the content of his testimony. While the prosecutor should have instructed B.P.'s mother not to speak to B.P. before B.P. took the stand or immediately after her first interruption, appellant has not established plain error affecting his substantial rights under the circumstances present here.

II. The district court did not abuse its discretion in declining to give a cautionary instruction regarding vouching testimony.

Expert testimony is generally admissible if it assists the fact-finder, has a reasonable basis, is relevant, and has probative value that outweighs its prejudicial effect. *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). A witness, however, may not vouch for or against the credibility of another witness. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). While an expert may testify to the behavioral characteristics displayed by children who have been sexually abused, expert testimony of a child's truthfulness is inadmissible because "the expert's status may lend an unwarranted stamp of scientific legitimacy to the allegations." *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quotation omitted).

Evidentiary rulings lie within the district court's discretion and "will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The decision whether to give a cautionary jury instruction is also within the

district court's sound discretion. *State v. Roman Nose*, 667 N.W.2d 386, 398 (Minn. 2003); *Muehlhauser v. Erickson*, 621 N.W.2d 24, 30 (Minn. App. 2000). An appellant must demonstrate both an abuse of discretion and resulting prejudice. *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

Appellant argues that the district court erred by allowing Nicollet County Child Protection social worker Brenda Dittrich to testify that she believed B.P. was telling the truth and by failing to give a cautionary instruction after defense counsel objected to that testimony. Dittrich testified that in her role as a child-protection social worker, she received training in the CornerHouse[1] interview method and has investigated approximately 500 child sexual abuse cases. Dittrich interviewed B.P. using the CornerHouse method. Dittrich described the interview process and identified the characteristics she generally looks for in a child she is interviewing, including eye contact, body cues, and whether the child makes consistent statements throughout the interview and asks clarifying questions. Dittrich testified that the presence of these characteristics suggests the child is being honest.

Later in her testimony, the prosecutor asked Dittrich: "Did you notice any characteristics of [B.P.] during your interview of him which you found to be particularly significant or to . . . assist you during the course of your investigation?" Dittrich responded: "[B.P.] . . . exhibited many things that would indicate he was being truthful and—." Defense counsel immediately interrupted Dittrich's testimony, objecting on the

[1]CornerHouse is a child-abuse training and evaluation center whose stated mission is to assess suspected child sexual abuse, to coordinate forensic interview services, and to provide training for other professionals.

basis that it constituted improper vouching. The district court sustained the objection but denied counsel's request for a cautionary instruction, stating that such instruction would "probably draw[] more attention to it." Appellant argues this decision was erroneous. We disagree.

Dittrich's testimony regarding B.P.'s truthfulness was improper. But it was an incomplete statement and constitutes an extremely small part of the trial. *See State v. Soukup*, 376 N.W.2d 498, 503 (Minn. App. 1985) (stating that where the testimony represents a small part of the trial as a whole, the error may be harmless), *review denied* (Minn. Dec. 30, 1985). Defense counsel's objection terminated Dittrich's brief vouching testimony, and the prosecutor immediately moved to a different line of questioning.

Additionally, because the tape of B.P.'s interview with Dittrich was played for the jurors, they had an independent basis to determine B.P.'s credibility and truthfulness. *See State v. Wembley*, 712 N.W.2d 783, 792 (Minn. App. 2006) (holding that expert's testimony violated vouching prohibition but was not unfairly prejudicial because the jury watched the videotape and was able to independently judge witness's credibility), *aff'd*, 728 N.W.2d 243 (Minn. 2007). As in *Wembley*, the jury here "was able to compare all of what they saw and heard in the videotaped interview with what they saw and heard as [the witness testified] in court during the trial." *Id.*

On these facts, we conclude that the district court did not abuse its discretion in declining to give a cautionary instruction. The district court's determination that such an instruction may serve to draw even more attention to Dittrich's incomplete statement was within the court's broad discretion. Moreover, we cannot conclude, on this record, that

the statement prejudiced appellant to the extent that it substantially influenced the jury to convict.

III. The district court did not abuse its discretion in admitting *Spreigl* evidence.

Evidence of past crimes or bad acts, known as *Spreigl* evidence, is not admissible to prove the character of a person or that the person acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). But *Spreigl* evidence may be admissible to prove factors such as motive, intent, identity, knowledge, and common scheme or plan. *Kennedy*, 585 N.W.2d at 389.

For *Spreigl* evidence to be admitted: (1) the state must give notice of its intent to offer the evidence, consistent with the rules of criminal procedure; (2) the state must clearly indicate what the evidence will be offered to prove; (3) the defendant's involvement in the act must be proven by clear and convincing evidence; (4) the evidence must be relevant to the state's case; and (5) the probative value of the evidence must not be outweighed by its potential for unfair prejudice to the defendant. *State v. Ness*, 707 N.W.2d 676, 685-86 (Minn. 2006).

This court reviews a district court's decision to admit *Spreigl* evidence under an abuse-of-discretion standard. *State v. Blom*, 682 N.W.2d 578, 611 (Minn. 2004). Appellant bears the burden of showing the error and any prejudice resulting from the court's decision. *Kennedy*, 585 N.W.2d at 389. When a district court errs in introducing evidence of prior bad acts, a reviewing court will not reverse unless there is a reasonable

possibility that the evidence significantly affected the verdict. *State v. Bolte*, 530 N.W.2d 191, 198 (Minn. 1995).

Here, prior to trial, the state moved to admit evidence of an August 2006 incident where appellant walked into B.P.'s mother's room naked. Appellant admitted to the investigating officer that the incident occurred, but explained that he was drunk and did not know B.P.'s mother was in the room. Appellant said that he was naked because he had been watching T.V. in the front room. He also acknowledged that the occupants of the room, B.P., his mother, and a friend, "got scared" when he entered the room. Over defense objection, the district court permitted B.P.'s mother to testify about the incident and allowed appellant's taped responses to the interviewing officer's questions about the incident to be admitted into evidence.

Appellant first argues that the *Spreigl* evidence is not relevant and fails to demonstrate a common scheme or plan because it relates to "a brief incident of exposure to an adult," which is not the same as sexual abuse of a child. We disagree. The prior incident involved appellant walking into the bedroom B.P. shared with his parents and slept in nightly. It was the same room from which, according to B.P., appellant removed B.P. from his bed and carried him to another room to assault him. And the incident occurred during the time frame in which the abuse occurred. *See Ness*, 707 N.W.2d at 688 (stating that "the closer the relationship between the other acts and the charged offense, in terms of time, place, or modus operandi, the greater the relevance and probative value of the other-acts evidence and the lesser the likelihood that the evidence will be used for an improper purpose"). On these facts, the district court did not abuse its

discretion in determining that the evidence was relevant and demonstrated a common scheme or plan.

Appellant next contends that the evidence was more prejudicial than probative because it was merely cumulative and meant to impugn his character. We disagree. The *Spreigl* evidence is probative because it is relevant and sufficiently similar to the charged crimes. The state needed the evidence to bolster the only other evidence of sexual abuse, B.P.'s testimony. While the evidence was no doubt damaging, that is not enough to establish that its potential for prejudice outweighs its probative value. Unfair prejudice is "not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005).

Moreover, the district court gave the jury three cautionary instructions to ensure the evidence was used for its intended purpose—assisting the jury in determining whether the charged crimes occurred. The final instruction specifically stated: "You are not to convict the Defendant solely because of this alleged incident in August 2006." This court presumes that jurors followed the district court's instructions. *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998). The district court's instructions were consistent with those outlined in CRIMJIG 2.01, and appellant did not object to them or request alternate instructions during trial. *See* 10 *Minnesota Practice*, CRIMJIG 2.01 (2006).

IV. The district court did not err in imposing permissive consecutive sentences.

A district court's decision to impose consecutive sentences generally falls within its broad discretion in sentencing. *State v. Munger*, 597 N.W.2d 570, 573 (Minn. App.

1999), *review denied* (Minn. Aug. 25, 1999). We will not interfere with this decision 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). Under the sentencing guidelines applicable to appellant's convictions, consecutive sentences are permissive for multiple offenses against persons, even when the offenses involve a single victim. Minn. Sent. Guidelines II.F., cmt. II.F.04 (2003). And permissive consecutive sentencing is not a departure from the guidelines. Minn. Sent. Guidelines II.F.

Although the jury found appellant guilty on all five counts charged in the complaint, the district court convicted appellant and imposed sentences only on counts three and four, relating to single, separate instances of abuse. The district court did not convict appellant of any of the counts involving multiple acts of abuse. At the sentencing hearing, the district court stated that because "there was more than one incident of sexual abuse that was determined by the jury here," imposition of permissive consecutive sentences did not exaggerate the criminality of appellant's actions.

Appellant asserts that his sentences violate Minn. Stat. § 609.04, subd. 1(4) (2008), which prohibits convictions of both the crime charged and a lesser-included offense, including "[a] crime necessarily proved if the crime charged were proved . . . ." Appellant contends that "[b]ecause [he] was also convicted of a first-degree count involving multiple acts over an extended period of time . . . he could only be convicted and sentenced on one count: first-degree criminal sexual conduct involving multiple acts

. . . ." A conviction on this count would result in only one 144-month sentence, rather than consecutive sentences of 144 months and 21 months.[2]

But as stated previously, although the jury found appellant guilty of the counts involving multiple acts over an extended period of time, the district court did not convict appellant on those counts. *See Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) ("A guilty verdict alone is not a conviction."). The record demonstrates that appellant was formally convicted on only counts three and four, relating to two separate incidents of abuse that occurred at different times. Appellant's reliance on Minn. Stat. § 609.04, subd. 1(4), is therefore misplaced.

In his reply brief, appellant takes his sentencing challenge one step further, arguing that "[i]t is fundamentally unfair that the state abandoned [his] more serious conviction as soon as it determined that manipulating his included convictions would render a longer prison term." This argument is also unavailing. We have rejected similar challenges to a prosecutor's charging decisions and the district court's authority to impose permissive consecutive sentences. *See State v. Perleberg*, 736 N.W.2d 703, 706-07 (Minn. App. 2007) (rejecting appellant's argument that consecutive sentences imposed on multiple first-degree criminal-sexual-conduct convictions exaggerated the criminality of his conduct), *review denied* (Minn. Oct. 16, 2007); *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007) (stating that the sentencing guidelines allow permissive consecutive

[2] In his reply brief, appellant withdraws his argument that he should have been sentenced to a single 110-month sentence on the first-degree charge and concedes that at the time of his offense, the presumptive guidelines sentence for first-degree criminal sexual conduct was 144 months.

sentencing for multiple criminal-sexual-conduct convictions even when the offense involves a single victim and a single course of conduct), *review denied* (Minn. Feb. 19, 2008).

We conclude that the district court adjudicated appellant's convictions for two separate incidents of criminal sexual conduct, and its decision to impose permissive consecutive sentences was not an abuse of discretion. And because the jury determined that appellant committed multiple acts of abuse, the district court's imposition of permissive consecutive sentences does not exaggerate the criminality of appellant's conduct.

Affirmed.