STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0858

State of Minnesota,
Respondent,

vs.

John J. Bussmann,
Appellant.

Filed July 14, 2009
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 27-CR-04-011306

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

John G. Westrick, Westrick & McDowall-Nix, 450 Degree of Honor Building, 325 Cedar Street, St. Paul, MN 55101 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

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

COLLINS, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the district court abused its discretion by (1) permitting testimony that unnecessarily entangled church doctrine with civil law; (2) excluding letters written by the complainant to appellant; and (3) denying appellant's proposed modifications and supplements to 10 *Minnesota Practice*, CRIMJIG 12.35 (1999) when instructing the jury on the elements of the offense. Appellant also challenges the sufficiency of the evidence to support his conviction and asserts that the prosecutor committed misconduct by impermissibly shifting the burden of proof on an element of the offense to appellant. We affirm.

FACTS

In the fall of 2001, then-Father John Bussmann (appellant) was assigned as the pastor of St. Walburga's Catholic Church in Hassan and St. Martin's Catholic Church in Rogers.[1] Appellant's responsibilities included sacramental duties at both churches and counseling parishioners. It was by virtue of his counseling role that appellant met and began a relationship with D.I.

In early 2002, after returning from a spiritual retreat, D.I. discussed with appellant what she believed was her calling from God to teach. Appellant encouraged D.I. to pursue this calling, and shortly thereafter he employed D.I. as the director of youth

[1] In 2002, the two churches were consolidated to become St. Mary Queen of Peace Catholic Church at the Rogers location.

ministries at St. Martin's even though she had no training, education, or experience in youth ministries. Although D.I. and appellant worked together in close proximity, initially they had minimal interaction. But after her mother became ill, D.I. consulted with appellant more frequently.

D.I. sought counsel from appellant when, after her mother's death, she became very lonely, depressed, and scared. D.I. testified that she went to appellant because a friend suggested that she speak with a "spiritual director." Between November 2002 and March 2003, D.I. and appellant met regularly to discuss D.I.'s emotional well-being and her mother's death. Over time, appellant and D.I.'s relationship intensified and included sexual activities. It was not until March 2004 that D.I. reported the sexual incidents.

On March 18, 2004, the state charged appellant with multiple counts of offenses. The original complaint was amended several times, and appellant moved to sever the counts for separate trials. The district court granted appellant's motion in part, and in May 2005, appellant was tried for and convicted of theft by swindle over $500, theft over $500, and fifth-degree criminal sexual conduct. In July 2005, appellant was tried for and convicted of the remaining two counts of third-degree criminal sexual conduct.

Appealing his convictions from the July 2005 trial, appellant argued in part that the district court abused its discretion by admitting evidence that entangled religious doctrine with civil law. In September 2006, this court affirmed appellant's conviction. *State v. Bussmann*, A05-1752, 2006 WL 2673294 (Minn. App. 2006), *review granted* (Dec. 12, 2006). On review, the Minnesota Supreme Court held that the clergy criminal sexual conduct statute, as applied, violated the Establishment Clause, reversed appellant's

convictions, and remanded the case to the district court for a new trial. *State v. Bussmann*, 741 N.W.2d 79, 94-95 (Minn. 2007) (*Bussmann I*). In February 2008, appellant was retried and convicted of one count of third-degree criminal sexual conduct.[2] Appellant was sentenced to 48 months of imprisonment, and he appeals.

D E C I S I O N

I.

The Minnesota Supreme Court reversed appellant's first conviction because the state introduced excessive testimony relating directly to Catholic Church doctrine, Roman Catholic duties, and Archiodicesan procedure, which violated the Establishment Clause. *Bussmann I*, 741 N.W.2d at 94. On remand, the district court was conscious of the supreme court's excessive-entanglement ruling and made a diligent effort to avoid permitting the introduction of any evidence that may run afoul of that ruling.

Father Kevin McDonough from the St. Paul Archdiocese of the Roman Catholic Church had testified as a state's witness in *Bussmann I*. In response to appellant's pretrial motion in limine to exclude "any and all religious or non-secular evidence and testimony from being presented [on retrial]," the district court stated:

> Reading the Supreme Court Opinion, they are very, very, cautious about having anything of a religious nature seem[ing] to impinge into the secular question of the guilt or innocence under Minnesota statute. Pretty clearly Father McDonough can testify . . . as to whether or not [appellant] was a member of the clergy at the time, [and] what his assignment was. . . . Once he starts getting into, as he did, as I understand in the first trial, of the religious nature, how the Church . . . reviews the

[2] Appellant was acquitted on the charge of third-degree criminal sexual conduct stemming from his relationship with another individual.

> relationships, the actions that the diocese took at the time, their investigation, their concerns and their conclusion pretty clearly that would not be allowed.

At trial, the district court significantly limited the scope of Father McDonough's testimony, allowing him to only testify about his role and responsibilities within the church, the process of assigning priests to parishes, appellant's employment with the church, and generally about the confidential nature of clergy-parishioner counseling, the formalities and locations of counseling sessions, and the process by which parishioners can report problems, concerns, or believed abuses. Despite the significantly reduced scope of religion-related testimony, appellant contends that the district court erred by permitting evidence of "Catholic beliefs, including the relationship . . . between a priest and parishioner in the view of the Catholic Church."

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion[.]" U.S. Const. amend. I. Whether a government action violates the Establishment Clause is controlled by the three factors set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The state action "must have a secular purpose, must neither inhibit nor advance religion in its primary effect, and must not foster excessive governmental entanglement with religion." *Odenthal v. Minn. Conference of Seventh Day Adventists*, 649 N.W.2d 426, 435 (Minn. 2002).

Unlike the first trial, on retrial there was no testimony regarding Catholic Church doctrine, the power that priests have traditionally had over parishioners, or internal church procedures regarding allegations of abuse. Because the charging statute requires proof of certain elements that directly touch and concern religious practices, it is

impossible to prove the charged offense without some religion-related testimony. After reviewing the limited religion-related testimony from Father McDonough, we are satisfied that the district court carefully adhered to the *Bussmann I* admonitions and admitted only such religion-related testimony as was necessary for the state to prove the charged offense. We conclude that the religion-related testimony did not excessively entangle church doctrine with civil law.

II.

Appellant next asserts that the district court erred by excluding love letters written by D.I. to appellant, arguing that the letters were relevant to show the jury "the true nature of their relationship" and the "depth of emotion, intimacy and passion" in their "deeply personal sexual affair."

We will not reverse an evidentiary ruling absent a clear abuse of discretion, and the appellant has the burden to show that he was prejudiced by such an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Under this standard, "[r]eversal is warranted only when the error substantially influences the jury's decision." *State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). We will reverse when there is a reasonable possibility that, had the erroneously excluded evidence been admitted, the verdict might have been more favorable to the defendant. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The harmless-error analysis, however, applies when evidence is excluded in violation of a defendant's constitutional right to present a defense. *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004); *see also Post*, 512 N.W.2d at 102 (holding that in determining whether district court's exclusion of defense evidence constituted

prejudicial error, this court must evaluate whether error was harmless beyond a reasonable doubt). We will affirm the conviction if there is no reasonable possibility that the evidence would have changed the verdict. *Blom*, 682 N.W.2d at 623.

Evidence must be relevant to be admissible. *State v. Quick*, 659 N.W.2d 701, 713 (Minn. 2003). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. However, otherwise relevant evidence may be excluded by other rules or statutes. Minn. R. Evid. 402; *see also, e.g*, Minn. R. Evid. 403 (stating that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

To convict appellant of third-degree criminal sexual conduct, it was the state's burden to prove beyond a reasonable doubt that (1) appellant intentionally sexually penetrated D.I.; (2) at the time of the sexual penetration, appellant was a member of the clergy; (3) at the time of the sexual penetration, appellant and D.I. were not married; and (4) the sexual penetration occurred during a period of time in which D.I. was meeting with appellant on an ongoing basis for the primary purpose of seeking or receiving religious or spiritual advice, aid or comfort, in private. Minn. Stat. 609.344(l) (2002). Consent is not a defense. *Id.* Therefore, relevant evidence must address, directly or indirectly, one of these elements. And because it is undisputed that appellant and D.I. had a sexual relationship while appellant was a member of the clergy and that the two

were not married, the issue before us is whether the district court abused its discretion by ruling that the letters were not relevant to prove or disprove that sexual penetration occurred during a time in which D.I. was meeting with appellant on an ongoing basis for the primary purpose of seeking or receiving religious or spiritual advice, aid or comfort, in private.

The letters written by D.I. during the course of her relationship with appellant clearly establish that a sexual relationship existed and that the relationship was consensual. But it is undisputed that a sexual relationship existed and, as a matter of law, consent is not a defense. The letters are not relevant to any other fact of consequence or element of the charge being tried; thus, the district court did not abuse its discretion by excluding them.

III.

Appellant proposed jury instructions on the elements of third-degree criminal sexual conduct, modifying and supplementing CRIMJIG 12.35 with language drawn from *Bussmann I.* The state opposed the proposed instructions, and the district court ultimately rejected them and instructed the jury on the elements of the offense strictly pursuant to CRIMJIG 12.35. Appellant contends that the district court thereby abused its discretion.

The district court has broad discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). The instructions must define the elements of the crime charged, and "it is desirable for the court to explain the elements of the offense rather than simply to read statutes." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn.

2001). A jury instruction is erroneous if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005); *see also State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998) (holding that if jury instructions correctly state the law in language that can be understood by the jury, there is no reversible error). Jury instructions are viewed in their entirety to determine whether they fairly and adequately informed the jury on the law of the case. *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

"We evaluate the erroneous omission of a jury instruction under a harmless error analysis." *State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). In doing so, we "examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). If the error might have prompted the jury to reach a harsher verdict than it might otherwise have reached, the defendant is entitled to a new trial. *Id.*

The jury instruction at issue was the same instruction on the elements of the offense given at the first trial, and the law has not changed. While the modifying and supplemental language proposed by appellant was drawn from *Bussmann I*, the supreme court did not disapprove of CRIMJIG 12.35 or change the law in any way in relation to the pattern instruction. *See Bussmann*, 741 N.W.2d at 90-92. Therefore, we conclude that the district court did not abuse its discretion by relying on CRIMJIG 12.35 when it instructed the jury on the elements of the offense.

IV.

Although appellant concedes that he had a sexual relationship with D.I., he contends that there is insufficient evidence to establish criminal liability, arguing:

> This sexual penetration did not take place either during a session where the primary purpose of the session was religious or spiritual aid, advice or comfort. Nor did the penetration take place while he was providing continuing religious or spiritual counseling. . . . [And] many of the alleged counseling sessions took place in public places, and do not fall within the purview of the statute's "private" requirement.

When we review a claim of insufficiency of the evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). On appeal, we assume that the jury believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The jury determines the credibility of the witnesses and the weight of their testimony, and we assume that the jury believed the state's witnesses and disbelieved the defendant's witnesses. *State v. Bolstad*, 686 N.W.2d 531, 539 (Minn. 2004). The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the jury reasonably could have found the defendant guilty of the charged offense. *Id.*

Appellant appears to argue that in order to violate the statute, sexual penetration must occur during or immediately following a private meeting in which the primary purpose was religious or spiritual aid, advice or comfort. However, the statute does not impose such a constrained requirement. The statute proscribes a sexual relationship between a member of the clergy and a parishioner if "the sexual penetration occurred

during a period of time" in which the parishioner and the member of the clergy were meeting on an ongoing basis and the parishioner was seeking or receiving religious or spiritual advice, aid or comfort. Minn. Stat. § 609.344, subd. 1(*l*)(ii) (2002) (emphasis added). Moreover, if the purpose of the statute is to protect vulnerable parishioners, allowing a sexual relationship to occur during the same period in time, even if not at the same moment in time, as counseling, is contrary to that purpose. Even if not every contact between a clergymember and a parishioner involves counseling, it is up to the jury to decide whether the facts in this case support finding an ongoing clergy-counselee relationship. *Bussmann I*, 741 N.W.2d at 83 ("Whether a clergy-counselee relationship was established, whether an established clergy-counselee relationship actually continued, and whether the proscribed sexual conduct occurred during that ongoing clergy-counselee relationship are factual matters for the jury to decide . . . .").

On this record, there is abundant evidence from which a reasonable jury could conclude that D.I. and appellant had an ongoing clergy-counselee relationship. The two often discussed how she was dealing with her mother's death, her fear of death, and the stresses of her new job within the church. D.I. relied on appellant when she needed comfort and support and when she had questions about her faith and her new calling to teach. Even if, as appellant contends, the statute requires each meeting to have some counseling aspect, a reasonable jury could find that each time D.I. and appellant were together, he provided comfort and guidance, which is the very cornerstone of the clergy-counselee relationship.

Appellant also argues that there is insufficient evidence to prove that any clergy-counselee relationship was in private. *Bussmann I* does not define "in private." But the dictionary defines "private" as "[o]f or confined to the individual; personal. . . . Undertaken on an individual basis." *The American Heritage Dictionary* 1442 (3d ed. 1992). Therefore, the "in private" requirement is intended to ensure the confidentiality or privacy of conduct or communications; "in private" is not synonymous with "in secret."

Here, D.I. testified that her first meeting with appellant after her mother's death was in private at the church and then the two of them, privately, went to her mother's gravesite. D.I. testified that after that first meeting, the two continued to meet privately to discuss the grieving process and how she was coping. The first time appellant kissed D.I. was as she was leaving his private quarters after she had consulted with him because she was having a bad day. Other sexual contact occurred in a private room at the church, in appellant's private home, and in his private living quarters in the church rectory. This is sufficient for a reasonable jury to conclude that the "in private" element of the statute was satisfied.

V.

Although appellant did not object at trial, he now contends that the prosecutor committed misconduct by impermissibly shifting the burden of proof to him on the issue of whether the clergy-counselee relationship had been terminated prior to the occurrence of any sexual activity.

Unobjected-to prosecutorial misconduct is waived, but we may review an alleged error according to the plain-error standard. *State v. Ramey*, 721 N.W.2d 294, 797, 299

(Minn. 2006). Plain error exists if there is an error that is plain and that affects the defendant's substantial rights. *State v. Washington*, 725 N.W.2d 125, 133 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007). An error is plain if it is clear or obvious under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997). An error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct." *Ramey*, 721 N.W.2d at 302. An alleged error does not contravene caselaw unless the issue is "conclusively resolved." *State v. Jones*, 753 N.W.2d 677, 689 (Minn. 2008).

If misconduct is found, a conviction will be reversed only if the misconduct impaired the defendant's right to a fair trial. *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). The defendant bears the initial burden of demonstrating plain error, but upon satisfying this obligation, the burden shifts to the state to show that the error did not affect the defendant's substantial rights. *Ramey*, 721 N.W.2d at 302. If the defendant satisfies his burden of proving that "the prosecutor's actions constitute plain error, and the state is unable to meet the burden of showing that there is no reasonable likelihood of a significant effect, the appellate courts then assess whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Washington*, 725 N.W.2d at 133-34 (quotation omitted).

"The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). A prosecutor commits misconduct when he or she engages in acts that "undermin[e] the fairness of a trial," or "violat[e] . . . clear or

established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *Id.* Throughout a criminal trial, the state has the burden to prove all elements of the crime beyond a reasonable doubt, and the burden of proving innocence cannot be shifted to an accused. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986); *see also, e.g.*, *State v. Coleman*, 373 N.W.2d 777, 782 (Minn. 1985) (stating that "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct"); *State v. Thomas*, 307 Minn. 229, 231, 239 N.W.2d 455, 457 (1976) (condemning prosecutor's suggestion that burden of proof is meant to protect the innocent, not shield the guilty); *State v. Trimble*, 371 N.W.2d 921, 926 (Minn. App. 1985) (holding that prosecutor's argument suggesting that presumption of innocence disappears when large amount of evidence of guilt exists is improper), *review denied* (Minn. Oct. 11, 1985). But in the context of comments made during closing argument that may operate to shift the burden of proof, courts will also consider any mitigating statements that correctly lay the burden on the prosecution. *State v. Tate*, 682 N.W.2d 169, 178-79 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). For example, when the district court properly instructs the jury after the prosecution misstates the burden of proof, the misconduct will typically not require reversal. *See id.*; *State v. McDonough*, 631 N.W.2d 373, 389 n.2 (Minn. 2001); *Race*, 383 N.W.2d at 664; *Coleman*, 373 N.W.2d at 782-83.

Here, the first two instances of alleged misconduct are similar. First, the prosecutor argued: "If the victim was meeting on an ongoing basis with the defendant to seek or receive religious or spiritual advice . . . unless and until that pastoral counseling

relationship ended, it was a crime for the defendant to have sex with the victim[ ]." Second, the prosecutor argued: "When a parishioner has met with a member of the clergy and a pastoral [counseling] relationship has been established, then that relationship, that pastoral counseling relationship, must be terminated. It must be terminated before a sexual relationship can begin." Neither of these statements misstates the law. *See* Minn. Stat. § 609.344, subd. 1(e) (requiring that sexual conduct occur during "period of time" when counseling meetings were occurring "on an ongoing basis").

Appellant next contends that the prosecutor committed misconduct when she asserted that

> [t]he [counseling] relationship that [D.I.] established with the defendant was never terminated. [D.I.] continued to seek and receive pastoral [counseling] from the defendant with regard to these issues all during the time period the defendant was having sex with her. This relationship was never terminated. The defendant never told [D.I.] that he had to terminate their [counseling] relationship because he wanted to have sex with her. The defendant never told [D.I.] she should seek or receive spiritual [counseling] from another priest since he was having sexual relations with her and the defendant never told [D.I.] that he could no longer hear her confession because he wanted to have a sexual relationship with her and she never did. She never went to anyone else. That [counseling] relationship was never terminated. [D.I.] continued to meet with the defendant on an ongoing basis to seek or receive religious spiritual advice aid or comfort from her priest, her counselor. The defendant.

This argument does not shift any burden of proof to appellant, it simply reiterates the state's theory of the case that (1) a clergy-counselee relationship existed, (2) the relationship needs to be terminated before a sexual relationship can legally occur, and (3) the relationship was never terminated. The prosecutor made a similar plea during her

rebuttal argument, stating: "[W]e submit that we have proven that there was [a clergy-counselee relationship] . . . , [and] if there was, that relationship has to be terminated. That has to end before there can be a sexual relationship under the law and it simply did not terminate." A prosecutor must be allowed reasonable latitude in arguing the state's case before the jury.

Finally, appellant complains of another part of the prosecutor's rebuttal argument in which she stated:

> And once that relationship was set up . . . he is [counseling] her with regard to her mother's death with regard to her fear of death, regard to heaven, regard to hell. . . . Once that relationship was set up, when did it terminate? It did not. . . . That relationship never terminated and for that reason, it was illegal.

Again, this statement does not argue that it is appellant's burden to prove that the clergy-parishioner relationship had been timely terminated, the argument is simply that it had not. Nothing in this record leads us to conclude that the prosecutor impermissibly shifted any burden of proof from the state to appellant.

Affirmed.