STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1351

State of Minnesota,
Respondent,

vs.

Richard Francis Gabrelcik,
Appellant.

Filed August 25, 2009
Affirmed
Bjorkman, Judge

Meeker County District Court
File No. 47-CR-07-934

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

Stephanie Beckman, Meeker County Attorney, Meeker County Courthouse, 325 Sibley Avenue North, Litchfield, MN 55355 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

BJORKMAN, Judge

On appeal from his convictions for criminal sexual conduct and the district court's denial of his motions for judgment of acquittal or a new trial, appellant argues that (1) the district court erred by limiting the evidence of alleged sexual misconduct committed by the 13-year-old complainant; (2) the district court erred by admitting the transcript of the complainant's interview with a case manager at Midwest Children's Resource Center and permitting the jury to review the transcript during deliberations; (3) the evidence was insufficient to show that he was in a "position of authority" over the complainant; and (4) additional errors, including the admission of irrelevant sex-related items, improper vouching testimony, and the prosecutor's failure to advise a witness not to refer to bad-act evidence, had the cumulative effect of depriving him of a fair trial. Because the evidence supports the jury's determinations and the district court did not commit error that warrants a new trial, we affirm.

FACTS

Appellant Richard Gabrelcik lived next door to the great-grandmother of 13-year-old complainant A.J.L. A.J.L. often visited her great-grandmother and sometimes stayed the night. On these occasions, A.J.L. visited appellant's home to play with a dog that previously belonged to A.J.L. and her mother.

Appellant knew that A.J.L. was in special education classes at school and was struggling with some of her class work. He offered to help tutor A.J.L. in math and

science. Between November 2006 and March 2007, A.J.L. went to appellant's home approximately two evenings each week for help with her school work.

On April 4, 2007, A.J.L. spent the night with her great-grandmother. While the two were watching television, A.J.L. passed a note on which she had written "Rick raped me." Later that night, A.J.L.'s great-grandmother told A.J.L's mother about the note, and A.J.L.'s mother reported the abuse to the authorities.

The next day, A.J.L.'s mother took A.J.L. to the Midwest Children's Resource Center (MCRC), where she was interviewed by a case manager. A.J.L. told the MCRC case manager that she was there because appellant raped her. A.J.L. also told the case manager that appellant showed her a movie depicting naked men and women having sex, and that after the movie appellant made her touch his penis with her hands, and then he made her pull her pants down and he licked her vagina. And she stated that at various times appellant touched her, both inside and outside her vagina, with his fingers, penis, and a green vibrator that he got from a "table kind of desk," and that one time he made her wear black "sex clothes." A.J.L. reported that appellant told her not to tell anyone because he would go to prison.

The state charged appellant with two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342 (2006); two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343 (2006); one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1 (2006); and one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1 (2006).

Prior to trial, appellant sought to introduce evidence that A.J.L. had been accused of sexually abusing a neighbor boy. Appellant argued that this evidence was admissible to show that "A.J.L.[] had a motive to fabricate the allegation against [appellant] . . . as a diversion from her own criminal activities." The district court carefully analyzed the issue and concluded that appellant was entitled to elicit this evidence from the investigating officer and A.J.L., subject to unspecified limitations. At trial, the district court limited defense counsel's ability to question A.J.L. regarding this incident, instructing counsel to refer to the matter as a "delinquency-type investigation" and not to "get[] into the specifics."

A.J.L. testified at trial that appellant showed her sex magazines and sex videos, and that he touched her more than ten times inside her vagina with his fingers, penis, and the green vibrator. She identified the black lingerie that appellant had her wear, which was recovered from appellant's residence during the execution of a search warrant. A.J.L. testified that she continued to go back to appellant's home, after the abuse began, to play with her dog and get help with her school work.

The MCRC case manager testified, and a DVD of her interview with A.J.L. was admitted into evidence and played for the jury. Each juror was given a copy of the transcript of the interview to follow along while the DVD was played. Additionally, a Minnesota Bureau of Criminal Apprehension forensic scientist testified that the green vibrator had A.J.L.'s DNA on the battery cover and appellant's DNA on the main body. A.J.L.'s mother, great-grandmother, and great-aunt also testified.

Appellant testified in his own defense, stating that A.J.L. visited him so that she could walk or play with the dog. Appellant acknowledged that he regularly helped A.J.L. with her school work between November 2006 and March 2007. Appellant stated that he bought the green vibrator for A.J.L.'s great-aunt when they were living together but that he never had any sex-related items out in the open when A.J.L. was visiting and did not know when she would have had access to them.

The jury found appellant guilty of five of the six charges. Appellant moved for a judgment of acquittal or a new trial, challenging the sufficiency of the evidence and alleging several evidentiary errors. The district court denied appellant's motions. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in permitting limited testimony regarding A.J.L.'s alleged sexual misconduct.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "We review evidentiary rulings under an abuse of discretion standard even when it is claimed that the exclusion of evidence deprived the defendant of his constitutional right to present a complete defense." *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006). The appellant has the burden of establishing that the district court abused its discretion. *Amos*, 658 N.W.2d at 203. "A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law." *State v. Mix*, 646 N.W.2d 247, 250 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Evidence of a victim's previous sexual conduct is not admissible in a prosecution for criminal sexual conduct except by court order pursuant to the rape-shield statute, Minn. Stat. § 609.347, subd. 3 (2006). *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). But such evidence is admissible "in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986) (citing *State v. Caswell*, 320 N.W.2d 417 (Minn. 1982)). In determining whether to admit evidence of the victim's prior sexual conduct, the district court must balance the state's interest in guarding the victim's privacy against the accused's constitutional rights. *Caswell*, 320 N.W.2d at 419.

Appellant contends that the district court erred in prohibiting defense counsel from eliciting specific information about the investigation into A.J.L.'s actions, such as the age of the male victim. Appellant also argues that by only permitting defense counsel to present this evidence through two witnesses, the investigating police officer and A.J.L, the district court interfered with defense counsel's right to determine how to present the evidence and which witnesses to question. We disagree.

Our review of the record reveals that appellant was able to sufficiently present his defense and convey to the jury his theory that A.J.L. fabricated the charges against him to divert attention from her own alleged sexual misconduct. Although the district court instructed defense counsel to refer to the allegations against A.J.L. as a "delinquency-type investigation," the jury heard the investigating officer state that A.J.L. "was a suspect in a criminal sexual conduct case." The officer acknowledged that A.J.L. was

still under investigation at the time she made her allegations against appellant. And the jury also heard A.J.L.'s therapist testify that she and A.J.L. discussed "the fact that [A.J.L.] was under investigation for a time with allegations that she was sexually inappropriate." Defense counsel was able to draw together this testimony in support of appellant's defense in his opening statement, which he made after the state rested its case. And defense counsel repeated this defense theory in closing argument.

Overall, this is not a case in which the district court deprived a criminal defendant of a meaningful opportunity to present a defense. *C.f. State v. Richards*, 495 N.W.2d 187, 195 (Minn. 1992) ("Although the right to present witnesses is constitutionally protected, the accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (quotation omitted)). The district court extensively reviewed the applicable caselaw, and its evidentiary ruling struck an appropriate balance that vindicated appellant's constitutional right to present his defense and protected A.J.L.'s privacy interest. We conclude that the district court did not abuse its discretion.

II. The district court did not commit plain error affecting appellant's substantial rights by admitting into evidence the transcript of A.J.L.'s interview and permitting the jury to review it during deliberations.

Generally, transcripts of a complainant's recorded statement should not be admitted into evidence "unless both sides stipulate to their accuracy and agree to their use as evidence." *State v. Swanson*, 498 N.W.2d 435, 439 (Minn. 1993) (quotation and emphasis omitted). But the district court may permit the jury to use such transcripts to "follow along . . . while a tape is played." *Id.*

Here, the DVD of the MCRC case manager's interview with A.J.L. was received into evidence and played for the jury during trial. The transcript of the interview was received as a court exhibit and a copy was provided to each juror to assist them in reviewing the video. The jurors returned their copies to the court after the video was played, but the transcript, not the DVD, was made available to the jurors during their deliberations.

Because appellant did not object to the court's handling of this evidence during trial, he must establish that the court's decisions amounted to plain error affecting his substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that to succeed on a claim of plain error each of the following must be present: (1) error; (2) that is plain; and (3) that affected appellant's substantial rights).

Appellant argues that the transcript is not the best evidence of the statement, that the parties did not agree to its accuracy and use as evidence, and that its use should have been limited to assisting the jury during the video presentation. Appellant further argues that the district court erred by withholding the DVD from the jury during deliberations. We agree; but we are not persuaded that this error affected appellant's substantial rights. *See Swanson*, 498 N.W.2d at 439-40 (concluding that although the district court erroneously admitted the transcripts because the parties did not stipulate to accuracy or agree to use as evidence, the error was harmless).

The district court played the DVD of A.J.L.'s interview with the MCRC case manager while the jury followed along using copies of the transcript. Thus, the jury would have been able to hear any discrepancies firsthand. Moreover, defense counsel

was allowed to conduct extensive examination of A.J.L. and the case manager but failed to point out any substantive discrepancies between the transcript and the DVD or show that the DVD was not admissible. And appellant does not identify any substantive discrepancies or inaccuracies in the transcript on appeal. Finally, appellant did not request a limiting instruction or object to any of the district court's rulings regarding the jury's use of the transcript. On these facts, appellant has not established plain error affecting his substantial rights.

III. Sufficient evidence supports the jury's finding that appellant was in a "position of authority" over A.J.L.

In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when the resolution of a matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Here, the jury convicted appellant of both first-degree and second-degree criminal sexual conduct. An element of both offenses is that the actor is "in a position of authority

over the complainant." Minn. Stat. §§ 609.342, subd. 1(b), .343, subd. 1(b). The statute defines "position of authority" as

> includ[ing] but is not limited to any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties or responsibilities to a child, or a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.

Minn. Stat. § 609.341, subd. 10 (2006).

Appellant argues that the evidence was insufficient as a matter of law to establish that he was in a position of authority over A.J.L. at the time of the alleged offenses because he is "not a parent" and "was not charged with the duties of a parent." Appellant contends that by simply volunteering to help A.J.L. with her homework he did not become charged with any duty or responsibility for her welfare. We are not persuaded by this argument.

"This court has held that 'position of authority' is 'broadly defined.'" *State v. Rucker*, 752 N.W.2d 538, 546 (Minn. App. 2008) (quoting *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1988), *review denied* (Minn. May 16, 1988)), *review denied* (Minn. Sept. 23, 2008). We have also held that the list of persons contained in the statutory definition is not exclusive. *Id*. Moreover, whether or not appellant invited A.J.L. over for each tutoring session or was asked explicitly by A.J.L.'s mother to supervise A.J.L. is not dispositive. *See State v. Waukazo*, 269 N.W.2d 373, 374 (Minn. 1978) (finding adult son of victim's foster parents to be in position of authority despite lack of express duty or authority to care for the child).

It is undisputed that appellant tutored A.J.L. in his home on a regular basis over a period of five months. Appellant testified that he directed the tutoring sessions in order to keep A.J.L. engaged in the learning process. Appellant monitored whether A.J.L. turned in her homework and what grades she received.

The record also reflects that appellant "always called [A.J.L.'s] mom when she showed up just to make sure that her mom knew where she was, and . . . always called her mom when she left to make sure that her—like it was with my kids." Appellant agreed that A.J.L. trusted him and told him that she loved him. And he told A.J.L. that he loved her back, as a grandchild or niece.

Viewing these facts in the light most favorable to the jury's verdict, we conclude that there was ample evidence to support the jury's determination that appellant was in a position of authority over A.J.L. at the time of the offenses.

IV. The district court did not commit other errors that warrant a new trial.

An appellant is entitled to a new trial if evidentiary or other errors, when taken cumulatively, had the effect of denying appellant a fair trial. *State v. Keeton*, 589 N.W.2d 85, 91 (Minn. 1998).

A. Sex-related items seized from appellant's home

In his posttrial motions, appellant challenged the district court's admission of several sex-related items that were seized during searches of appellant's home. But during trial, appellant either failed to object to the admission of these items or withdrew any objection made. "[W]hen allegedly improper or prejudicial evidence has been admitted without objection, a party may not object to its admissibility for the first time in

a motion for a new trial or on appeal." *State v. Saybolt*, 461 N.W.2d 729, 737 (Minn. App. 1990), *review denied* (Minn. Dec. 17, 1990). Errors to which no objection was taken are subject to plain-error analysis.[1] *Griller*, 583 N.W.2d at 740.

The evidence appellant challenges includes three pornographic magazines and photographs of personal lubricants, a box of condoms, pornographic playing cards, and "unidentified lingerie." He contends that these items are "wholly unrelated to the allegations" and their admission served only to "suggest improperly that [he] acted in conformity with his beliefs about sexual relationships" and show that he is a "sexual deviant." *See* Minn. R. Evid. 404 (prohibiting character evidence that merely shows "conformity" with prior acts or behavior during the incident in question).

The threshold requirement for the admissibility of evidence is relevancy. Minn. R. Evid. 402. 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. "[A]ny evidence is relevant which logically tends to prove or disprove a material fact in issue." *Boland v. Morrill*, 270 Minn. 86, 98-99, 132 N.W.2d 711, 719 (1965). But even relevant evidence

[1]Appellant argues that he preserved his right to appeal this issue by challenging the admission of this evidence in his motions in limine. But the district court did not address admission of this evidence during the pretrial conference or in its pretrial order. Absent a definitive ruling, appellant was obligated to renew his objection. *Cf.* Minn. R. Evid. 103(a) (stating that "[o]nce the court makes a *definitive* ruling on the record admitting . . . evidence, either at or before trial, a party need not renew an objection . . . to preserve a claim of error" (emphasis added)); *State v. Word*, 755 N.W.2d 776, 783 (Minn. App. 2008) (stating that "evidentiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear, or when the context at trial differs materially from that at the time of the former ruling.").

"may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403.

Appellant argues that A.J.L. did not identify any of the magazines as the ones she had seen in his home and that the pictures of the other sex-related items "were not in any way connected to A.J.L.'s allegations against [appellant]." But appellant fails to show how the admission of each particular item was plain error affecting his substantial rights. A.J.L. testified that appellant showed her "sex magazines" and "sex" videos. A.J.L. testified that appellant made her wear a "black [two] piece" lingerie, which she identified in court. The subject evidence was relevant to corroborate this testimony, and its probative value is not outweighed by potential prejudice to appellant merely because A.J.L. did not specifically identify each item. *See State v. Holscher*, 417 N.W.2d 698, 702-03 (Minn. App. 1988) (stating that "the lack of an absolute connection" between sexual-fetish evidence and the allegations against the appellant "does not affect the admissibility of the challenged evidence, but only the weight accorded it"), *review denied* (Minn. Mar. 18, 1988). Appellant has not established that the district court's admission of this evidence constituted plain error affecting his substantial rights.

B. Vouching testimony

It is improper for one witness to vouch for the truthfulness of another witness because such testimony interferes with the jury's duty to assess credibility. *State v. Blanche*, 696 N.W.2d 351, 374 (Minn. 2005). Vouching occurs when the state "implies a guarantee of a witness's truthfulness, refers to facts outside the record, or expresses a

personal opinion as to a witness's credibility." *State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998) (quotation omitted).

Appellant argues that "[t]he prosecutor repeatedly sought testimony vouching for the credibility of [A.J.L.]." Appellant objected to this testimony during trial, and though this appears to be an allegation of prosecutorial misconduct, appellant does not cite or argue to the appropriate standard of review.

Objected-to prosecutorial misconduct provides grounds for reversal if the misconduct, considered in the context of the whole trial, deprived the defendant of a fair trial. *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006). But we will find such error to be harmless beyond a reasonable doubt if the verdict rendered was surely unattributable to the error. *Id.*; *see also State v. Dobbins*, 725 N.W.2d 492, 507 (Minn. 2006) (stating that objected-to prosecutorial misconduct is reviewed to determine whether the misconduct was harmless beyond a reasonable doubt, i.e., whether the verdict was surely unattributable to the misconduct).

Appellant argues that A.J.L.'s great-grandmother improperly vouched for A.J.L.'s credibility when she testified that A.J.L.'s trial testimony was truthful. Appellant also contends that A.J.L.'s mother improperly vouched for A.J.L.'s truthfulness when she stated that "[A.J.L.] has never lied." The district court struck from the record and told the jury to disregard A.J.L.'s great-grandmother's statement. The court conducted a bench conference following appellant's attorney's objection to A.J.L.'s mother's statement and concluded that it appeared to be inappropriate vouching testimony, but the court failed to strike the statement from the record.

After careful review of the transcript, we conclude that any error resulting from the court's failure to strike A.J.L.'s mother's vouching testimony was harmless. Where the testimony represents a small part of the trial as a whole, the error may be harmless. *State v. Soukup*, 376 N.W.2d 498, 503 (Minn. App. 1985), *review denied* (Minn. Dec. 30, 1985). The record reveals that A.J.L.'s mother's vouching testimony on direct examination amounts to one line in the trial transcript, while the entirety of her direct examination comprises 14 pages of the 453-page transcript. Considered in the context of the whole trial, which included substantial other evidence against appellant, this testimony did not deprive him of a fair trial.

C. Witness's references to bad-act evidence

The prosecution has a duty to prepare its witnesses to avoid inadmissible or prejudicial testimony. *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). But a reviewing court will more likely find prejudicial misconduct when the state has *intentionally* elicited impermissible testimony. *Id.* And even an intentional elicitation of impermissible testimony warrants reversal only when it is likely that the testimony substantially impacted the jury's decision to convict. *Id.*

Appellant argues that he was prejudiced by the state's apparent failure to advise A.J.L.'s mother not to refer to an instance of appellant's prior bad conduct—specifically, her reference to "physical altercations" between appellant and A.J.L.'s great-aunt in

response to a question regarding "what [appellant's] relationship was like with [A.J.L.'s great-aunt] when it initially started."[2] This argument is unavailing.

Considered as a whole, the exchange between A.J.L.'s mother and the prosecutor did not likely influence the jury's decision to convict appellant. The transcript reflects that the prosecutor did not intentionally elicit impermissible testimony from A.J.L.'s mother, but rather that A.J.L.'s mother misconstrued the prosecutor's question and gave an inappropriate answer. Additionally, because the district court sustained defense counsel's objection and ordered the answer stricken from the record, there was no apparent prejudice. The district court immediately directed the jurors to disregard the answer. And in its final instructions, the district court reminded the jury "to disregard all evidence which I have ordered stricken or have told you to disregard." Without evidence to the contrary, we presume that the jury followed a district court's instruction. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002).

D. Cumulative effect of errors

Appellant argues that "the cumulative effect of these related errors requires a new trial," citing *State v. Ware*, 498 N.W.2d 454, 459 (Minn. 1993), in which the supreme court reversed and remanded the appellant's conviction of second-degree intentional murder due to the "synergy" of several trial errors, and *State v. Erickson*, 597 N.W.2d 897, 904 (Minn. 1999), in which the supreme court remanded the appellant's convictions where it determined that "the cumulative effect of [trial] errors may have deprived [the]

[2] This appears to be a prosecutorial-misconduct argument, but appellant does not cite the appropriate standard of review or fully brief such a claim.

appellant of a fair trial." We disagree. As noted above, none of the alleged errors prejudiced appellant or otherwise deprived him of a fair trial, and thus they did not have the cumulative effect of depriving him of a fair trial.

Affirmed.