STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1419

State of Minnesota,
Respondent,

vs.

Nathan NMN Obeta,
Appellant.

Filed August 25, 2009
Reversed and remanded
Klaphake, Judge

Ramsey County District Court
File No. 62-K9-07-003955

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Stauber, Judge; and Muehlberg, 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

KLAPHAKE, Judge

Following a jury trial, appellant Nathan Obeta was acquitted of kidnapping but convicted of first- and third-degree criminal sexual conduct. He was charged after 22-year-old M.B. reported to police that appellant raped her in the backseat of a Ford Bronco on the afternoon of April 26, 2007. Appellant claimed that M.B. consented to having sexual intercourse with him.

On appeal, appellant challenges a number of the district court's evidentiary rulings, which he claims prejudiced his ability to present a complete defense. Appellant further claims that the cumulative effect of the errors prevented him from receiving a fair trial. Because we are left with the firm impression that appellant did not receive a fair trial due to the cumulative effect of the district court's erroneous rulings, we reverse and remand for a new trial.

FACTS

M.B. spent the evening of April 25, 2007, at the home of her friend, E.K. E.K. had invited two men, appellant and his friend A.S., to her home in Isanti after making contact with them on the "Live Links" phone chat service. The group listened to music, hung out, and drank alcohol. The men stayed at E.K.'s until the early morning hours of April 26, when M.B. decided to leave with them.

Within a few blocks of E.K.'s home, A.S. ran a stop sign and was pulled over and arrested. The Bronco in which the three were riding was impounded, leaving M.A. and appellant without a vehicle, so M.B. decided to call her former boyfriend, T.G., for help.

M.B. asked T.G. to help the group pick up A.S., who had been released from the Isanti County jail, and to drive to St. Paul, where the men lived, to pick up the vehicle's owner and obtain some money so that they could retrieve the Bronco from the impound lot in Braham. T.G. agreed to help and the group set out on their mission, which took most of the day.

During her opening statement, the prosecutor described M.B.'s relationship with T.G. as "volatile." M.B. testified that her relationship with T.G. was "abusive" and that T.G. was a "jealous man." M.B. claimed that while T.G. was driving the group around, he became more and more upset with her, and called her a whore and a bitch. M.B. denied flirting with any of the men, although she admitted that at one point she pretended to lift up her shirt (or "flash") the men in an effort to tease T.G. While the details of their testimony were not always consistent, T.G., A.S., and appellant all tended to agree that M.B. was flirting with the men, that she flashed them at least once, and that she seemed to be enjoying herself.

By the time the group returned to the impound lot in Braham to retrieve the Bronco, it was late afternoon on April 26. M.B. explained that she decided to get into the Bronco, rather than into T.G.'s vehicle, because she was afraid of T.G. A.S. testified that appellant claimed she wanted to go with them because T.G. beat her. Appellant testified that M.B. simply preferred to ride with him and his friends. T.G. acknowledged that he was upset at that point and testified that M.B. was "happy to go with" appellant and his group.

T.G. left in his vehicle and returned to his home in Isanti. The others drove back to St. Paul in the Bronco, with its owner driving, A.S. in the front passenger seat, and appellant and M.B. in the back seat. M.B. claimed that she kept asking to be brought home and that she became "uneasy" and eventually scared when the men kept driving toward St. Paul. M.B. also testified that at one point appellant told her that there was a gun in the car. Appellant and A.S., however, denied any talk about a gun and claimed that M.B. did not appear scared or ask to go home. They testified that everyone was smoking cigars and having fun, particularly M.B., who was dancing and who again flashed them.

After A.S. and the owner of the Bronco were dropped off at various locations in St. Paul, appellant drove to a parking lot in Roseville. M.B. claimed that appellant got into the back seat and forced her to have sex; appellant claimed that the intercourse was consensual. M.B. acknowledged that she did not fight or scream, but claimed that she asked appellant to stop.

Afterward, M.B. got out of the Bronco and went to a nearby gas station where she used the bathroom. M.B. testified that when she came out, appellant had driven away. Appellant testified that M.B. asked him for a ride back to Isanti, but that he had already told her he would not drive her back. Appellant testified that M.B. threatened to tell the police that appellant had raped her if he did not bring her home, but that he told her to go ahead because he knew he had not done anything wrong. Appellant claimed that M.B. laughed and walked away.

M.B. called several people in an attempt to find a ride home, but could not reach anyone. She was able to reach at least one friend, who testified that he did not intend to come and pick her up and that he merely told T.G. to go and get her. After realizing that her friend was not coming, M.B. flagged down a police car and reported that she had been raped.

The officer testified that M.B. "was very upset" and "crying," and that her "shoulders were slumped forward." M.B. was transported to the hospital, where she was examined by a sexual assault nurse. The nurse testified that M.B. was "very upset, very quiet, shaking at times." The nurse found several scratches on M.B.'s back and arms, but she did not discover any injuries to M.B.'s vaginal area. The nurse's audiotape interview of M.B. was replayed for the jury, with some redactions.

A police detective was assigned to investigate the case. Appellant came in voluntarily and during an interview told the detective that the sex was consensual, that M.B. had told him that she would find her own way home, but that she became upset after the sex when he refused to drive her back to Isanti.

During its deliberations, the jury asked several questions regarding M.B.'s interview with the nurse, and portions of the audiotape were replayed several times. The jury eventually acquitted appellant of kidnapping, but found him guilty of first- and third-degree criminal sexual conduct.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by allowing the sexual assault nurse to testify about common injuries to and characteristics of sexual assault victims and to imply that because M.B. fit those characteristics she was such a victim. Appellant asserts that the testimony was improper expert testimony and that the nurse was vouching for M.B.'s credibility.[1]

To be admissible, expert testimony must be "helpful" to the jury and be based on special knowledge or training that laypeople and jurors do not have. Minn. R. Evid. 702; *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982). Because matters of witness credibility are generally within the competence and common experience of most jurors, the use of an expert's opinion to bolster the credibility of a witness is discouraged. *See State v. Morales-Mulato*, 744 N.W.2d 679, 687 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). This is particularly true in cases involving sexual assault of an adult victim when the issue is consent; the state may not present testimony on typical reactions or experiences of rape victims. *Saldana*, 324 N.W.2d at 229-30. "[S]uch testimony is of no help to the jury" because it is irrelevant whether the alleged victim "react[s] in a

[1] The state argues that the plain error standard of review applies because appellant failed to object at trial on the grounds that he now raises. But a review of the trial transcript demonstrates that appellant's attorney repeatedly objected to the nurse's testimony on the commonality of injuries and to the common reactions of victims of sexual assault. Appellant's attorney also made contemporaneous objections during the prosecutor's examination of the investigating detective. These objections put the district court and the prosecutor on notice of the challenges that appellant now makes on appeal.

typical manner to the incident," and she "need not display the typical post-rape symptoms . . . to convince the jury that her view of the facts is the truth." *Id*. at 229.

In this case, the nurse and the detective were not asked their opinions about whether they believed M.B. was a sexual assault victim or whether they believed she was telling the truth. To that extent, the statements were not offered as true "expert" opinions and did not constitute "vouching" testimony. But the nurse and the detective were allowed to testify that, based on their experience, most women who are assaulted "have significant fear and don't fight back," that "they just lay there and wait for it to be over with for fear of being injured more," and that "there's a delay" in reporting in "the majority" of sexual assault cases, thus permitting the jury to infer that M.B. was a typical victim.

In *Saldana*, 324 N.W.2d at 229, the jury heard "discussion of the stages a rape victim typically goes through . . . essentially an explanation of 'rape trauma syndrome.'" Although the statements of the nurse and the detective in this case were not so extensive and did not specifically refer to a syndrome, the statements were indirectly offered to explain M.B.'s reactions and symptoms and to allow the jury to draw inferences that M.B. was a typical rape victim. We therefore conclude that this testimony improperly invaded the province of the jury and the district court erred in allowing it over the continuing objections of defense counsel. *See id.* at 232; *State v. Vue*, 606 N.W.2d 719, 723 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). *Compare State v. Dunkel*, 466 N.W.2d 425, 429 (Minn. App. 1991) (finding no error in allowing state to ask a

single question to refute inference of late reporting and noting that state did not argue rape trauma syndrome in closing argument).

II.

Appellant argues that the district court erred by prohibiting him from cross-examining M.B. about a prior act of dishonesty that was relevant to her credibility and to allegations of bias. Before trial, appellant sought permission to cross-examine M.B. about a November 2006 report she made to police that her boyfriend, T.G., had assaulted her. As a result of that incident, M.B. was convicted of domestic assault, while T.G. was not charged. The district court denied the request, concluding that information regarding the relationship between M.B. and T.G. was not relevant and was more prejudicial than probative.[2]

Appellant asserts that evidence of M.B.'s relationship with T.G. and of her false allegations against him was relevant to M.B.'s credibility and to rebut the state's claim that T.G.'s account of the events was biased. During opening statements, the prosecutor described M.B.'s relationship with T.G. as "volatile," and M.B. herself described the relationship as "abusive" and claimed that T.G. was a "jealous man." Appellant asserts that the state was allowed to present the jury with an entirely one-sided view of the relationship between M.B. and T.G. Evidence of M.B.'s 2006 report of an assault is potentially more relevant because of appellant's claim that M.B. threatened to report him

[2] The state asserts that appellant was required to make a formal offer of proof regarding M.B.'s alleged prior act of dishonesty. But because the "substance of the precluded testimony" was apparent, a formal offer of proof was not necessary "to preserve the issue for appeal." *In re Welfare of M.P.Y.*, 630 N.W.2d 411, 415 (Minn. 2001).

for rape if he refused to drive her home, which paralleled her apparent false claim of assault against T.G. Appellant claims that the district court's rulings violated his rights to present a defense and to effectively cross-examine and confront M.B.

Minn. R. Evid. 608(b) provides in pertinent part:

> [Evidence of] specific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness[.]

An examining attorney who inquires into collateral matters on cross-examination, including matters relating to the witness' credibility, is bound by the answers he receives and is not permitted to introduce collateral matters to prove facts contradicting the answers, even if they are false. *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1981).

Appellant acknowledges that his attorney would have been bound by any response he would have received from M.B. But appellant should have been allowed to cross-examine M.B. about the 2006 incident involving T.G. We therefore conclude that the district court's ruling, which limited appellant's ability to probe M.B.'s character for truthfulness and had the effect of presenting the jury with a one-sided view of M.B. as the victim of an abusive relationship, was error.

III.

Appellant next argues that the district court erred in admitting M.B.'s audiotape statement to the nurse as a prior consistent statement. Appellant argues that the statement was materially inconsistent with M.B.'s trial testimony and was highly prejudicial

because it contained several damaging allegations, to which the jury paid particular attention.[3]

The audiotape was admitted into evidence as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B), which provides that an out-of-court statement is not hearsay and is admissible as substantive evidence if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." To be admissible under this rule, the prior statement must be "reasonably consistent" with the declarant's trial testimony, but need not be verbatim. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). The district court should "analyze the individual statements . . . to determine their consistency with [the declarant's] testimony." *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Without this type of analysis, "a few consistent statements in a multi-statement interview may be used to bootstrap into evidence inconsistent statements that do not qualify under the rule." *Id.*

In this case, the district court did not separately analyze the individual statements to determine their consistency with M.B.'s trial testimony. In addition, the audiotape contained several pieces of information that were either inconsistent with M.B.'s trial

[3] The state again asserts that the plain error standard applies to our review of this argument because appellant only objected to two inconsistent statements on the tape. But again, examination of the trial transcript demonstrates that appellant's attorney placed a lengthy objection on the record to the admissibility of the tape. During that objection, appellant's attorney stated that there were "at least five instances" in which M.B.'s testimony was inconsistent with her statements to the nurse and that the audiotape statement thus did not qualify as a prior consistent statement.

testimony or not mentioned by M.B. during her trial testimony. In particular, during her interview with the nurse, M.B. stated that appellant told her he had a gun in the car after he had parked the Bronco and immediately prior to the assault; that he told her to "shut up" and that he would take her home after he was done; and that appellant put his hand over her mouth to stop her from screaming during the assault. This information was not included in M.B.'s trial testimony, during which she stated that she did not resist because she was scared and that she did not recall appellant saying anything during the assault.

Because the district court failed to either exclude the entire audiotape or redact the inconsistent statements in that tape, the jury heard a number of inconsistent statements that were inadmissible under the rule. *See Bakken*, 604 N.W.2d at 110. Moreover, the jury paid particular attention to the audiotape and asked the court to repeat or replay portions of the tape several times during its deliberations. Thus, the error in admitting these inconsistent statements likely had a significant effect on the jury's verdict.

IV.

Finally, while some of the individual errors may be harmless, we believe that the cumulative effect of these errors deprived appellant of a fair trial. "Cumulative error exists when the cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (quotation omitted). In this close credibility contest in which the crucial issue was whether M.B. consented to sexual intercourse with appellant, we believe that the district court's evidentiary errors unfairly tilted the balance in favor of the state's case and

deprived appellant of a fair trial. Because there was "a great deal of conflicting testimony and the factual determinations must have been difficult," we conclude that "any error, however small, may have prejudiced defendant," particularly when the evidence of appellant's guilt was not overwhelming and the issue of consent was close and subject to conflicting evidence. *State v. Underwood,* 281 N.W.2d 337, 344 (Minn. 1979).

Reversed and remanded.