STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1932

State of Minnesota,
Respondent,

vs.

Kasey Vo Cao,
Appellant.

Filed August 25, 2009
Reversed and remanded
Worke, Judge

Anoka County District Court
File No. 02-K0-07-001284

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

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

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

Considered and decided by Worke, Presiding Judge; Minge, 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

WORKE, Judge

Appellant challenges his convictions of third- and fourth-degree criminal sexual conduct, arguing that (1) the prosecutor committed misconduct by telling the jury in his closing argument that corroboration of the complainant's testimony was not necessary; (2) the evidence is insufficient to support his convictions; and (3) he received ineffective assistance of counsel. Because we conclude that the prosecutor committed misconduct in his closing argument, we reverse and remand.

FACTS

In July 2006, appellant Kasey Vo Cao attended a party at the home of K.T. M.J.G. also attended the party. At some point during the night, M.J.G. became intoxicated and K.T. escorted her to an upstairs bedroom to lie down. Later, another individual escorted appellant, who was also intoxicated, to the same bedroom to lie down. The events that transpired thereafter are in dispute.

M.J.G. testified that she consumed a significant amount of alcohol at the party, became ill and fell asleep in an upstairs bedroom. She testified that she later woke to the feeling of someone having intercourse with her. M.J.G. was unable to describe the individual in bed with her, and did not recall anyone coming in or talking to her while she was in the bedroom. She testified that the next morning she found her shorts and underwear on the floor next to the bed. M.J.G. also found that she was unable to locate and remove a tampon that she had in when she went to bed. She then woke K.T., who told her what she recalled seeing the night before. M.J.G. went to an urgent care clinic to

have the tampon removed and to get the morning-after pill to prevent a pregnancy. She did not report a sexual assault to anyone at the clinic. That evening, M.J.G. called the police, who instructed her to go to the hospital, where she received a sexual-assault exam and spoke to the police.

Appellant testified that he had been drinking heavily prior to arriving at the party. He was feeling wobbly and dizzy and had blurred vision. He testified that someone took him to an upstairs bedroom where he dozed off. When he woke up, he realized that there was someone else in the bed and they began talking to each other in whispering voices. Appellant testified that they started kissing and touching each other, which quickly led to them having sexual intercourse. Appellant claims that M.J.G. was fully cooperative and was moving, responsive, and talking to him during the encounter. According to appellant, after a few minutes he told M.J.G. that he was tired and had to stop. Appellant testified that M.J.G. then gave him her phone number, which he saved in his cell phone.

K.T. testified that she went to the upstairs bedroom and had difficulty getting into the room because a vacuum cleaner had been placed in front of the door. Upon entering the room, she saw movement under the covers. K.T. ordered appellant to leave her house and she spoke briefly with M.J.G., who said she was "fine."

Appellant was charged with third- and fourth-degree criminal sexual conduct on the basis that M.J.G. was physically helpless. A jury found appellant guilty as charged. Appellant moved for a new trial, which the district court denied. Appellant was sentenced to an executed sentence of 41 months in prison. This appeal follows.

D E C I S I O N

Appellant argues that the prosecutor engaged in misconduct during his closing argument when he told the jury that corroboration of M.J.G.'s testimony was not necessary. Appellant failed to object to the alleged prosecutorial misconduct during trial or request a cautionary instruction on the remarks. Generally, when a defendant fails to object to a prosecutor's closing remarks or to seek a cautionary instruction he waives the right to have the issue considered on appeal. *State v. Parker*, 353 N.W.2d 122, 127 (Minn. 1984). But "[p]lain errors or defects affecting substantial rights may be considered by the court . . . on appeal although they were not brought to the attention of the [district] court." Minn. R. Crim. P. 31.02. Plain error exists if (1) there is an error, (2) that is plain, and (3) that affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998); *see also State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (applying plain-error analysis to alleged prosecutorial misconduct).

This court will reverse a conviction as a result of prosecutorial misconduct if the prosecutor's actions, "when considered in light of the whole trial, impaired the defendant's right to a fair trial." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). "In charging the jury *the court* shall state all matters of law which are necessary for the jury's information in rendering a verdict." Minn. R. Crim. P. 26.03, subd. 18(5) (emphasis added). During his closing argument, the prosecutor stated, "[t]he law in this state does not require corroboration. You can find a person guilty of criminal sexual conduct just on a victim's testimony alone." Because the district court is responsible for providing the jury with the instructions on the law necessary for rendering a verdict, the

prosecutor's remarks constituted error that was plain. *See State v. Jolley*, 508 N.W.2d 770, 773 (Minn. 1993) (providing that prosecutorial misstatements of the law constitute misconduct and can be addressed by the court giving a curative instruction). While prosecutorial misstatements of the law are easily cured by an instruction from the court, one was not given here and, based on the circumstances of this case, the error affected appellant's substantial rights.

Appellant was charged with third-degree criminal sexual conduct. *See* Minn. Stat. § 609.344, subd. 1(d) (2006) ("A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor knows or has reason to know that the complainant is . . . physically helpless."). "Physically helpless" is defined as a person who is "asleep or not conscious," "unable to withhold consent or to withdraw consent because of a physical condition," or "unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9 (2006).

In a prosecution for third-degree criminal sexual conduct, "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2006). This statutory rule, however, is not unqualified. "[I]n an individual case the absence of corroboration might mandate a holding on review that the evidence was legally insufficient." *Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986). Corroboration is required if the other evidence of guilt is insufficient. *State v. Cichon*, 458 N.W.2d 730, 735 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

Because the victim cannot recall the events that transpired and appellant presents a differing version of events, the importance of evidence corroborating a claim of helplessness is important and necessary. There was no one else present in the room at the time the intercourse occurred who can testify as to whether M.J.G. consented or was asleep or unconscious. The only source of corroborating evidence is the testimony of K.T. K.T. testified that her vacuum cleaner was blocking the bedroom door from the inside when she tried to gain access to the room. And although K.T. testified that M.J.G. never opened her eyes when she was talking to her, she also testified that M.J.G. responded to her question and that M.J.G. told her she was "fine." However, K.T. was not in the room when the intercourse occurred and cannot testify as to whether M.J.G. was asleep or unconscious. The presence of the vacuum in front of the door, the testimony of someone who was not present when the intercourse occurred, and the lack of physical evidence do not constitute sufficient corroborating evidence or lead to the conclusion that an assault did or did not occur. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (holding that the absence of physical evidence does not prevent a jury from convicting an accused of sexual abuse), *review denied* (Minn. Mar. 16, 1990).

We also note that the record is undeveloped as it relates to appellant's version of events. While appellant testified that M.J.G. gave him her phone number that night, appellant's phone records were not introduced into evidence. Appellant asserts that M.J.G. gave him her phone number while they were lying in the bed. Both M.J.G. and appellant testified that they did not know each other before the party; therefore, the number was presumably not there prior to that night. The presence of M.J.G.'s phone

number in his cell phone is a crucial piece of evidence that may support his claim that M.J.G. was awake and cooperative, thereby bolstering his credibility. *See Bliss*, 457 N.W.2d at 390 (providing that the weight and credibility of witness's testimony is to be determined by the fact-finder). It is possible that had the records been introduced, the essential element of the charge—that appellant knew or had reason to know that M.J.G. was physically helpless—could be negated. Therefore, while this is an unfortunate situation in which both parties were heavily intoxicated, based on the record, the absence of corroboration in this case "mandate[s] a holding on review that the evidence was legally insufficient." *Marshall*, 395 N.W.2d at 365.

While we generally consider a closing argument as a whole, because we have concluded that this is a case where corroboration of M.J.G.'s testimony is important, the prosecutor's remarks affected appellant's substantial rights. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that we consider closing arguments as a whole when addressing prosecutorial misconduct arising from the argument). Therefore, we reverse and remand for a new trial.

Finally, appellant also argues that the evidence was insufficient to sustain his conviction and he received ineffective assistance of counsel. However, based on our decision to reverse and remand, we do not reach those issues.

Reversed and remanded.