STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0705

State of Minnesota,
Respondent,

vs.

James Lee Curtis,
Appellant.

Filed September 15, 2009
Reversed and remanded
Stauber, Judge

Cook County District Court
File No. 16CR07221

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

Tim Scannell, Cook County Attorney, Cook County Courthouse, 41 West Second Street, Grand Marais, MN 55604 (for respondent)

Thomas M. Skare, 1429 Cloquet Avenue, Cloquet, MN 55720 (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Chief Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of attempted second-degree murder and from an order denying and dismissing his petition for postconviction relief, appellant argues that

(1) admission of character evidence unfairly prejudiced him; (2) the prosecutor committed prejudicial misconduct; and (3) newly discovered psychological evidence requires reversal of the verdict. Because we agree that highly prejudicial character evidence was improperly admitted, we reverse and remand.

FACTS

Appellant James Curtis and his wife, A.C., have been married for over 40 years. They reside in Grand Marais, Minnesota, and have six children (one other child is deceased). Appellant is a Marine Corps veteran with over 30 years of active and reserve service, much of it overseas, including tours of duty in Vietnam. A.C. is a homemaker. After moving to Grand Marais, appellant became a federally licensed gun dealer and opened a gun shop next to the family home.

Appellant had a drinking problem, spending many evenings drinking locally. A.C. separated from appellant several years ago after discovering him with another woman. Thereafter, appellant stayed in the gun shop where he created a sleeping area. A.C. continued to provide some support to appellant, including bringing him meals at the gun shop.

Appellant had a bad disposition much of the time, which caused constant, growing tension between A.C. and him. Appellant would verbally abuse A.C., and on at least one occasion, he allegedly physically harmed her as well. A.C. claimed she was often frightened of appellant, especially when he was drinking.

On April 9, 2007, while running errands, A.C. noticed appellant's truck at the American Legion. When she made dinner that evening, appellant's meal was set aside

and covered until he came home. When appellant arrived home, he became upset at A.C. because his meal was not freshly prepared. Appellant began shouting at A.C. and told her he was depressed and lonely and considering suicide, as he sometimes did when he had been drinking. A.C. became upset by appellant's behavior and began to leave the gun shop to return to the house. Appellant then said something to the effect of "do you want to see how it feels" or "how I feel." A.C. turned back to see what he meant. Appellant appeared extremely angry and upset. He then pulled a cocked .45 caliber handgun from under his pillow and held it for several seconds, while continuing to talk of his depression and suicide. Appellant then pointed the gun toward A.C., brought it upward and discharged it over A.C.'s head. She observed the flame from the gun barrel. The bullet passed over A.C.'s head and lodged in the ceiling.

The couple's son, J.C., heard the confrontation from the house and proceeded toward the gun shop. As he approached the gun shop, J.C. saw A.C. in the doorway, heard the gunshot, and saw her jump back. After confirming that his mother and father were uninjured, J.C. grabbed appellant and asked what was going on. The first words from appellant were, "I missed my f-cking head; I missed my f-cking head," and he also told J.C. that he was sick of life.

Law enforcement was contacted, and appellant was taken into custody. The deputy who responded to the scene reported that appellant appeared to be intoxicated. Appellant later told police that he removed the gun from under the pillow because he wanted A.C. to understand that he was seriously contemplating suicide. Appellant claimed that he accidentally discharged the gun and did not realize that it was cocked.

Appellant was subsequently charged with attempted murder in the second degree, assault in the second degree, reckless discharge of a firearm, and domestic assault.

At trial, appellant's main defense was that he did not intend to harm A.C. A.C. testified to past abusive behavior by appellant, including a particular incident in which he pushed her against the chimney in the family home, yelled at her, and tried to choke her. Appellant testified that he did not recall the incident and did not believe he had ever put a hand on her. On cross-examination, appellant also testified that he never harmed his children or touched them except for disciplinary spankings. The prosecutor specifically inquired about his 40-year-old daughter, R.S.

> Q. Okay. Um, I want to ask you again, because you already made a statement on this, you didn't ever lay a hand on any of your kids.
> A. No, sir, not unless in a spanking–
> Q. In particular your oldest daughter. You never touched her.
> A. No, sir.
> Q. If she were to come in here and say otherwise, she'd be lying.
> A. I don't know what–
> Q. Hold on a second. If she were to come in here otherwise, would she be lying?
> A. I'm not going to call them a liar. I'm not going to–
> Q. Okay. All right. Thank you . . . .

Following the cross-examination of appellant, the defense rested. The prosecutor then asked for some time to meet with R.S. to discuss her testimony as a possible rebuttal witness. After conferring with R.S, the prosecutor told the court and defense counsel that he intended to call R.S. to testify that she was sexually abused by appellant from the ages of 8 to 15. Defense counsel vigorously objected, stating, "this type of testimony is so

inflammatory and is so prejudicial there is no probative value that can be outweighed." He also argued that the alleged abuse was remote in time, could not be cross-examined, and the resulting prejudice could not be cured with an instruction. The prosecutor acknowledged that the alleged abuse had ceased more than 25 years earlier and agreed that the rebuttal testimony would be "extremely prejudicial" and represented "a nuclear option." He further stated that while R.S. was on his initial witness list, the specific nature of her testimony had not been fully disclosed.

The court limited but allowed R.S.'s testimony as rebuttal, gave a cautionary instruction to the jury, and, at defense counsel's request, ruled that she be questioned using leading questions. R.S. testified, that beginning when she was eight years old, appellant molested her multiple times over a period of seven years.

The jury found appellant guilty of all charges. Appellant was sentenced to 153 months in prison on the attempted second-degree murder charge. Appellant filed a petition for postconviction relief, arguing that: (1) newly discovered evidence established that he suffered from posttraumatic stress disorder (PTSD) and, therefore, was not competent to aid in his own defense; (2) the district court erred in allowing inadmissible character evidence; and (3) the prosecutor committed misconduct. In its order denying appellant's motion for a new trial and dismissing the petition for postconviction relief, the district court only addressed appellant's arguments regarding newly discovered evidence and inadmissible character evidence. This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion in denying his postconviction petition seeking a new trial based on the admission of improper character evidence. "The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000).

In denying the petition for postconviction relief, the district court found no abuse of discretion in allowing the character evidence presented by R.S., concluding that "[t]he evidence did carry with it the danger of undue prejudice but the probative value of the evidence exceeded the risk of prejudice." We disagree.

At trial, R.S.'s testimony that appellant had sexually abused her over 25 years earlier was admitted because "as the Court understands the law this is fair game or appropriate rebuttal." Rebuttal evidence is limited to that which explains, contradicts, or refutes defendant's evidence. *State v. Gore*, 451 N.W.2d 313, 316 (Minn. 1990). Appellant's ambivalent denial that he had "ever la[id] a hand on any of [his] kids," and more specifically, his claim that he had "never touched" R.S. were elicited by the prosecutor on cross-examination. The defense did not assert that appellant's character was unmarred by any history of abuse of his children. The defense strategy was simply based on appellant's lack of intent. Thus, R.S.'s testimony did not, in ordinary terms, rebut defense evidence.

However, extrinsic evidence of misconduct of the witness may be admitted if it constitutes impeachment by contradiction. *See generally State v. Waddell*, 308 N.W.2d 303, 304 (Minn. 1981) (holding that admission of "collateral" evidence contradicting a witness's testimony may not be barred if its probative value exceeds the risk of unfair prejudice). The common-law "sweeping-claims exception" permitted contradiction by extrinsic evidence of a broad denial of prior misconduct, even one made by a criminal defendant. *See* Fredrick C. Moss, *The Sweeping-Claims Exception and the Federal Rules of Evidence*, 1982 Duke L.J. 61, 89 (1982). And the federal courts have held that impeachment by contradiction is allowed by Rule 607 of the Federal Rules of Evidence. *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999).

The rationale for allowing extrinsic evidence to impeach a "broad disclaimer of misconduct," even though it concerns a collateral matter, is that "the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral-fact doctrine." 28 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure*, § 6119 at 116–17 (1993). Whether or not appellant had sexually abused his daughter was collateral to the charge of attempted murder against A.C. But when appellant broadly denied any such misconduct, he potentially opened the door to being impeached with R.S.'s testimony. As the district court expressed it, the matter became "fair game."

The problem with allowing impeachment by contradiction here, however, is that appellant did not offer his denial of prior abuse voluntarily, on direct examination; rather, the denial was extracted from him by the prosecutor on cross-examination, knowing that

he had R.S.'s testimony available for impeachment. As the Ninth Circuit Court of Appeals stated in *Castillo* "[c]ourts are more willing to permit, and commentators more willing to endorse, impeachment by contradiction where, as occurred in this case, testimony is volunteered on direct examination." 181 F.3d at 1133; *see also* Wright & Gold, *supra*, § 6119 at 117–18 (noting that impeachment by contradiction is often disallowed when the denial of misconduct is elicited on cross-examination "unless [the witness] volunteers the denial of misconduct in a nonresponsive or overbroad answer"). The reason for this distinction between denials offered on direct examination and those elicited on cross-examination is that "opposing counsel may manipulate questions to trap an unwary witness into 'volunteering' statements on cross-examination." *Castillo*, 181 F.3d at 1133.

That appears to be what occurred in this case. The prosecutor, proceeding beyond the scope of direct examination, asked appellant whether he "ever la[id] a hand on any of [his] kids." When appellant denied doing so, except for a possible spanking, the prosecutor asked appellant whether it was true he had "never touched" R.S. Appellant denied any such "touch[ing]." As one commentary points out, "if a witness has engaged in any embarrassing conduct in his life, he may be prone to deny it, especially if it is irrelevant to the issues in the case." Wright & Gold, *supra*, § 6119, at 119. As another commentator explains,

> [i]f the prosecutor is allowed to ask on cross-examination, based on good-faith information, whether the defendant tortures stray cats as a hobby, it is very likely that, even if true, the defendant will deny it. If he admits it, he may harm himself in the eyes of the jury. If he denies it, he will be

> lying, but about something totally foreign to the case being tried. Faced with this dilemma, it is more likely that the defendant will avoid certain ignominy and deny the allegation, hoping that the prosecutor is bluffing and has no evidence awaiting. If the prosecutor is permitted to contradict this falsehood, then every inadmissible and prejudicial fact about a witness capable of being proved could be injected into a trial at the whim and caprice of the prosecutor.

Moss, *supra*, at 96 n.172.

Appellant was faced with this dilemma when the prosecutor asked him about prior physical or (implicitly) sexual abuse of his daughter. The better view of the authorities is that extrinsic evidence to contradict appellant's denials was not admissible.

Of course, the analysis would be different if appellant's prior abuse of his children were not collateral to the charges being tried. The state argues on appeal that the abuse of R.S. was admissible as prior domestic-abuse evidence under Minn. Stat. § 634.20 (2008). That statute allows the admission of "similar conduct" committed by the defendant against the victim of domestic abuse, or against another family member. Minn. Stat. § 634.20. But the sexual abuse of R.S. was not "similar" to the alleged assault and attempted murder of A.C., and therefore, its probative value was minimal. The state presented evidence of appellant's relationship with A.C.

The probative value of evidence of sexual abuse of a child more than 25 years earlier would be substantially outweighed by the risk of unfair prejudice. *See generally id.* (incorporating balancing test). The remoteness in time of the prior sexual abuse and its utter dissimilarity to the charged act of attempted murder make its probative value nil. *Cf. State v. Ness*, 707 N.W.2d 676, 689 (Minn. 2006) (holding that 35-year-old incident

of sexual misconduct against boy was not admissible as *Spriegl* evidence in trial for similar act of sexual misconduct, and noting that it was "far beyond the time gap in any case where we have upheld the admission of other-acts evidence"). By contrast, the risk of prejudice from R.S.'s testimony of parental sexual abuse was extreme. As stated by defense counsel: "This is . . . most heinous criminal activity . . . first degree criminal sexual misconduct, and I think the jury will read it that way."

Thus, the district court abused its discretion in admitting R.S.'s testimony to impeach appellant's denial of past sexual abuse committed against her. This error requires reversal if there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). In applying this harmless-error standard, we consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005). We may also consider whether the state's properly admitted evidence provided overwhelming evidence of guilt. *Id.*

R.S.'s testimony was presented in dramatic fashion, as the state's last piece of evidence, the only rebuttal evidence offered. The evidence of prior sexual abuse appears to have been highly persuasive evidence of appellant's bad character. Although the district court gave a *Spriegl* cautionary instruction, the effect of that instruction in diminishing the effect of what the prosecutor characterized as the "extremely prejudicial" "nuclear option" is doubtful. The defense had no opportunity to counter this evidence. The prosecutor again, but briefly, mentioned appellant's conduct toward his daughter in

his closing argument, requiring defense counsel to attempt to mitigate the harm by arguing its remoteness and relevance. But the damage was likely irreparable. And the state's evidence of an intent to kill A.C. was certainly less than overwhelming. Therefore, we conclude that the admission of this testimony was prejudicial and requires a new trial.

Because we have determined that the admission of R.S.'s testimony was prejudicial error requiring a new trial, we need not reach appellant's arguments alleging prosecutorial misconduct and newly discovered evidence.

Reversed and remanded.