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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-118

State of Minnesota,
Respondent,

vs.

Joshua Lamar Smith,
Appellant.

Filed April 27, 2010
Affirmed
Bjorkman, Judge
Concurring specially, Minge, Judge

Ramsey County District Court
File No. 62-K9-07-002191

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defendant, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Bjorkman, 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 of two counts of first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion in limiting the

testimony of his DNA expert; (2) the prosecutor committed prejudicial misconduct in closing argument; (3) the district court violated appellant's right to a public trial by closing the courtroom to minors; (4) the district court erred in departing upward from the guidelines sentence; and (5) the fines are excessive. We affirm.

FACTS

Appellant Joshua Lamar Smith was convicted by a jury of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2006), arising out of attacks involving two victims. The first offense occurred on September 8, 2006. Then 16-year-old Smith invited 17-year-old E.J.E. to his home. E.J.E. is developmentally delayed and functions mentally at about age 12. Smith forced E.J.E. to perform oral sex by taking and threatening not to return her cell phone. Smith forced E.J.E. to remove her clothes by kicking her in the back of the head five or six times; Smith then penetrated her vaginally.

E.J.E.'s mother learned about the assault when she confronted her daughter about changes in her behavior. E.J.E. had saved the blood-stained underwear she wore on the night of the attack, and her mother turned it over to officers of the St. Paul Police Department. The sex crimes investigator identified Smith through E.J.E.'s descriptions and telephone records. The nurse who examined E.J.E. noted that E.J.E. had two complete clefts in the hymen, a sign of penetrating trauma that is evident in fewer than 5% of the sexual assaults the nurse investigates.

The second offense occurred on New Year's Eve 2006/2007. Fifty-five-year-old D.L.K. was walking home and had stopped in a parking lot to smoke shortly after

midnight. Smith approached her and made small talk. As D.L.K. turned to leave, Smith grabbed her by the neck, said "you're not going anywhere, bitch," and pushed her behind a nearby dumpster. Smith pushed down his jeans, and shoved his penis into her mouth. He then raped her vaginally. D.L.K. was terrified and unable to effectively resist Smith because of his size.[1]

Smith then hit and choked D.L.K. She remembers being dragged and placed in a "tuck-under garage" out of public view. Smith continued to kick and stomp on D.L.K. until she decided to "play dead." Once she stopped moving and pleading, Smith left. D.L.K. ran out to the street and stopped the first car that she saw. She had blood pouring out of a gash on her forehead, significant swelling around her left eye, and a broken nose. She also had an injury on the back of her head consistent with being thrown to the ground and genital injuries consistent with sexual assault.

D.L.K. told the police that her attacker was wearing dark clothes with some orange near the top. A neighbor reported that she saw a tall figure dragging something in the parking lot around the time of the attack, and that the person rode off on a bicycle about ten minutes later. The officers secured the scene, found a condom wrapper, blood stains, bicycle tracks, and a discarded condom behind the dumpster. Three days later, D.L.K. met with a forensic sketch artist. The sketch bears a strong likeness to Smith.

On the evening of the second offense, Smith was at his girlfriend's house, which is located about five blocks from where D.L.K. was assaulted. A friend who was with Smith reported that he left his girlfriend's house on a bicycle around 12:15 a.m. The

[1] D.L.K. is 4'9" and Smith was 6 feet tall at the time of sentencing.

same friend testified at trial that when she saw the forensic sketch on television, she identified the subject as Smith. Smith's girlfriend stated that he did not leave her house until 1:00 or 1:30 a.m., and that he was wearing dark clothes, including a dark jacket with a bright orange lining.

DNA evidence links Smith to both victims. A DNA sample from E.J.E.'s underwear matches a known sample from Smith. DNA from D.L.K.'s oral swab and from the condom found at the scene of her assault match the male DNA from E.J.E.'s underwear and Smith's DNA sample. The Bureau of Criminal Apprehension (BCA) estimated the statistical likelihood of obtaining such a match is less than one in a hundred billion, which the BCA characterizes as "once in the world population."

Smith retained Laurence Mueller, Ph.D., of the University of California, Irvine, to refute the DNA evidence. Dr. Mueller's expertise is in statistics and population genetics. The state challenged the admission of Dr. Mueller's proposed testimony on the ground that he was not qualified to testify about DNA testing and that his theories about laboratory error rates were irrelevant. Prior to trial, the district court ruled that Dr. Mueller could testify so long as his testimony met the *Frye-Mack* standard for admissibility of expert opinions. The district court precluded his proffered testimony regarding laboratory error at the Minnesota BCA and other DNA laboratories, and how uncertainty in laboratory performance impacts the weight assigned to DNA evidence.

On the first day of jury selection, the district court announced that children would not be permitted in the courtroom during the trial. Smith did not object to this condition

and there is no indication in the record that any person was excluded from the courtroom on this basis.

The jurors found Smith guilty on both charges. The jury then found, in a separate proceeding, that three aggravating factors were present with respect to D.L.K.'s rape: particular vulnerability due to size; multiple forms of penetration; and unnecessary cruelty.

The district court imposed a guidelines sentence of 173 months for the first-degree criminal sexual conduct conviction as to E.J.E. The district court sentenced Smith to 346 months, a double upward departure, for the offense related to D.L.K., to be served consecutively. The district court imposed fines of $5,000 on each count, for a total of $10,000. This appeal follows.

D E C I S I O N

I. Smith's constitutional right to present a defense was not violated by the limitations on the testimony of Smith's DNA expert.

Smith argues that he was denied his constitutional right to present a defense when the district court prevented his DNA expert from testifying that "respected scientists may disagree about the statistical weight assigned to DNA evidence."

Every criminal defendant has the right to be treated with fundamental fairness and to be "afforded a meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quotation omitted); *accord* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. But a defendant "must comply with the established rules of evidence designed to assure both fairness and reliability in

ascertaining guilt and innocence." *State v. Wolf*, 605 N.W.2d 381, 384 (Minn. 2000). Thus, even when a criminal defendant alleges that his constitutional right to present a defense has been violated, we review evidentiary rulings for abuse of discretion. *State v. Tovar*, 605 N.W.2d 717, 722 (Minn. 2000); *Wolf*, 605 N.W.2d at 384.

Smith argues that he was entitled to present Dr. Mueller's testimony that respected scientists disagree about the statistical weight assigned to DNA evidence. We agree, and the record shows that Dr. Mueller provided this testimony at trial. He described the "specific recommendations about how weight ought to be developed for a DNA match" that came out of the first National Research Council (NRC1) and stated that "some scientists . . . view at least certain parts of NRC1 to actually be the best methods for reporting weight of DNA evidence" even though the second National Research Council replaced the NRC1 methodology. Dr. Mueller also testified that the BCA did not use the NRC1 methodology.

The state asserted that Dr. Mueller lacked foundation to testify about the actual DNA testing and much of his direct testimony was overshadowed by the state's *voir dire* to establish its objections. For example, the state objected to the question, "How are the principles . . . and methods of population genetics used in forensic DNA typing?" on foundational grounds. Following a discussion at the bench, the state questioned Dr. Mueller about his experience and training over six pages of transcript before the objection was upheld. Similar exchanges occurred twice more during Dr. Mueller's testimony, though none as long as the first. The district court sustained each objection.

On this record, we conclude that the district court did not abuse its discretion in limiting Dr. Mueller's testimony. The district court permitted Dr. Mueller to testify within his area of expertise and to state his thesis that scientists disagree about statistical methods for reaching figures such as "once in the world population." Exclusion of testimony that was irrelevant or lacked foundation does not constitute abuse of discretion, and Smith's constitutional right to present a defense was not violated.

II. The prosecutor did not commit reversible error.

Smith asserts that the prosecutor committed reversible error by pursuing a pattern of questioning that denigrated and ridiculed Dr. Mueller, disparaging Dr. Mueller in closing argument, and misstating the law. These arguments are unavailing.

The state has an affirmative obligation to ensure that each defendant receives a fair trial. *State v. Henderson*, 620 N.W.2d 688, 701-02 (Minn. 2001). But we will not disturb a conviction unless prosecutorial misconduct, viewed in light of the entire record, was "so inexcusable, serious, and prejudicial that the defendant's right to a fair trial was denied." *Id.*

Smith did not object to the prosecutor's closing argument in the district court. Accordingly, our review on the issues related to the argument is limited to whether there was "(1) error; (2) that is plain; and (3) [that] affect[s] substantial rights." *State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). In cases involving prosecutorial misconduct, once plain error is shown, the burden shifts to the prosecution to demonstrate that the misconduct did not prejudice the defendant's substantial rights. *Id.* at 300. If all three prongs are met, we "then

assess[] whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings." *Id.* at 298.

First, Smith cites the prosecutor's statement in closing argument, with regard to the rape of D.L.K.:

> Now, [the judge] will instruct you that the state does not need to prove this case to you to a mathematical certainty or proof beyond all doubt, but I would suggest, with numbers like that [once in the world population], the state has, in fact, proven it to you beyond all doubt.

It is improper for prosecutors to equate DNA probability evidence with proof beyond a reasonable doubt. *See, e.g.*, *State v. Bailey*, 677 N.W.2d 380, 403 (Minn. 2004). The state concedes that the prosecutor's statement in closing argument—that with the DNA evidence "the state has, in fact, proved it to you beyond all doubt"—was improper. But the state contends that the error did not affect Smith's substantial rights, the third prong under the plain-error analysis. We agree.

In reviewing claims of prosecutorial misconduct arising out of closing arguments, we focus on the closing argument as a whole, rather than particular phrases or remarks that "may be taken out of context or given undue prominence." *State v. Johnson*, 616 N.W.2d 720, 728 (Minn. 2000). The evidence against Smith was substantial. It included testimony from the victims and other witnesses and physical evidence. The prosecutor's improper statement comprised only a small part of the closing argument (5 lines in 35 typed pages). We conclude that the error did not affect the outcome of the case so as to warrant a new trial. *See State v. Swanson*, 707 N.W.2d 645, 656 (Minn. 2006) (conducting a similar analysis).

Next, Smith argues that the prosecutor committed misconduct by disparaging Dr. Mueller in closing arguments. "[I]t is improper to disparage the defense in closing arguments or to suggest that a defense offered is some sort of standard defense offered by defendants when nothing else will work." *State v. Griese*, 565 N.W.2d 419, 427 (Minn. 1997) (quotation omitted). References to the witness's character are also inappropriate. *Bailey*, 677 N.W.2d at 404. But the only comments the prosecutor made about Dr. Mueller focused on his admission that he could not point to any actual error in the testing of Smith's DNA. After a close review of the record, we conclude that the prosecutor's statement was not error, plain or otherwise.

Finally, Smith protests the prosecutor's intense questioning of Dr. Mueller during cross-examination concerning the income he receives from his work as an expert witness. The state contends that this line of questioning properly goes to Dr. Mueller's bias. We agree. The prosecutor did not err in questioning Dr. Mueller about the compensation he receives for serving as an expert.

III. The district court did not violate Smith's right to a public trial.

Smith argues that he was deprived of the right to a public trial because the district court announced at the beginning of the trial that children would not be allowed in the courtroom during trial. We disagree.

"The right to a public trial is guaranteed by the Unites States and Minnesota Constitutions." *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009) (citing U.S. Const. amend. VI; Minn. Const. art. I, § 6). Whether the courtroom was closed to the public is a question of constitutional law, which we review de novo. *Id.*

"The threshold question in analyzing whether a criminal defendant has been deprived of the right to a public trial is whether there has been a closure of the courtroom." *State v. Cross*, 771 N.W.2d 879, 882 (Minn. App. 2009), *review denied* (Minn. Nov. 24, 2009) (quotation omitted). In *Cross*, the district court required that attendees at a sentencing hearing identify themselves to a deputy sheriff before entering the courtroom. *Id.* at 882. On appeal, this court determined that the security procedures did not constitute a closure of the courtroom for Sixth Amendment purposes. *Id.* There was no evidence in *Cross* that any person was actually turned away or removed from the courtroom. And we rejected Cross's argument that the identification request may have discouraged persons from attending the hearing, stating that "[a] voluntary decision by a member of the public to avoid courtroom security procedures" does not constitute closure. *Id.*

Smith speculates that some of his high-school friends might have been discouraged from attending the trial because of the district court's instruction. But, as in *Cross*, there is no evidence that any member of the public of any age was prevented from entering or forced to leave the courtroom at any time. On this record, we conclude that there was no closure of the courtroom, and Smith's right to a public trial was not violated.

IV. The district court did not abuse its discretion in departing upward from the sentencing guidelines.

Smith argues that because the record does not support the jury finding of particular cruelty and vulnerability due to size, and because it is not clear the district court would

have departed upward from the guidelines sentence on the single aggravating factor of multiple forms of penetration, his case must be remanded for resentencing.

We review a sentencing court's departure from the sentencing guidelines for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). There must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). "If the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a strong feeling that the sentence is disproportional to the offense." *State v. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984) (quotation omitted). Where a reviewing court finds that the departure is based on both valid and invalid factors, the sentence must be reversed unless the court determines that the district court would have imposed the same sentence absence reliance on the invalid factors. *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009).

The jury found three aggravating factors present with respect to D.L.K.'s rape: vulnerability due to size; multiple forms of penetration; and unnecessary cruelty. Based on these findings, the district court doubled the presumptive sentence for this offense. If these are valid aggravating factors, "the sentencing jury's findings of fact beyond a reasonable doubt are sufficient bases for the district court to enhance appellant's sentence." *State v. Adell*, 755 N.W.2d 767, 773 (Minn. App. 2008) (finding multiple forms of penetration and physical injury to be proper aggravating factors for a first-degree criminal-sexual-conduct charge), *review denied* (Minn. Nov. 25, 2008).

The Minnesota Supreme Court has held that multiple forms of penetration is a valid aggravating factor. *Rairdon*, 557 N.W.2d at 327. Smith concedes as much in his brief, but cites *State v. Dudrey*, 330 N.W.2d 719, 721 (Minn. 1983), for the proposition that a defendant who penetrates a victim in multiple ways during the course of a single behavioral incident may be convicted only once. While the *Dudrey* court so held, the court further stated that in such cases the multiple forms of penetration is an aggravating factor for purposes of sentencing. *Id.* at 722. Because the jury's finding of multiple forms of penetration was used for precisely this purpose here, Smith's argument fails.

Smith also argues, without citing any authority, that multiple forms of penetration should only be an aggravating factor when it is demonstrably true that this behavior is significantly atypical. But in designating multiple forms of penetration as a valid aggravating factor, the supreme court has identified it as not "typical" for first-degree sexual assault. *See Adell*, 755 N.W.2d at 775 ("[M]ultiple forms of penetration is not typical of the offense charged here."). Smith's argument fails.

The jury's finding on this single aggravating factor, in and of itself, supports the district court's sentencing departure. *State v. Allen*, 482 N.W.2d 228, 232 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992) (stating that multiple types of penetration alone will generally justify a double upward departure). And the jury's determination that D.L.K. was vulnerable due to her size is supported by her testimony that she was unable to resist Smith's initial act of grabbing her because she could not get close enough to him to strike back.

We need not decide whether particular cruelty was a valid aggravating factor.[2] During the sentencing hearing, the district court repeatedly referenced the extremely violent nature of Smith's attacks, the exceptional risk he poses to public safety, and his lack of empathy or remorse. The district court stated that "[t]here is every reason in the world to commit you for as long as I can." On this record, we conclude that the district court would have imposed the same sentence on the counts involving D.L.K. even if the particular cruelty factor were not considered. *See Vance*, 765 N.W.2d at 395-96 (holding that "when two out of three [sentencing] factors are valid, it is reasonable to conclude that the district court would have imposed the same sentence absent reliance on the [invalid factor].").

V. The district court did not impose excessive fines.

Finally, Smith argues that the $10,000 in fines imposed—$5,000 for each conviction—is excessive and punitive, in violation of the Eighth Amendment.

Individuals are constitutionally protected from excessive fines. U.S. Const. amend. VIII; Minn. Const. art. 1, § 5. This court reviews de novo whether the imposition of a fine violates a defendant's constitutional rights. *State v. Kujak*, 639 N.W.2d 878, 883 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002).

The touchstone of the excessive-fine analysis is proportionality: the fine "must bear some relationship to the gravity of the offense that it is designed to punish." *State v.*

[2] Because we do not reach Smith's argument on particular cruelty, the supreme court's recent decision in *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009), does not affect our decision.

Rewitzer, 617 N.W.2d 407, 413 (Minn. 2000). The proportionality analysis considers three factors:

> (1) the gravity of the offense and the harshness of the penalty;
> (2) a comparison of the contested fine with fines imposed for the commission of other crimes in the same jurisdiction;
> (3) a comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions.

Kujak, 639 N.W.2d at 883. The district court need not make a finding that the defendant is able to pay before imposing a fine as part of a sentence. *Perkins v. State*, 559 N.W.2d 678, 693 (Minn. 1997).

The legislature authorized the courts to impose a fine of up to $40,000 on persons convicted of first-degree criminal sexual conduct. Minn. Stat. § 609.342, subd. 2(a) (2008). First-degree criminal sexual conduct was previously a severity level 9 offense. *See* Minn. Sent. Guidelines IV (2004). Other level 9 crimes generally carry fines in the range of $30,000-$50,000. *See*, *e.g.*, Minn. Stat. §§ 609.195(b) (max $40,000 for murder 3); .221 (max $30,000 fine for assault 1); .25, subd. 2(2) (max $50,000 fine for kidnapping with great bodily harm) (2008); .322, subd. 1 (max $50,000 fine for sex trafficking) (Supp. 2009). The sentencing guidelines were revised in 2006, and criminal sexual conduct is now on a separate chart, in a class of its own, indicating, if anything, a legislative recognition of the unique severity of the crime. *See* Minn. Sent. Guidelines IV (2008).

The two $5,000 fines the district court imposed are well below that authorized by the legislature. Based on our thorough review of the record and consideration of the three

proportionality factors, we conclude that these fines are not out of proportion with the offense they were designed to punish.

Affirmed.

MINGE, Judge (concurring specially)

I join in the opinion, but write separately to address the upward departure. Based on this record, there is no practical factual dispute regarding D.L.K.'s vulnerability due to size and the particular cruelty of the attack on her. The jury found both factors present. The district court judge found that both factors existed and determined that the upward departure was supported by compelling circumstances. Although in many cases *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009), would require a remand for a new *Blakely* proceeding and resentencing because of improper allocation of the role between the court and the sentencing jury, this case is not one of them.