STATE OF MINNESOTA
IN COURT OF APPEALS
A09-417

State of Minnesota,
Respondent,

vs.

Amoud Omar Yusuf,
Appellant.

Filed May 4, 2010
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. 73-CR-07-3267

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Deborah Ellis, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

KALITOWSKI, Judge

Appellant Amoud Omar Yusuf challenges his conviction of second-degree criminal sexual conduct, arguing that (1) the district court improperly excluded the

complainant's therapy and counseling records from in camera review; (2) the district court plainly erred in admitting appellant's police interview into evidence without redacting the interviewer's commentary; (3) defense counsel was improperly precluded from cross-examining complainant's mother regarding her restitution request; and (4) the evidence was insufficient to support his conviction. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by denying in camera review of T.B.'s sexual-assault counseling and therapy records. We disagree.

Medical records are generally protected from disclosure by the physician-patient privilege. *See* Minn. Stat. § 595.02, subd. 1(d), (g) (2008). But this privilege "sometimes must give way to the defendant's right to confront his accusers." *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984). District courts are encouraged to review medical records in camera to determine whether the privilege must give way. *State v. Reese*, 692 N.W.2d 736, 742 (Minn. 2005). This approach "strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense." *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). But a defendant requesting in camera review "must make at least some plausible showing that the information sought would be material and favorable to his defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted).

In *State v. Evans*, the appellant argued that the district court abused its discretion when it limited review of witness medical records because details about a witness's underlying mental health problems may not have been disclosed. 756 N.W.2d 854, 872 (Minn. 2008). "But a defendant must make some showing that a confidential file contains information that would be material and favorable to his case." *Id*. The supreme court concluded that Evans failed to do so when he "offered only argument and conjecture." *Id.* at 873. Thus, the supreme court concluded that the district court did not abuse its discretion in limiting review of the witness's medical records. *Id*.

Here, appellant requested far-ranging in camera review of complainant T.B.'s medical, mental health, counseling, and school records. The district court granted review of many of the records, but found that appellant had not shown good cause for review of T.B.'s sexual-assault counseling and therapy records. The district court concluded that nothing in the record suggested that the counseling and therapy records contain exculpatory information.

In district court, appellant merely argued that "examination of the records we're seeking . . . would allow the [c]ourt to determine whether there's an ulterior motive for the child's allegations and the child's credibility in general." Appellant made no showing that the counseling and therapy files, specifically, were likely to contain such information.

Appellant bore the burden of making a plausible showing to the district court that the records contained evidence that would be material and favorable to the defense. Like the appellant in *Evans*, he merely offered argument and conjecture. Merely arguing that a

confidential medical file could contain certain information is not enough to require review.

We conclude that the district court properly balanced T.B.'s right to privacy against appellant's right of confrontation. *See Kutchara*, 350 N.W.2d at 926 (concluding that district court did not abuse its discretion in giving defendant access to victim's medical records from the assault at issue but denying him access to victim's past medical records). Thus, the district court did not abuse its discretion in denying in camera review of T.B.'s sexual-assault counseling and therapy records.

II.

Appellant argues that, although he did not object to its admission, the district court committed plain error when it admitted his police interrogation without redacting the officer's allegedly incriminating statements. We disagree.

"Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A defendant who fails to object to the admission of evidence forfeits his right to review unless the admission was plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Before an appellate court reviews unobjected-to conduct for error, there must be (1) error; (2) that is plain; (3) that affects substantial rights. *Id.* "An error is plain if it was clear or obvious." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (quotation omitted). Usually, plain error contravenes caselaw, a rule, or a standard of conduct. *Id.*; *see also United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) ("[A]n

error cannot be deemed 'plain,' in the absence of binding precedent, where there is a genuine dispute among the [courts]").

In *State v. Lindsey* the appellant argued that the district court erred by refusing to redact portions of his taped interrogation before it was played for the jury. 632 N.W.2d 652, 662 (Minn. 2001). The supreme court held that the admission of the evidence, including the police officer's accusations that Lindsey was lying, was not an abuse of discretion, because the statements helped provide context, and because defense counsel had the opportunity to cross-examine the interrogator. *Id*. at 663. Here, too, the police officer's statements provided context, and the defense had the chance to cross-examine. And *Lindsey* involved a less stringent standard of review because that appellant objected to the introduction of the tape in district court. *Id*. Further, here, the police officer never accused appellant of lying; she merely made statements such as: "there was a little boy . . . saying he was a little uncomfortable with something that had occurred. So, I came to get your side of the story," and "[w]ell, something did happen or I wouldn't be here."

Because the Minnesota Supreme Court has held that it was not an abuse of discretion to admit an entire police interrogation involving more inflammatory statements, we cannot say that the admission here was plain error. *See id*.; *see also Whab*, 355 F.3d at 158 ("Certainly, an error cannot be deemed 'plain,' in the absence of binding precedent . . ."). In addition, appellant has not established or asserted how the alleged error affected his substantial rights. *See Griller*, 583 N.W.2d at 740 (stating that the third prong of the plain-error test is that an appellant must show that the error affected his substantial rights).

We reject appellant's attempt to analogize this case to *State v. Myers*, where the supreme court held that expert testimony regarding a witness's truthfulness was inadmissible because expert status may "lend an unwarranted stamp of scientific legitimacy to the allegations." 359 N.W.2d 604, 611 (Minn. 1984) (quotation omitted). Appellant argues that a police officer is an expert in investigation and that admitting the police officer's comments "was tantamount to allowing expert testimony regarding credibility." But *Myers* is distinguishable. Here, unlike *Myers*, the police officer's statements were not expert evidence in the form of an opinion. Further, the police officer did not express an opinion about the veracity of appellant's testimony; she merely used interrogation tactics to elicit information.

We conclude that appellant has not established that the district court committed plain error in failing to sua sponte preclude the admission of appellant's unredacted police interview. Nor has appellant established that the admission of the interview affected his substantial rights.

III.

Appellant argues that the district court erred in precluding defense counsel from cross-examining T.B.'s mother regarding her request for restitution. Prior to trial, the prosecutor moved the court to exclude cross-examination of T.B.'s mother regarding the request. After defense counsel stated that he did not plan to cross-examine T.B.'s mother, and that he did not oppose the motion, the district court granted the motion with the understanding that "if [T.B.'s mother] opens that door in her testimony I may revisit

that ruling" and that, "[defense counsel], you should just not assume I'm revisiting that ruling until I do so."

Our review of the record indicates that T.B.'s mother did not say anything to reopen the issue, that defense counsel did not attempt to impeach her, and that the district court did not revisit its ruling. Thus, we conclude that appellant waived this issue and is precluded from raising it on appeal. *See, e.g.*, *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009) (finding that an appellant affirmatively waived her right to cross-examine witnesses).

IV.

Appellant claims that there was insufficient evidence for a jury to reasonably conclude that he was guilty of second-degree criminal sexual conduct, because T.B.'s statements were inconsistent. We disagree.

When considering a claim of insufficient evidence, "our review on appeal 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 will not disturb a jury verdict, if, considering the presumption of innocence and the requirement of proof beyond a reasonable doubt, a jury could reasonably conclude that a defendant was proven guilty of the offense charged. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We assume that the jury believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

Appellant was convicted of second-degree criminal sexual conduct, or "sexual contact with another person . . . under 13 years of age . . . ." Minn. Stat. § 609.343, subd. 1(a) (2008). Sexual contact includes "the intentional touching by the actor of the complainant's intimate parts," or "the touching by the complainant of the actor's . . . intimate parts," including touching the clothing covering the "intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i), (iv) (2008). Intimate parts include the genital area, groin, and buttocks. Minn. Stat. § 609.341, subd. 5 (2008).

Appellant argues that Minnesota cases provide that corroboration is not required to prove sexual assault only if the evidence was otherwise sufficient to sustain a conviction, and that a single uncorroborated witness must be credible. *See Myers*, 359 N.W.2d at 608 (stating that corroboration of allegations of the sexual abuse of a child is required only where the evidence is insufficient to sustain the conviction); *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969) (stating that a conviction can rest on the uncorroborated testimony of a single credible witness). And because T.B.'s testimony and statements were not repeated with word-for-word accuracy, appellant argues that he was not credible. We disagree.

Even when a witness's credibility is seriously called into question, the jury is entitled to believe him or her. *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). Inconsistencies in a victim's statements do not preclude a conviction. *State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990), *review denied* (Minn. May 23, 1990). Inconsistencies are a sign of human fallibility and do not prove that testimony is false, especially when it is about a traumatic event. *State v. Mosby*, 450 N.W.2d 629, 634

(Minn. App. 1990), *review denied* (Minn. May 23, 1990). Moreover, although there were minor inconsistencies in T.B.'s accounts, he repeatedly stated that appellant touched his buttocks, kissed him, and made T.B. touch appellant's "private area."

In addition, evidence corroborated T.B.'s account. Corroborating evidence includes "a prompt complaint by the victim," *State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984); "testimony by others as to the victim's emotional condition at the time [he] complained," *Id.*; and a defendant's lies about knowing a person, *State v, Miller*, 396 N.W.2d 903, 905 (Minn. App. 1986). Here, T.B. came home, told his mother about the incident, and made a prompt complaint. Both T.B.'s mother and the responding officer testified that T.B. appeared scared. In addition, appellant at first denied that T.B. was at his home that day. Further, DNA evidence showed with 99.91% accuracy that appellant's saliva was on T.B.'s shirt, and police officer and paramedic testimony confirmed T.B.'s testimony that appellant was not wearing underwear.

In light of the corroborating evidence and the significant deference we afford juries in credibility determinations, the jury was entitled to find T.B. credible and to reasonably conclude that appellant, with sexual intent, contacted T.B. with his intimate parts and touched T.B.'s intimate parts. Thus, we conclude that there is sufficient evidence to sustain appellant's conviction.

Affirmed.