STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1842

State of Minnesota,
Respondent,

vs.

Manuel De Jesus Diaz-Orellana,
Appellant.

Filed October 19, 2010
Affirmed
Stauber, Judge

Kandiyohi County District Court
File No. 34CR09152

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Boyd Beccue, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant Manual Diaz-Orellana challenges his conviction of first-degree criminal sexual conduct for assaulting a six-year-old boy, arguing that (1) the district court erred

in denying appellant's motion for acquittal due to insufficient evidence, and (2) he was denied a fair trial due to prosecutorial misconduct. We affirm.

FACTS

Appellant was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). The district court instructed the jury on both first-degree criminal sexual conduct and the lesser-included offense of second-degree sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2008). The jury found appellant guilty on both counts. The district court sentenced appellant to the presumptive 144-month sentence for first-degree criminal sexual conduct. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred in denying his motion for acquittal because there was insufficient evidence to convict him of first-degree criminal sexual conduct. "A motion for acquittal is procedurally equivalent to a motion for a directed verdict." *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005). The standard for deciding a motion for a directed verdict is whether, after viewing the evidence and all resulting inferences in the light most favorable to the state, the evidence is sufficient to present a fact question for the jury. *Id*. at 74-75. A district court may grant a motion to acquit if it determines that the state's evidence, when viewed in the light most favorable to the state, is insufficient to sustain a conviction. *See id.* at 75.

In assessing the sufficiency of the evidence, this court makes "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn

therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). The verdict will not be overturned if the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt. *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008). On review, we assume that the jury believed the state's witnesses and rejected any contrary evidence. *State v. Jackson*, 726 N.W.2d 454, 460 (Minn. 2007).

A person commits first-degree criminal sexual conduct if that person engages in sexual contact with a person less than 13 years of age, and the actor is at least 36 months older than the other person. Minn. Stat. § 609.342, subd. 1(a). Sexual contact with a person under 13 "means the intentional touching of the complainant's bare genitals or anal opening by the actor's bare genitals or anal opening with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(c) (2008).

Appellant admits that the state proved that he "committed second-degree criminal sexual conduct by touching [the complainant's] buttocks." But appellant argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct because there is no substantive evidence that he touched the complainant's anal opening. To support his claim, appellant challenges the admissibility of alleged inconsistent statements made by the complainant, J.C. Because appellant did not make this objection below, it is reviewed for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Under the plain-error standard, we will reverse only if there is error that is plain, affects

substantial rights, and seriously affects the fairness or integrity of the judicial proceedings. *Id.*

Appellant argues that J.C.'s trial testimony was inconsistent with the statements he made in his interview with a medical professional. Appellant contends that these "statements were admitted exclusively for impeachment purposes," and, therefore they were inadmissible as substantive evidence. Appellant argues that without J.C.'s prior inconsistent statements, there is insufficient evidence in the record to support his conviction of first-degree criminal sexual conduct.

We acknowledge that "[a] witness's prior inconsistent statement is admissible for impeachment purposes, but it is generally not admissible as substantive evidence." *State v. McDonough*, 631 N.W.2d 373, 388 (Minn. 2001); *see State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999) (noting that rules of evidence allow for admission of prior inconsistent statement as substantive evidence if the statement was made under oath or under like circumstances, but otherwise allow such evidence to be admitted only for impeachment purposes). But here, J.C. was the state's witness, and the state was not offering the testimony for impeachment purposes. And, more importantly, the audio and visual DVD containing the interview between J.C. and the licensed nurse, introduced into evidence by the state, is generally consistent with J.C.'s trial testimony. In his interview with the nurse, J.C. testified that appellant lived downstairs in the basement; that on the day of the alleged offense appellant invited "me and my brother downstairs"; that his brother went back upstairs; that appellant "was trying to make out with me"; that appellant "bited [sic] my ear"; that appellant "took his pants off and you know that thing

you put when you are in a robber;" and that "he put his privacy, his things where he does the p word, in my butt."

Appellant argues that J.C.'s trial testimony was inconsistent because J.C. initially testified that appellant put his penis "in [J.C.'s] line," but subsequently stated that appellant put his penis "on the line." We acknowledge that J.C.'s initial response to a question about what appellant did to him was "he put his privacy in my butt," and that he later used the phrases "on my line," "on my butt," in addition to "in my butt." But J.C.'s trial testimony that appellant put his privacy "in my butt" was consistent with his medical interview where he responded affirmatively to a question as to whether appellant's privacy went "inside" the "little hole part where your poop comes from." J.C. also answered "yea" to the nurse's question as to whether "the privacy [went] on the inside part of your butt."

Appellant also argues that a jury instruction given by the district court regarding prior inconsistent statements confirms that the medical interview statements "could not be used to prove an element of the offense." This instruction referenced by appellant states:

> In deciding the believability and weight to be given the testimony of a witness, you may consider evidence of a statement by or conduct of the witness on some prior occasion that is inconsistent with present testimony. Evidence of any prior inconsistent statement or conduct should be considered only to test the believability and weight of the witness's testimony.

But this instruction does not instruct the jury as to whether any particular testimony or statement *was* inconsistent. Rather it instructs the jury that they can use any perceived

inconsistencies in testimony as a basis to determine credibility. Appellant was free to argue to the jury (and did) that what J.C. told the medical examiner was inconsistent with his court testimony, and the jury was free to weigh that evidence. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002) (stating that there is a presumption that the jury followed the district court's instruction). And even if J.C.'s testimony was inconsistent, which it is not, a jury presented with the identified inconsistency is able to take the inconsistency into consideration when assessing the evidence. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (observing that jury considers any testimonial inconsistencies in determining credibility); *see also State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990) (stating that jury is entitled to believe evidence even if it is inconsistent or contradictory in some degree), *review denied* (Minn. May 23, 1990).

Citing *State v. Salazar*, appellant further contends that J.C.'s medical interview statements are only admissible as substantive evidence if the child *knew* he was speaking to a medical professional and that he *knew* it was important to tell the truth, and here there was no evidence that J.C. knew he was speaking to a medical professional. 504 N.W.2d 774, 777 (Minn. 1993). But the requirements articulated in *Salazar* are met here. First, J.C. knew he was speaking to a medical professional as the licensed nurse introduced herself to him by stating: "Alright, well you know what, my name is Leah and I am one of the nurses that work here." Second, J.C. knew he had to tell the truth because the nurse stated "[i]f I get it wrong, you be sure to correct me and be my teacher. And the most important thing is we're only going to talk about things that are real and true, things that really happened okay?" Thus, *Salazar* is not relevant here.

Based on the substantive evidence presented at trial, there is sufficient evidence to support the jury's conclusion that appellant touched J.C.'s anal opening. The complainant testified that "[appellant] put his privacy in my butt." Because a victim's testimony of sexual abuse is sufficient to satisfy the elements of first-degree criminal sexual conduct, this testimony alone would be sufficient evidence for a conviction. *See State v. Reichenberger*, 289 Minn. 75, 79, 182 N.W.2d 692, 694-95 (1970) (holding that "[t]here is ample direct testimony from the [victim] to convict defendant of [carnal knowledge of a child]," despite prior inconsistent statements by the victim about whether sex occurred). But in addition to J.C.'s testimony, R.C., J.C.'s father testified on cross-examination that "that's what I understood him to say, that he had put his penis in between his two cheeks, and that's what I understood him to say, in the line." Moreover, N.V., J.C.'s mother, testified that appellant "had put his part in my child's part, in his behind." And Leah Mickschl, the registered nurse with Midwest Children's Center who examined J.C. following the incident, testified that "[d]uring the interview portion, he did state that he felt like it went in." Mickschl further testified that J.C. told her that he felt appellant's privacy on his anal opening. Accordingly, there was sufficient evidence to support appellant's conviction of first-degree criminal sexual conduct, and the district court did not err in denying appellant's motion for acquittal.

II.

Appellant contends that he is entitled to a new trial based on several instances of prosecutorial misconduct, including: (1) encouraging the jurors to stand in J.C.'s shoes, (2) commenting on appellant's failure to testify, (3) arguing facts not in the record to

assert J.C.'s prior statements and trial testimony were consistent, and (4) urging the jury to consider J.C.'s prior inconsistent statements as substantive evidence.

For claims of prosecutorial misconduct to which a defendant did not object, we apply a modified plain-error test. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). When asserting prosecutorial misconduct, the defendant carries the burden of demonstrating both that an error occurred and that it was plain, after which the burden shifts and the state must show that the defendant's substantial rights were not affected by the error. *Id.*

Stand in Victim's Shoes

Appellant's first prosecutorial misconduct claim involves the prosecution's statement during closing argument that "there were differences, but we would submit not inconsistencies, not when you stand in the shoes of a seven-year old. Stand in his shoes." In considering whether the prosecutor's statements constituted error, Minnesota case law acknowledges that prosecutors have latitude in arguing legitimate inferences during closing argument. *See State v. Roman Nose*, 667 N.W.2d 386, 402 (Minn. 2003). This court considers a prosecutor's argument as a whole rather than focusing on particular phrases or remarks that may be taken out of context or given undue emphasis. *See State v. Leake*, 699 N.W.2d 312, 327 (Minn. 2005). Additionally, the alleged improper portion of an argument is considered in relation to its total length. *State. v. Stufflebean*, 329 N.W.2d 314, 318-19 (Minn. 1983). But prosecutors act improperly if they ask jurors to "put themselves in the shoes of the victim." *State v. Johnson*, 324 N.W.2d 199, 202

(Minn. 1982). Such arguments are improper because they invite the jury to render its verdict "on the basis of passion rather than reason." *Id.*

During his closing argument, the prosecution stated

> [J.C.] took the stand, and yes, there were differences, but we would submit not inconsistencies, not when you stand in the shoes of a seven-year old. Stand in his shoes. What did he describe? In or on my butt. What does that mean to a seven-year old.

When reviewing the context of the prosecutor's statements, it is clear that the prosecutor was not inviting the jury to render its verdict on the basis of passion. The prosecutor was asking the jurors to view part of the case not with the feelings of the victim, but with his perceptions of vocabulary. The prosecutor's statements taken in context appear to indicate that the prosecutor is illustrating that the distinction between "in my butt" and "on my butt" is not one a seven-year old would necessarily know how to make. And the reference to "in the shoes of" asks the jurors whether, if they were seven years old, *they* would find that an easy distinction to make. Therefore, because the prosecutor's comments were made to aid the jury in understanding why J.C.'s testimony regarding where appellant put his "privacy" may have differed, there is no error. *See Sanderson v. State*, 601 N.W.2d 219, 225-26 (Minn. App. 1999) (stating that record established that prosecution's comments were made to aid the jury in understanding the reasonableness of victim's conduct, not to decide the case based on the feelings they might attribute to her), *review denied* (Minn. Mar. 28, 2000).

Appellant's Failure to Testify

The Fifth Amendment protection against self-incrimination extends to prohibit prosecutorial comment either directly or indirectly on the defendant's failure to testify. *State v. DeRosier*, 695 N.W.2d 97, 106-07 (Minn. 2005). But references to a defendant's failure to testify are prohibited only if they manifest a prosecutor's intent to call attention to such a failure or if the jury would understand the references to be a comment on the defendant's failure to testify. *Id*. This court must consider the prosecutor's argument as a whole. *State v. Daniels*, 332 N.W.2d 172, 180 (Minn. 1983).

In her closing argument, the prosecutor stated:

> As I indicated in opening statement, in situations such as this trial, child sexual abuse, there are only two witnesses – the child and the defendant, the child and the perpetrator. Your duty is to weigh the credibility of the witnesses. There are no other witnesses, so it becomes important to whom the child disclosed and what he disclosed to these people. You heard his mother and father, you heard his babysitter, you heard him.

Appellant argues that the prosecutor's statement that J.C. and appellant "were the only two witnesses and the jury had to determine which was telling the truth," indirectly commented on appellant's failure to testify and constitutes plain error. We disagree. There was no explicit reference by the prosecutor to appellant's "failure to testify." Moreover, there is no indirect reference as to appellant's failure to testify. Taken in context, the prosecutor's comment informs the jury that because there was only one witness to the incident who testified, the jury would have to weigh his credibility, along with other witnesses, who did not actually witness the event.

Argued Facts Not in the Record

Appellant argues that the prosecutor intentionally misstated the evidence by asserting that there were no inconsistencies but only slight differences in J.C.'s statements and testimony and this constituted plain error. A prosecutor commits misconduct by arguing facts not in evidence or reasonable inferences from that evidence. *State v. Young*, 710 N.W.2d 272, 281 (Minn. 2006).

The prosecutor stated:

> You translate from child to grownup, just like the nurse practitioner, who translates for a child, whose limited understanding, whose seven-year old understanding was in/on my butt, inside my butt versus inside my cheeks. What does that mean? We would submit that he told you what happened to him as best he could.

As discussed above, there was sufficient evidence that appellant's privacy touched J.C.'s anal opening. Therefore, the prosecution did not misstate the evidence, and there is no plain error.

Prior Statements as Substantive Evidence

Appellant argues that the prosecutor's statement that "[w]e would submit what he disclosed to the nurse practitioner, that's what the defendant did" was impeachment evidence and urging its use as substantive evidence constituted plain error. Because we have determined that J.C.'s medical interview was substantive evidence, the prosecutor's comment was appropriate. Appellant is not entitled to a new trial.

Affirmed.