STATE OF MINNESOTA
IN COURT OF APPEALS
A10-320

State of Minnesota,
Respondent,

vs.

Robert Warren Jackley, Jr.,
Appellant.

Filed February 22, 2011
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CR-07-11518

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Klaphake, Judge; and Halbrooks, Judge.

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

CONNOLLY, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2004), asserting that the prosecutor erred during closing arguments by telling the jury that (1) the victim's testimony need not be corroborated and (2) it could consider *Spreigl* evidence as corroborative of the charged crime. Because we conclude there was no error, we affirm.

FACTS

R.V. is a vulnerable adult with an I.Q. of about 50, and lives with her mother. In 2005, R.V. began receiving weekly massages at a Rochester salon; massage was recommended to help R.V. manage back pain associated with scoliosis and a bulging disk. Appellant Robert Warren Jackley, Jr., performed most of R.V.'s massages. Salon records showed that appellant massaged R.V. 61 times between November 2005 and May 2007.

Around June 2007, the salon called R.V.'s mother and told her that R.V. would be receiving massages from another massage therapist because appellant no longer worked at the salon. R.V.'s mother was not given any further explanation regarding appellant's separation from the salon. When R.V.'s mother told R.V. that she would be receiving massages from a different therapist, R.V. became "really upset." R.V. wanted to know why appellant was no longer at the salon and if she "could go to where [appellant] was." R.V. insisted that she wanted to continue receiving massages from appellant. R.V.'s mother told R.V. that if R.V. explained how appellant performed a massage, she would

tell the new therapist to do the same thing. R.V. made her mother promise that she would not be mad at R.V. or appellant and then told her mother that appellant "rubbed her breasts." R.V.'s mother spoke with R.V.'s social worker, who advised her to report what R.V. had told her.

R.V. subsequently participated in a CornerHouse forensic interview with law enforcement. During her interview, R.V. told the detective that appellant had touched her breasts, "crotch area," and the side of her "buns." R.V. said that she believed appellant's touching of her breasts and "buns" was part of the massage, but did not feel the "crotch area" was supposed to be included. R.V. also told the detective that, when she was laying on her stomach, appellant had her put her hands on her "crotch area" and then placed his hands over hers, massaging her "crotch area" with both of their hands. When appellant massaged her "crotch area," R.V. thought that "it was kind of strange" because "boys shouldn't do that stuff." Appellant did not ask for permission to massage these areas and R.V. did not tell him to stop. R.V. reported that appellant touched her breasts "a lot" and that he had touched her "crotch area" more than once.

Appellant was charged with one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (prohibiting a person from engaging in sexual contact with another when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless"). Appellant proceeded to a jury trial. R.V., her mother, the salon's owner, another massage therapist from the salon, and the detective all testified. The jury also saw R.V.'s videotaped interview with the detective.

Additionally, the state presented *Spreigl* evidence in the form of testimony from L.F. for the purpose of showing any lack of a mistake or the presence of a common scheme or plan on the part of appellant. Prior to L.F.'s testimony, the district court instructed the jury that her testimony was being "admitted for the limited purpose of assisting you in determining whether [appellant] committed the acts with which [he] is charged in the complaint." L.F. testified that she also received massages from appellant at the same salon. L.F. was asked about a massage that appellant gave her on May 23, 2007. She testified that, at first, everything seemed "pretty normal," but "[a]s the hour progressed . . . it seemed like he was—his hands were going further than they should have inappropriately." L.F. testified that appellant also kissed her abdomen twice and touched her breasts. L.F. told appellant "No," the massage ended, and appellant left. L.F. told two friends and her husband what happened. She also called the salon the next day. L.F. testified that she did not know and had never met R.V. or R.V.'s mother.

Appellant testified that R.V. was one of his regular clients and that he typically gave her half-hour massages. Appellant testified that R.V. was often rigid and seemed to have difficulty relaxing. Appellant testified that he was aware of R.V.'s disability. Appellant also testified that R.V. would exhibit "somewhat strange behavior," including "lift[ing] herself up off the table," "rais[ing] her butt up while [appellant was] massaging her legs," and "tip[ping] her shoulders up." Appellant described this behavior as "raising a red flag." He testified that he told the detective that R.V.'s behavior "could be construed as sexual" and that it appeared that R.V. was "lift[ing] up like she wanted [appellant] to touch her [intimate parts]." Appellant thought R.V. might be attracted to

him in some way. Appellant denied that he had any inappropriate contact with R.V. or L.F. As part of his defense, appellant presented two character witnesses regarding appellant's reputation for truthfulness.

During the rebuttal portion of her closing argument, the prosecutor told the jury:

> Finally, the defense attorney told you that this is a he said/she said case, there's no corroborating evidence. Again, this isn't something that should paralyze you. The law in Minnesota says there doesn't have to be corroborating evidence. If you believe the testimony of [R.V.], if you believe what she told you is true and you believe that it happened, that is direct evidence of a crime and it is enough for you to convict. But in this case it's not—it's not exactly true that there's no corroborating evidence because when you're trying to decide and figure out only whether this happened or not this is when you can consider the testimony of [L.F.] and what happened to her. You consider that as evidence when you're trying to decide whether or not [R.V.] told—what she told you happened.

Defense counsel did not object to this argument at the time it was made. The jury found appellant guilty, and the district court sentenced appellant to 21 months in prison, staying execution of the sentence for ten years, and placed appellant on probation. This appeal follows.

D E C I S I O N

Appellant concedes that he did not object to the prosecutor's rebuttal argument at trial. Failure to object to alleged misconduct generally "forfeits the right to have the issue considered on appeal, but if the error is sufficient, [it] may [be] review[ed]." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003). We apply the plain error doctrine when "examining unobjected-to prosecutorial misconduct." *State v. Ramey*, 721 N.W.2d 294,

299 (Minn. 2006). To warrant appellate review, "there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "An error is plain if it was clear or obvious." *Ramey*, 721 N.W.2d at 302 (quotation omitted). Once a defendant demonstrates that an error occurred and that the error was plain, the burden shifts to the state to show that there is no reasonable likelihood that the absence of the misconduct would have a significant effect on the jury's verdict. *Id.*

I. The prosecutor did not err by telling the jury that Minnesota law did not require corroboration of R.V.'s testimony in order to convict appellant.

Appellant first contends that the prosecutor erred by telling the jury that Minnesota law did not require corroboration of R.V.'s testimony. Appellant relies on this court's unpublished opinion in *State v. Cao*, in which a similar prosecutorial statement was held to be plain error. No. A08-1932, 2009 WL 2595967, at *2 (Minn. App. Aug. 25, 2009), *rev'd and remanded*, 788 N.W.2d 710 (Minn. 2010). In *Cao*, "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.'" *Id.* (alteration in original). This court concluded that the statement was plain error because it invaded the province of the district court to instruct the jury on the law. *Id.* At the time appellant's brief was filed, review had been granted in *Cao*, but the supreme court had not ruled on the matter.

On September 16, 2010, the supreme court reversed and remanded *Cao* to this court, concluding that the prosecutor had not erred; "the prosecutor's statement was not plain error because when read in context, it was not tantamount to a jury instruction"; and

the statement was "used . . . as a springboard for a discussion on the strength of the corroborative evidence." 788 N.W.2d at 715-16, 718. The supreme court observed: "Ultimately, there is no conclusive statement in our case law prohibiting a prosecutor from stating that a victim's testimony need not be corroborated in a criminal sexual conduct case. It cannot be said that the prosecutor plainly erred by contravening settled law." *Id.* at 717; *see also* Minn. Stat. § 609.347, subd. 1 (Supp. 2005) (stating that "the testimony of a victim need not be corroborated" in criminal-sexual-conduct prosecutions). In light of the supreme court's ruling in *Cao*, appellant has failed to show that the prosecutor's statement was error, let alone plain error.

Furthermore, while appellant is correct that the absence of corroboration *may* result in a conclusion that the evidence was insufficient to support a conviction, appellant has not challenged the sufficiency of the evidence to support his conviction. *See, e.g.*, *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (noting that "the absence of corroboration in an individual case may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt" (quotation omitted)), *review denied* (Minn. Aug. 17, 2004).

II. The prosecutor did not err in telling the jury that it could consider *Spreigl* testimony as corroborative of R.V.'s account when determining whether appellant committed the acts alleged in the complaint.

Appellant also contends that the prosecutor erred in stating that the *Spreigl* testimony of L.F. could be considered as corroborative of R.V.'s testimony.[1] Appellant

[1] Appellant does not challenge the admission of L.F.'s testimony as relevant to the absence of mistake or the presence of a common scheme or plan.

asserts that "characterizing the *Spreigl* evidence as corroborative evidence, without clarifying that such evidence served a limited purpose, was misleading and constituted error." Appellant also argues that the prosecutor improperly suggested that appellant had a propensity to inappropriately touch women, thus transferring this into "a 'he said/they said' case." We conclude that appellant's assertions of prosecutorial error are unavailing for several reasons.

First, as the state correctly points out, "the Minnesota Supreme Court has repeatedly characterized *Spreigl* evidence as corroborative of substan[tive] evidence proving the offense charged." *See, e.g.*, *State v. Landin*, 472 N.W.2d 854, 859 (Minn. 1991) ("There was *corroborative Spreigl* evidence of defendant's violence toward women who rejected him." (Emphasis added.)); *State v. Williams*, 325 N.W.2d 812, 813 (Minn. 1982) ("The *Spreigl* evidence, which *corroborated* the victim's testimony, established that defendant had been involved in a similar act of misconduct . . . ." (Emphasis added.)). In particular, evidence admitted under the common-scheme-or-plan exception, one of the bases for which L.F.'s testimony was admitted, has been consistently characterized as "corroborative." *See, e.g.*, *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008) ("Under the common plan or scheme exception, other-crimes evidence is admissible if it has a 'marked similarity in modus operandi to the charged offense' that tends to *corroborate* evidence of the charged offense." (quoting *State v. Ness*, 707 N.W.2d 676, 688 (Minn. 2006) (emphasis added))); *State v. Forsman*, 260 N.W.2d 160, 167 (Minn. 1977) (stating common-scheme-or-plan exception "has evolved to embrace

evidence of offenses which, because of their marked similarity in modus operandi to the charged offense, tend to *corroborate* evidence of the latter" (emphasis added)).

Second, appellant's claim that the prosecutor implied that appellant had a propensity to touch women inappropriately appears to be, at best, a fleeting reference derived from the fact that *Spreigl* evidence necessarily involves some other act. Appellant is correct that "[e]vidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404(b). However, so long as *Spreigl* evidence is not "used as a means to attack the defendant's character or to establish a criminal propensity," "[t]here is nothing inappropriate, of course, about referring to properly admitted *Spr[ei]gl* evidence in a closing argument." *State v. Duncan*, 608 N.W.2d 551, 555 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). The prosecutor referred to L.F.'s testimony and properly argued that her testimony could be considered by the jury; she did not blatantly attack appellant's character or attempt to place appellant on trial for *both* the allegations of R.V. *and* the allegations of L.F. *Cf. id.* (prosecutor committed misconduct by telling the jury that "the theme [was], did the zebra change its stripes," implying defendant had a propensity to engage in criminal sexual conduct); *State v. Peterson*, 530 N.W.2d 843, 847-48 (Minn. App. 1995) (prosecutor committed misconduct by repeatedly referring to the victim and the *Spreigl* witness as "'both boys' accusing [the defendant]" and "the 'two' boys' accusations," transforming the case "to one in which the jury was deciding whether [the defendant] molested [the victim] and [the *Spreigl* witness]").

Third, the jury was instructed both prior to L.F.'s testimony and as part of the final jury instructions that L.F.'s testimony "is admitted for the limited purpose of assisting you in determining whether the defendant committed the acts with which the defendant is charged in the complaint." *See State v. Kennedy*, 585 N.W.2d 385, 392 (Minn. 1998) (reading of cautionary instructions both prior to presentation of *Spreigl* evidence and at the close of the case "lessened the probability of undue weight being given by the jury to the evidence"); *see also State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) ("We presume that jurors follow a judge's instructions.").

Fourth, the record reflects that the prosecutor was keenly aware of the limited purposes for which L.F.'s testimony was admitted and communicated that fact to the jury. While appellant asserts that the prosecutor "urge[d] the jury to use evidence admitted for a limited purpose for some other purpose," the prosecutor expressly reminded the jurors of the limited nature of L.F.'s testimony when she first addressed the testimony in her closing:

> Now, the judge has instructed you that you cannot convict this defendant on the testimony of [L.F.] You can't convict him for what you may have believed [he] did to [her]. But you can consider when trying to decide if what [R.V.] told you happened happened if the testimony of [L.F.] helps you make that decision. So consider these two women, unknown to each other, coming forward at a very similar time with very similar allegations. Both touched during their massage. Both touched on the breast. Consider her testimony when you consider if this touching could have been accidental or if there was intent behind it.

In sum, the prosecutor did not err by referring to L.F.'s testimony as tending to corroborate R.V.'s account of appellant's conduct and did not imply that appellant had a propensity to inappropriately touch women.

Affirmed.