STATE OF MINNESOTA
IN COURT OF APPEALS
A10-385

State of Minnesota,
Respondent,

vs.

Johnathan Quach,
Appellant.

Filed May 3, 2011
Affirmed
Hudson, Judge

Dakota County District Court
File No. 19HA-CR-09-2471

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

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, 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 Shumaker, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

HUDSON, Judge

Appellant challenges his conviction of one count of first-degree criminal sexual conduct, arguing that the district court erred by (1) failing to give a specific unanimity

instruction and (2) admitting the child-victim's statement to police. For the reasons stated below, we affirm.

FACTS

Appellant Johnathan Quach was accused of digitally penetrating the vagina of H.N., the daughter of his former girlfriend, on multiple occasions between 2006 and 2009. Based on these allegations, appellant was initially charged with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). Over his objection, appellant was later charged with three additional counts of first-degree criminal sexual conduct and four lesser-included offenses of second-degree criminal sexual conduct. But after the presentation of the evidence, the state opted to proceed on only one count of first-degree and one count of second-degree criminal sexual conduct.

At trial, H.N. testified that appellant touched her vaginal area three times when she was in fourth and fifth grades, and each incident occurred in her mother's bedroom while her mother was at work and her sister was in H.N.'s room. Appellant would tell H.N. to take down her pants because he needed to "clean it." He would proceed to "touch[] it" and "put something inside," and H.N. would feel pain. H.N. could not recall if appellant told her whether she could tell anyone what had happened.

H.N. testified that sometime between the second and third times that appellant touched her, he called H.N. into the living room in the middle of the night to watch a video showing an Asian girl touching her vagina. H.N. testified that a few days later, she told her mother about the incidents. H.N. testified that appellant and her mother argued,

and appellant moved out temporarily but subsequently returned and started being "all nice" to the family. H.N. testified that after she told her mother what had happened, appellant did not touch her again.

On cross-examination, H.N. testified that appellant and H.N.'s mother would yell at her for not completing her chores. But H.N. testified that she was not yelled at when she previously lived at her uncle's home. H.N. also testified that she did not remember when she told her mother and her uncle that appellant had touched her.

H.N.'s mother and uncle also testified. According to H.N.'s mother, H.N. told her that when she was in third grade, appellant took her into her mother's bathroom and showed her how to clean her menstrual discharge. H.N.'s mother testified that she confronted appellant and told him not to touch H.N. again. But H.N.'s mother testified that sometime after this conversation, appellant called her at work and told her that H.N. had to see a doctor "because she have some problem with her system." H.N.'s mother testified that she told appellant that there was nothing wrong with her daughter, but she did not discuss the conversation with H.N.

H.N.'s uncle testified that at the end of May 2009, appellant came to his home and told him that his relationship with H.N.'s mother had fallen apart because appellant had shown H.N. how to clean her menstrual discharge. H.N.'s uncle testified that shortly thereafter, H.N.'s mother arrived with her daughters, and appellant left. H.N.'s uncle testified that he asked H.N. if there was anything she wanted to tell him, and she started crying and told him that on two or three occasions, appellant took her into the bathroom, told her that he needed to clean her, and touched her vaginal area. On cross-examination,

H.N.'s uncle testified that H.N. told him that appellant had touched her six months prior to their conversation.

Over appellant's objection, the district court admitted H.N.'s prior statement to police, which was played to the jury. H.N. stated that appellant touched her vaginal area four times when she was between the ages of nine or ten and eleven. According to H.N., each incident occurred in the same way. Appellant would call H.N. into her mother's bedroom and tell her to take off her pants. Appellant would have H.N. lie on the bed on her knees and elbows, and appellant would be behind her on the floor. Appellant would proceed to put his finger inside H.N. for a "long time," which H.N. described as "55 seconds." H.N. stated that she could not see what appellant was doing because she was scared and closed her eyes, but she could feel pain.

H.N. stated that after appellant touched her the first time, he told her not to tell her mother. But H.N. stated that after appellant touched her a second time, she told her mother because she was scared. H.N. stated that her mother and appellant fought, and he was angry with H.N., but appellant and H.N.'s mother eventually got back together. According to H.N., appellant touched her two additional times after she told her mother that appellant had touched her, once three or four months later and once during the summer prior to her interview with police, which appears to have been the summer of 2008.

H.N. stated that on the final occasion that appellant touched her, he said there was something wrong with her. H.N. stated that she heard appellant on the phone saying that she needed to go to the doctor. H.N. stated that she told her mother about the incident

when she returned home. H.N. stated that her mother talked to appellant and that appellant began yelling at H.N. and her mother.

H.N. also stated that on one occasion, appellant called her into the living room in the middle of the night, showed her a video of a teenage girl doing something to her "bottom part," told her that it was normal to do what the girl was doing, and suggested that H.N. do the same thing. H.N. further stated that on another occasion, appellant talked to her about sex education and showed her a website where girls were talking about sex education. H.N. stated that this conversation occurred after the final time that appellant touched her.

Appellant did not testify, but his statement to police was played to the jury. Appellant said that he helped H.N. clean herself twice when she had menstrual discharge. Appellant stated that on the first occasion, H.N. was menstruating for the first time, and H.N.'s mother was at work. Appellant stated that he noticed that H.N. did not look well and asked her whether she was sick. Appellant stated that he realized that H.N. was having her period, took H.N. into the master bathroom, had her take off her clothes, and told her to get in the bathtub. Appellant stated that he put water on H.N.'s vaginal area, held up a wet towel, and tried to wash it. Appellant acknowledged that he may have inadvertently touched H.N.'s vaginal area. Appellant stated that when H.N.'s mother came home, he told her what had happened, and she told him that he should not clean H.N. again.

Appellant stated that on the second occasion, he went to Wal-Mart to purchase a gel that H.N. could use to clean her vaginal area. Appellant had H.N. get into the bathtub

in her bathroom and told her to clean herself. H.N. told appellant that she did not know how to use the gel, and appellant responded that he did not know either, but he told her to cut the tube and use the gel to clean herself. Appellant stated that he proceeded to cut open the tube, squeeze it, and spray the gel on H.N.'s vaginal area. Appellant denied that he touched H.N. or inserted the tube into her vagina. Appellant stated that when H.N.'s mother learned of the incident, she became angry with him.

Appellant stated that these two incidents occurred within four or five days of each other and that they both happened one and a half or two years before his interview with police. Appellant stated that he discussed each of these incidents with H.N.'s mother. Appellant denied that there were any other occasions on which he was alone with H.N. and she did not have any clothes on from her waist down.

Appellant stated that he did not help teach H.N. about sex, but one day, when H.N. came home from school and H.N.'s mother was also present, he discussed some aspects of sex education with H.N. Appellant also denied showing H.N. images of young girls who were naked or partially naked. But appellant stated that H.N. looked at such images on her own.

During closing argument, both the prosecutor and defense counsel focused on the plausibility of H.N.'s and appellant's versions of the events. The prosecutor emphasized that H.N. had consistently reported how appellant had touched her vaginal area and that appellant's claims of helping H.N. to clean her menstrual discharge were implausible. The prosecutor did not attempt to distinguish between any of the occasions on which appellant touched H.N. Defense counsel, in contrast, argued that appellant was simply

helping H.N. to clean her menstrual discharge and that even though appellant's actions may have been imprudent, they were not criminal. Defense counsel also pointed out inconsistencies in what H.N. told her mother, her uncle, the police, and the jury, and argued that H.N. had a motive to lie because appellant yelled at her. Like the prosecutor, defense counsel did not distinguish among the occasions on which appellant allegedly touched H.N.

The jury was instructed on the elements of first-degree criminal sexual conduct, which in relevant part include (1) "the defendant intentionally sexually penetrated H.N." and (2) "the defendant's act took place on or between 2006 and 2009." The jury was also instructed on the elements of second-degree criminal sexual conduct, which in relevant part include (1) "the defendant intentionally touched H.N.'s intimate parts or the clothing over the immediate area of H.N.'s intimate parts"; (2) "the defendant's act was committed with sexual or aggressive intent"; and (3) "the defendant's act took place on or between 2006 and 2009." The jury was further instructed that "[i]n order for you to return a verdict, whether guilty or not guilty, each juror must agree with the verdict. Your verdict must be unanimous."

During deliberations, the jury requested the opportunity to hear H.N.'s and appellant's prior statements once more. The district court granted the request over defense counsel's objection, concluding that the tapes were difficult to understand because of H.N.'s and appellant's accents and quiet voices. The tapes were each played once in their entirety in the courtroom.

The jury found appellant guilty of first-degree and second-degree criminal sexual conduct. The district court vacated appellant's conviction of the lesser-included offense of second-degree criminal sexual conduct and imposed a 144-month sentence. Appellant challenges the district court's failure to give a specific-unanimity instruction and its decision to admit H.N.'s statement to police.

D E C I S I O N

I. Jury instructions

Appellant argues that the district court erred in failing to instruct the jury to reach a unanimous verdict as to the specific act of penetration he committed. Appellant concedes that he did not request a specific unanimity instruction at trial. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). But the failure to object to a jury instruction will not defeat an appeal if (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

"The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). But the jury need not unanimously agree to "the facts underlying an element of a crime in all cases." *State v. Pendleton*, 725 N.W.2d 717, 731 (Minn. 2007). Nor must the jury unanimously agree to "which of several possible means the defendant used to commit the offense." *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002).

Appellant relies on *State v. Stempf*, 627 N.W.2d 352 (Minn. App. 2001), in support of his argument that the district court erred in failing to give a specific unanimity

instruction. In *Stempf*, the police discovered methamphetamine during two separate searches, one of defendant's truck and one of his workplace. *Id.* at 354. The defendant requested a jury instruction "requiring the jurors to evaluate the two acts separately and unanimously agree that the state had proven the same underlying criminal act beyond a reasonable doubt." *Id.* The district court refused to give the instruction, and the defendant was convicted of possession of a controlled substance. *Id.* We reversed and remanded. *Id.* at 359. Our decision turned on the following facts: (1) the two incidents of possession did not constitute a single act; (2) the acts occurred at different places and times; (3) the appellant presented distinct defenses for each act of possession; and (4) the state specifically argued that the jury could convict defendant even if individual jurors disagreed as to when and where the act of possession occurred. *Id.* at 358. We reasoned that the jury instructions violated the defendant's right to a unanimous verdict because they allowed for "possible significant disagreement among jurors as to what acts the defendant committed." *Id.* at 354, 358–59.

The state counters that this case is governed by our recent decision in *State v. Rucker*, 752 N.W.2d 538 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). In *Rucker*, the defendant was accused of engaging in a sexual relationship with two teenage girls over a two-year period, and he was ultimately charged with and convicted of two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. *Id.* at 548. On appeal, the defendant argued that the district court erred by not instructing the jury that it must agree unanimously on the underlying acts of penetration he had committed. *Id.*

We affirmed, pointing out that, unlike in *Stempf*, "the prosecution did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents." *Id.* at 548. We also noted that "appellant did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact with either child-victim." *Id.* We therefore concluded that a specific unanimity instruction was not required.

This case is governed by *Rucker*. Here, the state did not emphasize certain incidents, nor did it encourage the jury to find that some incidents were more likely to have occurred than others. Instead, the state argued that appellant touched H.N.'s vaginal area three times and that he used the same modus operandi each time. Also, the appellant did not present distinct defenses to each of the incidents. In his statement to police, appellant admitted that there were two occasions on which he may have accidentally touched H.N. But during closing argument, defense counsel did not attempt to argue that appellant had accidentally touched H.N. on two occasions and that he had never touched her again. Rather, defense counsel generally argued that appellant was helping H.N. to clean her menstrual discharge and that H.N. was lying about the nature of any touching that occurred. We acknowledge that in *Rucker*, we noted that the victim's recollections of specific incidents of abuse "served as examples of appellant's conduct," whereas here, H.N. testified to three distinct incidents of abuse. *See id.* But because this case, like *Rucker*, involves undifferentiated acts of criminal sexual conduct, we conclude that the

district court did not commit plain error by failing to give a specific unanimity instruction sua sponte.

Although the district court did not commit plain error, we note that the better practice would have been to give a specific unanimity instruction, especially where, as here, the state proceeded on one charge of criminal sexual conduct but presented evidence of multiple acts that could have violated the statute. To provide assurance regarding the unanimity of the verdict, the better practice would be to instruct the jury that it must unanimously agree to the act of penetration that constituted a violation of the statute.

II. Prior consistent statement

"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). The party challenging an evidentiary ruling has the burden of proving that the district court abused its discretion and that the party was prejudiced. *Id.* But even if the trial court erred in admitting the evidence, a new trial can only be ordered 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).

Generally, out-of-court statements offered to prove the truth of the matter asserted are considered hearsay and are not admissible. Minn. Evid. R. 802. But a prior statement by a witness is not hearsay if (1) the witness testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is helpful to the jury in evaluating the credibility of the witness; and (3) the statement is consistent with the

witness's testimony. Minn. Evid. R. 801(d)(1)(B). Appellant does not dispute that H.N. testified at trial and that defense counsel could have cross-examined H.N. But appellant contends that H.N.'s prior statement was not admissible because her credibility was not challenged, and, more significantly, because H.N.'s prior statement was not consistent with her trial testimony.

Initially, appellant contends that H.N's prior statement was not admissible because her credibility had not been challenged at the time her statement was introduced. A witness's credibility may be challenged in a number of ways, such as pointing out memory lapses, factual inconsistencies, and motives to lie. Before H.N.'s statement was admitted, defense counsel had cross-examined H.N. and her mother, and she had laid the groundwork for arguing that H.N. was falsifying the allegations against appellant because she did not like his disciplinary methods. The district court did not abuse its discretion in determining that H.N.'s credibility had been challenged and that the introduction of H.N.'s prior statement would be useful to the jury in evaluating H.N.'s credibility.

Next, appellant argues that the district court erred in admitting H.N.'s statement because it was not consistent with her trial testimony. To be admissible as a prior consistent statement, a witness's prior statement must be "reasonably consistent," but need not track the witness's trial testimony verbatim. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). Appellant points out that before admitting H.N.'s prior statement, the district court failed to listen to the statement and instead relied on a social worker's summary to determine whether it was substantially consistent with H.N.'s trial testimony. We agree with appellant that the preferred practice would have been for

the district court to compare the prior statement to H.N.'s trial testimony, but we conclude that the district court's failure to do so does not in itself constitute a clear abuse of discretion.

Appellant further contends that H.N.'s prior statement was inconsistent because, in her statement to police, H.N. said that appellant touched her four times, but at trial, she testified that he touched her only three times. Appellant relies on *State v. Bakken*, a case in which the defendant had been charged with first- and third-degree criminal sexual conduct. 604 N.W.2d 106, 107–08 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). At trial, the child-victim only testified to facts that would support a conviction of third-degree criminal sexual conduct, but the district court admitted a prior statement that included additional facts which could have escalated the severity of the offense to first-degree criminal sexual conduct. *Id.* at 110. We found that because the "inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule." *Id.*

H.N.'s prior statement is distinguishable from the prior statement in *Bakken*, however, because it does not include additional facts that would escalate the severity of the offense. Appellant was charged with one count of first-degree and one count of second-degree criminal sexual conduct, and H.N. had testified to facts sufficient to establish both of these charges before her prior statement was admitted. And in her statement to police and her trial testimony, H.N. was consistent in describing the way that appellant touched her vaginal area on the occasions that he abused her. The one

difference between her statement to police and her trial testimony was the number of times appellant touched her—four versus three. But given the difficulty of child-victims in distinguishing the number of incidents of abuse and the consistency with which H.N. described the way in which appellant touched her vaginal area, we conclude that the district court did not abuse its discretion in determining that H.N.'s prior statement and her trial testimony were "reasonably consistent" in their descriptions of the occasions on which appellant touched her.

Appellant also contends that H.N.'s prior statement was inconsistent with her trial testimony because it supplemented H.N.'s trial testimony with additional facts. Specifically, in her statement to police, H.N. stated that she was scared when appellant touched her, that appellant told her not to tell anyone what he had done, and that appellant was angry when he found out that she had told her mother. We agree with appellant that H.N. did not testify to these facts at trial, and that, to the extent that the district court determined that these statements were reasonably consistent with H.N.'s trial testimony, the district court abused its discretion by doing so.

But we conclude that a new trial is not necessary because appellant has failed to demonstrate a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Post*, 512 N.W.2d at 102 n.2. Even absent H.N's statement, there was significant evidence of appellant's consciousness of his guilt and his sexual intent. During each of the occasions that appellant claims that he was assisting H.N. to clean her menstrual discharge, her mother was not at home. Moreover, in her prior statement and in her trial testimony, H.N. consistently stated that appellant had her watch a

pornographic video while her mother and her sister were asleep. And finally, the prosecution introduced evidence that soon after appellant learned that police were investigating the allegations against him, he purchased a ticket to Vietnam. In light of this evidence, there is no reasonable possibility that H.N.'s statement significantly affected the verdict.

Affirmed.