STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1237

State of Minnesota,
Respondent,

vs.

Daniel Ryan Braatz,
Appellant.

Filed May 31, 2011
Affirmed
Stoneburner, Judge

Wright County District Court
File No. 86CR088975

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

Thomas N. Kelly, Wright County Attorney, Anne L. Mohaupt, Assistant County Attorney, Buffalo, Minnesota (for respondent)

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Minge, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, asserting that (1) evidentiary rulings were unfairly prejudicial and violated his rights to confront witnesses and present a complete defense; (2) prosecutorial misconduct deprived him of a fair trial; (3) the evidence was legally insufficient to support his conviction; and (4) ineffective assistance of trial counsel violated his Sixth Amendment rights. We affirm.

FACTS

In 2008, appellant Daniel Ryan Braatz was charged with third-degree criminal sexual conduct based on allegations that on or about June 1, 2005, Braatz had sexual intercourse with A.M.J., who was under the age of 16, while Braatz was more than 24 months older than A.M.J. At the time A.M.J. made the complaint, he was at the Red Wing juvenile-detention facility, having been adjudicated delinquent for burglary. The allegations against Braatz were made while A.M.J. was being interviewed about allegations of criminal sexual conduct committed by other men. Braatz is one of six individuals charged in 2008 and 2009 as a result of A.M.J.'s allegations, all involving separate incidents that occurred between 2003 and 2005.

Before trial, the state moved to suppress any evidence of A.M.J.'s past sexual conduct, including burglary committed to steal women's underwear, and his commitment to Red Wing. Braatz did not object to exclusion of evidence of A.M.J.'s adjudication, but argued that it was possible that A.M.J.'s allegations were motivated by sex-offender

treatment he was undergoing at Red Wing and that Braatz should have the opportunity to suggest such motive and to contrast the detail of A.M.J.s allegations against others with the "vague" allegations against Braatz. The district court, noting that Braatz would have an opportunity to challenge the "vagueness" of A.M.J.'s allegations against Braatz, granted the state's motions.

At trial, A.M.J. testified that he had attended a party at the Perez residence, but after a fight broke out at that party, he and Braatz went to a garage at Braatz's residence where they had oral sex and anal sex on a bench seat from a truck or van. A.M.J. was uncertain of the date, but he accurately described the location and appearance of the Braatz residence. A.M.J. testified that he was drinking alcohol and had smoked marijuana at the party.

Law-enforcement officers testified that Braatz's stepfather confirmed that, in the summer of 2005, a bench seat from a van was located in the garage but had since been put back in the van, which was stored on a relative's property. The officers found the van and used a blue light to fluoresce stains that were tested for the presence of seminal fluid. Both stains tested negative for seminal fluid, and the state's witness testified that the stains could have been caused by any of a large number of common substances. A.M.J. identified a photograph of the bench seat as appearing to be the bench seat on which the sexual encounter had occurred, but he was "not one hundred percent sure." Other officers testified that they had been called to a disturbance at a party at the Perez residence in the summer of 2005.

A witness for Braatz testified that she and some friends were at the Perez party when Braatz arrived, and they went with Braatz to Braatz's residence where he changed clothes. According to this witness, A.M.J. "tagged along" on his bicycle, but A.M.J. did not enter the Braatz residence. After Braatz changed clothes, they returned to the party at the Perez residence. A fight broke out, and Braatz left by the back door because he lived in that direction. A.M.J. left a couple of minutes later. The witness testified that she assumed that A.M.J. also left by the back door because that is where his bicycle was located. The witness did not see Braatz or A.M.J. again that night and does not know what either did after he left the party. She said that although many people at the party left because they feared that the police would be coming, no police came. She testified that her memories were somewhat foggy because she had been drinking at the party and it was a long time ago.

Braatz, who admitted that he had been convicted in 2003 of giving false information to the police, testified that he was at the Perez party and had a brief conversation with A.M.J. In response to a question about the conversation, Braatz stated that "[A.M.J.] was in a relationship with someone much older than [me], and I didn't know whether or not it was sexual." At that point, the district court called a recess and reminded Braatz, out of the presence of the jury, that evidence of A.M.J.'s prior sexual conduct had been excluded.

Braatz testified that he drank two beers that he brought from his house and left the party soon after the fight broke out, but A.M.J. was not with him. Braatz denied having any sexual contact with A.M.J. Braatz agreed with A.M.J.'s description of the residence

where Braatz lived at the time and stated that he had seen the van seat in the garage. Braatz testified that the doors to the garage had been broken so that they remained open.

In closing argument, Braatz focused primarily on A.M.J.'s lack of recollection and the inconsistencies between the statement A.M.J. gave to law enforcement and his trial testimony. The prosecution focused on A.M.J.'s willingness to testify about matters that did not portray him favorably, lack of motive to lie, and Braatz's prior conviction of giving false information to police. The jury found Braatz guilty. He was sentenced to 18 months in prison, execution stayed with conditions. This appeal followed.

D E C I S I O N

I. Evidentiary rulings

A. Exclusion of evidence

Braatz first challenges evidentiary rulings, arguing that he was denied the opportunity to present evidence impeaching A.M.J., in violation of his confrontation rights and the right to present a complete defense. On appeal, Braatz argues that the district court erred in excluding evidence that A.M.J. had been adjudicated delinquent for burglary and theft, because these are crimes of dishonesty that would have been "automatically" admitted to impeach an adult complainant. But Braatz did not raise this issue in the district court and consented to exclusion of evidence of A.M.J.'s juvenile adjudications, therefore this issue is waived on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that generally matters not argued to and considered by the district court will not be considered on appeal).

At the district court, Braatz argued that evidence of A.M.J.'s conduct of stealing women's underwear and evidence of allegations of criminal sexual conduct against five other men made while A.M.J. was in sex-offender treatment at Red Wing should be admitted to impeach A.M.J. Specifically, Braatz argued to the district court that the contrast in the detail of A.M.J.'s disclosures about other men with the lack of detail in his allegations against Braatz relates to A.M.J.'s credibility and the fact that A.M.J. was in treatment *may* have created a motive to fabricate allegations against Braatz. Braatz asserted that exclusion of this evidence precluded him from exercising his right to confront the witness and from presenting his defense. We disagree.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).[1] Minn. Stat. § 609.347, subds. 3, 4 (2010), precludes admission of evidence of a victim's prior sexual conduct in criminal sexual conduct cases except under limited circumstances and specific procedures not at issue in this case. And Minn. R. Evid. 412 similarly limits admission of evidence of a victim's previous sexual conduct in a prosecution for acts of criminal sexual conduct. Braatz has not presented any argument

[1] Braatz urges the de novo standard of review for suppression of evidence on constitutional grounds, citing *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992), for the proposition that, when the facts are not in dispute and the district court's suppression decision is a question of law, review is de novo. But the district court relied on the rules of evidence to exclude impeachment evidence in this case, and we conclude that the appropriate standard of review is abuse of discretion.

or evidence to overcome the prohibition on admission of a victim's sexual conduct, and the district court, which noted that Braatz could effectively cross-examine A.M.J. about the vagueness of his allegations and any inconsistencies in his allegations against Braatz, did not abuse its discretion by excluding evidence of A.M.J.'s other sexual conduct.

Braatz speculated at the district court and continues to speculate on appeal that A.M.J. may have been induced by the reporting requirements of his sex-offender treatment program at Red Wing to manufacture allegations against him and others, but Braatz has no evidence to support this speculation. The state informed the district court that the records showed no special treatment was given to A.M.J. as a result of his accusations, and counsel for Braatz stated that he did not have an offer of proof on this issue. When no offer of proof is made on an issue during trial, the appellate court cannot assess the possible probative value of the evidence, and an alleged error in excluding such evidence is not sufficiently preserved for review on appeal. Minn. R. Evid. 103(a)(2); *State v. Lee*, 494 N.W.2d 475, 479 (Minn. 1992) (stating that defendant did not properly preserve claimed errors for review by making an offer of proof showing the nature of the evidence excluded). We therefore do not address this issue further.

B. Admission of hearsay

Braatz argues that the district court abused its discretion by admitting evidence relating to the van seat and forensic testing of the seat on which the sexual conduct allegedly took place because it was based on hearsay, was not relevant, was more prejudicial than probative, and violated his right to confront witnesses. Braatz concedes

that there was no objection to admission of this evidence at trial, but urges consideration of the issue as plain error.

"The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (citing *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S. Ct. 1544, 1548–49 (1997))). Even if the three prongs are met, we correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. The defendant has a "heavy burden" to show that the error was prejudicial and affected the outcome of the case. *State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2009) (quotation omitted). "An error is prejudicial if there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Pearson*, 775 N.W.2d 155, 162 (Minn. 2009) (quotation omitted). When testimony admitted in violation of the Confrontation Clause does not relate to proving a contested element of the offense, the defendant's substantial rights are not affected. *State v. Bobo*, 770 N.W.2d 129, 143–44 (Minn. 2009).

Braatz admitted that there was a removable seat in a van owned by his stepfather and that the seat had, at some point, been in the garage. A.M.J. identified a photograph of the van seat as appearing to be the same seat that he alleged was in the garage and was the site of the sexual conduct in the summer of 2005. Even if other evidence concerning the van seat involved hearsay or was irrelevant, on this record, Braatz cannot establish that any error in admitting uncontested evidence about the van seat was reasonably likely to affect the jury's verdict. We find no merit in Braatz's assertion of plain error with

regard to this evidence. Much of the evidence that Braatz now claims was irrelevant was, in fact, favorable to his assertion that there was no sexual contact.

II. Prosecutorial misconduct

Braatz asserts that the prosecutor engaged in misconduct by making false and improper statements in closing argument. Specifically, Braatz challenges the prosecutor's statements that (1) A.M.J. had no motive to lie; (2) A.M.J. had a reason to recall some but not all details of the incident; (3) the incident involved "homosexuality"; and (4) A.M.J. lacked parental supervision on the night of the incident. Braatz also asserts that the prosecutor misstated the testimony of one of the witnesses. None of these statements was challenged at trial.

"Typically, a defendant is deemed to have waived the right to raise an issue concerning the prosecutor's final argument if the defendant fails to object or seek cautionary instructions." *State v. Ives*, 568 N.W.2d 710, 713 (Minn. 1997). But "[w]e can reverse a conviction even when the defendant failed to preserve the issue on appeal if we deem the error sufficient to do so." *Id.* In this case, Braatz has not asserted or briefed plain error with regard to the prosecutor's comments, therefore, we decline to engage in a plain-error analysis.

Nowhere in the record is there any evidence that A.M.J. had a motive to lie or that the prosecutor's comments about A.M.J.'s reason to recall some but not all of the details of the incident were misrepresentations of facts known to the prosecutor. Braatz has not cited evidence or authority for the proposition that, on this record, the prosecutor's use of the term "homosexuality" was so prejudicial that it affected the outcome of this case.

And the record speaks for itself: A.M.J. was without parental supervision on the night of the incident. To the extent that the prosecutor misstated the testimony of a detective about what Braatz told him about the van seat, the jurors were properly instructed to rely on their own recollections and notes about the evidence and to disregard any statement made by the court or an attorney about the evidence which differed from that recollection. We conclude that none of the claims of prosecutorial misconduct asserted by Braatz constitutes error that warrants reversal of his convictions.

III. Sufficiency of the evidence

Braatz asserts that the only evidence against him was A.M.J.'s testimony, which was not credible and not sufficient to support his conviction. But credibility determinations are for the fact-finder and not for the reviewing court. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, *Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130 (1993). When reviewing a claim of insufficient evidence, a reviewing court's inquiry is limited to whether a jury could have reasonably concluded that the appellant was guilty beyond a reasonable doubt. *State v. Norgaard*, 272 Minn. 48, 52, 136 N.W.2d 628, 631–32 (1965). "The reviewing court must view the evidence in a light most favorable to the verdict and assume the jury believed the state's witnesses and disbelieved the contrary evidence presented." *State v. Huss*, 506 N.W.2d 290, 292 (Minn. 1993) (citing *State v. Lanam*, 459 N.W.2d 656, 662 (Minn. 1990), *cert. denied*, 498 U.S. 1033, 111 S. Ct. 693 (1991)).

In a prosecution for criminal sexual conduct, the testimony of a victim need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2010). But case law establishes that there

may be cases in which the uncorroborated testimony of a complainant is not sufficient to support a conviction of criminal sexual conduct. *Huss*, 506 N.W.2d at 292–93 (concluding that on the unusual facts of a highly suggestive book being repeatedly used with a three-year-old child complainant of sexual abuse, and given the contradictory testimony of the child, the child's testimony was insufficient to support a conviction of criminal sexual conduct). In this case, A.M.J.'s testimony was corroborated in several respects. The inconsistencies in his testimony and between his testimony and the statement he gave to law enforcement were fully argued to the jury. The jury apparently found that the inconsistencies were not so great as to overcome A.M.J.'s credibility about the sexual conduct. On this record, the evidence supports the conviction.

IV. Ineffective assistance of counsel

Braatz asserts that his trial counsel was ineffective because counsel failed to (1) object to hearsay regarding the van seat; (2) challenge admission of irrelevant evidence relating to the van seat; and (3) object to prosecutorial misconduct. A postconviction decision on a claim of ineffective assistance of counsel involves mixed questions of law and fact and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). A reviewing court examines the effectiveness of counsel under the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 1854 (2002) (quotation omitted).

A claim of ineffective assistance of counsel requires showings that (1) the attorney's performance was deficient and (2) but for the deficient performance, there is a

reasonable probability that the case would have been decided differently. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). In this case, Braatz does not present an analysis of counsel's allegedly deficient conduct and makes no argument demonstrating that a different result may have been achieved had counsel objected to evidence concerning the van seat or the prosecutor's statements. Braatz has never disputed that the van seat was in the garage of his residence in the summer of 2005. And, as discussed above, there is no merit to his assertions of prosecutorial misconduct. We conclude that, on this record, Braatz has failed to overcome the presumption that counsel's conduct fell within the wide range of adequate professional assistance or to show that he is entitled to any relief for the deficiencies that he alleges in counsel's performance.

Affirmed.