STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1278

State of Minnesota,
Respondent,

vs.

Joseph Blade Eckman,
Appellant.

Filed June 10, 2013
Affirmed
Schellhas, Judge

Beltrami County District Court
File No. 04-CR-11-887

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

Timothy R. Faver, Beltrami County Attorney, Randall R. Burg, Assistant County Attorney, Bemidji, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

SCHELLHAS, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct. We affirm.

FACTS

Alleging that appellant Joseph Eckman sexually victimized his six-year-old nephew, J.M., respondent State of Minnesota charged him with one count of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2010).

Before trial, Eckman requested disclosure of information about J.M.'s 2009 allegations of criminal sexual conduct against Eckman in 2009, and the state provided transcripts of interviews of a sheriff and child-protection worker involved in the criminal investigation of J.M.'s 2009 allegations. But the state moved in limine to exclude evidence of J.M.'s 2009 allegations. Eckman opposed the state's motion and offered proof of the falsity of J.M.'s 2009 allegations, arguing that the evidence should be admitted because "a reasonable probability" existed that the allegations were false. The district court excluded the evidence, concluding that (1) Eckman's request that the evidence be admitted was untimely and (2) Eckman's proffered evidence to show that the allegations were false was inadequate.

The evidence at trial showed that, on March 9, 2011, J.M. spent the night at his paternal aunt's home and shared a bed with his five-year-old cousin. During that time, J.M.'s aunt discovered J.M. kneeling behind his cousin, exposing himself, and asking his cousin to lift her dress. In response to his aunt's questioning about where J.M. learned the behavior, he first identified his father and then identified his paternal grandfather. J.M.'s aunt knew that J.M. had not seen either his father or his paternal grandfather in a long time. J.M. then identified Eckman, his maternal uncle, and stated that Eckman "had sex with him." J.M. told his aunt that Eckman would put him on his grandpa's bed and stand

behind him. J.M. said that he would cry and plead for Eckman to stop. J.M. also said that "it would happen on the living room . . . couch." J.M. told the aunt that he had told his mother that Eckman had sex with him, but she did not believe him.

The prosecutor played for the jury a recording of a nurse's March 17, 2011, interview of J.M., in which J.M. stated that, during multiple encounters that occurred at J.M.'s maternal grandfather's home when no one else was home, Eckman showed J.M. pornographic videos in his grandfather's room, exposed himself, touched J.M.'s private parts, and made J.M. touch Eckman's private parts.[1] After the nurse told J.M. about the importance of not keeping "bad secrets and secrets that can hurt kids" from grownups, J.M. stated, "You can't tell a police or my dad, ors my uncle will get tooken away"; "I don't want him taken away"; and "I'm keeping it a secret from the police." While age six, J.M. testified generally consistent with his March 17 interview.

The district court admitted *Spreigl* evidence of Eckman's two 2007 adjudications of fifth-degree criminal sexual conduct. The jury found Eckman guilty of second-degree criminal sexual conduct.

This appeal follows.

D E C I S I O N

Application of Rape-Shield Statute

Eckman argues that the district court violated his confrontation, due-process, and fair-trial rights by excluding evidence of J.M.'s prior, allegedly false sexual-abuse accusations against his mother and Eckman. We disagree.

[1] Eckman was 20 years old at the time of trial.

The United States and Minnesota Constitutions entitle an accused to the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. And "[e]very criminal defendant has the right to be . . . afforded a meaningful opportunity to present a complete defense" "[u]nder the due process clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the Minnesota Constitution." *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 540 (Minn. 2012) (quotation omitted); *see also State v. Voorhees*, 596 N.W.2d 241, 249 (Minn. 1999) (stating that defendant's "right to present a complete defense" is included in defendant's "constitutional right to due process in the form of a fair trial").

"Evidentiary rulings of the district court will not be overturned absent a clear abuse of discretion, even when constitutional rights are implicated." *State v. Pendleton*, 706 N.W.2d 500, 510 (Minn. 2005). The appealing party has the burden of establishing that the district court abused its discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn.1999) (quotation omitted).

Admission of evidence of a victim's prior sexual conduct in a criminal sexual conduct case is governed by rule and statute. Under Minn. R. Evid. 412, commonly known as the rape-shield rule, evidence of prior sexual conduct of the victim "shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412." Minn. R. Evid. 412(1).

Under Minn. Stat. § 609.347, subd. 3 (2010), Minnesota's rape-shield statute, evidence of a victim's prior sexual conduct shall not be admitted or referred to except by court order.

"[T]he rape shield statute serves to emphasize the general irrelevance of a victim's sexual history, not to remove relevant evidence from the jury's consideration." *State v. Crims*, 540 N.W.2d 860, 867 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). "Every criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense." *Id.* at 865 (quotation omitted). "The right to present a defense includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies." *Id.* A defendant has a right to confront adverse witnesses to reveal bias or disposition to lie. *Id.* "To vindicate these rights, courts must allow defendants to present evidence that is material and favorable to their theory of the case." *Id.* at 866. "However, a defendant has *no* right to introduce evidence that either is irrelevant, or whose prejudicial effect outweighs its probative value." *Id.* "Rape shield provisions usually do not affect the right to present a defense because they rest on the premise that a person's character is generally irrelevant to a specific case." *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). In particular circumstances in which a victim's prior sexual conduct is relevant, evidence of a victim's sexual history may be admissible. *Crims*, 540 N.W.2d at 868. Prior false allegations of sexual abuse are relevant to test the victim's credibility. *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). A victim may be impeached with prior allegations if the victim testifies that no prior allegations were made. *State v. Kobow*, 466 N.W.2d 747, 751

(Minn. App. 1991), *review denied* (Minn. Apr. 19, 1991). A victim's sexual history may also be relevant and admissible when consent of the victim is a defense and evidence of the victim's previous sexual conduct tends to establish a common scheme or plan of similar sexual conduct by the victim under similar circumstances. Minn. R. Evid. 412(1)(A)(i); *see also* Minn. Stat. § 609.347, subd. 3(a)(i) (requiring district court to find prior allegations were fabricated before admitting prior conduct to show common scheme or plan); *Davis*, 546 N.W.2d at 34 (stating that victim's sexual history may also be relevant where it demonstrates pattern of clearly similar behavior constituting habit or modus operandi).

Here, the district court excluded the evidence on the grounds that (1) Eckman's request for admission of the evidence was untimely and (2) inadequate evidence showed that J.M.'s 2009 allegations were false.

Untimeliness

The rape-shield statute predicates the admissibility of previous-sexual-conduct evidence on a defendant making "[a] motion . . . at least three business days prior to trial." Minn. Stat. § 609.347, subd. 4(a) (2010). Eckman filed his request shortly before the first day of trial and therefore did not comply with the statute. Eckman nevertheless argues that he satisfied the rape-shield rule, which required only that he file his motion "prior to the trial." Minn. R. Evid. 412(2)(A). Eckman also argues that, when a conflict exists between the rape-shield rule and the rape-shield statute, the rape-shield rule prevails. We are not persuaded. Generally, in the event of conflict between the rule and statute, the rule controls. Minn. Stat. § 480.0591, subd. 6 (2010) ("If a rule of evidence is

promulgated which is in conflict with a statute, the statute shall thereafter be of no force and effect."). But, the rape-shield statute provides: "Rule 412 of the Rules of Evidence is superseded to the extent of its conflict with this section." Minn. Stat. § 609.347, subd. 7 (2010). Additionally, Eckman did not raise this argument in the district court and therefore waived it. *State v. Campbell*, 814 N.W.2d 1, 4 n.4 (Minn. 2012) ("Issues not raised in the district court but raised for the first time on appeal are considered waived.").

The state argues that Eckman's untimeliness alone is sufficient reason to affirm the district court's exclusion of the evidence. We disagree. Even if previous sexual-conduct evidence would be inadmissible under the rape-shield statute or rape-shield rule, "this evidence is . . . admissible 'in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense.'" *State v. Olsen*, 824 N.W.2d 334, 340–41 (Minn. App. 2012) (quoting *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986)), *review denied* (Minn. Feb. 27, 2013). We therefore continue with our analysis.

Falsity of Past Sexual-Abuse Allegations

"Before evidence of prior false accusations is admissible, . . . the trial court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *State v. Goldenstein*, 505 N.W.2d 332, 340 (Minn. App. 1993) (concluding that district court violated defendants' "constitutional right to present a defense" when district court "excluded evidence of . . . [child-victims'] prior false allegations," noting that district court found that "the allegations . . . were probably not true"), *review denied* (Minn. Oct. 19, 1993); *see State v. Caswell*, 320 N.W.2d 417, 419

(Minn. 1982) (concluding that district court abused discretion by declining to admit evidence that alleged victim "admitted she falsely told appellant [that another man] was involved in a prior rape," stating that "any time evidence tends to establish a predisposition to fabricate a charge of rape, the evidence should be admitted unless its potential for unfair prejudice substantially outweighs its probative value," noting that "[a]ny other approach would risk violating the defendant's right to due process, to confront his accusers, and to offer evidence in his own defense").

Eckman bore the burden to prove to the district court that a reasonable probability existed that J.M.'s 2009 sexual-abuse allegations against Eckman and J.M.'s mother were false. *See Crims*, 540 N.W.2d at 868 ("Unless and until a defendant shows the victim's sexual history to be relevant to the facts at bar, this particular form of character evidence simply is not admissible under the normal rules of evidence."). Eckman sought to satisfy that burden by relying on two March 2011 transcripts of interviews of a sheriff and child-protection worker involved in the 2009 criminal investigation of J.M.'s 2009 sexual-abuse allegations, which reveal that the sheriff and child-protection worker closed their investigation, in significant part, based on the results of Eckman's polygraph test. The state argues that the polygraph-test results cannot support a reasonable-probability-of-falsity conclusion. We agree.

"[I]t is permissible for police officers to use polygraph tests as part of a criminal investigation." *Hanson v. Bros. & One, Inc.*, 491 N.W.2d 292, 295 (Minn. App. 1992), *review denied* (Minn. Nov. 17, 1992); *see State v. Dressel*, 765 N.W.2d 419, 424–25 (Minn. App. 2009) (stating that "[p]olygraph examinations" are "useful investigatory

tools" that "often are used by law enforcement for investigatory purposes and, consequently, 'may frequently lead to confessions or the discovery of facts which may ultimately lead to the solution of many crimes'" (quoting *State v. Kolander*, 236 Minn. 209, 221, 52 N.W.2d 458, 465 (1952)), *review denied* (Minn. Aug. 11, 2009). But "[r]esults of polygraph tests, as well as evidence that a defendant took, or refused to take such a test, are not admissible in Minnesota in either criminal or civil trials." *State v. Opsahl*, 513 N.W.2d 249, 253 (Minn. 1994). A rationale for not admitting polygraph test results is that "insufficient evidence" exists of polygraph-test reliability. *State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985).

We conclude that the district court did not abuse its discretion by rejecting the polygraph-related evidence and discounting the conclusions informed by it, nor did the court abuse its discretion by concluding that Eckman failed to satisfy his burden to show a reasonable probability that J.M.'s 2009 allegations against his mother and Eckman were false. *See State v. Scruggs*, 822 N.W.2d 631, 643 (Minn. 2012) ("A district court has broad discretion in evidentiary matters.").

Rape-Shield-Corroboration Instruction

Eckman argues that the district court's plainly erroneous jury instruction that "the [victim's] testimony . . . need not be corroborated" requires reversal. We disagree.

Plain-error review applies because Eckman failed to make an on-the-record objection to the district court's instruction. *See id.* at 642 ("Failure to object to jury instructions may result in waiver of the issue on appeal. But we have discretion to review instructions not objected to at trial if the instructions contain plain error affecting

substantial rights or an error of fundamental law." (quotation and citation omitted)). "To establish plain error, a defendant must show: (1) an error; (2) that is plain; and (3) the error must affect the defendant's substantial rights." *Id.* (quotation omitted).

We conclude that the district court's jury instruction was plainly erroneous. "An error is plain if it contravenes case law, a rule, or a standard of conduct." *State v. Hokanson*, 821 N.W.2d 340, 356 (Minn. 2012) (quotation omitted). Section 609.347, subdivision 1, provides that, in criminal-sexual-conduct prosecutions, "the testimony of a victim need not be corroborated." Referring to that subdivision, the court instructed the jury that "the testimony of a victim need not be corroborated." But, "[a]lthough [under section 609.347, subdivision 1,] the testimony of a victim of criminal sexual conduct need not be corroborated, it is improper to instruct the jury that corroboration is not required because the lack of corroboration is an evidentiary matter, rather than a substantive matter." *State v. Johnson*, 679 N.W.2d 378, 388 (Minn. App. 2004) (citation omitted), *review denied* (Minn. Aug. 17, 2004); *see also State v. Fields*, 730 N.W.2d 777, 785 (Minn. 2007) (noting that court of appeals has held that "it is error to instruct a jury that the testimony of a victim alone may support a conviction" and "[a]ssuming, without deciding, that the district court erred in giving the instruction on victim testimony corroboration").

But Eckman must satisfy his heavy burden of proving that the district court's erroneous instruction affected his substantial rights. "To satisfy the third prong, [a defendant] bears the heavy burden of showing that there is a reasonable likelihood the error had a significant effect on the verdict." *State v. Davis*, 820 N.W.2d 525, 535 (Minn.

2012) (quotation omitted). Here, upon the prosecutor's request, the court read the erroneous instruction to the jury *after* Eckman's attorney concluded his closing argument and *before* the prosecutor's rebuttal. And "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." *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (quotation omitted). But Eckman does not satisfy his heavy burden of proving that the erroneous instruction affected his substantial rights. The error is not prejudicial when—as here—"the jury is properly instructed on the burden of proof and the state's need to prove its case beyond a reasonable doubt." *Johnson*, 679 N.W.2d at 388. And, as in *Fields* when the supreme court concluded that a district court's provision of a rape-shield-corroboration instruction was harmless, "the instruction was merely unnecessary rather than an inaccurate statement of law," "[t]he instruction did not under any circumstances mandate that the jury draw any particular inference, and the parties were free to argue for any conclusion they pleased." 730 N.W.2d at 785.

We conclude that the district court's plainly erroneous rape-shield-corroboration instruction does not warrant reversal.

Right-to-Testify Waiver

Eckman argues that his right-to-testify waiver was involuntary because the district court did not "eliminate potential intimidation by courtroom spectators from his constitutional decision whether or not to testify." "A defendant's right to testify is protected by the Due Process Clause of the United States Constitution and Minnesota law," the defendant's waiver of that right must be "voluntarily made," and "[t]he

defendant has the burden of proving that he or she did not voluntarily . . . waive the right to testify." *Andersen v. State*, ___ N.W.2d ___, ___, 2013 WL 1136318, at *7 (Minn. Mar. 20, 2013).

Here, after the district court carefully and thoroughly examined Eckman regarding the voluntariness and consequences of his right-to-testify waiver, Eckman decided to testify. But, soon after doing so, Eckman changed his mind and declined to testify.

Eckman argues that his right-to-testify waiver was involuntary because he "feared intimidation attempts by [J.M.'s] family while he was testifying" and "feared potential retaliation after the trial." Eckman's argument is unavailing. The record does not reflect that Eckman informed the district court that he felt intimidated in the courtroom. And, despite Eckman's argument that the record reflects intimidation in the courtroom because of testimony that his paternal aunt's significant other tried to "run [him] down with a car,"[2] the record does not evidence courtroom intimidation.

Eckman argues that the district court erred by not "remov[ing] the question of intimidation from [Eckman's] decision to exercise or waive the constitutional right to testify" by partially closing the courtroom to members of J.M.'s family who were intimidating Eckman. Because the record does not evidence courtroom intimidation, we do not further address this argument. We conclude that this ground does not warrant reversal because Eckman fails to prove that his right-to-testify waiver was involuntary.

[2] Eckman's aunt denied this during her testimony.

Evidence's Sufficiency

Eckman argues that the evidence was insufficient to sustain his second-degree criminal-sexual-conduct conviction. "When a sufficiency-of-the-evidence challenge has been made, an appellate court views the evidence in the light most favorable to the verdict and assumes the jury resolved all factual disputes in the State's favor." *Scruggs*, 822 N.W.2d at 641 n.1. Although, under the rape-shield statute, "the testimony of a complainant in a sexual assault prosecution need not be corroborated, Minn. Stat. § 609.347, subd. 1 (1988), . . . there may be cases in which the testimony of the complainant is such that a reversal . . . may be necessary absent corroboration." *State v. Shoop*, 441 N.W.2d 475, 478 n.2 (Minn. 1989). But "it is settled law that when [an appellate court] engage[s] in appellate review for the sufficiency of the evidence, it *may* be sufficient to convict on the uncorroborated testimony of a complainant." *State v. Cao*, 788 N.W.2d 710, 717 (Minn. 2010).

In that light, sufficient evidence supports Eckman's conviction. J.M.'s testimony and interview statements indicate that, when he was five years old, Eckman, on multiple occasions during one summer, touched J.M.'s private parts and made J.M. touch Eckman's private parts. The child-protection investigator described J.M.'s account as including much emotion and detail, including "things that a 5 year old wouldn't normally know or understand." *See State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) (stating that minor victim's testimony regarding criminal sexual conduct was corroborated by "[t]he testimony from others about [the victim's] demeanor . . . [and] emotional condition"), *review denied* (Minn. June 29, 2004). And the district court

admitted *Spreigl* evidence to show Eckman's intent and modus operandi. The evidence revealed that, in March and April 2007, Eckman was adjudicated delinquent as to two counts of fifth-degree criminal sexual conduct against a four-year-old male victim and a five-year-old female victim, respectively.

We conclude that sufficient evidence supports Eckman's second-degree criminal-sexual-conduct conviction.

Affirmed.