STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0193

State of Minnesota,
Respondent,

vs.

Donzell Antoine Varnado,
Appellant.

Filed December 30, 2013
Affirmed
Kirk, Judge

Dakota County District Court
File No. 19HA-CR-11-2064

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate State Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Johnson, Judge; and Toussaint, 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

KIRK, Judge

On appeal from his convictions of two counts of first-degree criminal sexual conduct, appellant argues that (1) the district court committed plain error by admitting evidence of the victim's character for truthfulness and credibility; (2) the evidence is insufficient to sustain his convictions; and (3) the district court abused its discretion by denying his motion for a dispositional departure. We affirm.

FACTS

In March 2011, 13-year-old K.C. reported to police that her mother's boyfriend, appellant Donzell Antoine Varnado, attempted to have sexual intercourse with her. Appellant and K.C.'s mother had been in an on-again, off-again relationship since K.C. was three years old. K.C. reported that the incident occurred at the beginning of March on an evening when her mother was at work. K.C. asked appellant, who was watching television in her mother's room, to rub her back because it was sore from playing basketball. K.C. lay down on her mother's bed on her stomach and appellant rubbed her back. After a while, appellant mistakenly thought K.C. was asleep and began touching K.C.'s vagina with his hands. Appellant pulled down her pants and underwear, put his fingers in her vagina, and attempted to put his penis in her vagina.

K.C. pretended to wake up and then left the room, took a shower, and began doing her homework in her room. K.C. texted her mother and told her that she needed to talk to her. After her mother got home from work, K.C. and her mother left the house in her mother's car. K.C. told her mother what had just happened. After her disclosure, K.C. and

her mother returned to the house and her mother confronted appellant, who denied that anything had occurred. K.C.'s mother allowed appellant to sleep in the basement that night but told him he had to leave the next day; appellant moved out of the house the next day.

In June 2011, respondent State of Minnesota charged appellant with one count of fifth-degree criminal sexual conduct. Shortly before the trial, the district court granted the state's motion to amend the complaint by replacing the existing count with two counts of first-degree criminal sexual conduct. The district court held a jury trial in March 2012, and both K.C. and appellant testified. Appellant denied that he had sexually assaulted K.C. He testified that K.C. asked him to give her a back rub and he did so for about 15 to 20 minutes while K.C. was lying on her mother's bed. Appellant testified that he left the bedroom and watched television in the living room after K.C. fell asleep on the bed.

The jury found appellant guilty of both counts alleged in the complaint. Following a sentencing hearing, the district court sentenced appellant to 144 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not commit plain error by admitting evidence of the victim's character for truthfulness and evidence vouching for the victim's credibility.

Appellant challenges the admission of certain statements that K.C. and her mother made, but he concedes that he did not object to the evidence at the time of admission. As a result, this court's review is under the plain-error standard. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). This standard requires that the defendant demonstrate: (1) error; (2) that is plain; and (3) that affects the defendant's substantial rights. *State v. Strommen*,

648 N.W.2d 681, 686 (Minn. 2002). If all three prongs are met, this court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations omitted).

Under the plain-error standard, appellant must first demonstrate that the district court committed an error that was plain. *See id.* "[A]n error is plain if it was clear or obvious." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (quotation omitted). Plain error can typically be demonstrated "if the error contravenes case law, a rule, or a standard of conduct." *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741.

A. Evidence of K.C.'s character for truthfulness.

Appellant challenges the admission of testimony the prosecutor solicited from K.C.'s mother during the trial. The prosecutor asked, "[W]ith your experience obviously as [K.C.'s] mother, would you describe [K.C.] as a truthful person?" K.C.'s mother responded, "Yeah. She always seemed, I mean, she tells the truth."

Under the Minnesota Rules of Evidence, evidence of a witness's character for truthfulness may only be presented if the witness's character for truthfulness is first attacked. Minn. R. Evid. 608(a). A witness who testifies at trial opens up the issue of his or her credibility, not his or her character. *See State v. Mayhorn*, 720 N.W.2d 776, 789-90 (Minn. 2006). The state concedes that the district court committed plain error by admitting K.C.'s mother's statement because K.C.'s character for truthfulness was not attacked during the trial, but it contends that the error did not affect appellant's substantial rights.

We agree. It is unlikely that this one statement affected the outcome of the case. K.C. testified and provided a detailed explanation of the offense. Appellant also testified and provided his own version of the events. The jury was able to observe both K.C. and appellant, and its verdict indicates that it found K.C.'s testimony to be credible. Thus, the district court's error did not affect appellant's substantial rights.

B. Evidence that K.C.'s mother vouched for K.C.'s credibility.

Appellant next challenges the admission of certain statements that K.C. made during an interview with a social worker shortly after she reported the incident. The district court admitted a recording of the statement K.C. gave to the social worker into evidence and played the recording for the jury. After describing the incident, K.C. told the social worker that her mother confronted appellant about the allegations. The following exchange occurred between K.C. and the social worker:

> [K.C.]: And then, um, I went in and sat by my mom. And he kept saying that he didn't do it and this never happened and it, and it could have been me just imagining it and I was dreaming and, and I told him that he was lying. And my mom believed me. . . .
> [SOCIAL WORKER]: Your mom believed you?
> [K.C.]: Yeah, she said that it wasn't that he was lying and I was telling the truth.

Later in the interview, the social worker stated, "Um, you told me that your mom believes you. Is she supportive of you?" K.C. responded, "Yes." The prosecutor did not ask K.C.'s mother if she believed K.C.'s allegations during her testimony at trial.

A "witness cannot vouch for or against the credibility of another witness" because "the credibility of a witness is for the jury to decide." *State v. Ferguson*, 581 N.W.2d 824,

835 (Minn. 1998) (quotations and alteration omitted). However, a defendant opens the door when he introduces evidence that "creates in the opponent a right to respond with material that would otherwise have been inadmissible." *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007) (quotation omitted); s*ee State v. Myers*, 359 N.W.2d 604, 611-12 (Minn. 1984) ("Having sought, however, to discredit the child's credibility by showing that the child's mother (the ultimate 'expert' with respect to the complainant) did not believe her for several months, the defendant must be said to have waived objection to responsive opinion testimony . . . .").

Appellant contends that K.C.'s statements were inadmissible and that he did nothing to open the door to their admission. In support of his argument, appellant relies on two cases. *See Van Buren v. State*, 556 N.W.2d 548, 550-51 (Minn. 1996) (holding that the defendant was denied a fair trial because the prosecutor elicited testimony from the victim and two other witnesses that certain members of the victim's family believed the victim's allegations and the prosecutor emphasized the testimony during closing argument); *State v. Maurer*, 491 N.W.2d 661, 662 (Minn. 1992) (concluding that the district court erred by admitting testimony from "several" witnesses that the victim "appeared to be 'sincere'" but the error was harmless because it was not likely that the jury gave the testimony much weight). However, both *Van Buren* and *Maurer* are distinguishable from this case because in those cases the district court admitted vouching testimony from several witnesses. In contrast, the evidence that appellant objects to consisted of two statements that K.C. made to a social worker; the state did not elicit vouching testimony directly from any of the

witnesses. Further, the prosecutor in *Van Buren* referenced the evidence in closing argument, which did not occur in this case.

The state contends that appellant opened the door to the admission of the challenged statements because appellant's counsel asked K.C.'s mother questions that implied that she did not believe K.C.'s allegations. We agree. Appellant's counsel asked K.C.'s mother questions including, "[A]t one point you were surprised that the case was even going forward, weren't you?" and, "In fact, the day that [K.C.] made the allegations you didn't call the police, did you?" Appellant's counsel did not directly ask her if she believed K.C., but the questions he asked her strongly implied that she did not, which opened the door to her belief of K.C.'s allegations. *See Myers*, 359 N.W.2d at 611-12.

Moreover, even if appellant did not open the door to vouching testimony, the two statements in K.C.'s statement to the social worker likely did not affect appellant's substantial rights. The prosecutor did not directly elicit testimony from K.C.'s mother about whether she believed K.C., K.C.'s statements were made in the context of explaining to the social worker what occurred after the incident that led to her contacting the police, and the evidence in the record that K.C.'s mother asked appellant to move out of the house and ended her relationship with him demonstrates that she believed K.C.'s allegations. Therefore, the district court did not commit plain error by admitting into evidence K.C.'s entire statement to the social worker.

II. The evidence is sufficient to sustain appellant's convictions.

When reviewing the sufficiency of the evidence supporting a conviction, this court's review is limited to a meticulous analysis of the record to determine whether the evidence,

when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In doing so, this court assumes "that the jury believed all of the state's witnesses and disbelieved any evidence to the contrary." *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A. The evidence is sufficient to establish that appellant is more than 48 months older than K.C.

Appellant was convicted of committing one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b) (2010). Under that statute, an individual is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with a complainant who "is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant." Minn. Stat. § 609.342, subd. 1(b). Appellant contends that the state did not establish that he is more than 48 months older than K.C.

Appellant is correct that the trial record does not contain evidence of his date of birth. However, the record contains substantial evidence that appellant is more than 48 months older than K.C. First, the jury was able to observe both appellant and K.C. during their testimony at the trial. K.C. testified that she was 14 years old and the jurors could observe that appellant appeared significantly older than K.C. Second, appellant testified that he

graduated from high school and was currently attending school to obtain his second associate's degree. This evidence implied that appellant was at least 18 years old.

Third, the jury heard testimony from appellant, K.C., and K.C.'s mother that appellant and K.C.'s mother met and began dating when K.C. was three years old and, at the time of the incident, they had been dating for approximately ten years. Based on the evidence, the jury could reasonably conclude that appellant is at least 48 months older than K.C. because he was older than seven years old when he began dating K.C.'s mother. The jury was instructed on the elements of the offense and that it was required to find each element beyond a reasonable doubt. The jury's guilty verdicts indicate that it found that appellant is more than 48 months older than K.C. *See State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) (stating that courts presume that juries follow the instructions they are given). The evidence is sufficient to support the jury's finding that appellant is more than 48 months older than K.C.

B. The evidence is sufficient to prove appellant sexually penetrated K.C.

Appellant contends that the evidence was insufficient to establish that he sexually penetrated K.C. for three reasons: (1) K.C.'s story changed over time; (2) K.C. had a motive to fabricate; and (3) the allegations were not corroborated by physical evidence. In cases that depend primarily on conflicting testimony, it is particularly important to assume that the jury believed the state's witnesses because it is the jury's exclusive function to weigh the credibility of witnesses. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). A "jury is free to accept part and reject part of a witness's testimony." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). "Inconsistencies or conflicts between one witness and another do

not necessarily constitute false testimony or serve as a basis for reversal." *Id.* A conviction can be based solely on testimony from one credible witness. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Appellant contends that K.C.'s trial testimony included two details of the incident that she had not previously described: (1) appellant ejaculated on her, and (2) appellant rolled her on her side. While it is true that these two details were not part of K.C.'s initial interview with the social worker approximately a week after the incident occurred, K.C. never wavered on the fact that appellant penetrated her with his fingers and attempted penetration with his penis. Instead, she simply provided more details about the incident during her testimony at the trial. *See State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) ("[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event."), *review denied* (Minn. Mar. 16, 1990). Moreover, appellant's counsel questioned K.C. about the additional details during cross examination and, on redirect, K.C. explained that it was very hard for her to talk about the incident on the day she spoke with the social worker. She testified that she did not tell the social worker about the ejaculation because she was embarrassed and the social worker did not ask her if appellant had ejaculated. The jury's verdict indicates that it believed K.C.'s testimony, and we defer to the jury's credibility determinations. *See Pieschke*, 295 N.W.2d at 584.

Appellant next contends that K.C. had a motive to fabricate the allegations because she felt that appellant was abandoning her by moving out of the home. Appellant and K.C.'s mother both testified that they argued the day before the incident occurred and that

appellant stated that he planned to leave the home, but there was conflicting testimony about whether K.C. knew that appellant planned to leave. Appellant and K.C.'s mother testified that the argument occurred while K.C. was not home, but disagreed about whether appellant had packed his belongings. K.C. denied that she knew appellant was planning to move out.

Finally, appellant contends that there was no physical evidence to corroborate K.C.'s allegations. However, a sexual assault victim's testimony does not need to be corroborated. Minn. Stat. § 609.347, subd. 1 (2012); *see Myers*, 359 N.W.2d at 608 ("Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction."). In addition, Minnesota appellate courts have held that a victim's prompt complaint and emotional condition at the time of the complaint constitute corroborative evidence. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984); *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). Here, K.C. reported the sexual assault to her mother immediately after it occurred and both K.C. and her mother testified that K.C. was very frightened and upset after the incident. Accordingly, we conclude that the evidence is sufficient to prove that appellant sexually penetrated K.C.

III. The district court did not abuse its discretion by denying appellant's motion for a dispositional departure.

A district court must impose the presumptive sentence provided by the sentencing guidelines unless the case involves "identifiable, substantial, and compelling circumstances" that warrant a departure. Minn. Sent. Guidelines II.D (2010). Substantial and compelling circumstances include "circumstances that make the facts of a particular case different from

a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The decision whether to depart from the guidelines is within the district court's discretion and this court will not reverse absent a clear abuse of that discretion. *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). Only a "rare case" warrants reversal of the district court's decision not to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Although the district court is required to give reasons for its decision to depart from the guidelines, no explanation is required when it imposes a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). This court "may not interfere with the [district] court's exercise of discretion, as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011). Here, the district court imposed the presumptive sentence after it reviewed a pre-sentence investigation report, a psychosexual evaluation report, and heard arguments from both appellant's counsel and the prosecutor. Based on all of the information before it at the time of the sentencing hearing, the district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

Affirmed.