STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0181

State of Minnesota,
Respondent,

vs.

Steven Jon Lynn Horton,
Appellant.

Filed February 18, 2014
Affirmed
Chutich, Judge

Chippewa County District Court
File No. 12-CR-12-87

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

David Gilbertson, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant Steven Horton challenges his convictions of first- and second-degree criminal sexual conduct, raising five separate issues. He asserts that the district court

plainly erred in its response to the jury's questions during its deliberations and by admitting inadmissible hearsay evidence; the evidence was not sufficient to sustain his first-degree criminal-sexual-conduct conviction; the prosecutor committed prejudicial misconduct; and the district court abused its discretion by excluding evidence of Z.O.'s past allegations of sexual abuse. We conclude that the district court did not plainly err in communicating with the jury and in admitting hearsay evidence. Because the state presented sufficient evidence to convict Horton of first-degree criminal sexual conduct and Horton's other arguments are unavailing, we affirm.

FACTS

Appellant Steven Horton moved in with Z.O., her mother, and her siblings in January 2009, and he married Z.O.'s mother in February 2010. Z.O.'s father died when she was three, and her mother struggled with alcoholism for a number of years. Z.O.'s mother entered inpatient chemical-dependency treatment on January 10, 2012.

On January 12, 2012, Z.O. told her teacher at school that Horton had been sexually abusing her. Z.O.'s teacher immediately referred Z.O. to a social worker, Sally Neubauer. Z.O. told Neubauer that Horton was "touching her inappropriately" on her "top and bottom" and that Horton "tried to go as far as raping her." When Horton attempted to rape her, Z.O. said she "roll[ed] over and pull[ed] away [to] try to avoid it." Z.O. explained that Horton sometimes sexually touched her daily, but that he would stop for a while and then start again. She said her mother and siblings were unaware of the abuse because it happened when her mother was not home and her younger siblings were asleep.

Neubauer immediately reported Horton's sexual abuse of Z.O. to Chippewa County Family Services. After Neubauer made her report, BreeAnn Bothun, a child protection worker, and Clara City Police Chief Ralph Bradley interviewed Z.O. that same day. The interview was recorded and entered into evidence at trial.

During the January 12 interview, Z.O. told Bothun and Bradley that Horton had been sexually abusing her for one-and-a-half to two years. Z.O. said the touching happened when everyone in her house was asleep, and she explained that her mother could not get upstairs to Z.O.'s bedroom because her mother only had one leg. Z.O. said that Horton touched her "inappropriately" all over her body. She explained that Horton touched her with his hands on her breasts and genitals, both over and under her clothes. Z.O. said Horton abused her "[m]ore than twenty times[.]"

Z.O. told Bothun and Bradley that Horton tried to "rape" her the previous night, January 11, stating that "[h]e tried to stick his private parts in [hers]." On the night of January 11, Z.O. was wearing a tank top and spandex shorts. Horton came into her room and touched her "everywhere," both over and under her clothes. He touched her breasts, stomach, legs, and genitals. Bothun asked Z.O. whether she felt his penis, and Z.O. nodded her head affirmatively. Z.O. nodded her head affirmatively again when Bothun asked if Horton only touched her with his penis on her "private area." After this contact, Z.O. "twisted out of reach" from Horton and "forced [herself] to fall asleep."

When Bothun and Bradley completed the interview with Z.O., Z.O. and her siblings were removed from their home. When Z.O. went with Bothun and Bradley to retrieve her belongings from her home, Z.O. was able to locate the tank top she was

wearing the previous night, which matched the description she gave during her interview. The sheets that were on Z.O.'s bed had been removed, and Z.O. did not know where the sheets went. They were also unable to find Z.O.'s spandex shorts. Both Bothun and Bradley testified at trial.

That same day, January 12, Dr. Carol Lietzau, a physician and a member of the Chippewa County Child Protection Team, examined Z.O. Z.O. told Dr. Lietzau that Horton had been sexually abusing her for approximately two years and that he touched her breasts and genitals, both over and under her clothes. Z.O. said she was unsure of whether Horton penetrated her with his penis. Z.O. explained that the last time she showered was right before the January 11 incident.

Dr. Lietzau did not see any injuries or bruising during her physical examination of Z.O., and Dr. Lietzau testified at trial that this lack of injury was not unusual. Dr. Lietzau completed a sexual assault kit on Z.O. and turned the kit over to the Clara City Police Department. Forensic scientists from the Minnesota Bureau of Criminal Apprehension performed DNA testing on Z.O.'s sexual-assault kit, her tank top, and a known DNA sample from Horton. Semen was found on Z.O.'s shirt, and one sperm cell was found on the perineal swab from Z.O.'s sexual assault kit. The DNA from the sperm cell fraction found on Z.O.'s shirt matched Horton's DNA. Non-sperm-cell fractions were also tested from the shirt, and they matched three or more people. Z.O. and Horton could not be excluded as possible matches, but the test excluded 99.998 percent of the world's population.

Because only one sperm cell was found on the perineal swab, no DNA findings could be made. The non-sperm-cell fraction of the perineal swab matched the Y-chromosome of the DNA profile from Horton, meaning that neither he nor any of his paternally related male relatives could be excluded as contributors. This specific Y-chromosome of the DNA profile is found in only one in 476 Caucasian males. Dr. Lietzau testified at trial that the transmission of a sperm cell to a woman's genitals by someone's hands or clothing "would be very rare."

On January 17, Chief Bradley interviewed Z.O. again. Z.O. explained that on the night of January 11, Horton was shirtless and wore "pajama pants." He got into her bed and tried to force her legs apart. She told Bradley that she tried to turn away from Horton, but that he "felt [her] turn" and "grabbed [her] shoulders to where [she] was on [her] back." She said that Horton did not get her legs apart and that she did not think Horton was able to penetrate her with his penis. This interview was recorded and admitted into evidence at trial.

Bradley interviewed Z.O. again on February 1, 2012, after he learned that Horton was planning to return to the family home, a violation of Z.O.'s mother's "safety plan" with Chippewa County Family Services. Z.O. said her mother took her to visit Horton on January 30 at his family's home. Horton told her "that he was sorry, [that] he wasn't mad at [her], [and that] he still loved [her]." Z.O. said that she was willing to move out of her home so that Horton could move back in with her mother. Z.O. said that she could tell that her mother wanted to be with Horton more than with her. The recording of this interview was admitted into evidence at trial.

The state charged Horton with first-degree criminal sexual conduct (genital-to-genital contact); second-degree criminal sexual conduct (significant relationship, victim under 16 years of age, and multiple acts); and second-degree criminal sexual conduct (victim under 13 years of age and actor more than 36 months older than victim). *See* Minn. Stat. §§ 609.342, subds. 1(a), 2(a), .343, subds. 1(h)(iii), 2(a), 2(b), .343, subds. 1(a), 2(a) (2010).

Before trial, the district court ruled that evidence that Z.O. lied about sexual abuse allegations three times in the past was inadmissible. It ruled that evidence about the latest episode could be admitted for impeachment purposes, however.

At trial, Z.O. testified about how Horton sexually abused her. Contrary to her interview with Bothun and Bradley on January 12, Z.O. responded, "no," when the prosecutor asked her whether she felt Horton's penis touch her. Z.O. also explained that her mother tried to convince her that she had schizophrenia and that the sexual abuse was a hallucination, even though Z.O. was never diagnosed with a mental illness. Z.O. said that the sexual abuse she experienced was not a hallucination.

Z.O.'s mother testified at trial that Z.O. had been diagnosed with "audio and visual hallucinations," "severe depression," and a "brief psychotic disorder." She said that Z.O. continued to suffer from hallucinations. Z.O.'s mother described how Z.O. told her three times that the January 11 assault did not happen and that it was a hallucination. She denied trying to convince Z.O. that the sexual assault was a hallucination.

Horton's sister, sister-in-law, and sister-in-law's girlfriend all testified at trial. His sister stated that Z.O. wanted to be around Horton constantly and did not appear to fear

him. She said that Z.O. was angry with Horton because her family had to move from Marshall to Clara City and Z.O. had to leave her friends. Horton's sister-in-law testified that she saw Z.O. "throwing a fit" in her room after the January 11 incident and that Z.O. stated, "I made a really big mess," "I lied," and "I don't know how to fix it."

Horton's sister-in-law's girlfriend testified that Z.O. acted in an overly familiar manner with Horton that seemed like more than a daughter-stepfather relationship. She stated that Z.O. asked her after the January 11 incident, "What if it didn't happen?" and also referenced having hallucinations.

Horton testified in his own defense and denied having any sexual contact with Z.O. He denied taking the bedding or shorts from Z.O.'s room and said that Z.O. did not sleep with sheets. Horton explained that Z.O. and her mother shared clothes and claimed that the semen on Z.O.'s shirt came from having sex with his wife while she was wearing the shirt. He said that Z.O. was angry with him because the family had to move from Marshall to Clara City.

The jury began deliberating mid-afternoon on a Friday. The jury returned to the courtroom once to view the January 12 video recording of Z.O. and to listen to the recording of Bradley's interview of Z.O. from January 17. The jury resumed its deliberations and then returned to the courtroom at 8:16 p.m. with two questions for the district court. After receiving further instructions, the jury resumed its deliberations and returned its verdicts at 10:38 p.m.

The jury convicted Horton of first-degree criminal sexual conduct (genital-to-genital contact) and second-degree criminal sexual conduct (victim under 13 years of age

and actor more than 36 months older than victim). *See* Minn. Stat. §§ 609.342, subds. 1(a), 2(a), .343, subds. 1(a), 2(a). The jury acquitted Horton of second-degree criminal sexual conduct (significant relationship, victim under 16 years of age, and multiple acts). *See* Minn. Stat. § 609.343, subds. 1(h)(iii), 2(a), 2(b).

Horton filed a post-trial motion for a judgment of acquittal on first-degree criminal sexual conduct, asserting that the state's evidence was insufficient to convict him because the January 12 recorded interview of Z.O. was inadmissible hearsay. The district court denied Horton's motion. This appeal followed.

D E C I S I O N

I. Z.O.'s Out-of-Court Statements

Horton contends that the district court plainly erred by admitting Z.O.'s out-of-court statements on genital-to-genital contact from the January 12, 2012 recorded interview because they were inadmissible hearsay. The state now asserts that the statements were admissible under the residual hearsay exception. After carefully reviewing the recorded interview, we conclude that the district court did not plainly err by failing to sua sponte exclude these statements.

When a defendant fails to object to the admission of evidence, our review is under the plain-error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error requires that the appellant show "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "A district court error is clear or obvious when it contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding

legal principles." *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011) (quotation omitted). A defendant's substantial rights are affected when "there is a reasonable likelihood that the error substantially affected the verdict." *Strommen*, 648 N.W.2d at 688. "If those three prongs are met, we may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001) (quotation omitted).

A witness's prior inconsistent statements that are not made under oath are generally admissible only for impeachment purposes and not admissible to prove the truth of matters asserted in them. Minn. R. Evid. 613(b); 801(d)(1)(A). But a witness's statements may be admitted as substantive evidence if they come within an exception to the hearsay rule. *State v. Ortlepp*, 363 N.W.2d 39, 43–44 (Minn. 1985).

We note initially that it is particularly critical for counsel to object to potential hearsay evidence at trial because of the "complexity and subtlety of the operation of the hearsay rule and its exceptions," so that a "full discussion of admissibility" can be conducted at trial. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Without an objection at trial, "the state [is] not given the opportunity to establish that some or all of the statements were admissible under one of the numerous exceptions to the hearsay rule." *Id.* "Where an objection is not made, hearsay evidence will be admitted" if it "has probative force." *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978).

Here, the prosecution moved to admit the recorded interview of Z.O. into evidence without objection from the defense. A portion of the interview is probative of whether genital-to-genital contact occurred. Given the principles articulated in *Manthey* and

Hamilton on the importance of hearsay objections, we are not convinced that review of Horton's hearsay claim is necessary to ensure the fairness and integrity of his trial.

Nevertheless, even after evaluating the evidence under the plain-error standard, the hearsay claim fails to meet the plain-error test. In particular, Horton cannot show any controlling precedent that should have alerted the district court that it must, sua sponte, exclude portions of the January 12 video of Z.O. to avoid plain error.

Minnesota Rule of Evidence 807, the residual hearsay exception, provides that a "statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness" is admissible if:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

A "totality of the circumstances" test must be used to determine whether the out-of-court statements have "equivalent circumstantial guarantees of trustworthiness." *State v. Robinson*, 718 N.W.2d 400, 408–09 (Minn. 2006) (quotation omitted).

When considering whether statements fall under rule 807, we must consider "those circumstances actually surrounding the making of the statements." *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990), *cert. denied*, 498 U.S. 1033, 111 S. Ct. 693 (1991). Where there is a child victim involved in the case,

> these circumstances include whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any

> apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

State v. Ahmed, 782 N.W.2d 253, 260 (Minn. App. 2010).

Applying this standard here, we cannot conclude that it was plain error for the district court to admit these statements under rule 807. Z.O. spontaneously reported to her teacher at school that Horton tried to rape her. The same day as her initial report, the record shows that Z.O. stated in the interview with Bothun and Bradley that "[Horton] tried to rape [her] physically" and that "[h]e tried to stick his private parts in [hers]." Later in the interview, when Z.O. responded as to whether she felt Horton's penis and whether Horton's penis touched her genitals, she nodded affirmatively to both questions.

Aside from Z.O.'s affirmations on genital-to-genital contact, Z.O.'s account of the sexual abuse she suffered by Horton remained consistent throughout the proceedings. Moreover, physical evidence supported Z.O.'s report of genital-to-genital contact. Seminal fluid was found on Z.O.'s shirt and the perineal swab from the sexual assault kit, and Horton could not be excluded as a possible contributor. And an expert testified that it "would be very rare" for seminal fluid to be transferred to a woman's genitals by means other than genital-to-genital contact. In sum, after examining the totality of the circumstances surrounding the making of Z.O.'s January 12 statement, we hold that, under the residual hearsay exception, the district court did not commit plain error in admitting these statements.

II. Sufficiency of the Evidence

Horton argues that the evidence introduced at trial was insufficient to prove first-degree criminal sexual conduct, specifically that the defendant's "bare genitals or anal opening" came into contact with the victim's "bare genitals or anal opening." *See* Minn. Stat. § 609.341, subd. 11(c) (2010). He contends that because the January 12 recorded statement of Z.O. was inadmissible and the physical evidence was consistent with a rational hypothesis other than guilt, the state failed to prove direct contact between his genitals and Z.O.'s. As discussed above, we disagree that the recorded statement was improperly admitted and conclude that sufficient evidence supports the conviction of criminal sexual conduct in the first degree.

When reviewing the sufficiency of the evidence supporting a conviction, "our review on appeal is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court reviews a sufficiency-of-the-evidence claim by determining "whether the legitimate inferences drawn from the facts in the record would reasonably support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012).

In addition, we assume "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 that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). Reversal is proper, however, "if facts proving an essential element of the offense are left more to conjecture and speculation than to reasonable inference." *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005).

The interview from January 12, 2012, and the seminal fluid found on Z.O.'s perineal swab reasonably support the jury's finding that genital-to-genital contact occurred. In the interview, Z.O. reported that, the night before the interview, Horton "tried to rape me physically" by "stick[ing] his private parts in mine." Z.O. nodded affirmatively when asked whether Horton's penis touched her genitals and again when asked whether Horton had touched her with his penis in her "private area." Even though these statements conflicted with her later trial testimony, this inconsistency alone is not sufficient to reverse Horton's conviction. *See, e.g.*, *State v. Reichenberger*, 289 Minn. 75, 77–80, 182 N.W.2d 692, 694–95 (1970) (affirming conviction of criminal sexual conduct where 13-year-old victim's multiple inconsistent accounts were presented to jury).

In addition, the non-sperm cell fraction found on Z.O.'s perineal swab matched the Y-chromosome of the DNA profile from Horton, a profile found in only one in 476 Caucasian males. Testimony from the examining doctor established that the transfer of seminal fluid onto the perineum is usually through sexual transmission and that indirect transfer of seminal fluid by hand would be "very rare."

Moreover, viewed in the light most favorable to the state, other facts support the conclusion that Horton engaged in genital-to-genital contact with Z.O. First, Z.O. testified that Horton had the opportunity to commit this sexual abuse because he was alone with the children that evening. Second, seminal fluid found on the shirt Z.O. was wearing the night of January 11 contained DNA that matched Horton's DNA; the DNA from the non-sperm fraction of the shirt was a mix of three or more persons. Horton and Z.O. were possible contributors, and 99.998 percent of the world population could be excluded. Finally, Z.O.'s spandex shorts and sheets disappeared after the January 11 incident, and Horton's explanation concerning the missing sheets seemed implausible. The totality of all of these facts, assessed in a light most favorable to conviction, shows that the jury could reasonably conclude that Horton was guilty of first-degree criminal sexual conduct with a person under age 13.

III. Prosecutorial Misconduct

Horton argues that the prosecutor committed misconduct by inflaming the passions of the jury during the cross-examination of Horton, Z.O.'s mother, and Horton's sister-in-law and during closing argument. The state responds that the prosecutor's language was not inflammatory and that, in any event, it did not affect the verdict. We agree with the state's position.

When a defendant fails to object to alleged prosecutorial misconduct during trial, we review only for plain error, determining if error occurred, if the error was plain, and if any error "had a significant effect on the verdict." *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011) (quotation omitted). The state bears the burden of proving that there is no

reasonable likelihood that the absence of the misconduct would have significantly affected the jury's verdict. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). A new trial is only necessary if the misconduct, when viewed in the context of the whole trial, "impaired the defendant's right to a fair trial." *State v. Mayhorn*, 720 N.W.2d 776, 785 (Minn. 2006) (quotation omitted).

The prosecutor did not commit misconduct by asking the questions and making the statements that Horton identifies. Horton alleges that questions asked of him and his wife during cross-examination were "designed to elicit emotional responses in the jurors." But Horton concedes that "it is perfectly acceptable for a prosecutor to question a witness's possible bias to show his or her testimony may not be credible." The questions he identified from cross-examination did exactly that.

The prosecutor first challenged Horton's claim of innocence by pointing out that if he had sexually molested his step daughter, he would not likely admit to his guilt while testifying on his own behalf at trial. The prosecutor then asked Horton whether he would agree that his twelve-year-old stepdaughter was "easy prey" when her mother was "drunk or in detox." During cross-examination of Z.O.'s mother, the prosecutor challenged her credibility by asking her about a statement she made to Z.O.'s sister expressing hostility towards Z.O. The prosecutor also questioned Z.O.'s mother about whether she would favor Horton over Z.O.

These questions lie within the credibility-questioning realm that Horton concedes is "perfectly acceptable." While the question labeling Z.O. as "easy prey" used colorful and colloquial language, the inquiry aptly raised the vulnerability of a 12-year-old.

Moreover, the questions to Z.O.'s mother served legitimate purposes in probing the mother's credibility as a witness for Horton and in explaining why Z.O. had not reported the other episodes of abuse that she testified had occurred. Horton cites no authority to support his claim that the prosecutor's specific language or purpose was inappropriately inflammatory or that any error was plain.

Horton further contends that the prosecutor committed misconduct by introducing facts not in evidence during the prosecutor's cross-examination of Horton's sister-in-law. After the witness testified that she had been sexually abused as a child, the prosecutor commented, "So you would know firsthand there is a variety of reasons why a child may not tell. They may feel they won't be believed, it's their fault, the family may disintegrate, there's a variety of reasons why a child may not tell."

Even assuming that this insertion was inappropriate, no basis exists to reverse Horton's convictions because these two sentences did not have a significant effect on the verdict. The trial court instructed the jurors that statements of the attorneys were not evidence, and we may presume that the jury followed those instructions. *See State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). Accordingly, we conclude that the state has met its burden of proving that there is no reasonable likelihood that the absence of misconduct during cross-examination would have significantly affected the jury's verdict. *See Ramey*,721 N.W.2d at 302.

Horton lastly contends that the prosecutor committed misconduct during closing argument when he inflamed the jury's passions and prejudices by impugning Z.O.'s mother with these statements:

> And just a comment on [Z.O.'s mother], the Defendant's wife. I mean at a minimum her loyalties are conflicting. You've got her husband, you've got her daughter. Seems pretty clear she's hitched her wagon to Steven Horton and had little qualms about throwing her daughter under the bus.

Horton's contention is unavailing.

During closing argument, a prosecutor may properly present arguments about why particular witnesses should be perceived as credible or incredible as long as he does not "impl[y] a guarantee of a witness's truthfulness, refer[] to facts outside the record, or express[] a personal opinion as to a witness's credibility." *State v. Patterson*, 577 N.W.2d 494, 497 (Minn. 1998). Horton does not allege that the prosecutor's closing argument transgressed any of these boundaries. Rather, he objects to the colorful phrase that the prosecutor employed. The state's closing argument "need not be colorless, it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995).

Here, the reference to throwing Z.O. under the bus suggested to the jury that the mother was more loyal to Horton than to her daughter, encouraging jurors to question the mother's credibility. Moreover, when viewed as a whole, the prosecutor's closing argument properly focused on assessing the evidence and the inferences to be drawn from it. *See State v. Glaze*, 452 N.W.2d 655, 662 (Minn. 1990) (finding no prejudice to the appellant when remarks were isolated and did not represent the closing argument viewed

in its entirety). Finally, the jury's verdicts were unattributable to this single statement in the prosecutor's closing argument.

IV. Z.O.'s Prior Accusations

Horton next contends that the district court denied him his right to present a complete defense by excluding evidence that Z.O. had fabricated sexual-assault claims on at least three earlier occasions. He alleges that the district court applied an incorrect legal standard when excluding the evidence. The state responds that Horton cannot attack the district court's ruling because Horton's counsel invited any error by citing the wrong legal standard during the evidentiary hearing. Alternatively, the state argues that the evidence would have been excluded even if the district court had applied the standard that Horton now espouses. For the reasons that follow, we hold that the district court used the incorrect standard, but that the error was harmless.

In challenging a district court's evidentiary rulings, the challenging party has the burden of showing the error and any resulting prejudice. *See State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). "[W]e will not reverse . . . if the error is found to be harmless beyond a reasonable doubt." *State v. Kobow*, 466 N.W.2d 747, 750 (Minn. App. 1991), *review denied* (Apr. 18, 1991). "A ruling is prejudicial and therefore reversible if there is a reasonable possibility the error complained of may have contributed to the conviction." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989).

Although we agree with Horton that the district court applied the incorrect legal standard, we do not find any reversible error in the court's exclusion of Z.O.'s alleged prior accusations. Before trial, Horton moved the district court to admit evidence of

incidents where Z.O. allegedly fabricated reports of sexual abuse in 2004, 2007, and 2009.

Citing Minnesota's rape-shield statute, Horton's counsel urged the district court to use a preponderance-of-the-evidence standard to determine whether Z.O.'s prior reports had been fabricated. *See* Minn. Stat. § 609.347, subd. 3 (2010); Minn. R. Evid. 412. Applying this standard in its pretrial order, the district court cited *State v. Davis*, 546 N.W.2d 30 (Minn. App. 1996), *review denied* (Minn. May 21, 1996). *Davis* requires that a sexual-assault victim's prior consensual sexual conduct "must occur regularly and be similar in all material respects" to be admissible under the rape-shield statute. *Id.* at 34. *Davis* applies only to a sexual-assault victim's prior consensual sexual conduct. *Id.* at 33–34. But "the legislature has determined, as a matter of public policy, that consent is not available as a defense in cases involving children under the age of 16 who are abused by a person at least 48 months older." *Bjerke v. Johnson*, 727 N.W.2d 183, 194 (Minn. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007). Accordingly, the *Davis* standard is inapplicable to this case of child sexual abuse.

The correct standard to determine the admissibility of prior incidents of alleged fabrication is set out in *State v. Goldenstein*, 505 N.W.2d 332 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). *Goldenstein* requires that the district court "make a threshold determination . . . that a reasonable probability of falsity exists" in previous reports of sexual assault by the victim. *Id.* at 340. "Reasonable probability" has been generally defined as the same level of proof as probable cause. *State v. Harris*, 295 Minn. 38, 42, 202 N.W.2d 878, 881 (1972) (concluding that "reasonable probability" and

"probable cause" are the same in the context of stopping someone for driving while under the influence of alcohol). In addition, the district court must find that the probative value of the evidence is not outweighed by the danger of unfair prejudice. Minn. R. Evid. 403; *Kobow*, 466 N.W.2d at 750.

Regarding the 2004 incident, Horton alleged that Z.O. reported that she had been sexually abused by her grandfather. Z.O. later retracted the accusation. Police and doctors' reports from 2004, however, reported a finding of "probable child sexual abuse" based on Z.O.'s "detailed history [of the alleged sexual abuse] with sexual knowledge beyond her developmental level." Applying the *Goldenstein* probable-cause standard to Horton's offer of proof, we conclude that the district court did not err in excluding evidence about the 2004 allegation. Horton failed to establish a reasonable probability that the 2004 report of sexual abuse was false.

Regarding the 2007 incident, Horton claimed that Z.O. alleged that she had been raped by three boys after Z.O.'s mother had confronted her about her sexualized behavior toward other children. Z.O. immediately retracted the allegation when Z.O.'s mother said that she was going to call the police. No report was ever made to, nor investigated by, the police or child-abuse professionals. The district court noted that the 2007 incident "likely included fabrication," but it held that it was inadmissible because it was not similar to this case in which Z.O. was interviewed three times by the police and never recanted her allegations of sexual abuse by Horton.

The district court's exclusion of the 2007 incident, while incorrect under the applicable *Goldenstein* standard, was harmless beyond a reasonable doubt because the

excluded evidence had minimal probative value. The jury heard testimony from Z.O.'s mother and others that Z.O. said she lied about Horton's assault on her and that Z.O. reported having hallucinations. This testimony directly attacked Z.O.'s credibility and makes it unlikely beyond a reasonable doubt that the jury's conclusion would have been altered by further testimony from Z.O.'s mother about the alleged 2007 incident.

Concerning the 2009 incident, the record shows that the district court allowed the evidence to be used for impeachment purposes. Because evidence of this allegation was presented to the jury, Horton cannot show any prejudice from the district court's incorrect application of the *Davis* standard.

V. Jury Instructions

Horton states that the district court plainly erred "in failing to advise the jury that it could continue its deliberations on Monday morning" after the jury sent a note to the district court at 8:15 on a Friday night, asking, "What happens if we cannot agree on a verdict?" and "[D]o we have to stay here until we do or does this mean a mistrial?" The state responds, and we agree, that the district court instructed the jury appropriately.

We review for plain error where there was no objection to the jury instructions at issue. *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010). District courts have broad discretion in giving jury instructions, and those jury "instructions must be read as a whole to determine whether they accurately describe the law." *State v. Earl*, 702 N.W.2d 711, 720 (Minn. 2005). "If the instructions, when read as a whole, correctly state the law in language that can be understood by the jury, there is no reversible error." *State v. Laine*, 715 N.W.2d 425, 432 (Minn. 2006) (quotation omitted). A district court may not

"require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *State v. Kelley*, 517 N.W.2d 905, 909 (Minn. 1994) (quotation omitted).

After meeting with the prosecutor, Horton's attorney, and Horton in chambers, the district court answered the jury's two questions with a response almost identical to CRIMJIG 3.04.[1] *See* 10 *Minnesota Practice*, CRIMJIG 3.04 (2006). The district court stated:

> Now what I can tell you now is this, I'm going to reread a portion of the jury instructions that I gave you earlier and I will tell you that you should keep deliberating if there is a reasonable probability that you may reach a verdict. In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict; your verdict must be unanimous; you should discuss the case with one another; and deliberate with the view towards reaching agreement if you can do so without violating your individual judgment. You should decide the case for yourself but only after you have

[1] CRIMJIG 3.04 states in relevant part:

> In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.
>
> You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

10 *Minnesota Practice*, CRIMJIG 3.04 (2006).

> discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to re-examine your own views and change your opinion if you become convinced they are erroneous but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.
>
> In this case the Defendant has been charged with multiple offenses. You should consider each offense and the evidence pertaining to it separately. The fact that you may find the Defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.
>
> Now, I'm going to send you back into the jury room with those instructions and you can discuss them among yourselves. If you think that it requires any further communication to the Court, we will receive that but please keep in mind the instructions I have read and go back and continue at this point, all right? Thank you.

The jury resumed its deliberations at 8:18 p.m. and returned its verdicts at 10:38 p.m.

Horton argues that the district court "failed to give the jurors any sense of the limits of their duties," resulting in the jury feeling coerced to give a unanimous verdict that night. He further asserts that "the [jury's] deliberation, well into a Friday night, was unreasonable." Horton relies on *State v. Kelley* to support his contentions, but *Kelley* is distinguishable. *See* 517 N.W.2d at 905.

In *Kelley*, the jury sent a note to the district court after deliberating for six hours to say it was deadlocked; the jury also said in its note, "[W]e want to know how long we have to carry on . . . please advise." *Id.* at 907. The district court did not tell the attorneys about the note and responded, "Continue deliberations." *Id.* at 908. Five hours later, the jury sent another note to the district court stating it could not reach a verdict,

and the district court again did not notify the attorneys and told the jury to "keep working." *Id.* at 907–08. The jury then returned a guilty verdict two hours later. *Id.* at 908. The supreme court held that the district court's failure to notify the attorneys about the jury's notes, in addition to the repeated instructions to continue deliberations even though the jury had twice said that it was deadlocked, warranted a new trial. *Id.* at 909–10.

None of the relevant facts in *Kelley* are present here. The district court informed both attorneys and Horton about the note it received from the jury and listened to arguments about how it should respond. The district court informed counsel and Horton of the jury instructions it planned to use in its response, and they all agreed with the district court's proposed instructions. Because of these factual distinctions, Horton's reliance on *Kelley* is misplaced.

In addition, the district court did not coerce or threaten the jury by reading and appropriately paraphrasing CRIMJIG 3.04 after the jury had only deliberated for approximately six hours. *See State v. Jones*, 556 N.W.2d 903, 911 (Minn. 1996). Nor did the district court coerce the jury into returning a verdict that night. *See State v. Buggs*, 581 N.W.2d 329, 338 (Minn. 1998) (holding that the district court's communication to the jury was not coercive where the jury stated that it was at an impasse and the district court, after speaking with counsel, responded with a note that the jury should continue deliberating). The time when the jury asked its questions–8:15 p.m.—was not so late as to require the jury to discontinue deliberations for the evening,

and the jury's deliberations were "not excessive in light of the length and complexity of the trial." *See id.*

Affirmed.