**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1843**

State of Minnesota,
Respondent,

vs.

Terrance Alfonso Dudley,
Appellant.

**Filed January 20, 2009**
**Affirmed**
**Halbrooks, Judge**

Ramsey County District Court
File No. K1-06-4894

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

**HALBROOKS,** Judge

Appellant challenges his convictions of first- and third-degree attempted criminal sexual conduct on the grounds that the district court erred by not granting him substitute counsel and by not redacting portions of his statement to police before presenting it to the jury and because the state committed prosecutorial misconduct. We affirm.

## FACTS

On December 5, 2006, 14-year-old S.T. was babysitting her niece and nephew in her sister's apartment. The accounts of S.T. and appellant Terrance Alfonso Dudley as to what occurred that day differed greatly. S.T. testified that appellant came to the apartment and asked her for some water. Because she had seen appellant once before and his sister lived in the building, S.T. allowed appellant to come in. Appellant and S.T. talked for a while, and appellant asked S.T. some questions with sexual overtones, including if she was a virgin and if she thought her body was nice. While sitting beside her on the couch, appellant rubbed S.T.'s leg and tried to kiss her. When S.T. told appellant to leave, appellant threw a blanket over her head. When S.T. removed it, appellant put his hand over her mouth and nose and pushed her face down on the couch. S.T. stated that she was afraid for her life and thought that she was going to die. Appellant then pulled S.T. by her hair into a bedroom and threw her on the bed. S.T. screamed to her four-year-old niece, asking her to call the police. In response, appellant got off S.T. and told the niece not to call the police.

S.T. and appellant then went into the kitchen; S.T. testified that she thought appellant would try to rape her. Appellant hugged and kissed her and "ask[ed] [her] to suck his stuff" while pulling S.T.'s head toward his waist. Approximately 20 minutes later, S.T.'s sister arrived home. When S.T. could get her sister alone, she told her what happened, and S.T.'s sister called the police. S.T. provided the police with a detailed description of what had occurred. S.T. had tears in her eyes as she spoke and visible scratches. One of the officers testified that S.T. appeared "very frightened" and was "shaking uncontrollably."

Appellant was arrested and interviewed the following day by Officer Lu. Appellant initially told Officer Lu that he had been drinking in S.T.'s sister's apartment on December 4, but had not been in the building on December 5. When asked about the scratches on his neck, appellant stated that he had gotten them in a fight in S.T.'s sister's apartment. When he was interviewed again on December 7, appellant admitted that he had been in S.T.'s sister's apartment on December 5, but he denied trying to sexually assault S.T. Instead, appellant claimed that S.T. made advances toward him.

Appellant was charged with third-degree attempted criminal sexual conduct in violation of Minn. Stat. §§ 609.17, subd. 1, .344, subd. 1(b) (2006). He appeared for a hearing on January 12, 2007, and public defenders were appointed and conditions of release were argued. At a January 26, 2007 hearing, the district court found probable cause, and appellant filed a speedy-trial demand. At the pretrial hearing on March 6, 2007, appellant rejected the state's plea offer, and the parties discussed discovery and the potential for an amended complaint. On March 27, 2007, the state filed an amended

complaint, adding a charge of first-degree attempted criminal sexual conduct in violation of Minn. Stat. §§ 609.17, subd. 1, .342, subd. 1(e)(i) (2006).

On the third day of voir dire, appellant advised the district court that he did not want either of his public defenders representing him because they lied to and misled him, did not represent his best interests, did not ask his opinion on trial strategy, did not help him with problems he was having with other inmates and guards at the jail, pressured him to plead guilty, and did not strike a juror upon his request. The district court responded by stating multiple times that appellant's attorneys were doing an adequate job. In addition, the district court stated that it could not appoint another public defender and that it would not grant a continuance due to the late timing of the request. Eventually, appellant stated that he wanted to keep his attorneys. The district court permitted appellant to strike the juror he had previously wanted to strike.

The jury convicted appellant of first- and third-degree attempted criminal sexual conduct. This appeal follows.

## D E C I S I O N

### I.

Appellant argues that the district court abused its discretion by denying his request for substitute counsel. The decision whether to grant a defendant substitute counsel is reviewed for abuse of discretion. *State v. Clark*, 722 N.W.2d 460, 464 (Minn. 2006). When the district court abuses its discretion by denying a request for substitute counsel, we look to see if the defendant has established prejudice. *State v. Fields*, 311 N.W.2d 486, 487 (Minn. 1981).

A defendant has the right to select counsel of his or her choice. *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). But "an indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *Id.* "[O]nly if exceptional circumstances exist and the demand is timely and reasonably made," will a district court grant an indigent defendant's request for substitute counsel. *Id.* (quoting *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977)). "[E]xceptional circumstances are those that affect a court-appointed attorney's ability or competence to represent the client." *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001).

The supreme court has addressed in several cases the issue of whether or not a district court's denial of a defendant's request for substitute counsel constitutes an abuse of discretion. In *Worthy*, the defendants informed the district court of their dissatisfaction with appointed counsel on the first day of trial. 583 N.W.2d at 274. The supreme court held that the request was not timely, given that the defendants had earlier made requests for a consolidated trial against counsel's advice and made speedy-trial demands. *Id.* at 278–79.

Analyzing the exceptional-circumstances prong of the test, the supreme court noted that the defendants

> told the trial court they wanted new counsel because they felt they were not being properly represented. According to McKinnis, his attorney told him that he was not going to win the case. McKinnis's attorney explained that he and Worthy's attorney told McKinnis and Worthy that the evidence against them was quite strong and that their chances for success at trial were not good, but also told them that they were "ready, able, and willing to try their cases."

*Id.* at 279. The supreme court stated that "[g]eneral dissatisfaction or disagreement with appointed counsel's assessment of the case does not constitute the exceptional circumstances needed to obtain a substitute attorney." *Id.* Therefore, the supreme court held that the district court did not abuse its discretion by denying the defendants' request for substitute counsel. *Id.*

In *Clark*, the defendant sought substitute counsel during jury selection on the second day of what was expected to be a two- or three-day trial. 722 N.W.2d at 464. The supreme court held that the district court did not abuse its discretion by denying defendant's request because the request, made after jury selection had begun, was not timely and because exceptional circumstances did not exist when the district court was satisfied that defendant's counsel had conducted a proper investigation, had obtained favorable pretrial rulings on evidentiary matters, and was thoroughly prepared for trial. *Id.* at 464–65.

In *Gillam*, the defendant advised the district court both before and during trial that he disagreed with his court-appointed attorney's trial strategies and "was generally dissatisfied." 629 N.W.2d at 446–50. The district court denied Gillam's request for substitute counsel. *Id.* at 450. The supreme court held that, although in certain circumstances an indigent defendant's dissatisfaction with counsel could affect the counsel's ability or competence to represent him, there was no evidence suggesting such were present:

> The district court took testimony regarding Gillam's request, weighed the evidence, considered whether the situation affected the attorney's ability or competence to represent

> Gillam, and determined that Gillam's dissatisfaction did not constitute an exceptional circumstance warranting a substitute attorney. The court noted that Gillam's attorney had been representing him competently and adequately up until then, and the court could find no reason that would indicate the quality of representation would lessen.

*Id.*

Here, appellant requested substitute counsel on the third day of jury selection. Appellant asserts that his request was timely because he did not have a chance to make the request earlier. Appellant's claimed reasons for substitute counsel all relate to pretrial matters, with the exception of a decision to strike one juror during voir dire. Other than that trial-related disagreement, appellant could have requested substitute counsel before the start of trial. There were three hearings before trial commenced. As for the strategic decision whether to strike a juror, the juror was eventually struck from the jury panel, which prevented any prejudice to appellant. As in *Clark* and *Worthy*, we conclude that appellant's request was not timely. *Clark*, 722 N.W.2d at 465; *Worthy*, 583 N.W.2d at 279.

Nor did appellant establish exceptional circumstances. Appellant alleged that his attorneys lied to him, did not represent his interests, did not help him with problems that he was experiencing at the jail, pressured him to plead guilty, and did not ask his opinion on trial strategy or whether to use a peremptory strike. He argues that these reasons evince a fundamental breakdown of the attorney-client relationship.

But the record shows that appellant's counsel prevailed on several pretrial evidentiary issues, challenged (albeit unsuccessfully) the admissibility of portions of

appellant's custodial statements, and secured the state's agreement to a sentence at the low end of the presumptive range. It was not until appellant's counsel disagreed with him concerning a specific potential juror that appellant voiced dissatisfaction with his attorneys. In response to appellant's request, the district court indicated that appellant had received adequate representation: "I haven't seen anything to indicate that [appellant had not been properly represented.] I have been here with you for a week, and they have done a perfectly fine job representing you." The district court also stated, "I have seen nothing to indicate that you have not been given anything but the finest legal representation."

Appellant also asserts that the district court erred by stating that it was not possible to appoint a substitute public defender and by not conducting a "searching inquiry" into his request. But the district court's statement regarding its ability to appoint substitute counsel must be placed in context. It was made in response to appellant's request, which occurred after trial was underway. Because the request was untimely, the district court's statement that it was not then possible to appoint substitute counsel was not erroneous. A "searching inquiry" is required when there are "serious allegations of inadequate representation before trial has commenced." *Clark*, 722 N.W.2d at 464. Here, no serious allegations of inadequate representation had been asserted. On this record, we conclude that the district court did not abuse its discretion by denying appellant's request for substitute counsel.

**II.**

Appellant argues that the district court erred by not redacting portions of his December 7, 2006 police interrogation relating to officers' references to statements made by appellant's sister, suggestions that appellant was not telling the whole truth, and statements concerning DNA evidence. "An evidentiary ruling by a [district] court will not be reversed absent an abuse of discretion, and a defendant who asserts that a trial court erroneously admitted evidence has the burden of showing the error and any resulting prejudice." *State v. Lindsey*, 632 N.W.2d 652, 662–63 (Minn. 2001).

"[I]mmaterial and irrelevant portions of an extrajudicial interrogation of a defendant should generally not be received in evidence." *State v. Hjerstrom*, 287 N.W.2d 625, 627 (Minn. 1979). In *State v. Haglund*, the supreme court concluded that evidence in a note written by the defendant that indicated that he had a prior conviction was inadmissible. 267 N.W.2d 503, 505–06 (Minn. 1978). But in *Lindsey*, the supreme court held that statements made by police to the defendant, accusing him of lying, questioning him about his gang involvement, and telling him, "[Y]ou been had," "I've got you made on this," "[Y]ou're gonna go," and "I just have to get you charged this morning" were admissible and relevant because they were related to the charged crime and gave context to the defendant's statements. 632 N.W.2d at 663. In addition, the supreme court concluded that the statements were not unfairly prejudicial, given that the defendant's attorney had "ample opportunity" to cross-examine the officer. *Id.*

An officer's reference to a third person's statements during an out-of-court interview with a defendant is not hearsay when it is offered "to give context to [the

defendant]'s responses and admissions on the tape." *State v. Tovar*, 605 N.W.2d 717, 726 (Minn. 2000). But in *Bernhardt v. State*, the supreme court held that an officer's false assertions in an interview, which had been admitted into evidence, were hearsay. 684 N.W.2d 465, 474–76 (Minn. 2004). The supreme court in *Bernhardt* distinguished *Tovar*, and held that the statements were inadmissible hearsay because the officer was never cross-examined regarding the accuracy of the assertions and a limiting instruction was never given, which put the "statements . . . before the jury as statements supporting the truth of such implications." *Id.* at 475–76.

**A. The first portion**

In the first portion of the interrogation challenged by appellant, Officer Anthony Gabriel referred to statements by appellant's sister that she believed S.T.'s allegations:

| | |
|---|---|
| Appellant: | You know what I'm saying. And ah, I really couldn't, I really couldn't say nothing when told like that. I don't know. But then I even, I even explained to my sister. Like the night before, she all cussed out [inaudible]. |
| Officer: | Yeah, so—okay. So now [appellant's sister is] lying, so that's three girls lying here. |
| Appellant: | [My sister] lies. |
| Officer: | Yep. |
| Appellant: | How's my sister lying? |
| Officer: | She believes that ah, this happened. She went down and talked to the girl before we did. |
| Appellant: | And she believed that it happened? |
| Officer: | Yep. |

This exchange followed appellant's own statement to Officer Gabriel that S.T.'s sister had accused him of raping S.T.

Appellant argues that these statements were irrelevant and inadmissible hearsay. We disagree. As in *Tovar*, these references are not hearsay; they are not offered for the truth of the matter asserted, i.e., that appellant's sister is correct in her belief. *See* 605 N.W.2d at 726. In addition, the concerns from *Bernhardt* do not exist here because appellant does not contend that these statements are false and appellant had an opportunity to cross-examine Officer Gabriel, the interrogator. *See* 684 N.W.2d at 475–76. Finally, appellant himself brought up S.T.'s sister's allegation that appellant committed the rape, thereby raising the issue of what others believed about the allegation.

Appellant also argues that the statements are not admissible because vouching testimony is not admissible. Typically, vouching testimony is not admissible because it is the province of the jury to determine credibility. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). But the statement was not offered for its truth; it was used to provide context to appellant's statements. Therefore, the officer's statements were admissible, and the district court did not abuse its discretion.

**B. The second portion**

The second interrogation portion challenged by appellant is Office Michael Dugas's statements "I've heard like four different stories come out of you as to what happened"; "I'm not believing you're telling me the whole truth. . . . I think that you're not telling me the whole truth. . . . I don't think you're being completely honest with me"; and "Because right now, I'm not believing it." Appellant argues that these statements are irrelevant and characterizes these statements as vouching testimony, relying on *State v. Ellert*, 301 N.W.2d 320, 323 (Minn. 1981).

But *Ellert* is distinguishable because in that case the officer testified at trial that the defendant was lying. 301 N.W.2d at 323. Here, as with the references to appellant's sister, the officer's statements were made in the course of an interrogation and were offered to give context to statements made by appellant in response to the officer's comments or questions. Specifically, the officer comments on appellant's "[f]our different stories" concerning what occurred with S.T. and appellant and later repeated some of his earlier statements after hearing the officer's concerns that he was not telling the truth. Without the officer's statements, appellant's testimony would be confusing. And it would be difficult for any officer to conduct an interrogation without questioning some of the statements made in the interview. And without knowing the intensity of that questioning, it would be difficult for a jury to decide how much weight to give to a defendant's responses. We therefore conclude that the district court did not abuse its discretion by admitting this evidence.

**C. The third portion**

The last challenged portion of the interrogation relates to the officers' discussion of DNA evidence and the suggestion that it could prove appellant's innocence:

> Officer #1: We've offered you a DNA sample and you said you wouldn't and now you said that you would give us a DNA sample.
> Appellant: Ah, I figure you all go and get your all warrant and come back.
> Officer #1: Okay. So now, we, you're not saying that we can't, then we got to go a warrant—right?
> Appellant: Huh?
> Officer #1: You're, you're saying that we can't right now—we have to go get a warrant—right?
> Appellant: Ah, I don't see the, the reason, reason for that. I ain't . . .

Officer #1: I already told you the reason. Well, then this will prove that you're innocent.

Officer #2: If you didn't do nothing, none of your DNA will be in her bedroom or under her fingernails—right?

Appellant: If I do nothing.

Officer #2: Basically. If the story you're telling us is truthful, then there's not going to be any DNA under her fingernails. And there's not going to be any in her bedroom. Since you've never been in there, you've only been in her sister's bedroom, and she didn't scratch you. You've told me that story five times now. Right? So this will prove your innocent [sic] or prove you're lying. If it proves you're lying, you're going. All right.

Minn. R. Evid. 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In *State v. Kromah*, the supreme court stated that "courts need to be fully cognizant of the potentially prejudicial nature of the statistical probability evidence and ensure that DNA identification evidence is not presented in a misleading or unfairly prejudicial way." 657 N.W.2d 564, 567 (Minn. 2003). In addition, in *State v. Bailey*, the supreme court cautioned that the state should "avoid any attempt to equate DNA probability statistics with proof beyond a reasonable doubt." 677 N.W.2d 380, 403 (Minn. 2004).

The statements here are not prejudicial and are relevant. First, appellant cites no caselaw discussing the prejudicial nature of statements about DNA evidence when presented through an earlier interview of the defendant. Appellant cites only cases where individuals testified about DNA evidence. Second, the statements in this interview were offered to establish context, not for their truth. Further, the statements pose little risk of prejudice because there was earlier testimony regarding DNA evidence that appellant has not challenged. The results of the DNA tests, although some were inconclusive,

overshadowed these references to whether the DNA testing would be voluntary or not. Therefore, the district court did not abuse its discretion by admitting the evidence.

**III.**

Appellant argues that he is entitled to a new trial because the state committed prosecutorial misconduct at three points during his trial. We disagree.

Appellant did not object to any of the prosecutor's statements made during the opening statement or closing argument. Accordingly, a new trial is warranted only if there was error, the error was plain, and the error affected appellant's substantial rights. *See State v. Ramey*, 721 N.W.2d 294, 298, 302 (Minn. 2006). "If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Id.* at 302. Error is plain when it is "clear or obvious," which is shown if the error "contravenes case law, a rule, or a standard of conduct." *Id.* (quotation omitted). The burden to establish plain error is on appellant. *See id.* But once appellant meets his burden, the burden shifts to the state to establish that the error did not affect appellant's substantial rights. *See id.* at 302–03.

Appellant claims that the prosecutor made comments during the opening statement and closing argument that inflamed the passions and prejudices of the jury by "emphasizing a theme of fear." The prosecutor began his opening statement:

> This case that you are about to hear is about one of a woman's most terrifying fears. It's about the issue of rape. What is a little different about this case, as you'll hear, is that this isn't about a woman. It's about a 14-year-old girl.
>
> And what you'll hear from the evidence is that on December 5th of 2006 14-year-old [S.T.] had to be older than

> 14. She had to be stronger and she had to be braver than 14. She went through a terrifying experience and she had to react somehow, and it's likely her reactions is what has caused this case to be brought before you as an attempted criminal sexual conduct.

During closing argument, the prosecutor stated:

> "I thought I was going to die." [S.T.] told that to Officer Lu when he came to the scene. She talked about the defendant's hands being over her mouth and her nose and she said, " I thought I was going to die."
>
> This is one of a woman's worst fears realized, a man is trying to rape her, a man physically trying to take her. And this isn't a woman. This is a 14-year-old child. This is a young girl and she was scared. Scared probably isn't even enough of a word to use. She was terrified.

A "prosecutor must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). Inflaming the jury's passions and prejudices is a larger concern when credibility is a central issue. *Id.* "'Prosecutors in sexual abuse cases must abide by the highest behavior,'" and "[b]ecause sexual-abuse cases generally evoke emotional reactions, an attempt by the prosecutor to exacerbate such reactions by making 'any emotive appeal' to the jury 'is likely to be highly prejudicial.'" *State v. Rucker*, 752 N.W.2d 538, 551 (Minn. App. 2008) (quoting *State v. Danielson*, 377 N.W.2d 59, 61 (Minn. App. 1985)), *review denied* (Minn. Sept. 23, 2008). But "[p]rosecutors are permitted to make reasonable inferences from evidence on the record, to analyze or explain the evidence, and to make legitimate arguments to the jury based on the evidence." *Id.* at 552.

Here, the prosecutor's references to S.T.'s fear of appellant were well-supported by the record. S.T. testified that she "felt like [she] was going to die" and that she was scared. One of the officers testified that S.T. was "very frightened" and "shaking uncontrollably" when she was interviewed about this incident. It was also obvious to the jury that S.T. was afraid of appellant because she was extremely reluctant to enter the courtroom to testify. S.T. was the state's first witness, and the prosecutor had to leave the courtroom three times in order to talk to S.T., who did not want to be in the courtroom with appellant. S.T. ultimately agreed to take the stand when the jury and appellant were temporarily out of the courtroom. After the jury and appellant returned, S.T. testified with four sheriff's deputies present. Finally, we note that the prosecutor's comments about S.T.'s fear constituted a very small portion of his opening statement and closing argument.

Appellant also argues that the prosecutor committed misconduct by asking "were they lying" questions in his closing argument when he stated, "[Y]ou need to decide who's credible here. Is it [S.T.] with the words she used—you're judging her credibility, with her demeanor, with the corroboration for her statements—or is it the defendant."

Typically, posing "were they lying" questions to one witness about other witnesses' testimony is inappropriate. *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999). But asking the jury during closing argument to weigh the credibility of two witnesses is not the same as asking "were they lying" questions to a witness at trial, and is not improper. *State v. Caine*, 746 N.W.2d 339, 359–60 (Minn. 2008).

Finally, appellant argues that the prosecutor's comments about the presumption of innocence were improper. The prosecutor argued, "Ladies and Gentlemen, the defendant is presumed innocent until the State proves through evidence beyond a reasonable doubt that he's not. I have done that. The presumption only lasts until you receive the evidence and it's shown to you to prove otherwise."

In *State v. Young*, the supreme court concluded that the following language did not misstate the law:

> When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the—instructions on. He's no long [sic] an innocent man. The evidence that's been presented to you by the state has shown you that he's guilty beyond a reasonable doubt. Let me tell you why[.]

710 N.W.2d 272, 280-81 (Minn. 2006) (alterations in original); *see also* 10 *Minnesota Practice*, CRIMJIG 3.02 (2006) ("The defendant is presumed innocent of the charge made. This presumption remains with the defendant unless and until the defendant has been proven guilty beyond a reasonable doubt."). The supreme court stated that "when explaining the presumption of innocence, counsel would be wise to adopt some definition which has already received the general approval of the authorities, especially those in our own state." *Young*, 710 N.W.2d at 281 (quotation omitted). Here, the prosecutor's statements regarding the burden of proof were almost identical to the language approved by the supreme court in *Young*. Because the prosecutor was merely explaining that the

state had met its burden, we conclude that the argument was not improper and did not constitute misconduct.

**Affirmed.**