STATE OF MINNESOTA
IN COURT OF APPEALS
A11-982

State of Minnesota,
Respondent,

vs.

William Arthur Bickel,
Appellant.

Filed June 11, 2012
Affirmed
Cleary, Judge

Ramsey County District Court
File No. 62-CR-10-4064

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, 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

CLEARY, Judge

Appellant William Bickel challenges his convictions under Minn. Stat. § 609.342, subd. 1(a) (2008), and Minn. Stat. § 609.343, subds. 1(a), 1(h)(iii) (2008). Appellant argues that the district court committed plain error when it failed to issue a specific unanimity instruction to the jury, and that the district court abused its discretion when it allowed relationship evidence involving appellant's two-year-old step-granddaughter to be presented at trial. Because we hold that the district court did not err by not issuing a specific unanimity instruction and did not abuse its discretion by allowing the relationship evidence, we affirm.

FACTS

At all times relevant to this case, seven-year-old Y.R. lived with her parents and two brothers in the bottom half of a duplex that they shared with appellant, his wife, and their son. Appellant's wife, Victoria Rodriguez-Bickel, is Y.R.'s maternal grandmother and appellant is Y.R.'s step-grandfather. From November 2008 until March 2010, one of Rodriguez-Bickel's adult daughters, Francesca Gonzales, and her three children also lived in the upstairs apartment of the duplex with Rodriguez-Bickel, appellant, and their son.

Y.R. and appellant's son are roughly the same age and were in the same grade during the 2009–2010 school year. Y.R., her brothers, and appellant's son all went to the same school and rode the bus together. From November 2009 until May 2010, on days when Y.R.'s parents could not get home from work in time to meet the bus, appellant

would pick up all four children from the bus stop after school. Appellant would take the children back to his apartment in the duplex where they would do their homework. Appellant would watch Y.R. and her brothers at least once or twice a week. The bus usually dropped the children off between 4:04 p.m. and 4:10 p.m., and Y.R.'s mother or father would arrive to pick their children up within 15–30 minutes.

Appellant also watched one of his other step-granddaughters, A.G., five days a week. A.G. would get off the bus at 2:30 p.m. and stay with appellant until her mother picked her up around 4:00 p.m. By the time Y.R.'s parents came home, A.G. was not usually at appellant's apartment, and most of the time Gonzales and her children were not there either. Although appellant usually watched the children by himself, sometimes Rodriguez-Bickel would accompany him to the bus stop and help watch the children at the duplex.

On May 22, 2010, following a birthday party at a neighboring house for Rodriguez-Bickel's mother, Y.R. returned to the duplex with her father and younger brother to get ready for bed. When they arrived at the duplex, appellant was also there, sitting beside a bonfire in the backyard. Y.R.'s father instructed Y.R. and her brother to put on their pajamas, but while Y.R.'s father was using the restroom, Y.R. went upstairs to appellant's apartment to try on a pair of shorts. When Y.R.'s father went upstairs to look for Y.R., he found her in the bathroom with appellant, and Y.R. was buttoning her shorts as appellant exited the bathroom. Y.R. told her father that she had told appellant to leave the bathroom but that he would not leave. Appellant told Y.R.'s father that he was helping her try on the shorts to see if they fit. Y.R. later told her father that appellant

sometimes touched her after school. Y.R.'s mother arrived at the duplex, heard Y.R.'s allegations, and called 911.

Before the police arrived at the house, Y.R. told her mother that the touching had started when there was snow on the ground. Once the police arrived, they questioned Y.R. about the incident that evening and about the other times that inappropriate touching had occurred. Y.R. went into more detail, telling the police that appellant liked to wrestle and that when they were wrestling, appellant would touch her vagina and buttocks.

Y.R. was taken to the hospital to be examined and interviewed again. Three days later, Y.R. visited the Midwest Children's Resource Center (MCRC) for another interview and examination. The MCRC interview was recorded and played for the jury during the trial.

Appellant was charged with two counts of criminal sexual conduct in the first degree under Minn. Stat. § 609.342, subd. 1(a), and two counts of criminal sexual conduct in the second degree under Minn. Stat. § 609.343, subds. 1(a), 1(h)(iii), for conduct that took place from January 1, 2010, until May 23, 2010, culminating in the incident on May 22, 2010.

At trial, Y.R. testified about the incident on May 22, 2010, as well as other incidents when appellant had touched her. She testified that on May 22, 2010, appellant told her he wanted to touch her breasts and went into the bathroom with her. She stated that he did not touch her when they were in the bathroom together that night. Y.R. testified that, on multiple occasions, appellant had touched her breasts, vagina, and buttocks both over her clothes and under her clothes, and on one occasion had put his

penis in her vagina and touched it to her buttocks. She stated that appellant would do this after school in his bedroom, and that her brothers and uncle were in the living room when it occurred.

Appellant did not testify at trial, but the state introduced a recorded custodial interview between appellant and a Saint Paul police sergeant from May 23, 2010. During the interview, appellant initially denied touching Y.R., but eventually admitted, "I might've pinched 'er or slapped her or whatever in the butt." He also said, "Well I might've – I twisted her boobie, you know, boobie twister or whatever." Finally, appellant admitted, "I guess I can honestly say I fondled her." Appellant stated that the fondling happened less than five times.

Rodriguez-Bickel's adult daughter Gonzales also testified at the trial. Over appellant's motion to exclude the evidence, Gonzales testified about two incidents that she witnessed between appellant and her two-year-old daughter L.G. Gonzales testified that, in January 2010, she was walking past appellant's bedroom and saw appellant unzip his pants in front of L.G. Gonzales testified that appellant said to her daughter, "Here, [L.G.], look, look what I have." At this point, appellant's penis was not exposed. Gonzales testified that, on another occasion, she again witnessed appellant in his bedroom with L.G., his penis was fully exposed to L.G., and he said to her, "Look what I have." Gonzales testified that she picked up L.G. and appellant covered himself. Gonzales did not tell Rodriguez-Bickel about the incidents right away, but when she did, Rodriguez-Bickel kicked her out of the apartment. After Gonzales testified, the district court issued the following cautionary instruction to the jury:

> The evidence which was being offered to you through Francesca Gonzales was offered for the limited purpose of assisting you in determining whether the defendant committed those acts with which he is charged in this complaint. This evidence is not used to prove the character of the defendant or that the defendant acted in conformity with that character.
>
> The defendant is not being tried for and may not be convicted of any offenses other than the charged offenses. You are not to convict the defendant on the basis of any occurrence with [L.G.] . . . because to do so might result in unjust double punishment.

In its final instructions to the jury, the district court repeated this cautionary instruction about Gonzales's testimony. The court also issued an instruction that, "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." The jury found appellant guilty of one count of criminal sexual conduct in the first degree, specifically, sexual penetration of an underage complainant, and two counts of criminal sexual conduct in the second degree. The jury found appellant not guilty of one count of criminal sexual conduct in the first degree, specifically, sexual contact with an underage complainant.

D E C I S I O N

I.

Appellant argues that the district court committed plain error by not providing a specific jury instruction to the jurors stating that, in order to convict appellant, they had to unanimously agree on which specific acts of penetration and sexual contact he committed. "A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to

appeal." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). "Nevertheless, a failure to object will not cause an appeal to fail if the instructions contain plain error affecting substantial rights . . . ." *Id.* "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "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) (quoting *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997)).

"The jury's verdict must be unanimous in all cases." Minn. R. Crim. P. 26.01, subd. 1(5). "But 'unanimity is not required with respect to the alternative means or ways in which the crime can be committed.'" *State v. Stempf*, 627 N.W.2d 352, 354–55 (Minn. App. 2001) (quoting *State v. Begbie*, 415 N.W.2d 103, 106 (Minn. App. 1987), *review denied* (Minn. Jan. 20, 1988)). "Generally, specific dates need not be proved in cases charging criminal sexual conduct over an extended period of time." *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008). *See also State v. Poole*, 489 N.W.2d 537, 544 (Minn. App. 1992) *aff'd*, 499 N.W.2d 31 (Minn. 1993).

We first address whether the district court erred by not including a unanimity instruction about the specific acts of penetration and sexual conduct appellant committed. The district court instructed the jury that, "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." Although appellant did not object to this general unanimity instruction at trial, appellant now argues that the jury should have been instructed that it had to agree as to which specific acts of penetration and sexual contact he committed.

Appellant relies on *Stempf*, in which a defendant was convicted of a controlled-substance crime for possession of a substance containing methamphetamine. 627 N.W.2d at 354. The state had charged the defendant with only one count of possession, but presented evidence that he possessed the substance both in a vehicle and at his workplace. *Id.* The defendant asked for a jury instruction that explained to the jurors that they had to unanimously agree as to which act of possession the state had proved beyond a reasonable doubt. *Id.* The trial court refused to give such an instruction. In its closing argument, the state told the jury that it could convict the defendant even if some jurors thought that he had possessed the substance in the vehicle and others thought that he had possessed it at his workplace. *Id.* This court vacated the defendant's conviction, holding that "[b]ecause some jurors could have believed [the defendant] possessed the methamphetamine found on the premises while other jurors could have believed [the defendant] possessed the methamphetamine found in the truck, it is possible that the jury's verdict of guilty was not unanimous." *Id.* at 359.[1]

[1] Appellant also relies on *State v. Infante*, in which a defendant argued that he had a right to a unanimity instruction telling the jurors they must agree on which of two physical acts constituted assault. 796 N.W.2d 349, 352 (Minn. App. 2011). This court distinguished the facts in *Stempf*, where the incidents of possession were separate and distinct acts rather than one continuous episode. *Id.* at 357. Conversely, the two physical acts in *Infante* were considered "part of a single behavioral incident." *Id.* Appellant argues that the court should similarly distinguish the facts here from the "single behavioral incident" in *Infante* because appellant is accused of multiple acts against Y.R. As explained above,

In another case involving multiple acts, a defendant was convicted of two counts of criminal sexual conduct in the first degree and two counts of criminal sexual conduct in the second degree for his contact with two junior-high students over the course of two years. *Rucker*, 752 N.W.2d at 542–43. On appeal, the defendant relied on *Stempf* and argued that he had a right to a unanimity instruction telling the jurors that they had to agree as to which specific acts he had committed. However, this court distinguished *Stempf* and stated:

> Unlike *Stempf*, the prosecution here did not emphasize certain incidents, distinguish as to the proof of some incidents compared to others, or encourage the jury to find certain incidents were more likely to have occurred than other incidents, and [the defendant] did not present separate defenses for each incident of alleged sexual abuse; rather, he simply maintained throughout his trial that he never had sexual contact with either child-victim. The victims referred to a few specific dates in their testimony on which incidents of abuse occurred, but with respect to their testimony and the state's case as a whole, these recollections served as examples of [the defendant's] conduct and not distinct allegations of sexual abuse.

Id. at 548. Based on this analysis and the particular facts of the case, this court also stated, "we conclude that the district court did not err in not instructing the jury that it must unanimously agree on which specific incidents formed the basis of [the defendant's] convictions." *Id.*

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criminal sexual conduct is generally charged as a course of conduct occurring over a period of time rather than distinct acts. Here, the state charged appellant with a course of conduct that took place from January 1, 2010, until May 23, 2010, and distinguishing *Infante* is not persuasive.

Appellant argues that the circumstances in this case are similar to the situation in *Stempf*, claiming that the charges against him included distinct acts rather than one continuing offense and that jurors could have relied on different acts to find appellant guilty. However, as noted by the court in *Rucker*, specific dates need not be proved in cases charging criminal sexual conduct over a period of time. Appellant here is charged with a course of conduct from January 1, 2010, until May 23, 2010. Similar to the prosecution in *Rucker*, the state here did not highlight certain incidents as more likely to have occurred than other incidents or distinguish as to the proof of some incidents.

The state here focused on one specific date, May 22, 2010, simply because that was the date Y.R. revealed the abuse. Appellant's actions on this specific date served as an example of appellant's course of conduct and were not a distinct allegation. The testimony of Y.R. related mostly to appellant's behavior when Y.R. was at his apartment after school. Y.R. testified that when she came home from school, appellant would wrestle with her and touch her breasts, vagina, and buttocks. She also testified that appellant digitally penetrated her vagina, and penetrated her vagina and touched his buttocks with his penis. She admitted at trial that no touching occurred in the bathroom on May 22, 2010, and there was no distinct allegation that sexual abuse occurred on that specific date.

The district court did not err by not including a specific unanimity instruction for the jury. Because we hold that there was no error, our plain error analysis need not go past first step.

II.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted). "When balancing the probative value against the potential prejudice, unfair prejudice 'is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage.'" *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quoting *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005)). The erroneous admission of evidence is prejudicial if "there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). Appellate courts "presume that juries follow the instructions they are given." *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, ___, 2012 WL 1020175 (Minn. 2012).

"Evidence of similar conduct by the accused against the victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice . . . ." Minn. Stat. § 634.20 (2008). "Domestic abuse" includes criminal sexual conduct within the meaning of Minn. Stat. §§ 609.342 and 609.343. Minn. Stat. § 518B.01, subd. 2(a)(3) (2008). "[T]he rationale for admitting relationship evidence under section 634.20 is to illuminate the relationship between the defendant and the alleged victim and to put the alleged crime in the context of that relationship." *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App.

2010) (citing *State v. McCoy*, 682 N.W.2d 153, 159 (Minn. 2004)), *review denied* (Minn. Nov. 16, 2010). "[E]vidence showing how a defendant treats his family or household members . . . sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Valentine*, 787 N.W.2d at 637.

Appellant argues that the district court abused its discretion when it allowed relationship evidence involving appellant's two-year-old step-granddaughter to be presented at trial. Gonzales's testimony was offered pursuant to Minn. Stat. § 634.20. Her testimony was immediately followed by a cautionary instruction by the district court, which stated that the evidence was not being offered as character evidence and that the jury should not convict appellant on the basis of any occurrence with L.G. Gonzales's testimony was not heard in isolation. Earlier during the trial, Y.R. testified extensively about appellant's behavior and actions toward her. The jury heard about Y.R.'s interview with the police and her hospital interview. The jury watched the interview with Y.R. held at MCRC and heard appellant's interview in which he admitted to fondling Y.R. Finally, the court also repeated its cautionary instruction at the close of trial that the jury was not to use Gonzales's testimony as proof of appellant's character or convict him based on the alleged incidents involving L.G.[2] Because there was a multitude of other evidence presented, Gonzales's testimony was not extensive, and two cautionary instructions were given to the jury, it is unlikely that the testimony significantly affected the verdict. Based

[2] This court has previously stated that any prejudicial effect of admitting evidence of similar prior conduct can be mitigated by a cautionary instruction to the jury. *State v. Waino*, 611 N.W.2d 575, 579 (Minn. App. 2000).

on the foregoing, the district court did not abuse its discretion in admitting the evidence under Minn. Stat. § 634.20.

III.

Appellant's pro se brief challenged the evidence presented by witnesses at trial, arguing that the state's witnesses were lying and that the events they testified about never happened. However, the jury already resolved the credibility of the witnesses' testimony. *See, e.g., State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (stating that the jury determines the weight and credibility of witness testimony). Thus, appellant presents no meritorious arguments in his pro se brief.

Affirmed.