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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1768**

State of Minnesota,
Respondent,

vs.

Andres Sylvester Rasmussen,
Appellant.

**Filed March 31, 2014
Reversed and remanded
Stauber, Judge**

Kandiyohi County District Court
File No. 34CR11801

Lori A. Swanson, Minnesota Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Kirk Anderson, Special Assistant Appellate Public Defender, Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

STAUBER, Judge

In this combined appeal from his conviction of three counts of first-degree criminal sexual conduct, and from the order denying his petition for postconviction relief

following a stay and remand by this court, appellant argues that (1) he is entitled to a new trial because the district court abused its discretion by allowing hearsay evidence; (2) the district court erred by determining that he was not entitled to postconviction relief for ineffective assistance of counsel; (3) the district court erred by allowing the state to charge appellant with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2010), in addition to the first-degree criminal sexual conduct charge under Minn. Stat. § 609.342, subd. 1(h) (2010), when his conduct constituted one ongoing course of conduct; and (4) the district court abused its discretion by sentencing appellant to consecutive sentences. Because the district court abused its discretion by allowing several witnesses to testify about their conversations with the victim concerning the alleged sexual abuse before the victim testified, resulting in inadmissible and prejudicial hearsay testimony, we reverse and remand.

FACTS

In October 2011, 21-year-old appellant Andres Rasmussen was charged with third- and fourth-degree criminal sexual conduct after he allegedly engaged in sexual contact with his 15-year-old cousin from September 2010 through September 2011. Appellant was offered a plea agreement to resolve the charges. Under the terms of the offer, appellant would plead guilty to the third-degree criminal sexual conduct charge and receive the presumptive 36-month stayed sentence. The state would then dismiss the fourth-degree criminal sexual conduct charge, and imposition of any additional jail time would be argued to the district court.

Appellant's trial counsel informed appellant of the plea offer while he was in jail. At that time, appellant told his trial counsel that he would accept the offer. Trial counsel, however, failed to inform the prosecutor of appellant's acceptance of the plea offer. A week later, trial counsel discovered that the state intended to amend the complaint to add more serious charges. Trial counsel then contacted the prosecutor, informing him that appellant had accepted the plea offer. The prosecutor responded by stating that the offer was being withdrawn. A telephone conference was later held on the issue at which the district court informed trial counsel that appellant could bring a motion to enforce the plea offer and/or oppose the amended complaint, but that the court was not inclined to grant it.

In December 2011, the complaint was amended to charge appellant with four counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g), and one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii).

At trial, the state began its case by calling Detective Chad Nelson as its first witness. Detective Nelson's testimony was followed by the testimony of both of the victim's parents. These witnesses were allowed to testify as to their conversations with the victim pertaining to her alleged sexual relationship with appellant.

The final witness called by the state was the victim, S.M. She testified that the first incident of sexual abuse occurred in the fall of 2010, when she performed oral sex on appellant and then engaged in sexual intercourse with him. S.M. also testified that appellant sexually abused her "like twenty or more" times over the course of the ensuing year. Although S.M. did not testify in detail regarding each incident of sexual abuse or the

specific timing between the fall of 2010 and the fall of 2011, she provided the details of several of the incidents, including sexual penetration occurring (1) at a warming house; (2) twice in appellant's truck, one of them near an impound lot; (3) in a field near Pennock; (4) at a house in Willmar where appellant had just moved; and (5) at appellant's house in Lake Lillian after she helped him move. S.M. claimed that she finally told her school counselor about the abuse on September 30, 2011, because she "couldn't handle it no more."

Appellant was convicted of three counts of first-degree criminal sexual conduct. The district court sentenced appellant to consecutive sentences of 144 months each, for a total sentence of 432 months. This appeal followed.

Appellant filed his notice of appeal, and this court granted his motion to stay the appeal and remand to the district court for postconviction proceedings. Appellant's petition for postconviction relief alleged that he was denied the effective assistance of counsel because his trial counsel failed to timely communicate appellant's acceptance of the state's original plea offer. The district court concluded that trial counsel's failure to communicate appellant's acceptance of the plea offer to the state in a timely manner constituted conduct that fell below an objective standard of reasonableness. But the court concluded that appellant "failed to demonstrate prejudice as a result of [trial counsel's] failure to adhere to an objective standard of reasonableness." Thus, the district court denied appellant's petition for postconviction relief, and this court reinstated this appeal.

DECISION

Appellant argues that he is entitled to a new trial because the district court abused its discretion by allowing inadmissible and prejudicial hearsay testimony. “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion and that the appellant was prejudiced as a result. *Id.*

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. An out-of-court statement is not hearsay if the declarant testifies at trial, is cross-examined about the statement, and the statement is consistent with the declarant’s trial testimony and helpful to the factfinder in evaluating the declarant’s credibility. Minn. R. Evid. 801(d)(1)(B).

Here, the district court allowed Detective Nelson and the victim’s parents to testify about their conversations with the victim concerning the alleged sexual abuse. Although appellant objected to this testimony as hearsay because the victim had not yet testified, the district court overruled the objection and admitted the testimony under Minn. R. Evid. 801(d)(1)(B), “on the assumption that [S.M.] testifies.” In making the decision, the court commented that “I don’t think there’s any specific order that . . . the State has to call their witnesses in.”

Appellant concedes that a prior consistent statement is an exception to the hearsay rule. But appellant argues that, at the time the witnesses testified, “there was no prior consistent statement to begin with” because the victim had not yet testified. Thus, appellant argues that the district court abused its discretion by allowing the hearsay evidence.

We agree. The challenged testimony is hearsay. *See* Minn. R. Evid. 801(c). And although Minn. R. Evid. 801(d)(1) provides an exception to the hearsay rule, Minn. R. Evid. 801(d)(1)(B) plainly states that in order to be admissible, the declarant must testify at trial, be “subject to cross-examination concerning the statement,” and the statement must be “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.” The comments to the rule provide that, “when a witness’ prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule.” Minn. R. Evid. 801(d)(1) 1989 comm. cmt. Thus, the rule anticipates that the witness testifies before the district court determines whether to admit the prior statement.

Here, the record reflects that S.M. did not testify until after her parents and Detective Nelson had testified. Moreover, as discussed below, her prior statements were not completely consistent with her trial testimony. By allowing the witnesses to testify about the out-of-court statements before the victim testified, the whole purpose of the rule was flouted because there had not yet been an attack on the credibility of the victim. Furthermore, it was impossible to determine if the prior statement was helpful to the trier

of fact because no one could assess whether the prior statement would be consistent with the victim's trial testimony. *See State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997) (stating that "before [a] statement can be admitted [under rule 801(d)(1)(B)], the witness' credibility must have been challenged, and the statement must bolster the witness' credibility with respect to that aspect of the witness' credibility that was challenged"). Consequently, the exception set forth in rule 801(d)(1) had not yet been triggered when the hearsay testimony was admitted.

The state argues that the district court properly exercised its discretion by permitting the state to introduce prior consistent statements made by the victim before the victim testified because the district court has broad discretion in controlling the manner in which testimony is received. We acknowledge that the district courts have such "broad discretion." *See State v. Ross*, 451 N.W.2d 231, 235 (Minn. App. 1990) (citing Minn. R. Evid. 611(a)), *review denied* (Minn. Apr. 13, 1990). But that discretion is not limitless, and it is abused when it results in the admission of testimony that is hearsay due to the manner in which the testimony is received.

The state further argues that, even if the testimony was improperly admitted, appellant is unable to establish prejudice because the victim did testify at trial. We again disagree. By allowing Detective Nelson and the victim's parents to testify before the victim testified, appellant was deprived of meaningful cross-examination of the police officer and the victim's parents because he had not yet heard the victim's version of the events or had a chance to cross examine her. The result impaired defense counsel's

challenge to credibility on all issues because appellant could not challenge what he had not yet heard.

The district court's qualified admission of this testimony also denied appellant a complete defense. *See State v. Nissalke*, 801 N.W.2d 82, 99 (Minn. 2011) (stating that every criminal defendant has a constitutional right to present a complete defense). Defense counsel could not anticipate the victim's testimony by merely examining Detective Nelson and the victim's parents. This was readily exemplified by the testimony at trial regarding count I of the complaint, which charged appellant with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g), for sexually penetrating S.M. on or about September 1 through October 31, 2010. In order to prove the charge, the state was required to prove that S.M. was sexually penetrated by appellant sometime between September 1 and October 31, 2010. At trial, however, S.M. testified that the first incident of sexual abuse occurred in the fall of 2010, when it was "kinda cold" and "before it started snowing." But S.M. was unable to provide specific dates and could not recall the month in which the sexual abuse began. Consequently, S.M.'s testimony did not establish whether the sexual abuse began in September, October, or November of 2010. Although Detective Nelson testified that he was told by S.M. that the "sexual abuse started . . . in September/October 2010," had this testimony been offered, as it should have been after S.M. testified, it arguably would have been hearsay and not admissible under Minn. R. Evid. 801(d)(1)(B), because of inconsistencies with S.M.'s prior testimony. By allowing Detective Nelson to testify before S.M., defense counsel was unable to anticipate that Detective Nelson's testimony would be inconsistent with

S.M.'s testimony on this issue. These circumstances clearly prejudiced appellant.

Therefore, we conclude that appellant is entitled to a new trial.

Appellant also argues that he was denied the effective assistance of counsel because his trial counsel failed to timely inform the state that he had accepted the state's original plea offer. We acknowledge that the Supreme Court has held that a criminal defendant's Sixth Amendment right to effective counsel extends to the consideration of plea offers that "have lapsed or been rejected." *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012) (holding that defendant is entitled to competent counsel at critical phases of trial, including plea bargaining, and counsel's failure to communicate plea offer can constitute inadequate representation). And we emphasize that prosecutors are held to a high standard and should not make promises or plea offers unless they are serious about honoring such agreements. But because we are reversing on the hearsay issue, we decline to further address appellant's ineffective-assistance-of-counsel argument.

Similarly, we also need not address appellant's other arguments, including his contention that the district court abused its discretion by sentencing appellant to consecutive sentences. But we note that although consecutive sentences were permissive here, *see* Minn. Sent. Guidelines II.F.02 (2010), 2.F.02 (Supp. 2011), a sentence that unfairly exaggerates the criminality of a defendant's conduct is an abuse of discretion. *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). Consequently, when contemplating whether to impose permissive consecutive sentences, courts should consider sentences imposed on other defendants in similar cases. *See State v. Yang*, 774 N.W.2d 539, 563 (Minn. 2009) (stating that, when determining whether consecutive sentences unfairly

exaggerate the criminality of a defendant's conduct, appellate courts review sentences imposed on other defendants in similar cases).

Reversed and remanded.