STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0679

State of Minnesota,
Respondent,

vs.

Derek James Robinette,
Appellant.

Filed April 20, 2020
Affirmed in part, reversed in part, and remanded
Florey, Judge

Otter Tail County District Court
File No. 56-CR-18-2562

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Michelle M. Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn M. Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Chief Judge; Larkin, Judge; and Florey, Judge.

S Y L L A B U S

A proposed modification to the sentencing guidelines that does not amend the sentencing grid or result in the reduction of any sentence does not operate as a statement by the legislature of its intent to abrogate the amelioration doctrine, as required by *State v. Kirby*, when that modification takes effect without legislative action.

O P I N I O N

FLOREY, Judge

In this direct appeal from the judgment of conviction for first-degree criminal sexual conduct, appellant argues that (1) the district court erred by allowing the state to elicit prejudicial testimony over appellant's objection; (2) the prosecutor committed prejudicial misconduct by introducing appellant's unredacted statement to police; and (3) appellant is entitled to have his case remanded for resentencing to receive the benefit of recent changes to the sentencing guidelines that would reduce his criminal-history score. We affirm the conviction, but reverse and remand for resentencing.

FACTS

In 2018, J.M. lived with her ex-husband, appellant Derek James Robinette, and her children, including 13-year-old P.W. Robinette and P.W. did not have a good relationship. In the summer of 2018, P.W. started running away from home. When she did, Robinette would call the police to find her. P.W. also began seeing a psychologist. In September 2018, P.W. threw "a fit" and broke her bedroom window. J.M. called the police. When police arrived, P.W. was in her bedroom and was very upset. P.W. told the officer that she had told her mother and brothers that Robinette was "touching [her] privates" but that they did not believe her. P.W. said that this had occurred multiple times. The officer contacted a detective and did not ask P.W. any more questions.

Robinette arrived home about 30 minutes after the police arrived. When an officer told him that they would be removing the kids and conducting forensic interviews,

Robinette replied, "I never touched her" even though the officer did not disclose the content of the allegations or who made them.

Melanie Cole, a child-protection specialist with CornerHouse, interviewed P.W. on the same day police had removed her from her parents' home. P.W. told Cole that Robinette touched her privates under her underwear once, and touched her breasts six or seven times. P.W. also told Cole that Robinette had anally penetrated her on six or seven occasions. P.W. stated that this happened in Robinette's bedroom and that her 11-year-old sibling, G.O., witnessed it. P.W. also recounted that she had disclosed the sexual abuse to two friends, G.S. and I.G. Cole interviewed G.O. the next morning, who stated that he once saw Robinette touching P.W.'s chest area, and on another occasion he saw Robinette put his "privates" in P.W.'s "booty."

P.W. underwent a sexual-assault examination. She told the nurse that she started experiencing abuse the previous summer and repeated the allegations that Robinette touched her chest and penetrated her anus. The examination did not reveal evidence of injury to P.W.'s genitals or anus.

Detective Andrew Miller interrogated Robinette. When Miller would ask Robinette if he had ever touched P.W. inappropriately, Robinette would respond with "not that I'm aware of" and with what Miller characterized as other "weak denials." Robinette suggested that P.W. might be falsely accusing him because she did not like the way he disciplined her. According to Robinette, P.W. said she wanted him in jail earlier that day.

Miller and Cole interviewed P.W.'s friends G.S. and I.G. G.S. did not know anything about Robinette touching P.W., but he stated that P.W. once told him that

Robinette would make her and G.O. "make out or have sexual contact with each other." G.O. denied this in an interview with Miller and Cole. I.G. reported that P.W. told him about the sexual contact with G.O. and that Robinette had molested her. Miller and Cole also interviewed P.W.'s mother J.M., who said that she did not believe P.W.'s allegations.

The state charged Robinette with multiple counts of first-degree and second-degree criminal sexual conduct. A jury trial was held. P.W. testified that she told J.M. earlier in the summer that Robinette had sexually abused her but that J.M. did not believe her. She also said that the abuse always occurred in Robinette's bedroom and that Robinette sometimes had G.O. come into the room. P.W. testified that she had lied when she told her friends that Robinette also made her and G.O. "do stuff."

G.O. testified that he saw Robinette touching P.W.'s bottom with his "private" but that he would stand in the doorway and was never in Robinette's room during the sexual abuse. I.G. testified that P.W. had told him a long time ago that Robinette abused her.

Robinette called J.M. as his only witness. She testified that P.W. had first accused Robinette of abuse two to three years previous, but that P.W. admitted she lied while she was being taken to a doctor for examination. J.M. stated that P.W. lied multiple times; and that on the night of the arrest, when P.W. learned the police were on the way, she said that she was going to accuse Robinette of sexual abuse so that he would go to jail. J.M. also testified that she asked G.O. if he witnessed any abuse, and G.O. said, "No. She's crazy." J.M. stated that G.O. and P.W. were close, and that G.O. would do and say whatever P.W. asked.

The jury found Robinette guilty. The district court imposed a sentence of 168-months' imprisonment, the presumptive sentence for a severity-level-A offense with a criminal-history score of two. Robinette was also sentenced to ten years of conditional release. Robinette appeals.

ISSUES

I. Did the district court abuse its discretion by allowing the state to elicit testimony that (1) J.M. allowed a registered sex offender to babysit and (2) Robinette's "minimal denials" indicated deception?

II. Does the alleged prosecutorial misconduct warrant a new trial in this case?

III. Is Robinette entitled to resentencing based on subsequent changes to the sentencing guidelines?

ANALYSIS

I. Did the district court abuse its discretion by allowing the state to elicit testimony that (1) J.M. allowed a registered sex offender to babysit and (2) Robinette's "minimal denials" indicated deception?

Robinette contends that the district court committed reversible error when it permitted the admission of certain testimony. Specifically, Robinette contends that testimony to the effect J.M. permitted a sex offender to babysit, as well as testimony that Robinette's interrogation answers suggest dishonesty, were inadmissible.

"We afford trial courts considerable discretion in admitting evidence and review their evidentiary rulings for an abuse of that discretion." *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (quotations omitted). Whether Robinette is entitled to a new trial "rests on [his] ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted).

"[A]n appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (discussing the factors court considers when determining whether wrongfully admitted evidence significantly affected the verdict) (quotation omitted). In determining the effect erroneously admitted evidence had on the verdict, we consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002).

First, Robinette challenges the district court's decision to allow the state to ask J.M on cross-examination whether a registered sex offender lived in the home and was allowed to babysit her children before Robinette moved back in. The prosecutor argued that such a question would be probative of J.M.'s "decision-making skills" and her "bias." The prosecutor also argued that it was important "for the jury to know past parenting decisions she's made." The district court decided that, if J.M. testified that P.W. was "untruthful, there can be questions regarding her own personal bias or her own credibility. . . I'm going to allow that question to be asked."

Per Minn. R. Evid. 402, only relevant evidence is admissible. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Here, the district court determined that the state's question

about the sex offender living in the home would be relevant to show J.M.'s bias against P.W.

On appeal, the state contends that J.M. had a reason to lie about the sexual-assault allegations to appear more favorable in her child-protection case. But whether a registered sex offender was living in the home is not relevant to whether Robinette committed the crimes charged. Nor does it tend to show why J.M. would be biased against P.W. or for Robinette. Rather, such evidence simply tends to show that J.M. lacks good judgment as a parent.

The state also contends that this evidence is relevant as an attack on J.M.'s credibility pursuant to Minn. R. Evid. 608(b). A witness's credibility can be attacked with "evidence of bias, prejudice, or interest of the witness for or against any party to the case." Minn. R. Evid. 616. But, as Robinette points out, the state did not follow the proper procedure to cross-examine J.M. about specific instances of conduct by failing to memorialize the notice required by Minn. R. Evid. 608(c). Neither did the state establish that the probative value would outweigh the potential for unfair prejudice. Finally, even if the proper procedure had been followed, this evidence is not the type contemplated by rule 608, which allows an attack on the credibility of the witness—not her character. *State v. Mayhorn*, 720 N.W.2d 776, 789-90 (Minn. 2006). Specific instances of conduct are probative of credibility if they involved an untruth or an act of deception. *See State v. Haynes*, 725 N.W.2d 524, 530-31 (Minn. 2007). However, evidence that is not probative of truthfulness, but rather of the witness's character, is not permitted under rule 608(b). *Mayhorn*, 720 N.W.2d at 790. Evidence such as whether or not a sex offender was

previously living with J.M. is probative of character, not truthfulness. Accordingly, we conclude that the district court's decision to allow this evidence was error.

Next, Robinette challenges the testimony of Detective Miller, who testified that Robinette's "minimal denials" during the interrogation, unlike "strong, definitive denials" evidenced "deception." Robinette claims that Miller's testimony is subject to Minn. R. Evid. 702 because it was not an inference made from his observations, but rather "an effort to impart to the jury specialized knowledge he claimed to have as a seasoned detective;" and that it lacked foundational reliability to be admissible as expert testimony. As the state concedes, this argument has merit. However, we need not determine whether Miller's testimony was lay or expert, because even if allowing such testimony was error, it was not prejudicial, as discussed below.

Robinette argues that he is entitled to a new trial because the complained-of errors significantly affected the verdict. But we are not persuaded that the errors asserted here had a significant impact on the outcome of the trial. The defense mitigated the impact of the testimony regarding the sex offender previously having lived with J.M. by eliciting that information on direct. Additionally, J.M. directly attacked P.W.'s credibility. Likewise, Miller's testimony about the minimal denials made up only a small portion of the four-day jury trial. The jury was able to see a recording of Robinette's interview, as well as hear testimony from P.W., G.O., G.S., and I.G. The evidence against Robinette—specifically P.W.'s testimony and consistent statements which were corroborated at least in part by the testimony of G.O. and I.G. —was strong. And the evidence complained of here was not particularly overwhelming or persuasive. While the decision to allow the testimony about

the registered sex offender living with J.M. was error, it did not significantly affect the outcome of the trial. Similarly, Miller's testimony was not especially influential, given that the jury was able to view the entirety of his interview with Robinette. Because the complained-of evidentiary rulings did not significantly impact the jury's verdict, we conclude that Robinette is not entitled to a new trial.

II. Does the alleged prosecutorial misconduct warrant a new trial in this case?

Robinette asserts that the state's introduction of his recorded statement to police, without redacting a statement that he assaulted J.M., was prejudicial plain error because it is inadmissible prior-bad-acts evidence. When the defendant fails to object during trial, prosecutorial misconduct is reviewed under a modified plain-error standard. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). The defendant bears the burden of establishing error that is plain, and upon doing so the burden shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury's verdict. *Id.*

> To evaluate the effect on substantial rights, we consider various factors, including the pervasiveness of improper suggestions and the strength of evidence against the defendant. If the State fails to demonstrate that the alleged error did not affect the defendant's substantial rights, we consider whether the error should be addressed to ensure fairness and the integrity of judicial proceedings.

State v. Parker, 901 N.W.2d 917, 926 (Minn. 2017) (citations omitted).

Here, Robinette voluntarily stated to police that he had assaulted J.M. The statement was made in passing during a lengthy interview with Miller. Miller did not follow up further on the statement. There were ten other witnesses and nearly 400 pages of testimony

that the jury heard over four days. The state did not mention this statement in closing argument or at any other point during the trial. And the admission concerned a different victim, J.M., who was testifying in support of Robinette. Based on our review of the record, we conclude that even if the admission of this statement constitutes misconduct, it did not have a significant effect the verdict. Accordingly, Robinette is not entitled to a new trial based on this argument.

III. Is Robinette entitled to resentencing based on subsequent changes to the sentencing guidelines?

Robinette asserts that, due to a modification to the sentencing guidelines which became effective August 1, 2019, he should not have received a custody-status point in the calculation of his criminal-history score. With one criminal-history point instead of two, the duration of his presumptive sentence would be reduced to 156 months instead of 168 months. Robinette argues that because the change to the guidelines responsible for this reduction in the presumptive sentence took effect before his case became final, he is entitled to the benefit of the change.

"[I]nterpretation of the sentencing guidelines [is] subject to de novo review . . . . We apply the rules of statutory construction to our interpretation of the sentencing guidelines." *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012) (citation omitted).

The sentencing guidelines in effect when Robinette committed the offenses assigned a custody-status point if the offense was committed while the offender was on probation following the conviction of a felony. A custody-status point was also assigned if the offender was discharged from probation, but committed an offense within the initial period

of probation pronounced by the court. Minn. Sent. Guidelines 2, subd. B.2.a(1)-(4) (Supp. 2017). Here, Robinette received a custody-status point at sentencing because, while he was not on probation when he committed the offense, it occurred during the probationary period initially pronounced by the court.

In 2019, the guidelines were revised, and the provision assigning a custody-status point when the offender is discharged early from probation was eliminated. Now, a custody-status point is assigned only if the offender was actually on probation at the time of the offense in question. Minn. Sent. Guidelines 2, subd. B.2 (Supp. 2019). This amendment to the guidelines became effective August 1, 2019, while this direct appeal was pending before this court.

Robinette asserts that he is entitled to the relief he seeks pursuant to the common-law amelioration doctrine. The amelioration doctrine requires that a law that mitigates punishment be applied to acts committed before the law's effective date, so long as no final judgment has been reached and the legislature has not explicitly expressed contrary intent. *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). Under *Kirby*, three conditions must be met for the amelioration doctrine to apply: (1) there must be no statement by the legislature that establishes the legislature's intent to abrogate the amelioration doctrine; (2) the amendment must mitigate punishment; and (3) final judgment must not have been entered as of the date the amendment takes effect. *Id.* at 490. The state does not contest that requirements two and three are met in this case.

Kirby states that the legislature "knows how to expressly abrogate the amelioration doctrine" and does so by stating something to the effect of, "crimes committed prior to the

effective date of this act are not affected by its provisions." *Id.* at 491. Absent such language, we presume that the legislature intends for the amelioration doctrine to apply. *Id.* at 500.

Here, there is no such express language by the legislature.[1] The issue is whether a policy statement adopted by the guidelines commission without express legislative approval operates as a statement of intent by the legislature. Minn. Stat. § 244.09, subd. 11 (2018) states:

> Any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or in the early release of any inmate . . . shall be submitted to the legislature by January 15 of any year . . . and shall be effective on August 1 of that year, unless the legislature by law provides otherwise. All other modifications shall take effect according to the procedural rules of the commission.

The guidelines commission proposed a modification to Minn. Sent. Guidelines 2, subd. B.2. The proposed changes were submitted to the legislature, and the legislature did not act, so the new guidelines took effect on August 1, 2019, per Minn. Stat. § 244.09, subd. 11. In addition to the proposed changes to the guidelines themselves, the guidelines commission also proposed modifications to its policies. The proposed policy modifications to Minn. Sent. Guidelines 3.G.1 state that "[m]odifications to sections 1 through 8 of the

[1] The state argues that there was no *legislative action* resulting in a change to the guidelines, and thus the amelioration doctrine cannot apply. This argument is based on a misreading of the holding of *Kirby*. While *Kirby* dealt with the application of the amelioration doctrine resulting from a legislative action that resulted in a change to the guidelines, it does not require legislative action in that sense. Rather, *Kirby* requires a statement by the legislature establishing its intent to abrogate the amelioration doctrine. *Id.* at 490. Absent such statement of intent, we presume that the amelioration doctrine applies. *Id.*

Minnesota Sentencing Guidelines . . . apply to offenders whose date of offense is on or after the specified modification date." In its report, the guidelines commission stated that the proposed modification "was taken in light of *State v. Kirby*." In a footnote, the guidelines commission noted that it "adopted these proposed modifications December 20, 2018 and submitted them to the Legislature January 11, 2019 . . . The Legislature took no action to provide that the changes should not take effect. *See* Minn. Stat. § 244.09, subd. 11."

The state argues that the legislature's inaction on the proposed change to Minn. Sent. Guidelines 3.G.1 is, in effect, a statement evincing the legislature's intent to abrogate the amelioration doctrine. The state asserts that if, pursuant to Minn. Stat. § 244.09, subd. 11, legislative inaction is sufficient to enact changes to the guidelines which impact the grid and criminal-history scores, the same is true with respect to Minn. Sent. Guidelines 3.G.1. The state contends that the legislature's inaction with regard to the modification of 3.G.1 operates as legislative ratification.

The modification to 3.G.1 has the purported effect of making any future changes to the guidelines prospective-only, which would effectively abrogate the amelioration doctrine entirely. However, in *Kirby*, the Supreme Court clearly stated, "[w]e have never ruled—and decline to rule today—that the amelioration doctrine may be abrogated by Commission statements not ratified by the Legislature." *Kirby*, 899 N.W.2d at 493.

Based on the plain language of Minn. Stat. § 244.09, subd. 11, legislative inaction is sufficient to adopt modifications that amend "the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any

sentence or in the early release of any inmate." The statute requires the guidelines commission to submit proposed modifications that would impact the grid to the legislature, and expressly provides that, if the legislature does not act, the modifications take effect. However, the statute also states: "*All* other modifications shall take effect according to the procedural rules of the commission." Minn. Stat. § 244.09, subd. 11 (emphasis added). Based on the plain language of Minn. Stat. § 244.09, subd. 11, the modification to 3.G.1 take effect "according to the procedural rules of the commission" and do not require submission to, or approval by, the legislature.

The plain language of Minn. Stat. § 244.09, subd. 11, does not provide a mechanism for legislative adoption of modifications to guidelines commission policies and the commission is not required to submit modifications of its policies to the legislature for approval. Here, the mere fact that the commission chose to submit its proposed changes to 3.G.1 to the legislature does not render the legislature's inaction on the proposal a statement of its intent to abrogate the amelioration doctrine, as would be required under *Kirby*. 899 N.W.2d at 490.

D E C I S I O N

We conclude that legislative inaction on the proposed modification to 3.G.1 does not operate as a statement by the legislature establishing its intent to abrogate the amelioration doctrine because Minn. Stat. § 244.09, subd. 11, does not provide for legislative adoption of modifications that do not amend the sentencing guidelines grid or result in the reduction of any sentence or in the early release of any inmate. Because we discern no statement by the legislature establishing its intent to abrogate the amelioration

doctrine with regard to the modification to Minn. Sent. Guidelines 2 subd. B.2, the amelioration doctrine applies in this case. Accordingly, while we affirm the district court's evidentiary rulings in this case, and thus, appellant's conviction, we reverse and remand for resentencing in accordance with the modified sentencing guidelines.

Affirmed in part, reversed in part, and remanded.