STATE OF MINNESOTA
IN COURT OF APPEALS
A11-859

State of Minnesota,
Respondent,

vs.

Reginald Dwayne Clark,
Appellant.

Filed June 4, 2012
Affirmed in part, reversed in part, and remanded
Huspeni, Judge[*]

Olmsted County District Court
File No. 55-CR-08-5595

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant challenges his criminal-sexual conduct convictions, objecting to several of the district court's evidentiary rulings, the jury instructions, and his sentence. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Appellant Reginald Dwayne Clark was charged by amended complaint with five counts of criminal sexual conduct arising out of allegations made by his step-daughter, N.M., who was born December 1994. Counts one and three alleged sexual penetration of N.M. "[s]ometime during the year of 2005" and charged appellant with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2004) (victim under 13 and actor more than 36 months older), and first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2004) (significant relationship). Counts two and four alleged sexual penetration of N.M. "[d]uring the month of July 2007" and charged appellant with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2006) (victim under 13 and actor more than 36 months older), and first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2006) (significant relationship). Count five alleged sexual contact with N.M. "[d]uring the month of July 2007," and charged appellant with second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2006) (victim under 13 and actor more than 36 months older).

Both parties filed various pretrial motions with the district court. Appellant moved to admit prior alledgedly false allegations of sexual assault by N.M. and to deny testimony by the state's proffered expert witness. The district court denied both motions.

A first jury trial ended in a hung jury. At a second jury trial, N.M. testified that she wanted to be an actress and that appellant and N.M.'s mother took her to a talent agency so that she could audition. She testified that after the audition, appellant told her she would have to do modeling before she began acting, and he asked her to do "poses" for him. N.M. testified that she would do these "poses" for appellant in her underwear and that appellant touched her vagina and penetrated her vagina with his tongue. According to N.M., this occurred while they were living at the "yellow house," which was in 2005. N.M. testified that she told her mother about these incidents.

N.M. testified that the next instance of sexual contact occurred after the family had moved to the "big house with the game room," in 2007. N.M. testified that appellant asked her to do the modeling poses again and that appellant bribed her with clothing, shoes, and a phone. When N.M. "posed" for appellant, he took photographs of her but did not touch her. But N.M. testified that in July 2007, appellant drove her to a park and told her that she was "sick" and that he had to look at her vagina. He then touched her with his fingers. N.M. also testified that shortly after the incident in the car, appellant came into her bedroom and took photographs of her and penetrated her vagina using his tongue. N.M. testified that appellant said he would give her a candy bar if she allowed him to do this. During cross examination, N.M. acknowledged that she initially did not

tell police about the incident of penetration from 2005, but stated that she did not do so because she was scared.

N.M.'s stepmother also testified for the state. According to her testimony, N.M. started wetting the bed in the summer of 2007. To N.M.'s stepmother, that was a "red flag" because she had previously wet the bed four years before when "something else dramatic was going on in her life." N.M. eventually told her stepmother that appellant had been "naughty" and that appellant "lick[ed] her" and N.M. pointed to her vaginal area.

Amy Russell, the state's expert witness, testified generally about concepts in child sexual abuse, including the dynamics that may affect a child's delay in reporting sexual abuse and the dynamics of intra-familial abuse as it relates to delay in disclosure. Russell also testified about the grooming process that can occur in child- abuse cases.

The state introduced two prior statements that N.M. gave to police officers shortly after the allegations came to light in October 2007. During the interview, N.M. described the assaults and said that she was "scared 'cause [appellant had] already been in jail for abusing people." N.M. told investigators that during July 2007, appellant told her that she had a disease and that he needed to check her vagina. He then touched her vagina with his hand while they were in a car near the park. N.M. also told investigators that shortly after the incident in the car, appellant came into her bedroom at night and penetrated her vagina with his tongue. In a second interview about a week later, N.M. told investigators that appellant had sexually assaulted her two years before the 2007

incidents. N.M. thought that she was 10 or 11 years old when the first incidents occurred. Appellant testified and denied the sexual abuse.

During discussions regarding final jury instructions, appellant objected to the following proposed instruction:

> It is not necessary to prove the commission of a crime on the precise day or even year stated in the Complaint. If you find by proof beyond a reasonable doubt that Mr. Clark has committed the acts complained of in the Complaint, you may find him guilty even if you find the act or acts were committed at dates other than those charged in the Complaint.

Appellant's counsel argued that "this specific instruction would unnecessarily mislead the jury as to the province as to when the act occurred." The district court concluded that "the proposed instruction . . . accurately reflects the law" and overruled appellant's objection. The jury was instructed on the elements of each of the charged offenses and was given the instruction to which appellant objected.

On the second day of jury deliberations, the jury asked a question: "Count One allegedly occurs in 2005 and Count Two allegedly occurs in 2007. If the only difference is the date and if we disregard the date, how are these counts different?" The jurors asked the same question regarding counts three and four. The district court met with both counsel to discuss a response. Over appellant's objection, the district court eventually instructed the jury as follows:

> Counts One and Three and Counts Two and Four are charged in the alternative. You need to consider each element of these counts when applying the facts during the course of your deliberations. If necessary, you need to reread the instructions as they relate to all five counts submitted to you

> for your consideration and apply the facts as you determine them to be to all five counts in rendering a verdict.

The jury returned its verdict, finding appellant guilty of the charges arising out of the 2007 events and acquitting appellant of the charges arising out of the incident in 2005. The district court imposed a sentence on each count upon which appellant was found guilty: 333 months for first-degree criminal sexual conduct (victim under 13 and actor more than 36 months older); 333 months for first-degree criminal sexual conduct (significant relationship); and 140 months for second-degree criminal sexual conduct (victim under 13 and actor more than 36 months older). The district court ordered that all three sentences be served concurrently. The district court also imposed a lifetime conditional release period under Minn. Stat. § 609.3455, subd. 7(b) (2006). This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred in its instruction to the jury on the requirement of unanimity. District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explain[ ] the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001).

Appellant contends that the district court erred by instructing the jury that it could disregard the dates of the offenses and find appellant guilty for each count even if the jurors concluded that he committed the act during a different time period. According to appellant, this jury instruction did not accurately state the law with respect to his charges. The district court's instruction to the jury raises concern, especially in light of the fact that the state charged appellant with single acts of criminal sexual conduct, as opposed to a course of conduct over a period of time. But, assuming without deciding that this instruction erroneously stated the law, we conclude that any error in providing this jury instruction was harmless. *See State v. Lee*, 683 N.W.2d 309, 316 (Minn. 2004). In determining whether the decision to give a particular jury instruction constitutes reversible error, we "examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop*, 441 N.W.2d 475, 481 (Minn. 1989). If the error might have prompted the jury to reach a harsher verdict than it might otherwise have reached, the defendant is entitled to a new trial. *Id.*

Here, the case was presented in terms of three separate and distinct events, one that occurred in 2005 and two that occurred in 2007. The district court correctly instructed the jury on the elements of each offense, and those instructions included the year during which the assault was alleged to have occurred. The jurors had a copy of the jury instructions as they deliberated. Moreover, the jury verdict forms very clearly differentiate between the allegation from 2005 and those from 2007. And the jury acquitted appellant of the charges arising out of the 2005 incident, but convicted him of

the charges arising out of the 2007 incidents, demonstrating that the jurors understood the distinctions between the charged offenses and complied with the requirement of a unanimous verdict. The record reflects that the offenses, when presented to the jury for its consideration, were more than adequately distinguished from each other, both in terms of elements and in terms of dates. We conclude that any error in instructing the jury that it could convict appellant even if it determined that the assault happened at a different time was harmless beyond a reasonable doubt.

II.

Appellant next argues that the district court abused its discretion by allowing the prosecutor to admit evidence of N.M.'s prior consistent statements to police investigators. "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). Appellant concedes that he failed to object to the admissibility of these statements and that this court must review his assertion for plain error. Where 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). "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 686, 689 (Minn. 2002). "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." *Id.* (quotation omitted).

Generally, out-of-court statements offered to prove the truth of the matter asserted are considered hearsay and are not admissible. Minn. R. Evid. 801(c), 802. But a prior

statement by a witness is not hearsay if (1) the witness testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is helpful to the jury in evaluating the credibility of the witness; and (3) the statement is consistent with the witness's testimony. Minn. R. Evid. 801(d)(1)(B).

Appellant argues that the district court erred in admitting N.M.'s two statements because they were not consistent with her trial testimony. We cannot agree. To be admissible as a prior consistent statement, a witness's prior statement must be "reasonably consistent," but need not track the witness's trial testimony verbatim. *See In re Welfare of K.A.S.*, 585 N.W.2d 71, 75-76 (Minn. App. 1998). Appellant contends that the admitted statements "provided much more and significant detail" about the events that occurred. But providing additional information in a prior statement is not the same as providing inconsistent information. *See State v. Zulu*, 706 N.W.2d 919, 924-25 (Minn. App. 2005) (concluding that a prior statement given by a victim that included more information than the victim testified to at trial did not constitute an inconsistent statement).

Here, N.M.'s prior statements and her trial testimony were not inconsistent. While N.M.'s two prior statements provided some details regarding the allegations that she did not testify to at trial, both statements were still consistent with N.M.'s trial testimony. *See id.* (concluding that prior statement was not inconsistent when the prior statement contained facts that were not testified to at trial). Moreover, the additional facts did not affect the elements of the offense. *Cf. State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000) (holding that prior statements were not consistent when the prior statement

included discussions of a threat and the use of a knife, which would have escalated the degree of the appellant's offense), *review denied* (Minn. Feb. 24, 2000).

But appellant also complains that the recorded statements contained prejudicial hearsay regarding prior misconduct by him. We conclude that any error in admitting these portions of the prior statements did not affect appellant's substantial rights. N.M.'s two statements constituted over one hour of recordings and 75 pages of transcript. The potentially prejudicial statements were made in passing, were brief, and were vague in nature. And the overwhelming discussion on the recordings had to do with appellant's actions toward N.M., her response, and how she reported the abuse. Moreover, none of the allegedly prejudicial references were brought up again by either party during trial.

Because N.M.'s prior statements were not inconsistent with her trial testimony and because the inclusion of any potentially prejudicial information in the statements did not affect appellant's substantial rights, there is no evidentiary error requiring reversal.

III.

Appellant next argues that the district court abused its discretion by prohibiting him from presenting evidence of a prior, allegedly false accusation of sexual assault by N.M. Every criminal defendant has a right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense. *State v. Goldstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). A district court's evidentiary rulings will not be disturbed on appeal absent a clear abuse of discretion. *State v. Jackson*, 770 N.W.2d 470, 482 (Minn. 2009). Even if the exclusion of evidence violates a defendant's right to present a defense, appellate courts will not

reverse the decision if the error is harmless beyond a reasonable doubt. *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989).

Evidence of prior false accusations of sexual abuse is admissible to attack the credibility of other statements. *See Goldenstein*, 505 N.W.2d at 340. But "[b]efore evidence of prior false accusations is admissible . . . the [district] court must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists." *Id.* Appellant sought to introduce evidence that N.M. made a prior accusation of sexual assault against appellant's son. Appellant's offer of proof included an excerpt from a police report, stating that N.M.'s mother told police that "a few years ago, [N.M.] accused [appellant]'s son of touching her and she admitted to us that she lied." N.M.'s mother testified outside of the presence of the jury in the first trial, and agreed that N.M. had alleged sexual assault against appellant's son, but denied that N.M. ever admitted to her that the allegations were false. Appellant provided no other evidence to support his contention that the allegations were false.

We conclude that the district court's decision to preclude admission in the present trial of evidence of false allegation by N.M. did not constitute an abuse of discretion. To support his motion to admit this challenged evidence, appellant again submitted the police report addressed above. Appellant offered no other evidence to show a reasonable probability of falsity of N.M.'s accusation. Nor did appellant's offer of proof demonstrate a reasonable probability of falsity.

Appellant further argues that he was prejudiced by his inability to refer to N.M.'s prior allegation of sexual assault during N.M.'s stepmother's testimony. According to

appellant, he was "unable to rebut the stepmother's assertions implying that [N.M.]'s bedwetting indicated she was being abused by appellant." N.M.'s stepmother testified that N.M.'s bedwetting was a "red flag" to her that something was wrong, since N.M. had only wet the bed four years prior when "something else dramatic was going on in her life". N.M.'s stepmother did not explain the dramatic event or refer to any prior allegations of sexual assault that occurred four years prior. N.M.'s stepmother also testified to other concerning behavior from N.M. that led her to believe something was happening. Appellant's inability to question N.M.'s stepmother about the prior accusation of sexual assault on cross-examination in response to her testimony about "red flag" behavior was not prejudicial to him or to his defense. We therefore conclude that the district court did not abuse its discretion by refusing to admit this evidence.

IV.

Appellant also argues that the district court abused its discretion by allowing the state to call an expert witness to testify on the subject of delayed reporting in child abuse victims. The district court's decision on whether to admit expert testimony is reviewed for a clear abuse of discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999). Expert testimony is generally admissible if it assists the factfinder, has a reasonable basis, is relevant, and has probative value that outweighs its prejudicial effect. *State v. Jensen*, 482 N.W.2d 238, 239 (Minn. App. 1992), *review denied* (Minn. May 15, 1992). An expert's opinion should not comprise opinions that the jury could readily form without expert help. *See State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982). An expert

witness may not vouch for or against the credibility of another witness. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998).

In *State v. Myers*, the supreme court recognized that "[t]he nature . . . of the sexual abuse of children places lay jurors at a disadvantage" and that "[b]y explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist the jury in evaluating the credibility of the complainant." 359 N.W.2d 604, 610 (Minn. 1984). The supreme court further stated that

> jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particular of children as young as this complainant.

Id.

Here, Russell explicitly stated that she had not examined N.M. and she offered no opinions on whether N.M. was telling the truth. Russell testified only about the phenomenon of delayed reporting and about how familial relationships and grooming behaviors affect delayed reporting. The supreme court has affirmed the use of this kind of expert testimony in cases of child sexual abuse and we decline appellant's invitation to "re-examine its wholesale acceptance of a theory and brand of testimony which lacks scientific or technical rigor." *See In re Custody of J.J.S.*, 707 N.W.2d 706, 711 (Minn. App. 2006) (declining the appellant's invitation to adopt a new legal presumption

contrary to prevailing law because "[c]hanging [the] law is beyond our scope of review"), *review denied* (Minn. Mar. 14, 2006). The district court did not abuse its discretion by allowing expert testimony about which appellant complains.

V.

Appellant argues that the district court erred in calculating his sentence and further erred by imposing a lifetime conditional release period. Although appellant did not raise these issues at sentencing, we will consider them on appeal. *See State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008) (stating that "[b]ecause courts have authority to correct an illegal sentence under Minn. R. Crim. P. 27.03, subd. 9, a defendant cannot forfeit, or waive by silence, review of an illegal sentence"), *review denied* (Minn. Sept. 23, 2008).

Sentencing

Appellant raises two arguments with respect to his presumptive sentence. He first argues that the district court erred by imposing the guidelines sentence in effect in 2007, based primarily on his assertion that "it [was] not clear from the jury's verdict for which date the jury found appellant guilty." We disagree. The jury verdict forms explicitly referred to an assault that occurred in 2007. Thus, the jury found that the sexual assault occurred in 2007, and the district court did not err in sentencing appellant under the 2007 guidelines.

Appellant further argues that the district court erred by imposing a sentence for the second conviction of first-degree criminal sexual conduct and the conviction of second-degree criminal sexual conduct. "[I]f a person's conduct constitutes more than one

offense under the laws of this state, the person may be punished for only one of the offenses. . . ." Minn. Stat. § 609.035, subd. 1 (2006). Appellant was convicted of two counts of first-degree criminal sexual conduct based on the same course of conduct in 2007. Thus, under the statute, he should have been sentenced on only one of these offenses. The district court erred by imposing a concurrent sentence on both first-degree criminal-sexual-conduct convictions, and one of the 333-month sentences must be vacated.[1]

But, appellant's conviction of second-degree criminal sexual conduct arose out of a separate behavioral incident of sexual contact occurring in the park in 2007. This incident does not share a unity of time and place with the first-degree offenses of penetration, as it occurred on a separate day in a separate location. And "[m]ultiple acts against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). Because the sexual assaults from 2007 do not constitute a single behavioral incident, the district court did not err in imposing a sentence for appellant's conviction of second-degree criminal sexual conduct.

[1] We reject appellant's contention that one of his convictions for first-degree criminal sexual conduct should be vacated. Under Minn. Stat. § 609.04, subd. 1 (2006), a defendant may not be convicted for both a charged offense and for a lesser-included offense of that charged offense. But neither of the first-degree offenses for which appellant was found guilty is a lesser-included offense of the other: by proving the offense under Minn. Stat. § 609.342, subd. 1(a) (defendant 36 months older), the state did not necessarily prove the second offense under Minn. Stat. § 609.342, subd. 1(g) (significant relationship). Because neither conviction of first-degree criminal sexual conduct is a lesser-included offense of the other, section 609.04 is not implicated and both convictions may stand.

Conditional Release Period

Finally, appellant challenges the district court's imposition of a lifetime conditional release period. Appellant argues that none of the multiple guilty verdicts resulting from his single trial could meet the definition of a "previous or prior sex offense" under the conditional release statute. There is merit in appellant's argument. "Interpretation of a statute presents a question of law, which [appellate courts] review de novo." *Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011). "When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation and citation omitted).

A criminal defendant is subject to a mandatory lifetime conditional release term when the "court commits an offender to the custody of the commissioner of corrections for a violation of [certain sex offenses] and the offender has a previous or prior sex offense conviction." Minn. Stat. § 609.3455, subd. 7(b).

> A conviction is considered a 'prior sex offense conviction' if the offender was convicted of committing a sex offense before the offender has been convicted of the present offense, regardless of whether the offender was convicted for the first offense before the commission of the present offense, and the convictions involved separate behavioral incidents.

Minn. Stat. § 609.3455, subd. 1(g) (2010).

The statutory language distinguishes between "prior" and "present" offenses, supporting appellant's argument that a prior offense must be separate from the offense

presently before the court. In this case it is clear that appellant's convictions occurred simultaneously in time as the result of one trial. Appellant's convictions were recorded in the district court file in the same warrant of commitment. *See State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002) ("The general practice, and a practice to which district courts should adhere, is to have the conviction recorded and appear in a judgment entered in the file."). It would strain credulity to identify any conviction in this case as a "previous or prior sex offense conviction" giving rise to a mandatory lifetime conditional release period. We therefore conclude that the district court erred by imposing the lifetime conditional release period, and we reverse and remand to allow the district court to reflect our decision on this issue.

In sum, because the district court did not err in applying the applicable guidelines, we affirm appellant's 333-month sentence. And because appellant's conviction for second-degree criminal sexual conduct arose out of a separate behavioral incident, we affirm the concurrent 140-month sentence on that offense. But because the district court erred by imposing a concurrent sentence on the second conviction for first-degree criminal sexual conduct and erred by imposing a lifetime conditional release period, we vacate appellant's concurrent 333-month sentence and the conditional release period, and remand to the district court for imposition of the correct sentence.

Affirmed in part, reversed in part, and remanded.