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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1291**

State of Minnesota,
Respondent,

vs.

Jimmy Clade Hamilton,
Appellant.

**Filed July 16, 2012
Affirmed
Halbrooks, Judge**

Scott County District Court
File No. 70-CR-10-1046

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Chief Judge; and Worke, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Jimmy Hamilton was tried in Scott County on 13 criminal counts for conduct that occurred in Washington and Scott counties that included: five counts of

first-degree criminal sexual conduct; four counts of second-degree criminal sexual conduct; two counts of fifth-degree criminal sexual conduct; and two counts of indecent exposure. A jury found appellant guilty of all 13 counts. The district court sentenced appellant to 278 months for the felony criminal-sexual-conduct convictions, 365 days for each of the fifth-degree criminal-sexual-conduct convictions, and 90 days for each of the misdemeanor indecent-exposure convictions. On appeal, appellant contends that most of his convictions must be reversed because (1) Scott County was not the proper venue for acts occurring in Washington County; (2) the district court improperly admitted prior-act evidence; (3) the district court erred by admitting prior consistent statements; (4) there was insufficient evidence to support the verdicts; and (5) the district court improperly imposed multiple punishments for the same conduct. We affirm.

FACTS

Appellant lived with his wife, L.H., and their two children, a daughter M.A.H. and a son M.H., who is almost six years younger than M.A.H. As a family, they moved to Cottage Grove when M.A.H. was eight years old and lived there for five years. It was during this time that appellant began to sexually abuse M.A.H. While M.A.H. admitted that her memory is foggy about what happened because she does not want to remember it, she testified that she remembers the bigger incidents of abuse. When she was eight or nine years old, appellant would play a game of having M.A.H. close her eyes and guess what kind of food he had on his thumb. He would start with food but would ultimately have M.A.H. take his penis in her mouth. Another time appellant put on a glow-in-the-

dark condom and had M.A.H. perform oral sex on him. M.A.H. estimated that oral sex happened approximately ten times while they lived in Cottage Grove.

M.A.H. testified that when she was nine years old, appellant had her wear L.H.'s lingerie and model it for him. In another incident, appellant had M.A.H. get on her hands and knees while naked. Appellant, who was also naked, positioned himself behind her and did humping motions to simulate sexual intercourse. M.A.H. testified that she could not remember if his penis touched her body during this incident. Appellant also got into M.A.H.'s bed while he was naked and touched her breasts and vagina, and rubbed her clitoris. M.A.H. could not remember if his fingers ever penetrated her.

When M.A.H. was 13 years old, the family moved to Shakopee. M.A.H. testified that after they moved, she remembered appellant putting flavored lubricant on his penis and having her give him oral sex. M.A.H. also testified that one night she woke up to find appellant masturbating on her face, at which time she told him to get out of her room. Appellant continued to frequently masturbate in M.A.H.'s presence. He would masturbate in his bedroom and have M.A.H. talk to him until he ejaculated. Sometimes she would see him ejaculate. M.A.H. testified that there were times, in both Cottage Grove and Shakopee, that appellant would masturbate, using her hand. M.A.H. also testified that, when she was in junior high school, he would masturbate while driving her to school.

M.A.H. did not tell anyone about the sexual abuse while it was occurring. Appellant would grab M.A.H.'s arm to prevent her from telling L.H., or he would threaten her by saying that the family was financially dependent on him. It was not until

M.A.H. was 18 years old that she told her boyfriend about the sexual abuse. The boyfriend encouraged M.A.H. to tell her mother, and they got an ex parte order for protection (OFP) in July 2009. After they got the OFP, M.A.H. and L.H. waited for appellant to come home. When he did, M.A.H. called the police. While they waited for the police to arrive, L.H. confronted appellant about what he had done. While appellant did not admit anything, he started to cry and told M.A.H. that he was sorry. Appellant was arrested and tried in Scott County for the alleged conduct occurring in both Washington and Scott counties, and the jury found him guilty of all counts. This appeal follows.

D E C I S I O N

I.

The United States and Minnesota Constitutions guarantee criminal defendants the right to be tried in the county or district where the crime allegedly occurred. U.S. Const. amend VI; Minn. Const. art. 1, § 6. For criminal action arising out of an incident of alleged child abuse, the state may prosecute the defendant “either in the county where the alleged abuse occurred or the county where the child is found.” Minn. Stat. § 627.15 (2008). The interpretation of the venue statute is a question of law, which this court reviews de novo. *State v. Wolf*, 592 N.W.2d 866, 869 (Minn. App. 1999), *aff’d*, 605 N.W.2d 381 (Minn. 2000). Appellant contends that Scott County was an improper venue for trial because the charged crimes occurred in both Washington and Scott counties.

The supreme court has adopted a liberal approach when interpreting venue under section 627.15. *See State v. Krejci*, 458 N.W.2d 407, 411-12 (Minn. 1990) (holding that

the statute is applicable in more than just “doubtful” cases). Under this approach, a child may be “found” and the defendant may be prosecuted in the county where the child resides. *State v. Larson*, 520 N.W.2d 456, 460 (Minn. App. 1994), *review denied* (Minn. Oct. 14, 1994). This court has further held that “for the purpose of establishing venue in the limited area of child-abuse, a child can be ‘found’ in the county where the child resided either when the abuse occurred or when the abuse was discovered.” *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *review denied* (Minn. Sept. 23, 2008).

Appellant contends that he cannot be tried in Scott County for acts of sexual abuse that occurred in Washington County. Appellant’s contention is contrary to case law and inconsistent with the liberal approach of establishing venue under section 627.15. The abuse of M.A.H. started in Washington County and continued in Scott County after appellant and his family moved. M.A.H. resided in Scott County when she reported the abuse.

Appellant also contends that Scott County is not the proper venue because M.A.H. was no longer a “child” who could be “found” pursuant to section 627.15 because M.A.H. reported the abuse when she was 18. This argument is without merit. The statute of limitations for criminal sexual conduct involving a victim who was under the age of 18 at the time of the offense is nine years after the commission of the offense or three years after the offense was reported to law-enforcement authorities, whichever is later. Minn. Stat. § 628.26(e) (2008). Appellant’s interpretation of section 627.15 cannot be reconciled with section 628.26(e), which clearly contemplates and allows for abuse to be reported and prosecuted after a child-abuse victim becomes an adult. M.A.H. reported

the abuse to the authorities in July 2009, and appellant was prosecuted within three years. Further, the abuse occurred as recently as 2009, which is well within the nine years allowed by the statute of limitations. Scott County was a proper venue for trial.

II.

Appellant contends that the district court erred by permitting the state to present *Spreigl* evidence of other crimes, wrongs, or acts against his sister, G.F. *Spreigl* evidence is inadmissible to prove action in conformity with a person's character, but may be admitted to show motive, opportunity, intent, knowledge, identity, absence of mistake or accident, or a common scheme or plan. Minn. R. Evid. 404(b); *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The overarching concern is that the evidence might be used for an improper purpose to convict a defendant. *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006). If the admissibility of the evidence of the other act is a close call, it should be excluded. *State v. Bolte*, 530 N.W.2d 191, 197 (Minn. 1995). This court reviews the district court's decision to admit *Spreigl* evidence for an abuse of discretion. *Ness*, 707 N.W.2d at 685.

The state called appellant's sister, G.F., as a witness. G.F. is three years younger than appellant. G.F. testified that when appellant was 15 or 16 years old, they lived in the Philippines because their father was stationed there through the military. According to G.F., appellant masturbated in front of her by leaving his door open and making loud and weird noises. She also testified that in 1986, when appellant was 19 years old, she and appellant were in a hotel room together, and he offered her \$20 for sex. She said "No," but appellant eventually had sexual intercourse with her against her will. Appellant

admitted that he and his sister had sexual intercourse, but he claimed it was consensual. The state sought to admit these acts to prove motive, intent, absence of mistake, and a common scheme or plan.

Appellant argues that the probative value of G.F.'s testimony regarding the masturbation is outweighed by unfair prejudice because the evidence was stale and not needed by the state to prove that appellant masturbated in front of M.A.H. Appellant also argues that the evidence of him having intercourse with his sister in 1986 is unfairly prejudicial and is not markedly similar in modus operandi to the charged offense.

The district court held that appellant's prior bad acts were markedly similar to M.A.H.'s allegations against him. The district court stated:

The Court determines that [appellant's] prior bad act bears a marked similarity to the current allegations against him. The State highlights the fact that [appellant's] sister, [G.F.], testified that [appellant] forced her to have sexual intercourse with him, and that [appellant] would masturbate in his bedroom with the door open making loud noises, almost as if he wanted her to catch him. Here, [appellant] is accused of masturbating in front of the alleged victim, both in her bed and in a room with an open door in hopes of being caught by his daughter. [G.F.] and the alleged victim were both under the age of 18 at the time of the acts at issue, and both appear to have occurred in a private domestic setting, either at the family residence or a hotel room in which the family stayed, and with a member of his immediate family. Masturbating in a room in one's own residence with the door open, in hopes of being caught by a daughter under the age of 18, or one's 13-16 year-old-sister, are markedly similar occurrences which justify the admission of these prior bad acts testified to by [G.F.].

The district court also found that the prior bad-acts evidence was not stale. In general, prior acts become less relevant as time passes. "[T]he greater the time gap, the

more similar the acts must be to lessen the likelihood that the *Spreigl* evidence will be used for an improper purpose.” *State v. Washington*, 693 N.W.2d 195, 201 (Minn. 2005) (quotation omitted). But even if there is a significant gap in time, the supreme court has allowed admission of prior acts with a gap of 16 to 19 years when the acts are highly similar. *Id.* at 203 (16 years); *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004) (16 years); *State v. Wermerskirchen*, 497 N.W.2d 235, 243 (Minn. 1993) (19 years); *State v. Rainer*, 411 N.W.2d 490, 493 (Minn. 1987) (16-19 years). While appellant’s abuse of M.A.H. began in 2000, 14 years after the sexual abuse involving his sister, the district court determined that admissibility of the evidence was proper based on the similarities between the *Spreigl* evidence and M.A.H.’s allegations.

To minimize the potential for any improper use, the district court gave a cautionary instruction to the jury and emphasized to the prosecution that it was to use the evidence for a limited purpose only. Because we agree that the prior-act evidence was admissible based on the intent, common plan, and modus operandi of appellant and because the district court took careful steps to avoid any improper use of the evidence, we conclude that the district court did not abuse its discretion by admitting this evidence.

III.

The district court reviewed and subsequently admitted redacted versions of two of M.A.H.’s prior statements: a one-paragraph affidavit submitted in support of her application for an OFP and her statement to Detective Corey Schneck. The district court has broad discretion when making evidentiary rulings, and this court will not reverse

absent a clear abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Before a prior consistent statement may be admitted pursuant to Minn. R. Evid. 801(d)(1)(B), the district court must determine whether: (1) there has been a challenge to the witness's credibility; (2) the prior consistent statement would be helpful to the trier of fact in evaluating the witness's credibility; and (3) the prior statement and the trial testimony are consistent with each other. *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). If a statement is admitted under rule 801(d)(1)(B), it operates as substantive evidence. Minn. R. Evid. 801(d)(1)(B) 1989 comm. cmt. But "when a witness'[s] 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." *Id.*

There is no dispute that the state met the first two factors. First, because appellant denied the conduct that M.A.H. reported, her credibility was challenged. Second, a prior consistent statement may bolster the witness's credibility by rebutting claims of an improper influence or motive, providing a meaningful context, or establishing accuracy of memory. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000); *see also State v. Lucas*, 372 N.W.2d 731, 738 (Minn. 1985) (statement admitted under rule 801(d)(1)(B) to help jury assess memory and motivation). Here, because appellant asserts that M.A.H. was lying or mistaken about the events, the prior consistent statements would be helpful in evaluating the accuracy of her memory. This satisfies the second factor.

For the third factor, the threshold inquiry into whether a statement is consistent does not require that the trial testimony and the prior statement be identical. *Bakken*, 604 N.W.2d at 109. But the district court should analyze the individual statements for consistency to guard against inconsistent statements that do not qualify under the rule from being bootstrapped into evidence. *Id.* “Thus, where inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule.” *Id.* at 110.

A. Statements in OFP affidavit

The state introduced into evidence the affidavit that M.A.H. submitted when she sought an OFP against appellant. Appellant contends that three statements from the affidavit were inadmissible because they are inconsistent. The first statement appellant claims is inconsistent is M.A.H.’s assertion that “I remember he rubbed his penis on my vagina.” At trial, M.A.H. testified that she could not remember whether appellant’s penis touched her body. M.A.H.’s inability to remember whether or not this specific act occurred is not inconsistent with the OFP affidavit. She did not testify that appellant’s penis did not touch her. She just was unable to recall when called at trial.

The second statement from the affidavit that appellant challenges is: “He would make me watch porn with him.” We agree that this statement was not part of M.A.H.’s trial testimony and should not have been admitted. But even if the district court errs in an evidentiary ruling, this court will not reverse unless the error substantially influenced the jury to convict. *State v. Brown*, 455 N.W.2d 65, 69 (Minn. App. 1990), *review denied*

(Minn. July 6, 1990). Here, there was overwhelming evidence of appellant's prolonged and repeated sexual abuse of M.A.H. This single statement was not enough to substantially influence the jury to convict, in light of all the evidence taken as a whole.

The third statement from the affidavit that appellant challenges is that he masturbated in front of M.A.H. "in the last week." M.A.H. testified that appellant masturbated in front of her on numerous occasions. The statement that he did so within the last week is consistent with her testimony.

B. Statements from interview with Detective Schneck

Appellant contends that the district court erred by allowing the state to play a tape recording of the statement that M.A.H. gave to Detective Schneck as a prior consistent statement because the recording contained inconsistencies from her testimony. But appellant did not object to the playing of any of the statements. Because appellant failed to object, this court reviews the issue for plain error. *See State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). For appellant to establish plain error, he must show (1) error; (2) that was plain; and (3) that affected his substantial rights. *Id.* To satisfy the third element, "a defendant must show prejudice that forms the basis for a reasonable likelihood the error substantially affected the verdict." *Id.* If appellant can establish all three factors, this court will not grant relief unless the error must be addressed to ensure the fairness and integrity of the judicial proceedings. *Id.*

Appellant asserts that the admission of six statements from the recorded conversation between M.A.H. and Detective Schneck constitute error. First, appellant claims that the district court erred by admitting the statement that when M.A.H. was

positioned on her hands and knees, “[appellant] put [his penis] on [my vagina] and like rubbed like he was having sex, but I don’t think he ever went in.” Even though M.A.H. testified that she could not remember if his penis touched her body during this incident, as we previously noted, not being able to remember certain details of an event does not constitute an inconsistency. There was also a statement in the recording that the last time that M.A.H. saw appellant masturbating was within the month before she applied for the OFP. Because M.A.H. testified that she saw appellant masturbate numerous times, it was not inconsistent to admit her statement that provides a more specific time for the last occurrence.

The other four statements included that: (1) appellant extracted oral sex in exchange for letting M.A.H. open her Christmas presents; (2) appellant had sexually abused his sister; (3) appellant would masturbate while watching child pornography; and (4) M.A.H. did not think that appellant had home sex tapes involving her, but that she did not know for sure. Because M.A.H. did not testify regarding any of these incidents, the district court erred by admitting these statements into evidence. But because appellant fails to establish how any of these statements affected his substantial rights, appellant failed to reach the threshold for establishing plain error.

IV.

Appellant argues that there was insufficient evidence to convict him on five of the charged offenses. In considering a claim of insufficient evidence, this court is limited to a thorough review of the record “to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the

verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court “cannot retry the facts, but must take the view of the evidence most favorable to the state.” *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). Because the jury is in the best position to weigh the evidence and evaluate the credibility of witnesses, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). An appellate court must assume that the jury believed the state’s witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

A. Count 2: first-degree criminal sexual conduct

Appellant argues that there was insufficient evidence to support a conviction of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2008), in Washington County between 2000 and 2004 because M.A.H. did not positively testify that there was genital-to-genital contact. Criminal sexual conduct in the first degree is defined as sexual contact with a person under 13 years of age when the actor is more than 36 months older than the victim. Minn. Stat. § 609.342, subd. 1(a). For the purposes of this subdivision, “sexual contact” means the intentional touching of the victim’s bare genitals by the actor’s bare genitals with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(c) (2008). In the OFP affidavit, M.A.H. stated, “I remember he rubbed his penis on my vagina.” In the statement she made to Detective Schneck, she

said “he put [his penis] on [my vagina] and like rubbed like he was having sex, but I don’t think he ever went in.” Because both statements are admissible as prior consistent statements and are substantive evidence, there was sufficient evidence for the jury to convict appellant of first-degree criminal sexual conduct under section 609.342, subd. 1(a).

B. Count 4: first-degree criminal sexual conduct

Appellant contends that there was insufficient evidence to support a conviction of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2008), in Scott County between 2004 and 2007 because M.A.H. did not testify that there was oral sex in Shakopee. Criminal sexual conduct in the first degree includes when “the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.” Minn. Stat. § 609.342, subd. 1(g). “Sexual penetration” includes oral sex. Minn. Stat. § 609.341, subd. 12(1) (2008). M.A.H. testified that she believed that appellant forced her to perform oral sex while they were in Shakopee. Because M.A.H. testified that there was sexual penetration, there is sufficient evidence to support the charges of first-degree criminal sexual conduct under section 609.342, subdivision 1(g).

C. Count 8: second-degree criminal sexual conduct

Appellant contends that there was insufficient evidence to support a conviction of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(g) (2008), in Scott County between 2004 and 2007 because M.A.H. did not testify that there was sexual contact in Shakopee. Second-degree criminal sexual conduct includes a person

who engages in sexual contact with another person when “the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact.” Minn. Stat. § 609.343, subd. 1(g). For the purposes of this subdivision, “sexual contact” includes the touching by the complainant of the actor’s, the complainant’s, or another’s intimate parts with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(b)(ii) (2008). M.A.H. testified that she believed that appellant masturbated by forcing her to use her hand on him in both Cottage Grove and Shakopee. This testimony, if believed by the jury, was sufficient to convict appellant of criminal sexual conduct in the second degree under Minn. Stat. § 609.343, subd. 1(g).

D. Counts 12 and 13: indecent exposure

Appellant contends that there was insufficient evidence to convict him of indecent exposure under Minn. Stat. § 617.23, subd. 1(1), (3) (2008), in Scott County between June 2009 and July 2009 because M.A.H. never testified that she saw appellant masturbate in the month before she sought the OFP. A person commits indecent exposure when he “willfully and lewdly exposes the person’s body, or the private parts thereof . . . or engages in any open or gross lewdness or lascivious behavior, or any public indecency.” Minn. Stat. § 617.23, subd. 1(1), (3). M.A.H. stated in her OFP affidavit that appellant masturbated in front of her within the week before she sought the OFP. She also told Detective Schneck that appellant masturbated within the month before she sought the OFP. Because both statements are admissible as prior consistent statements, there was sufficient evidence to support two convictions of indecent exposure.

V.

Appellant contends that counts 12 and 13, which were both counts of indecent exposure, arose from the same behavioral incident, and, therefore, the district court erred in imposing multiple 90-day punishments. Under Minn. Stat. § 609.035, subd. 1 (2008), the district court is generally prohibited from imposing “multiple sentences . . . for two or more offenses that were committed as part of a single behavioral incident.” *State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986). The factors that this court uses to determine whether two offenses arose out of a single behavioral incident are the singleness of purpose and the unity of time and place. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Sentencing decisions are ordinarily factual determinations that this court will not reverse unless they are clearly erroneous. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009), *aff’d*, 792 N.W.2d 825 (Minn. 2011).

The evidence that appellant committed indecent exposure from June 2009 to July 2009 comes from the OFP affidavit and M.A.H.’s statements to Detective Schneck. In the OFP affidavit, M.A.H. stated, “[Appellant] has masturbated in front of me. This has happened in the last week.” M.A.H. also told Detective Schneck that appellant masturbated in front of her all the time before she sought the OFP. Because the evidence demonstrates that appellant masturbated in front of M.A.H. on multiple occasions, there were separate behavioral incidents to support the imposition of separate sentences.

Affirmed.