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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-0600**

State of Minnesota,
Respondent,

vs.

Oswald Reid,
Appellant.

**Filed September 4, 2012
Affirmed
Cleary, Judge**

Hennepin County District Court
File No. 27-CR-10-23545

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and
Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant challenges his convictions under Minn. Stat. §§ 609.342, subds. 1(a), (b), (g), 609.344, subd. 1(g)(iii) (2010), arguing that the postconviction court erred when it denied his petition for relief; that the district court erred when it instructed the jurors; that the prosecutor committed misconduct when she elicited vouching testimony from witnesses and commented on witnesses' credibility in her closing argument; and that there was insufficient evidence to prove that appellant sexually penetrated one of the victims in Hennepin County on or between January 1, 2003, and January 1, 2006. We affirm.

FACTS

Appellant Oswald Reid was prosecuted as a result of two different investigations, one in 2007 and one in 2010. During the 2007 investigation, A.B.W. accused appellant of sexually assaulting her. A.B.W.'s cousin, S.W., was appellant's stepdaughter, and A.B.W. claimed that the assault occurred at S.W.'s home and that S.W. was present when it happened. Champlin Police Department Investigator Derek Goodwater questioned S.W., who claimed that no assault occurred. In 2010, S.W. approached another Champlin investigator, Timothy Meade, and said that she wanted to discuss the 2007 investigation. S.W. admitted that she had not been entirely truthful when giving her 2007 statement and that she wanted to "come clean." As a result of Investigator Meade's interview with S.W. in 2010, he reopened the 2007 case, and appellant was eventually charged with four counts of first-degree criminal sexual conduct and one count of third-degree criminal

sexual conduct against three different victims. Appellant did not request to sever the charges, and a single trial was held on all five counts.

At trial, after each side presented its opening statement and before any witnesses testified, the district court issued an instruction to the jurors:

(Whereupon, a discussion was had at the bench off the record.)

THE COURT: All right. Members of the jury, in this case the state will present evidence to prove criminal sexual conduct charges involving three separate alleged victims. The charges concerning each alleged victim are to be considered separately and individually, and each must be proven by proof beyond a reasonable doubt before the defendant can be found guilty of an individual charge.

Evidence presented as to each charge is not admissible to prove character in order to show that the defendant acted in conformity with that character, but may be admissible to show other matters—and if the attorneys could approach?

(Whereupon a discussion was had at the bench off the record.)

THE COURT: Specifically, such evidence may be admissible to show opportunity, plan, knowledge or absence of mistake or accident.

After this instruction was given, victims A.P., S.W., and A.B.W. testified, as did both Champlin investigators. The prosecutor asked S.W. questions about why she came forward in 2010 and whether she thought it was possible that A.B.W. was assaulted. The prosecutor asked Investigator Meade why S.W. decided to go to the police in 2010, what S.W. said about her belief of A.B.W.'s allegations, and why he reopened the investigation in 2010. Investigator Meade testified that S.W. told him that she believed

A.B.W. was assaulted and that she wanted to go to the police because she wanted to tell the truth and she had not been entirely truthful in 2007. Investigator Meade also testified that he reopened the investigation because there was new evidence, based on S.W.'s statements, and because he believed that S.W. was telling the truth.

A.P. testified that appellant touched her when appellant lived in Champlin and she was 13 or 14 years old.¹ Appellant lived in two different houses in Champlin, one house was on West River Road and the other house was on Hampshire Court. Both houses are in Hennepin County. Appellant lived at the house on Hampshire Court from March 3, 2003 until October 2005. A.P. testified that the touching happened at the house on West River Road.

During her closing argument, the prosecutor argued that the victims were credible witnesses and that they were being honest. Appellant did not object to any statements in the prosecutor's closing argument. Appellant's counsel entered an objection to the court's cautionary instruction, arguing that the language instructing the jury that the testimony was admissible to show opportunity, plan, knowledge, or absence of mistake or accident should be stricken. Appellant's counsel argued that, because a *Spreigl* analysis had not been conducted, this *Spreigl* portion of the instruction was not appropriate. The district court again issued this same instruction in its final instructions to the jury, and a copy of the instruction accompanied the jury into deliberations.

¹ A.P. was born on November 18, 1989. On January 1, 2003, A.P. was 13 years old, and she turned 16 years old on November 18, 2005.

The jury found appellant guilty of all five counts of criminal sexual conduct. The court sentenced appellant to consecutive sentences of 144 months on three of the counts of first-degree criminal sexual conduct, a concurrent sentence of 144 months for the remaining count of first-degree criminal sexual conduct, and a concurrent sentence of 108 months for the single count of third-degree criminal sexual conduct. Appellant filed an appeal with this court and then moved for a stay of that appeal pending postconviction proceedings in district court.

In his petition for postconviction relief, appellant argued that he should be granted a new trial because the district court judge who presided at his trial, Patricia Kerr Karasov, “disqualified herself from being a district judge, or forfeited her judicial office, by violating the residence requirement of the Minnesota Constitution, thereby depriving her of any judicial authority and rendering [appellant’s] trial invalid.” The postconviction court denied appellant’s petition, stating that appellant “fails to show that the law considers Judge Karasov to have forfeited her judicial office. However, even if [appellant] had shown that Judge Karasov forfeited her judicial office, [appellant] is not entitled to post-conviction relief because Judge Karasov presided over [appellant’s] case as a judge *de facto*.”

While appellant’s postconviction petition was pending, the Minnesota Supreme Court issued an opinion in response to a formal complaint filed by the Minnesota Board on Judicial Standards (Board) against Judge Karasov. *In re Conduct of Karasov*, 805 N.W.2d 255 (2011). The court concluded that the Board proved by “clear and convincing evidence that Judge Karasov failed to reside within her judicial district during

her continuance in office.” *Id.* at 258. The court held that Karasov “did not reside in her judicial district from July 1, 2009, to September 30, 2009, in violation of Minn. Const. art. VI, § 4.” *Id.* at 268. As a result, the court censured Judge Karasov for judicial misconduct and suspended her from judicial office without pay for six months. *Id.* at 277.

Nearly two months later, the district court denied appellant’s postconviction petition, and appellant moved to reinstate his appeal in this court. This court granted the motion, dissolved the stay of appellant’s appeal, and this appeal followed.

DECISION

I.

Appellant argues that the postconviction court erred when it denied his petition for relief. “When reviewing a postconviction court’s decisions, we examine only whether the postconviction court’s findings are supported by sufficient evidence.” *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). “[A] postconviction court’s decision will not be disturbed absent an abuse of discretion.” *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006). In reviewing a postconviction court’s decision to grant or deny relief, issues of law are reviewed de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

A.

“Each judge of the district court in any district shall be a resident of that district at the time of his selection and during his continuance in office.” Minn. Const. art. VI, § 4.

Appellant argues that, when Judge Karasov failed to reside in her judicial district from July 1, 2009, to September 30, 2009, she forfeited her judicial office and therefore lacked the authority to preside over his trial. Appellant contends that the “consequence of violating the residency requirement [of Minn. Const. art. VI, § 4] is permanent loss of judicial office.”

Appellant also argues that Minn. Stat. § 351.02(4) (2010), relating to vacancies in public office, demonstrates that Judge Karasov vacated her judgeship. Appellant cites a separate provision that limits certain portions of chapter 351 to elected county officials, a list that does not include district court judges. Appellant argues that this separate limiting provision “indicates that the remaining provisions of Chapter 351, including § 351.02, are not specifically limited to elected county officials and apply more broadly to all public offices including that of district judge.”

Finally, appellant relies on *State v. Harris* to argue that a person must be a district court judge in order to preside over a felony trial. 667 N.W.2d 911 (Minn. 2003). Appellant contends that *Harris* “supports the conclusion that if a judge’s forfeiture from judicial office can be established, then a judge lacked the authority to preside over a felony trial.” Appellant mischaracterizes *Harris*. The holding in *Harris*, more accurately stated, is that:

the legislative grant of authority to the chief judge of a judicial district to assign any district court matter to a judicial officer pursuant to Minn. Stat. § 487.08, subd. 5, violates Article VI, Section 1 of the Minnesota Constitution, because the grant of authority runs afoul of the constitutional mandate that judicial officers be inferior in jurisdiction to the district court.

Id. at 919–20.

At oral argument, appellant also noted the recent decision in *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012) (holding that the convictions must be reversed in order to correct the error committed when the judge that presided over the trial had agreed to testify as an expert witness for the same prosecuting authority in another trial). The court in *Pratt* held that the judge’s relationship with the prosecuting authority “would cause a reasonable examiner to question his impartiality” and that “reversal is required to maintain the public’s confidence in the independence, integrity, and impartiality of the judiciary.” *Id.* at 878–79. *Pratt* is distinguishable from the present case because appellant does not argue that Judge Karasov could not be impartial to the parties. There is no indication that Judge Karasov’s residency violation would cause a reasonable examiner to question her impartiality.

The Minnesota Supreme Court did impose disciplinary sanctions on Judge Karasov almost a year after appellant’s trial, but those sanctions were censure and a six-month suspension, and no statement or holding in the sanctions indicates that Judge Karasov was not a de jure judge² when she presided over appellant’s trial and sentencing. The supreme court did not hold or indicate that Judge Karasov had forfeited her office, and the sanction of a suspension of limited duration necessitates a conclusion that she did not forfeit her office. Moreover, the trial in this case did not occur during the time period

² A de jure judge is a judge who “exercises the duties of [the judge’s judicial] office for which the [judge] has fulfilled all of the qualifications.” *See Black’s Law Dictionary* 1193–94 (9th ed. 2009) (defining “officer de jure” and “judicial officer”).

wherein Judge Karasov was not residing in the Fourth District. In any case, because we conclude that Judge Karasov presided over appellant's trial as a de facto judge, we need not make a determination as to any additional characterization of her status while presiding over the trial.

B.

The postconviction court held that, even if Judge Karasov was not a de jure judge because she forfeited her judicial office, appellant is “not entitled to post-conviction relief because Judge Karasov presided over [appellant's] case as a judge *de facto*.” “A de facto judge is a ‘judge operating under color of law but whose authority is procedurally defective.’” *Harris*, 667 N.W.2d at 920 n.5 (quoting *Black's Law Dictionary* 845 (7th ed. 1999)).

The de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and of individuals whose interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It would be a matter of almost intolerable inconvenience, and be productive of many injustices, of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy.

Burt v. Winona & St. P. R. Co., 31 Minn. 472, 476, 18 N.W. 285, 286–87 (1884)
(quotation omitted).

While no previous Minnesota case directly addresses this issue,³ other jurisdictions have analyzed whether a judge who violates a residency requirement still has authority to preside over cases. See *Relative Value Studies, Inc. v. McGraw-Hill Cos.*, 981 P.2d 687, 688 (Colo. App. 1999) (“[A] properly appointed judge, despite even a conceded violation of the constitutional residency requirement, does not lose his or her authority to act as judge merely because of the violation.”); *Baker v. State*, 833 A.2d 1070, 1086 (Md. 2003) (noting that the judge was appointed and subsequently elected and was a duly qualified judge, but that he changed his residence during his term in violation of the residency requirement in the constitution, and holding that “even if, by virtue of a change of residence, [the judge] ceased to be a *de jure* judge, he was, until his retirement, at the very least a *de facto* judge”).

Similarly here, appellant does not argue that Judge Karasov was not a properly elected and qualified district court judge before her violation of the residency requirement. The Minnesota Supreme Court found that Judge Karasov did not reside in her district from July 1, 2009, to September 30, 2009. Appellant first appeared before Judge Karasov in August 2010, almost a year after she last resided outside of her district. Even if Judge Karasov forfeited her judicial office by residing outside of her district, she did not lose her authority to act as a judge based on the residency violation and was operating under color of law as a district court judge. Judge Karasov presided over

³ *State v. Irby*, ___ N.W.2d ___ (Minn. App. Sept. 4, 2012), addresses a similar issue where the appellant argued that Judge Karasov was not a *de jure* judge nor a *de facto* judge when she presided over his trial. This court in *Irby* also concludes that Judge Karasov was a *de facto* judge.

appellant's trial as a de facto judge. The postconviction court did not abuse its discretion by denying appellant's petition.

II.

Appellant argues that the district court erred when it gave the jury a partial *Spreigl* instruction regarding the testimony of the three victims. The charges were not severed, and appellant conceded at trial that "the testimony elicited [was] admissible." The only issue is whether the district court issued the proper instructions to the jury regarding use of the testimony.

District courts are allowed "considerable latitude" in the selection of language for 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 explained 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). "[A] misstatement of the law in a jury instruction requires reversal only if the error was prejudicial." *State v. Porter*, 674 N.W.2d 424, 429 (Minn. App. 2004). "Such an error is prejudicial and a new trial is required only if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.*

The record here suggests that appellant was the first to introduce the *Spreigl* language as part of the jury instructions. Given that appellant requested *Spreigl* language and acknowledged that the testimony was admissible, the prosecutor was relieved of an obligation to provide a *Spreigl* notice of intent to admit the evidence pursuant to Minn. R.

Evid. 404(b) and Minn. R. Crim. P. 7.02. See *State v. Mosby*, 450 N.W.2d 629, 632–33 (Minn. App. 1990) (“Evidence incidentally necessary as an element of substantive proof of the charged offense is not *Spreigl* evidence even though it relates to another crime of the defendant’s doing.”), *review denied* (Minn. Mar. 16, 1990). The instruction ultimately given by the court was language taken from Minn. R. Evid. 404(b) and included both the language requested by the appellant and the language requested by the prosecutor. All of the language related to the purposes for which evidence of other acts may be admitted.⁴

The state presented ample evidence at trial. All three of the victims testified in great detail about the times appellant assaulted them. Both investigators from the Champlin Police Department also testified for the state. The prosecutor did not rely on the *Spreigl* instruction in her closing argument; she highlighted the details of the victims’

⁴ Part of the instruction that appellant submitted to the district court to read before any witnesses testified, before each of the state’s witnesses testified, and in the final jury instructions stated: “When considering the charge or charges surrounding an individual person, the testimony concerning another person or persons is not to be used to prove the character of the defendant, or that the defendant acted in conformity with such character.”

When appellant objected to the instruction as given, the prosecutor explained:

What I objected to was what defense was requesting in terms of a partial—basically, a partial *Spreigl* instruction. They wanted the part about not using the other victim’s testimony towards the defendant’s character, or to find that he acted in conformity with that character, but they wanted to leave out the part about what it is legally appropriate to use another victim’s testimony for.

In response, the court had added language to the instruction stating, “such evidence may be admissible to show opportunity, plan, knowledge, or absence of mistake or accident.”

testimony, their credibility, and the elements of the charges against appellant. Based on this, it cannot be said that the partial *Spreigl* instruction had a significant impact on the verdict. Even if the district court erred in instructing the jury, it was not a prejudicial error.

III.

Appellant did not object at trial, but now argues that the prosecutor committed prosecutorial misconduct when the prosecutor asked S.W. whether she believed A.B.W.’s allegations of assault, when the prosecutor asked Investigator Meade what S.W. said about her belief of A.B.W.’s allegations, when the prosecutor asked Investigator Meade why he reopened the investigation, and when the prosecutor mentioned the “honest” testimony of the three victims in her closing argument.

“Ordinarily, the defendant’s failure to object to an error at trial forfeits appellate consideration of the issue.” *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006). “On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial rights.” *Id.*; *see also* Minn. R. Crim. P. 31.02. “With respect to any unobjected-to prosecutorial misconduct, we will apply the plain error doctrine.” *State v. Dobbins*, 725 N.W.2d 492, 506 (Minn. 2006); *see also Ramey*, 721 N.W.2d at 299.

“[B]efore an appellate court reviews unobjected-to trial error, there must be (1) error, (2) that is plain, and (3) affects substantial rights.” *Id.* at 302 (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). “If each of these requirements is met, we then assess whether we should address the error to ensure fairness and the integrity of the

judicial proceedings.” *State v. Prtine*, 784 N.W.2d 303, 314 (Minn. 2010); *see also Ramey*, 721 N.W.2d at 302.

A.

Prosecutors may not elicit vouching testimony from trial witnesses. *Van Buren v. State*, 556 N.W.2d 548, 551 (Minn. 1996). “[O]ne witness cannot vouch for or against the credibility of another witness.” *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998).

In her examination of S.W., the prosecutor asked S.W. if she thought it was possible that the assault of A.B.W. happened, but she did not specifically ask if S.W. believed A.B.W. When the prosecutor asked why Investigator Meade chose to reopen the investigation, he responded that he did so because there was new evidence, based on S.W.’s statements, and because he believed that S.W. was telling the truth. Instead of focusing on Investigator Meade’s statement about S.W.’s truthfulness, the prosecutor followed up by asking, “So was this a situation where there had been a substantial change in the information you had in the case?”

It appears that the prosecutor did not intend to elicit vouching testimony from Investigator Meade. The prosecutor did not ask Investigator Meade if he thought S.W. was telling the truth. She asked him why he decided to reopen the case. She then followed up by highlighting that he had new information with which to reopen the case. If she had intended to solicit vouching testimony, it is more likely that she would have focused on why he thought S.W. was truthful. She did not, and it appears that she was

not intentionally eliciting vouching testimony. Because the prosecutor did not commit error, we need not address the second and third prongs of the plain-error analysis.

B.

“It is improper for a prosecutor in closing argument to personally endorse the credibility of witnesses.” *State v. Porter*, 526 N.W.2d 359, 364 (Minn. 1995). “This rule, however, ‘is not designed to prevent the prosecutor from arguing that particular witnesses were or were not credible.’” *State v. Leutschaft*, 759 N.W.2d 414, 425 (Minn. App. 2009) (quoting *State v. Everett*, 472 N.W.2d 864, 870 (Minn. 1991)), *review denied* (Minn. Mar. 17, 2009). “The use of the first-person pronoun ‘I’ indicates that the prosecutor has injected his or her personal opinion into an argument.” *Leutschaft*, 759 N.W.2d at 425.

In *Leutschaft*, the prosecutor described a witness’s testimony during his closing argument:

You saw [the witness] for quite a while, observed her, listened to her, heard her sworn testimony. She’s not some flaky individual. She’s a responsible, mature person who works at a responsible job taking care of people, who has five children. She’s not a vindictive person, which she would have to be to be making this up, who is going to go to all and any lengths to get back at [the defendant] for what? Tailgating her? Telling her to move over into another lane? Do you believe that? Is that reasonable? Does that match with common sense? No, it doesn’t. Quite to the contrary, [the witness] was very honest on the stand, both on direct and cross. She did as best she could to tell you what it is she saw, and she knows what she saw.

759 N.W.2d at 424–25. This court determined that the prosecutor’s arguments were not improper; the court noted that the prosecutor called the jury’s attention to the witness’s

testimony and argued that it was plausible and that the witness testified honestly. *Id.* at 425.

Similarly, the prosecutor here was discussing the testimony in context of whether it was plausible. She argued that the stories of the three victims were different and that, if they were lying, their stories would match up better than they did. The prosecutor did not interject her own opinion about the victims' credibility by using the word "I," but rather argued that the victims' testimony was honest. The prosecutor did not err by arguing that S.W. and the other victims testified honestly. Because the prosecutor did not err, we need not address the second and third prongs of the plain-error analysis.

IV.

Appellant argues that there was insufficient evidence to prove that he sexually penetrated A.P. in Hennepin County on or between January 1, 2003, and January 1, 2006. In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the case depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing 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).

Appellant argues that the state failed to prove that appellant sexually penetrated A.P. in Hennepin County on or between January 1, 2003, and January 1, 2006. Appellant claims that there was no evidence to prove this element of the charge and that there was testimony that appellant did not live on West River Road until July 2006, which is after the time alleged in this charge.

Because we view the evidence in the light most favorable to the conviction, it appears that the jury could reasonably conclude that appellant was guilty of the charged offense. A.P. testified that she was sure that no penetration occurred after she turned 16 years old because that is when she was able to make her own choices about visiting appellant's house. A.P. was certain that the penetration happened when she was 13 or 14 years old. A.P. also testified that the penetration occurred at appellant's house in Champlin, although she thought it occurred at the house on West River Road. We assume that the jury believed A.P.'s testimony. Because appellant lived in two different houses in Champlin, it appears that a jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that A.P. was correct about the time that the penetration occurred, but was mistaken about where the penetration occurred. Either house in Champlin would satisfy the state's burden to prove that the penetration occurred in Hennepin County. If the jury believed A.P. that the penetration occurred while appellant lived in Champlin, and that it occurred when she was 13 or 14 years old, then the penetration would have occurred

between January 1, 2003, and January 1, 2006. There was sufficient evidence for the jurors to reach the verdict that they did.

Affirmed.