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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0362

State of Minnesota,
Respondent,

vs.

Carnell Cobb,
Appellant.

Filed February 25, 2013
Affirmed in part, reversed in part, and remanded
Chutich, Judge

Mille Lacs County District Court
File No. 48-CR-10-2508

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Janice Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Mark D. Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

On appeal from his conviction of multiple counts of first- and second-degree criminal sexual conduct, appellant Carnell Cobb argues that the prosecutor committed

prejudicial misconduct by asking the victim's mother, with whom Cobb had lived, whether Cobb possessed pornography and by asserting a fact not in evidence that a neighbor had seen Cobb and the victim alone together. Cobb also contends that his convictions and sentences on all counts, other than his conviction on count 3 (first-degree criminal sexual conduct based on a significant relationship and multiple acts of penetration over an extended time), must be vacated because they are lesser-included offenses. We conclude that the prosecutor's questions did not amount to prejudicial misconduct. Because the conviction on count 3 subsumed the remaining convictions, we affirm Cobb's conviction on count 3, reverse the remaining convictions, and remand.

FACTS

In June 2006, Cobb met the victim's mother and moved into the apartment she shared with H.G., her then-eight-year-old son. Cobb, H.G., and H.G.'s mother lived together for only a few months. Four years later, in July 2010, H.G. first reported that Cobb sexually assaulted him during that summer of 2006 when they lived together. After further investigation into H.G.'s allegations, the state charged Cobb with six counts of criminal sexual conduct. Following a jury trial, Cobb was convicted of all six offenses.

During the investigation into H.G.'s allegations against Cobb, social worker Aaron Strong conducted a recorded CornerHouse-style[1] forensic interview of H.G. During the interview, H.G. described in detail how he had been sexually abused, accused Cobb of the assaults, and commented that he had once walked in on Cobb and his mother

[1] A CornerHouse-style interview is a protocol for questioning young children and involves, among other things, the use of open-ended questions and anatomically correct dolls.

watching a video with "naked people in [it]." H.G. clarified that Cobb never made H.G. watch the videos. The video of the CornerHouse-style interview was admitted into evidence and played for the jury at trial, and a transcript of the interview was provided to the jury as well.

At trial, H.G. testified that, during the summer of 2006, Cobb and H.G.'s mother would usually "hang out" inside the apartment during the day while H.G. would "hang out" around town with his friends. H.G. recalled being alone with Cobb approximately 20–30 times that summer. H.G. explained that his mother experienced health issues that summer, had regular medical appointments every other week, and was in the emergency room about once a week. Once or twice a month, H.G.'s mother spent the night at the hospital. H.G. testified that, when his mother was at the hospital, he stayed at the apartment with Cobb or went downstairs to his friend's apartment.

H.G. also testified that, two or three weeks after Cobb moved in, Cobb began "forc[ing]" H.G. to "have sex with him." H.G. said that the sexual assaults occurred approximately ten times. H.G. explained that he did not tell anyone that summer what Cobb was doing because he "did not want [Cobb] to kill [him]" and H.G. was afraid his mother would not believe him.

In July 2010, H.G. told his girlfriend that he had been raped several years earlier. This disclosure was the first time H.G. told anyone about the sexual assaults. After his conversation with his girlfriend, H.G. told his mother that Cobb had raped him and that H.G. wanted Cobb to be in prison.

H.G.'s mother testified that she experienced numerous health issues and attended frequent medical appointments throughout the summer of 2006. She testified that she never noticed any inappropriate behavior, sexual or otherwise, between Cobb and H.G., and that she never had any "motherly feelings" that something was not right. H.G.'s mother did recall that, shortly after Cobb first moved in, he and H.G. went from having a friendly, "buddy buddy" relationship to H.G. not wanting to be around Cobb. She testified that H.G. "absolutely hated [Cobb]." During direct examination, the prosecutor asked her, "To your knowledge, did the defendant have pornography in the house?" Before H.G.'s mother answered, defense counsel objected and the district court sustained the objection.

Jessica Vittum, a child-protection investigator with Mille Lacs County, provided testimony regarding how and why delayed disclosure of sexual abuse can occur. She explained that delayed disclosure is the most common reaction by children to sexual abuse because they are afraid that they are not going to be believed or that someone they care about will be hurt as a result of reporting the abuse.

Brad Barnes, the investigator with the county sheriff's department assigned to H.G.'s case, also testified at trial. Barnes interviewed Cobb twice during his investigation. In the first interview, Cobb wondered why H.G. and his mother would wait so long to bring up these allegations. Cobb denied that he had inappropriate relations with H.G. and denied that he and H.G. had ever been alone together in the apartment.

Barnes obtained records from two area hospitals covering the relevant time period of June 1 to September 1, 2006. He testified that although he did not receive records from every hospital and clinic in the area, the records he did receive showed that H.G.'s mother had not stayed overnight in those hospitals during that time. Barnes explained that he did not collect any physical evidence during his investigation because H.G. and his mother no longer lived in the apartment where the incidents occurred.

Cobb testified in his own defense. He did not remember H.G.'s mother staying overnight at a hospital during the time he lived with her, but he did remember that she once stayed overnight at a sleep clinic. Cobb claimed that the night H.G.'s mother was gone, H.G. stayed with his grandmother and that Cobb was never alone with H.G.

On cross-examination, the prosecutor asked Cobb whether a certain neighbor and friend ever saw him and H.G. home alone together. Defense counsel objected, asserting that the question stated facts not in evidence. The judge directed the prosecutor to rephrase the question, and the prosecutor then asked Cobb "are you disagreeing with the fact that [this neighbor] saw times when you were home alone with [H.G.]?" The defense again objected, the judge overruled the objection, and Cobb responded, "I would be outside. [H.G.] would be outside. We wouldn't be in the house. [H.G.] would go play with his friends or whatever." When asked whether he was ever alone with H.G. in the apartment, Cobb responded that there were times where he would be watching television and H.G. would "come in and run right back out."

Steven Voshell, principal of the local elementary school, testified that he interacted with H.G. approximately 15–20 times when H.G. attended the school. He

stated that, in his opinion and based on his professional knowledge, H.G. had a reputation with some people around the school for untruthfulness and that, as a result, he questioned the credibility of H.G.'s testimony.

The jury found Cobb guilty of all six counts of criminal sexual conduct. The district court sentenced Cobb to 189 months in prison on count 3, and imposed a concurrent 57-month sentence on count 5 (second-degree criminal sexual conduct involving sexual contact where the defendant has a significant relationship with a victim who is under 16 years of age). The district court entered the remaining counts as convictions, without imposing any additional sentences. This appeal follows.

D E C I S I O N

I. Prosecutorial Misconduct

Cobb argues that the prosecutor committed prejudicial misconduct by raising the subject of pornography and by asserting that H.G. and Cobb had been seen alone together by a neighbor, a fact not in evidence.

Generally, misconduct results when a prosecutor violates clear or established standards of conduct such as "rules, laws, orders by a district court, or clear commands in this state's case law." *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007). Not every instance of misconduct results in a new trial, however. When reviewing objected-to prosecutorial misconduct, misconduct deemed serious will not result in a new trial if the misconduct is "harmless beyond a reasonable doubt" and "the verdict rendered was surely unattributable to the error." *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003) (quotation omitted). Misconduct deemed less serious will be found harmless and no new

trial will be granted if it is unlikely the misconduct "played a substantial part in influencing the jury to convict." *Id.* (quotation omitted); *see also State v. McDaniel*, 777 N.W.2d 739, 749 (Minn. 2010).[2]

A. Question About Pornography

Cobb argues that the prosecutor's question to H.G.'s mother regarding whether Cobb possessed pornography was irrelevant and highly prejudicial, and that it amounted to inadmissible and unnoticed *Spreigl* evidence. Cobb contends there was no reason to ask this question because whether he had pornography was not relevant to proving any fact at issue.

It is misconduct to elicit or to attempt to elicit inadmissible evidence, even if there has been no prior ruling on admissibility. *Fields*, 730 N.W.2d at 782 n.1. Generally, evidence of a defendant's past crimes, wrongs, or bad acts, known as *Spreigl* evidence, may not be admitted "to prove the defendant's character for committing crimes." *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009).

Under the facts of this case, we conclude that the prosecutor's single and unanswered question to H.G.'s mother was not misconduct because it was relevant to H.G's credibility. During H.G.'s CornerHouse-style interview, H.G. confirmed that he saw Cobb and his mother watching movies together that contained images of "naked people." At trial, the defense attempted to discredit H.G.'s credibility and truthfulness.

[2] The supreme court in *McDaniel* recited this two-tiered approach to objected-to prosecutorial misconduct claims, but noted that "[w]e have not yet decided whether this two-tiered approach . . . 'remains viable.'" *McDaniel*, 777 N.W.2d at 749 (quoting *State v. Graham*, 764 N.W.2d 340, 348 (Minn. 2009)). The *McDaniel* court was able to resolve the appellant's claims without reaching the issue. *Id.*

If H.G.'s mother had confirmed that she and Cobb watched movies with naked people in them, part of H.G.'s statements would have been corroborated. *See State v. Hanson*, 355 N.W.2d 328, 329 (Minn. App. 1984) (reversing trial court's suppression of sexually oriented magazines that child victim had described, in part because they "may assist the jury in determining [the victim's] credibility").

Moreover, the prosecutor's sole question did not result in the introduction of inadmissible evidence because H.G.'s mother did not answer the question, and the question itself was not evidence. *See State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (stating that questions and statements of attorneys are not evidence). The district court instructed the jury accordingly, and further told the jury that it should not "speculate as to possible answers to questions [the district court] did not require to be answered." Under these circumstances, the single question, to which objection was successfully made, was not misconduct.

B. Question Regarding Neighbor's Observations

Cobb next contends that the prosecutor's question asserting that a neighbor at the apartment complex had seen Cobb and H.G. alone together was misconduct because it stated facts not in evidence. Cobb argues that the misconduct was prejudicial because a "key aspect of the defense was that [Cobb] had not been alone with H.G." Questions by a prosecutor that intentionally misstate evidence or assert prejudicial facts not in evidence are likely misconduct. *State v. Mayhorn*, 720 N.W.2d 776, 788–89 (Minn. 2006).

We agree with Cobb that the prosecutor's question was improper. Because the state never called the neighbor to testify, the prosecutor's question asserting that the neighbor had seen Cobb and H.G. alone was misconduct.

Even assuming that this misconduct was serious, however, we conclude that it was harmless because the guilty verdict was "surely unattributable to the error." *Powers*, 654 N.W.2d at 678. First, in response to the question, Cobb never affirmed or denied that the neighbor had seen him and H.G. alone. Cobb's response to the prosecutor's question was that "I would be outside. [H.G.] would be outside. We wouldn't be in the house." Second, Cobb admitted later during his testimony that there *were* times, albeit brief, when he and H.G. were alone together in the house. Third, H.G. and his mother both testified that H.G. and Cobb were alone together when H.G.'s mother was gone because of medical issues. Given the totality of evidence showing that Cobb had opportunities to be alone with H.G., the prosecutor's single question about the neighbor was harmless beyond a reasonable doubt.

In addition, the weaknesses in the state's case that Cobb identifies in his attempt to show the misconduct resulted in an unfair trial—H.G.'s four-year delay in reporting the sexual abuse, the absence of corroborating physical evidence, and H.G.'s poor credibility—were all raised and emphasized by the defense at trial. By contrast, the state presented evidence that H.G. and Cobb were alone together and H.G.'s explicit testimony about the sexual abuse. H.G.'s mother corroborated some of H.G.'s testimony when she testified that she was frequently gone at the doctor's office during the summer Cobb lived with her. The evidence presented by the state thus provided a basis for the jury to reject

testimony to the contrary, and the prosecutor's improper claim that the neighbor saw Cobb and H.G. together was harmless beyond a reasonable doubt.

II. Sentencing Issues

Minnesota law prohibits multiple convictions of the same offense, or of one offense and a lesser-included offense, on the basis of the same criminal act. Minn. Stat. § 609.04 (2012) (providing that a defendant may be "convicted of either the crime charged or an included offense, but not both"). In applying section 609.04, this court looks at "the statutory definitions rather than the facts in the particular case to determine whether the lesser offense is necessarily included." *State v. Whisonant*, 331 N.W.2d 766, 769 (Minn. 1983). An offense is "necessarily included" in a greater offense if it is impossible to commit the greater offense without committing the lesser offense. *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986).

Cobb asserts, the state concedes, and we agree that Cobb's convictions of first-degree criminal sexual conduct contained in counts 1 and 2, as well as the remaining counts of second-degree criminal sexual conduct (counts 4, 5, and 6) should be vacated, along with the concurrent sentence imposed on count 5.[3] Under section 609.04, Cobb's conviction for count 3 subsumed and precluded entry of convictions for the other counts.

[3] In addition to count 5 being a lesser-included offense of count 3, the district court plainly erred in failing to instruct the jury that the sexual contact in count 5 could include H.G.'s touching of Cobb's intimate parts. *See State v. Mahkuk*, 736 N.W.2d 675, (Minn. 2007) (holding that a jury instruction that eliminates a required element of the crime is error that is not harmless beyond a reasonable doubt).

We therefore affirm the conviction on count 3, reverse the remaining convictions, and remand the case to the district court to vacate the five improper convictions.

Affirmed in part, reversed in part, and remanded.