STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0260

State of Minnesota,
Respondent,

vs.

Nathan Obeta,
Appellant.

Filed March 11, 2013
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-K9-07-003955

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

On appeal from his conviction of first- and third-degree criminal sexual conduct following a retrial, appellant argues that the district court once again erred by (1) excluding all evidence of the complainant's history of using a chat line to meet men; (2) prohibiting him from cross-examining the complainant about a prior false allegation of assault; and (3) allowing the prosecutor to introduce the complainant's out-of-court statement to a sexual-assault nurse as a prior consistent statement or a statement made for the purpose of a medical diagnosis. He argues that these cumulative errors entitle him to a new trial. Because we conclude that the district court's error in prohibiting appellant from cross-examining complainant about the assault allegation was harmless beyond a reasonable doubt and because there were no other evidentiary errors, we affirm.

FACTS

The parties do not dispute the facts of the alleged sexual assault as set out in *State v. Obeta* (*Obeta II*), 796 N.W.2d 282 (2011) and *State v. Obeta* (*Obeta I*), No. A08-1419, 2009 WL 2596102 (Minn. App. Aug. 25, 2009), *review denied* (Minn. Nov. 17, 2009). Briefly stated, appellant Nathan Obeta and his friend met the complainant, M.B., and her friend on the evening of April 25, 2007, in Isanti, Minnesota. That evening, police arrested appellant's friend and impounded the car he was driving. Upon the friend's release from police custody, M.B. convinced her ex-boyfriend, T.G., to give her and the two men a ride to St. Paul. After spending the day collecting money, appellant obtained the car from an impound lot near Isanti. Instead of driving M.B. back to her home as

requested, appellant drove M.B. and his friends to St. Paul. M.B. alleged that, after dropping his friends off, appellant forced her to have sexual intercourse in the car.

Afterwards, M.B. went to a nearby gas station where she used the bathroom and asked to use the phone, telling the attendant that she was stranded. M.B. was unable to find a ride, and went across the street to wait in a Taco Bell. Two to three hours after the alleged assault, M.B. flagged down a police officer to report that appellant had raped her. The officer took M.B. to a hospital where she was examined by a sexual-assault nurse.

Following a jury trial, appellant was found guilty and convicted of first- and third-degree criminal sexual conduct. On appeal, this court reversed his convictions based on the cumulative effect of several trial errors, and remanded for a new trial. *Obeta I*, 2009 WL 2596102 at *5-6. The supreme court denied review. On remand, the state requested a pretrial order allowing it to present evidence from an expert to testify about counterintuitive rape-victim behavior. The district court denied the request, and the state appealed. The supreme court accepted accelerated review and reversed the district court, holding that the district court did have discretion to admit expert opinion testimony on rape-victim behavior in adult criminal-sexual-conduct cases. *Obeta II*, 796 N.W.2d at 294.

On remand, the case returned to the district court for a second jury trial. Before trial, appellant discovered new evidence that it believed was relevant to his defense of consent. At appellant's first trial, M.B.'s friend, E.K. testified that she met Obeta and his friend through Livelinks, a chat line service, and invited them to her home. Livelinks is a chat line service for callers over 18 years of age that allows individuals to record

greetings, listen to others' greetings, and send messages to persons in whom they are interested. Livelinks users often use the service as a way to connect and meet with other Livelinks users in person. M.B. testified that she learned only later in the evening that E.K. had met the men through Livelinks. But, before the second trial, E.K.'s sister, J.K., came forward with new information about M.B.'s involvement with the Livelinks service. The district court continued the trial for an evidentiary hearing, at which the defense called both E.K. and J.K.

E.K. testified that she and M.B. used Livelinks to connect with men and invite the men to E.K.'s house in Isanti. The women would then entertain their male visitors with activities including drinking alcohol, smoking marijuana, and sometimes, sex. E.K. testified that she had sex with these men around 85% of the time, sometimes for money, and described herself as a "prostitute." She testified that M.B. sometimes left the house with men she had met through Livelinks and had sex with the men she met through Livelinks 20-25% of the time, but she did not know if M.B. charged money for sex. Finally, E.K. testified that, after M.B. alleged that appellant sexually assaulted her, the women continued their Livelinks activity.

J.K. testified that she was aware of E.K. and M.B.'s Livelinks activities because she lived in the house with E.K. She testified that M.B. spent the night at the house about five nights per week. J.K. testified that she witnessed M.B. performing oral sex a few times, a threesome involving E.K., M.B. and a man, and M.B. having sex with a man on a car in the driveway. She also testified that M.B. would sometimes leave the house with her male visitors and estimated such occurrences to happen three or four times per month.

Finally, J.K. also testified that a few days after M.B. alleged that appellant sexually assaulted her, M.B. returned to her Livelinks activity.

Based on this testimony, appellant moved to present evidence of M.B.'s involvement with Livelinks, including evidence of her sexual conduct both before and after the alleged assault, to support his consent defense. The district court denied the motion, ruling that the evidence was inadmissible under Minn. R. Evid. 412.

Before trial, appellant also renewed his motion to question M.B. about a prior allegation of assault against her ex-boyfriend, T.G. In November 2006, M.B. called the police to report that she had been assaulted by T.G., her boyfriend at the time. After interviewing and observing M.B. and T.G., the responding police officer concluded that the evidence suggested that it was M.B., and not T.G., who had been the aggressor. The officer then arrested M.B. for domestic assault.

At the first jury trial, the district court prohibited the defense from cross-examining M.B. about the evidence because it concluded that "information about the relationship between M.B. and T.G. was not relevant and was more prejudicial than probative." *Obeta I*, 2009 WL 2596102 at *4. This court held that the district court erred in excluding the evidence and that appellant "should have been allowed to cross-examine M.B. . . . [because the ruling] limited appellant's ability to probe M.B.'s character for truthfulness . . . ." *Id.*

On remand, the prosecutor opposed appellant's renewed motion to question M.B. about this incident, arguing that the 2006 allegation was relevant only to illuminating the relationship between M.B. and T.G., who had testified at the first trial, but whom the

prosecutor did not intend to call as a witness in the second trial. The district court agreed that the 2006 allegation was no longer relevant and prohibited the defense from cross-examining M.B. about it.

Finally, appellant also renewed his objection to the out-of-court statement M.B. made to the sexual-assault nurse examiner. At the first trial, the entire recording was admitted into evidence as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B), despite some inconsistencies with M.B.'s trial testimony. This court concluded that the district court erred by failing to "either exclude the entire audiotape or redact the inconsistent statements in that tape . . . ." *Obeta I*, 2009 WL 2596102 at *5. At the retrial, the district court again allowed the prosecutor to play the recording in its entirety.

Following the second jury trial, appellant was again found guilty of first- and third-degree criminal sexual conduct. He now challenges the district court's decisions to exclude evidence of M.B.'s prior sexual conduct, to prohibit appellant from cross-examining M.B. about her prior allegation of assault, and to allow the prosecutor to introduce M.B.'s out-of-court statement to the sexual-assault nurse; finally, he argues that the cumulative effect of these errors entitles him to a new trial.

D E C I S I O N

I. Complainant's Prior Sexual Conduct

Appellant argues that the district court abused its discretion and violated his constitutional right to present a defense and to confront witnesses by excluding evidence of M.B.'s history of using Livelinks. A reviewing court examines a district court's evidentiary rulings for an abuse of discretion. *State v. Davis*, 546 N.W.2d 30, 33 (1996),

review denied (Minn. May 21, 1996). Here, the district court denied appellant's motion to present evidence of M.B.'s history of using Livelinks pursuant to Minn. R. Evid. 412 (often referred to as the "rape shield" rule), which provides:

> (1) In a prosecution for acts of criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in rule 412. Such evidence can be admissible only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the following circumstances:
>
> (A) When consent of the victim is a defense in the case,
>
> (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent; . . . .

Id. The purpose of the rule is to guard a complainant's privacy and to protect a complainant from harassment. *State v. Caswell*, 320 N.W.2d 417, 419 (Minn. 1982).

Appellant disputes the inadmissibility of M.B.'s sexual history, arguing that despite the rape-shield rule, he has a constitutional right to present evidence material and favorable to his theory that M.B. consented to have sex after connecting with him using the Livelinks service. "Every criminal defendant has a right to fundamental fairness and to be afforded a meaningful opportunity to present a complete defense." *State v. Crims*, 540 N.W.2d 860, 865 (1995), *review denied* (Minn. Jan. 23, 1996). "The right to present a defense includes the opportunity to develop the defendant's version of the facts, so the jury may decide where the truth lies." *Id.* A defendant also has a right to confront an adverse witness to reveal bias or disposition to lie. *Id.* "To vindicate these rights, courts must allow defendants to present evidence that is material and favorable to their theory of

the case." *Id.* at 866. "In the event of a conflict, the defendant's constitutional rights require admission of evidence excluded by the rape shield law."[1] *Id.*

The rape-shield rule usually does not affect a defendant's right to present a defense because the rule is based on the premise that a person's character is generally irrelevant to a specific case. *Davis*, 546 N.W.2d at 34. "However, when a victim's sexual history involves a *pattern* of *clearly* similar behavior constituting habit or modus operandi and is favorable to the defendant's theory of consent, the evidence becomes relevant, material, and *potentially* admissible as a matter of constitutional law." *Id.*, *see also Crims*, 540 N.W.2d at 868 (noting a constitutional defendant's right to present evidence that is material and favorable to the theory of defense). "To qualify as a pattern of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects." *Davis*, 546 N.W.2d at 34. Modus operandi is defined as those activities "so unusual, so outside the norm, and so distinctive as to constitute a signature." *Crims*, 540 N.W.2d at 868 (quotation omitted).

In ruling that appellant's proffered evidence regarding M.B.'s Livelinks activities was inadmissible, the district court noted that, "on the surface it appears that there is great similarity between the incidents that have occurred previously." But the district court found that the prior incidents were not sufficiently similar because "the activity which took place, took place almost 24 hours later, several hours later, at a totally different location. It involved numerous intervening circumstances which make the conduct—

[1] Minn. R. Evid. 412 has a counterpart rape-shield statute, Minn. Stat. § 609.347, subd. 3 (2012).

which separate the sexual conduct in this case from the way it might have otherwise occurred." Therefore, the district court concluded that "the probative value of the evidence in question, that is to say, the alleged victim's previous activities through Livelinks is, in fact, outweighed by its inflammatory or prejudicial nature and may not be admitted in this case."

The district court did not abuse its discretion in denying appellant's motion to admit this evidence. Appellant argues that M.B.'s prior sexual conduct was relevant and admissible because it established a common scheme or plan by which M.B. and E.K. would leave messages on Livelinks describing themselves and indicating an interest in partying, invite desirable men to E.K.'s home, drink alcohol and sometimes smoke marijuana with the men, and M.B. would have sex with the men 20-25% of the time. But M.B.'s history of using Livelinks to connect with men and occasionally have consensual sex is irrelevant to the charge of rape without evidence of modus operandi. *See id.* (finding a victim's history of exchanging sex for *drugs* was not clearly similar to a theory of consent to trade sex for drug *money*).

A careful review of the record here shows no pattern of clearly similar behavior. First, E.K. testified that M.B. only engaged in sexual activity with men she met through Livelinks "twenty, twenty-five percent [of the time] maybe." On this testimony, M.B. was *not* engaging in consensual intercourse with men she met through Livelinks 75-80% of the time. Moreover, under our caselaw, the sexual behavior was not "similar in all material respects." *See Davis*, 546 N.W.2d at 34. Although M.B. and E.K. connected with appellant through Livelinks, neither E.K. nor J.K. testified that M.B. had ever

engaged in sexual activity with a man she met through Livelinks either on the day after connecting and partying at E.K.'s or at a location other than E.K.'s home. Unlike the consensual encounters arranged through Livelinks that occurred in E.K.'s home during the course of partying, the sexual contact here occurred the next day, in a different city, and in a car. On this record, appellant has failed to establish a pattern of clearly similar behavior, and thus did not demonstrate the relevance of M.B.'s sexual history to his defense. Therefore, appellant's claims of constitutional error must fail.

Appellant also argues that the district court abused its discretion by not allowing cross-examination or testimony about E.K.'s and M.B.'s familiarity with Livelinks. The district court did not allow appellant to question E.K. or M.B. about their previous usage of Livelinks because it believed that the questions were an attempt to raise an improper inference of previous sexual conduct. But E.K. did testify that she was "absolutely" familiar with Livelinks, and M.B. did not deny familiarity with Livelinks. Appellant argues that he should have been allowed to cross-examine M.B. in order to undermine her credibility after she suggested that she believed the men were E.K.'s "friends." But M.B. testified that, while she first thought the men were E.K.'s friends, she learned shortly after meeting them at E.K.'s home that E.K. had met them on Livelinks and that she was not surprised by this information. But she denied being present when E.K. listened to the men's recordings or connected with them over the phone. As discussed above, appellant's attempt to establish "context" by introducing evidence of M.B.'s history of using Livelinks is barred by Minn. R. Evid. 412, and the district court did not abuse its discretion in excluding this evidence.

II. Complainant's Prior Allegation of Assault

In *Obeta I,* we determined that the district court erred by denying appellant the opportunity to cross-examine M.B. regarding the 2006 report she made to police that T.G. assaulted her. 2009 WL 2596102 at *4. We held that appellant should have been allowed to cross-examine M.B. about the 2006 assault allegation pursuant to Minn. R. Evid. 608(b), which provides in pertinent part:

> [Evidence of s]pecific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness. . . .

Id. But we also explained that, "[a]n examining attorney who inquires into collateral matters on cross-examination, including matters relating to the witness' credibility, is bound by the answers he receives and is not permitted to introduce collateral matters to prove facts contradicting the answers, even if they are false." *Id.*

Appellant argues that the district court abused its discretion and violated his constitutional right to confront witnesses by once again prohibiting the defense from cross-examining M.B. regarding her 2006 allegation of assault against T.G. We agree that this was error. As we pointed out in *Obeta I*, the evidence was "potentially more relevant because of appellant's claim that M.B. threatened to report him for rape if he refused to drive her home, which paralleled her apparent false claim of assault against T.G." *Id.*

But the district court's decision is subject to the harmless-error test. Where a district court erroneously excludes evidence, a reviewing court will only reverse "when

there is a reasonable possibility that, had the erroneously excluded evidence been admitted, the verdict might have been more favorable to the defendant." *State v. Richardson*, 670 N.W.2d 267, 277 (Minn. 2003). If the evidentiary ruling is an error, "and the error reaches the level of a constitutional error, such as denying the defendant the right to present a defense, our standard of review is whether the exclusion of evidence was harmless beyond a reasonable doubt." *Id.* (quotation omitted).

We conclude the error was harmless beyond a reasonable doubt because defense counsel acknowledged at the pretrial hearing that it had received a disclosure from respondent that M.B. would deny that she had made a false accusation. Unlike the situation in *Obeta I*, where there was no indication of how M.B. would respond if questioned about the 2006 assault allegation, the record here clearly shows that M.B. planned to deny that the allegation was false. Because the jury would have heard M.B. deny falsely accusing her boyfriend and because the defense would have been bound and not helped by her answer, appellant's argument fails.

III. Complainant's Statement to the Sexual-Assault Nurse Examiner

Finally, appellant argues that the district court abused its discretion in allowing the prosecutor to introduce M.B.'s audiotaped out-of-court statement to the nurse as a prior consistent statement and as a statement made for the purpose of medical diagnosis. In *Obeta I*, we held that the district court erred in admitting the entire audiotaped statement to the nurse as a prior consistent statement because the jury was allowed to hear a number of taped statements that were inconsistent with M.B.'s trial testimony, and therefore inadmissible under Minn. R. Evid. 801(d)(1)(B). 2009 WL 2596102 at *5.

> In particular, during her interview with the nurse, M.B. stated that appellant told her he had a gun in the car after he had parked the Bronco and immediately prior to the assault; that he told her to 'shut up' and that he would take her home after he was done; and that appellant put his hand over her mouth to stop her from screaming during the assault. This information was not included in M.B.'s trial testimony . . . .

Id. Because the jury paid particular attention to the audiotape, asking the court to replay portions of the tape during its deliberations, we concluded that "the error in admitting these inconsistent statements likely had a significant effect on the jury's verdict." *Id.*

Appellant objects that "the very same inconsistent statements that caused this court concern in *Obeta I* were presented to the jury again." Specifically, appellant complains that at the retrial M.B. testified that appellant told her there was a gun in the car "at some point," but that she could not remember when; and that she made no mention of an attempt to scream, of appellant telling her to "shut up," or of appellant covering her mouth with his hand. Appellant argues that these taped statements made to the nurse were inconsistent with M.B.'s trial testimony, and, as in *Obeta I*, should not have been allowed into evidence.

But appellant waived his objection because he did not specifically object to any of the portions of the taped interview that he now complains were inconsistent with M.B.'s trial testimony. While appellant objected to the admission of the taped statement generally, an objection must be specific to be preserved. *See State v. Brown*, 792 N.W.2d 815, 820 (Minn. 2011) ("[I]f an attorney fails to object to admission of evidence, or does object but fails to state the specific ground for that objection, the evidentiary issue generally is not preserved for appeal unless the ground for the objection is clear from the

context of the objection."). When objecting to the tape below, defense counsel stated that he saw inconsistencies between M.B.'s trial testimony and the transcript of the tape, but saw these inconsistencies as "primarily pertaining to some of the comings and goings on either side of the alleged sexual assault. I am not going to say—because I don't think I can—that there were inconsistencies with respect to the allegations that go directly to the sexual assault." For purposes of the record, defense counsel specifically referenced a series of line numbers from the transcript of the taped statement. None of those specific line numbers and challenges relate to the objections that appellant raises on appeal. Therefore, this issue has been waived.

IV. Cumulative Error

Appellant argues that the cumulative effect of the errors deprived him of a fair trial. "Cumulative error exists when the cumulative effect of the . . . errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (quotation omitted). But the district court did not abuse its discretion by prohibiting admission of M.B.'s prior history of using Livelinks or by admitting M.B.'s audiotaped statement to a nurse as a prior consistent statement. And the district court's error in prohibiting appellant from questioning M.B. about her prior assault allegation was harmless beyond a reasonable doubt. Appellant was entitled to a fair trial, not a perfect one. *See State v. Blom*, 682 N.W.2d 578, 626 (Minn. 2004). With the exception of one error we deem harmless, the district court carefully considered and

applied our reasoning from *Obeta I* to appellant's retrial. We are satisfied that, this time, appellant received a fair trial.

Affirmed.