STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1413

State of Minnesota,
Respondent,

vs.

Abdirahman Ibrahim Salah,
Appellant.

Filed June 10, 2013
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-10-52638

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, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Larkin, 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 multiple counts of third, fourth, and fifth-degree criminal sexual conduct, appellant argues (1) the district court violated his right to a fair trial by failing to provide the jury with the legal definitions of "force," "coercion," and "intentionally," which were essential to the jury's determination of whether the state had proven beyond a reasonable doubt the elements of the charged offenses; (2) the court violated his right to a fair trial by admitting expert-opinion testimony from a nonexpert police officer that rehabilitated one complainant's credibility; and (3) his convictions on counts two, three, four, and five must be vacated because he cannot have five convictions for one behavioral incident or act. Because appellant received a fair trial and because he failed to establish that his convictions should be vacated, we affirm.

FACTS

Appellant Abdirahman Salah was a Somali cultural liaison for Burnsville Public Schools, assigned to help students and their families with school issues. He was charged with two counts of attempted third-degree criminal sexual conduct for attempting to use force or coercion to penetrate a child who is less than 18 years old, two counts of fourth-degree criminal sexual conduct for engaging in sexual contact with that person, and fifth-degree solicitation of a juvenile to possess marijuana. These charges were based on allegations made by R.M., a 16-year-old high school student, about appellant's conduct on April 26, 2010.

At appellant's jury trial, R.M. testified that on April 26, 2010 appellant approached her to ask whether she needed help with her classes. She responded that she did need help, and appellant told her he could help with her schoolwork. Later that afternoon, appellant took R.M. out of study hall and into his office. He told her that he individually tutored students at his home and could help her with math. Appellant told R.M. that he was available to help her after school that day, that they could work on her homework at his home, and that he would make sure she got home safely. When R.M. told appellant that she needed to let her mother know of her plans, he responded that the school would contact her mother.

When the school day ended, appellant called R.M.'s cell phone and told her to meet him at the transit station parking lot next to the school. She met him in the parking lot and got into his car. As they drove toward appellant's home, he informed R.M. that he had a class, but that she could stay at his apartment and wait for him. She indicated that she did not want to wait alone and asked to be dropped off at a friend's home. He took her to her friend's home and picked her up approximately two-and-a-half hours later.

When they arrived at appellant's apartment, R.M. took her schoolbag, but left her purse with her cell phone in the car. Upon entering the apartment, R.M. took out her homework and began asking appellant questions. But appellant began talking to R.M. about T.V. shows and adult movies; he asked R.M. if she had heard of a particular sex tape. Appellant began discussing marijuana and smoked marijuana in front of R.M. He offered her some marijuana, but she refused.

Appellant then went into the bathroom. R.M. remained on the couch. She was concerned about what was happening, but she did not have her cell phone with her and was unfamiliar with the area. When appellant returned from the bathroom, he was naked from the waist down. He asked R.M. if she had ever done oral sex; R.M. said no. He told her "a lot of people do it . . . I can teach you . . . ." Appellant then grabbed his penis and began pushing it against R.M., rubbing it up her shoulder, across her face and cheek, and trying to get it in her mouth. R.M. kept pushing appellant away, but he continued to touch her, lifting her shirt, touching her breasts, and trying to unhook her bra. She asked appellant to stop, which he did.

Appellant then put on loud music, came back to her and started rubbing his penis on her again. R.M. began to yell for him to leave her alone, and appellant told her the music was on so that no one could hear them. She became panicked and began to cry. Appellant told her that if she was "going to be a little girl, I'll stop." Finally, appellant got dressed and drove R.M. home. On the way to her house, appellant told R.M. not to tell anyone what happened and said R.M. should remember that he knew where she lived.

At school the next day, R.M. told her school counselor what had happened. The counselor took R.M. to see the school liaison officer, a member of the local police. Because the incident took place in Minneapolis, the case was referred to the Minneapolis police, and routed to the Sex Crimes Unit of the Minneapolis Police Department. An officer from the Sex Crimes Unit conducted a taped interview with R.M. on April 30, 2010, at the high school.

Appellant's trial testimony was largely consistent with her taped interview with the officer, although there were some inconsistencies between her testimony and the statements she had made to her counselor and the school liaison officer. At trial, appellant questioned the officer about the discrepancies, and he testified that, in his experience, victims in sexual-assault cases are interviewed several times because they don't give all the details to the first person to whom they speak.

Following his jury trial, appellant was found guilty of two counts of attempted third-degree criminal sexual conduct, two counts of fourth-degree criminal sexual conduct, and one count of fifth-degree criminal sexual conduct, but not guilty of the solicitation-of-a-juvenile charge. The district court found that all the convictions were part of the same behavioral incident and sentenced appellant on count one to the presumptive 24-month prison term. This appeal follows.

D E C I S I O N

I. Jury Instructions

Appellant argues that the district court committed plain, reversible error by failing to instruct the jury on the legal definitions of "force" and "coercion" when instructing the jury on the elements of the attempted third-degree and fourth-degree criminal sexual conduct, and by failing to instruct the jury on the legal definition of "intentionally," an element of each offense with which appellant was charged.

"A defendant's failure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal." *State v. White*, 684 N.W.2d 500, 508 (Minn. 2004). Because appellant did not

request instructions on the terms "force," "coercion," or "intentionally" and did not object to the jury instructions given at trial, we review the instructions under the plain-error standard. *See State v. Vance*, 734 N.W.2d 650, 655 (Minn. 2007), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303 (Minn. 2012). Under the plain-error standard, appellant must establish that there was "(1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If these three prongs are met, this court "then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

"[D]istrict courts have considerable latitude in selecting language for jury instructions; a particular instruction is therefore error only if it materially misstates the law." *State v. Caine*, 746 N.W.2d 339, 353 (Minn. 2008) (quotation omitted). "[J]ury instructions must define the crime charged and explain the elements of the offense to the jury." *Vance*, 734 N.W.2d at 656. For there to be plain error in a jury instruction, the instruction must be misleading or confusing on fundamental points of law. *Caine*, 746 N.W.2d at 353.

The term "force" is defined in Minn. Stat. § 609.341, subd. 3 (2010), and the term "coercion" is defined in subd. 14 (2010). Both terms are encompassed in a pattern jury instruction. *See* 10 *Minnesota Practice*, CRIMJIG 12.01 (2006). The term "intentionally" is defined in Minn. Stat. § 609.02, subd. 9(3) (2010), and is encompassed in a pattern jury instruction in 10 *Minnesota Practice*, CRIMJIG 7.10 (Supp. 2011). The district court did not provide the legal definition of these terms. But the district court did

tell the jury, at the beginning of all instructions, "[i]f I have not defined a word or a phrase, you should apply the common, ordinary meaning of that word or phrase."

Appellant argues that the district court's failure to define these terms was reversible plain error because it "weaken[ed] the state's burden of proving those elements." But appellant provides no authority to support his argument that a district court's failure to instruct a jury, sua sponte, on terms that are statutorily defined is plain, reversible error. But "detailed definitions of the elements to the crime need not be given in the jury instructions if the instructions do not mislead the jury or allow it to speculate over the meaning of the elements." *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979) (holding that the failure to instruct the jury on the definition of "great bodily harm" as used in Minn. Stat. § 609.02, subd. 8 (1978), was not erroneous or prejudicial).

Moreover, "'intent' has a common meaning, and the definition provided by CRIMJIG does not greatly increase the jury's understanding of the phrase." *State v. Harlin*, 771 N.W.2d 46, 52 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Nov. 17, 2009). Similarly, the words "force," and "coercion" have common meanings, and the district court's failure to legally define the terms for the jury was not error because the definition provided by the CRIMJIG would not have greatly increased the jury's understanding of the term.

Even if the district court's failure to define the terms "force," "coercion," and "intentionally" was plain error, it did not affect appellant's substantial rights. "A jury may infer that a person intends the natural and probable consequences of his actions." *Id.* (quotation omitted). In this case, the jury could easily have inferred that appellant

intended to use force or coercion to accomplish sexual contact and to attempt sexual penetration when he took her to his apartment, appeared naked from the waist down, asked her if she had done oral sex, rubbed his penis against her, pushed his penis against her face in an attempt to get it in her mouth, lifted her shirt, and tried to unclasp her bra.

II. Expert Opinion Testimony

On cross-examination of the officer, appellant's counsel questioned him regarding differences in R.M.'s account of the incident to him and to her school counselor and the school's police liaison officer. The officer testified that he has a four-year degree in criminal justice from the University of Minnesota, has been employed by the Minneapolis Police Department for 23 years, has been an investigator in the Sex Crimes Unit for 12 of those years, and has investigated 1,000-1,100 sexual assault cases during that time. On redirect examination, the state elicited the officer's opinion, based on his experience as a police officer working with sexual abuse victims, that victims in sexual-assault cases are interviewed several times because they don't give all the details to the first person to whom they speak. Appellant did not object to the admission of this evidence at trial, but he now argues that the district court erred by admitting this evidence, which he believes rehabilitated R.M.'s credibility and violated his right to a fair trial.

Minn. R. Evid. 702 provides for the admission of expert testimony and, in relevant part, states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the

form of an opinion or otherwise." The 1977 comment to the rule states: "The qualifications of the expert need not stem from formal training, and may include any knowledge, skill, or experience that would provide the background necessary for a meaningful opinion on the subject."

"Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis; however, [a reviewing court] has discretion to consider an error not objected to at trial if it is plain error that affects substantial rights." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007).

The district court did not err by allowing the officer to testify as an expert witness. "The qualification of an expert is a matter resting in the discretion of the [district] court, and a ruling admitting expert testimony will not be disturbed on appeal unless there is an abuse of discretion." *State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987) (quotation omitted). Minnesota appellate courts "have afforded substantial discretion to [district] courts in permitting expert testimony of police officers testifying about matters within the ambit of their law enforcement expertise." *State v. Carillo*, 623 N.W.2d 922, 927 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). "[I]n cases where the victim of sexual assault is an adolescent, the admissibility of expert testimony concerning the behavioral characteristics typically displayed by adolescent sexual assault victims is a matter resting in the discretion of the [district] court." *Sandberg*, 406 N.W.2d at 511 (finding sufficient foundation established for district court to allow police officer to testify as an expert witness about typical behavior of adolescent sexual assault victims where officer testified that he had worked for the police department for 15 years, had been an investigator in the

juvenile division for nine years, had investigated over 500 cases of child abuse, and had attended or been involved in 26 classes on the subject of child abuse). The officer testified that he had worked for the Minneapolis Police Department for 23 years and 12 of those years had been with the Sex Crimes Unit. Additionally, he testified that he has investigated 1,000-1,100 sexual-assault cases. The district court was well within its discretion to allow him to testify as an expert witness as to typical behavior of adolescent victims of sexual abuse.

III. Vacating Convictions

Finally, appellant asserts that four of his five convictions must be vacated. Citing Minn. Stat. § 609.04 (2010), he argues that, because "the offenses were all part of the same behavioral incident, the court was . . . limited to entering only one conviction." Minn. Stat. § 609.04 bars multiple convictions for a crime and lesser-included offenses. On this record and the inadequate briefing provided, we cannot determine whether the four convictions appellant wants to be vacated are lesser-included offenses of the attempted third-degree criminal-sexual-conduct conviction. We specifically decline to address this issue on the merits, but we do so without prejudice.

Affirmed.