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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1031**

State of Minnesota,
Respondent,

vs.

Anthony Ruben Lucero,
Appellant.

**Filed July 16, 2018
Affirmed
Johnson, Judge**

Becker County District Court
File No. 03-CR-15-2955

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Brian W. McDonald, Assistant Becker County Attorney, Detroit Lakes, Minnesota (for
respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant
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Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

A Becker County jury found Anthony Ruben Lucero guilty of third-degree criminal sexual conduct based on evidence that he engaged in the sexual penetration of an intoxicated 15-year-old girl. Lucero seeks a new trial on the ground that two of the state's witnesses testified that he previously had engaged in a similar type of sexual misconduct. We affirm.

FACTS

This appeal concerns an incident that occurred in 2005 but was not reported to law enforcement until ten years later. In June 2015, S.L. informed the Becker County Sheriff's Office that Lucero, with whom she had just ended a long-term relationship, had sexually molested a 15-year-old girl in 2005. Investigator Nguyen interviewed the victim and two other persons who had information about the incident. In December 2015, the state charged Lucero with third-degree criminal sexual conduct for engaging in sexual penetration of a person who was mentally impaired, mentally incapacitated, or physically helpless, in violation of Minn. Stat. § 609.344, subd. 1(d) (2004), and third-degree criminal sexual conduct for engaging in sexual penetration of a person who was between the age of 13 and 16, in violation of Minn. Stat. § 609.344, subd. 1(b).

Before trial, Lucero filed a motion *in limine* to prohibit all witnesses from referring to the fact that he was a registered sex offender. The district court granted the motion and ruled the evidence inadmissible. The prosecutor inquired whether the victim could testify that she had heard that Lucero had committed one or more similar acts in the past and had

gotten away with it, for the purpose of explaining why she did not report the crime. The district court ruled that such testimony is inadmissible under the previous ruling. The prosecutor assured the district court that the victim would not mention any prior incident.

The case was tried to a jury on two days in February 2017. The state called five witnesses. Four of the state's witnesses attended a party in 2005 at the home of a family that lived in S.L. and Lucero's neighborhood. The party occurred outdoors, around a bonfire. Some teenagers attended the party, including S.L.'s son; the host family's daughter, A.S.; and her friend, A.B. Everyone at the party drank alcoholic beverages, including the teenagers.

A.B., who was 14 or 15 years old at the time of the incident and 26 years old at the time of trial, testified as follows: During the party, she began to feel sick from drinking too much, so she went into the house and lay down on a couch in the living room. Lucero approached her and tried to persuade her to go downstairs with him "because everybody would see upstairs." She refused his request to go downstairs. Lucero pushed up her shirt and touched her breasts. He tried to kiss her. He pulled down her pants and put his mouth on her vagina and then penetrated her vagina with his fingers. She passed out and later vomited.

A.S. testified that, during the party, she went inside the house to check on A.B. She saw A.B. lying on the couch, and she saw Lucero sitting in a reclining chair nearby. A.S. saw that A.B.'s pants were unzipped. A.B. mumbled something about "a bad man." A.S. zipped up A.B.'s pants and told her to keep her clothes on. A.S. returned to the living room later to check on A.B. again. On this occasion, Lucero was kneeling by the couch, but

when he saw A.S., he returned to the reclining chair and pulled a blanket over himself. A.S. saw that A.B.'s pants were again unzipped and that her shirt was pulled up to her neck. A.B. then vomited on herself and on the couch. A.S. and her mother cleaned up.

During the direct examination of A.S., the prosecutor asked whether she had ever discussed the incident with anyone. A.S. answered by saying that S.L. had approached her and said, "if I knew anything that I needed to tell someone because *it wasn't the first time.*" Lucero's attorney did not object to this part of A.S.'s testimony. At the end of the first day of trial, the district court noted that A.S. had made "an inadvertent slip" by referring to a prior incident but that the court would not give the jury a curative instruction so as not to draw attention to it. Lucero's attorney did not object to the district court's decision not to give a curative instruction.

S.L. testified that she left the party before dark and went home and went to bed. She awoke sometime after dark and saw that neither Lucero nor her son had come home. She went to the neighbors' house to look for her son. When she entered the house, she saw A.B. lying on the floor with her pants pulled down to her knees and her shirt lifted up. A.B. was crying. S.L. saw Lucero sitting in a reclining chair, wrapped in a blanket. When S.L. tried to remove the blanket, Lucero prevented her from doing so, but she saw that his pants were down.

During the cross-examination of S.L., Lucero's attorney asked S.L. about her prior conversations with Investigator Nguyen. Lucero's attorney referred to "an incident that you wanted to tell her about." S.L. responded by saying that she talked to Investigator Nguyen about "*one of them.*" Lucero's attorney also asked S.L. about inconsistencies in

her reports to Investigator Nguyen. S.L. responded by saying that Lucero “had already confessed to it himself already *along with the others*.” Lucero’s attorney did not object to these parts of S.L.’s testimony.

Lucero called two witnesses in his defense. S.L.’s son testified that he slept inside the house but did not see Lucero in the living room and did not see or hear Lucero interact with A.B. The man who hosted the party testified that he was outside for most of the party until 4:00 a.m. and did not see or hear anything unusual after he went inside the house. Lucero did not testify.

The jury found Lucero guilty on both counts. Lucero moved for a new trial on the ground that he was deprived of a fair trial because two of the state’s witnesses made references to his having engaged in similar forms of sexual misconduct in the past. The district court denied the motion, reasoning that “it is unlikely that the jury would have made a different decision without hearing” the statements. The district court sentenced Lucero to 41 months of imprisonment. Lucero appeals.

D E C I S I O N

Lucero argues that he did not receive a fair trial because two of the state’s witnesses (A.S. and S.L.) made references to previous incidents in which Lucero had engaged in a similar type of sexual misconduct.

Lucero concedes that he did not object to the evidence that he challenges on appeal. Both parties ask this court to apply the plain-error test. *See* Minn. R. Crim. P. 31.02. Under the plain-error test, we may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the

defendant's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). An error is plain if it is clear or obvious under current law, *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002), and an error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct," *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *Griller*, 583 N.W.2d at 741. If the first three requirements of the plain-error test are satisfied, we then consider the fourth requirement, which asks whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005) (quotation omitted).

Lucero's argument is based generally on a rule of evidence that provides, "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith," though it may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Minn. R. Evid. 404(b). If the state wishes to introduce such evidence, the district court must apply a five-part test to determine whether the evidence is admissible. Minn. R. Evid. 404(b); *see also State v. Spreigl*, 272 Minn. 488, 490-97, 139 N.W.2d 167, 169-73 (1965). But Lucero does not specifically argue that the district court erred by admitting inadmissible evidence or by denying his motion for a new trial. Lucero also does not specifically argue that the prosecutor engaged in misconduct by improperly eliciting inadmissible evidence. Rather, Lucero relies on cases that recognize

simply that a defendant does not receive a fair trial if the state's witnesses volunteer information that is inadmissible and prejudicial. Specifically, Lucero argues as follows:

The prosecutor in a criminal trial is responsible for prejudicial information volunteered by its witnesses. *State v. Huffstutler*, 130 N.W.2d 347, 348 (Minn. 1964) (citation omitted). The prosecutor has a duty to ensure that witnesses know the limits of permissible testimony and to caution its witnesses against offering prejudicial testimony. *State v. Underwood*, 281 N.W.2d 337, 342 (Minn. 1979). Consequently, the burden falls on the State to prepare its witnesses, prior to testifying, to avoid inadmissible or prejudicial statements. *State v. Carlson*, 264 N.W.2d 639, 641 (Minn. 1978); *State v. McNeil*, 658 N.W.2d 228, 232 (Minn. App. 2003). An appellant is entitled to a new trial if the inadmissible information was prejudicial, whether or not it was intentionally elicited. *State v. Haglund*, 267 N.W.2d 503, 506 (Minn. 1978); *State v. Richmond*, 214 N.W.2d 694, 695 (Minn. 1974).

In response, the state relies on a different set of cases that recognize that a defendant's right to a fair trial is not violated if the state unintentionally elicits inadmissible evidence, the inadmissible evidence is mentioned only in passing, the importance of the inadmissible evidence likely is not apparent to the jury, and the evidence of guilt is overwhelming. See *State v. Hall*, 764 N.W.2d 837, 843 (Minn. 2009); *Haglund*, 267 N.W.2d at 506. The state contends that there is no reversible error in this case because there is overwhelming evidence of Lucero's guilt, the references made by A.S. and S.L. were "vague and of a passing nature," A.S.'s testimony was unintentionally elicited by the prosecutor, and S.L.'s testimony was elicited by Lucero's attorney on cross-examination.

In *Haglund*, a witness for the state made a reference to the appellant's prior incarceration. 267 N.W.2d at 505. The supreme court reasoned that the inadmissible

evidence did not require a new trial because the prosecutor did not intentionally elicit the evidence, the reference to the prior incarceration “was of a passing nature,” “the import of the [reference] may have been missed,” and the evidence of guilt in the “case was overwhelming.” *Id.* at 506. For those reasons, the inadmissible evidence was not sufficiently prejudicial to warrant a new trial. *Id.* Similarly, in *State v. Hall*, 764 N.W.2d 837 (Minn. 2009), the state played for the jury an audio-recording of a police interrogation in which the appellant referred to his prior conviction of fifth-degree assault. *Id.* at 842. The supreme court reasoned that the inadmissible evidence did not require a new trial because “Hall’s reference to a fifth-degree assault conviction was unintentionally elicited,” his “reference to the prior conviction was of a passing nature,” “neither the officer nor the prosecutor dwelled on the statement or highlighted it for the jury,” and “there was strong evidence of Hall’s guilt.” *Id.* at 843.

This case is much like *Haglund* and *Hall*. First, the state did not intentionally elicit either piece of inadmissible evidence. The prosecutor asked A.S. a general question about whether she had talked to anyone about the incident in the ten years between the incident and trial, a question that does not appear to have been designed to elicit information about prior bad acts by Lucero. S.L.’s testimony was elicited by Lucero’s attorney. Second, each witness referred to the inadmissible evidence only briefly and without repetition. Third, the references were fairly vague, which means that they likely had little meaning or importance to the jury. And fourth, the jury heard overwhelming evidence of Lucero’s guilt. A.B. testified that Lucero touched her breasts, tried to kiss her, placed his mouth on her vagina, and penetrated her vagina with his fingers. A.S. testified that she twice saw

that A.B.'s clothing was partially removed while Lucero was alone with her in the living room. S.L. testified that she saw A.B. with her pants down and saw Lucero in the living room with his own pants down. Although the references to Lucero's prior bad acts were inadmissible, the inadmissible evidence is, in the particular circumstances of this case, not prejudicial enough to require a new trial. *See Hall*, 764 N.W.2d at 843; *Haglund*, 267 N.W.2d at 506. Assuming that the plain-error test applies, Lucero's argument fails because he cannot satisfy the third requirement. *See Griller*, 583 N.W.2d at 741.

Thus, Lucero's right to a fair trial was not violated by two witnesses' brief, vague references to prior incidents in which Lucero reportedly engaged in a similar type of sexual misconduct.

Affirmed.