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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0690**

State of Minnesota,
Respondent,

vs.

Timothy James Niedermayer,
Appellant.

**Filed May 13, 2019
Affirmed
Bratvold, Judge**

Washington County District Court
File No. 82-CR-16-5240

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County
Attorney, Stillwater, Minnesota (for respondent)

Glenn P. Bruder, Mitchell, Bruder & Johnson, Edina, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from the judgment of conviction of criminal sexual conduct in
the first and second degree, appellant contends that three errors require reversal. First, he
argues that the district court plainly erred because its jury instructions constructively

amended the complaint and affected his substantial rights. Second, appellant claims that the district court abused its discretion by failing to sanction the state for a discovery violation. Third, appellant argues that the record evidence is insufficient to sustain his conviction of second-degree criminal sexual conduct. We conclude that the district court did not abuse its discretion in instructing the jury on the date of the offenses to conform to the evidence presented at trial, the state did not commit a discovery violation, and the evidence is sufficient to support appellant's conviction. Accordingly, we affirm.

FACTS

Appellant Timothy James Niedermayer and J.C. started a romantic relationship in 2013, and got engaged in November 2013. They had no children together, but J.C. had five children from prior relationships. Three of the children were triplets, one of whom was K.K.

Niedermayer owned a home in Maplewood. He and J.C. rented a second home in Oakdale and, in April 2014, J.C., her five children, her parents, and Niedermayer moved into the Oakdale home. Niedermayer also kept his home in Maplewood. Niedermayer lived at the Oakdale home “full-time” for the first two or three weeks, and then “off and on” after that. He was “really good with the kids” and showed particular affection towards K.K. J.C. “thought it was just . . . nice” that Niedermayer was getting along with her kids.

Niedermayer did not like the sleeping arrangements at the Oakdale home because J.C.'s children sometimes slept with her. When the children slept in their bed, Niedermayer “would leave the bed and go on the floor.” He would also sometimes go into K.K.'s room, which she shared with a sibling, and sleep on the floor. K.K. sometimes slept in J.C. and

Niedermayer's bed. A.J., who was three years older than K.K., did not often sleep in her mother's bed unless she was sick.

J.C. and her family moved out of the Oakdale house in April 2015. A few weeks later, J.C. and Niedermayer stopped dating, but remained on good terms; and they often talked by phone and discussed getting "back together."

Also in April 2015, J.C. observed that K.K., who had just turned ten years old, stopped wearing "girly" clothes, such as dresses, and began wearing "baggy clothes," such as sweatpants and sweatshirts. K.K. would cry when J.C. asked her to wear something else. J.C. also noticed that K.K. had become angry and "withdrawn" and had lost interest in her favorite sports.

In September 2015, J.C. learned that K.K. had downloaded a sexually explicit game on her electronic tablet. While driving, J.C. asked K.K. if anybody had touched or hurt her. K.K. initially said no. But after sitting "quiet for about two minutes," K.K. said, "[Niedermayer] touches me." J.C. immediately took K.K. to a hospital emergency room, which referred K.K. to Midwest Children's Resource Center (MCRC) and contacted law enforcement and child protective services. Around the same time, A.J., who was 13 years old, told her grandmother that Niedermayer had touched her. A.J. was also referred to MCRC. During forensic interviews at MCRC, a registered nurse case manager separately interviewed K.K. and A.J. The interviews were videotaped, received into evidence at trial, and played for the jury.

In K.K.'s interview, she described Niedermayer's behavior, which included kissing her on the lips, entering the bathroom when she was showering, turning on "gross shows,"

and rubbing her back. She also said he would “lay by [her],” touch her “front private,” and “[s]ometimes go inside [her] underwear.” Additionally, he would touch her front private “kind of hard” while she pretended she was sleeping. On one occasion, she noticed some bleeding when she went to the bathroom.¹ K.K. also stated that Niedermayer would send her text messages, calling her “baby” and “girlfriend.” K.K. described some specific incidents of abuse that occurred in her mom’s bedroom at the Oakdale house, at a car wash, in the shower, and at Niedermayer’s house in Maplewood. K.K. stated that Niedermayer had locked her bedroom door, placed her on top of him, and “his front private would touch [hers]” over her underwear. She stated that she was “9 going to turn 10” at the time of the abuse. She also stated that the abuse happened “way more than one time.” K.K. said she was not aware of any of her siblings being abused, but she was worried about them.

In A.J.’s interview, she stated that Niedermayer massaged her back and at times “talked really dirty.” A.J. also described a specific incident that occurred at Niedermayer’s Maplewood home where they were playing catch and he touched her vaginal area over her clothing with his hand. A.J. stated she was “probably 12” or 13 at the time of the abuse. She stated that she was “really scared” and was “scared for [her] family.”

MCRC reported the abuse to police. The police investigator spoke with Niedermayer and also subpoenaed the text messages between K.K. and Niedermayer. While the investigator was not able to retrieve the contents of the text messages, he was able to determine that messages were transmitted between K.K. and Niedermayer.

¹ This fact was reported off camera and was contained in the MCRC summary, which was received into evidence during the testimony of the registered nurse case manager.

The state charged Niedermayer by complaint with two counts of criminal sexual conduct. Count one was criminal sexual conduct in the first degree (penetration) with a person under 13, K.K. Minn. Stat. § 609.342, subd. 1 (2014). Count two was criminal sexual conduct in the second degree (significant relationship) with a victim under 16, A.J. Minn. Stat. § 609.343, subd. 1(g) (2014). The offense date on the complaint was listed as “on or about” April 1, 2015, for both charges. The probable-cause statement in the complaint summarized the police investigation and stated that K.K. had reported multiple assaults, some at the Oakdale home, and some at Niedermayer’s home in Maplewood.

During the three-day trial, the jury heard testimony from J.C., the police investigator, and the MCRC nurse, each of whom testified to the events described above. K.K. and A.J. testified that Niedermayer sexually abused them. K.K. testified that initially she liked Niedermayer because “[h]e was funny.” But then “[i]t got weird” because he started rubbing her leg at night in her room, and he would kiss her on the lips. On one occasion when K.K. slept in her mother’s bed with Niedermayer, she woke up with her pants and underwear down. K.K. testified that, on other occasions, Niedermayer touched her using his hand in her “vagina area” on the “[i]nside of [her] underwear,” and that he would “try” to put his finger in her vagina. K.K. would tell him to stop and “try to move away.” She testified that it would always hurt later when she went to the bathroom, and sometimes she “couldn’t even go because it hurt so bad.” When the abuse occurred, J.C. was sometimes in the same bed, but never woke up. K.K. testified that Niedermayer told her that if she told anybody about the abuse he would “hurt [her] and then [her] mom.”

A.J. testified that she did not like Niedermayer from the beginning because he would talk dirty to her. She also testified about the incident discussed during her MCRC interview and stated that Niedermayer “rubbed [her] vagina” when he reached for the ball between her legs. She testified that she was 12 years old when this happened. Niedermayer told her that if she told anyone he would “kill [her].”

After the state rested, defense counsel moved for an acquittal on both counts because “no reasonable juror should be able to find beyond a reasonable doubt that either the date of the occurrence or the location of the occurrence are sufficient to meet the elements of the crime which are charged in the complaint.” Defense counsel argued that K.K. and A.J. gave conflicting accounts of how old they were when certain incidents happened, consequently the evidence of when the alleged sexual contact occurred was insufficient to support a conviction. The district court denied the motion.

Niedermayer, testifying in his defense, denied that he abused K.K. and A.J. He admitted that he took K.K. to a car wash where they were alone, and he admitted sending texts to K.K.

The district court provided a copy of the jury instructions to both parties before they were read to the jury and asked if there were any objections. Neither party objected. The district court read the instructions to the jury without change. For both counts, the jury was instructed that it must determine whether Niedermayer’s acts took place “on or before April 2015.” The jury found Niedermayer guilty on both counts. After a presentence investigation, the district court imposed concurrent sentences of 144 and 70 months for counts one and two, respectively. Niedermayer appeals.

DECISION

I. The district court did not err when it instructed the jury to determine whether the offenses occurred “on or before” April 2015 instead of whether the offenses occurred “on or about April 1, 2015,” as alleged in the complaint.

Niedermayer argues that the district court erred when it “instruct[ed] the jury in a manner inconsistent with the language of the December 2016 [c]omplaint.” He explains that the complaint stated that the abuse occurred “on or about” April 1, 2015, but the jury instructions asked the jury to determine whether alleged criminal acts took place “on or before April 2015.” Niedermayer contends that the jury instructions constructively amended the complaint and deprived him of his substantial rights because his defense strategy was “effectively shredded.” Niedermayer admits that he did not object to the jury instructions at trial.

District courts are allowed “considerable latitude” in selecting language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). This court reviews the adequacy of jury instructions for abuse of discretion. *State v. Peou*, 579 N.W.2d 471, 475 (Minn. 1998). Because Niedermayer did not object to the jury instructions at trial, this court reviews the jury instructions for plain error. *State v. Robinson*, 699 N.W.2d 790, 799 (Minn. App. 2005), *aff’d*, 718 N.W.2d 400 (Minn. 2006).

On appeal, a defendant may obtain “review and relief from plain errors affecting substantial rights if those errors had the effect of depriving the defendant of a fair trial.” *State v. Litzau*, 650 N.W.2d 177, 192 (Minn. 2002). To demonstrate plain error,

an appellant must show that there was (1) an error, (2) that is plain, and (3) the error must affect substantial rights. An error is plain if it is clear and obvious; usually this means an error

that violates or contradicts case law, a rule, or an applicable standard of conduct.

State v. Matthews, 779 N.W.2d 543, 548-49 (Minn. 2010) (citations omitted). An error affects a defendant's substantial rights "if the error was prejudicial and affected the outcome of the case." *State v. Griller*, 583 N.W.2d 736, 741 (Minn. 1998).

After a trial has started, amendments to a complaint are governed by Minn. R. Crim. P. 17.05. *See State v. Caswell*, 551 N.W.2d 252, 254 (Minn. App. 1996). The purpose of rule 17.05 is "to protect against confusing the jury, violating due process notions of timely notice, and adversely affecting the trial tactics of the defense." *State v. Guerra*, 562 N.W.2d 10, 13 (Minn. App. 1997). Rule 17.05 provides that a trial court may amend a complaint at any time before a verdict so long as (a) "no additional or different offense is charged," *and* (b) "if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05; *see also State v. DeVerney*, 592 N.W.2d 837, 846 (Minn. 1999) (applying both prongs).

A complaint is "constructively amend[ed]" if "the record demonstrates that a defendant is confronted with [a different or] an additional charge after trial has begun." *Guerra*, 562 N.W.2d at 12-13. If an amendment affects a material element of the charged offense, then a "different offense" is charged. *Id.* at 13. The time that an act of abuse occurred is not a material element of first or second degree criminal sexual conduct. *See State v. Shamp*, 422 N.W.2d 520, 527 (Minn. App. 1988) (second degree), *review denied* (Minn. June 10, 1988); *State v. Warborg*, 395 N.W.2d 368, 370 (Minn. App. 1986) (first degree). And, in general, "it is not always possible to know with certainty" when an offense

occurred, especially “where there is a minor victim who does not complain to the authorities immediately.” *State v. Waukazo*, 269 N.W.2d 373, 375 (Minn. 1978).

Ruberg v. State considered an issue similar to the one raised by *Niedermayer*. 428 N.W.2d 488, 488-91 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988). In *Ruberg*, a defendant was convicted of two counts of criminal sexual conduct in the first degree involving his daughter and her cousin. *Id.* at 489. Defendant was divorced in 1977 and saw his daughter over the summers and every other Christmas. *Id.* at 488. After the daughter was with defendant over the summer of 1986, she wrote a letter to her mother describing the sexual acts that defendant committed with her and her cousin. *Id.* at 489. The case proceeded to a jury trial, and after the close of evidence, the state moved to amend the date of the offenses in the complaint from “on or about 1981 through 1986” to “on or about a period from 1980 through 1986.” *Id.* at 490. The trial court allowed this amendment. *Id.*

On direct appeal of his conviction, defendant raised several issues, one of which was whether the district court erred in allowing the state to amend its complaint. *Id.* at 490-91. Defendant argued that the amendment adversely affected his defense trial tactics and he was “denied an opportunity to rebut the amended dates” because the amendment was permitted after the close of the evidence. *Id.* at 490. We rejected the argument and affirmed his conviction. *Id.* at 491. We first determined that the amendment “did not add or charge a different offense.” *Id.* at 490. Reasoning that the date of the offense is not an essential element of criminal sexual assault, we noted that the Minnesota Supreme Court has held that, for sexual abuse of a child, particularly in cases where a minor victim did not report the abuse to authorities immediately, the “complaint need not allege the particular date” of

the offense. *Id.* (quoting *State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984)). Consequently, we concluded that the trial court acted within its “sound discretion” because the amendment “merely changed the date of the crime to conform to the evidence presented at trial.” *Id.*

Here, Niedermayer claims that the jury instructions amended the date of the alleged offense. Niedermayer does not claim that the jury instructions added a new offense. Based on the evidence at trial, the district court instructed the jury to determine whether the acts took place “on or before April 2015” instead of “on or about April 1, 2015,” as stated in the complaint. In doing so, the jury instructions did not require Niedermayer to defend against an additional or different offense. Therefore, the district court’s decision to use “on or before” instead of “on or about” in the jury instructions “merely changed the date to conform to the evidence presented at trial.” *See Ruberg*, 428 N.W.2d at 489; *see also Shamp*, 422 N.W.2d at 527 (stating that permitting an amendment to a complaint to “extend the dates” for an alleged sexual assault did not “change any elements of the crime or add an offense” because defendant “was well aware he was charged with committing sexual misconduct over an extended time period”).²

² Niedermayer also argues that rule 17.05 does not authorize a district court to sua sponte amend a complaint. We reject this argument for two reasons. First, the district court did not act sua sponte; it offered the jury instructions to both parties, neither of whom objected. Second, Niedermayer’s argument fails to demonstrate that this error caused him prejudice.

We conclude that the district court did not constructively amend the complaint to add a different offense and, therefore, did not plainly err in instructing the jury. Because we find no plain error, we do not further pursue a plain-error analysis.³

II. The district court did not abuse its discretion when it allowed A.J. to testify about an additional instance of abuse as relationship evidence.

On the second day of the trial, before A.J. testified, defense counsel sought to limit her testimony. A.J. had revealed a new incident to the prosecution on the Friday before the first day of the trial, which the prosecution then disclosed to the defense. Defense counsel objected to allowing A.J. to testify about the new incident because it was not included in A.J.’s video interview at MCRC. The district court overruled the objection and

³ Even if we were to assume that the district court’s jury instructions constructively amended the complaint to add a different offense, we would not conclude that Niedermayer’s substantial rights were prejudiced. Niedermayer relies on *Guerra* to argue that his substantial rights were affected because the jury instructions negated his counsel’s “narrowly tailored” trial strategy. But in *Guerra*, we determined that a jury instruction constructively amended the complaint to add a new and different charge, and this prejudiced the defendant’s substantial rights because he was “not given an opportunity to develop a defense” to the additional charge. 562 N.W.2d at 14. The additional charge in *Guerra* would have “require[d] a substantially different defense” because the underlying facts were different. *Id.* We recognize that discrediting K.K. and A.J.’s testimony about offense dates and their ages was part of Niedermayer’s general defense strategy. But, as noted above, Niedermayer was not required to defend against an additional charge. Niedermayer also had ample notice in the probable-cause statement and the MCRC interviews that he faced evidence of “multiple” instances of abuse that occurred in the Oakdale and Maplewood homes. We conclude that Niedermayer’s substantial rights were not affected by the district court’s decision to amend the jury instructions to conform to the evidence on the dates of the alleged offenses.

allowed A.J.’s testimony about the new incident, along with a limiting instruction to the jury that Niedermayer was not charged in relation to the new incident.⁴

Niedermayer argues on appeal that the state’s “untimely disclosure” of A.J.’s additional allegations on the “eve of the trial” prejudiced his defense. Further, Niedermayer contends that the district court erred by allowing A.J. to testify that Niedermayer made her watch a show “about child molesters” in her mom’s room. A.J. testified that Niedermayer “talk[ed] about how he hated [child molesters], and then he pulled his pants down.” He then asked her to pull her pants down. A.J. said “no.” Niedermayer then pushed A.J. out of the room.

A prosecutor must “allow access at any reasonable time to all matters within the prosecutor’s possession or control.” Minn. R. Crim. P. 9.01, subd. 1. If, after initially disclosing evidence, a party discovers new information or evidence subject to disclosure, that party “must promptly notify the other party of what it has discovered and disclose it.” Minn. R. Crim. P. 9.03, subd. 2(b). Whether a discovery violation under these rules occurred is reviewed de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005).

Here, the prosecutor told defense counsel about the new evidence on the Friday before the trial was scheduled to begin on Monday. Importantly, the district court found that the state disclosed the new evidence on the same day it learned about the incident

⁴ The district court instructed the jury that the “the state is about to introduce evidence of occurrences in 2015 for which the defendant is not charged. This evidence is being offered for the limited purposes of assisting you in determining whether the defendant committed those acts with which the defendant is charged in the complaint. The defendant is not being tried and may not be convicted for any offense other than the charged offenses.”

from A.J. Because the state's prompt notification complied with the rules governing discovery, we conclude that there was no discovery violation.

Because there was no discovery violation, the district court's decision to admit A.J.'s testimony was an evidentiary issue, which is reviewed for abuse of discretion. *State v. Shannon*, 583 N.W.2d 579, 583 (Minn. 1998). And here, the district court admitted the evidence to show the "history of the relationship" and gave a limiting instruction to the jury. Relationship evidence is generally admissible to illuminate a relationship between an alleged offender and a victim of sexual abuse. *See, e.g., State v. Lunsford*, 507 N.W.2d 239, 242 (Minn. App. 1993) (holding that the district court did not abuse its discretion in admitting evidence of shared drug use between a victim and abuser, even though drug use was unrelated to the alleged sexual assaults), *review denied* (Minn. Dec. 14, 1993). We conclude that the district court did not abuse its discretion in admitting A.J.'s testimony about the additional incident of abuse as relationship evidence.

III. There was sufficient evidence for the jury to convict Niedermayer of second-degree criminal sexual conduct with respect to A.J.

Niedermayer argues that there was insufficient evidence for the jury to convict him of second-degree criminal sexual conduct in relation to A.J. Niedermayer argues that it was implausible that "a middle-aged man, managed to stand up, run across the living room, wordlessly grab the ball and use it as a pretext for fondling [A.J.]." The state argues that Niedermayer does not dispute that specific elements of second-degree criminal conduct are "not proven, but instead argues that A.J.'s testimony was not credible."

At trial, the state's burden was to prove beyond a reasonable doubt that Niedermayer had "a significant relationship" to A.J. at the time of the alleged sexual contact with her. Minn. Stat. § 609.343, subd. 1(g). A "[s]ignificant relationship" includes "an adult who jointly resides intermittently or regularly in the same dwelling as the complainant." Minn. Stat. § 609.341, subd. 15 (2014). "Sexual contact," in pertinent part, is "the intentional touching by the actor of the complainant's intimate parts," including "touching of the clothing covering the immediate area of the intimate parts." *Id.*, subd. 11(b) (2014). The weight and credibility of individual witnesses is for the jury to determine. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Here, the jury believed A.J. and found her testimony credible. Her testimony was consistent with what she stated in her MCRC interview. Niedermayer argues that it would have been impossible for him to rub A.J.'s body if he reached for the ball with his palm facing A.J., as she testified, because "the ball would have been between his palm and A.J.'s body." But the jury believed A.J., and it is not for this court to "try the facts anew." *State v. Daml*, 162 N.W.2d 240, 242 (Minn. 1968).

In sum, we conclude that the district court did not plainly err by instructing the jury to determine whether the abuse took place "on or before April 2015," and did not abuse its discretion by admitting testimony from A.J. about a new incident of abuse as relationship evidence. We also conclude that there was sufficient evidence for the jury to convict Niedermayer of second-degree criminal sexual conduct relating to A.J.

Affirmed.