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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1534**

State of Minnesota,
Respondent,

vs.

Mario Pedro Moreno,
Appellant.

**Filed July 29, 2019
Affirmed
Smith, Tracy M., Judge**

Faribault County District Court
File No. 22-CR-16-499

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Kathryn Karjala-Curtis, Faribault County Attorney, Blue Earth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this direct appeal from three convictions of first-degree criminal sexual conduct, appellant argues that (1) his convictions should be reversed because the state failed to prove

his guilt beyond a reasonable doubt, (2) the district court erred in denying his motion for a new trial based on discovery violations by the state, and (3) two of his three convictions and sentences should be vacated because they are for the same offense and arose from the same unitary course of conduct. We affirm.

FACTS

In August 2010, L.C. moved into a house in Wells, Minnesota, with her two daughters, A.P. and R.P. That October, L.C.'s boyfriend, appellant Mario Pedro Moreno, moved into the house with them. At the time that Moreno moved in, A.P., the youngest child, was seven years old.

From 2010 to 2014, Moreno was intermittently employed. He worked construction full time, but, when he was not working construction, he would sometimes only work at a local bar eight days a month. L.C., working various full-time shifts, would often leave A.P. and R.P. in the care of Moreno.

In September 2014, Moreno moved out of the house but maintained a relationship with L.C. In January 2016, Moreno came to the house, had supper, and spent the night. In the morning, he became angry that L.C. had been talking with someone, and she decided to end the relationship with him. According to L.C., Moreno then "proceeded to beat the hell out of [her]." Moreno was eventually convicted of third-degree assault for this incident.

In August 2016, A.P. told L.C. that Moreno had "hurt" her. A.P. was not able to articulate exactly what had happened, but, when L.C. asked her more specific questions, A.P. answered affirmatively. L.C. asked if Moreno "touched" her and if he had "raped"

her, to which A.P. responded, “Yes.” Shocked, L.C. called the police and reported it the next day. A.P. has since had behavioral difficulties, including trying to harm herself and expressing a wish to die.

On September 6, 2016, child-protection specialist Tara Wickelgren interviewed A.P. This was Wickelgren’s first interview of this nature, after starting at this position in March 2016 and receiving a five-day CornerHouse¹ training on how to perform forensic interviews of children. During the interview, A.P. disclosed “sexual abuse, vaginal penetration, and anal penetration,” to Wickelgren. A.P. identified her abuser as “Mario,” her mother’s ex-boyfriend. She told Wickelgren that the abuse had occurred while he lived with them, from the time she was 7 to when she was 12 years old. A.P. told Wickelgren that the abuse happened every other day, always at the home. Wickelgren used anatomical drawings while interviewing A.P. to identify the nature of the abuse. According to Wickelgren, A.P. did not appear to be manufacturing the story or to have been coached in any way.

On September 7, 2016, Deputy Mark Purvis interviewed Moreno at the Faribault County Jail. Moreno indicated confusion about what was going on and what the allegations were. Deputy Purvis indicated that there were allegations of sexual assault but did not mention any specifics about the allegations or identify A.P. or L.C. Deputy Purvis explained to Moreno that he was facing criminal sexual conduct charges. Moreno

¹ CornerHouse is an organization that offers training in forensic interviewing to Minnesota professionals who respond to reports of child abuse, including teachers, child-protection workers, and law-enforcement officers.

maintained that he knew nothing of the allegations and said, “I don’t know what [A.P.’s] saying, I don’t know what she’s been coerced to say.”

On September 8, 2016, respondent State of Minnesota charged Moreno with three counts of criminal sexual conduct in the first degree, in violation of Minn. Stat. § 609.342, subd. 1(a) (2014). Count 1 was based on vaginal penetration during the period August 1, 2010 to December 31, 2014; count 2 was based on anal penetration during the same time frame; and count 3 was based on compelling fellatio during the same time frame. Moreno waived his right to a jury trial. A court trial was held from April 25 to 27, 2018.

At trial, A.P., then 14, testified. She stated that, after Moreno moved into their house, “[h]e would come up to [her] room, when [she] was sleeping, and he would sometimes do anal and sometimes he would make [her] do oral and other times it would be vaginal.” A.P. explained that this started when she was seven years old and lasted until she was twelve. She stated that the sexual abuse occurred on more than one occasion, sometimes in her bedroom and sometimes in the basement. A.P. testified that she would sometimes resist Moreno and, when she did, he would get mad, sometimes striking her. She also testified that, before she told her mother in 2016, she told her friend B.S. about the sexual abuse. A.P. stated that, when Moreno did these things to her, she felt “empty and numb. Scared.”

A.P.’s friend B.S. also testified. The defense objected to her testimony on the ground that it was a late disclosure and they did not know what she was going to say. The district court noted the objection but took the testimony. B.S. stated that, in the summer of 2016, she talked to A.P. about a secret A.P. wanted to share. B.S. testified that A.P. told

her “[t]hat Mario would do stuff to her—touched her and had anal with her.” B.S. stated that she thought she was “the first person [A.P.] told.”

The state called other witnesses, including Wickelgren, and An.P., a friend of L.C.’s who also lived in the house for a time while Moreno lived there. The state introduced Wickelgren’s recorded interview of A.P.

Moreno testified on his own behalf. He testified that he first met L.C. when he was young—around 19—and they had been “on and off since then.” He stated that he moved in with L.C. in late summer 2010. During that time, he was working full time but was laid off a few months later. He had a night job working at a bar in Mankato, where he worked from 2010 to 2014. Moreno testified that, in 2013, he was injured and was unable to work because he had a large leg brace that kept him immobile. He also testified that the medication he was on at that time put him to sleep and prevented him from having sex with anyone. Moreno denied ever having sex with A.P. or touching her in any inappropriate way.

The defense also called Hollida Wakefield, a licensed psychologist, to testify. She explained that there are scientifically agreed upon methods for interviewing children. Wakefield stated:

The most important and basic one that . . . underlies all the others is to go into the interview without what they call confirmatory bias. To go into the interview and think of all possibilities that could have resulted in this child being in this interview room at this point and to explore those. One of the things I find most often in interviews that end up with unreliable false information is that the interviewer has been told what happened and seems to be trying to get the child to

repeat the allegations on the tape rather than exploring all possibilities.

Having reviewed Wickelgren's 2016 interview of A.P., Wakefield testified that it suffered from confirmatory bias and that it was made less reliable because ground rules were not established. She also testified that the use of the anatomical drawings affected the reliability of A.P.'s statements because "research, specifically on the drawings, indicates that when they're used, the information has more error in it, more false statements." Wakefield testified, "I think it's implausible that he's hitting her, choking her, raping her every other day from age—almost every day from age 7 to age 12."

In rebuttal, the state offered the expert testimony of Stefanie Randolph. The defense had objected to her testimony because the state did not provide the defense with a report about her testimony prior to trial. The district court decided to allow Randolph's testimony only as rebuttal to anything testified to by Wakefield. The district court instructed counsel to limit their questioning to the scope of issues raised by Wakefield's testimony. Randolph testified that she is a victim-assistant specialist at the National Child Protection Training Center and had been a forensic interviewer for seven to eight years. She explained that using anatomical diagrams in an interview with a child can help "come to a common language" regarding body parts as well as for "clarification purposes." She also testified that she would not rule out claims of anal penetration or think that that was unusual and said, "[I]n any interview, we're going to follow up and ask questions about what the child has told us."

Following the three-day trial, the district court issued its findings of fact, conclusions of law, and verdict. The district court found Moreno guilty of all three counts. In doing so, the district court found the testimony of A.P. to be more credible than that of Moreno, stating:

A.P.'s testimony and disclosures to [L.C.] and [B.S.] were not full of details and there were many responses of "I don't remember." However, A.P. has been consistent in describing sexual abuse that occurred by Moreno sticking his penis into her butt and vagina and making her suck on his penis. Had A.P. been fabricating these allegations, it seems likely that she would have further embellished them rather than claim that she could not remember the details of the abuse. . . . Also telling was A.P.'s physical appearance and body language. She appeared reluctant to testify. When asked to identify Moreno, A.P. demonstrated difficulty in directing her eyes towards Moreno. While these traits do not confirm the veracity of A.P.'s testimony, they do burnish her credibility and undermine any claim that A.P. was making up these allegations in an attempt to get revenge. The [c]ourt finds A.P. was credible when she testified regarding the sexual abuse by Moreno, when she told [B.S.] about the sexual abuse, when she disclosed the abuse to [L.C.] and again when she described the abuse to Wickelgren.

Moreno subsequently moved for a judgment of acquittal or a new trial, arguing that the state failed to provide proper discovery, that the charges were overly broad, and that the case against Moreno was based on inconsistent and unreliable claims. The district court denied these motions, convicted Moreno of all three counts, and sentenced him to concurrent 234-, 360-, and 360-month prison terms.

This appeal follows.

DECISION

I. Sufficient evidence supports Moreno’s convictions for criminal sexual assault.

Moreno first argues that his convictions must be reversed because the state did not prove his guilt beyond a reasonable doubt, primarily arguing that A.P.’s allegations against him were not credible.

When reviewing a claim of insufficient evidence, we review the record to determine whether the evidence is sufficient to allow a fact-finder to reach its verdict. *State v. Olhausen*, 681 N.W.2d 21, 25 (Minn. 2004); *see also State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011) (“[Appellate courts] use the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence.”). Appellate courts review the evidence in the light most favorable to the conviction and assume that the fact-finder “believed the state’s witnesses and disbelieved any evidence to the contrary.” *Olhausen*, 681 N.W.2d at 25. The verdict will not be disturbed if the fact-finder “could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 25-26.

Minn. Stat. § 609.342, subd. 1, provides:

A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant’s age nor consent to the act by the complainant is a defense.

The state therefore needed to prove (1) that Moreno sexually penetrated or had sexual contact with A.P., (2) that A.P. was under 13 years old at the time, and (3) that Moreno

was more than 36 months older than A.P. at the time. The district court found that “[i]t is undisputed that A.P., was under 13 years of age during the relevant time frame and that Moreno was more than 36 months older.” It went on to find that “Moreno intentionally penetrated A.P. by inserting his penis into her anal and vaginal opening,” that “Moreno made A.P. perform fellatio on him,” and that “these acts were done with sexual intent.” Most of the district court’s decision was based on the finding that A.P.’s statements were credible, since this was “a case without physical evidence.”

The supreme court has stated that “a conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969). Furthermore, a conviction can be supported by a single witness, even when there are inconsistencies between her testimony and prior statements. *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004).

Moreno primarily relies on *State v. Huss* to argue that A.P.’s testimony was not sufficient to support his convictions. 506 N.W.2d 290 (Minn. 1993). In *Huss*, the supreme court reversed a father’s conviction for sexually assaulting his three-year-old daughter. *Id.* at 290. In that case, the supreme court noted that the only direct evidence about the abuse came from the child herself, and the supreme court described that testimony as “particularly troublesome.” *Id.* at 292. The child’s testimony on the stand was unusual, as the court explained:

The child was on the stand for almost an hour before she made any accusation of abuse, and then she said both her mother and her father had touched her in a bad way. When she was asked repeatedly on direct examination whether she had any “yucky secrets,” she answered in the negative. Further she testified

that she knew that no one was supposed to touch her private parts, but that six people had touched her there, including a playmate. She also called a hug and a touch to her hair “bad touches.” Although the child had not seen her father for approximately a year before trial, she testified that she had taken a shower at his house on the day she gave her testimony. The child was not able to identify appellant in the courtroom, although he was pointed out to her and she testified that her father was bald and blind, although appellant is neither.

The supreme court determined that her testimony was not sufficient to meet the state’s burden of proof, but only because of “these unusual facts.” *Id.* at 293.

Moreno identifies seven reasons why A.P.’s testimony is just as “troublesome” as that in *Huss*: (1) A.P. gave different accounts of how often Moreno abused her; (2) she lived in a small house, and no one saw Moreno act inappropriately; (3) she provided no meaningful details of the abuse; (4) there were no medical findings to support her claims that she was vaginally and anally abused hundreds of times; (5) she waited years before reporting the abuse; (6) the forensic interview with Wickelgren was problematic; and (7) A.P. had a motive to falsify allegations against Moreno.

None of these facts rise to the level of the problematic testimony in *Huss*. The supreme court made clear that *Huss* was an unusual case and that “the standard for overturning a conviction for insufficiency of the evidence is a high one,” particularly since an appellate court will not weigh evidence or evaluate the credibility of witnesses. *Id.* at 292. Given that the district court expressly found A.P.’s testimony to be credible, and there was nothing about her testimony that was drastically inconsistent or troubling, Moreno has not met the heavy burden necessary to have his guilty verdicts overturned. Sufficient evidence supports the convictions.

II. The district court did not err in denying Moreno's motion for a new trial based on alleged discovery violations by the state.

Moreno argues that he is entitled to a new trial because the state made repeated discovery violations that compromised his right to a fair trial.

“Whether a discovery violation occurred is an issue of law which [we] review[] de novo.” *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). We review any sanction imposed by the district court for a discovery violation for an abuse of discretion. *Id.* “Generally, without a showing of prejudice to the defendant, the state’s violation of a discovery rule will not result in a new trial.” *Id.*

Moreno states that the prosecutor made a “pattern of discovery violations,” arguing that he was not properly given notice of the testimony of Randolph, B.S., An.P., and A.P. He also takes issue with the fact that he was never given a copy of any police reports from the North Mankato Police Department, which had been involved in Moreno’s arrest.

With respect to Randolph’s testimony, because Randolph was an expert witness, the state was required to provide Moreno with a report of what she was going to testify to. Minn. R. Crim. P. 9.01, subd. 1(4)(c). This did not happen, so the district court excluded Randolph from testifying in the state’s case-in-chief. But “[d]isclosure rules do not apply to rebuttal evidence.” *State v. Yang*, 627 N.W.2d 666, 677 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). The district court therefore did not abuse its discretion by permitting Randolph to testify in rebuttal. In any event, any discovery violation did not result in prejudice. Randolph’s testimony was similar to that of Wakefield, in that they both agreed to certain established practices for interviewing children about potential abuse.

The main difference in their opinions concerned the use of anatomical drawings, and it is unlikely that this divergence affected the verdict.

Regarding the testimony of B.S. and An.P., Moreno argues that he was not given the “full substance” of their statements prior to trial. The prosecution is required to disclose “written or recorded statements,” “written summaries of oral statements,” and “the substance of oral statements” that relate to the case. Minn. R. Crim P. 9.01, subd. 1(2)(a), (b), (c). The district court found that,

[w]hile the state did not provide the sum and substance of [B.S.’s] potential testimony, it identified her as a confidant of the victim regarding the abuse. With respect to [An.P.], [d]efendant listed her as a potential fact witness on his witness list. The fact that he was not able to locate her does not preclude the [s]tate from locating her and calling her to testify even if it was shortly before the trial began.

Moreno argues that, because the state failed to provide fuller accounts of what B.S. and An.P. were going to testify to, he is entitled to a new trial. But he does not allege prejudice, and it is not evident that any prejudice resulted from the inadequate disclosure. Regarding B.S., the defense knew that she was a “confidant of the victim regarding the abuse,” and that description encapsulates what B.S. testified to, as her testimony was not lengthy or particularly detailed.

Regarding An.P., the defense did not object to her testimony at trial, so this court reviews for plain error. *See State v. Vick*, 632 N.W.2d 676, 685 (Minn. 2001) (explaining that an appellate court may review unobjected-to error for (1) error, (2) that is plain, and (3) that affects substantial rights before the appellate court decides whether (4) the error seriously affected the fairness and integrity of the judicial proceedings). An.P. testified

that, when she was living with L.C. at the house, she noticed instances of Moreno going into the bathroom while A.P. was in the bathtub and closing the door. She testified that this disturbed her. An.P. also testified that she had general concerns about what was going on in the house but that she did not feel she could speak candidly to L.C. about them. Even if allowing this testimony was plain error in light of the prosecution's inadequate disclosure, it did not affect Moreno's substantial rights, as the district court did not rely on it when making its decision. The district court expressly stated that "[An.P.'s] testimony was discounted by the [c]ourt in its findings."

Moreno further argues that the state prosecutor met with A.P. prior to her testimony but did not furnish the defense with a copy of their conversation. Though the district court did not rule on it, this was a discovery violation. Because the conversation was either a "recorded statement" or an oral statement, the state was required to provide a copy, a written summary, or "the substance" of the statement. Minn. R. Crim. P. 9.01, subd. 1(2). But Moreno does not explain how the nondisclosure resulted in prejudice to him. As the district court pointed out, "the mechanism for dealing with inconsistent testimony is [to] challenge the testimony through confrontation and cross-examination" and Moreno

was afforded that opportunity and questioned A.P. on her statements regarding the frequency of the abuse. In his closing, [d]efendant argued that A.P.'s testimony was not credible given the changes from her previous statements. Given that [d]efendant did address any inconsistencies by A.P. at trial, any changes in her testimony becomes a credibility issue.

Moreno also argues that the state failed to disclose case-related information held by North Mankato police officers, specifically, the names of the officers involved in Moreno's

arrest and a related police report, in violation of Minn. R. Crim. P. 9.01, subd. 1a(1) (extending prosecution's disclosure obligations to others who participated in investigation of case). The district court found that the state was unaware of the report and did not possess it until after the trial, while appellant knew of his interactions with North Mankato Police yet never sought discovery of the police reports from the state or otherwise pursued the information. In any event, Moreno does not explain how the asserted discovery violation caused him prejudice or affected the verdict.

Moreno further argues that the prosecutor committed misconduct by attempting to introduce, without sufficient notice, evidence that Moreno had mistreated dogs. However, at trial, when the prosecutor attempted to elicit this information from A.P., the district court immediately interrupted and refused to allow the testimony. There is no basis in the record to conclude that this alleged misconduct prejudiced Moreno or affected the verdict.

In sum, Moreno alleges a number of discovery violations by the state, and some of them indeed occurred. But Moreno fails to point out how they resulted in prejudice. Instead, Moreno argues that he is entitled to a new trial pursuant to *State v. Kaiser*, in which the supreme court exercised its "supervisory powers" and granted a new trial because of prosecutorial discovery violations, even when prejudice was not clear. 486 N.W.2d 384, 387 (Minn. 1992). Not only is *Kaiser* easily distinguishable from this case, as the violations in that case were much more obvious and flagrant, but we are an error-correcting court and it is not our role to exercise a "supervisory power." See *In re Welfare of M.K.*, 805 N.W.2d 856, 865 (Minn. App. 2011) ("[T]his court, as an intermediate-appellate court,

does not exercise supervisory powers reserved to the supreme court.”). Because none of the discovery violations prejudiced Moreno, he is not entitled to a new trial.

III. The district court properly convicted and sentenced Moreno on all three counts of first-degree criminal sexual conduct.

Moreno finally argues that two of his three convictions and sentences should be vacated because “all three convictions are for the same offense and arose from the same unitary course of conduct,” citing both Minn. Stat. § 609.035 (2016) and Minn. Stat. § 609.04 (2016).

We first address the issue of separate convictions. Minn. Stat. § 609.04, subd. 1, states: “Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” An “included offense” is “[a] crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). The protections of section 609.04, however, do not apply if the offenses constitute separate criminal acts. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). “The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035.” *Id.*

Here, the state charged Moreno with three counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a), for offenses that occurred between 2010 and 2014. In the charge descriptions, each count referenced a different sexual act: count 1, “vaginal intercourse”; count 2, “anal intercourse”; and count 3, compelled fellatio. The district court found that Moreno committed all three acts during that time period.

In *State v. Folley*, the supreme court explained, “As we have interpreted Minn. Stat. § 609.04 (1988), a defendant may not be convicted of two counts of criminal sexual conduct (different sections of the statute or different subsections) on the basis of the same act or unitary course of conduct.” 438 N.W.2d 372, 373 (Minn. 1989) (footnote omitted). In that case, the defendant was charged with two counts of first-degree criminal sexual conduct, based on two different sections of the statute: one count for sexual assault of a child, in violation of section 609.342, subdivision 1(a) (1998), and a second count for “multiple acts” of sexual assault of a child “committed over an extended period of time,” in violation of then section 609.342, subdivision 1(h)(v) (1998). *Id.*; see Minn. Stat. § 609.342, subd. 1(h)(v). Because the single act forming the basis for the first count was among the “multiple acts” over an “extended period of time” forming the basis for the second count, the supreme court concluded that “both convictions were based on the same evidence and the same acts” and vacated one of the convictions. *Id.*

This case, like *Folley*, involves multiple acts of sexual assault occurring over a long period of time. See *id.* But this case differs from *Folley* in the crimes charged. In *Folley*, the appellant was charged with violating subdivision 1(a) (single act) and 1(h)(v) (multiple acts over an extended period of time), and the single-act count overlapped with the multiple-acts count. Here, Moreno was charged with three, non-overlapping, single-act counts, for violations of Minn. Stat. § 609.342, subd. 1(a). Therefore, the supreme court’s reasoning in concluding that *Folley* could not be convicted of both counts does not apply here.

Moreno relies on *State v. Suhon*, 742 N.W.2d 16 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008), a multiple-sentence case under Minn. Stat. § 609.035, to argue why this case, in contrast to *Suhon*, involves a single behavioral incident and thus the same criminal act under Minn. Stat. § 609.04. In *Suhon*, the complainant, like A.P., described multiple acts of sexual conduct occurring over several years. 742 N.W.2d at 19. But, in that case, the complaint specified that each of the three charged counts referenced a different period of time. *Id.* at 20. Suhon was convicted of three counts and sentenced to consecutive prison terms. This court affirmed, concluding that the district court did not clearly err by finding that the abusive acts did not constitute a single behavioral incident because the acts were separated by time and place, days passed between incidents, and the acts happened in different rooms although in the same house.

Suhon does not compel a different result here. A.P. described three types of penetration that occurred in her bedroom or in the basement, and she described the acts as occurring every other day for four or five years. Unlike in *Suhon*, all three counts were charged as having occurred in the same time period. But, because the district court found that Moreno committed sexual penetration against A.P. in three different ways, it found three separate crimes that were not the same act or part of the same unitary course of conduct. This finding is supported by the record, namely A.P.'s testimony, which the district court found credible. She testified that the vaginal, anal, and oral penetration occurred multiple times, in at least two different locations, over a period of at least four years. Thus, the record describes multiple criminal acts, including the three that resulted

in convictions, and, because the convictions are supported by evidence of separate conduct, they are not prohibited by section 609.04.

As for the separate, concurrent sentences, because the separate-criminal-acts analysis of Minn. Stat. § 609.04 is analogous to the analysis of whether the offenses constituted separate behavioral incidents pursuant to Minn. Stat. § 609.035, *see Bertsch*, 707 N.W.2d at 664, the district court properly sentenced Moreno on all three convictions.

Affirmed.