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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1948**

State of Minnesota,
Respondent,

vs.

James Francis Vierling,
Appellant.

**Filed June 22, 2020
Affirmed
Smith, John, Judge***

Steele County District Court
File No. 74-CR-17-166

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

Dan McIntosh, Steele County Attorney, Christy Hormann, Assistant County Attorney, Owatonna, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Florey, Judge; and Smith, John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant James Francis Vierling's 2018 conviction of first-degree criminal sexual conduct because there was sufficient evidence for the conviction, and the district court did not err in admitting evidence of similar sexual conduct or in concluding that Vierling was not entitled to a new trial for the state's purported discovery violation in his 2015 assault prosecution.

FACTS

In 2015, Vierling was charged with multiple counts of assault after physically abusing his stepdaughter, M.M. While preparing for trial, M.M. informed the prosecutor that Vierling had forced her to perform fellatio on him when she was approximately five or six years old. The prosecutor did not disclose this incident due to it "not being the basis for the charges in this complaint, not being part of any history of the relationship evidence in this case, and because it would have most likely required a child protection response and further investigation." The day after M.M. informed the prosecutor of this incident, Vierling pleaded guilty to second-degree assault pursuant to a plea agreement where the parties jointly recommended a downward dispositional departure resulting in a probationary sentence. By the time he was sentenced on April 28, 2016, Vierling had been apprised of the allegation made by M.M. to the prosecutor.

In January 2017, Vierling was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2006). The criminal sexual conduct

described in the complaint was the incident that M.M. had revealed to the prosecutor prior to Vierling's guilty plea to second-degree assault.

A two-day jury trial was held in July 2018. M.M. testified that Vierling was her stepfather, and that he sexually assaulted her when she was five or six years old by pushing her to the floor, pulling down his pants, and placing his penis in her mouth. She did not remember if anything came out of Vierling's penis after he inserted it into her mouth. M.M. testified that her mother was in the kitchen when this abuse took place, and likely heard it, but chose not to intervene. She stated that she did not tell her mother or law enforcement about what happened but told some friends and a foster parent about it. M.M. also described other instances of physical threats and abuse perpetrated by Vierling, including an instance when he inserted his fingers into her vagina. M.M. admitted that her relationship with Vierling became more distant after she discovered that he was not her biological father, but she denied that that discovery led her to manufacture accusations against him. She also denied that Vierling's probationary sentence for his assault conviction led her to accuse him of forcing her to perform fellatio on him.

Prior to M.M.'s testimony about other instances of abuse perpetrated by Vierling, the trial court gave a cautionary instruction in which it informed the jury that they were to hear about conduct that occurred subsequent to the charged offense, that the evidence was being offered for the limited purpose of demonstrating the nature and the extent of the relationship between Vierling and M.M., and that the evidence was being introduced in order to assist them in determining whether Vierling committed the acts with which he was

charged. The district court added that Vierling was not being tried for, and was not to be convicted of, any behavior other than the charged offense.

The jury also heard testimony from M.M.'s foster parent, M.M.'s therapist, and M.M.'s mother. M.M.'s foster parent testified that M.M. wrote down on a piece of paper as they were going to meet the prosecutor that Vierling had forced her to perform fellatio, and she confirmed that M.M. had confided in a friend days before. M.M.'s therapist also testified that M.M. had told her about the abuse that occurred when M.M. was five or six years old. But M.M.'s mother stated that M.M. never told her about the incident or the circumstances surrounding it.

James Vierling testified. He denied putting his penis in M.M.'s mouth. He also denied ever putting his fingers inside M.M.'s vagina. Vierling admitted that he pleaded guilty to physically assaulting M.M. He also admitted to the conduct which led to the second-degree assault charge. He noted that he pleaded guilty because the assault allegations were true.

In its closing instructions, the trial court repeated the caution it had given the jury regarding the evidence of other instances of abuse. And in its closing argument, the state reminded the jury that Vierling was charged with one offense and that was the act of forcibly inserting his penis into M.M.'s mouth.

The jury found Vierling guilty of first-degree criminal sexual conduct. Vierling received a 144-month sentence which was to be followed by a ten-year conditional release period.

Vierling filed a notice of appeal in December 2018. The appeal was later stayed and the case remanded to the district court for postconviction proceedings. In his petition for postconviction relief, Vierling requested a new trial because of a discovery violation in his prosecution for second-degree assault. Vierling alleged that the state had failed to disclose M.M.'s allegation of criminal sexual conduct after it was disclosed to the prosecutor. He argued that the allegation should have been disclosed because it would have been relevant to settlement negotiations and could have been used as potential cross-examination material at trial. Vierling alleged that, because the allegation was not disclosed, he accepted the state's plea agreement when he otherwise would not have, and that the state then used his assault conviction to bolster M.M.'s credibility in his trial for criminal sexual conduct. Vierling argued that, because of the state's discovery violation, he was "deprived of due process of law to a fair trial." At the same time Vierling filed a postconviction petition in the present case, he filed a petition for postconviction relief in his 2015 assault case, which similarly alleged that the state's failure to disclose M.M.'s allegation of sexual abuse led him to enter a plea agreement that he otherwise would not have entered had he known of the allegation.

The state opposed Vierling's petitions. It argued that there was no discovery violation in Vierling's assault case and that, even if there had been a violation, Vierling had not established that he was prejudiced by it. The state also argued that Vierling's claim that he would not have pleaded guilty had he known about M.M.'s allegation of criminal sexual conduct is not credible as he had actual knowledge of the allegation prior to his sentencing, yet never moved to withdraw his plea and failed to timely petition for

postconviction relief. Finally, the state argued that Vierling's claim that it had secured his conviction in the assault case so as to use that conviction against him in his prosecution for criminal sexual conduct was unavailing as it did not use Vierling's assault conviction to bolster M.M.'s credibility.

A hearing on Vierling's postconviction petitions was held in June 2019. At the hearing, Vierling testified that, had he known that M.M. had alleged that he had coerced her to perform oral sex on him, he would not have signed the plea agreement because the assault conviction could be used against him in a subsequent prosecution for sexual abuse.

The district court denied Vierling's postconviction petitions in both matters.

In October 2019, this court dissolved the stay and reinstated this appeal.

D E C I S I O N

Vierling advances three arguments on appeal, the second of which was made in his postconviction petition, and the first and third which are being raised for the first time on direct appeal.

I.

Vierling first argues that there was insufficient evidence to convict him of first-degree criminal sexual conduct.

When the sufficiency of the evidence is challenged, this court “‘carefully examine[s] the record to determine whether the facts and the legitimate inferences drawn from them would permit the fact[-]finder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.’” *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quoting *State v. Boldmam*, 813 N.W.2d 102,

106 (Minn. 2012)). “The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). “The verdict should be upheld if the jury, giving due regard to the presumption of innocence and to the state’s burden of proof beyond a reasonable doubt, could reasonably have found the defendant guilty of the offense charged.” *State v. Thames*, 599 N.W.2d 122, 127 (Minn. 1999).

Minn. Stat. § 609.342, subd. 1(g), provides that:

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 . . . the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the act. Neither mistake as to the complainant’s age nor consent to the act by the complainant is a defense.

“Sexual penetration” includes the act of fellatio “whether or not emission of semen occurs.”

Minn. Stat. § 609.341, subd. 12(1) (2006).

Vierling argues that “even with recognition of the deference to the verdict of the jury, the lack of corroboration taken together with the physical impossibility/improbability of the allegation, the conviction of the [a]ppellant should be reversed.” Vierling notes that M.M. could not recall any details of the incident, including why her mother, who was nearby, did not respond. He also notes that M.M. neglected to tell her mother or law enforcement about this incident for approximately ten years, that she did not recall any seminal emission, and that the allegation only arose when “collateral issues were confronting the relationship between M.M. and her parents.”

In response, the state argues that M.M.'s testimony was partially corroborated by other evidence in the record. It notes that M.M.'s testimony about the sexual assault was consistent with the note she gave to her foster mother, and with what she had previously disclosed to a friend. The state also argues that M.M.'s testimony was supported by similar-conduct evidence which demonstrated that Vierling frequently lost his temper with M.M. and either physically or sexually assaulted her in response. The state argues that, given the deference afforded to jury verdicts, there are no grounds for reversing Vierling's conviction, especially considering that the defects identified by Vierling were either presented to the jury and rejected, or irrelevant. The state emphasizes that it is not the role of this court to retry the facts of the case or substitute its credibility determinations for those of the jury.

The state's analysis is correct. Vierling's conviction came down to an assessment of credibility, which is the province of the jury. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990) ("The weight and credibility of individual witnesses is for the jury to determine . . . [and it] has no obligation to believe a defendant's story." (quotation omitted)). Moreover, in a prosecution for first-degree criminal sexual conduct, "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2006); *State v. Cao*, 788 N.W.2d 710, 716-17 (Minn. 2010). This reflects the general rule that "a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quoting *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969)). Vierling has not identified anything in the record that is so impossible or improbable as to cast doubt on the jury's verdict. The fact that M.M. could not recall certain details is not a defect at

all, much less one that requires this court's intervention. *See State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983).

Therefore, there was sufficient evidence to support the jury's verdict.

II.

Vierling next argues that the district court erred when it denied him a new trial, which he argues he was entitled to because of the state's purported discovery violation in his 2015 assault case.

The district court concluded that the state did not commit a discovery violation in Vierling's assault case as M.M.'s allegation of sexual abuse was not sufficiently relatable to the assault case to warrant production under Minn. R. Crim. P. 9.01. The district court noted that "[a]lthough the two incidents involved the same victim, the disclosed act of sexual abuse significantly predated the events at issue and did not arise out of the same behavioral incident ... and the conduct was not motivated by obtaining a common criminal objective." The district court added that, even if the state had committed a discovery violation, Vierling had failed to demonstrate that he was prejudiced as he made no attempt to withdraw his plea despite being aware of M.M.'s allegation of sexual abuse. Finally, the district court concluded that Vierling's petition for postconviction relief for the purported discovery violation was untimely, and that none of the exceptions to the statutory time-limit applied.

On appeal, Vierling repeats the same arguments that he made in his postconviction petition, namely, that the state withheld the allegation of sexual abuse that M.M. had made during trial preparation in his assault case; that, had he known of the allegation, he would

not have accepted the state's plea deal, and would have used M.M.'s allegation in cross-examination to establish her bias against him; and that the allegation led the state to make an attractive plea offer in order to gain his conviction, which was then used to bolster M.M.'s credibility in the present case. Vierling argues that the state's discovery violation deprived him of "due process of law to a fair trial" in the present case, and "a knowing intelligent entry of a guilty plea" in his assault case.

In response, the state argues that Vierling's claim that the state committed a discovery violation in his assault case is untimely, and that even when the merits of Vierling's arguments are considered, they do not warrant granting him a new trial. With respect to the latter, the state notes that Vierling fails to cite any caselaw which "holds that a discovery violation by the state in one case, necessarily leads to a new trial in a subsequent case."

The state is correct that Vierling's collateral attack on his guilty plea in his assault case is unsupported by any authority. The supreme court has stated that a collateral attack on the validity of a guilty plea will only be allowed in "unique cases." *State v. Warren*, 419 N.W.2d 795, 798 (Minn. 1988) (quoting *State v. Edmison*, 379 N.W.2d 85, 86 (Minn. 1985)). However, the only "unique cases" in which a collateral attack is permitted are those where the defendant's prior conviction was accompanied by a "violation of a pivotal constitutional right," particularly the right to counsel. *Id.* But "[w]hen [a] defendant has counsel, it may be assumed that other important trial rights, including a factual basis for the plea, are being protected, at least for the purposes of a collateral attack." *Id.* As Vierling does not allege that a "pivotal constitutional right" was violated when he pleaded

guilty to second-degree assault in 2015, but rather that he was deprived of “a knowing intelligent entry of a guilty plea,” his case is not unique. Therefore, Vierling’s guilty plea in his assault case is immune from collateral attack and cannot be used to challenge his conviction in the present case.

As such, the district court did not err in concluding that Vierling was not entitled to a new trial for the state’s purported discovery violation.

III.

Finally, Vierling argues that the district court erred by admitting M.M.’s testimony that Vierling digitally penetrated her approximately four years after the charged incident took place. Vierling argues that this testimony was not admissible under section 634.20 because it was not a “prior incident” and was “more prejudicial than probative.”¹ His argument that the evidence was more prejudicial than probative is two-fold. First, he argues that, because this evidence was not offered to prove an element of the charged offense, he “was entitled to *Spriegl* analysis, including notice and a judicial determination of whether there was clear and convincing evidence that the subsequent act of criminal sexual conduct in fact had occurred.” Second, he argues that the evidence confused the jury because “[t]he offense date of the alleged fellatio and digital penetration incidents

¹ Both parties and the district court refer to evidence admitted pursuant to section 634.20 as relationship evidence. Despite a tendency among courts to conflate the two, *see State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010), “[r]elationship evidence admitted under section 634.20 is a subtype of general relationship evidence.” *State v. Bell*, 719 N.W.2d 635, 638 n.4 (Minn. 2006). In order to avoid any confusion, evidence admitted pursuant to section 634.20, which is at issue here, will be referred to as “similar-conduct evidence.”

were very vaguely described by the complainant [and t]he jury was instructed with an equally vague time element in which the charged offense had to be proven beyond a reasonable doubt.”

In response, the state argues that similar-conduct evidence need not be prior in time to the charged conduct to be admitted under section 634.20. The state also argues that the similar-conduct evidence was more probative than prejudicial. It notes that the evidence was “probative to assist the jury when it weighed M.M.’s credibility, as well as probative to explain the delay in her reporting of the assault,” and that Vierling’s claim that the similar-conduct evidence was prejudicial is unavailing as there is no indication in the record that either the state or the defense conflated that evidence with the charged offense. Finally, the state contends that, even if the district court erred in admitting the similar-conduct evidence, there was no prejudice to Vierling warranting a new trial.

In a prosecution for criminal sexual conduct:

Evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. “Domestic conduct” includes, but is not limited to, evidence of domestic abuse, violation of an order for protection under section 518B.01; violation of a harassment restraining order under section 609.748; . . . or violation of section 609.749 or 609.79, subdivision 1. “Domestic abuse” and “family or household members” have the meanings given under section 518B.01, subdivision 2.

Minn. Stat. § 634.20 (2016); Minn. Stat. § 518B.01, subd. 2(a)(1), (3) (2016); *see also State v. Sanders*, 743 N.W.2d 616, 620 (Minn. App. 2008), *aff'd*, 775 N.W.2d 883 (Minn. 2009). Similar-conduct evidence has probative value if it helps establish the relationship between the victim and defendant or places the alleged conduct in context. *State v. Barnslater*, 786 N.W.2d 646, 652 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010). However, it may give rise to unfair prejudice if the evidence persuades by illegitimate means and gives the state an unfair advantage. *Bell*, 719 N.W.2d at 641. This court applies an abuse-of-discretion standard of review to the admission of evidence pursuant to section 634.20. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

Vierling's arguments that the district court erred in admitting evidence that he digitally penetrated M.M. four years after the charged incident took place are unavailing. First, Vierling's argument that the state's similar-conduct evidence was inadmissible because it was not prior to the charged offense is legally unsupported. This court has held that "[t]he statute does not state that evidence of 'similar conduct' is admissible only if that conduct occurred before the incident giving rise to the charged offense," emphasizing that "there is no temporal restriction contained in the statute." *State v. Lindsey*, 755 N.W.2d 752, 756 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). Second, Vierling's argument that the evidence was more prejudicial than probative finds no support in either case law or the record. Similar-conduct evidence does not need to prove some element of the charged offense to be admissible. Rather, it may be offered to "assist[] the jury by providing a context with which it [can] better judge the credibility of the principals in the relationship." *McCoy*, 682 N.W.2d at 161. Additionally, there is no indication in the

record that the admission of the similar-conduct evidence confused the jury. At the close of trial, the trial court instructed the jury that Vierling could only be convicted of the charged offense, and that it was prohibited from convicting Vierling on the basis of the subsequent conduct. Similarly, the state reminded the jury that Vierling was charged with one offense and that was the act of forcibly inserting his penis into M.M.'s mouth.

As such, there is no indication that the district court's decision to admit the subsequent sexual abuse as similar-conduct evidence was in error.

Affirmed.