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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1035**

State of Minnesota,
Respondent,

vs.

Dirk Udo McHugh,
Appellant.

**Filed May 26, 2020
Affirmed in part, reversed in part, and remanded
Hooten, Judge**

Anoka County District Court
File No. 02-CR-18-3821

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this direct appeal from multiple convictions of criminal sexual conduct, appellant argues that the evidence is insufficient to sustain a conviction for first-degree criminal

sexual conduct because the only evidence of the child-victim's age was her pretrial statements to an investigator and her trial testimony. Alternatively, appellant argues that the district court committed reversible error by allowing the state to repeatedly admit relationship evidence regarding a prior incident of sexual conduct with a different child. Appellant also argues that his three lifetime conditional release terms must be reduced to three ten-year terms because the district court simultaneously entered the three convictions in a single hearing. We affirm in part, reverse in part, and remand to the district court with instructions to correct appellant's warrant of commitment.

FACTS

On June 6, 2018, the Anoka County Sheriff's Office received a report that appellant Dirk McHugh engaged in criminal sexual conduct with his 17-year-old daughter. Two days before the police received this report, the victim gave her mother a letter informing her that McHugh had been sexually abusing her for seven years. The letter described a pattern of abuse that began in approximately 2010 when the victim was 10 years old. The abuse worsened as the victim aged, culminating with McHugh's vaginal rape of the victim on April 12, 2018. Following the vaginal rape, McHugh told the victim that "he would make her regret it" if she ever told anyone.

The next day, the victim participated in a forensic interview regarding the abuse. During the interview, the victim told the investigator about the first time McHugh assaulted her when she was 10 years old. Shortly after the victim returned home from school, McHugh told her to lay down on her bed and that he "was going to do something to her." McHugh touched the victim's upper thighs and vaginal area over her clothes. After this

incident, McHugh told the victim that it was “okay” that he touched her in this way. The victim reported to the investigator that McHugh touched her in this way on several occasions.

In approximately 2012, when the victim was 12 years old, McHugh began to put his hands under her clothing. The victim recounted to the investigator the first time that McHugh touched her genitals under her clothes. The victim struggled against his actions, but McHugh called her a “whore” and a “slut,” and then slapped her when she cried. When asked by the investigator if “any part of [McHugh’s] body [went] inside of [her] body,” the victim initially responded not until she was raped when she was 17. However, later in the interview, the victim stated that McHugh put his finger inside of her vagina when she was “younger.”

McHugh continued this conduct until April 12, 2018, when the victim was 17 years old. The victim told the investigator that on that day McHugh came into the victim’s room, took off her clothes and underwear, and then took off his pants and started to masturbate. McHugh made the victim touch his penis with her hand. He then told the victim to lay on her back and “spread her legs.” The victim recalled the sickly scent of McHugh’s body odor and the alcohol on his breath as he climbed on top of her. Crying, the victim told the investigator how it felt to have her father’s bodyweight pressing down on her while listening to his grunts as he raped her. Leaving semen spilled across her stomach, McHugh stood up, told the victim to “clean herself up” and to “wash the sheets,” and then exited the room as if “nothing happened.”

The victim had not told her mother about the abuse in part due to her mother's reaction after McHugh's stepdaughter, the victim's older half-sister, reported a similar incident of abuse from McHugh when she was eight or nine years old. The sister told their mother that McHugh had drunkenly entered her room and climbed into bed with her late one night. The sister stated that McHugh forced her hands to touch his penis and told her to open her mouth so that he could kiss her. Shortly after, McHugh passed out on her bed and the sister went to find their mother and report what happened. After that night, neither McHugh nor their mother spoke of the event until approximately 2016, when their mother, while discussing the incident with her sister, asked the victim if anything similar had ever happened to her. The victim later admitted in the letter to her mother that she had lied to her mother and sister in 2016 when she denied that anything occurred.

McHugh was charged with three counts of criminal sexual conduct. For the conduct that occurred from 2010–2012, McHugh was charged with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010), where the actor had a significant relationship with the complainant, who was under the age of 16, and the sexual abuse involved multiple acts committed over an extended period of time. For the conduct that occurred in 2012–2016, McHugh was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2012), where the actor engaged in sexual penetration and had a significant relationship with the complainant, who was under the age of 16, and the sexual abuse involved multiple acts committed over an extended period of time. For the vaginal rape that occurred on April 12, 2018, McHugh was charged with third-degree criminal sexual conduct in violation of Minn. Stat.

§ 609.344, subd. 1(f) (2016), where the actor engaged in penetration and had a significant relationship to the complainant who was at least 16 years old but under 18 years old.

At trial, the victim, her sister, their mother, the victim's boyfriend, and two police investigators all testified. The victim's letter to her mother was admitted into evidence. McHugh's conduct with the victim's sister was admitted as relationship evidence over McHugh's objection. The jury was also shown a video of the victim's forensic interview, which detailed the above facts.

The victim's testimony on the stand largely mirrored her statements to the police at the forensic interview. She testified that the sexual conduct began when she was "about 10" and that McHugh would begin to touch her stomach before moving to her vaginal area and chest. She reported that the instances of sexual conduct occurred every few weeks and escalated from touching her over her clothes to touching her and rubbing her under her clothes—"bare skin to bare skin"—when she was "maybe 11 or 12," and eventually to "more intense" and "faster" rubbing and inserting a finger into her vagina when she was "maybe 14." The victim testified that McHugh's abuse occurred multiple times per week, and at one point, the victim asked McHugh to stop but he refused.

The letter that the victim wrote to her mother, which included a reference to the incident between McHugh and her sister, was introduced into evidence. The district court offered a limiting instruction regarding evidence of the abuse of the sister and instructed the jury that the evidence was being admitted to assist the jury in determining the nature and extent of the relationship between McHugh and his family members and to help the jury decide whether McHugh committed the identified acts with the victim. In their

testimony, the sister and the mother also testified about the incident between the sister and McHugh. Prior to the sister and the mother's testimony, the state requested that the district court read the limiting instruction again; the district court readily complied.

McHugh also testified in his own defense. When asked about the incident with his stepdaughter, McHugh simply stated that he did not remember it occurring or any details about the event. When asked about any incident of sexual abuse with the victim, McHugh denied any wrongdoing. The jury found McHugh guilty of all three counts of criminal sexual conduct.

At sentencing, McHugh's attorney acknowledged that McHugh was subject to a lifetime conditional release term as all three counts on which he was convicted arose from different incidences of conduct. The district court confirmed by asking "[e]ven though they're announced or accepted contemporaneously like that?" McHugh's attorney agreed and stated "even if there's, like, a second in between, they do count as separate actions." Accordingly, the district court sentenced McHugh on three separate convictions to be served concurrently: 90 months in prison and a 10-year conditional release for the second-degree criminal sexual conduct, 168 months in prison and a lifetime conditional release for the first-degree criminal sexual conduct, and 140 months in prison and a lifetime conditional release for the third-degree criminal sexual conduct. However, the warrant of commitment indicates that McHugh was ordered to serve a lifetime conditional release for each count.

McHugh appeals.

DECISION

I. The state's evidence regarding the victim's age was sufficient to support a finding of guilt.

McHugh argues that the state's evidence was insufficient to convict McHugh of first-degree criminal sexual conduct as a matter of law because the evidence was insufficient to prove that McHugh sexually penetrated the victim before she turned 16 years old.

When reviewing the sufficiency of the evidence, this court conducts “a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). “A reviewing court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *State v. Brandes*, 781 N.W.2d 603, 606 (Minn. App. 2010). We first identify the circumstances proved, then “determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013).

Direct testimonial evidence is evidence “based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017). Importantly, “a conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). Even when conflicting evidence exists, a reviewing court must

assume that a jury believed a witness and disbelieved any conflicting evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

To be convicted of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii), the actor must have engaged in multiple acts of sexual penetration over an extended period of time with a child under the age of 16 and with whom the actor had a significant relationship. The only element which McHugh takes issue with on appeal is the age of the victim when he repeatedly penetrated her with his finger.

The circumstances proved regarding the victim's age were as follows: the victim testified that McHugh's sexual conduct occurred frequently and progressed from touching her over her clothes, to rubbing her under her clothes—"bare skin to bare skin"—when she was "maybe 11 or 12." The victim further testified that the rubbing became "more intense" and "faster" when she was "maybe 14," at which time McHugh began inserting a finger into her vagina.

The jury was shown the victim's interview with the police investigator. In the interview, the victim stated that McHugh touched her under her clothes when she was in middle school. However, when asked by the investigator if "any part of [McHugh's] body [went] inside of [her] body," the victim responded not until McHugh put his penis inside of her vagina when she was 17 years old. Nevertheless, the jury saw that the victim subsequently told the investigator later during the same interview that McHugh would put his finger inside of her vagina when she was "younger." When the investigator testified, McHugh's attorney drew the jury's attention to this purportedly inconsistent statement.

The jury listened to this testimony, heard the purportedly inconsistent statement about the age at which McHugh first penetrated the victim and the qualifier used by the victim when she stated the age at which McHugh first penetrated her, and still convicted McHugh of first-degree criminal sexual conduct.

When we consider the evidence in the light most favorable to the verdict, we conclude that the victim's direct testimony as to her age was sufficient to support the jury's determination that the victim was under the age of 16 when McHugh penetrated her with his finger so as to sustain a conviction of first-degree criminal sexual conduct. At trial, the victim testified that she was "maybe 14" when McHugh first put his finger into her vagina. This direct testimonial evidence on the age element, though qualified with a "maybe," was presented to the jury. And although the victim told the investigator that she had not been penetrated by McHugh until she turned 17 years old, the victim subsequently stated in the very same interview that McHugh put his finger inside of her vagina when she was "younger." Most significantly, this purported inconsistent statement was highlighted for the jury by McHugh's attorney, and the jury still determined that some form of sexual penetration occurred before the victim turned 16 years old.

As the victim was the sole source of evidence on the age element, the jury's decision was made after weighing the relative credibility of the victim and McHugh. As it is the jury's prerogative to make determinations regarding credibility, *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985), even in light of the victim's purportedly inconsistent statement regarding her age at the first time she was penetrated, we conclude that the evidence is sufficient on the age element to sustain McHugh's conviction.

II. The district court did not commit reversible error when it allowed evidence of a prior sexual assault to be admitted as relationship evidence.

McHugh argues that the district court committed reversible error when it allowed evidence of McHugh's prior sexual assault of his stepdaughter to be admitted as relationship evidence. As evidentiary rulings are firmly within the discretion of the district court, a district court's decision to admit relationship evidence is reviewed for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

A. Evidence of the prior sexual assault is admissible relationship evidence under Minn. Stat. § 634.20 (2018).

“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” Minn. Stat. § 634.20. “Domestic abuse” includes criminal sexual conduct. Minn. Stat. § 518B.01, subd. 2(a)(3) (2018).

The supreme court has stated that the rationale for admitting relationship evidence is to illuminate the relationship between the defendant and the victim, as well as to put the crime in the context of that relationship. *McCoy*, 682 N.W.2d at 159. Therefore, evidence as to how a defendant treats his family and “interacts with those close to him” sheds light on how the defendant may treat the victim. *State v. Valentine*, 787 N.W.2d 630, 637 (Minn. App. 2010), *reviewed denied* (Minn. Nov. 16, 2010).

At a pretrial hearing, the state sought to admit evidence of McHugh's conduct with his stepdaughter as relationship evidence. The district court concluded that the evidence was admissible in part because the victim included a reference to her sister's incident in

her letter to her mother, and because the evidence would illuminate the relationship between McHugh and not only the victim, but also the victim and any other family members also subject to abuse. Over McHugh's objection, the district court acknowledged that this evidence was not *Spreigl*¹ evidence but that, in the context of relationship evidence, the "door swings pretty wide." Although the district court allowed the testimony, it stated that it may "put the brakes on at some point in questioning and be sympathetic or at least listen closely to objections" and "might put some limit" on the testimony. Additionally, the district court agreed to offer a jury instruction outlining the illuminative nature of relationship evidence.

At the time of the alleged assault, the sister, along with the victim and their mother, resided in McHugh's home. Therefore, this evidence shows how McHugh "interacts with those close to him" so as to illuminate and put into context the relationship between McHugh and the victim. *See id.* at 637 (stating that relationship evidence allows the jury to see how a defendant "interacts with those close to him"); *see also McCoy*, 682 N.W.2d at 159 (stating that relationship evidence provides the context of a familial relationship). Therefore, evidence of McHugh's prior interaction with his stepdaughter, though sexual in nature, is plainly admissible relationship evidence under Minn. Stat. § 634.20.

B. The danger of unfair prejudice to McHugh does not substantially outweigh the probative value of the relationship evidence regarding the prior sexual assault.

Even if evidence qualifies as relationship evidence under Minn. Stat. § 634.20, the statute still prohibits the admission of relationship evidence when "the probative value is

¹ *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

substantially outweighed by the danger of unfair prejudice.” Minn. Stat. § 634.20. However, limiting instructions as to the narrow and contextual nature of relationship evidence may decrease the risk that a jury uses the evidence in a manner in which its prejudicial nature substantially outweighs any probative value. *See, e.g., State v. Lindsey*, 755 N.W.2d 752, 757 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008) (stating that limiting instructions may decrease the likelihood of unfair prejudice). This is because reviewing courts presume that juries follow the instructions given to them by the district court. *State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998). Therefore, the existence of limiting instructions, along with other evidence of guilt, are important considerations when we assess whether the admission of evidence substantially affected a jury’s verdict. *State v. Fraga*, 898 N.W.2d 263, 274 (Minn. 2017).

McHugh argues that the prejudicial nature of his sexual assault of his stepdaughter substantially outweighed any probative value of the evidence because it was discussed multiple times and thus the cumulative effect of the testimony substantially prejudiced him. However, the state requested, and the district court freely gave, limiting instructions to the jury before the testimony of his stepdaughter, the victim, and their mother regarding the alleged sexual assault of his stepdaughter.² The limiting instruction was as follows:

² McHugh claims that the state introduced evidence of the incident with his stepdaughter through questioning five witnesses. However, a review of the record only shows that the victim, her sister, their mother, and McHugh were questioned in any detail about the incident. Additionally, a limiting instruction was requested before the testimony of each of the victim, her sister, and the mother. McHugh denied memory of any incident involving his stepdaughter. When an investigator was asked about the incident, the district court limited the question to simply repeating what McHugh himself had said about the incident and no additional limiting instruction was given.

You are about to hear evidence of conduct by the defendant. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant and family or household members, done in order to assist you in determining whether the defendant committed those acts which the defendant is charged with in the Complaint.

The defendant is not being tried for and may not be convicted of any behavior other than the charged offenses with [the victim]. You are not to convict the defendant on the basis of conduct against [his stepdaughter] in the past. To do so might result in unjust double punishment.

The limiting instruction specifically stated that the incident was being admitted to assist the jury in determining the nature and extent of the relationship between McHugh and his family members and to help the jury decide whether McHugh committed the identified acts with the victim. The district court warned the jury not to draw any impermissible inferences from this evidence, and instead this evidence was only being presented to provide context for McHugh's relationship with the victim and to shed light on his relationship with his family. Furthermore, the district court reiterated the limiting instruction prior to jury deliberations.

As a reviewing court presumes that juries follow the instructions given to them by a district court, *Ferguson*, 581 N.W.2d at 833, and in light of the extensive testimonial evidence of McHugh's guilt with regard to his sexual abuse of the victim, McHugh's argument regarding the prejudicial effect of the cumulative admission of evidence of the sexual assault of his stepdaughter is unpersuasive. See *Fraga*, 898 N.W.2d at 274 (noting that limiting instructions and other evidence of guilt are important considerations when determining whether the admission of evidence substantially affected a verdict).

Therefore, because evidence of McHugh's assault of his stepdaughter was admissible relationship evidence under Minn. Stat. § 634.20, and the district court gave the jury multiple limiting instructions regarding the nature, purpose, and narrow focus of the evidence regarding his stepdaughter, we conclude that the district court did not abuse its discretion when it admitted evidence regarding the sexual assault of her stepdaughter so as to shed light on how McHugh treats his daughters.

III. The district court erred when it imposed a lifetime conditional release for McHugh's violation of Minn. Stat. § 609.343, subd. 1(h)(iii).

Finally, McHugh argues that his three lifetime conditional release terms must be reduced to ten-year terms because the district court entered simultaneous convictions for all three charges. Although the district court sentenced McHugh to a lifetime conditional release on two counts, the warrant of commitment currently lists lifetime conditional release terms for all three of his convictions.

In general, when a defendant is adjudicated guilty and committed to the custody of the commissioner of corrections for a violation of Minn. Stat. § 609.343, the defendant must also serve a mandatory ten-year conditional release term upon release from prison. Minn. Stat. § 609.3455, subd. 6 (2018). However, when a defendant has a previous sex offense conviction, the defendant must be placed "on conditional release for the remainder of the offender's life." Minn. Stat. § 609.3455, subd. 7(b) (2018). Furthermore, a conviction occurs once the district court pronounces that the defendant is adjudicated guilty. *State v. Nodes*, 863 N.W.2d 77, 82 (Minn. 2015). Even if a defendant is convicted and adjudicated guilty of multiple sex offenses in a single proceeding, so long as the

convictions are entered sequentially and not simultaneously, a district court must impose a lifetime conditional release term on any adjudications following the first. *Id.* Finally, “[w]hen an orally pronounced sentence varies from a written sentencing order, the orally pronounced sentence controls.” *State v. Staloch*, 643 N.W.2d 329, 329 (Minn. App. 2002).

At sentencing, the district court stated that “we’re *going* to enter these convictions as three convictions.” (Emphasis added.) McHugh claims that this statement indicates that the district court entered McHugh’s convictions simultaneously, and not sequentially. However, not only does this phrase indicate that it was the intention of the district court to enter the convictions as three separate convictions in the future, but the district court subsequently convicted and sentenced McHugh on each of the counts sequentially.

Although the district court asked McHugh’s attorney if McHugh would be subject to lifetime conditional release terms “[e]ven though they’re announced or accepted contemporaneously like that,” McHugh’s attorney acknowledged, and the district court accepted, that lifetime conditional releases still apply “even if there’s, like, a second in between,” because they still “count as separate actions.” *See Nodes*, 863 N.W.2d at 82 (stating that sequential entering of convictions allows for the imposition of lifetime conditional release terms). Accordingly, the district court clearly sequentially entered convictions and sentenced McHugh to three separate counts of criminal sexual conduct to be served concurrently. Therefore, the district court did not err when it imposed lifetime conditional release terms for McHugh’s convictions for first-degree criminal sexual conduct and third-degree criminal sexual conduct, as both of these convictions were adjudicated following McHugh’s conviction for second-degree criminal sexual conduct.

However, as McHugh's conviction for second-degree criminal sexual conduct was the first conviction adjudicated, and McHugh did not have any prior eligible convictions so as to warrant the imposition of a lifetime conditional release term under Minn. Stat. § 609.3455, subd. 7(b), the warrant of commitment should be corrected to impose a ten-year conditional release term for his conviction of second-degree criminal sexual conduct.

Affirmed in part, reversed in part, and remanded.