STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2042

State of Minnesota,
Respondent,

vs.

Antoine Martez Eubanks,
Appellant.

Filed February 1, 2021
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Hennepin County District Court
File No. 27-CR-17-24151

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal from a judgment of conviction of second-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion for in camera review of a child-protection case file, and by denying his motion for mistrial

after a state's witness vouched for the credibility of the complainant. Appellant also argues that he is entitled to be resentenced in accordance with recent amendments to the sentencing guidelines. Because the district court misapplied the law in determining whether to grant in camera review of the child-protection records, we remand that issue to the district court to determine whether Eubanks should have been granted access to the records and, if so, whether a new trial should be granted. We affirm the district court's denial of a mistrial as being within its discretion. Finally, we reverse the sentence and remand for resentencing in accordance with amendments made to the sentencing guidelines in the event no new trial is ordered.

FACTS

Between 1995 and 2009, appellant Antoine Martez Eubanks and L.C. were involved in an on-again, off-again relationship, and had three daughters. Eubanks and L.C. reconnected in the summer of 2017, which led to Eubanks spending time with L.C. and the children. During that summer, Eubanks spent the night at L.C.'s house on several occasions. When Eubanks spent the night, he slept either on the couch in the living area or in the bedroom of one of his daughters (the child). The child's room has a full-size bed and a couch. When Eubanks spent the night in the child's room, L.C. expected him to sleep on the couch. But according to the child, Eubanks slept in bed with her.

On the night of July 18, 2017, Eubanks spent the night at L.C.'s house. That evening, the child, who was 12 years old at the time, went to bed before Eubanks. She later woke up when Eubanks got in her bed beside her and began rubbing her back. Eubanks continued to rub her back and the child noticed that his hand "started to get lower

and lower." His hand went under her clothing and "closer to [her] vagina." He eventually placed his hand on her vagina and made a "rubbing motion" for 15-30 seconds. The child "started to move a lot" and Eubanks stopped. This happened at approximately 3:30 a.m.

When L.C. got up to get ready for work, the child went to tell her what happened. The child was tearing up and unable to speak, so she used her mother's phone to type out what had occurred. The child's stepfather then attempted to take her to a medical center to be examined, but staff at the first two medical centers were unable to perform a forensic examination at those locations. She was ultimately examined that evening at Hennepin County Medical Center by a forensic nurse examiner (the nurse examiner). The child told the nurse examiner that she woke up early that morning when Eubanks got in her bed and began rubbing her back, and that Eubanks then "rubbed [the child's] genital area." The nurse examiner collected DNA swabs from the child's perineal area and sent the swabs to the Minnesota Bureau of Criminal Apprehension (BCA) for testing. The swabs did not contain enough information for a full DNA comparison, but testing did reveal the presence of male DNA. On July 27, the child was interviewed by a forensic interviewer at CornerHouse. During the interview, the child again stated that Eubanks had touched her vaginal area.

Respondent State of Minnesota charged Eubanks with one count of second-degree criminal sexual conduct. Prior to trial, Eubanks moved for the district court to conduct an in camera review of child-protection records related to the child. The district court denied the motion. Following trial, the jury found appellant guilty of second-degree criminal sexual conduct and the lesser-included offense of attempted second-degree criminal sexual

conduct. The district court sentenced Eubanks to 48 months in prison, stayed execution of sentence, and placed Eubanks on probation for five years. Eubanks now appeals.

DECISION

I. The district court misapplied the law in its denial of Eubanks's motion for in camera review.

Eubanks's first argument is that the district court erred when it denied his motion for in camera review of a child-protection case file involving the child. Both the United States and Minnesota Constitutions require that criminal defendants have a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV; Minn. Const. art. 1, § 7. Criminal defendants are thus accorded "a broad right to discovery in order to prepare and present a defense." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012). This right, however, is not unlimited. *See State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) ("A defendant's right to present a complete defense is not absolute."). Here, it is undisputed by the parties that the records at issue are confidential.[1] In such cases, the court must strike a balance between a criminal defendant's right to obtain evidence that may be helpful to his defense and an individual's interest in having her "confidences kept." *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

In striking this balance, the court may review the confidential records in camera to determine their relevance, but in camera review is a "discovery option," not a right. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992). A defendant is only entitled to an in camera

[1] The statutory protections cited by the district court include the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.90 (2018), and Minn. Stat. §§ 260C.171, 595.02 (2018).

review of confidential information after first making "some plausible showing that the information sought would be both material and favorable to his defense." *Id.* (quotations omitted). The request must be "reasonably specific." *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *review denied* (Minn. Sept. 15, 1989). Evidence is only material if there is a "reasonable probability" that disclosure would lead to a different result at trial. *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998) (quotation omitted).

We review a district court's decision on the release and use of protected records for an abuse of discretion. *Hokanson*, 821 N.W.2d at 349. "A district court abuses its discretion when its decision is based on an erroneous view of the law . . . ." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

Eubanks moved for in camera review of a child-protection file. The child-protection case involved the child and was opened after the sexual assault at issue here. In the motion, he asserted as his basis that "the records will contain information about credibility and motive to fabricate, and should contain reports of interviews with the child and her mother, both witnesses in the criminal case."

At the motion hearing, Eubanks's counsel explained that the defense was interested in "other statements of the child, other statements of [L.C.] about these allegations." He further explained that there was a "history in juvenile court" between Eubanks and L.C. related to their older children, and that Eubanks was "of the opinion that there's been manipulation by [L.C.] of the children against him" that would speak to her bias as a witness. He ultimately requested that the district court conduct an in camera review of the records "to find out if there are prior statements regarding these allegations or any other

information that would relate to the credibility or motive to fabricate either on the child's part or [L.C.'s] part." Eubanks argues that these assertions were reasonably specific and met the burden of making a plausible showing that the records contained information that was both material and favorable to his defense.

The district court denied the motion for in camera review. In doing so, the district court found that the request was "non-descript," "vague at best," and offered only "vague generalities and speculation" in support of the motion. The district court noted that Eubanks asserts that he "knows the files *will* contain information about credibility, and/or motive to fabricate." The district court went on to state:

> While [this] is a confident assertion, it is broad and without support. Furthermore, Mr. Eubanks states there *should* be reports of interviews with [the child] and her mother. The use of the word "should" implies Mr. Eubanks does not know this to be the case, and even if he were to know, he does not expand further as to how [h]e knows this, and why they are material and favorable to his defense.

The district court concluded that Eubanks failed to make out a "plausible showing that any of the requested documents contain information that is material and favorable to his defense" and, as such, the request "appears to be a fishing expedition, without sufficient support to justify *in camera* review."

We conclude that the district court misapplied the law in requiring proof by Eubanks that he knows the file *will* contain material and favorable evidence. The legal standard to obtain in camera review requires only a "plausible showing." *Hummel*, 483 N.W.2d at 72. We note that this is a case that involved very little physical evidence and hinged on the credibility of the child and the mother. Here, Eubanks identified a specific juvenile court

file involving the child. The child-protection file was only opened after the report of the sexual assault involved in the criminal case. Depending on the stage of the child-protection proceedings and what had been filed with the court in that case, Eubanks may not have been in a position to know with certainty whether the file would contain statements by the child or mother that would be "material and favorable" to his defense. And the legal standard does not require such a level of certainty as the threshold for obtaining in camera review. *State v. Burrell*, 697 N.W.2d 579, 604-05 (Minn. 2005).

We remand this issue to the district court to ascertain whether an in camera review is warranted under the proper legal standard and, if so, to review the file to determine if there are any records relating to statements made by the child or mother that are material and favorable to the defense. If a review is conducted and the district court concludes that some records should have been provided to Eubanks the court can then evaluate whether a new trial must be granted.

II. The district court did not abuse its discretion by denying the motion for a mistrial.

Eubanks's second argument on appeal is that the district court erred by denying his motion for a mistrial. He contends that a witness called by the state, the person who conducted a forensic interview of the child at CornerHouse (the interviewer), impermissibly vouched for the child's credibility. Vouching testimony, where a witness testifies that he or she believes the victim is telling the truth, is generally inadmissible. *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). Judging credibility is within the province of the jury. *State v. McCray*, 753 N.W.2d 746, 754 (Minn. 2008).

We review a district court's denial of a motion for a mistrial for an abuse of discretion. *State v. Griffin*, 887 N.W.2d 257, 262 (Minn. 2016). "A mistrial should be granted only if there is a reasonable probability, in light of the entirety of the trial including the mitigating effects of a curative instruction, that the outcome of the trial would have been different had the incident resulting in the motion not occurred." *Id.* The district court is in the best position to determine if a mistrial is warranted, or if an alternate remedy is appropriate. *Id.*

At trial, the state called the interviewer as a witness. The interviewer testified about her report of the interview. During defense counsel's cross-examination of the interviewer, the following exchange occurred:

> Q: And then in this particular case you—you wrote there's a heading for interview information, you put some information in there; is that correct?
> A: That's correct.
> Q: And in that section you wrote that although cooperative [the child] seemed evasive and guarded during inquiry regarding the top of a—topic of concern; is that right?
> A: Yes.
> Q: Okay. And then you referenced that as indicating at times she would just say that she couldn't remember; is that right?
> A: Yes.
> Q: So—And this report would have been written up shortly after the interview, is that what you do?
> A. Within a week or so generally.
> Q. Okay. And it was your—I mean, it was your opinion that based on your experience you saw some signs of her being evasive?
> A: Well, after looking back sometimes I've done several other interviews before I get to the report, and after looking at the tape yesterday when I was preparing and again today I don't think it was so much—I think we could characterize it as evasive, I think it—she was just very—having a very difficult

> time. And so if we want to frame it as evasive, it was just very difficult as we could see at a number of points during the interview. It was just difficult for her to tell what happened, and it did not appear to me that she was trying to lie about it or—or maybe make things up, that did not appear, it just appeared that the circumstances of her—of her—

Defense counsel objected to the answer as nonresponsive. The district court immediately instructed the jury as follows:

> And, Members of the Jury, it's always kind of dangerous, and no offense to the witness, but it would be wrong for someone to try to put their take on whether or not someone is lying or not. That's not really what this is about. The issue is whether or not you, based upon all the evidence you have and looking at not only the witnesses but documentary evidence and anything else, if you find a witness credible.
>
> So please don't let that kind of opinion dictate that. I think the witness was just trying to explain what she might have meant by the word "evasive." So I'll direct that you disregard that last kind of lengthy explanation there once it got past kind of dealing with just evasiveness.

After the jury left for the day, the district court judge, defense counsel, and prosecutor discussed the interviewer's statement. The district court judge stated that he "wish[ed] she hadn't" said what she did, but noted that he thought that they "dealt with it effectively" and adjourned the proceedings.

When the trial reconvened, defense counsel moved for a mistrial. Defense counsel argued that Eubanks was entitled to a new trial because the interviewer testified as an expert witness and impermissibly vouched for the child's testimony. The district court denied the motion. The district court observed that the interviewer's answer was a "very unfortunate use of words, however, it was in direct response to a defense question about the use of the

word 'evasive' and her explanation of what she meant by that" and found "that the answer was responsive to the question." The district court also noted that it had promptly instructed the jury to disregard the statement and that it believed that the jury could and would do so. The district court ultimately concluded that "given the curative instruction in the immediate moment and the context of her very brief statement I don't find that it's overly prejudicial to the defense" and denied the motion.

Eubanks argues that a mistrial was warranted and that he is entitled to a new trial because there is a reasonable probability that the outcome would have been different had the interviewer not vouched for the child's credibility. He contends that the prejudicial nature of the comment was "not effectively reduced by curative measures" and that the instructions "failed to specifically tell the jury to disregard [the interviewer's] vouching testimony." Finally, Eubanks claims that because the interviewer testified as an expert the jury likely gave great weight to her testimony, and that the case against him was not strong.

We are not persuaded. As noted above, the district court is in the best position to determine if a mistrial is warranted or if an alternate remedy is appropriate. *Griffin*, 887 N.W.2d at 262. In denying the motion, the district court thoroughly analyzed the potential prejudice that may result from the interviewer's testimony. The district court observed that it immediately instructed the jury to disregard the statement, that the statement was brief, and that the district court did not believe that it would be difficult for the jurors to disregard the statement. "Cautionary instructions given by the trial court relating to allegations of misconduct are a significant factor favoring denial of a motion for a mistrial." *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000) (quotation omitted). And we presume that

the jury follows the district court's instructions. *State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009); *see also State v. Pendleton*, 706 N.W.2d 500, 509 (Minn. 2005) (noting that when a district court orders a jury to disregard a statement, we presume that the jury followed that instruction). Here, the district court immediately and clearly explained that it was improper for one witness to vouch for the credibility of another and that credibility was ultimately a question for the jurors to decide based on all the evidence presented.

We also agree with the district court that the context of the statement is relevant in this case. The statement was in response to repeated questions from defense counsel about the interviewer's use of the term "evasive" in her report. In emphasizing the interviewer's use of the term "evasive," it appears that defense counsel was trying to suggest that the child was not being truthful during the interview. The interviewer's response was thus in direct response to defense counsel's question, rather than the result of the prosecutor attempting to elicit improper testimony. And the prosecutor did not repeat the vouching testimony.

Given the context and brief nature of the remark, and the immediate and thorough curative instruction to the jury to disregard the statement, we conclude that there is not a reasonable likelihood that the outcome would have been different if the interviewer had not made the improper statement. The district court therefore did not abuse its discretion by denying the motion for a mistrial and we affirm the district court's ruling on this issue.

III. Eubanks is entitled to be resentenced.

Eubanks argues that he is entitled to be resentenced because amendments to the sentencing guidelines have reduced his criminal-history score. The proper calculation of a

defendant's criminal-history score is a question of law that we review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

Eubanks was sentenced in September 2019 to 48 months in prison, with execution of the sentence stayed for five years. This was the presumptive sentence for second-degree criminal sexual conduct based on a criminal-history score of one. Minn. Sent. Guidelines 4.B (2018). Eubanks was assigned one custody-status point based on a 2015 gross-misdemeanor level conviction of driving while impaired (DWI) and one-half of a felony point for a 2006 conviction of theft. Eubanks was sentenced to 365 days in jail, with 335 days stayed, and placed on probation for four years for the DWI conviction.

In 2019, the Minnesota Sentencing Guidelines Commission amended how custody-status points are assigned. Prior to the amendments, an offender received a full custody-status point if the offender committed a new offense while on probation. Minn. Sent. Guidelines 2.B.2.a.(1)-(3) (Supp. 2017). Following the 2019 revisions, an offender now typically receives only one-half of a custody-status point for an offense committed while on probation.[2] *See* Minn. Sent. Guidelines 2.B.2.a.(1)-(3) (Supp. 2019).

Under the amelioration doctrine, an amendment to a statute applies to an offense committed before the effective date of the amendment if "(1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been

[2] There are certain circumstances under which an offender may still receive a full custody-status point for an offense committed while on probation, Minn. Sent. Guidelines 2.B.2.a (Supp. 2019), but those circumstances do not apply to this case.

entered as of the date the amendment takes effect." *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). In *State v. Robinette*, this court concluded that the amelioration doctrine applied to the 2019 amendments to the sentencing guidelines that changed how custody-status points are assigned because there was no statement that clearly established that the legislature intended to abrogate the amelioration doctrine. 944 N.W.2d 242, 249-50 (Minn. App. 2020), *review granted* (Minn. June 30, 2020). Because Eubanks's conviction was not final when the amendment became effective, he is entitled to be resentenced if the amendment results in a lower criminal-history score and therefore lower presumptive sentence.

Eubanks maintains that he is entitled to be resentenced because, under the 2019 amendments, his criminal-history score would be zero, and the presumptive sentence would be 36 months instead of 48 months. Minn. Sent. Guidelines 4.B (Supp. 2019). We agree.

Under the sentencing guidelines, "[a]n offender's criminal history score is the sum of points from eligible: (1) prior felonies; (2) custody status at the time of the offense; (3) prior misdemeanors and gross misdemeanors; and (4) prior juvenile adjudications." Minn. Sent. Guidelines 2.B (Supp. 2019). With respect to criminal-history points assigned for prior felony convictions, the sentencing guidelines provide that "[t]he felony point total is the sum of the felony weights. If the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number." Minn. Sent. Guidelines 2.B.1.i. Since Eubanks has only one-half of a felony point, with rounding down, his total felony points are zero. With the recent amendments to the sentencing guidelines, he is left

with only one-half of a custody point, which is also rounded down. This leaves him with a criminal history score of zero and, since his criminal-history score and presumptive sentence are lower under the 2019 amendments, he is entitled to be resentenced pursuant to the amelioration doctrine. We therefore reverse and remand for resentencing in the event no new trial is granted with respect to the child-protection records review issue.

Affirmed in part, reversed in part, and remanded.