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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0208
A20-0610**

State of Minnesota,
Appellant (A20-0208),
Respondent (A20-0610),

vs.

John William Litzau,
Respondent (A20-0208),
Appellant (A20-0610).

**Filed February 16, 2021
Affirmed
Florey, Judge**

Becker County District Court
File No. 03-CR-18-1535

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State of Minnesota)

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Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

The state appeals from the district court's postverdict order vacating the jury's guilty
verdict for first-degree criminal sexual conduct on the ground of insufficient evidence of

penetration. Litzau cross-appeals from the district court's judgment of conviction for second-degree criminal sexual conduct, arguing that the prosecutor committed prejudicial misconduct in closing and rebuttal argument. We affirm the district court's postverdict order and Litzau's second-degree conviction.

FACTS

In July 2018, respondent/cross-appellant John William Litzau was charged with second-degree criminal sexual conduct based on allegations involving a young relative (the victim). The charges stemmed from an initial report made by the victim to her grandmother and a subsequent forensic interview that occurred with licensed social worker Debra Nagle, where the victim stated that Litzau—a 43-year-old relative who lived in the same house as the victim's father, pulled down the victim's clothes, including her underwear, and was “tickling” her “butt”—the place she went “poop and pee”—after bringing the victim to an unoccupied house. After the “tickling” ended, the victim reported that Litzau gave her ice cream because she had “been so good” and directed her not to tell anyone she had gotten the treat. After a later meeting with the victim, appellant State of Minnesota filed an amended complaint in September 2019, adding a second charge of first-degree criminal sexual conduct.

The rescheduled jury trial took place in early December. The jury heard from the victim's grandmother, the victim's father, forensic interviewer Debra Nagle, investigator Jon Peterson, defense expert Jessica Mugge, Litzau's cousin, Litzau's brother-in-law, and Litzau himself. The victim, who was seven years old at the time of trial, also testified briefly. She was able to answer basic background questions but became less responsive

during questioning.¹ The victim’s full videotaped forensic interview with Nagle was also played for the jury.²

The jury found Litzau guilty of both first- and second-degree counts of criminal sexual conduct. Litzau filed a motion for judgment of acquittal or alternatively a new trial, arguing insufficiency of the evidence and prosecutorial misconduct. The district court granted Litzau’s motion for judgment of acquittal on count I (first-degree criminal sexual conduct) based on insufficient evidence to support the inference of intentional penetration, but denied his motion on count II (second-degree criminal sexual conduct), as well as his request for a new trial. This appeal by the state and cross-appeal by Litzau follow.

DECISION

I. Insufficiency of the evidence on penetration

The state argues that the district court erred in granting Litzau’s motion for judgment of acquittal on first-degree criminal sexual conduct based on insufficient evidence of penetration. “If the jury returns a verdict of guilty . . . a motion for a judgment of acquittal may be brought within 15 days after the jury is discharged.” Minn. R. Crim. P. 26.03, subd. 18(3)(b). Because it is “procedurally equivalent to a motion for a directed verdict,” this court reviews a motion for judgment of acquittal de novo. *State v. McCormick*, 835 N.W.2d 498, 506 (Minn. App. 2013) (quoting *State v. Slaughter*, 691 N.W.2d 70, 74 (Minn. 2005), *review denied* (Minn. Oct. 15, 2013)). “[T]he test to be applied is whether, after

¹ During her testimony, the victim stated that she did not know or recognize anyone in the courtroom, including Litzau—a relative who had lived with her prior to the incident.

² The interview and the grandmother’s testimony was admitted as substantive evidence under Minn. Stat. § 595.02, subd. 3 (2018).

viewing the evidence and all resulting inferences in the light most favorable to the state, the evidence is sufficient to present a fact question for the jury.” *McCormick*, 835 N.W.2d at 506 (quotation omitted).

On appeal, the state challenges the district court’s postverdict order vacating the jury’s first-degree guilty verdict, arguing that sufficient evidence of penetration was established at trial through the victim’s statements and gestures, particularly through the forensic interview. Penetration is defined as “any intrusion however slight into the genital or anal openings: (i) of the complainant’s body by any part of the actor’s body or any object used by the actor for this purpose.” Minn. Stat. § 609.341, subd. 12(2)(i) (2018).

During the forensic interview, the following exchange took place with Nagle and the victim, which served as a primary basis for the state’s criminal-sexual-conduct charges:

Q. So you told me [Litzau] pulled your clothes down.
What kind of clothes were you wearing?

A. Pants.

Q. Pants . . . and do you remember what pants you were wearing?

A. I don’t know.

Q. That’s okay if you don’t know. Do you know if you were wearing underwear that day?

A. I was wearing underwear.

Q. And what happened to your underwear?

A. It got in my pants.

Q. It got in your pants? So did – did your underwear come down when your pants got pulled down?

A. Ah-huh.

Q. They did? Okay. So then when [Litzau] pulled your pants down, did he pull your underwear down too? Did I get that right? Okay. . . and then what happened after he pulled your pants down?

A. He started tickling me.

Q. And what did he tickle you with?

A. His hand.

- Q. His hand and what did his hand do when it was tickling you?
- A. I don't know.
- Q. Did it move or was it still?
- A. It moved.

In addition, to support the specific element of intentional penetration required for first-degree criminal sexual conduct, the state points to the following excerpt from later on during the same forensic interview with the victim:

- Q. Okay. Well let me ask just my few questions, okay? When [Litzau] tickled the part that you showed me, what's the name of that part?
- A. The butt.
- Q. The butt and what do you use that butt – part of your butt for?
- A. Go poop or pee.
- Q. To go poop or pee? Does poop and pee come out of the same part or a different part?
- A. You know the hole that you – that's under here?³
- Q. Ah-huh.
- A. That's the part.
- Q. That's the part?
- A. Yeah.
- Q. Okay and what comes out of that hole?
- A. Poop or – poop and pee.
- Q. Poop and pee and when [Litzau] tickled you, you said he used his fingers, is that right? Did his fingers go inside of that hole?
- A. No.⁴

This type of appeal from the district court's posttrial order—where an element of the alleged offense relies on a series of inferences to be made from the direct evidence that

³ The video for this forensic interview shows the victim gesturing generally to her general vaginal region when talking about the area that Litzau touched.

⁴ Litzau notes that during this portion of the forensic interview, the victim specifically denied that his fingers went “inside of that hole,” thereby foreclosing any direct evidence of actual penetration based on these statements.

was presented at trial—“requires us to conduct a de novo review of the sufficiency of the state’s circumstantial evidence.” *McCormick*, 835 N.W.2d at 506. Here, the district court wrote a thorough memorandum explaining its decision to set aside the first-degree criminal-sexual-conduct conviction and why the chain of necessary inferences was too attenuated on the element of intentional penetration to support the jury’s first-degree guilty verdict.

In its postverdict order, the district court addressed why the victim’s gestures and description of the area that Litzau touched during the forensic interview did not establish conclusive evidence of the act of penetration:

During this exchange, [the victim] does not clearly express what part of her, the butt or vaginal region, that [Litzau] actually touche[d]. The State asserts it was [the victim’s] vaginal region that was touched, as the video for this forensic interview shows [the victim] pointing to her vaginal region when talking about the area [Litzau] touched. Even if [the victim] was trying to point to her vaginal region, there is no definitive evidence to support the act of penetration.

The district court further explained why the victim’s description of the “tickling” that occurred and the “hole” that might have been touched during this reported contact still did not definitively establish the inference that penetration occurred:

When [the victim] first mentions the “hole,” it is equally likely that she was referring to the “hole” for the sole purpose of answering Debra Nagle’s question about whether or not pee and poop come out of the same body part. Even if the Court made the assumption that [the victim] was referring to the area [Litzau] touched, [the victim] still fails to describe that specific part of her was “tickled” that would support a finding of penetration.

These observations and conclusions by the district court are supported by the record. While the state clearly presented sufficient evidence that sexual touching occurred to an intimate part of the victim, the inference that the “tickle” the victim described to her “butt” amounted to a breach of the genital or anal opening—even the “outer folds” of this intimate area—is a link too far removed in the series of inferences necessary to reasonably find intentional penetration here, as is required to sustain a first-degree criminal-sexual-conduct conviction. *Cf. State v. Shamp*, 422 N.W.2d 520, 523 (Minn. App. 1988) (affirming sufficient evidence of penetration for first-degree criminal sexual conduct where “[the victim] never testified as to penile penetration, but stated that appellant would place his fingers on her anus and in her vaginal area and that he would move his fingers between the folds of skin covering her vagina”). The circumstances proved here by the state—that there was some touching to the victim’s genital area causing her discomfort or even pain—do not exclude an alternative explanation of mere contact without penetration. Because the victim’s statements were too ambiguous to unequivocally establish the necessary inference of penetration, even under the broader *Shamp* definition, the district court did not err in granting Litzau’s motion for judgment of acquittal on first-degree criminal sexual conduct.

II. Prosecutorial misconduct in closing argument

As a cross-appeal, Litzau argues that the prosecutor committed prejudicial misconduct in his closing and rebuttal arguments by (1) speculating that the young victim’s reluctance to testify was due to Litzau’s presence in the courtroom and (2) implying that the victim lacked prior sexual knowledge or experience despite the district court’s pretrial order prohibiting such evidence.

Appellate courts consider the closing argument as a whole when evaluating alleged prosecutorial misconduct. *State v. Pendleton*, 759 N.W.2d 900, 911 (Minn. 2009). The standard of review for prosecutorial misconduct depends on whether the defendant objected at trial. *State v. Martin*, 773 N.W.2d 89, 104 (Minn. 2009). When the defendant objects, this court applies a two-tiered harmless-error analysis. *Id.* For cases that involve “unusually serious prosecutorial misconduct,” this court determines whether the misconduct was harmless beyond a reasonable doubt. *Id.* For less-serious misconduct, this court determines whether the misconduct “likely played a substantial part in influencing the jury to convict.” *Id.*

However, when the defendant does not object at trial, this court applies a modified plain-error test. *Id.* (citing *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006)). Under that test, the defendant must demonstrate that there was an error that was plain. *Id.* If plain error is established, then the state has the burden to demonstrate that the error did not affect the defendant’s substantial rights. *Id.* If those prongs are established, then this court determines whether to address the error “to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

A. Reluctance to testify

At the beginning of closing argument, the prosecutor began by stating:

At the start of this trial I told you that this case was about silencing [the victim]. That effort to silence [the victim] began with ice cream, telling her that she was a good girl and not to tell.

[The victim] felt that pressure in this room. She came in, she had a seat, she froze. I want you to keep in mind the other opening comments I made to you. In opening comments

I also told you that I didn't know how she was going to perform. She might be shy. She might be nonresponsive. She might be here to tell you. That is what I told you. It's almost like I knew to expect she wouldn't be able to say much in the courtroom.

You had to watch her struggle and deny basic truths that she should know, like, do you know anyone in the room? And that all occurred while the defendant had opportunity to sit between two attorneys and stare at her throughout trial. But [the victim's] silence is deafening.

Later in closing argument, the prosecutor further addressed the victim's testimony and demeanor at trial:

On December 12, 2019, [the victim] comes in this courtroom. She comes through these swinging gates, and she looks all confident. She walks in. She goes to have a seat. But something was different about this occasion. She gets up here, and she was silenced. She even failed to provide us basic truths that we know she knew. And you can infer from that that what Ms. Nagle and what Ms. Mugge told you about the chilling effect on children, of coming in and having to sit in a room of authoritative people or their offender, what that does to a child's ability to disclose. It discourages it.

But even then she gave us basic information. Maybe not a lot, but she gave us some basic stuff. And some of that stuff is the intangible things you get to weigh. You have been instructed you get to look at a witness's demeanor and their behavior, all those things, so it's not just the words coming out of people's mouths. You get to watch their body language.

You got to see her. Where did she look when she first came in? She focused on the Judge. She didn't look away from the Judge until I asked her about that ball in my hand. And once I got her attention with the ball, her eyes caught the defense table and she couldn't unlock. She was frozen. She was petrified up there. That is silencing. But you can read into that body language and see that, and that speaks to the sincerity and reliability of her disclosures that she made previously.

Based on the above statements, Litzau argues that "the State's denigration of Litzau's constitutional right to be present by portraying him as intimidating [the victim] into not

testifying” amounted to prejudicial misconduct undermining the fairness of his trial. Litzau did not object to these closing statements at trial; accordingly, we review this challenge under the modified-plain-error test. *See Ramey*, 721 N.W.2d at 302.

Overall, these observations by the prosecutor, which were grounded in evidence already presented to the jury, certainly did not rise to the level of misconduct. The prosecutor did not misstate evidence; rather he appropriately encouraged the jury to make a reasonable inference based on two prior expert’s testimony and the victim’s observable demeanor in the courtroom. This was not foundationless speculation. Further, it is evident from the transcript that the prosecutor described the courtroom setting as a whole, not just Litzau’s presence, as possibly intimidating or “silencing” the young victim during her testimony. As the state emphasizes, the victim’s credibility was a central issue in this case and “[w]hen viewed as a whole, the prosecutor’s reference to the courtroom setting, including Litzau’s presence, was a proper element of the argument that the jury should find [the victim’s] out-of-court allegations to be credible.” We see no error here.

B. Prior sexual knowledge or experience

Litzau also challenges a second remark made by the prosecutor near the end of trial. During rebuttal, the prosecutor stated:

Remember the video. When [the victim] went to describe the tickling she was using her fingers. Finger is part of the hand, for a child who describes tickling “down here.” Rubbing over the labia with one’s hand, getting through those folds with one’s hand, would that not feel like tickling? Would that not feel like tickling to a girl who has no other experience?

Litzau argues that, “[b]ecause the State . . . knew that a factual basis existed to believe that [the victim] had sexual knowledge, and that this evidence had been ruled inadmissible, it was improper to argue that [the victim] had ‘no other experience’ to explain why she would say ‘tickles’ to describe a sexual touch.” The parties agree that Litzau objected to this portion of the state’s rebuttal argument at trial, so we apply a harmless-error analysis to this prosecutorial-misconduct challenge. See *Martin*, 773 N.W.2d at 104.

Litzau points to the pretrial order from the district court which stated that discussion of any prior sexual knowledge by the victim would not be permitted at trial unless the state opened the door to this issue. Specifically, the district court’s order stated:

Neither party may introduce evidence regarding the child victim’s sexual history or previous sexual conduct. ‘Alternative source of knowledge’ evidence may only be admitted if the State introduces evidence suggesting that Defendant is the sole source of the victim’s knowledge of sexual matters.

In response, the state argues that the prosecutor’s no-other-experience comment did not violate the district court’s order, because “[b]y those express terms [in the above quoted order], the state was permitted to offer evidence (and therefore argue in closing) that Litzau was the only source of [the victim’s] ‘knowledge of sexual matters.’” Further, the state emphasizes that the lack-of-sexual-experience statement in closing was not the first time the issue of the victim’s prior sexual experience had been raised at trial; the portion of the forensic interview where the victim stated another unidentified person had inappropriately touched her was repeatedly read aloud to the jury by defense counsel. Thus, the state argues

that Litzau “opened the door by repeatedly implying that [the victim] had been sexually touched on another occasion.”

We need not determine whether the challenged statement was a violation of the pretrial order. This isolated statement certainly did not rise to the level of “unusually serious prosecutorial misconduct” and was harmless beyond a reasonable doubt to the second-degree criminal-conduct conviction. There was substantial evidence throughout the trial record establishing sexual touching by Litzau to the victim’s intimate parts, including the victim’s direct statements describing the act to both her grandmother and the forensic interviewer. Litzau is not entitled to a new trial on this second-degree conviction.

Affirmed.