

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0251**

State of Minnesota,
Respondent,

vs.

Kenneth Keith Clark,
Appellant.

**Filed February 1, 2021
Affirmed in part, reversed in part and remanded
Hooten, Judge**

St. Louis County District Court
File No. 69DU-CR-17-1556

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this direct appeal from final judgments of conviction for first- and second-degree criminal sexual conduct, appellant argues that he is entitled to a new trial because the district court plainly erred by allowing an expert witness to offer her opinion that there was

an “oral assault,” which impermissibly vouched for the victim’s credibility. Alternatively, appellant argues that the district court erred by entering convictions for both counts of criminal sexual conduct because second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. We affirm in part, reverse in part, and remand.

FACTS

In 2012, C.W. reported that she was sexually assaulted in Duluth by her cab driver, appellant Kenneth Clark, after he drove her home. On the night of the incident, Duluth Police Officer Brent Mathison responded to a call from C.W.’s residence reporting the sexual assault. When he arrived at the residence, Officer Mathison spoke to C.W., who said that her cab driver had sexually assaulted her by forcing her to engage in oral sex in the front seat of his cab earlier that evening. C.W. told Officer Mathison that the cab driver had ejaculated, but she believed she had moved her head away before he ejaculated.

Another officer transported C.W. to the hospital, where she was treated by a sexual assault nurse examiner (nurse) with specialized training in providing medical and forensic exams to alleged sexual assault victims. The nurse reported that C.W. cried as she described how Clark pulled the cab around the side of her house and then, while grabbing her hand, stated “I want you to feel this.” C.W. told the nurse that Clark forced her to touch his penis with her hand and claimed that there was an “oral event.” C.W. also described Clark touching her bare breasts and her back under her bra. When the nurse asked C.W. if Clark ejaculated, C.W. responded, “I don’t know. I just jumped out of the cab.” In her report, the nurse checked a box indicating there was “oral copulation.” The nurse then

collected an oral swab from C.W.'s mouth, which she placed in a sexual assault kit, and collected a blood sample. During a physical examination, the nurse found that C.W. reported tenderness to her scalp consistent with her report about Clark grabbing her hair. C.W. also reported pain to the back of her neck.

That same evening, Officer Mathison contacted the cab company and learned that Clark was C.W.'s cab driver. Officer Mathison then contacted Clark, who acknowledged that he was C.W.'s driver and agreed to provide a penile swab at a local hospital. Clark provided the penile swab later that evening.

More than three years later, Duluth Investigator John Barrett was reviewing pending sexual assault cases after the police department had received a grant to address untested evidence kits. Investigator Barrett discovered that the Minnesota Bureau of Criminal Apprehension (BCA) had not tested the oral swab from C.W. or the penile swab from Clark. He also noticed that C.W.'s sexual assault kit did not have a known DNA sample from Clark, although labs typically require such samples for comparison to the evidence. To obtain a known DNA sample, Investigator Barrett contacted Clark, who voluntarily allowed Barrett to swab his cheek. Barrett placed the cheek swab in the station's secured evidence room. A few months later, that swab, the penile swab, and the sexual assault kit were all sent to the BCA for testing.

A BCA forensic scientist tested the DNA samples and found no semen on either the oral swab from C.W. or the penile swab from Clark. Clark's penile swab also tested negative for amylase, which is an enzyme found in saliva. However, testing did reveal a mixture of DNA from two or more individuals on the penile swab. Although 99.8% of the

population could be excluded as contributors to the DNA mixture, C.W. and Clark could not be excluded.

After the DNA testing, the state charged Clark with (1) first-degree criminal sexual conduct, penetration using force or coercion causing personal injury, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2016); and (2) second-degree criminal sexual conduct, force or coercion to accomplish sexual contact causing personal injury, in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2016). The central issue at Clark's 2019 trial was whether Clark coerced C.W. to manipulate his penis, which would have constituted second-degree criminal sexual conduct, and/or coerced her to engage in oral sex, which would have constituted first-degree criminal sexual conduct.

C.W.'s testimony

At trial, C.W. testified as to her recollection of what had occurred seven years earlier. C.W. said that, on the night of the incident, Clark locked the cab doors and drove her to an abandoned apartment building located next door to C.W.'s residence. C.W. testified that, after Clark stopped the cab, he took his penis out of his pants, grabbed C.W.'s hand, and moved her hand so that it was stroking his penis. C.W. also testified that Clark then grabbed the hair on the back of her head, which was painful, forced her head down to his penis and forced her to perform oral sex. C.W. said that Clark ejaculated in her mouth. She also testified that she did not consent to this sexual activity. Finally, C.W. testified that after Clark unlocked the car door and she exited the cab, she ran home and told her friend, S.C., who called the police and an ambulance.

C.W.'s statement to Officer Mathison

Officer Mathison testified that he reviewed a compact disc recording of the statement he took from C.W. on the night of the incident. The disc was admitted at Clark's trial and played for the jury. In the recording, C.W. stated that Clark took her to the side of the building and grabbed her head, forcing her to engage in oral sex. C.W. also stated that Clark "did ejaculate, but he pulled my head back before he came in my mouth."

BCA forensic scientist's testimony

The BCA scientist testified that Clark's penile swab tested negative for semen and amylase, which is an enzyme found in saliva. The prosecutor asked the BCA scientist whether amylase would be expected to be present on the penile swab, to which she responded:

If – so the details – or the information I have for this case was that there was an oral assault, so that's why we tested it for the presence of amylase to check for the presence of saliva. So I can't say whether it would be expected to be there, but that's the reason we tested it. We do know, however, that it is possible for saliva to still be present on a sample even though that amylase test is negative. We have seen that on samples in the lab and we know that it can occur. So just because it was negative does not mean that saliva wasn't there.

The scientist testified that she received information about the case from both the police and the nurse who took the swabs. She indicated that because she had received information that "there was an oral assault," she tested the penile swab "to check for the presence of saliva." When describing her testing procedures, she again stated that, "based on the facts of the case that there was an oral assault" she tested the DNA from C.W.'s

blood sample. She also explained that a cheek swab is often the source for obtaining a known DNA profile.

On cross-examination, defense counsel asked the scientist whether C.W.'s allegation of oral sex prompted the testing for amylase:

Q: And the reason that testing for amylase was done was because of the claim of the oral sex?

A: Yes.

Q: Is that right? And that's also why the oral swab was taken from [C.W.]: Because of that same oral sex claim?

A: Yes.

Clark's convictions

The jury found Clark guilty of both counts, and the district court entered convictions on both. Clark appeals.

D E C I S I O N

I. The district court did not plainly err by admitting the opinion and testimony of the BCA forensic scientist into evidence.

Clark argues that the district court prejudicially erred by admitting into evidence the scientist's testimony that she (1) received information from the nurse and Duluth police that there was an oral assault; and (2) based her investigation on information that there was an oral assault.

When a defendant fails to object to testimony at trial, he generally forfeits any right to appellate relief on the issue. *State v. Webster*, 894 N.W.2d 782, 786 (Minn. 2017). However, appellate courts can review such claims pursuant to the plain-error doctrine. *Id.*

“The United States Supreme Court has established a three-prong test for plain error.” *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “The plain error test gives us discretion to review unobjected-to errors if: (1) there is error, (2) the error is plain, and (3) the error affects substantial rights.” *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012). “If the defendant establishes all three factors, we consider a fourth: whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted). Under the third prong, Clark bears the burden of establishing that there is a reasonable likelihood that the error had a significant effect on the jury’s verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).

Because Clark did not object to the testimony of the forensic scientist at trial, we review the claim under the plain-error standard. An error is “plain” if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Generally, an alleged trial error is not plain error unless it is “so clear . . . and so prejudicial to the defendant’s right to a fair trial, that the defendant’s failure to object-and thereby present the trial court with an opportunity to avoid prejudice-should not forfeit his right to a remedy.” *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006).

Clark argues that the district court plainly erred by admitting the scientist’s testimony because the testimony (1) informed the jury that the police officer, sexual assault nurse examiner, and forensic scientist all believed Clark was guilty of an oral assault; and (2) impermissibly vouched for the credibility of C.W. by persuading the jury that Clark had committed first-degree criminal sexual conduct.

First, Clark argues that the scientist's testimony that she learned from the police and the nurse that there was an "oral assault" impermissibly conveyed her own and others' opinions that Clark was guilty of nonconsensual sexual penetration. Clark contends that this testimony violated settled law prohibiting opinion testimony that a defendant has committed an unlawful act. Clark further argues that the issue of whether he coerced C.W. to engage in sexual penetration or sexual contact was for the jury to decide.

An expert witness may testify in the form of an opinion only when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. Expert opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Minn. R. Evid. 704. We provided a detailed summary of the admissibility of opinion testimony in *State v. Patzold*:

[U]ltimate conclusion testimony which embraces legal conclusions or terms of art is not considered helpful to the jury. The district court may also exclude testimony on the ultimate issue when the testimony would merely tell the jury what result to reach. But the supreme court has allowed police officers to express opinions concerning who killed a victim when the conclusion was factual rather than legal and was offered in response to leading questions, and the officer avoided legal terminology. We have also held that a 911 operator's lay opinion testimony that the caller was being assaulted was admissible because it was rationally based on her perceptions and was helpful to the jury.

917 N.W.2d 798, 808 (Minn. App. 2018) (quotations and citations omitted), *review denied* (Minn. Nov. 27, 2018).

Clark cites two cases to support his argument that the scientist's testimony improperly influenced the jury to believe that Clark was guilty of nonconsensual sexual penetration. In *State v. Saldana*, the sole issue for the jury was whether sexual intercourse that occurred between defendant and the complainant was consensual. 324 N.W.2d 227, 229 (Minn. 1982). A sexual assault counselor testified that she believed the complainant was the victim of a sexual assault and rape. *Id.* at 230, n.4. The supreme court found that opinion evidence was unhelpful and inadmissible because "the jurors were equally capable of considering the evidence and determining whether a rape occurred." *Id.* at 231.

Similarly, in *State v. Hoetvedt*, a defendant was charged with third-degree assault. 623 N.W.2d 909, 911 (Minn. App. 2001), *review denied* (Minn. May 29, 2001). At trial, a police officer testified that he believed the defendant assaulted the complainant. *Id.* at 914–15. This court held that the police officer's opinion testimony was inadmissible. *Id.* at 915–16.

This case is distinguishable from both *Saldana* and *Hoetvedt*. In *Saldana*, the sexual assault counselor testified that she believed the complainant was the victim of a sexual assault and rape. And in *Hoetvedt*, the police officer testified that he believed the defendant assaulted the complainant.

In this case, however, the scientist never testified that she believed that C.W. was forced to perform oral sex by Clark. Rather, she explained that because she received information that "there was an oral assault," she tested the penile swab "to check for the presence of saliva." She also testified that she tested C.W.'s DNA from her blood sample "based on the facts of the case that there was an oral assault." The scientist did not express

any personal belief that Clark committed an unlawful act, nor did she tell the jury which result to reach. Additionally, she never testified as to the beliefs of either the police, nurse, or investigator. Instead, the scientist's testimony explained her testing process and the reasons for certain testing, helping the jury to understand and evaluate the evidence. Based on this record, where the scientist was simply referencing the type of assault that had been reported to her in order to explain why she chose a particular testing procedure, we conclude that her testimony was admissible for this purpose.

Second, Clark argues that the scientist's testimony that she had information from the police and the nurse that there was an oral assault impermissibly vouched for C.W.'s credibility, as well as the credibility of the nurse. Clark contends that such testimony violates settled law prohibiting testimony vouching for another's credibility. Credibility is an issue for the jury to decide. *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). “[O]ne witness cannot vouch for or against the credibility of another witness.” *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998). “In most cases, even though an expert’s testimony about the credibility of a witness could provide the jury with useful information, the possibility that the jury may be unduly influenced by an expert’s opinion mitigates against admission.” *State v. Morales-Mulato*, 744 N.W.2d 679, 687 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Apr. 29, 2008).

The central issue we must resolve is whether the scientist's testimony was actually “vouching” for C.W.'s credibility. Clark argues that the challenged testimony vouched for C.W.'s credibility because it (1) effectively conveyed to the jury that the police and nurse believed C.W.'s report that there was an oral assault; and (2) implied that the scientist

believed the reports of the police and the nurse. However, as already explained, the scientist did not express any personal belief that Clark committed an oral assault, nor did she testify that she believed the police's and nurse's reports to her. The scientist simply explained the testing procedures she followed based on the information she received that there was an oral assault. As already explained, her testimony was admissible for this purpose.

Because the scientist's testimony neither conveyed anyone's opinion or belief that Clark was guilty of nonconsensual sexual penetration nor vouched for C.W.'s credibility, the district court did not err by admitting her testimony.

II. The district court erred by convicting Clark of two counts of criminal sexual conduct arising from the same act.

Clark argues in the alternative that his conviction for second-degree criminal sexual conduct must be vacated because the district court erred by convicting him of two counts of criminal sexual conduct arising from the same act. The state agrees.

Minn. Stat. § 609.04, subd. 1 (2018), provides that a defendant may not be convicted of both the crime charged and an included offense. An "included offense" is "a crime necessarily proved if the crime charged were proved." *Id.*, subd. 1(4). Further, "section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Chavarria-Cruz*, 839 N.W.2d 515, 523 (Minn. 2013) (quotation omitted). "Whether multiple offenses form part of a single behavioral act is a question of fact," but where the facts are undisputed, we review *de novo* whether the offenses are part of the same behavioral incident. *State v. Marchbanks*, 632

N.W.2d 725, 731 (Minn. App. 2001). When a defendant is convicted on more than one charge for the same act, the district court should “adjudicate formally and impose sentence on one count only.” *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). We “look to the official judgment of conviction in the district court file as conclusive evidence of whether an offense has been formally adjudicated.” *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (quotations omitted). Whether the district court erred in adjudicating multiple convictions is also a question of law, which we review de novo. *State v. Ferguson*, 729 N.W.2d 604, 618 (Minn. App. 2007), *review denied* (Minn. June 19, 2007).

Here, Clark’s charges for first- and second-degree criminal sexual conduct were part of the same behavioral incident, as both crimes were charged following Clark’s sexual assault of C.W. The jury found appellant guilty of both first-degree criminal sexual conduct and second-degree criminal sexual conduct, and the district court entered convictions for both offenses. Second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 753 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Because the district court erroneously entered convictions for both offenses, in violation of Minn. Stat. § 609.04, subd. 1, we reverse on this issue and remand to the district court to vacate appellant’s adjudication of guilt on the second-degree criminal sexual conduct charge, while leaving the jury’s finding of guilt intact.

Affirmed in part, reversed in part and remanded.