

*This opinion is nonprecedential except as provided by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
A20-1643**

State of Minnesota,
Respondent,

vs.

Ronald James Lipe,
Appellant.

**Filed December 20, 2021
Affirmed
Ross, Judge**

Carver County District Court
File No. 10-CR-17-706

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

Mark Metz, Carver County Attorney, Chaska, Minnesota; and

Thomas R. Ragatz, Special Assistant Carver County Attorney, St. Paul, Minnesota (for respondent)

Marsh J. Halberg, Christina Zauhar, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Ross, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

A jury found Ronald Lipe guilty of criminal sexual conduct for sexually abusing his seven-year-old granddaughter, and we partially affirmed his conviction and remanded on specific instructions. Here we resolve Lipe’s challenge to the district court’s refusal on

remand to grant a new trial after we instructed the district court to apply the proper standard and reconsider whether Lipe had been entitled to a requested continuance to conduct discovery into a circumstance about the child’s sexual behavior that the state discovered and disclosed just before trial. Because Lipe failed to demonstrate on remand that the continuance would have led to any admissible evidence, the district court correctly determined that it had acted within its discretion when it previously denied him a continuance and that the prosecutor did not misstate the evidence during closing argument. We therefore affirm.

FACTS

In 2017, a seven-year-old girl (whom we will call Jane for the sake of her privacy) told her mother that she had a secret with her grandfather, Ronald Lipe. Jane revealed that when Lipe would babysit her and her brother, Lipe would touch her vagina. *State v. Lipe*, A18-1985, 2019 WL 4745325, at *1 (Minn. App. Sept. 30, 2019) (*Lipe I*). Lipe denied ever having touched Jane “in a sexual way[,]” and he claimed instead that Jane was at fault for his touching her vagina, asserting that she occasionally grabbed his hand and pulled it beneath her pants. A jury rejected Lipe’s explanation and found him guilty of two counts of second-degree criminal sexual conduct. The district court entered a judgment of conviction and sentenced Lipe to 90 months in prison.

Lipe appealed his conviction, arguing, among other things, that the district court had made two erroneous trial decisions arising out of the state’s disclosure of information just days before trial. The arguments rested on the state’s disclosure that, “after [Lipe’s conduct] was reported and investigated, there was an incident where [Jane] and a same

aged friend engaged in touching.” Lipe argued on appeal first that this touching incident was relevant to his defense and that the district court erroneously refused to continue the trial to allow him to investigate evidence of the incident. *Lipe I*, 2019 WL 4745325, at *1. Lipe argued next that, based on the touching incident, the prosecutor engaged in misconduct during closing arguments by misstating the facts about Jane’s sexual conduct to discredit Lipe’s hand-grabbing defense by telling the jury that Jane was “not acting out like this towards anyone else.” *Id.* at *10.

We rejected all Lipe’s other arguments but held that the district court erred by deciding the continuance issue based on the legal standard for admissibility rather than for discoverability of the late-breaking evidence. *Id.* at *6. Because the district court had not invited evidence bearing on discoverability, the record was not sufficiently developed either for the district court’s decision or for our review of it. We therefore remanded the case with instructions for the district court to receive evidence and reconsider whether Lipe had been entitled to a continuance and, if he was, to decide whether he is entitled to a new trial based on the prosecutor’s statements during closing arguments. *Id.* at *6, *10.

On remand, the district court allowed the parties to thoroughly develop the record with any evidence and argument bearing on the remand issues. It heard testimony from Jane’s mother about the reported touching incident. Jane’s mother testified that Jane had been at a babysitter’s home when the babysitter found Jane and the babysitter’s same-aged daughter in bed together under the blankets. When they emerged from the blankets, Jane was pulling her pants up. The babysitter reported the incident to Jane’s parents and told Jane’s mother that “both girls are saying it was each other’s idea.” Jane told her mother

that the girls were “pretending they were married and playing sex” and that it had happened about six times beginning in November 2017. The district court allowed the parties to supplement the record further. It directed the state to have a detective interview the babysitter and allowed Lipe to request additional testimony from her by motion. Lipe did not seek additional testimony. The district court also discussed whether the parties might call Jane or the babysitter’s child to testify. Lipe did not ask to call the children. His attorney reasoned openly, “[W]e don’t think they’re going to need to be called to show prejudice in this case, so we anticipate not calling them as well.” The district court also conducted an *in camera* review of Jane’s therapy and child-custody records seeking “any indication that [Jane] pulled, grabbed, or otherwise physically forced the other child to touch her” and “any other relevant evidence that might help the defense.” It found none.

Lipe moved for a new trial during the remand. The district court denied his motion. The district court answered the remand issues in the negative, finding no discoverable or admissible evidence that called into question its prior decision not to continue the trial for further discovery. Lipe again appeals.

DECISION

Lipe seeks a new trial, arguing that the district court erred by determining that he was not entitled to a continuance to discover evidence about Jane’s “playing sex” with her friend, and by concluding that the prosecutor did not misstate the facts in her summation. Our review of the record resulting from the district court’s thorough proceedings and careful analysis on remand leads us to reject Lipe’s arguments.

I

We easily hold that the district court correctly concluded that Lipe was not entitled to a continuance to conduct more discovery. We need not cover all the bases the district court covered, because one of them disposes of Lipe’s argument: Lipe never introduced, or apparently even attempted to introduce, any testimony showing that a continuance would have led him to admissible trial evidence. This omission means that he failed to demonstrate any prejudice by the district court’s refusal to grant the continuance.

Lipe asserts that he had a right to offer evidence of Jane’s “playing sex” with her friend to bolster his testimony that Jane put his hand on her vagina and that he therefore lacked a “sexual or aggressive intent” under Minnesota Statutes sections 609.341, subdivision 11 (2016) and 609.343, subdivision 1(a), (h) (2016). But after its evidentiary hearing and its *in camera* review, the district court announced that no discoverable, material, or admissible evidence was, in fact, discovered and that the playing-sex evidence would be inadmissible under rules 402, 403, and 412. We review that decision for an abuse of discretion. *State v. Barnes*, 713 N.W.2d 325, 333 (Minn. 2006). Critically here, even if we held that the district court’s conclusion reflected an abuse of discretion, we would affirm anyway if the error was harmless. *State v. Lee*, 929 N.W.2d 432, 440 (Minn. 2019). Given the harmless-error standard and the record on remand, we will assume for this discussion that the district court erred by denying Lipe’s motion for a continuance and focus on whether he was prejudiced. To show prejudice from the nondisclosure of evidence, Lipe must show that the evidence was admissible. *State v. Radke*, 821 N.W.2d 316, 326 (Minn. 2012). For the following reasons, he cannot.

A victim's sexual history is generally inadmissible. Minn. R. Evid. 402, 403; *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *rev. denied* (Minn. Jan. 23, 1996). In unusual cases, a victim's sexual conduct may be admissible if it "explains a physical fact in issue at trial, suggests bias or ulterior motive, or establishes a pattern of behavior *clearly* similar to the conduct at issue." *Crims*, 540 N.W.2d at 868. Lipe argues that the "playing sex" evidence is clearly similar to his conduct and is probative of Jane's credibility. We reject both assertions.

First, the "playing sex" evidence is not clearly similar to Lipe's conduct. To be clearly similar, evidence of a victim's sexual history must be so like the conduct at issue that it rises to the level of a *modus operandi*. *Id.* That is a high bar. In *Crims*, for example, the victim's history of trading sex for *drugs* was irrelevant to the defendant's defense that she consented to sex with him as compensation for drug *money*. *Id.* The similarities here are even weaker. Lipe points out that in both circumstances, Jane was under a blanket with her pants down, away from home in a babysitting context, and someone else was touching her vagina. These similarities, he argues, show that Jane engaged in a pattern of sexually explorative behavior. Contrary to his implication, the evidence does not indicate that anyone touched her vagina during the babysitting incident. And even if it did, *modus operandi* requires more than generalized coincidences. Lipe also speculates that while the girls were "playing sex," Jane moved her friend's hand to her vagina much like Lipe testified Jane did with his. But he declined the district court's offer to call either of the girls to testify, forfeiting his opportunity to elevate his speculation about forced touching into evidence. We add that the playing-sex evidence is also attenuated because it all occurred

months after Lipe touched Jane. We repeat here that a victim's sexual conduct after an alleged rape, "unconnected to a pattern of pre-existing behavior, . . . is remote and uninformative about the events underlying the rape charge." *Id.* at 869. The circumstances of Jane's behavior with a same-aged girl is not a circumstance remotely similar to Lipe's she-grabbed-my-hand-and-made-me-do-it defense.

Second, the playing-sex evidence is not probative of Jane's credibility as a witness. Lipe argues that he could have used the evidence to impeach Jane's testimony that others touched her vagina only "when it hurts or something." But Lipe chose not to develop the record of the playing-sex incident on remand, and the cursory description of what occurred does not indicate that the other girl touched Jane's vagina. The evidence could not have reasonably impeached Jane's credibility.

We likewise reject as unpersuasive Lipe's arguments that the scope of the district court's *Paradee* review of Jane's therapy and child-protection records was too narrow and relevant evidence might be discovered there. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). The district court reviewed Jane's updated records "for any indication that [she] pulled, grabbed, or otherwise physically forced the other child to touch her." We do not agree that this was too narrow an inquiry, as it focuses specifically on the remand issues. But even if it were too narrow, the district court also looked more broadly "for any other relevant evidence that might help the defense." We have had the opportunity to review the records also. Our review supports the district court's conclusion that they lack any relevant, noncumulative information. Because we affirm the district court's decision that the playing-sex evidence was irrelevant and that the risk of confusing the jury substantially

outweighed its probative value under rule 402 or 403, we need not address Lipe's arguments about the proper scope and interpretation of the rape-shield law in Minnesota Statutes section 609.347 (2020) and its counterpart in Minnesota Rule of Evidence 412.

II

Lipe challenges the district court's decision to deny his new-trial motion premised on prosecutorial misconduct. When a defendant does not contemporaneously object to prosecutorial misconduct during closing arguments, we review for plain error. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). Lipe concedes that he did not object contemporaneously but asks for less stringent harmless-error review because he objected to the statement in posttrial motions. We reject the request and review only for plain error.

Lipe asserts that the prosecutor erroneously told the jury during her closing argument that Jane was "not acting out like this towards anyone else. She's not grabbing other people's hands and making them touch her vagina, so why would she be doing this with [Lipe] and no one else?" *Lipe I*, 2019 WL 745325, at *10. Lipe argues that this remark misstates the facts. We previously held, conditionally, that "[i]f there existed admissible evidence making the prosecution's summation on this point inaccurate, then the district court must also determine whether, in that light, this argument was improper and requires a new trial." *Id.* Given our prior holding and the related, conditional nature of our remand instruction, the law of the case required Lipe to show admissible evidence to prove he is entitled to a new trial. As discussed, the district court correctly determined that Lipe failed to do so. Lipe is not entitled to a new trial based on the prosecutor's remark.

Affirmed.