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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1266**

State of Minnesota,
Respondent,

vs.

Michael Arthur Rock,
Appellant.

**Filed July 31, 2023
Affirmed in part, reversed in part, and remanded
Kirk, Judge***

Hennepin County District Court
File No. 27-CR-20-11687

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

Mary F. Moriarty, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Slieter, Judge; and Kirk, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appealing from the judgments of conviction for first-degree and third-degree criminal sexual conduct, appellant argues the district court erred by denying his request to introduce evidence that another male's DNA was present on the victim's comforter, and in imposing a lifetime rather than ten-year conditional release term. We affirm in part because the district court did not err in its evidentiary rulings but reverse in part and remand for resentencing.

FACTS

Appellant Michael Arthur Rock is the maternal uncle to A.H., born in 2004. Rock lived with A.H., her mother, and her siblings in Brooklyn Park. In May 2020, A.H. disclosed to her boss that her uncle raped her. A.H.'s mother brought A.H. to the hospital where she was examined and diagnosed with a urinary tract infection. After reporting to law enforcement, A.H. was interviewed by a forensic interviewer at CornerHouse. A.H. recounted three instances of sexual abuse with Rock. A.H. stated that the first instance occurred two years prior, when she was 14 years old, after Rock picked her up from an after-school activity and brought her home. She was on her bed using her cell phone when Rock entered her room, touched her, pinned her down, pulled down her pants, and "started raping [her]." When he was done, she felt something wet on her leg. A.H. informed the forensic interviewer that Rock raped her again two weeks prior to the interview when she was sleeping in her room at night. Finally, A.H. recounted an occasion when Rock picked

her up in his car, pulled into a parking lot, put his hand inside her bra and shirt, and grasped her breast.

Respondent State of Minnesota charged Rock with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2016), and third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(f) (2018). Before trial, Rock moved the district court to admit evidence of semen found on A.H.'s bedding that did not match Rock's DNA profile. Officers learned from A.H.'s mother that A.H. often swapped comforters with her older sister, who had a boyfriend, and that A.H. told her mother she had never been sexually active. The district court denied Rock's motion.

The district court held a jury trial. The jury heard testimony from A.H., A.H.'s mother, the detective that investigated the allegations, the physician's assistant that examined A.H., the forensic interviewer, Rock's mother, and Rock's friend. A.H. testified, largely consistent with her CornerHouse interview, that Rock raped her on two occasions. Both times Rock penetrated her, and "white stuff" ended up on her leg. A.H. testified that she knew it was Rock even when it was dark because she could see him illuminated by the night light, smell his cigarette smoke, and hear his voice. She also testified that Rock put his hand under her shirt and grabbed her breast. The detective testified that police did not discover Rock's DNA on anything that was tested by the crime lab. She explained that it is not uncommon to fail to find perpetrator DNA in cases involving "older allegations." Rock's mother testified that she believed A.H. had a reputation for lying in her family. But A.H.'s mother testified she knew A.H. only to lie about "[s]mall," "[n]ormal, teenage things."

The jury found Rock guilty of both offenses. The district court convicted Rock of both offenses and sentenced him to 144 months in prison with a conditional release period of ten years for first-degree criminal sexual conduct. The district court also sentenced Rock to 70 months in prison for third-degree criminal sexual conduct, to be served concurrently with his other offense, and imposed a lifetime conditional release period.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by excluding evidence of semen that did not match Rock’s DNA profile.

Rock advances three arguments contending that the district court erroneously excluded evidence of semen on A.H.’s bedding that did not match his DNA profile. “Evidentiary rulings rest within the sound discretion of the district court, and we will not reverse an evidentiary ruling absent a clear abuse of discretion.” *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). The abuse-of-discretion standard applies even when a defendant claims the exclusion of the evidence violated his constitutional right to a meaningful opportunity to present a complete defense. *Loving v. State*, 891 N.W.2d 638, 646 (Minn. 2017). But “[a] defendant’s right to present a complete defense is not absolute.” *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009). Defendants must still comply with evidentiary rules. *State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013).

We review the district court’s exclusion of evidence under the harmless-error test, first determining whether the district court erred. *State v. Olsen*, 824 N.W.2d 334, 340 (Minn. App. 2012), *rev. denied* (Minn. Feb. 27, 2013). If we conclude that the district

court did err, we then determine whether the error was harmless. *Id.* An error in excluding evidence is harmless only if we are “satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, a reasonable jury would have reached the same verdict.” *Id.* (quotation omitted). We consider each of Rock’s arguments in turn.

A. Rape-Shield Exception

First, Rock argues that the semen evidence should have been admissible under an exception to the rape-shield rule. Under Minnesota Rule of Evidence 412, evidence about a victim’s prior sexual conduct is generally excluded. Minn. R. Evid. 412; *see also* Minn. Stat. § 609.347, subd. 3 (2022) (rape-shield statute). However, an exception applies “[w]hen the prosecution’s case includes evidence of semen . . . at the time of the incident.” Minn. R. Evid. 412(1)(B). When the state’s case involves such evidence, “evidence of specific instances of the victim’s previous sexual conduct, to show the source of the semen” is admissible if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature. *Id.*

In denying Rock’s pretrial motion to admit evidence showing the semen found on A.H.’s bedding did not match his DNA profile under Minn. R. Evid. 412(1)(B), the district court observed that the state indicated it did not intend to offer physical evidence of semen. Rock contends the exception should have applied because the “prosecution’s case” involved its discovery, which included the DNA report and evidence of semen. We disagree. First, we are unpersuaded that evidence of semen discovered on the victim’s bedding produced within the state’s discovery alone renders specific instances of the

victim's previous sexual conduct admissible. The advisory-committee comment to rule 412 explains, "when the prosecution has *offered* evidence concerning semen . . . to show either that the offense occurred or that the accused committed it . . . [t]he accused may offer evidence of the victim's specific sexual activity to rebut the inferences raised by the prosecution's evidence." Minn. R. Evid. 412 1989 comm. cmt. Here, the state never offered evidence at trial that semen was discovered by law enforcement on A.H.'s bedding, rendering it unnecessary for Rock to rebut any inference that he was the source of the semen.

Rock also argues that the exception applies because A.H. testified at trial that Rock ejaculated on her. While such testimony may fall within the ambit of the exception, the district court also relied on Minn. R. Evid. 403 when excluding the evidence and reasoned that the semen on the bedding and Rock's proposition that A.H. had sex with someone else "are somewhat attenuated." Generally, "[a]ll relevant evidence is admissible" unless otherwise provided by law. Minn. R. Evid. 402. Evidence is relevant if it tends to make the existence of any fact or consequence more or less probable than it would be without the evidence. Minn. R. Evid. 401. But relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Minn. R. Evid. 403. The district court is afforded "discretion in balancing the probative value of evidence against its prejudicial effect." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993).

We discern no abuse of discretion. We agree that Rock's proposed evidence and theory risked a "trial within a trial" concerning the family's sleeping habits and shared

bedding, A.H.'s sister's sexual history, and A.H.'s mother's credibility on her explanation for the semen on the comforter. When there was no additional evidence that A.H. was sexually active and Rock did not advance an alternative perpetrator defense, the district court did not abuse its discretion in determining the limited probative value of the evidence was substantially outweighed by the danger of confusion, delay, and unfair prejudice.

B. Motive to Fabricate

Next, Rock contends the evidence of semen on A.H.'s bedding should have been admissible for the alternative purpose of showing she had a motive to fabricate the allegations against Rock. Particularly, Rock argues that A.H. made her initial rape allegations after A.H.'s coworkers noticed she was experiencing vaginal itchiness at work. Rock reasons that A.H. had a motive to lie about Rock raping her to hide that she had sex with another person who could have been the source of her itchiness. The district court deemed this argument "speculative" and rejected it, reasoning that the evidence had little probative value to show a motive to fabricate and the probative value was substantially outweighed by unfair prejudice to A.H.

In *Olsen*, a victim visited a medical center to determine whether she contracted a sexually transmitted disease (STD) from her former boyfriend. 824 N.W.2d at 336. At the medical center, the victim also disclosed she had been sexually abused by the defendant three years prior. *Id.* The defendant brought a motion to introduce evidence of the clinic visit to show the victim was ashamed and motivated to "shift the negative inferences from herself to the [defendant] by falsely accusing him of rape." *Id.* This court determined that excluding the evidence was not an abuse of discretion because the evidence showed no

motive to fabricate as she never claimed the defendant was the source of the STD. *Id.* at 341. While A.H. did claim that Rock was the source of her vaginal itchiness, Rock's theory that A.H. lied to hide other sexual activity involves a degree of speculation when there was no additional evidence to suggest A.H. was sexually active at the time. On these facts, the district court did not err by excluding the evidence for this purpose.

C. Deficiencies in the Investigation

Finally, Rock argues he was deprived of his right to present a complete defense when he was prevented from asking the detective "about her failure to follow up on the fact that an unknown male's sperm was found on A.H.'s comforter" on cross-examination. The district court rejected this basis for admissibility. The state argues Rock did not advance an alternative perpetrator defense at trial, which leaves only additional investigation into A.H.'s sexual history, the family's sleeping habits, and A.H.'s sister's sexual history. The district court concluded, and we agree, such evidence was more prejudicial than probative. As such, the district court did not err.

D. Harmless Error

Even if we were to conclude that the district court erred in excluding evidence, which we do not, any error was harmless beyond a reasonable doubt. The state's case against Rock was strong. *See State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (noting this court considers the strength of the state's case during harmless-error analysis). A.H.'s trial testimony recounting the sexual abuse was largely consistent with the statements she made during her CornerHouse interview and to the physician's assistant, which the jury found credible. Though Rock's mother testified that A.H. had a reputation for lying, A.H.'s

mother testified that A.H. only lied about small, teenage things. Notably, the detective testified that investigators did not discover Rock's DNA on anything that was tested by the crime lab. Rock had an opportunity to cross-examine the state's witnesses and attacked A.H.'s credibility. We are satisfied that even if evidence of semen on A.H.'s bedding had been admitted, a reasonable jury would have reached the same verdict beyond a reasonable doubt. *See id.*

II. The district court erroneously imposed a lifetime conditional release period.

During sentencing, the district court imposed a lifetime conditional release period as a part of his sentence for third-degree criminal sexual conduct. Rock argues that this conditional release period must be reduced to ten years because, at the time of his convictions in this case, he did not have a previous or prior sex offense. The state concedes this issue and agrees that the district court erred. We agree also.

Whether a sentence conforms to the requirements of a statute is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). When the district court commits an offender to the commissioner of corrections for criminal sexual conduct, if “the offender has a previous or prior sex offense conviction, the court shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for the remainder of the offender’s life.” Minn. Stat. § 609.3455, subd. 7(b) (2022). In *State v. Nodes*, the Minnesota Supreme Court considered the statutory meaning of a “previous or prior sex offense conviction.” 863 N.W.2d 77, 80 (Minn. 2015). The court determined that a conviction occurs when the court accepts and records, in relevant part, a verdict of guilty by a jury. *Id.* The court also concluded “[n]othing in the

statute suggests that a conviction entered at the same hearing as a subsequent conviction cannot function as a ‘prior sex offense conviction’ . . . or that a particular temporal gap between the convictions is required.” *Id.* at 82. Thus, “when two convictions are entered in the same hearing, one before the other, the first-entered conviction constitutes a prior sex offense conviction with respect to the later-entered conviction.” *State v. Brown*, 937 N.W.2d 146, 156 (Minn. App. 2019).

In *Brown*, this court distinguished *Nodes* and reversed a district court’s imposition of a lifetime conditional release period when the convictions for two offenses were accepted and recorded simultaneously. *Id.* at 157. Because the district court referred to the defendant’s offenses collectively and there was no temporal gap between the convictions, this court reasoned that “no conviction [was] entered before the other, and no conviction can be prior to the other.” *Id.* (noting the district court simultaneously entered the convictions when it stated “[a]nd standing convicted of those crimes, so you’re going to be convicted today on both counts”).

Here, similar to *Brown*, the district court accepted and recorded the jury’s verdict convicting Rock of both offenses at the same time. During the sentencing hearing, the district court stated:

So, Mr. Rock, *having been found guilty of the crimes of Criminal Sexual Conduct in the First Degree and Criminal Sexual Conduct in the Third Degree, and standing convicted of those crimes*, it is the sentence of the Court that as punishment you’re committed on Count I to the custody of the Commissioner of Corrections for 144 months. You will have a conditional release period of 10 years following any executed prison term. You have credit for 42 days. You’re required to

serve a minimum of two-thirds of your imprisonment with a maximum of one-third month on supervised release.

....

So for Count II, you're committed to the custody of the Commissioner of Corrections for 70 months. You'll have a life-long conditional release period following any executed prison term.

(emphasis added). On these facts, Rock's first-degree criminal sexual conduct conviction was not entered before his third-degree criminal sexual conduct conviction, or vice versa. As neither of Rock's offenses constituted a "previous or prior sex offense conviction" and Rock did not have any criminal-sexual-conduct convictions prior to this case, the district court erred when it sentenced Rock to a lifetime conditional release period. We accordingly reverse in part on this basis and remand for resentencing consistent with this decision.¹

III. Rock's additional assignments of error are without merit.

In addition to restating the arguments advanced in his principal brief, Rock asserts in his pro se supplemental brief that he is entitled to relief because (1) the state intentionally withheld exculpatory child protection records; (2) the state's prosecutor committed misconduct by vouching for the victim; (3) the district court erred by sentencing him on both offenses because his actions arose from a single behavioral incident or the same course

¹ Rock also argues that the district court imposed an illegal sentence when it imposed a lifetime conditional release period because the state failed to charge Rock by indictment. Because we conclude Rock did not have a "previous or prior sex offense conviction" and reverse Rock's sentence on this basis, we do not consider Rock's alternative basis to reverse.

of conduct; and (4) the cumulative effect of all errors denied Rock his right to a fair trial. We are unpersuaded.

First, Rock argues the state committed a *Brady* violation warranting the reversal of his conviction when it intentionally withheld exculpatory child protection records and disclosed the material late in the discovery process. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding the state’s suppression of material evidence favorable to the defendant violates the constitutional guarantee of due process). To obtain relief, a defendant must first show the evidence was favorable because it was exculpatory or impeaching. *Zornes v. State*, 903 N.W.2d 411, 417 (Minn. 2017). Here, the district court compelled disclosure of the child protection records based on Rock’s pretrial motion, reviewed the records *in camera*, and concluded the records did not contain exculpatory information. Rock advances no argument as to why the reports contained favorable information contrary to the district court’s conclusion. As Rock fails to show the evidence was exculpatory, he cannot obtain relief on this basis.

Second, Rock contends the prosecutor engaged in misconduct by vouching for A.H. during the state’s closing argument. Rock never raised an objection during the state’s closing argument. We review unobjected-to claims of prosecutorial misconduct under a modified plain-error standard and consider whether there is (1) error, (2) that is plain, and (3) affects substantial rights. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). But here, Rock does not show error as the statements he points to do not “impl[y] a guarantee of a witness’s truthfulness, refer[] to facts outside the record, or express[] a personal opinion as to a witness’s credibility.” *State v. Patterson*, 577 N.W.2d 494, 497 (Minn.

1998). The prosecutor permissibly acknowledged that the issue of A.H.’s credibility was for the jury to decide and “argue[d] that the state’s witnesses were worthy of credibility.” *State v. Yang*, 627 N.W.2d 666, 679 (Minn. App. 2001), *rev. denied* (Minn. July 24, 2001). As the closing argument statements identified by Rock do not constitute vouching or error, Rock also cannot obtain relief on this basis.

Third, Rock asserts the district court “erred when it sentenced him on both counts in violation of” Minn. Stat. § 609.04 (2018) and Minn. Stat. § 609.035 (2018). Indeed, Minnesota Statutes section 609.035 precludes multiple sentences for a single behavioral incident. Minn. Stat. § 609.035, subd. 1. Section 609.04 precludes multiple convictions unless both offenses constitute separate criminal acts. Minn. Stat. § 609.04 (noting a defendant may not be sentenced for both an offense and “a crime necessarily proved if [that offense] were proved”). Under both statutes, the key inquiry is whether Rock’s offenses were part of a single behavioral incident. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006) (“[W]hether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident.”). To make this determination, this court considers “whether the offenses occurred at substantially the same time and place” and “whether the conduct was motivated by an effort to obtain a single criminal objective.” *State v. Barthman*, 938 N.W.2d 257, 265-66 (Minn. 2020) (quotations omitted). Here, Rock’s offenses constituted separate criminal acts that were not part of a single course of conduct because they occurred years apart and were not motivated by a single criminal objective. As such, Rock cannot obtain relief from his sentence on this basis.

Last, as Rock has not demonstrated any error beyond an error in his sentencing, Rock's argument that the cumulative effect of the errors "require a reversal" is without merit.

Affirmed in part, reversed in part, and remanded.