STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0034

In the Matter of the Welfare of: G. V. G., Child.

Filed November 6, 2023
Affirmed
Klaphake, Judge*

Hennepin County District Court
File No. 27-JV-21-2725

David E. Suchar, Steven L. Schleicher, Stephanie Laws, Jevon C. Bindman, Clayton J. Carlson, Maslon L.L.P., Minneapolis, Minnesota (for appellant G.V.G.)

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Klaphake, Judge.

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

Following designation as an extended-jurisdiction-juvenile prosecution, a jury found appellant guilty of second-degree criminal sexual conduct. The district court adjudicated appellant delinquent and imposed a 90-month stayed adult sentence. On appeal from the adjudication and conviction, appellant argues the evidence presented at trial was insufficient to support the jury's verdict. In the alternative, appellant argues he is entitled

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

to a new trial because the district court erred when it excluded expert testimony on false memories, admitted the victim's forensic interview, and admitted other allegations of sexual misconduct as relationship evidence. In addition, appellant argues the prosecutor attempted to elicit inadmissible evidence, and cumulative errors in the proceedings warrant a new trial. Because the record supports the jury's verdict, and the district court did not abuse its discretion in its evidentiary rulings, appellant is not entitled to a new trial and his conviction is affirmed.

DECISION

I.

Appellant argues the evidence presented at trial was insufficient to support his conviction because the jury determined the victim was not credible, and the dates of offense had not been proven beyond a reasonable doubt. When reviewing a sufficiency-of-the-evidence challenge, this court analyzes the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to sustain said conviction. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). We assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (quotation omitted). A verdict will not be overturned if the jury, "acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Ortega*, 813 N.W.2d at 100.

Credibility of the Victim

Appellant was acquitted on one of the charged counts of second-degree criminal sexual conduct. Appellant contends this acquittal demonstrates the jury deemed the victim not credible and, because the state's case rested largely on the credibility of the victim, insufficient evidence supported his conviction. Juries, not appellate courts, are tasked with weighing credibility and it is well-established that "a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quoting *State v. Hill*, 172 N.W.2d 406, 407 (Minn. 1969)). But contrary to appellant's contention, a jury is permitted to believe some parts of a witness's testimony and not believe other parts. *State v. Landa*, 642 N.W.2d 720, 726 (Minn. 2002). In this case, the victim testified that appellant sexually touched her through three distinct "games," each with unique facts, and each of which was charged as a separate count. The jury was free to believe the testimony of the victim with respect to two of the "games" even though it found appellant not guilty with respect to one. This is not a basis for reversal.

Dates of Offense

Appellant asserts the evidence presented at trial did not sufficiently establish the dates of offense because the victim was unable to recall specific acts of sexual touching occurring on specific dates. Precise offense dates are only essential elements when "the act done is unlawful during certain seasons, on certain days or at certain hours of the day." *State v. Becker*, 351 N.W.2d 923, 927 (Minn. 1984). "Generally, specific dates need not be proved in cases charging criminal sexual conduct over an extended period of time." *State v. Rucker*, 752 N.W.2d 538, 547 (Minn. App. 2008), *rev. denied* (Minn. Sept. 23,

2008). At trial, the victim testified the sexual touching "games" occurred on holidays and at family gatherings beginning when she was 11 years old, and which continued until December 2019, when she was 14 years old. We conclude this testimony was sufficient to establish the timeframe of the offense.

II.

Appellant argues that the district court abused its discretion by excluding expert testimony about false memories. Expert testimony regarding a novel scientific theory is only admissible if the proponent of the evidence establishes that the underlying scientific evidence is generally accepted in the relevant scientific community and that the scientific evidence has foundational reliability. *Doe 76C v. Archdiocese of St. Paul*, 817 N.W.2d 150, 156 (Minn. 2012) (describing what is commonly referred to as the "*Frye-Mack*" standard). Whether a particular principle satisfies general acceptance in the relevant scientific community is a question of law that we review de novo, but district court determinations regarding foundational reliability are reviewed for an abuse of discretion. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

Prior to trial, appellant filed his notice of intent to offer expert testimony regarding the risk of false memories of criminal sexual conduct in children and young adults, the role of therapy in the development of false memories, and incremental reporting as an indicator of false memories. The state responded by filing a motion in limine seeking to prohibit testimony related to false memories. At trial, the district court determined that, absent a *Frye-Mack* hearing to determine whether this kind of evidence was the scientific standard,

appellant's expert would not be permitted to summarily testify that it was the scientific standard.

Appellant contends the district court should have allowed the testimony because the supreme court implicitly determined the topic of false memories was a proper subject for expert testimony in *Doe 76C*. But contrary to appellant's argument, the supreme court's analysis in *Doe 76C* was directed to a narrower issue: whether the district court, after holding a three-day *Frye-Mack* hearing, abused its discretion in determining that the theories of repressed and recovered memories lacked foundational reliability based on the evidence presented. 817 N.W.2d at 169-70. The supreme court did not opine generally on whether the topics of false, repressed, or recovered memories were proper subjects for expert testimony. *Id.* at 169-71.

Appellant faults the state for not requesting a *Frye-Mack* hearing and the district court for not conducting a *Frye-Mack* hearing sua sponte after it determined more information was needed regarding whether the proposed false memory testimony reflected the scientific standard. But the *Frye-Mack* standard places the burden on the proponent of the novel scientific evidence—in this case, appellant—to demonstrate acceptance in the scientific community and foundational reliability before the testimony may be admitted. *See Goeb*, 615 N.W.2d at 816. Appellant failed to request a *Frye-Mack* hearing despite the state's written challenge to the testimony. As such, we conclude the district court did not abuse its discretion by excluding expert testimony regarding false memories.[1]

[1] Even if we concluded the district court should have conducted a *Frye-Mack* hearing sua sponte, appellant was not prejudiced as the excluded testimony was within the jury's ability

III.

Appellant argues the district court improperly admitted a recording of the victim's forensic interview. First, he argues the district court violated his Sixth Amendment confrontation right by precluding defense counsel from cross-examining the victim with a recording of her forensic interview. Second, he argues the district court abused its discretion by later admitting a recording of the forensic interview as a prior consistent statement and under the residual hearsay exception.

Confrontation Clause

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. "The Confrontation Clause is satisfied by a declarant's appearance at trial for cross-examination. . . ." *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008). While evidentiary rulings are within the district court's discretion, whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law that is reviewed de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

At trial, appellant's counsel attempted to introduce a recording of the forensic interview during cross-examination of the victim, but the district court declined to admit the forensic interview at that time having decided the victim was unable to authenticate the

---

to assess. *See State v. Fedor*, 628 N.W.2d 164, 172 (Minn. App. 2001); *State v. Erickson*, 454 N.W.2d 624, 627-28 (Minn. App. 1990), *rev. denied* (Minn. May 23, 1990).

recording. Appellant contends the district court's decision impeded his ability to effectively cross-examine the victim, violating his Confrontation Clause rights.

But "the Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *State v. Gilleylen*, 993 N.W.2d 266, ___, 2023 WL 4611400, at *6 (Minn. July 19, 2023) (quotation omitted). While appellant may have wished to cross-examine the victim with the recording of the forensic interview, there is no dispute that the victim appeared at trial and was subject to cross-examination by appellant's counsel. That is all the Confrontation Clause demands and as such, appellant's Sixth Amendment rights were not violated.

Prior Consistent Statement

Hearsay evidence generally is inadmissible as substantive evidence. Minn. R. Evid. 802; *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). Hearsay is defined as an out-of-court statement that is offered to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). But a prior statement by a witness is admissible non-hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement, the statement is reasonably consistent with the declarant's testimony, and the statement is helpful to the fact-finder in evaluating the declarant's credibility. Minn. R. Evid. 801(d)(1)(B); *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005).

Following the victim's testimony, the state sought to introduce the recorded interview through another witness who could authenticate it. The district court determined

the forensic interview was admissible as a prior consistent statement under rule 801(d)(1)(B) and under the residual hearsay exception provided for in rule 807. Appellant contends the district court improperly concluded the forensic interview was a prior consistent statement because the district court did not undertake a statement-by-statement analysis of the forensic interview as required by *State v. Bakken*. 604 N.W.2d 106, 109-10 (Minn. App. 2000). But this court in *Bakken* specifically highlighted only "where inconsistencies directly affect the elements of the criminal charge, the [r]ule 801(d)(1)(B) requirement of consistency is not satisfied, and the prior inconsistent statements may not be received as substantive evidence." *Id*.

None of appellant's argued inconsistencies go directly to the elements of the charge. Appellant points to inconsistency regarding when the victim disclosed the sexual abuse, which goes to credibility, and inconsistency related to the specific dates of offense which are not required elements of a second-degree criminal sexual conduct offense. Because we conclude that the district court did not abuse its discretion in admitting the recording of the victim's forensic interview as a prior consistent statement, we do not reach the issue of whether the recording was admissible under the residual hearsay exception.

IV.

Appellant argues the district court abused its discretion in admitting allegations of out-of-state sexual misconduct involving appellant against the victim as relationship evidence. In a prosecution for criminal sexual conduct, evidence of domestic conduct by the accused against the victim, commonly known as relationship evidence, is "admissible unless the probative value is substantially outweighed by the danger of unfair prejudice."

Minn. Stat. § 634.20 (2022); *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). Relationship evidence has probative value if it "helps to establish the relationship between the victim and the defendant" or "places the event in context." *State v. Lindsey*, 755 N.W.2d 752, 756 (Minn. App. 2008), *rev. denied* (Minn. Oct. 29, 2008). Relationship evidence may give rise to unfair prejudice if the evidence "persuades by illegitimate means." *State v. Bell*, 719 N.W.2d 635, 641 (Minn. 2006) (quotation omitted). We review a district court's decision to admit relationship evidence for an abuse of discretion. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

In this case, the district court admitted allegations that appellant sexually penetrated the victim in Arizona because the evidence would "illuminate the history of the relationship between [appellant] and [the victim] within the context of domestic abuse." Appellant contends the Arizona allegations involved more serious conduct which prejudiced appellant, and the probative value of the evidence was low because the Arizona allegations occurred after the charged Minnesota conduct. We are not convinced.

As to prejudice, nothing suggests the Arizona allegations were presented to persuade by illegitimate means. The victim testified in little detail regarding the Arizona allegations, as shown by the following colloquy:

> Q. And while you were in Arizona, did anything happen with [appellant]?
> A. I was sexually assaulted by [appellant].
> . . . .
> Q. Did that sexual assault involve—did he penetrate you?
> A. Yes.

This court has previously found no abuse of discretion when a district court admitted relationship evidence more factually detailed than what was presented to the jury in this case. *See State v. Patzold*, 917 N.W.2d 798, 805-06 (Minn. App. 2018). As to probative value, admissible relationship evidence is not limited to domestic conduct occurring before the charged offense. As this court has previously noted, the legislature amended the language of section 634.20 in 2002, from "similar prior conduct" to "similar conduct." *Lindsey*, 755 N.W.2d at 756 (finding no abuse of discretion in admitting evidence of subsequent acts of domestic assault as relationship evidence). As such, we perceive no abuse of discretion here.

V.

Appellant argues the prosecutor committed misconduct by attempting to elicit testimony regarding his placement in sex offender therapy contravening the district court's pretrial order precluding the state from referring to appellant's mental illness or diagnosis.

The right to due process of law includes the right to a fair trial. *Spann v. State*, 704 N.W.2d 486, 493 (Minn. 2005). When a prosecutor intentionally elicits or attempts to elicit inadmissible evidence, a new trial may be ordered if "the misconduct appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial is denied." *State v. Steward*, 645 N.W.2d 115, 121 (Minn. 2002). But a new trial is unnecessary if the misconduct was harmless. *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016). "Prosecutorial misconduct is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the misconduct." *Id.* (quotation omitted).

Appellant specifically challenges the following colloquy between the prosecutor and appellant's mother:

> Q. All right . . . I just want to ask you a few questions about May of 2020. And sometime in May of 2020, you learned—this is the Arizona reporting—that [the victim] reported that during your family vacation in Arizona, that [appellant] sexually assaulted her.
> A. Yes.
> Q. Now, shortly after hearing about that, you put [appellant] in therapy with a therapist that specializes in sexual offending; right?
> A. We put him with the first available therapist. We didn't necessarily— . . .

Having considered this testimony, we conclude it is not necessary to decide whether the prosecutor committed misconduct, because even assuming misconduct occurred, we are convinced any misconduct was harmless. The victim directly testified to appellant's multiple acts of sexual touching. The testimony elicited by the prosecutor only established that appellant had been placed in therapy. Under these circumstances, the jury's verdict was surely unattributable to the implication of one question asked over the course of a six-day jury trial. As such, a new trial is unnecessary.

VI.

Finally, appellant argues the district court's cumulative errors in evidentiary rulings warrant a new trial. "Cumulative error exists when the cumulative effect of the errors and indiscretions, none of which alone might have been enough to tip the scales, operate to the defendant's prejudice by producing a biased jury." *State v. Penkaty*, 708 N.W.2d 185, 200

(Minn. 2006) (quotations omitted). Because we conclude none of the challenged evidentiary rulings constitute error, appellant is not entitled to a new trial.

Affirmed.