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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1131**

State of Minnesota,
Respondent,

vs.

Xavier Hill,
Appellant.

**Filed July 8, 2024
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Morrison County District Court
File No. 49-CR-22-167

Keith Ellison, Attorney General, Jacob Campion, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Schmidt, Judge; and Harris, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that (1) the district court abused its discretion by admitting hearsay, (2) the prosecutor committed plain error by eliciting testimony that appellant refused to speak with police

after his arrest, (3) his criminal-history score is incorrect, and (4) the district court erred by imposing an aggravated sentence. We affirm appellant's conviction but reverse and remand his sentence for a determination of his correct criminal-history score.

FACTS

On November 27, 2021, seven-year-old N.B. was taken to the hospital by her mother. N.B. reported to a nurse in the emergency department that she was tired because the previous night, appellant Xavier Hill, her mother's boyfriend, put his penis in her mouth and "white stuff started coming out the end of his penis."

B.C., a registered nurse, performed a physical examination on N.B. B.C. collected swabs from areas of N.B.'s body. The swabs were sent to the Bureau of Criminal Apprehension (BCA). Semen was detected on swabs from N.B.'s perineal, rectal, and lower-back areas. Semen was not detected on an oral swab.

B.C. conducted a forensic interview with N.B. N.B. stated that Hill lived with her family, and she called him "dad." N.B. stated: "[W]hen we were on the couch [Hill] . . . puts in a video . . . and then he puts his penis on, well, my penis, but then I have like (inaudible) so it's not even gonna work." N.B. stated that Hill looked for a place to put his penis, and that sometimes it hurt her in "the middle being [her] butt and then the penis."

Respondent State of Minnesota charged Hill with four counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1a(e), (g) (2020).

On March 8, 2023, approximately 15 months after the sexual-assault report, Hill's jury trial began. N.B. testified but had a difficult time recalling information. N.B. testified

that the night before her mom took her to the hospital, Hill got her out of bed and they went into another room. By circling body parts on pictures of male and female anatomies, N.B. showed that Hill put his penis in her mouth. She testified that a white liquid came out of Hill's penis, and it tasted bad. The prosecutor asked N.B. if Hill put his penis anywhere else. She replied: "I don't think so." The prosecutor asked if the "white stuff" went anywhere else. N.B. replied: "No." The prosecutor asked if Hill did "this more than one time." N.B. replied that it was more than once, but it was not "very many" times.

The emergency-room nurse testified about seeing N.B. at the hospital. Defense counsel objected when the prosecutor asked the nurse the following questions: (1) "[D]id she tell you what happened?" and (2) "What did [N.B.] report?" The district court overruled the objections, explaining that the nurse could testify about acquiring "information for medical treatment."

The nurse then testified that she told N.B. that she was there to take care of N.B. if she needed help. The nurse testified: "[N.B.]'s mom said that she was saying that she was tired. And I just asked her if she wanted to tell me why she was tired." The nurse further testified: "[N.B.] said that she was up last night and that her mom's boyfriend takes her into the bathroom sometimes to talk and do things." The following exchange occurred between the prosecutor and the nurse:

Q: And what did she say that [Hill] did to her?

A: She said that last night when he was putting his penis in and out of her mouth the white stuff came out and this time it got into her mouth, and it tasted really bad, and she did not like that at all.

....

Q: What happened after [N.B.] told you this?
A: She told me that it has happened about four times
And she told me . . . that he has put his penis on her butt
and her back and the white stuff has gotten on those
places before, but it has never gone into her mouth.

B.C. testified about the physical examination and forensic interview with N.B. A video of the interview was played for the jury. A forensic scientist for the BCA testified about the semen present on N.B.'s perineal, rectal, and lower-back swabs. She testified that "the male DNA profile obtained from the sperm cell fraction of all three of those areas was a single source male DNA profile, and that matches the profile obtained from . . . Hill."

The jury found Hill guilty of six counts of criminal sexual conduct, including first-degree criminal sexual conduct—penetration—victim under 14 years old and actor 36 months older than the victim. The state had moved for an aggravated sentence. In the *Blakely* proceeding,¹ the jury found that Hill sexually penetrated N.B. in more than one way. The jury was instructed that its finding would "assist the [c]ourt in determining [Hill]'s sentence."

The district court sentenced Hill to 336 months in prison, an upward durational departure—the presumptive sentence was 168 months in prison (144-201 months range). The district court based the aggravated sentence on the jury's finding that Hill penetrated N.B. in more than one way. The district court relied on this sole factor to find that Hill's conduct was significantly more serious than is typical of the crime. The district court

¹ "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quotation omitted).

determined that the jury's finding was supported by the evidence of N.B. testifying that Hill "put his penis into her mouth, and . . . ejaculated into her mouth" and the DNA evidence that showed that Hill's "semen [was] found in [N.B.]'s vaginal and anal areas as well as her lower[-]back areas." The district court determined that the evidence showed that Hill penetrated N.B.'s "mouth and vaginally and/or anally." This appeal followed.

DECISION

Hearsay

Hill first argues that the district court abused its discretion by admitting hearsay statements that N.B. made to the nurse at the hospital. We review evidentiary rulings for an abuse of discretion, reversing only if the error prejudiced the appellant's substantial rights. *State v. Chavez-Nelson*, 882 N.W.2d 579, 588 (Minn. 2016).

Here, the district court ruled that the nurse's statements regarding her interaction with N.B. were admissible under exceptions to the hearsay inadmissibility rule. First, the district court ruled that the statements were admissible for medical diagnosis.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. Minn. R. Evid. 801(c), 802. An exception to the inadmissibility rule is for statements that are "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803(4). The rationale behind the medical-diagnosis exception is "the patient's belief that accuracy is essential to

effective treatment.” *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006) (quotation omitted).

The nurse testified that she was the first medical professional to see N.B. The nurse told N.B. that she was there to take care of her if she needed help. The nurse testified: “[N.B.’s] mom said that she was saying that she was tired. And I just asked her if she wanted to tell me why she was tired.” The nurse further testified: “[N.B.] said that she was up last night and that her mom’s boyfriend takes her into the bathroom sometimes to talk and do things.” The nurse testified that N.B. volunteered the information within the first two to three minutes of being in the room together. This fits within the rationale behind the medical-diagnosis exception—N.B. believed that accuracy in her reporting was essential to her treatment. *See id.* The district court did not abuse its discretion by admitting this evidence under the hearsay exception for medical diagnosis or treatment.²

Prosecutorial misconduct

Hill next argues that the prosecutor committed misconduct. At trial, an investigator testified that he interviewed Hill “after [Hill] was arrested.” The prosecutor asked if Hill provided any information. The investigator replied: “No. He refused to talk.” Defense counsel did not object, but Hill now argues that it was plain error for the prosecutor to elicit testimony regarding his exercise of his right to remain silent.

² The district court also ruled that the statements were admissible under the residual exception to the hearsay rule. Because we conclude that the district court appropriately ruled that the statements were admissible under the medical-diagnosis exception, we need not review whether the statements were admissible under the residual exception.

Unobjected-to claims of prosecutorial misconduct are reviewed under a modified plain-error standard. *State v. Epps*, 964 N.W.2d 419, 423 (Minn. 2021). Hill must establish plain error. *See State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006). An error is plain if it is clear or obvious, and usually this is shown if the error violates caselaw, a rule, or a standard of conduct. *Id.* at 302. If an appellant establishes plain error, the burden shifts to the state to show that the plain error did not affect the appellant’s substantial rights. *Id.*

The state agrees that it was plain error for the prosecutor to elicit this testimony. *See State v. Beck*, 183 N.W.2d 781, 783 (Minn. 1971) (holding that it was error to admit testimony by police officer that he advised “defendant that he had a right to remain silent and that anything he said might be used against him” because testimony was “wholly gratuitous, serving no probative purpose”). The state claims that there is “no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict.” *Ramey*, 721 N.W.2d at 302 (quotation omitted). To determine whether there is a reasonable likelihood that the prosecutor’s error had a significant effect on the verdict, we “consider the strength of the evidence against the defendant, the pervasiveness of the improper suggestions, and whether the defendant had an opportunity to (or made efforts to) rebut the improper suggestions.” *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Here, the misconduct did not have a significant effect on the verdict. First, the evidence against Hill was strong, including N.B.’s testimony, the nurse’s testimony, B.C.’s testimony, the video of N.B.’s interview, and the DNA evidence. Second, the statement was not pervasive—it happened just once. Finally, the defense had an opportunity to rebut

the improper suggestion because the district court instructed the jury that Hill's silence should not be held against him. *See State v. Ferguson*, 581 N.W.2d 824, 833 (Minn. 1998) (“We assume that the jury follows a [district] court’s instructions.”).

Criminal-history score

Hill argues that his criminal-history score was inaccurately calculated because it included two convictions from the state of Georgia without the state offering evidence for the district court to determine whether the convictions were properly calculated. The state agrees that Hill's sentence must be remanded for an accurate calculation of his criminal-history score.

Hill did not challenge his criminal-history score at sentencing. But a sentence based on an incorrect criminal-history score is an illegal sentence, which Hill can challenge for the first time on direct appeal. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). “We review determinations of a defendant’s criminal[-]history score for [an] abuse of discretion.” *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff’d mem.*, 909 N.W.2d 594 (Minn. 2018).

Hill's sentencing worksheet showed two convictions from the state of Georgia. But the record does not show that the state laid any foundation for the Georgia convictions to prove that they were properly considered in calculating Hill's criminal-history score. *See State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006); Minn. Sent'g Guidelines 2.B.5. (Supp. 2021). When, as here, a defendant does not challenge his criminal-history score at the time of sentencing, we will reverse and remand for further proceedings to permit the state to “develop the sentencing record so that the district court can appropriately make its

determination.” *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008). Accordingly, we reverse Hill’s sentence and remand to allow the state to introduce evidence to satisfy its burden of proof with respect to the proper calculation of Hill’s criminal-history score.

Aggravated sentence

Finally, Hill challenges his aggravated sentence, arguing that the state did not prove that he penetrated N.B. in more than one way. When reviewing a challenge to the sufficiency of the evidence supporting an aggravating factor, this court reviews the record to determine whether the jury reasonably could find the aggravating factor based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999) (discussing sufficiency-of-the-evidence review after jury trial on substantive offense). In doing so, we view the evidence in the light most favorable to the jury’s finding and assume that the jury believed the evidence supporting the aggravating factor and disbelieved contrary evidence. *Id.*

Here, the district court relied on the jury finding that Hill sexually penetrated N.B. in more than one way to enhance Hill’s sentence. Using anatomical drawings, N.B. showed that Hill put his penis in her mouth. The nurse testified that N.B. reported that Hill put “his penis in and out of her mouth.” A forensic scientist testified that semen was identified on N.B.’s perineal, rectal, and lower-back swabs. This evidence, as the jury found, showed that Hill sexually penetrated N.B. in more than one way on the night of the offense.

Affirmed in part, reversed in part, and remanded.