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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1407**

State of Minnesota,
Respondent,

vs.

Chris Henry,
Appellant.

**Filed August 26, 2024
Affirmed
Kirk, Judge***

Hennepin County District Court
File No. 27-CR-21-20881

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Rebecca Ireland, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, 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NONPRECEDENTIAL OPINION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

In this appeal from a final judgment of conviction for first-degree criminal sexual conduct, appellant argues that his conviction must be reversed, and the case remanded for a new trial, because the district court committed prejudicial plain error by (1) allowing the investigator to offer lay opinion testimony identifying appellant in video evidence and (2) admitting an unredacted recording of the complainant's interview that contained inadmissible character evidence. Alternatively, appellant argues that the district court abused its discretion by denying his motion for in camera review of the complainant's private medical, therapy, and school records, requiring a remand for further proceedings. We affirm.

FACTS

In November 2021, respondent State of Minnesota charged appellant Chris Henry with one count of first-degree criminal sexual conduct pursuant to Minnesota Statutes section 609.342, subdivision 1a(e) (Supp. 2021). The matter proceeded to a jury trial from which these facts are derived.

According to the complainant in this case, K.W., she first met Henry on October 2, 2021.¹ On that date, K.W. and her friend were walking to CVS when they were approached by Henry in a red SUV. Henry asked the girls how old they were, and K.W. replied that she was 16 years old, although she was only 13 years old. Henry offered to drive K.W. and

¹ K.W. initially knew Henry only as "King." K.W. subsequently identified "King" as Henry via his driver's license photo prior to trial and in court during trial.

her friend to CVS and the girls accepted. After going into CVS, K.W. and Henry exchanged phone numbers and Henry brought the girls back to K.W.'s friend's apartment. Henry and K.W. communicated by phone calls and text messages over the next couple days.

On October 4, Henry and K.W. agreed to meet up and Henry promised K.W. that he would take her shopping. When Henry picked up K.W., he was driving the same red SUV that he drove on October 2.

Instead of going shopping, Henry drove K.W. to multiple locations over the course of the day. Henry first brought K.W. to a drive-thru and then to an apartment that Henry took grocery bags into. After Henry returned to the vehicle, he told K.W. to lean over the center console and hug him, and Henry kissed K.W.

Next, Henry drove to a strip mall parking lot where he provided alcohol to K.W. Henry then drove to a gas station where he got out of the vehicle and K.W. saw that he had a firearm in his pocket. K.W. was also aware of another, larger firearm in the vehicle.

K.W. returned to Henry's vehicle, and Henry drove her to a shopping mall. Once at the mall, Henry dropped off K.W. and she went inside alone to place her phone in some bushes inside the mall so her mother could not track her true location.

After K.W. returned to the vehicle, Henry drove to pick up a female friend. After picking up the friend, Henry drove to another gas station where he gave the friend "some weed" and the friend rolled a "blunt." Henry drove to a liquor store parking lot where K.W. got out of the vehicle, sat down on the sidewalk, and smoked the marijuana. Henry got angry and raised his voice at K.W. because the sidewalk was dirty. Henry drove them to

another gas station where K.W. cried because she was scared of Henry and Henry's friend tried to calm down K.W. Henry then dropped his friend off at her house.

Henry drove to a building that he described as his brother's house. K.W. testified that the building looked like the same place Henry had brought groceries to earlier that day.

Henry told K.W. to get into the backseat and K.W. complied "[b]ecause [she] was scared and [she] didn't know what else to do." Henry got into the backseat with K.W. and told her to take off her pants. Henry got on top of K.W. and penetrated her vagina with his penis. K.W. testified that she told Henry to stop but he told her to "just let me finish" and continued to sexually penetrate her until he ejaculated.

Henry dropped off K.W. at her friend's apartment where she sat outside and told a woman that she had been sexually assaulted. K.W.'s mother picked her up and took K.W. to the hospital where K.W. underwent a sexual assault examination and spoke with a police officer. Henry's Y-chromosomal DNA was present on K.W.'s sexual assault kit swab. On October 22, K.W. completed a forensic interview where she disclosed that "King" had sexually assaulted her.

At trial, several witnesses testified, including K.W., the lead investigator, and the forensic interviewer. K.W.'s forensic interview was admitted into evidence and played for the jury. Still images from surveillance video at various locations Henry and K.W. had visited on October 4 were admitted. Additionally, a video K.W. had recorded on her phone from the inside of Henry's vehicle was admitted and played for the jury. Following trial, the jury found Henry guilty, and the district court sentenced him to 234 months in prison.

Henry appeals.

DECISION

On appeal, Henry makes two claims of evidentiary error: (1) allowing the investigator to offer lay opinion testimony identifying him in video evidence and (2) admitting an unredacted recording of K.W.'s forensic interview that contained inadmissible character evidence. Alternatively, Henry argues that the district court abused its discretion by denying his motion for in camera review of K.W.'s private medical, therapy, and school records, requiring a remand for further proceedings. We address each argument for reversal in turn.

I. Evidentiary Error

We begin our analysis by assessing whether Henry is entitled to a new trial based on his evidentiary-error claims. Henry did not object to the admission of the officer's testimony at trial, and he objected to the admission of the forensic interview on a different ground than what he asserts on appeal. We therefore review his claims of error for plain error. *See State v. Guzman*, 892 N.W.2d 801, 814 (Minn. 2017); *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016).

To establish reversible error under the plain-error test, "a criminal defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant's substantial rights." *Myhre*, 875 N.W.2d at 804. "If any prong of the test is not met, the claim fails." *State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006). And even if a defendant demonstrates plain error, an appellate court should "correct the error only when it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Pulczynski v. State*, 972 N.W.2d 347, 356 (Minn. 2022).

“With respect to the substantial-rights requirement, [the defendant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). In evaluating the reasonable likelihood that admission of the evidence significantly affected the verdict, appellate courts consider “(1) the manner in which the State presented the testimony, (2) whether the testimony was highly persuasive, (3) whether the State used the testimony in closing argument, and (4) whether the defense effectively countered the testimony.” *State v. Matthews*, 800 N.W.2d 629, 634 (Minn. 2011). The strength of the evidence against the defendant is also a relevant consideration. *State v. Fraga*, 898 N.W.2d 263, 277 (Minn. 2017).

We are satisfied that any error in the admission of this evidence did not affect Henry’s substantial rights and therefore he is not entitled to a new trial. We address both of Henry’s evidentiary-error claims in turn.

A. The Officer’s Testimony

Henry’s first argument on appeal is that the district court committed prejudicial plain error by allowing the admission of the investigator’s testimony identifying Henry in still photos taken from surveillance videos and identifying Henry’s voice in the video that K.W. recorded while she was in Henry’s vehicle. Specifically, Henry argues that the officer’s testimony was admitted in violation of Minnesota Rule of Evidence 701 because it was not helpful to the jury. *See* Minn. R. Evid. 701 (allowing a lay witness to testify to “opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness’s testimony or the determination of a

fact in issue; and (c) not based on scientific, technical, or other specialized knowledge”). Because we conclude that Henry failed to establish that the testimony affected his substantial rights, we do not resolve Henry’s rule 701 argument. *See Matthews*, 800 N.W.2d at 634 (“If the defendant fails to establish that the claimed error affected his substantial rights, we need not consider the other plain error factors.”).

At trial, the state elicited the following testimony from the police officer regarding the still photos taken from surveillance videos:

Q: Okay. Moving to [Exhibit] 4. All right. What are we seeing in this picture?

A: The closest male to us looks—is unidentified, but the one standing by the exit doors is Chris Henry.

Q: And that’s the white shirt?

A: Correct.

Q: Exhibit 5, what are we seeing in this photograph?

A: Seeing an unidentified male closest to us. Bus shelter. This is outside of CVS. Chris Henry with the white shirt, red pants. [K.W.] is standing next to him.

....

Q: Moving to the next slide, [Exhibit] 17. What do we see in this photo?

A: We see Chris Henry dressed all in red, entering the Speedway in Richfield.

The state later recalled the police officer to have him identify the voice captured on the video that K.W. recorded while she was in Henry’s vehicle. The officer testified that he recognized the voice on the recording as Henry’s. The officer based this identification on

his familiarity with Henry's voice from speaking with him directly and listening to his recorded jail phone calls.

Henry argues that the *Matthews* factors demonstrate that the admission of this testimony significantly affected the verdict and that the evidence against him was too weak to conclude that the admission did not significantly affect the verdict. We are not persuaded.

We begin by addressing the first and second *Matthews* factors: the manner in which the state presented the testimony and whether the testimony was highly persuasive. We recognize that presenting the evidence through the lead investigator's testimony ordinarily renders it more persuasive and tends to weigh in favor of the evidence significantly affecting the verdict. But the effect of the testimony on the verdict in this case was mitigated by the fact that the testimony was given in the form of short, general descriptions of the photo exhibits, and was not emphasized or followed-up on during the rest of the officer's extensive testimony. Similarly, the voice-identification testimony was brief and not emphasized after it was admitted. Under the circumstances of this case, these *Matthews* factors do not weigh in Henry's favor.

We next turn to the third *Matthews* factor: whether the state used the testimony in closing argument. Although the state mentioned the officer's identification testimony during closing argument, it was only mentioned once and not emphasized repeatedly throughout the argument. We agree with Henry that this factor weighs in his favor, but its weight is minimal.

We next address the fourth *Matthews* factor: whether the defense effectively countered the testimony. Here, the defense countered the evidence by cross-examining the investigator about his identifications of Henry. In particular, the defense elicited an admission from the investigator that he could not examine the facial features of the individual in exhibit 4 and that he could not compare the facial features of the individual in exhibit 5 to Henry. The defense also asked several questions to highlight the fact that the officer did not witness the scene captured in the video stills in person. This factor does not weigh in Henry's favor.

Finally, the evidence against Henry was strong enough to support the conclusion that the testimony at issue did not substantially affect the jury's verdict. Extensive surveillance video corroborated K.W.'s testimony about all of the places she went with Henry on October 2 and 4. K.W. identified Henry before trial in a photo and during trial in court. And DNA evidence linked Henry to the crime by the presence of his Y-chromosomal DNA on K.W.'s sexual assault kit swab and his DNA as a major profile in the red SUV.

In reviewing the *Matthews* factors and the strength of the evidence against Henry, we are satisfied that any error in the admission of the officer's testimony did not affect Henry's substantial rights and he is therefore not entitled to a new trial on this basis.

B. Forensic Interview

At trial, the state admitted K.W.'s full, unredacted forensic interview which lasted for over one hour and two minutes. On appeal, Henry contends that the district court committed prejudicial plain error by failing to sua sponte redact or strike the following statements from the video:

K.W.: [H]e does wear red all the time because he said he like leads his own Minneapolis Blood gang.

Interviewer: Okay.

K.W.: ‘Cause I asked him, I said, are you in gang, ‘cause he was wearing all red.

Interviewer: Mm-hmm.

K.W.: And he said, I’m not in a gang. I lead a gang.

....

K.W.: Um, he did say that he was like apparently involved—he said he wasn’t actually involved, but the police thought he was involved in a shoot-out the day before.

Interviewer: Okay.

K.W.: And he said that he had just beat a murder charge.

Interviewer: Okay.

K.W.: But at the same time, he said last—we were driving through Minneapolis, and he said, last time I was in this neighborhood, I popped a N word.

Henry also points to K.W.’s statement during the interview that Henry brought her to a park where he sold “weed” and her description of the event as “just like a regular drug exchange.”

Henry argues that these statements were “inadmissible as unnoticed, irrelevant, and highly and unfairly prejudicial” violations of Minnesota Rule of Evidence 404(b), which provides requirements for the admission of “[e]vidence of another crime, wrong, or act.” But, because we conclude that Henry failed to establish that this evidence affected his

substantial rights, we do not resolve his rule 404(b) argument. *See Matthews*, 800 N.W.2d at 634.²

We again begin by addressing the first two *Matthews* factors. The evidence was presented by showing the jury the entire forensic interview. The statements at issue constitute one minute and 50 seconds of an interview that is over one hour and two minutes long. Further, the state did not highlight the statements by questioning K.W. or other witnesses about the statements. Because the statements were presented in a brief, cursory manner, these factors do not weigh in Henry's favor.

We next turn to the third and fourth *Matthews* factors. The state referenced some of the content of the statements in closing argument, but only as evidence of grooming K.W. by instilling fear—not for any improper purpose.³ And although the defense did not counter the evidence, we are satisfied that it did not substantially affect the jury's verdict because the manner in which it was presented and used rendered its persuasive value as to an impermissible purpose minimal.

² We note that the state argues that K.W.'s statements were admissible "immediate-episode evidence" because they tend to prove that Henry engaged in grooming behavior with K.W. "Immediate-episode evidence" is a narrow exception to the general prior-bad-acts rule and allows the state to "prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Riddley*, 776 N.W.2d 419, 425 (Minn. 2009) (quotation omitted). While we are inclined to agree with the state that there likely was no error in admitting K.W.'s statements because they were evidence of grooming behavior, we need not rely on this basis because we resolve this issue on the substantial-rights prong of plain-error analysis.

³ The state did not reference K.W.'s statements about the drug deal in its closing argument.

Finally, as discussed above, the strength of the evidence against Henry demonstrates that this evidence did not substantially affect the jury's verdict. We therefore conclude that any error in admitting these statements did not affect Henry's substantial rights and he is not entitled to a new trial on this basis.

II. In Camera Review

We next turn to Henry's argument that the district court abused its discretion by denying his request for in camera review of K.W.'s private medical, therapy, and school records.

Before trial, Henry moved for in camera review of

any and all therapy records and notes from [K.W.'s] therapist(s), psychiatrist(s), counselor(s), and/or medical providers . . . in which [K.W.] made any statements regarding allegations with [Henry], her treatment and substance[] abuse history, as well as but not limited to any records indicating any controlled substances that were in her system on or about October 5, 2021.

In his request, Henry identified the providers he sought information from. Relevant to this request, K.W. mentioned in her forensic interview that she tested positive for opiates and not marijuana after the assault. In his supporting memorandum, Henry explained that he was seeking this evidence for "impeachment purposes" and to determine whether K.W. made inconsistent statements. The district court denied Henry's motion, finding that Henry "failed to make a plausible showing that the records sought will be favorable and material to his defense."

Appellate courts review a district court's denial of a motion for in camera review for an abuse of discretion, which occurs when the district court's decision is contrary to

law or “is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted); *see also State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008) (applying abuse-of-discretion standard to review a district court ruling on a motion for in camera review).

To obtain in camera review of confidential records, a defendant must make a “plausible showing” that the requested material would be “material and *favorable* to the defense.” *State v. Conrad (In re Hope Coal.)*, 977 N.W.2d 651, 659 n.6 (Minn. 2022). The request must be reasonably specific, *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *rev. denied* (Minn. Sept. 15, 1989), and “[f]ishing expeditions” are not sufficient to meet the defendant’s burden, *In re Hope Coal.*, 977 N.W.2d at 659 n.6 (quotation omitted).

But the legislature has enacted laws making a person’s therapy records privileged and prohibiting disclosure of those records without the person’s consent. *See, e.g.*, Minn. Stat. § 595.02, subd. 1(d), (g) (2022); *see also In re Hope Coal.*, 977 N.W.2d at 659. Unlike confidential records, the Minnesota Supreme Court has recognized that statutorily privileged documents, like sexual-assault-counselor records, cannot be pierced through in camera review in criminal proceedings. *In re Hope Coal.*, 977 N.W.2d at 661. This court recently extended the supreme court’s approach in *In re Hope Coalition* to the privileges established in Minnesota Statutes section 595.02, subdivision 1(d) and (g), which relate to records maintained by medical and mental-health professionals. *See State v. Ramirez (In re State)*, 985 N.W.2d 581, 586 (Minn. App. 2023) (“[P]aragraphs (d) and (g) prohibit custodians of protected records from disclosing them except when a specifically stated

exception applies.”), *rev. granted* (Minn. Mar. 14, 2023) and *appeal dismissed* (Minn. July 31, 2023).

As an initial matter, Henry has not shown that K.W. consented to the disclosure of her medical or therapy records, nor has he established that some other statutory exception applies. Those records, therefore, are categorically protected from disclosure—even for in camera review—and the district court did not abuse its discretion by denying Henry’s motion for in camera review. *See In re State*, 985 N.W.2d at 586 (“Following the supreme court’s approach in *In re Hope Coalition*, we hold that a district court may not order the production of records protected by these privileges absent an express exception.”); *see also* Minn. Stat. § 595.02, subd. 1(d) (“A licensed physician . . . shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity, and which was necessary to enable the professional to act in that capacity . . .”), (g) (“A . . . psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual’s request shall not, without the consent of the professional’s client, be allowed to disclose any information or opinion based thereon . . .”).

Even if in camera review were allowed, we are satisfied that the district court did not err by concluding that Henry failed to meet his burden to make a plausible showing that the records sought would be material and favorable. In his memorandum in support of his motion, Henry claimed that “it is highly likely [K.W.] discussed [the sexual-assault allegations] with her [in-patient treatment] provider” and that “[p]resumably, the positive

opioid test must have been obtained by medical personnel when she was in the hospital.” Henry’s memorandum suggests that he was unsure whether the information he requested existed and, if it did exist, in which provider’s records the information would be found. The district court did not abuse its discretion by denying his motion for in camera review on the ground that the request was “unsubstantiated and broad” and “more akin to [a] fishing expedition.”

Further, Henry already had evidence of the material he sought to find in the records, including K.W.’s admission that she consumed alcohol and marijuana on the date of the offense, her statement that she tested positive for opioids, her blood-alcohol test results showing she was under the influence when she spoke with the police, and her conflicting statements about her substance use on the date of the offense. The district court did not abuse its discretion by denying Henry’s motion for in camera review on the ground that he failed to demonstrate how the records would help his defense.

Affirmed.