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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Jose Francisco VELASQUEZ-LAZO, Appellant.

A20-0801

|

Filed February 1, 2021

Hennepin County District Court, File No. 27-CR-19-7606

Attorneys and Law Firms

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Considered and decided by [Bratvold](#), Presiding Judge; [Worke](#), Judge; and [Reilly](#), Judge.

NONPRECEDENTIAL OPINION

[REILLY](#), Judge

*1 Appellant challenges his second-degree criminal-sexual-conduct conviction on the grounds that (1) the district court's evidentiary rulings were improper, (2) the district court improperly denied appellant's motion to exclude the CornerHouse video of the victim's statements, and (3) the district court abused its discretion in sentencing. We affirm.

FACTS

This appeal arises out of appellant Jose Francisco Velasquez-Lazo's second-degree criminal-sexual-conduct conviction. Respondent State of Minnesota charged appellant with second-degree criminal sexual conduct for conduct when the victim was under 13 years old and appellant was more than 36 months older than the victim.

The state presented testimony from the victim, N.L.P., at trial. N.L.P. lives with her mother, L.P., and her younger sister, J.S.P. N.L.P. and her family met appellant through church and later moved into his house. Appellant lived on the main level of the house with his family, while N.L.P. and her family lived upstairs. After several years, N.L.P. and her family moved out of appellant's house and into a nearby home. Appellant offered to help N.L.P. and J.S.P. get to school on Friday mornings when L.P. went to work. N.L.P. testified that on multiple occasions, appellant came into her bedroom and "would wake us up, but before that I would always feel his hand on my body." Using a diagram, N.L.P. showed that appellant touched her chest, stomach, and vaginal areas. N.L.P. testified that appellant touched her "really close part to where I ... go to the bathroom" by placing his hand "under [her] pants" and moving his hand around on her skin. N.L.P. stated that appellant also touched her on "the upper part ... [l]ike really close to my chest," and moved his hands around in "a circle" on her chest until she fully woke up. N.L.P. described the sexual contact as "uncomfortable" and stated she "didn't like it."

N.L.P.'s sister, J.S.P., testified that N.L.P. told her appellant touched N.L.P. on her "[b]reast" and "[p]rivate part[s]." One time, J.S.P. was walking toward the bedroom she shared with N.L.P. when she saw appellant "sitting down ... right next to my sister's bed, and [with] his hands near her body."

N.L.P. eventually told her mother, L.P., about the sexual abuse and L.P. contacted the police department. The police arranged for N.L.P. to have a forensic interview at CornerHouse, a children's advocacy center that conducts forensic interviews of child sexual-abuse victims. N.L.P. stated in her CornerHouse interview that appellant "would touch [her] in places where he wasn't supposed to," including

“up [her] shirt” and “on [her] chest.” N.L.P. also stated that appellant “was touching [her] stomach and [her] legs.”

The jury found appellant guilty of criminal sexual conduct. After the jury returned its verdict, the district court prepared another verdict form asking the jury two more questions: (1) whether appellant was “in a position of authority with respect to N.L.P. at the time he committed the offense of Criminal Sexual Conduct in the 2nd Degree,” and (2) whether appellant’s “sexual abuse of N.L.P. occur[red] in her bedroom.” The jury answered “yes” to both questions, finding that appellant was in a position of authority over N.L.P., and that the sexual abuse occurred in her bedroom. The district court sentenced appellant to 24 months in prison. This sentence constitutes both an upward dispositional departure from the presumptive sentence of a stay of execution to an executed prison sentence, but also a downward durational departure from 36 months to 24 months. This appeal follows.

DECISION

I. The district court did not abuse its discretion in its evidentiary rulings.

*2 Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). Even when, as here, an appellant claims he was “deprived [of the] constitutional right to a meaningful opportunity to present a complete defense” by the district court’s exclusion of evidence, we still review for an abuse of discretion. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

Appellant claims the district court erred by excluding evidence, limiting the defense’s cross-examination of the victim, and restraining the defense attorney’s closing argument. Appellant argues these errors violate his constitutional right to introduce evidence in his defense and his right to confront witnesses against him. Both the United States and Minnesota Constitutions guarantee the right to a jury trial and to confront witnesses in all criminal prosecutions. *U.S. Const. amends. VI, XIV*; *Minn. Const. art.*

I, § 6. When the erroneous exclusion of evidence deprives a defendant of a constitutional right, we review whether the exclusion was harmless beyond a reasonable doubt. *State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013). To conclude an error was harmless, we must be “satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (*i.e.*, a reasonable jury) would have reached the same verdict.” *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The state bears the burden of proving that the error was harmless. *State v. Hannon*, 703 N.W.2d 498, 505 (Minn. 2005).

A. The district court did not prevent appellant from presenting a complete defense by excluding the U-visa-program manual.

Appellant argues the district court improperly excluded evidence and deprived him of a meaningful opportunity to present a complete defense. Due process requires that every defendant must have “a meaningful opportunity to present a complete defense.” *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)).

The defense sought to impeach N.L.P. by claiming she fabricated the sexual-abuse allegations to obtain an immigration benefit for her family. The district court asked the defense to make an offer of proof. Defense counsel stated, “[o]ur theory is that the family are undocumented immigrants and that they will benefit from making this accusation and participating in the prosecution by obtaining legal status through the U visa program.” The defense intended to call M.S., N.L.P.’s aunt, to testify that she overheard a conversation between N.L.P. and J.S.P. that they felt “bad that they had to fabricate claims against [appellant] in order to get the immigration benefit.” The defense also wanted to introduce a copy of the U-visa law-enforcement resource guide. Page two of this guide states,

The information provided in this Guide is intended for general educational purposes only. It is not intended to provide legal advice. The information in this Guide may or may not apply to individual circumstances. Readers should review local policies

and seek legal counsel regarding any specific applications of federal and state laws.

The district court permitted the defense to call M.S. to testify about the conversation she overheard, and to cross-examine N.L.P. and J.S.P. about a conversation they had about the family's immigration status, reasoning that the testimony could go to motive. But the district court prohibited the defense from introducing the U-visa-program manual because “the judge gives the instruction on relevant law, not exhibits, so there's no foundation for it.”

*3 We discern no abuse of discretion in this decision. While a defendant has the constitutional right to present a complete defense, this right is “subject to the limitations imposed by the rules of evidence.” *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014). A defendant “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Minn. R. Evid.* 403; *see also State v. Pass*, 832 N.W.2d 836, 842 (Minn. 2013) (noting that “evidentiary rules designed to permit the exclusion of unfairly prejudicial, confusing, or misleading evidence are unquestionably constitutional” (quotation omitted)).

Here, appellant sought to introduce the U-visa-program manual but did not lay proper foundation for its introduction or explain its relevance to the defense. The defense did not identify a witness who would lay the foundation for this document. The defense also failed to explain why the manual was relevant, or how it would help impeach the witnesses. And the guide itself said it was for general educational purposes only and may not apply to individual circumstances. Further, the district court permitted appellant to call M.S. to testify about a conversation she overheard between N.L.P. and J.S.P. M.S. testified that N.L.P. and J.S.P. discussed a plan to “send [appellant] to jail” to get legal residency. The defense had the opportunity, through this witness testimony, to argue

that N.L.P. fabricated the allegations against appellant. The U-visa-program manual was neither relevant nor admissible. For that reason, we also conclude that, even if it was error to exclude the U-visa-program manual, the error was harmless because a reasonable jury would have reached the same verdict. *See Post*, 512 N.W.2d at 102.

Because appellant was not prohibited from presenting a complete defense, the district court did not abuse its discretion.

B. The district court did not improperly limit defense counsel's cross-examination of the victim's mother.

Appellant argues that the district court improperly limited defense counsel's cross-examination of L.P., N.L.P.'s mother. In criminal cases, the Sixth Amendment secures the defendant's right to cross-examine witnesses for motive or bias. *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 1110 (1974) (“We have recognized that the exposure of a witness[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”).

The defense intended to cross-examine L.P. about her immigration status to bolster its argument that N.L.P. fabricated the claims. The district court did not allow the defense to pursue this line of questioning because “immigration status is only admissible to show bias,” and there was no “issue of the mother's bias in this case.” The district court permitted the defense to ask L.P. “if she ever instructed her daughters” to lie, but noted that this line of questioning had “nothing to do with her immigration status.”

The district court's decision does not constitute an abuse of discretion. “[T]he main purpose of cross-examination under the Confrontation Clause is to allow the defendant an opportunity to reveal bias, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.” *State v. Tran*, 712 N.W.2d 540, 551 (Minn. 2006) (quotation omitted). The district court “possesses wide latitude to impose reasonable limits on cross-examination of a prosecution witness” based on “concerns about such things as harassment, decision making on an improper basis, confusion of the issues, and cross-examination that is repetitive or only marginally relevant” *State v. Lanz-Terry*, 535 N.W.2d 635,

639 (Minn. 1995) (affirming district court's decision to limit cross-examination and exclude extrinsic evidence).

*4 As the district court noted, L.P.'s bias was not an issue in the case. The defense argued that N.L.P. and J.S.P. fabricated the allegations to receive favorable immigration benefits, but did not claim that L.P. participated in this plan. Questions about L.P.'s immigration status had the potential to confuse the jury and was of limited relevance. The district court permitted the defense to question M.S. about the conversation between N.L.P. and J.S.P. Given this record, we discern no abuse of discretion in the district court's decision to limit defense counsel's cross-examination about L.P.'s immigration status. We are also satisfied that even if the evidence had been admitted, a reasonable jury would have reached the same verdict. Thus, appellant's challenge also fails under a harmless-error review.

C. The district court did not improperly restrain defense counsel's closing argument.

Appellant claims the district court improperly restrained his counsel from discussing L.P.'s temporary protected status during closing argument. In closing argument, a criminal defendant has a right "to make all legitimate arguments on the evidence, to explain the evidence, and to present all proper inferences to be drawn therefrom." *State v. Atkinson*, 774 N.W.2d 584, 589 (Minn. 2009) (quotation omitted). Yet "[c]ourts may limit the scope of a defendant's arguments to ensure that the defendant does not confuse the jury with misleading inferences." *Id.*

Defense counsel called M.S. to testify about a conversation she overheard between N.L.P. and J.S.P. to falsely report a sexual-abuse allegation against appellant to get legal residency. During cross-examination, the prosecutor and M.S. engaged in the following exchange:

Prosecutor: Okay. And [L.P. is] Salvadoran? From El Salvador?

M.S.: Yes, she's from there.

Prosecutor: And are you Salvadoran, as well?

M.S.: Yes, I'm from there.

Prosecutor: Okay. And so I assume you're familiar, then, with the fact that Salvadorans are eligible for temporary protected status in the United States.

M.S.: Yes, she has that.

Prosecutor: Right. So your testimony is that the girls made this up anyway?

M.S.: Yes, that's true.

Appellant did not object and did not elicit any more information from M.S. about the family's temporary protected status.

During closing argument, defense counsel summarized M.S.'s testimony and argued that N.L.P. and J.S.P. "talked about using this [sexual-abuse] allegation as a way to solve some immigration problems that the family was having." Defense counsel stated, "this is a family that we know are immigrants, they don't have a permanent right to be here, that's what temporary" The prosecutor objected, and the district court sustained the objection because the term "temporary protected status" was "something that came out of the mouth of [the prosecutor]," rather than a statement from a witness. The district court explained that:

[T]here appeared to be going to be further explanation on what [temporary protected status] meant, and there was no evidence in the case about what it meant, and there was no evidence in the case ... other than this one question and answer [between the prosecutor and M.S.], as to the immigration status of any of the people involved. So I did not allow [defense counsel] to discuss what protective status was or what it meant or any implications of it because that was not part of this case.

Appellant failed to object to the district court's ruling. The district court appears to have incorrectly recalled the

testimony because the witness did, in fact, affirm the attorney's statement that L.P.'s family was eligible for temporary protected status. However, the defense attorney did not follow up with M.S. about the meaning of "temporary protected status." Indeed, the defense attorney failed to elicit any testimony from any witness about the meaning or effect of "temporary protected status." And the district court did not prohibit the defense from asking follow-up questions. Therefore, the district court was correct in sustaining the prosecutor's objection because it would have been improper for the defense to argue something at closing that was not in evidence.

*5 We may review evidentiary rulings for plain error affecting substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Plain error exists when a district court commits (1) an error (2) that was plain and (3) that affected the defendant's substantial rights. *Id.* If these elements are satisfied, we may reverse if the error affected the fairness and integrity of judicial proceedings. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The defendant bears the burden of establishing by a reasonable likelihood that the absence of the alleged error would have affected the jury's verdict. *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016).

We determine that appellant is not entitled to relief under this test because even assuming there was an error and the error was plain, appellant's substantial rights were not affected. The district court permitted appellant to present a complete defense and attempt to discredit N.L.P.'s testimony. For example, the district court allowed the defense to question M.S. about a conversation she overheard between N.L.P. and J.S.P. During closing, defense counsel tried to discredit N.L.P.'s testimony by noting that she was "looking down, shaking, [and] crying" during her testimony, suggesting that she was "being asked to lie about something important." The defense also argued during closing that N.L.P. and J.S.P. "us[ed] this allegation as a way to solve some immigration problems that the family was having." The district court's decision to limit the defense's closing argument about the family's "temporary protected status" did not affect their ability to argue that N.L.P. fabricated the allegations. Thus, appellant has not satisfied the prejudice prong of the plain-error test and is not entitled to a new trial based on improperly excluded evidence.

II. The district court did not abuse its discretion by admitting the CornerHouse video into evidence as a prior consistent statement.

Appellant challenges the district court's decision to admit the CornerHouse video into evidence at trial. We review the district court's admission of evidence for an abuse of discretion. *State v. Davis*, 864 N.W.2d 171, 179 (Minn. 2015). A district court abuses its discretion if its ruling is based on an error of law. *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). We will not reverse based on an error of law unless the error prejudiced the defendant. *Davis*, 864 N.W.2d at 180. Appellant bears the burden of proving that the district court abused its discretion and that he was prejudiced by the ruling. *State v. Bustos*, 861 N.W.2d 655, 666 (Minn. 2015).

Appellant claims the CornerHouse video was inadmissible hearsay. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. *Minn. R. Evid.* 801(c). While such statements are generally inadmissible, an out-of-court statement does not constitute hearsay when it is a prior consistent statement. *Minn. R. Evid.* 801(d)(1), 802. A prior statement is consistent when: (1) the declarant testifies at the trial, (2) the declarant is subject to cross-examination about the statement, and (3) the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." *Minn. R. Evid.* 801(d)(1)(B). "[V]ideotaped statements of children who allegedly have suffered sexual abuse," such as CornerHouse videos, are commonly admitted as prior consistent statements. *State v. Wembley*, 712 N.W.2d 783, 789 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007).

*6 Appellant does not challenge the first two factors, but asserts that N.L.P.'s CornerHouse interview was inconsistent with her trial testimony. We disagree. A prior statement need not be identical to be "consistent" under this rule. *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005). Instead, the admission of a videotaped statement is proper so long as it is "reasonably consistent" with the witness's trial testimony. *Id.* (quoting *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998)). N.L.P. told her CornerHouse interviewer that appellant "would touch [her] in places where he wasn't supposed to," including "up [her] shirt" and "on [her] chest." N.L.P. also told the interviewer that appellant "was touching [her] stomach and [her] legs." N.L.P. placed circles on a

diagram showing that appellant touched her vaginal and chest areas. At trial, N.L.P. similarly placed circles on a diagram showing that appellant touched her chest, stomach, and vaginal areas. N.L.P. also testified that appellant put his hands under her shirt and under her pants and touched her on the “part where [she] go[es] to the bathroom.”

Based on this record, we determine that N.L.P.’s statements to the CornerHouse interviewer are reasonably consistent with her trial testimony. Because the requirements of [rule 801\(d\)\(1\)\(B\)](#) are satisfied, the district court did not abuse its discretion by admitting the CornerHouse video into evidence as a prior consistent statement.

III. We affirm the district court's sentencing decision because it would have imposed the same sentence absent reliance on two invalid factors.

The Minnesota Sentencing Guidelines prescribe a range of sentences that is presumed to be appropriate and the sentencing court “must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” [State v. Soto](#), 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). “Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” [State v. Hicks](#), 864 N.W.2d 153, 157 (Minn. 2015) (quotation omitted). District courts have great discretion in imposing sentences, and this court will reverse sentencing decisions only for an abuse of that discretion. [Soto](#), 855 N.W.2d at 307-08. But where a district court departs from presumptive sentencing guidelines, we review de novo whether the district court's reason for its departure is permissible. [Dillon v. State](#), 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Appellant claims the district court abused its discretion by upwardly departing from the presumptive guidelines sentence. The sentencing guidelines provide a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3.b (2016). The district court “must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts ... which support reasons for departure.”

[State v. Rourke](#), 773 N.W.2d 913, 921 (Minn. 2009); *see also* [Blakely v. Washington](#), 542 U.S. 296, 301, 303-04, 124 S. Ct. 2531, 2536 (2005) (holding that accused is entitled to a jury trial on additional facts supporting departure). In ordering a departure, the district court must “explain why the circumstances or additional facts found by the jurors in a *Blakely* trial provide the district court a substantial and compelling reason to impose a sentence outside the range on the grid.” *Id.* at 920.

After the jury returned its guilty verdict, the district court instructed the jury to deliberate on two more factors: whether appellant was in a position of authority over N.L.P., and whether the sexual abuse occurred in N.L.P.’s bedroom. The jury found aggravating offense-related factors. The district court granted the state's motion for an upward dispositional departure because (1) the “[v]ictim was particularly vulnerable,” (2) there were “[m]ultiple victims or multiple incidents per victim,” (3) the “[c]rime committed in victim's home or zone of privacy,” and (4) appellant was in a “[p]osition of authority, superiority, confidence[,] or trust.”

*7 Appellant argues the district court abused its discretion by determining that four aggravating factors supported an upward departure, when the jury only found two aggravating factors. The record reveals that the district court cited two invalid factors because those factors were not presented to, or decided by, the jury. “[W]hen a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors.” [State v. Vance](#), 765 N.W.2d 390, 395 (Minn. 2009) (quotation omitted). “In doing so, we consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure.” [State v. Stanke](#), 764 N.W.2d 824, 828 (Minn. 2009). We will affirm the sentence imposed by the district court only if we can conclude from the record that the district court would have imposed the same sentence absent its reliance on the improper aggravating factors. *Id.*

Here, the record supports a conclusion that the district court would have imposed the same sentence, absent its reliance on the two invalid factors. At sentencing, the district court stressed appellant's position of trust or authority over the victim and her family. The district court found that appellant “used his association with the church to insinuate himself into

this family, single-parent family that needed help and support and thought that that's what he was there for, and then, in fact, he used his in with that family to abuse this child.” The district court characterized this behavior as “particularly egregious.” The jury found this factor was present, and the district court gave significant weight to this valid factor. Because the district court would have imposed the same sentence absent

its reliance on the two invalid factors, appellant is not entitled to resentencing.

Affirmed.

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