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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Gilberto GUZMAN-DIAZ, Appellant.

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Filed July 23, 2018

Kandiyohi County District Court, File No. 34-CR-16-944

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

***1** Appellant Gilberto Guzman-Diaz sexually assaulted his young daughter once or twice a week for years, and he threatened to kill her family members if the child told anyone about the abuse. But when Guzman-Diaz's daughter was 14 years old, she reported the abuse to her mother. After a two-day jury trial, Guzman-Diaz was convicted of first-degree criminal sexual conduct for multiple acts committed over an extended period of time. He appeals his conviction arguing: the district court erred by denying him his constitutional right to present a complete defense because it excluded testimony about the immigration benefits for crime victims; and it abused its discretion by denying his motion for a mistrial after a prejudicial statement about deportation was made in front of the jury. Guzman-Diaz also makes multiple pro se arguments. We affirm.

FACTS

On October 21, 2016, M.G. spent the night at the home of her father, appellant Gilberto Guzman-Diaz. Her mother picked her

up the following morning, and when she did, M.G. was upset and crying. And after her mother insisted, M.G. told her that Guzman-Diaz had sexually abused her. She did not go into detail about the abuse. M.G. told her mother that Guzman-Diaz threatened to kill M.G.'s mother, her little sister, or her grandmother if she told anyone about the abuse. Her mother then brought M.G. to Rice Memorial Hospital.

At the hospital, M.G. was examined by a sexual assault nurse examiner. That nurse described M.G. as tearful, flushed, withdrawn, crying, and holding her knees to her chest. M.G. told the nurse examiner that her father touched her vagina with his hands and his penis, on the outside and inside, and that he kissed her neck. She reported that her father threatened to kill her family members if she told anyone. And when asked if this type of incident had happened before, M.G. explained it had happened once or twice a week since she was nine years old.

Based on M.G.'s recount of the assault, the sexual assault nurse examiner took swabs of her perineal area,[1] her vagina, and her neck. These swabs were sent to the Bureau of Criminal Apprehension (BCA), and both the perineal and vaginal swabs were found to contain semen and sperm from Guzman-Diaz.[2]

A police officer was called to the hospital on the same evening as the exam, and began an investigation. He met with M.G., who he described as upset and crying, and noted she took long pauses before answering questions and her breathing rate would increase, especially when asked about sexual acts. M.G. described the course of events that took place on October 21, 2016. M.G. said she was at home with her father and her siblings. The children were watching TV in the living room, a room that was divided in two by a curtain to accommodate the living room and also a bedroom for Guzman-Diaz. After watching TV, M.G. fell asleep in her father's room. At some point during the night, Guzman-Diaz woke M.G. up and touched her buttocks and vagina with his hands and then with his penis, and penetrated her vagina with his penis.[3] When he was finished, Guzman-Diaz directed M.G. to take a shower, which she did. M.G. also described for the officer what she was wearing that evening, what her father's bedsheets looked like, and where to find those items in the home. The following morning, police executed a search warrant on Guzman-Diaz's home and found the garments and bedsheets as M.G. described them.

***2** Guzman-Diaz was charged with three counts of first-degree criminal sexual conduct. The first count was for penetration or sexual contact with a victim between 13-16 years of age, by a defendant who was more than 48 months older and in a position of authority;[4] the second count was for penetration or sexual contact with a victim under 16, with whom the defendant has a significant relationship;[5] and the third count was for penetration or sexual contact with a victim under 16 that involved multiple acts committed over an extended period of time.[6]

Guzman-Diaz pleaded not guilty and, before the case went to trial, the defense filed a motion in limine to allow an immigration attorney to testify regarding the possible immigration benefits available for victims of crimes. The district court held an evidentiary hearing and then denied the motion. The case proceeded to a two-day jury trial where M.G., M.G.'s mother, the sexual assault nurse examiner, two police officers, and two BCA technicians testified on behalf of the state, consistent with the facts as described above. The general defense theory was that M.G. fabricated the allegations against her father. Guzman-Diaz supported this theory by testifying on his own behalf that he slept through the night on October 21, and committed no abuse. The defense had one other witness who was present at the home on the night in question until approximately 1:00 a.m. and testified that she did not see either M.G. or Guzman-Diaz leave their bedrooms.

The jury found Guzman-Diaz guilty of all three counts of first-degree criminal sexual conduct. The district court sentenced Guzman-Diaz to 172 months in prison on count three—penetration or sexual contact with a victim under 16 years of age that involved multiple acts committed over an extended period of time—after determining all counts constituted the same behavioral incident.

Guzman-Diaz appeals.

DECISION

I. The district court did not deny Guzman-Diaz the right to present a complete defense when it excluded general testimony from an immigration attorney.

Guzman-Diaz argues the district court denied him the constitutional rights to present a complete defense and to confront witnesses against him when it denied his motion to present testimony from an immigration attorney regarding the possible immigration benefits for crime victims.

Guzman-Diaz has a right to a complete defense under the Due Process clause of the Fourteenth Amendment of the United States Constitution, and under Article 1, section 7, of the Minnesota Constitution. *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992). He also has a right to confront witnesses under the Sixth Amendment of the United States Constitution, and under Article 1, section 6, of the Minnesota Constitution. *State v. Byers*, 554 N.W.2d 744, 748 (Minn. App. 1996), *aff'd as modified*, 570 N.W.2d 487 (Minn. 1997). Defendants have a right to present their theory of the case, but the evidence they present remains subject to the rules of evidence. *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014). And when objected to, it is a defendant's burden to establish that evidence is relevant and admissible. *State v. Svoboda*, 331 N.W.2d 772, 775 (Minn. 1983). Evidentiary rulings—even those that invoke constitutional rights—are reviewed for an abuse of discretion. *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006).

***3** When determining whether any piece of evidence should be introduced, the court must weigh the probative value of that evidence against the "danger of unfair prejudice." Minn. R. Evid. 403. Here, the district court took every step to ensure it appropriately engaged in that balancing.

Guzman-Diaz wished to present expert evidence from an immigration attorney that crime victims could receive immigration benefits. Specifically, the attorney was to discuss U-Visas which could allow an individual to remain in the United States if the person is a victim of a crime and cooperates with the law enforcement investigation. The defense argued this evidence was relevant because it could show bias or motive to report false information about Guzman-Diaz. Because it was unclear what M.G. knew about these benefits—and thus unclear whether the evidence was probative—the district court held an evidentiary hearing. That hearing established that M.G. was unfamiliar with U-Visas, that she did not believe she would gain any benefits by reporting her father's abuse, and while she may have talked to government representatives, an immigration lawyer, or to her siblings who were seeking immigration relief—no one had told her that her actions in reporting her father's abuse would have any immigration-related benefit.

Based on this testimony, the district court decided "[t]he evidence regarding potential immigration benefits [was] irrelevant because there was no showing that the victim possessed any knowledge of a U Visa or any similar immigration benefits." Thus, "the victim could not possess any bias or self-interest, as related to a U Visa, at the time the victim reported the alleged abuse." Evidence is probative and relevant when it advances an inquiry and tends to prove or disprove a material fact. *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The district court properly and carefully determined that evidence to be presented by the immigration attorney here failed to advance the inquiry.

The district court also concluded that evidence pertaining to immigration is highly prejudicial and has a danger of misleading the jury. And even probative evidence should not be admitted if it is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403. Unfair prejudice "does not mean the damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Mosley*, 853 N.W.2d at 797 (quoting *State v. Cermak*, 365 N.W.2d 243, 247 n.2 (Minn. 1985)). Because the court found there was so little probative value to the evidence to be presented by the immigration attorney, it determined the prejudicial quality of a discussion about immigration status outweighed it. This was wholly proper and consistent with the requirements of Minnesota Rule of Evidence 403.

Guzman-Diaz argues that M.G.'s testimony that she met with an immigration attorney at some point, that she met with "someone from the government," and that immigration paperwork may have been submitted on her behalf, is sufficient to demonstrate a motive to report the sexual abuse. But expert testimony should only be admitted when the "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. To be admissible and assist the trier of fact, expert testimony must be relevant to a case and to the specific victim. *See Mosley*, 853 N.W.2d at 800 (determining it was proper to exclude expert testimony when the offer of proof was "very general and nonspecific" to the case). Guzman-Diaz's offer of proof that immigration benefits exist for crime victims, generally, and that M.G. *could have* known about them, fails to connect the specific victim, M.G., to possible immigration benefits for crime reporting.

***4** Guzman-Diaz further contends that evidence of immigration status is not so prejudicial that it should outweigh the probative value of the immigration attorney's testimony. He argues that any prejudice could be tempered with a cautionary instruction. But even helpful expert testimony will be excluded if substantially outweighed by the danger of unfair prejudice, and because we agree with the district court's determination that the evidence from the immigration attorney has so little probative value that *any* danger of unfair prejudice would outweigh it. *See State v. Anderson*, 789 N.W.2d 227, 235 (Minn. 2010) ("The district court may ... exclude expert testimony if its probative value is substantially outweighed by the danger of unfair prejudice."). And topics in immigration bring with them a danger of some amount of prejudice.

The testimony from an immigration attorney that Guzman-Diaz wished to present was inadmissible under the rules of evidence, therefore the district court's decision to exclude this evidence did not violate Guzman-Diaz's right to present a complete defense, or to confront witnesses against him.

II. The district court did not abuse its discretion when it denied Guzman-Diaz's motion for a mistrial after a prejudicial statement was made in front of the jury.

Guzman-Diaz argues the district court abused its discretion when it denied defense counsel's motion for a mistrial after M.G.'s mother, when asked why M.G. did not report the sexual abuse earlier, responded that M.G. was worried if she did and "if [Guzman-Diaz] was deported that he was going to kill ... her grandmother." Defense counsel objected to the testimony and moved for a mistrial, arguing the comment about deportation is inflammatory. The district court denied the motion for a mistrial, noting that the comment was brief and did not relate to any of the issues of the case. The district court offered to provide a cautionary instruction, but the defense declined the offer.

Decisions by a district court to deny a motion for a mistrial are reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). To determine whether a district court abused its discretion in denying a motion for a mistrial, appellate courts have considered the strength of the case against the defendant. *See State v. Bickham*, 485 N.W.2d 923, 925 (Minn. 1992) (considering the strength of evidence in a case to conclude that the district court did not abuse its discretion in denying a motion for a mistrial). They have also considered whether the prejudicial statement was intentionally elicited by a prosecutor. *See State v. Holbrook*, 305 Minn. 554, 557–58, 233 N.W.2d 892, 895 (1975) (quoting *State v. Richmond*, 298 Minn. 561, 563, 214 N.W.2d 694, 695 (1974)) (while not dispositive, there is "importance to whether the prosecutor intentionally elicited" prejudicial testimony). And they have considered the prevalence of the prejudicial statement or topic throughout the trial. *See State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016) (alleged prosecutorial misconduct was harmless beyond a reasonable doubt when the prosecutor "did not refer to the [prejudicial] answer at any other point in the trial"); *State v. Bahtuoh*, 840 N.W.2d 804, 819 (Minn. 2013) (a prejudicial comment did not entitle the defendant to a mistrial where it was "isolated and brief" and uttered only once in a four-day trial). We apply those same considerations here.

First, the case against Guzman-Diaz was strong. M.G. testified that her father sexually assaulted her, and her account of the incident in October 2016 remained highly consistent from the time she gave a detailed account to the sexual assault nurse examiner, all the way up to her testimony at trial. Even more fundamentally, it was Guzman-Diaz's DNA that was identified in semen found on M.G.'s perineal region and in her vagina.

***5** Next, neither party asserts that the comment was intentionally elicited by the prosecutor. The prosecutor informed the court that he had instructed the witness not to bring up immigration, and the question the prosecutor asked was clearly intended to elicit testimony regarding Guzman-Diaz's threats to kill M.G.'s family members, which did not necessarily include anything about deportation.

Further, the prejudicial comment at issue was one single word—"deported." It was isolated. It was brief. And it was never again mentioned during the trial. Finally, the district court made every effort to avoid any possible prejudice by offering to provide a curative instruction. In sum, the district court's decision to deny Guzman-Diaz's motion for a mistrial—based on this single word—was not an abuse of discretion.

But Guzman-Diaz contends the mention of deportation—which alludes to immigration status—changed the outcome of the case. *See State v. Manthey*, 711 N.W.2d 498, 506 (Minn. 2006) (internal quotation marks omitted) (stating a mistrial should not be granted "unless there is a reasonable probability that the outcome of the trial would be different if the event that prompted the motion had not occurred"). We are not persuaded. We recognize that references to issues involving immigration status and deportation can be prejudicial, but this was a trial filled with prejudicial allegations—sexual penetration involving appellant's daughter. And the comment on deportation was within a sentence about Guzman-Diaz threatening to kill his daughter's grandmother if she told anyone about the abuse, to explain the delayed reporting. The inflammatory character of a comment can be "substantially diminished" by comparison with more egregious events that are admissible. *State v. Aveen*, 284 Minn. 194, 198, 169 N.W.2d 749, 751 (1969). We do not discern that the word "deported" would inflame the jurors more than the sexual penetration allegations and explicit threats to kill members of a child's family if she disclosed the sexual abuse.

The district court did not abuse its discretion when it denied Guzman-Diaz's motion for a mistrial.

III. Guzman-Diaz's pro se arguments are without merit.

Guzman-Diaz submitted a pro se brief in which he argues he received ineffective assistance of counsel, he describes facts not in the record, and asserts he did not receive key evidence. He asks for further investigation into his case. We address each issue in turn.

First, Guzman-Diaz asserts that his trial counsel lied to him and failed to present evidence he provided to her. Specifically, Guzman-Diaz asserts he gave his attorney evidence of M.G.'s potential sexual relationship with her boyfriend—loosely asserting the boyfriend could be an alternative perpetrator. But this evidence would be inadmissible under Minnesota Rule of Evidence 412, which states that "evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." There are exceptions to this prohibition, but none that apply here.[7] On the one hand, the decision not to present such evidence was likely strategic, and thus insufficient to support the ineffective assistance claim. *See Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015) (there is a "general rule that appellate courts do not review an attorney's trial strategy for competence"). And the Minnesota Supreme Court has previously rejected ineffective-assistance-of-counsel claims when the evidence the defendant wished their counsel to present was inadmissible. *State v. Thompson*, 788 N.W.2d 485, 496 (Minn. 2010) (determining that even if trial counsel had complied with defendant's request regarding the offering of evidence, it would not have affected the outcome of the case because the evidence at issue, a polygraph test, was inadmissible). Guzman-Diaz did not receive ineffective assistance of counsel.

***6** Guzman-Diaz also asserts a multitude of facts that are not in the record, including the immigration status of M.G.'s mother; relationship evidence between Guzman-Diaz and M.G.'s mother; and past accusations made by M.G. and M.G.'s mother. But "[a]n appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988). Thus we do not consider these alleged facts.

Next, Guzman-Diaz asserts that he was not given the DNA results proving his DNA was found inside M.G.'s vagina. But this is patently contradicted by the record. During a pre-trial hearing, Guzman-Diaz was asked if he had received the BCA results, which included the DNA, and he responded that he had.

And last, Guzman-Diaz asks for further investigation into his case, by either the state or this court. Specifically, he wants proof of where he bought the condom he would have used when he assaulted M.G.[8] But the state is only required to prove the elements of a charged crime to support a conviction. *State v. Hage*, 595 N.W.2d 200, 206 (Minn. 1999). Guzman-Diaz's possession of, or use of a condom is not an element of the offense. And this court has no duty or ability to further investigate Guzman-Diaz's case. We are bound by what is in the record on appeal. *See Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (stating that appellate courts are not factfinders, and are not empowered to make or modify findings of fact).

Guzman-Diaz's arguments fail to demonstrate that he was denied constitutional rights, or that the district court abused its discretion in its rulings. To the contrary, a review of the record in this case demonstrates a careful and attentive district court who made every effort to ensure Guzman-Diaz received a fair trial. We affirm the decision of the district court.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 3520535

Footnotes	
1	The perineal area is the area between a woman's vaginal opening and anal opening.
2	A DNA profile of the swabs indicated a mixture of two or more individuals' DNA, with a major male profile matching Guzman-Diaz, and a minor female profile matching M.G. The swab of M.G.'s neck did not contain saliva and therefore did not contain DNA to test.

3	In her trial testimony, M.G. described Guzman-Diaz's penis as his "thing," but then identified it as his penis on a drawing of a male's anatomy. She also described his actions as having "relations" with her but clarified that he put his penis in her vagina.
4	In violation of Minnesota Statutes section 609.342, subdivision 1(b) (2016).
5	In violation of Minnesota Statutes section 609.342, subdivision 1(g) (2016).
6	In violation of Minnesota Statutes section 609.342, subdivision 1(h)(iii) (2016).
7	Consent is not an issue in this case because of the age of the victim, and while certain evidence can come in when the source of semen is in question, the semen discovered was a DNA match to Guzman-Diaz. *See* Minn. Evid. R. 412 (1)(a)-(b).
8	M.G. told the sexual assault nurse examiner Guzman-Diaz used a condom, though she did not discuss it in her trial testimony.