STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0720

State of Minnesota,
Respondent,

vs.

Thomas Allen Moe,
Appellant.

Filed April 28, 2025
Affirmed
Reyes, Judge

Olmsted County District Court
File Nos. 55-CR-19-5031, 55-CR-20-5184

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

Michael Walters, Olmsted County Attorney, James E. Haase, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Bond, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this direct appeal from his convictions of first-degree criminal sexual conduct and second-degree criminal sexual conduct, appellant argues that the prosecutor committed misconduct by accusing him of tailoring his testimony, requiring reversal. We affirm.

FACTS

Appellant Thomas Allen Moe resided in a trailer park in Rochester, Minnesota. On or before December 7, 2016, a woman and her three children, including C.M. and O.M., moved in next door to appellant. The following facts are based on evidence presented at appellant's jury trial.

C.M. would regularly go to appellant's residence with appellant as the only other person present. When she was 12 years old, appellant began sexually abusing her. C.M. stated that appellant would place his penis in her mouth and that he would have her rub his penis with her hand until he ejaculated. C.M. additionally recalled that appellant would touch her breasts and pubic region with his hands and mouth, put his hand inside her vagina, have her lay on top of him and perform fellatio while he had his mouth on her pubic region, and have her sit on his lap while they were both unclothed from the waist down.

O.M. would also go over to appellant's residence with appellant as the only adult present. When she was six or seven years old, appellant began sexually abusing her. O.M. stated that appellant would touch her "private parts" under her clothes and have her remove her clothes and sit on his lap while he was unclothed.

The siblings entered foster care by August 2018. Around November 2018, C.M. disclosed the abuse to her foster mother. After the foster mother reported the abuse, an investigator interviewed appellant about C.M.'s accusation. Appellant acknowledged that, on multiple occasions, he watched C.M. and/or O.M. without their mother present. The investigator provided appellant with details of the accusation, including that he had C.M. touch his penis, that she had her mouth on his penis, and that he ejaculated. Appellant

denied committing any abuse. During this interview, appellant made no mention of being unable to ejaculate or become sexually aroused, but he did disclose other medical conditions, including that he has difficulty walking, has a bad back, and has Ménière's disease.

In July 2019, following C.M.'s accusations, respondent State of Minnesota charged appellant with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.342, subd. 1(a), 609.343, subd. 1(a) (2016). Approximately a year after C.M.'s disclosure, O.M. disclosed to her foster mother that appellant abused her. The state subsequently charged appellant with one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), regarding O.M. The district court granted appellant's motion to consolidate the cases for a single trial.

Appellant was present throughout trial and testified in his own defense. In his testimony, appellant denied abusing the victims. He added that C.M. and O.M. never came to his residence alone; rather, they always came with neighbor children. Appellant additionally testified that, because of a stroke, he was "basically impotent" and could not "get an erection or ejaculate."

During closing argument, the prosecutor noted that "[appellant] sat here through all the evidence." The prosecutor argued that appellant's statement that he was impotent was not credible because he volunteered it for the first time at trial, despite having previous opportunities to do so. The prosecutor added that appellant's testimony that he was never alone with the victims was not credible because he made a contradictory statement to the

investigator. Based on this testimony, the prosecutor stated that the jury "should find [appellant's] testimony to be incredible. And by that I mean not credible. It's intentional. It's him minimizing where he's already made concessions and tailoring his evidence—tailoring his testimony to the evidence." Appellant objected to this statement, arguing that the prosecutor improperly accused him of tailoring. The district court overruled appellant's objection, finding that an "adequate arguable suspicion of tailoring [existed] . . . to support" the prosecutor's statement.

The jury found appellant guilty on all counts. The district court sentenced appellant to 36 months in prison, stayed for five years, for second-degree criminal sexual conduct relating to the abuse of O.M. It then sentenced appellant to 187 months in prison for first-degree criminal sexual conduct relating to the abuse of C.M. This appeal follows.

DECISION

Appellant argues that the prosecutor committed serious misconduct during closing argument by stating that he tailored his testimony to the state's case because no evidence supported those statements. We are not persuaded.

Appellate courts "review [a] district court's findings of fact for clear error and its application of law to those facts de novo." *State v. Berry*, 959 N.W.2d 184, 187 (Minn. 2021). If this court finds that the district court clearly erred by finding that the evidence presented at trial supports an adequate suspicion of tailoring, we then review the prosecutor's argument for misconduct. Appellate courts review objected-to prosecutorial misconduct under the harmless-error standard. *State v. Wren*, 738 N.W.2d 378, 390 (Minn. 2007).

The Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause give a criminal defendant the right to be present at trial and listen to the testimony presented against them. U.S. Const. amends. VI, XIV; *State v. Swanson*, 707 N.W.2d 645, 657 (Minn. 2006). Prosecutorial misconduct occurs when a prosecutor uses "a defendant's exercise of his right to confrontation to impeach the credibility of his testimony . . . in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Swanson*, 707 N.W.2d at 657-58. When there is evidence of tailoring, a prosecutor is free to impeach the defendant on those grounds. *State v. Leutschaft*, 759 N.W.2d 414, 419 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009).

Tailoring of testimony "occurs when a witness shapes his testimony to fit the testimony of another witness or to the opponent's version of the case." *Id.* In *Leutschaft*, the state charged the defendant with various offenses following a road-rage incident in which a witness accused the defendant of pointing a gun at her. *Id.* at 417. The witness testified at trial, stating that she did not wear her sunglasses or use her cell phone during the incident. *Id.* at 419. However, the defendant testified at trial and stated that the witness was wearing sunglasses or using a cellphone during the incident, implying that she did not accurately observe the event. *Id.* The defendant did not previously make such a statement, including to the arresting officer. *Id.* On cross-examination, the prosecutor asked the defendant, "You got to listen to the testimony here of [the witness], right?" and "[The witness] didn't get to listen to [your testimony], right?" *Id.* While these questions came "dangerously close" to being impermissible accusations of tailoring, this court held that they did constitute misconduct because "there was at least an arguable suspicion of

tailoring because the facts omitted by [the defendant] in his statements to police were significant enough that it would be reasonable to expect an arrested person to disclose them if they were true." *Id.*

We conclude that there is evidence that appellant tailored his testimony in two respects. First, the evidence supports the prosecutor's accusation that appellant tailored his testimony when testifying that he could not get an erection or ejaculate. During appellant's interview with an investigator regarding C.M.'s accusation, the investigator informed appellant of C.M.'s accusation that he ejaculated while abusing her, but appellant did not disclose that he was unable to get an erection or ejaculate, despite discussing several other medical conditions. At trial, the victims testified about various acts of abuse during which appellant ejaculated or was otherwise sexually aroused. On direct examination, appellant asserted, for the first time, that he could neither become sexually aroused nor ejaculate. Appellant's testimony about these conditions, after failing to disclose them during the interview with the investigator, provides sufficient evidence of tailoring because it would be reasonable to expect that appellant would have disclosed his impotence then if it was true. *See id.* (explaining that potentially exculpatory facts that defendant omitted in statements to police "were significant enough that it would be reasonable to expect an arrested person to disclose them if they were true").

Second, the evidence supports the prosecutor's assertion that appellant tailored his testimony at trial that he never watched C.M., O.M., and their sibling alone. During appellant's interview with the investigator, he stated that, on a few occasions, he watched C.M., O.M., and their sibling without anyone else present. However, after listening to the

victims' testimony that the abuse occurred when appellant was alone with them, appellant then testified that the victims always came over to his residence with friends and that they were "never alone." Appellant's contradictory earlier statements and later testimony raise an inference that, after listening to the victims' testimony describing the nature of the abuse, he tailored his testimony to show that he did not have an opportunity to abuse the victims because he was never alone with them. Because there is evidence that appellant tailored his testimony in two ways, we conclude that the district court did not clearly error by determining that adequate evidence of tailoring supported the prosecutor's statement that appellant tailored his testimony.

Affirmed.