Case A-24-480

NEBRASKA SUPREME COURT/COURT OF APPEALS

State of Nebraska
Plaintiff/Appellee

v.

Travis Belina
Defendant/Appellant

Appeal from the District Court of Madison County
Hon. Mark A. Johnson

Appellant's Reply Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Propositions of Law

I. When evaluating whether a prosecutor committed misconduct during closing argument, the argument should be looked to in its entirety, rather than parsing out the statements and considering them one by one.

State v. Graham, 764 N.W.2d 340 , 356 (Minn. 2009);
People v. Bowers, 491 P.3d 400 (Colo. App. 2021).

II. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.

State v. Dubray, 289 Neb. 208, 222-23 (2014).

Argument

I. The district court erred by entering judgment conviction on Count VI, alleging Third Degree Sexual Assault of B.C., despite insufficient evidence B.C., who was the age of consent, was coerced to allow sexual contact.

Belina argues the State introduced insufficient evidence of coercion to support a conviction on Count VI. In response, the State does not meaningfully dispute Belina's arguments regarding the limits of the holding in *State v. McCurdy*, 301 Neb. 343 (2018), which limits reliance upon to "non-physical force" to prove coercion to cases within the context of a family or household relationship. As such, the State's argument asks this Court to expand the reach of *McCurdy* Section 28-320 beyond the limits previously established. Of course, it is not this Court's province to do so.

Because the State cannot claim the existence of a familiar relationship creating moral or economic coercion, the State relies, as it must, only on B.C.'s age and the fact Belina gave him a job at the feedlot. Under *McCurdy*, that is not enough because its holding is specifically

limited to cases involving a family or household relationship. *Id.* at 363 (emphasis added).

Even after examining authorities from other states cited by the State, mere employment, even when coupled with age, is insufficient in the absence of other circumstances supporting a finding of "non-physical force."

Two of the cases cited by the State, *State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011) and *Powe v. State*, 597 So.2d 721 (Ala. 1991) are obviously distinguished by the presence of a familiar relationship.

In *Meyers,* the defendant was the stepfather of the victim. He pursued and engaged in a sexual and romantic relationship with the victim while she was "in a very vulnerable psychological state" due to her crack cocaine addiction, her estrangement from her mother, and her need for support and shelter, as well as a history of sexual and physical abuse inflicted by Meyers in the past. *Id.*

Similarly, the defendant in *Powe* was the natural father of the victim, as Powe was married to the victim's mother and resided in the household with N.S. and her mother. He was 40 years old, the victim eleven. The assault occurred in her parents' bedroom while no one else was at home. The opinion specifically notes its holding "is limited to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust."

In *Commonwealth v. Rhodes*, 510 Pa. 537 (1986), a twenty year old man who knew the eight-year-old child victim and her family for three years lured the victim into an abandoned, filthy building and instructed her to lay down and pull her legs up, whereupon he forced his will upon her and engaged in acts of sexual and deviate sexual intercourse to the extent that she was bleeding and torn." 510 Pa. at 557. This is wholly different that the State's claim B.C. was coerced during the day, while in the presence of his friend, after apparently voluntarily climbing into the backseat of the truck. (633:6-634:12).

The State misapprehends or misconstrues the import of the holding in another case it cites, *State v. Stevens*, 311 Mont. 52 (2002). There, the

alleged assault happened in a professional massage context. The Montana Supreme Court distinguished between victims who were asleep, and therefore helpless, when the nonconsensual touch began, and two who were awake. *Id.*, at *50. The court held the evidence was *insufficient* to support a verdict with respect to two of the accusers who were awake, reasoning, "the State offered no evidence at Stevens' trial that Jody and Erin were incapable of consent due to 'force' or being 'physically helpless.'" *Id.* Accordingly, without such evidence, a rational trier of fact could not have found that the State proved the essential element 'without consent' beyond a reasonable doubt." In doing so, the court specifically rejected the State's argument that the "force element was met in this case because the women, who were too frozen, frightened and physically helpless" to resist, experienced more than just a 'trace of fear,'" as was held insufficient in a previous case from the same court. *Id.*, at *51.

Likewise, the State's reliance upon *State v. Mielak*, 33 Neb. App. 309, 325 (2025), is unpersuasive. That case involves a victim who passed out drunk on a bathroom floor, where she had gone to vomit and fall asleep, when she was digitally penetrated. 33 Neb. App. at 323. The opinion relies upon these "unique circumstances," along with Mielak's admissions during the investigation, to find the evidence sufficient. Further, the case does not address a claim, or a discussion, of psychological or moral force. Certainly, the opinion does not hold that mere inaction is sufficient to establish a lack of consent when, as in this case, the inaction comes from a person who is awake, upright, old enough to consent, otherwise healthy, able to hold a job, and not in a familial relationship with the accused or dependent upon the accused in any way.

The term "force" under Section 28-320 has never before in this State been construed to extend so far as the State asks the Court to do in this case. For these reasons, insufficient evidence supports Belina's convictions on Counts VI and X and the convictions should be vacated.

II. The district court erred by instructing the jury, on Counts II and VI that "coercion" for purposes of sexual assault includes "economic force" or "moral force" without defining the terms.

Belina argues the district court erred by instructing the jury regarding "economic force" and "moral force" in the absence of any authority allowing conviction based upon those concepts except in cases involving a familial or household relationship.

Against Belina's argument the district court improperly instructed the jury on the issue of coercion, the State argues that Belina's counsel in the district court failed to preserve the error by not objecting on the basis now raised, and by not including his proposed instruction in the record on appeal.

As to the latter point, Belina does not assign the failure to give his requested instruction, so whether it is included in the record is of no moment.

As to the former point, Belina does not apprehend how his objection made in the district court meaningfully differs from that raised on appeal. Both in the district court, and in this court, he asserts that the jury should not have been instructed using the terms "economic force" or "moral force." To reiterate, his argument to this court is that, for the reasons advanced in the foregoing argument, instructing the jury regarding "economic force" and "moral force" was improper, especially without defining them, as neither of the two theories were supported by the evidence.

Further, even if it could be said counsel below waived the objection by failing to raise it below, the objection may be reviewed for plain error. *See*, *State v. Watt*, 285 Neb. 647 (2013). Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*, at 667. Here, the instruction affects Belina's right to be convicted only upon a finding by the jury of the elements of the offense as prescribed by the Legislature. Those elements do

not allow conviction based upon non-physical force claimed to result from an employment relationship. *McCurdy, supra.*

For these reasons, Belina submits his conviction under Counts II and VI, if not vacated and dismissed, should be reversed based upon instructional error.

III. The district court erred by refusing to instruct the jury that for purposes of Third-Degree Sexual Assault, in a case where the alleged victims were over fourteen as charged in Counts II and VI, that a person over fourteen may consent to sexual contact.

As asserted in his opening brief, Belina assigns that the district court erred by refusing to instruct the jury the alleged victims were of sufficient age to consent to sexual contact.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997)(reversing for failure to provide self-defense instruction).

The tendered instruction was warranted by the evidence because there was scant, if any evidence, that any of the victims, each of whom was old enough to consent, expressed a lack of consent through words or conduct, or that they were compelled to submit due to force or the threat of force or coercion. *See, Arg. I, supra.* Further, the prosecutor elicited testimony of the alleged victims' age, and consistently referred to them as "boys", inviting an inference that their age precluded them from being able to lawfully consent.

Additionally, Belina was prejudiced because other charged offenses involved age thresholds of eighteen (Solicitation of a Minor) and nineteen (Child Abuse) years. Belina was charged with each of these offenses as to both C.K. and B.C. Consequently, the court's instructions left an impermissibly grave risk that jurors would find Belina guilty of sexual

assault believing the alleged victims could not consent because they were under eighteen. Neither the evidence, argument of the State, nor instruction by the Court would have disabused them of that potential misinterpretation of the law.

Belina respectfully submits his convictions on Counts II, VI and X, if not vacated and dismissed, should be reversed on this basis.

IV. The district court erred by entering judgment of conviction on Counts IV, VIII and IX, Solicitation of a Minor for Prostitution, in the absence of sufficient evidence.

Belina argues that the was insufficient on the charges of solicitation because the State did not prove the requisite *reus*, the act of soliciting sexual contact.

Against the argument, the State opens with two hypotheticals. Neither is useful in analyzing the issue raised by Belina. The first hypothetical is unhelpful because this case does not involve anyone claiming to be, appearing to be, or holding themselves out as a sex worker. Sex workers are not contacted for consensual, "free" sex. The second hypothetical is likewise unhelpful because, unlike the man in the hypothetical, there is no evidence Belina ever approached anyone and offered to pay for any sexual contact. That is precisely his point.

As to T.S., the State's reliance upon allegations concerning C.K. and B.C. is inappropriate absent evidence T.S. was aware of the alleged conduct. Just as circumstances that could otherwise create a motive for a witness to fabricate his testimony must be known to the witness for the circumstances to be relevant, anything occurring (though nothing did) between Belina and C.K. or B.C. is irrelevant to how T.S. would have interpreted it unless T.S. was aware of it. Here, because there is no evidence T.S. had knowledge of any alleged sexual conduct between Belina and either C.K. or B.C., or of any involving backrubs, the State's reliance is untenable.

As to B.C., the State argues, "it is uncontroversial that physical actions can constitute speech" and the trier of fact knew that Belina had paid B.C. for sexual contact in another circumstance. (Appellee's Brief, p. 24 *citing* 637:4–7, 670:4–5). Belina disputes the State's characterization of the record. At page 637, B.C. simply describes alleged sexual activity between he and Belina in a pasture in the evening. At page 670, B.C. testified that Belina gave him money for helping with the work – without saying it was for any sexual activity, or for doing it again sometime, or for being quiet. (670:7-20). Belina submits this testimony does not support the State's statement that, "The trier of fact knew that Belina had paid B.C. for sexual contact in another circumstance." Rather, the testimony provides no evidence, as argued by Belina, he ever committed the *reus* of offering money for sexual contact.

As to all three witnesses, Belina stands on arguments made in in his opening brief. Simply, there is no proof of the requisite *reus* of solicitation: the solicitation of sexual contact. *See, State v. Papillon*, 173 N.H. 13, 236 A.3d 839 (2020)(holding criminal solicitation encompasses both *actus reus* of "solicitation" and the *mens rea* of having the requisite intent of a criminal act); *State v. Thoman*, 2021 S.D. 10, 955 N.W.2d 759 (2021)(act of "asking" another person to engage in specific criminal conduct is the *actus reus* of solicitation); *State v. Martinez*, 2006-NMCA-148, 140 N.M. 792, 149 P.3d 108 (2006) (the *actus reus* of solicitation is the solicitation itself and the crime is complete once the asking, enticing, or encouraging is done). Belina simply did not *solicit* anything of value to entice the participation of the witnesses.

Likewise, the evidence is no witness ever claimed, to anyone, Belina solicited sex by offering money. (When C.K. arrived home after the first alleged encounter he told his parents he had received $100 for checking cows (288: 1)). Finally, as previously noted, the State's solicitation theory is incompatible with its third-degree assault theory that sexual activity alleged to have occurred with C.K., B.C., or T.S. was non-consensual. Whatever the scant evidence establishes Belina did prior to any sexual

contact, it is difficult to conceive that it was both coercive and a solicitation of consensual activity.

For these reasons, Belina respectfully submits the evidence is insufficient to support the judgments entered on Counts IV, VII and IX and those convictions should therefore be reversed.

V. The district court committed reversible error by overruling Belina's objections and allowing Deb Milligan, Dana Kubo, and Investigator Jon Downey to give testimony designed to validate the truth of C.K.'s and B.C.'s allegations.

Belina argues that the prosecutor introduced testimony from three witnesses, with expertise and experience in the area of sexual assault, providing an opinion which either directly *or indirectly* validated the allegations of C.K. and B.C. as true, in violation of *State v. Doan*, 1 Neb. App. 484, 492 (1993).

The State agrees with the legal premise of Belina's argument. Brief of Appellee, p. 27) ("What is not permitted is for an expert witness, as happened in Doan, to testify that they were able to validate a victim's allegations as true based on their statements and behaviors.").

Though its argument is limited to whether the testimony set forth by Belina served to validate the claims, the State offers little basis to conclude otherwise. Its main argument seems to be the witnesses did not explicitly use term "validate," but *Doan* makes clear that is not where the line is drawn.

As to witness Milligan, the crux of the State's argument is: "And a therapist testifying that her client was showing symptoms of sexual abuse and based on those symptoms still needed treatment is not the same as testifying that she had received validation such that she knew that her client had been sexually abused by the defendant." Belina disagrees. By her testimony Milligan essentially provided a diagnosis the person was sexually abused and that he therefore required continued treatment. It is difficult to conceive how such testimony would not be received by a juror to validate

C.K.'s claims. *See, e.g., State v. Roenfeldt,* 241 Neb. 30, 39 (1992) (testimony proper because expert was unfamiliar with and did not testify to an opinion on whether victim had indeed been sexually abused).

As to Kuno and Downey, Belina understands the State's argument to be that her testimony was admissible because she did not use the word "validate." As to both, the State does not meaningfully address Belina's argument that a juror would naturally receive the testimony to validate the witness's claims. Among other things, Kuno testified the assaults reported by had "taken place" and caused "emotional trauma." (597:1-24). After eliciting testimony supporting an inference Downey has expertise resulting from his years of experience, including "years of seeing people damaged irretrievably –," the prosecutor elicited testimony from the investigator that working with B.C. and C.K. was difficult because working with "adolescent males who have been sexually abused" is difficult. (769:9; 772:11-14). Though it is true the above recitation reformulates the word order to some degree, it seems undeniable that a juror could have received the testimony to mean Downey found the investigation difficult because he believed C.K. and B.C. had been "damaged irretrievably" by Belina, was "concerned for the mental health and welfare of" the two boys, and that is why he recommended counseling (771:25).

With respect to each of the witnesses, the State provides no alternative interpretation of the testimony.

This was error requiring reversal of all counts related to C.K. and B.C.

VI. Trial counsel committed ineffective assistance by failing to object and/or move to strike inadmissible expert testimony from Dana Kuno bolstering B.C.'s credibility.

Noting that defense counsel below did not object to the testimony of Dana Kuno set forth above, Belina argues ineffective assistance of counsel. In opposition, the State argues Belina has not identified the specific testimony that should have been objected to. However, the specific

testimony is set forth in the immediately preceding argument and counsel finds nothing in the rules requiring it to be repeated again in order to enable fair consideration of the issues raised.

Nonetheless, Belina will specifically identify the testimony to which objection should have been made here, as follows: After qualifying Kuno as an expert, the prosecutor established that B.C. was her client but that he "quit coming to therapy because he was not ready to deal with the emotional trauma of what had taken place." (597:1-24). The prosecutor also introduced testimony from B.C. that that his discontinuing treatment was "against therapist's advice" or "ATA." (657: 17). Similar to Milligan, [Kuno] testified she conducts a diagnostic interview, identify significant behaviors, suggested that B.C.'s "disclosure" of more alleged abuse as time progressed was consistent with the way adolescents report sexual trauma.

Beyond that, Belina stands by the argument made in his opening brief, noting that the State's offers only an argument Kuno's testimony was admissible. For the reasons set forth in the preceding argument, Belina submits the State's position should be rejected.

VII. The district court erred by allowing the prosecutor to argue during closing arguments that lawyers are bad people that do "bad stuff" and that defense counsel intentionally attempted to "confuse," "trick," "fool," and mislead the alleged victims and jurors.

In its effort to oppose Belina's assignment that the prosecutor committed prosecutorial misconduct during closing arguments, the State employs only a divide and conquer approach, separating each of the statements made by the prosecutor during closing argument and individually assessing them on the merits, as if the statements were made in a vacuum.

Belina submits this is not the proper analysis. Other courts seem to take the more logical approach that the closing argument "should be looked to in its entirety, rather than parsing out the statements and considering

them one by one." *E.g. State v. Graham*, 764 N.W.2d 340 , 356 (Minn. 2009). "When assessing alleged prosecutorial misconduct during a closing argument, [appellate courts] look to the closing argument as a whole, rather than to selected phrases and remarks"); *People v. Bowers*, 491 P.3d 400 (Colo. App. 2021)("We evaluate claims of improper argument in the context of the argument as a whole").

Of course, the foregoing authorities are consistent with the Nebraska standard for determining prejudice caused by misconduct during closing arguments. *State v. Dubray,* 289 Neb. 208, 222-23 (2014)("Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole").

Further, the State not only chooses against evaluating the arguments, but also against measuring the comments against the standard articulated in *State v. Dubray,* 289 Neb. 208, 222-23 (2014). That is perhaps understandable, because it would be hard to do.

Accordingly, Belina reasserts his argument advanced in his opening brief. He respectfully submits the district court erred by failing to remedy the prosecutor's misconduct. This requires reversal of the judgment on all counts not otherwise vacated based upon insufficient evidence.

VIII. The foregoing errors and misconduct are sufficiently prejudicial to require a new trial.

In section X of his opening brief, Belina provides further argument as to why all of his assigned errors were prejudicial and should not be considered harmless error. This is not a cumulative error argument that must be assigned. The section does not argue a separate error Belina is required to assign.

As such, it is notable that the State neither contests the factual assertions made, nor advances an argument that the evidence was so overwhelming that the errors complained of were harmless.

Conclusion

For the foregoing reasons, Counts I and II should be reversed and remanded for trial. All remaining counts should be remanded with directions to dismiss with prejudice.

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This Brief was prepared using Microsoft Word and is typeface compliant and consists of 3, words including cover page, table of contents, and table of authorities as well as signature blocks for a total of 14,088 words in Appellant's combined submission.

/s/Adam J. Sipple

Certificate of Service

I hereby certify that on Thursday, April 17, 2025 I provided a true and correct copy of this *Reply Brief* to the following:

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