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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0476**

In the Matter of the Welfare of: D. A. D., Child

**Filed September 5, 2017
Affirmed in part, reversed in part, and remanded
Larkin, Judge**

Hennepin County District Court
File No. 27-JV-15-7377

Cathryn Middlebrook, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant D.A.D.)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Klaphake, Judge.*

UNPUBLISHED OPINION

LARKIN, Judge

In this appeal from his extended jurisdiction juvenile convictions of aiding and abetting first- and second-degree criminal sexual conduct, appellant argues that the state

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

failed to prove his guilt beyond a reasonable doubt and that his conviction of aiding and abetting second-degree criminal sexual conduct must be vacated because it is a lesser included offense of aiding and abetting first-degree criminal sexual conduct. We affirm in part, reverse in part, and remand.

FACTS

Respondent State of Minnesota charged juvenile appellant D.A.D. by petition with several counts of aiding and abetting first-, second-, third-, and fourth-degree criminal sexual conduct. The state alleged that 16-year-old K.N. attended a party at a family member's home to watch a boxing match in May 2015. Appellant D.A.D. and A.K. were at the party. After the fight was over, K.N. went to sleep in a makeshift bed under the basement stairs, in the early morning hours of May 3. According to the petition, K.N. woke to discover D.A.D. and A.K. on either side of her, kissing her and touching her all over her body. K.N. said that D.A.D. penetrated her vagina with his fingers and his penis. During the penile penetration, K.N. began to cry out for her father, and D.A.D. stopped. D.A.D. and A.K. left the home, K.N. told family members she was raped, and K.N.'s mother called the police.

The state moved to certify D.A.D. for trial as an adult. The district court held a certification hearing, denied the state's motion, and designated the matter an extended jurisdiction juvenile (EJJ) prosecution. Before trial, the state dismissed the third- and fourth-degree charges. The remaining charges were tried to a jury over the course of six days. The jury heard testimony from K.N., K.N.'s sister, K.N.'s cousin, the mother of the party's hostess, a party guest, four police officers, two scientists from the Bureau of

Criminal Apprehension, a sexual-assault nurse examiner, a sexual-assault expert, A.K. (who had pleaded guilty to fourth-degree criminal sexual conduct based on his involvement in the incident), and D.A.D.

A.K. testified as follows:

Q: Did you see [K.N.] lay down under the stairs to go to sleep?

A: Yes.

Q: Did she ask you to come and lay down next to her?

A: No.

Q: Did you hear her ask [D.A.D.] to come lay down next to her?

A: No.

Q: After she laid down under the stairs, what did you do?

A: Laid down next to her.

....

Q: Did you see where [D.A.D.] was?

....

A: On the other side of her.

Q: When you laid down next to her, what did you do?

A: I kissed her neck.

Q: Did she kiss you back?

A: No.

Q: Did you touch her?

A: Yes.

Q: Did she touch you back?

A: No.

Q: Where did you touch her?

A: Her vagina.

Q: Was it over her clothes or under her clothes?

A: Over.

Q: What did you feel when you touched her vagina?

A: I felt fingers. I felt [D.A.D.'s] fingers down there.

Q: And what were his fingers doing?

A: Inside.

Q: They were inside [K.N.]?

A: Yes.

Q: Did you ever hear [K.N.] say, yes, that she wanted to do that?

A: No.

Q: Did you hear her say anything?
A: No.

K.N.'s testimony, in relevant part, was as follows:

Q: And you laid on your stomach to fall asleep. What happened next?

A: I woke up to them—[D.A.D. and A.K.] had both came in and [A.K.] was on my left side and [D.A.D.] was kind of on my right-slash-backside.

....

Q: What happened after you woke up to them on either side?

A: They were kissing me on my neck and my face and they were touching me all over my body.

....

Q: [Did you] kiss them back?

A: No.

Q: Did you touch them back?

A: No.

Q: What did you do?

A: I laid there.

Q: You said you laid there. What happened as you laid there?

A: They continued to touch me and feel me [A.K.] was rubbing on my vagina and then [D.A.D.] lifted my butt into the air, he put his fingers inside me, and then he inserted his penis into me.

When asked on redirect where D.A.D. and A.K. were touching her when she woke, K.N. responded “my butt and my vagina.” But when asked for more detail, she said, “I don’t remember.”

The sexual-assault nurse examiner testified that she examined K.N. approximately four hours after the incident. She testified that K.N.’s labia “was swollen to the point where [the labia minora] was actually protruding out” beyond the labia majora and that K.N.’s hymen “was swollen out.” The nurse also indicated that K.N.’s vagina was too swollen to

tolerate an examination with a speculum and that she was uncomfortable even attempting an internal cotton swab.

D.A.D. testified at trial and implied that the sexual activity was consensual. He testified that K.N. invited him to “come lay by” her, that she kissed him, and that she moved to position herself for intercourse.

The jury found D.A.D. guilty of aiding and abetting first- and second-degree criminal sexual conduct. The district court sentenced D.A.D. to 144 months in prison on the first-degree count and 90 months in prison on the second-degree count, to be served concurrently. The district court stayed execution of the prison terms and placed D.A.D. on EJJ probation until his 21st birthday. D.A.D. appeals.

D E C I S I O N

I.

D.A.D. contends that the evidence was insufficient to sustain the jury’s guilty verdicts. When considering a claim of insufficient evidence, this court carefully analyzes the record to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Because a jury is in the best position to evaluate the credibility of witnesses and weigh evidence, we give a jury verdict “due deference.” *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). We assume the jury was persuaded by the evidence supporting the conviction, especially “where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the

verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

“A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” Minn. Stat. § 609.05, subd. 1 (2014). D.A.D. was found guilty of aiding and abetting first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(ii) (2014), which provides that a “person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor causes personal injury to the complainant, and . . . the actor knows or has reason to know that the complainant is . . . physically helpless[.]” Sexual penetration includes “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body[.]” Minn. Stat. § 609.341, subd. 12 (2014). A sleeping person is physically helpless. *Id.*, subd. 9 (2014). D.A.D. was also found guilty of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(e)(ii) (2014), which provides that a “person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if . . . the actor causes personal injury to the complainant, and . . . the actor knows or has reason to know that the complainant is . . . physically helpless[.]”

D.A.D. does not contest that he engaged in sexual penetration and contact with K.N. or that K.N. suffered personal injury as a result. But he asserts that “no rational jury could

have found on the evidence the state presented that K.N. was physically helpless when [he] sexually touched and penetrated her.” He argues that the “record unequivocally establishes that K.N. was awake when [D.A.D.] sexually penetrated her,” that K.N. “gave material inconsistent statements about whether she was awake or asleep when the sexual touching began,” and that “no rational jury . . . would have resolved this material conflicting evidence against [D.A.D.].”

D.A.D.’s argument is unavailing when the following evidence is viewed in the light most favorable to the convictions. A.K. testified that after he saw K.N. lie down to go to sleep, he lay down next to her and that D.A.D. was on the other side of her. A.K. testified that he kissed K.N.’s neck and touched her vagina, and that K.N. did not kiss or touch him back. A.K. also testified that when he touched K.N.’s vagina, he “felt [D.A.D.’s] fingers down there” and that D.A.D.’s fingers were “[i]nside” of K.N. A.K. testified that he did not hear K.N. say anything during this touching. A.K.’s testimony provided a basis for the jury to conclude D.A.D. digitally penetrated K.N.’s vagina while K.N. was asleep.

K.N.’s testimony that she woke up to D.A.D. and A.K. “touching [her] all over [her] body” supports this view of the evidence. Although K.N. could not testify regarding what D.A.D. did to her while she was asleep, A.K.’s testimony sufficiently establishes that D.A.D. digitally penetrated K.N. before she woke up. The jury’s verdicts indicate that it resolved inconsistencies in K.N.’s testimony regarding whether she was awake or asleep when the sexual touching began in favor of the state. In addition, the verdicts indicate that the jury discredited D.A.D.’s testimony suggesting that K.N. was awake and consented to his sexual advances. We defer to the jury’s resolution of any inconsistencies in the trial

testimony. *See Pieschke*, 295 N.W.2d at 584 (stating that “weighing the credibility of witnesses is the exclusive function of the jury”).

In sum, A.K.’s testimony, as buttressed by K.N.’s testimony, was sufficient to allow the jury to reasonably conclude, beyond a reasonable doubt, that D.A.D. was guilty of aiding and abetting first- and second-degree criminal sexual conduct, because it proves that he digitally penetrated K.N.’s vagina while she was asleep. We therefore do not disturb the jury’s verdicts.

II.

D.A.D. argues, and the state agrees, that his EJJ conviction for aiding and abetting second-degree criminal sexual conduct must be vacated because it is a lesser included offense of aiding and abetting first-degree criminal sexual conduct. Minn. Stat. § 609.04, subd. 1 (2014), allows convictions for “either the crime charged or an included offense, but not both.” “A lesser degree of the same crime” or “[a] crime necessarily proved if the crime charged were proved” is an included offense. Minn. Stat. § 609.04, subd. 1. In determining whether an offense constitutes an included offense, we look to the statutory elements and apply de novo review. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012); *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986).

[T]he proper procedure to be followed by the [district] court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally

adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984).

D.A.D. was convicted and sentenced for both first- and second-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(ii), and Minn. Stat. § 609.343, subd. 1(e)(ii). First-degree criminal sexual conduct requires sexual penetration, whereas second-degree criminal sexual conduct requires sexual contact. Minn. Stat. §§ 609.342, subd. 1(e)(ii), .343, subd. 1(e)(ii). Because sexual penetration necessarily involves sexual contact, second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Thus, the judgment of conviction on D.A.D.'s second-degree EJJ conviction must be reversed under Minn. Stat. § 609.04, subd. 1.

Conclusion

Because the evidence was sufficient to sustain the jury's guilty verdicts, we affirm in part, leaving the judgment on D.A.D.'s EJJ conviction for aiding and abetting first-degree criminal sexual conduct undisturbed. But because D.A.D.'s second-degree criminal sexual conduct offense is a lesser included offense, we reverse the judgment on that offense and remand for the district court to vacate the attendant sentence, while leaving the underlying guilty verdict in place.

Affirmed in part, reversed in part, and remanded.