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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0577**

State of Minnesota,
Respondent,

vs.

Kevin Gachohi,
Appellant.

**Filed January 16, 2018
Affirmed
Peterson, Judge**

St. Louis County District Court
File No. 69DU-CR-16-3735

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

Mark S. Rubin, St. Louis County Attorney, Christopher J. Pinkert, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from his conviction of fifth-degree criminal sexual conduct (CSC), appellant Kevin Gachohi argues that the evidence is insufficient to prove that he had nonconsensual sexual contact with the victim. We affirm.

FACTS

On September 20, 2016, the state charged appellant with fifth-degree CSC in violation of Minn. Stat. § 609.3451, subd. 1(1) (2016), for alleged nonconsensual sexual contact. The charge stemmed from an incident that occurred in the afternoon of August 1, 2016, on a public lakefront walkway in Duluth (the lakewalk).

A.L. called 911 dispatch at 3:22 p.m. On the 911 recording, A.L. sounded shaken and emotionally upset. She told dispatch that while she was walking on the lakewalk, an unknown man approached her, grabbed her breasts and buttocks, and kissed her. She told the dispatcher that the man (1) asked her for a lighter on the lakewalk, (2) kept talking to her while she was walking, (3) called her “sweetie” and “babe,” and (4) told her that he wanted to take her away to Jamaica. A.L. described the man as “African American, about 6’2”. . . skinny, Jamaican accent, wearing a dark T-shirt, short hair” and wearing jeans and sunglasses. She said that after she arrived at a parking lot, the man left and walked back to the lakewalk.

Minutes later, Officer Kass of the Duluth Police Department responded and met A.L. in a parking lot near the lakewalk. At trial, Kass testified that A.L. was crying and visibly upset. A.L. was with her boyfriend and her child, who was in a stroller. According

to Kass, A.L. said that she was walking on the lakewalk with her child in a stroller while her boyfriend was finishing an errand nearby. On her way back to her car, an African-American male with a Jamaican accent approached her on the lakewalk and asked her for a cigarette lighter. The man was wearing a hat. When the man pulled out a cigarette, his hand brushed the left side of A.L.'s breast. A.L. first thought the touch was an accident, but after the man grabbed her from the side and behind and placed his hand on her breast, A.L. believed that the touching was purposeful. A.L. told the man to stop, and his hand slid down to touch her buttocks. A.L. told Kass that she was "about 50% sure" about the suspect's description, but she would be able to identify him. A.L. did not mention to Kass that the suspect kissed her.

Meanwhile, Officer Peterson searched the lakewalk for a person who matched the description that A.L. gave to the 911 dispatcher. Peterson's body camera was recording. Peterson testified at trial that he spoke with appellant, who matched the general description. Peterson noticed that appellant was wearing a black and white shirt, not a dark shirt, and that he had a hat on, a detail that was not in the description that A.L. gave to dispatch. Peterson stated that it was common for descriptions of suspects to be slightly off the mark.

While speaking with Peterson, appellant (1) denied coming from the parking-lot area where A.L. was located, (2) stated that he had had no contact with women in the area, and (3) said that he was just hanging out at the beach. Peterson then continued his search but did not find anyone else who matched the suspect's description. Peterson next met up with Kass and A.L. in the parking lot. A.L. viewed Peterson's body-camera footage and positively identified appellant as the man who had touched her.

Peterson returned to the lakewalk to speak with appellant again. This time, appellant told Peterson that A.L. was a friend and that he had met her previously at Mitch's Bar in Duluth. Appellant denied touching A.L. inappropriately, but he admitted that he approached A.L. and asked her how she was doing. He told Peterson that he asked A.L. if he could give her a hug and then gave her a hug before walking away.

At trial, A.L. testified that she was walking on the lakewalk with her child in a stroller while her boyfriend completed an errand. She said that appellant approached her to ask for a lighter. She had not met appellant before and had never been to Mitch's Bar. Appellant began asking her questions about her life, and she gave one-word "yes" or "no" answers. A.L. explained that, during the encounter, she was scared, tried to get away from appellant, and mentally shut down because she was anxious.

A.L. testified that when appellant pointed down the lakewalk, trying to show her directions, his hand brushed her breast. She first thought this touch was an accident but then said that after appellant grabbed her "multiple, multiple times" she realized it was not accidental. She testified that appellant gave her a "side hug" without permission and that he placed one hand on her left breast and another on her waist. When A.L. was almost to her car, appellant gave her another hug and kissed her on her neck. A.L. said that she tried to get away from appellant and she made it clear to appellant that she did not consent to his actions. As soon as they came into view of A.L.'s boyfriend, appellant turned around and walked away. When she arrived at her car, A.L. told her boyfriend what had happened and called 911.

On cross examination, the defense established that appellant is 5'7" tall, not 6'2", and that appellant is from Kenya, not Jamaica. A.L. explained that she said that appellant was 6'2" because her "boyfriend is 6'4", and so it seemed kind of an appropriate height, which [appellant] looked shorter than my boyfriend, but, obviously, was taller than me." A.L. also explained that appellant's accent sounded Jamaican to her and that she has resided in Minnesota her entire life and does not "know that many variations of accents."

Appellant testified at trial that he is from Kenya and has never been to Jamaica. He denied touching A.L. inappropriately. Appellant testified that he recognized A.L. from Mitch's Bar and approached her to say "Hi." He said that A.L.'s boyfriend then called A.L. on her cellphone. He asked A.L. for a hug, hugged her, and then left. Appellant admitted that A.L. did not recognize him when he approached her.

The jury found appellant guilty of fifth-degree CSC, and the district court sentenced him to 364 days in jail, stayed for two years on the condition that he comply with supervised probation. Appellant now appeals.

D E C I S I O N

Appellant argues that his conviction must be reversed because the evidence at trial was insufficient. When reviewing whether the evidence in a criminal case was sufficient, appellate courts are limited to "ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004) (quotation omitted). Appellate courts will not disturb a verdict "if the jury, acting with due regard for the presumption of innocence and for the necessity of

overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty.” *Id.* at 476-77 (quotation omitted). Appellate courts examine the evidence in the light most favorable to the verdict, and will assume that “the jury believed the state’s witnesses and disbelieved evidence contradicting those witnesses.” *State v. Pilot*, 595 N.W.2d 511, 519 (Minn. 1999).

The Due Process clause of the Fourteenth Amendment to the United States Constitution requires the state to prove every element of a charged offense beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 204, 97 S. Ct. 2319, 2324 (1977); *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). A person is guilty of fifth-degree CSC if that person engages in “nonconsensual sexual contact.” Minn. Stat. § 609.3451, subd. 1(1) (2016). “Consent” means “words or overt action by a person indicating a freely given present agreement to perform a particular sexual act with the actor.” Minn. Stat. § 609.341, subd. 4(a) (2016). The definition of “sexual contact” includes the touching of a complainant’s buttocks or breast, either under or over that person’s clothing, when committed without the complainant’s consent and with “sexual or aggressive intent.” Minn. Stat. § 609.341, subs. 1, 5, 11 (2016).

The evidence at trial was sufficient for a jury to reasonably conclude that the defendant was guilty of fifth-degree CSC. The evidence establishing “sexual contact” included (1) A.L.’s statement to the 911 dispatcher that appellant grabbed her buttocks and breasts, (2) Kass’s trial testimony that A.L. told her that appellant intentionally touched her buttocks and breasts, and (3) A.L.’s trial testimony that appellant touched her buttocks and breasts.

The evidence was also sufficient to prove that appellant acted with sexual intent. A.L. told the 911 dispatcher that appellant called her “sweetie” and “babe.” A.L. said that appellant’s touching was not accidental because it happened multiple times. A.L. told the 911 dispatcher and testified at trial that, in addition to grabbing her breasts and buttocks, appellant kissed her on the neck.

Finally, the evidence was sufficient to prove that the sexual contact was nonconsensual. A.L. told the 911 dispatcher that she did not know appellant, and she was upset during the 911 call. A.L. was also crying and visibly upset when she spoke with Kass, and she testified at trial that she did not give appellant permission to touch her.

Appellant argues that the state failed to prove that he sexually touched A.L. without consent when it presented only A.L.’s “uncorroborated conflicting statements.” But, as appellant recognizes, a conviction may rest on the uncorroborated testimony of a single credible witness. *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969). And corroboration of a victim’s testimony is not required to show the lack of consent in a CSC case. Minn. Stat. § 609.341, subd. 4(c) (2016). Also, inconsistencies and conflicts in testimony are a “sign of fallibility of human perception” and do not necessarily point to false testimony when the testimony is consistent as a whole. *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983) (quotation omitted).

Even if corroboration were required, however, we would conclude that A.L.’s testimony was corroborated. Corroborative evidence includes testimony from others regarding the victim’s “demeanor, emotional condition, and change[s] in behavior after [a] sexual assault.” *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *review denied*

(Minn. June 29, 2004). A victim's prompt complaint is corroborative evidence of a sexual assault. *State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984). A detailed description of the crime is also evidence of credibility, supporting a conviction. *State v. Danielski*, 374 N.W.2d 322, 326 (Minn. App. 1985), *review denied* (Minn. Dec. 13, 1985). A.L. immediately reported the assault when she returned to her vehicle in the parking lot. The 911 call reveals that A.L. sounded shaken. Kass testified that A.L. was crying and visibly upset in the parking lot after the assault. A.L. gave consistent, detailed descriptions of the offense. And appellant admitted he approached A.L. on the lakewalk.

Appellant relies on cases in which convictions were reversed when the state provided no evidence to corroborate a witness's testimony and there were "additional reasons to question the victim's credibility." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). For example, appellant cites *State v. Huss*, 506 N.W.2d 290, 292-93 (Minn. 1993), where the supreme court determined that a three-year-old complainant's uncorroborated testimony in a sexual-abuse case was insufficient to prove guilt because the child was exposed to "highly suggestive" material and her testimony was inconsistent. But, in *Huss*, the child's testimony was "particularly troublesome" to the supreme court because it was "contradictory as to whether any abuse occurred at all, and was inconsistent with [the child's] prior statements and other verifiable facts." *Id.* at 292.

Appellant argues that this case is like *Huss*, and he points to several inconsistent details in A.L.'s statements. Appellant contends that (1) A.L.'s statements about appellant hugging and kissing her before he grabbed her breasts and buttocks were inconsistent; (2) A.L. first said that appellant called her "sweetie" and "babe" before touching her, while,

at trial, she said that appellant touched her after she said that she did not have a lighter; and (3) A.L. stated for the first time at trial that a second hug occurred closer to her vehicle when appellant kissed her neck.

On review of the whole record, any inconsistencies in A.L.'s testimony are minor, and concern only details that are not material. While A.L. may have included or omitted certain details of her encounter with appellant at trial, or the details regarding the sequence of appellant's actions may have varied, A.L. consistently stated that appellant approached her, asked her for a lighter, and touched her breasts and buttocks without her consent. This case is different from *Huss* because A.L. consistently testified to specific facts that established the elements of the crime.

Appellant also relies on *State v. Langteau*, where the supreme court determined that the evidence was insufficient to convict a defendant of armed robbery when no evidence explained the puzzling behavior of the defendant and the complainant in relation to the crime. 268 N.W.2d 76, 77 (Minn. 1978). Appellant analogizes this case to *Langteau*, arguing that A.L.'s reaction to appellant's alleged behavior is inconsistent with being sexually assaulted because there were multiple people around on the lakewalk and A.L. never screamed or approached another person for help. Unlike *Langteau*, however, A.L. explained that she responded to the unwanted contact without calling out for help because she suffers from anxiety and was scared, and she was "shutting down." A reasonable jury could find this explanation credible and consistent with the shock of being sexually assaulted. Furthermore, this court assumes that the jury believed A.L. and disbelieved

evidence to the contrary. *Pilot*, 595 N.W.2d at 519. Assessing A.L.'s credibility is exclusively the province of a jury. *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009).

Appellant also points to the fact that A.L. initially described the suspect as 6'2" with a Jamaican accent, but appellant is 5'7" and from Kenya. Again, a reasonable jury could have credited A.L.'s explanation that she based her estimate of appellant's height on a comparison with her boyfriend's height and her testimony that she has resided in Minnesota her entire life and does not know many accents.

Affirmed.