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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0872**

State of Minnesota,
Respondent,

vs.

Boe Michael Tankersley,
Appellant

**Filed May 7, 2018
Affirmed
Smith, John, Judge***

Hennepin County District Court
File No. 27-CR-16-18973

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, John, Judge.

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

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant Boe Michael Tankersley's multiple convictions for criminal sexual conduct because (1) the evidence was sufficient to support the convictions and (2) prosecutorial misconduct, if any, was not prejudicial.

FACTS

In April 2016, M.H. told her youth leader that her stepfather, a chiropractor, had "touched [her] inappropriately." The youth leader told M.H.'s pastor, who asked M.H. if appellant had ever touched her "in a place where a swimsuit would cover." After M.H. answered yes, the pastor immediately called the police and M.H.'s mother.

In May, M.H. was interviewed at CornerHouse by Judy Weigman. M.H. described two specific incidents which led to the criminal charges: one involved her stepfather rubbing her breasts during a sports physical and the other involved her stepfather digitally penetrating her in her bedroom.

Appellant was eventually charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Before trial, appellant filed a motion in limine requesting that the state be precluded from eliciting evidence of his other bad acts. The state did not contest this motion, and it was granted.

At trial, the prosecutor repeatedly referenced appellant's prior conduct with M.H. beyond the two specific incidents that led to his criminal charges. This included the prosecutor questioning witnesses about appellant allegedly touching M.H.'s thigh and butt,

kissing her on the lips, walking in while she was showering, and exposing himself to her, as well as references to this conduct in opening and closing arguments.

The jury found appellant guilty of both counts of criminal sexual conduct. The district court sentenced appellant to a guidelines sentence of 160 months on count one, and a concurrent sentence of 70 months on count two.

This appeal follows.

D E C I S I O N

I. The evidence was sufficient to convict appellant of second-degree criminal sexual conduct.

Appellant argues that the evidence was insufficient to convict him of second-degree criminal sexual conduct because the state did not prove he acted with sexual intent. In considering a claim of insufficient evidence, review by this court is “limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We cannot retry the facts and must take the view of the evidence most favorable to the state. *See State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). Accordingly, we assume that the jury believed the state’s witnesses and disbelieved any contradictory evidence. *See State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court 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).

To convict appellant of second-degree criminal sexual conduct, the state had to prove beyond a reasonable doubt that he engaged in sexual contact with M.H. when she was younger than 13-years-old and that appellant is more than 36 months older than M.H. See Minn. Stat. § 609.343, subd. 1(a) (2012).¹ “Sexual contact” is defined as “the intentional touching by the actor of the complainant’s intimate parts” that is “committed with sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(a)(i) (2012). “Intimate parts” are defined to include the “breast of a human being.” *Id.* at subd. 5 (2012). Appellant argues that the state did not prove that he touched M.H.’s breast with the requisite sexual or aggressive intent when he performed the sports physical.

“[B]ecause intent is a state of mind, it is generally proved by inferences drawn from a person’s words or actions in light of all the surrounding circumstances.” *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996). We apply a two-step analysis in determining whether circumstantial evidence is sufficient to support a guilty verdict. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). First, we identify the circumstances proved, deferring to the verdict of the fact-finder and, second, independently determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

Here, the record supports the following circumstances: (1) when M.H.’s mother was not present in the home, appellant performed a physical examination of his

¹ The sports physical took place in September 2014. The digital penetration took place at some time in 2013 or 2014. Because the statute was unchanged during this time period, the 2012 version is used herein.

stepdaughter as she lay on the couch in the family's living room, (2) appellant had M.H. put on a medical gown with only her underwear on and asked her to remove her bra, which she did upon his request, (3) during the exam appellant reached under M.H.'s gown and touched her chest for "a really long time," moving her breasts with his hands in way that made M.H. uncomfortable and scared, and (4) when M.H.'s mother returned home, appellant abruptly stopped this part of the exam.

These circumstances lead only to the reasonable inference that appellant acted with sexual or aggressive intent when he touched M.H.'s breasts for an extended period of time during the physical. Based on M.H.'s testimony, appellant's explanation for his actions is simply implausible. M.H. testified that appellant touched her breasts with his bare hands and appellant himself explained that the physical exam did not require him to touch M.H.'s breasts with his hands. By appellant's own explanation of what the exam entailed, there was no medical reason for him to be touching M.H.'s breasts with his bare hands.

Appellant also asserts that corroboration was necessary because M.H.'s testimony was unreliable and inconsistent with her statements to the CornerHouse interviewer. In her interview, M.H. reported that appellant was *not* breathing heavily while touching her during the physical examination, but M.H. testified at trial that appellant *was* breathing heavily when he touched her. Based on this discrepancy, appellant argues, "Where sexual intent can only be inferred from outside circumstances, the question of whether [he] was breathing heavily while performing M.H.'s physical is of key importance." Appellant also argues that M.H.'s testimony was unreliable because she had a motive to lie about the incident due to appellant's extramarital affair "breaking apart her family."

Appellant's argument is unconvincing. "[A] conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted); *see also* Minn. Stat. § 609.347, subd. 1 (2016) (providing that "the testimony of a victim need not be corroborated" in a criminal-sexual-conduct prosecution). The determination of whether a witness was reliable is a matter for the jury, not the reviewing court. *See State v. White*, 357 N.W.2d 388, 390 (Minn. App. 1984). The jury in appellant's case was entitled to credit the testimony of M.H. and reasonably inferred that appellant acted with sexual intent based on M.H.'s version of events. *See Foreman*, 680 N.W.2d at 539 (where the jury is "apprised of the previous inconsistent statements . . . the task of weighing credibility was for the jury, not this court"). Therefore we conclude that the evidence was sufficient to support appellant's second-degree-criminal-sexual-conduct conviction, including the element of sexual intent.

II. Any misconduct by the prosecutor did not prejudice appellant.

Appellant argues that the prosecutor committed misconduct by (1) repeatedly referencing evidence of his other bad acts and (2) asking "were they lying" questions about the state's other witnesses. Appellant asserts that these errors deprived him of a fair trial and substantially affected the jury verdict.

Because appellant did not object to any of the prosecutor's alleged misconduct, we apply a modified plain-error test. *State v. Mosley*, 853 N.W.2d 789, 801 (Minn. 2014). To prevail, an appellant must establish that there was an error and that the error was plain. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If such an error is established, the

burden then shifts to the state to show that the plain error did not affect appellant's substantial rights. *Id.*

Given the strength of the state's evidence as a whole, we conclude that the error, if any, did not affect appellant's substantial rights. *See, e.g., Mosley*, 853 N.W.2d at 801 (determining that no relief was warranted where defendant's substantial rights were not affected, even upon an assumption of plain error); *State v. Dobbins*, 725 N.W.2d 492, 513 (Minn. 2006) ("In light of this strong evidence against [appellant], the state has shown that there is no reasonable likelihood that the absence of the misconduct at issue would have a significant effect on the jury's verdict."). The state's evidence of prior bad acts and line of "were they lying" questioning was only a small piece of an overall strong case against appellant. M.H.'s discussion of appellant's prior bad acts was a limited portion of her direct testimony and M.H.'s mother only testified as to the exposure incident. Appellant had the opportunity to rebut all of the alleged prior bad acts, providing innocent explanations at length on direct examination for his various conduct and why M.H. likely misinterpreted it. Similarly, the prosecutor asked "were they lying" questions only briefly on appellant's cross-examination and, as defense counsel requested, appellant's answers were not referenced in closing arguments. *Cf. State v. Morton*, 701 N.W.2d 225, 235-36 (Minn. 2005) (holding that defendant's substantial rights were not violated even where the state improperly referred to his answers to "were they lying" questions in closing argument, thereby emphasizing the misimpression already made to the jury). Finally, at trial M.H. described appellant digitally penetrating her in her bedroom and rubbing her bare breasts during the sports physical. These two incidents were the basis for appellant's two criminal-

sexual-conduct convictions, and M.H.'s testimony regarding both incidents was nearly identical to the CornerHouse interview that was played for the jury.

As discussed above, the jury was entitled to credit M.H.'s version of events, and M.H.'s direct testimony regarding the sexual contact and penetration was sufficient to convict appellant; no physical proof, additional eyewitness, or other corroborating evidence was necessary. See Minn. Stat. § 609.347, subd. 1. Because appellant's substantial rights were not affected, we need not consider whether to address the matter to ensure the fairness and integrity of the judicial proceedings. See *Morton*, 701 N.W.2d at 234 ("Only if the three prongs of [the plain-error] test are satisfied will we assess whether we should address the error to ensure fairness and the integrity of the judicial proceedings."). In sum, we conclude that appellant failed to satisfy the three-pronged plain-error test and the district court did not commit reversible error.

III. Appellant's pro se claims lack merit.

Appellant raises four additional pro se arguments. We address each in turn.

Inflaming passions

Appellant argues that the prosecutor's references to his extramarital affair "smear[ed]" his name and "inappropriately incite[d] a moral prejudice against him within the jury." As a general rule, the state "must avoid inflaming the jury's passions and prejudices against the defendant." *State v. Porter*, 526 N.W.2d 359, 363 (Minn. 1995). "While the state's argument need not be colorless, it must be based on the evidence produced at trial, or the reasonable inferences from that evidence." *Id.* (quotation omitted).

Appellant's defense attorney discussed the affair multiple times on direct examination and the affair appears to have been part of a larger theme of his defense. Since the affair was a significant part of appellant's defense as an explanation for his uncomfortable interactions with M.H, we conclude it is unlikely that there was any prejudice to appellant in the state referencing the affair as well.

Striking jurors for cause

Appellant argues that the district court should have removed more jurors for cause. Appellant provides no specific citations to the record and has not provided us with a transcript of the voir dire proceedings. Because there is an insufficient record before us to review this claim, it has not been sufficiently raised. *See State v. Little*, 851 N.W.2d 878, 885 (Minn. 2014) ("It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.") (quotation omitted).

Ineffective assistance of counsel

Appellant argues that he received ineffective assistance of counsel because his attorney did not procure a better plea deal and did not present enough evidence about how, among other things, appellant's affair may have motivated M.H. and her mother to seek revenge against him.

"To prove ineffective assistance of counsel, a defendant must show that (1) his attorney's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel's errors." *State v. Mosley*, 895 N.W.2d 585 (Minn. 2017) (quotations omitted). "An

attorney's representation meets the objective standard of reasonableness if the attorney exercises the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances. Strategic choices made by an attorney after a thorough investigation of the facts and law are virtually unchallengeable." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016) (quotation omitted).

The arguments that appellant complains his attorney did not make at trial appear to be strategic choices, which this court will not second-guess on appeal. *See State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012). As to appellant's grievance that he did not receive a more favorable plea offer, it is well settled that the prosecution's participation in plea negotiations is discretionary; the prosecutor "has no duty to initiate plea bargaining" or "make a bargain." *State v. Andrews*, 282 Minn. 386, 391 n. 4, 165 N.W.2d 528, 532 & n. 4 (1969). Appellant chose not to accept the straight guilty plea he was offered, and there is no evidence that this choice was based on misinformation or lack of information by his defense counsel. Thus, appellant's ineffective-assistance-of-counsel arguments do not entitle him to relief.

Downward departure

Appellant argues that "a multitude of factors" indicated that he should have received a downward departure. Appellant argues that his low criminal-history score, high education level, self-owned business, child-support obligations, and strong family support made him particularly amenable to probation.

This court will reverse sentencing decisions only for an abuse of discretion, and district courts are afforded great discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn.

2014). Only in a rare case will this court reverse a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

“[A]s long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination,” this court will not interfere with the district court's decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011). In this case, in finding that there were no substantial or compelling reasons for a downward dispositional departure, the district court stated:

Mr. Tankersley, I have carefully considered the whole record including the letters and the comments of your family and friend. . . . You argue that you should get probation for the sake of your family, that your children need you, and I agree there . . . are indications that you are a devoted father. However, you were not a devoted father to [M.H.]. You used your position of trust and authority to violate her. You should have thought of your other children when you did that. Instead of owning up to your deeds, you took this to trial and you revictimized [M.H.] by causing her to testify to the sexual abuse she suffered in a courtroom full of strangers. It's apparent from my reading of the PSI that you have not fully owned up to the extent of what you did to [M.H.]

We conclude that this is not a “rare case which would warrant reversal of the refusal to depart.” *See Kindem*, 313 N.W.2d at 7.

Affirmed.