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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1009**

State of Minnesota,
Respondent,

vs.

Andrew Demon Fain,
Appellant.

**Filed June 18, 2018
Affirmed
Bratvold, Judge**

Hennepin County District Court
File No. 27-CR-16-27975

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant Andrew Demon Fain challenges his conviction of fourth-degree criminal sexual conduct, arguing that there is insufficient evidence to prove his guilt because the

victim's testimony contains inconsistencies and the record has no corroborating evidence. Because any inconsistencies in a victim's statements are credibility issues for the jury and because corroborating evidence is not required, we affirm.

FACTS

The evidence at trial established the following: In October 2016, Fain was living with his girlfriend of nine years, Y.E., and her four children, including 16-year old K.D.N. On October 24, 2016, K.D.N. was at home with Fain, her three-year-old sister, and her uncle. Her mother, older sister, and brother were out of the home. K.D.N. stayed home from school and awoke at approximately 11:00 a.m. After taking a shower, she returned to her bedroom wearing only a towel. Fain opened her bedroom door and asked to borrow money. He noticed that she was not fully dressed, closed the door, and walked away. K.D.N. donned shorts and a shirt then walked into the living room and handed Fain \$20.

Shortly thereafter, Fain called K.D.N. into his bedroom, which he shared with Y.E. She complied. K.D.N. testified that Fain "pulled out . . . a silver/broken glass pipe. . . . He put some white stuff in it." Fain tried to make her smoke it by putting the pipe in her mouth. He asked for money "to get some more," but K.D.N. declined.

K.D.N. left his bedroom and went to a nearby bathroom where she texted her mother, Y.E. K.D.N. explained that she had loaned money to Fain and asked what time Y.E. would be home from work. K.D.N. texted, "I need to talk to u . . . When u get home." In response, Y.E. asked whether Fain had done "something." K.D.N. replied, "I'll tell u when u get home . . . When u get home. . . . I wanna talk to u alone . . . He didn't do anything."

Sometime after K.D.N. left the bathroom, Fain asked her to return to his bedroom. She did. Again, Fain tried to get her to smoke the pipe and “he just tried to blow smoke” into her mouth. But this time, Fain was so close to K.D.N. that his mouth was “basically” on hers. K.D.N. also testified, “[H]e reached his hands in my pants. . . . He was like trying to move his fingers around inside” her vagina and “inside” her underwear. K.D.N. was shocked “[b]ecause he never did this before.” She backed away. Fain told her, “don’t tell your mom, don’t tell anybody.” K.D.N. left his bedroom.

Later, Fain called to K.D.N. from the basement and asked her to come downstairs. When she did, “He did the same thing.” K.D.N. testified, “He tried to make me smoke the pipe and he put his hand in my pants again.” She was not wearing underwear. Again, Fain told her not to tell anyone. K.D.N. told Fain that she needed to change for work and went upstairs.

A short time later, Fain called K.D.N. into his bedroom. She complied, in part, because she did not see a choice; she did not want to leave her three-year-old sister with Fain. K.D.N. testified, “it happened again [t]he crack pipe and him touching me.” K.D.N. did not recall whether she was wearing underwear during this encounter.

After her brother arrived home, K.D.N. went to work early and called her older sister and Y.E. around 2:00 p.m. K.D.N. testified that she told her sister, Fain “touched me and tried to smoke crack with me.” Her sister testified that K.D.N. was crying and said that Fain “had put his hands in her pants” and that he asked her to smoke crack or marijuana. Her sister told K.D.N. to call their mom right away. K.D.N. immediately called Y.E. and

described what had happened. Y.E. picked up K.D.N. from her workplace and drove her to the police station.

Officer Daniels testified that, at the police station, he took statements from K.D.N. and Y.E. He also photographed their text messages from earlier that day. K.D.N. told Daniels that Fain touched her twice and “put his hands into her shorts and touch[ed] her vaginal area, attempting to place his fingers inside of her.” K.D.N. also told Daniels “that she kept moving so that Defendant could not insert his fingers into her vagina.” K.D.N. said that, during the second incident, Fain “again placed his fingers inside her pants and was able to insert his fingers into her vagina.” That afternoon, Daniels arrested Fain.

In a subsequent interview by Detective Orgon and a child-protection worker, K.D.N. said that Fain approached her, put his hands “up inside” her shorts and touched her vagina three times. Orgon testified that K.D.N. told him that “at least a finger went inside of her vagina.”

The state charged Fain with one count of third-degree criminal sexual conduct (penetration) with a person between 16 and 18 years of age, in violation of Minn. Stat. § 609.344, subd. 1(f) (2016), and one count of fourth-degree criminal sexual conduct (sexual contact) with a person between 16 and 18 years of age, in violation of Minn. Stat. § 609.345, subd. 1(f) (2016).

Trial lasted three days in January 2017. The state called five witnesses: K.D.N., her older sister, Y.E., Orgon, and Daniels. Fain did not testify. In addition to the facts summarized above, K.D.N. testified that she had smoked marijuana with Fain on a prior occasion and loaned him money but did not tell Y.E. about either instance. Y.E. also

testified that, for the three months prior to the incident, she had been trying to get Fain away from the house without involving law enforcement.

The jury found Fain not guilty of third-degree criminal sexual conduct (penetration) and guilty of fourth-degree criminal sexual conduct (sexual contact). The district court imposed a sentence of 69 months, with credit for 162 days, and a ten-year conditional release term. This appeal followed.

D E C I S I O N

Fain argues that the evidence is insufficient to support the conviction for three reasons: (1) K.D.N. testified inconsistently with her statements about the number of times Fain touched her and whether she was wearing underwear during each encounter, (2) K.D.N. admitted that she was not always truthful, and (3) K.D.N.'s testimony was biased and she had a motive to fabricate the allegations.

In reviewing a claim of insufficient evidence, “our review on appeal 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, 230 (Minn. 1989). We do not retry the facts, *see State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978), because the fact-finder assesses the credibility of witnesses and weighs their testimony, *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). We will not disturb the 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 of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation and alteration omitted).

To support a conviction for fourth-degree criminal sexual contact, the state was required to prove that Fain and K.D.N. had a significant relationship, that K.D.N. was at least 16 but not 18 years of age at the time of the contact, and that Fain had sexual contact with K.D.N. by touching her intimate parts with sexual or aggressive intent. Minn. Stat. §§ 609.345, subd. 1(f), 609.341, subd. 11(b) (2016).

Fain contends that the evidence was insufficient to prove that he had sexual contact with K.D.N. Fain argues that his conviction must be reversed because the only evidence was K.D.N.’s testimony, which was of “dubious veracity” and not credible. He gives three reasons why this court should find K.D.N. not credible and therefore, require corroborating evidence. We will discuss each reason separately.

First, Fain contends that K.D.N.’s trial testimony was inconsistent with her prior statements. Specifically, Fain argues that K.D.N. had two different versions of her story; in one version, K.D.N. told Daniels about two instances of sexual contact; in the second version, K.D.N. told Orgon and her mother about three instances of sexual contact. Fain also argues that K.D.N.’s lack of specificity when describing Fain’s conduct shows her testimony was fabricated.

“[I]nconsistencies and related credibility determinations [are] for the jury to assess.” *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004). We defer to the credibility determinations made by the jury and assume that it “believed the state’s witnesses and disbelieved any evidence to the contrary.” *State*

v. Moore, 438 N.W.2d 101, 108 (Minn. 1989). Inconsistencies and conflicts “are a sign of the fallibility of human perception—not proof that false testimony was given at trial.” *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983) (quoting *State v. Hanson*, 286 Minn. 317, 355, 176 N.W.2d 607, 609 (1970)). “This is especially true when testimony goes to the particulars of a traumatic and extremely stressful incident.” *Id.* Evidence may be found credible by the jury if the “victim’s testimony, when taken as a whole, was consistent.” *Id.*

For example, in *State v. Mosby*, this court affirmed Mosby’s conviction of both first- and second-degree criminal sexual conduct. 450 N.W.2d 629, 631 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). On appeal, Mosby argued, in part, that the evidence was insufficient to convict him because the victim’s testimony was inconsistent and unreliable. *Id.* at 634. On direct examination, the victim testified that Mosby “took his hand and stuck it in [her] private,” which she said was the part she uses to “go to the bathroom.” *Id.* at 632. The victim first testified that Mosby used his hand to molest her and later testified that he stuck his finger inside her vagina “just a little.” *Id.* This court determined that the discrepancies “concern[ed] insignificant details,” and “[o]n the whole, [the victim’s] testimony was consistent.” *Id.* at 634.

Here, as in *Mosby*, the record evidence supports the jury’s verdict despite minor discrepancies. The record contains conflicting evidence about whether Fain touched K.D.N. two or three times, whether K.D.N. wore underwear during any or all encounters, and whether Fain asked K.D.N. to smoke crack or marijuana. But these discrepancies concern insignificant details of the case. *See Mosby*, 450 N.W.2d at 634; *see also Johnson*, 679 N.W.2d at 387. K.D.N. testified about a traumatic event, specifically that Fain put his

hands inside her shorts and tried to “move his fingers around . . . inside” her vagina. Although the encounters were brief, K.D.N. provided detailed testimony at trial about each incident of sexual contact. K.D.N. described her location in the house and what happened and where she was each time he touched her. When taken as a whole, K.D.N.’s testimony was largely consistent on the central issue—Fain committed sexual contact against K.D.N. by touching her intimate parts. *See Stufflebean*, 329 N.W.2d at 319. The inconsistencies between K.D.N.’s testimony and her prior statements was submitted to the jury, whose verdict shows that the jurors found her credible. We defer to the jury’s determination. *See Moore*, 438 N.W.2d at 108.

Second, Fain argues that K.D.N. was not credible because she testified at trial that she had not told her mother that she smoked marijuana with Fain and had loaned him money in the past. Fain suggests that K.D.N. could not be believed because “she was at times willing and capable of hiding her conduct.” The jury heard K.D.N. testify about what she concealed from her mother, and the jury’s verdict indicates that it found her credible. We defer to the jury’s determination. *See id.*

Third, Fain argues that K.D.N.’s testimony was not credible because she was biased and had a motive to testify against Fain to have him removed from Y.E.’s house. The jury heard Y.E.’s testimony that she wanted Fain away from her house. Evidence of bias and motive are relevant considerations for a jury to assess witness credibility. *See State v. Larson*, 787 N.W.2d 592, 598 (Minn. 2010). K.D.N. testified that she was aware of the tenuous relationship between Fain and Y.E., and was upset with Fain for not repaying the money he borrowed. She also testified that she did not fabricate events, even though she

was upset with Fain. “We will not disturb the jury’s weighing of credibility.” *Mosby*, 450 N.W.2d at 634.

Finally, Fain argues that if corroborating evidence was required, none exists in this record because there were no eye witnesses apart from K.D.N. Fain suggests that the state failed to obtain corroborating evidence because Daniels did not arrange for a physical examination of K.D.N., nor did he secure a blood or urine sample, and because Orgon did not recommend a Sexual Assault Resource Center Exam (SARS exam) at the hospital or refer K.D.N. to a facility that conducts forensic interviews of children.

A victim’s testimony need not be corroborated to sustain a conviction. Minn. Stat. § 609.347, subd. 1 (2016). “[A] conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (stating that “corroboration is not mandated by statute or the constitution”). “Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction.” *State v. Meyers*, 359 N.W.2d 604, 608 (Minn. 1984). Corroboration can include the victim’s “prompt and consistent accounts of the assault, her post-rape appearance and emotional state, and her detailed descriptions of [the perpetrator] and his vehicle.” *State v. Daby*, 359 N.W.2d 730, 733 (Minn. App. 1984) (citations omitted).

Here, the evidence is sufficient to establish sexual contact and support Fain’s conviction. Even if K.D.N.’s testimony was insufficient on its own, the record includes corroborating evidence that reveals “the consistent and positive nature of [her] statements.” *See Meyers*, 359 N.W.2d at 608. K.D.N. promptly reported Fain’s conduct to her older

sister and Y.E. after leaving the house and arriving at work; both K.D.N.'s older sister and Y.E. testified about what K.D.N. told them. Y.E. and K.D.N. gave sworn statements to the police that were consistent on the significant details. Daniels testified that K.D.N. told him that Fain had put his hand into her shorts and touched her vagina. Orgon testified that K.D.N. told her that Fain approached her, put his hands "up inside" her shorts, and touched her vagina. Orgon also testified that K.D.N. appeared to be emotionally upset by Fain's conduct. K.D.N.'s older sister testified that K.D.N. was crying when she called. Daniels testified that K.D.N. "seemed very upset about the incident" and "just seemed sad . . . like she wanted to cry."

The jury could reasonably conclude that Fain committed sexual contact based on K.D.N.'s testimony. Nonetheless, the jury had corroborating evidence because K.D.N. promptly reported the conduct to her family and the police, K.D.N.'s statements immediately following the events were largely consistent with her trial testimony, and witnesses testified that K.D.N. was emotionally upset when she reported Fain's assault.

Affirmed.