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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1475**

State of Minnesota,
Respondent,

vs.

Barry Richard Closmore,
Appellant.

**Filed August 13, 2018
Affirmed
Smith, John, Judge***

Washington County District Court
File No. 82-CR-16-723

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Rodenberg, 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UNPUBLISHED OPINION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 Barry Richard Closmore's conviction for third-degree criminal sexual conduct because sufficient evidence supports the conviction.

FACTS

The state charged appellant with one count of third-degree criminal sexual conduct after A.C. reported that appellant, the boyfriend of A.C.'s mother, physically held A.C. down and penetrated her vagina during the early morning hours on February 21, 2016.

At trial, A.C. testified that she would sometimes spend the night with her mother, D.C., who "basically lived" with appellant. A.C. testified that she had a good relationship with appellant, but that his behavior changed during the evening of February 20, 2016. She testified appellant acted "different" and "weird" that night while she was consuming alcohol in appellant's garage with appellant, D.C., and K.W. She testified appellant made a comment about blowing marijuana smoke into her mouth, but "backed away" when D.C. entered the garage. She testified that appellant and D.C. eventually went into the house, and K.W. and A.C. stayed in the garage.

A.C. testified that appellant came back to the garage 15 minutes later and wanted to get in a hot tub at a neighbor's house. Appellant, K.W., and A.C. got in the hot tub. A.C. wore a bra and underwear. A.C. felt appellant touch her legs and buttocks under the water, which made her uncomfortable and worried. After K.W. left the hot tub, A.C. decided to leave; she carried her clothes to appellant's house and appellant followed.

A.C. testified that, when she got into the house, she believed appellant went downstairs and she went upstairs to take a bath. She removed her clothes and started to fill the bathtub with water. She went into the attached bedroom, where A.C. normally stayed when the room was not occupied by appellant's mother, to grab an item for the bath. She testified that appellant entered the room, grabbed her by the back of the neck, pushed her down, and inserted his penis into her vagina forcefully. A.C. testified that appellant would not let her move, and pushed her back down when she tried to get up. She testified that she repeatedly told appellant, "No." She testified that appellant placed his hands on her neck and upper back, and he "pushed [her], face into the bed." She did not scream because she did not want to wake the children sleeping in a nearby room.

A.C. testified that when appellant finished, she listened for his door to close and then grabbed a blanket and ran to K.W.'s house. K.W. and his mother answered the door. A.C. told them about the assault. She told police and a nurse that the assault occurred in the garage after she left the hot tub. She also told the officer that appellant removed her clothes. She testified that, a few days after the assault, she remembered more details and realized the assault occurred in the bedroom and not the garage, but she did not contact police to inform them of her altered memory.

K.W. testified that A.C. looked very bad when he and his mother answered the door, and that she appeared frightened and was crying. K.W. testified that A.C. told him that appellant sexually assaulted her. K.W.'s mother testified that A.C. told her that she "didn't want to do it," and that she was in pain. K.W. contacted police.

A police officer testified that A.C. reported that appellant pushed her, bent her over a table in the garage, removed her clothes, held her down, penetrated her vagina, and continued to hold her down when she tried to get up. The officer testified that A.C. said she was frightened. A police sergeant located A.C.'s wet undergarments, a towel, and pants in the upstairs bathroom.

A.C. was taken to the hospital for a sexual assault examination. The nurse who performed the examination testified that A.C. told her a similar story as that reported to the police. The nurse collected swabs of A.C.'s vaginal area. DNA testing of those swabs confirmed that semen found on A.C. belonged to appellant.

Appellant did not testify, but his interview with police was played to the jury. Appellant indicated that he did not have a sexual relationship with A.C. and he did not recall sexually penetrating her on February 21. During closing arguments, appellant's attorney argued that A.C. and appellant had consensual sex on February 21, and that A.C. lied about it because she did not want to admit that she had consensual sex with D.C.'s boyfriend.

The jury returned a guilty verdict after asking the district court several questions and rewatching appellant's interview. Appellant admitted aggravating sentencing factors and agreed to a departure sentence of 96 months if the state dismissed a second charge. The district court sentenced appellant in accordance with the agreement after finding that aggravating factors supported a departure.

DECISION

In considering a claim of insufficient evidence, our review is limited to an analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the case depends primarily on conflicting testimony. *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 that the defendant was guilty of the crime. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

In order to prove third-degree criminal sexual conduct, the state needed to show that: (1) appellant intentionally sexually penetrated A.C.; (2) A.C. did not consent; and (3) appellant used force or coercion to accomplish the penetration. Minn. Stat. § 609.344, subd. 1(c) (2014); 10 *Minnesota Practice*, CRIMJIG 12.21 (2015). Sexual penetration has been defined as sexual intercourse or “any intrusion however slight into the genital . . . openings . . . of the complainant’s body by any part of the actor’s body.” Minn. Stat. § 609.341, subd. 12(1), (2) (2014). Coercion is defined in part as “use by the actor of confinement, or superior size or strength, against the complainant that causes the complainant to submit to sexual penetration or contact against the complainant’s will.” *Id.*, subd. 14 (2014).

Under Minnesota law, “the testimony of a victim need not be corroborated” in a trial for third-degree criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2016). Nevertheless, appellant argues that A.C.’s testimony was not sufficient to sustain the conviction in light of discrepancies between A.C.’s report of the assault and her trial testimony, her failure to contact police when her memory changed, and her lack of injuries.

Appellant cites to *State v. Ani*, 257 N.W.2d 699 (Minn. 1977), for the principle that corroboration of testimony may be required in some instances to uphold a criminal conviction. In *Ani*, the Minnesota Supreme Court indicated that “corroboration is not a requirement” in sex-crime cases, but “the absence of corroboration in an individual case may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt.” 257 N.W.2d at 700 (quotation omitted). The supreme court upheld the conviction in *Ani* because “the victim’s testimony was positive and not contradicted, and was strongly corroborated by other evidence.” *Id.* Appellant argues that this case is unlike *Ani* because “there were significant reasons for the jury to doubt A.C.’s credibility” and therefore corroboration was required.

The supreme court has reversed convictions where there were strong reasons to question the credibility of an alleged victim and testimony was not corroborated. See *State v. Huss*, 506 N.W.2d 290 (Minn. 1993); *State v. Langteau*, 268 N.W.2d 76 (Minn. 1978). In *Huss*, a child provided direct testimony that she had been abused by her father, but the testimony was “contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts.” 506 N.W.2d at 292 (indicating the child accused both parents of “bad touches,” described hugs and touches to hair as “bad

touches,” inaccurately described her father, and testified that she had showered at her father’s house that day despite not having seen him in a year). Despite the contradictory testimony, the supreme court wrote that it may have upheld the conviction if not for the fact that the child was repeatedly exposed to a highly suggestive book and audio tape on sexual abuse. *Id.* at 292-93. The supreme court noted that the exposure to the book and audio tape “raise[d] questions about the validity of the accusations made against [the father]. This is especially so in light of the child’s testimony.” *Id.* at 293.

In *Langteau*, the defendant challenged whether his conviction was supported by sufficient credible evidence. 268 N.W.2d at 77. The supreme court acknowledged that the victim’s testimony would normally be sufficient to sustain the verdict, but reversed the conviction and remanded for a new trial after “a careful consideration of the record.” *Id.* In support of its ruling, the supreme court cited unexplained gaps in the state’s case, such as no explanation for why the victim had stayed at a hospital well past visiting hours, why the defendant would rob someone he knew well, and why no stolen items were found in the defendant’s room or on his person. *Id.* The state attempted to fill the gaps in the case by arguing the defendant was under the influence of drugs, despite no evidentiary support for such an argument. *Id.* The supreme court stated that “[u]nder all the circumstances,” a new trial was required. *Id.*

This case is unlike both *Huss*, with the alleged victim’s contradictory and inaccurate descriptions of verifiable facts, and *Langteau*, with gaps in the case the state filled with unsupported assertions. A.C. provided consistent statements concerning the details of the assault on February 21. She provided direct testimony that appellant sexually penetrated

her, she did not consent to the penetration, and he used force to accomplish the penetration. To the extent A.C.'s testimony differed from her statements on February 21 as to location and whether clothing was removed, A.C. explained to the jury why her story had changed. The jury credited A.C.'s version of events, including the DNA evidence and her explanation of the inconsistencies, over appellant's argument that A.C. created the accusation to conceal consensual sex. "[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).

Moreover, although not required, the state presented corroborating evidence of A.C.'s version of events. Corroborating evidence may include the victim's "prompt and consistent accounts of the assault, her post-rape appearance and emotional state, and her detailed descriptions of her assailant." *State v. Daby*, 359 N.W.2d 730, 733 (Minn. App. 1984) (citations omitted). The jury heard from multiple witnesses who described A.C.'s appearance after the assault and her prompt report of the assault. K.W. and his mother testified about finding a naked and crying A.C. outside of their house, and about A.C.'s accounting of the assault. The witnesses testified that A.C. unwaveringly identified appellant as her assailant. We conclude that the record before the jury was sufficient to allow the jury to reach the verdict that it did. We discern no reason to disturb the verdict.

Affirmed.