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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0060**

State of Minnesota,
Respondent,

vs.

Jay Rodney Richard Clayborne,
Appellant.

**Filed December 14, 2020
Affirmed
Reilly, Judge**

Dakota County District Court
File No. 19HA-CR-17-4780

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges his conviction for second-degree criminal sexual conduct, arguing that the district court erred by limiting the testimony of his expert witness about a sleep disorder he asserts was relevant to his defense. We affirm.

FACTS

This appeal arises out of appellant Jay Rodney Richard Clayborne's conviction for second-degree criminal sexual conduct against the victim, his daughter, in August 2017. The victim testified that appellant was lying next to her on the couch watching a movie when he removed her bra and touched her breast with his hand for four to five minutes. The victim ran out of the room, but appellant followed her and grabbed her arm. The victim ran into her bedroom and tried to slam her door, but appellant put his foot in the door and blocked it from closing. Appellant then made the victim "pinky promise" not to tell anyone that he touched her breast, and said he was sorry. The victim told her mother about the sexual contact, and her mother reported the incident to the police.

Respondent State of Minnesota charged appellant with one count of second-degree criminal sexual conduct. Appellant noticed his intent to raise a defense of "sexsomnia" or "unconsciousness/acting while asleep." The state requested a *Frye-Mack* hearing. The district court held an evidentiary hearing to consider the state's challenge to appellant's expert witness. Appellant's expert witness is a doctor and a medical director of sleep-medicine services. The doctor testified that "[t]here are several divisions and sleep disorder types," and "parasomnia is a specific category of a type of sleep disorder." The doctor

explained that there are “several types of disorders under the heading of parasomnias,” including a type “formally recognized as sleep-related abnormal sexual behaviors,” and commonly known as “sexsomnia” or “sleep sex.”

The defense asked the doctor to explain the standard or procedure for “determining if someone has this condition or diagnosing it.” The doctor testified that the diagnostic process begins with a “formal consultation,” which includes a review of the patient’s medical history and a “complete review of the medical records that were appropriate for the case.” The doctor noted that “it would be helpful to interview individuals, family members, who might have observed such behaviors, and then of course at that point a direct interview with the individual.”

As for appellant’s case, the doctor testified that he reviewed police reports, medical records, and appellant’s criminal records. The doctor interviewed appellant but no one else. The doctor testified that appellant’s behavior “certainly did suggest . . . sexsomnia.” Even so, the doctor declined to give a “formal diagnosis of anything” for appellant and reiterated, “I’m not providing a diagnosis. I think a diagnosis can be formally acquired with subsequent clinical encounters.” Following the evidentiary hearing, the district court granted the state’s motion to limit the doctor’s testimony. The district court held that the doctor could testify about parasomnia disorders in general, including sexsomnia. But the district court prohibited the doctor from testifying that appellant suffered from sexsomnia when he touched the victim’s breast.

The district court held a jury trial in June 2019. The doctor testified about sleep-related abnormal sexual behaviors known as “sexsomnia.” The doctor noted that a person

suffering from sexsomnia would not “know who the other people around them are,” and would be unable to seek out a specific person for sexual contact or otherwise “target an individual [victim].” The doctor testified that he “would be skeptical” that a person had sexsomnia if the person pulled the victim “to be next to them in their bed” or “walk[ed] down a hallway into someone’s room.” He also testified that it was “generally true” that a person with sexsomnia would not “attempt to conceal or cover up” their actions upon waking. The jury found appellant guilty of criminal sexual conduct, and the district court imposed sentence. This appeal follows.

DECISION

Appellant argues that the district court erred by prohibiting his expert witness from testifying that appellant suffered from sexsomnia when he touched the victim’s breast. We review a district court’s evidentiary determinations for an abuse of discretion, governed by the harmless-error standard. *State v. Smith*, 940 N.W.2d 497, 505 (Minn. 2020) (citations omitted). This includes evidentiary rulings “related to the admissibility of expert testimony.” *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). Expert testimony is admissible under Minnesota Rule of Evidence 702 if: (1) the witness qualifies as an expert, (2) the expert’s opinion has foundational reliability, and (3) the expert testimony helps the trier of fact. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012). Rule 702 incorporates the *Frye-Mack* standard, which applies if the expert evidence “involves a novel scientific theory.” *Id.*

The issue presented is whether the doctor’s proposed testimony satisfied the *Frye-Mack* standard. This standard has two prongs. *Id.* at 165. Under the first prong, the

underlying scientific theory must be “generally accepted in the relevant scientific community.” *Id.* (quotation omitted). Under the second prong, “the particular scientific evidence . . . must be shown to have foundational reliability.” *Id.* (quotation omitted). To satisfy the second prong, the proponent of a scientific test must “establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Id.* (quotation omitted). The first prong is a question of law, which we review de novo. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000). We review the second prong for abuse of discretion. *Id.*; *see also State v. Loving*, 775 N.W.2d 872, 877 (Minn. 2009) (holding that rulings on foundational reliability are reviewed for abuse of discretion).

The district court determined that appellant satisfied the first prong of the *Frye-Mack* standard.¹ Yet the district court found that appellant failed to satisfy the second prong because there was insufficient foundational reliability to support the doctor’s testimony that appellant suffered from sexsomnia. The district court noted that the doctor did not conduct “[a] long-term period of evaluation,” did not interview appellant’s spouse or the victim, and did not try to “gather corroborating information or learn another witness’s version of [appellant’s] alleged episode of ‘sexsomnia.’” The district court reasoned that “the test to establish whether an individual suffers from ‘sexsomnia’ may be

¹ The district court determined that appellant satisfied the first prong of the test because sexsomnia is generally accepted in the scientific community. Because we conclude that the district court did not abuse its discretion by determining that the doctor’s proposed testimony lacked foundational reliability, we do not consider whether sexsomnia is generally accepted by the scientific community.

reliable,” but “its administration in this particular instance did not conform to the procedure necessary to ensure foundational reliability.” As a result, the district court determined that appellant’s sexsomnia defense “has not been shown to have foundational reliability and therefore shall be excluded from testimony.”

We agree with the district court. “When determining whether an opinion is foundationally reliable under Rule 702, the district court must analyze the proffered testimony in light of the purpose for which it is being offered . . . [and] consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying.” *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020) (citation and quotation omitted). “Foundational reliability goes beyond a mere helpfulness standard,” and “looks to the theories and methodologies used by an expert.” *Id.* (quotations omitted). The proponent of the evidence has the burden of proving that the evidence is reliable. *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 529 (Minn. 2007).

Appellant argues that the doctor’s opinion has foundational reliability because the doctor explained how to diagnose someone with sexsomnia and “followed these established procedures” to evaluate appellant. Appellant’s arguments do not persuade us. The doctor discussed the tests and guidelines used in the diagnostic process. The doctor testified that it is “helpful” to interview friends and family members when diagnosing a case of sexsomnia, and noted that a physical examination or a sleep study is “helpful” to rule out other medical causes, such as sleep apnea. The doctor testified that he performed a “forensic evaluation” on appellant and appellant’s behaviors “suggest[ed]” or were “consistent with” a sexsomnia diagnosis.

Even so, the doctor cautioned that his opinion “[a]ssum[ed] the credibility and honesty of the defendant.” The doctor interviewed appellant for about an hour and a half, reviewed the police report, and reviewed some of appellant’s medical records. But the doctor did not interview the victim, the victim’s mother, or any of appellant’s family members, friends, or former romantic partners, to gather corroborating information. The doctor did not undertake a long-term period of evaluation to diagnose appellant with sexsomnia. The doctor did not review appellant’s medical records from when he was a child, when symptoms typically begin to appear. The doctor also acknowledged that he did not find any previous mention of parasomnia behaviors in any of appellant’s medical records. The doctor did not complete a physical examination or perform a sleep study to rule out other causes. The doctor agreed that the details of the case were “sparse,” and noted that he had “limited information” on which to form an opinion. The doctor therefore declined to give a “formal diagnosis of anything” for appellant and reiterated, “I’m not providing a diagnosis. I think a diagnosis can be formally acquired with subsequent clinical encounters.”

As the district court noted, appellant never reported an episode of sexsomnia to a doctor until after the state charged him with criminal sexual conduct. And the district court did not prohibit the doctor from testifying; the district court permitted him to testify about sexsomnia in general, but did not allow him to testify that appellant personally suffered from sexsomnia when he touched the victim’s breast. At trial, the doctor agreed that a person with sexsomnia would not “know who the other people around them are,” would be unable to seek out a specific person for sexual contact, and would not “target an

individual.” The doctor testified that he “would be skeptical” that a person had sexsomnia if the person pulled the victim “to be next to them in their bed” or “walk[ed] down a hallway into someone’s room.” The doctor also noted that a person with sexsomnia would not “attempt to conceal or cover up” their actions upon waking.

The record establishes that the doctor failed to “reliably appl[y] the underlying theories and methodologies” to the appellant in this case. *Garland*, 942 N.W.2d at 742 (citing *Doe*, 817 N.W.2d at 168-69). The doctor performed a forensic evaluation but did not conduct a complete physical examination, administer a sleep study, conduct interviews with any other individuals, or fully review appellant’s medical records. And the doctor admitted that he could not formally diagnose appellant with sexsomnia, given the limited information available to him. Based on this record, we discern no abuse of discretion in the district court’s determination that the expert’s opinion lacked foundational reliability. Because the doctor’s opinion lacked foundational reliability, it failed the second prong of the *Frye-Mack* standard. We therefore affirm.

Affirmed.