

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0858**

State of Minnesota,
Respondent,

vs.

Buomkuoth Gatluak Puot Well,
Appellant.

**Filed May 24, 2021
Affirmed
Kirk, Judge***

Blue Earth County District Court
File No. 07-CR-19-2279

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Reyes, Judge; and Kirk, Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that (1) the act alleged does not amount to first-degree criminal sexual conduct; (2) the district court improperly limited his cross-examination of the state's DNA witness; and (3) the district court abused its discretion by imposing the presumptive sentence. We affirm.

FACTS

The state charged appellant Buomkuoth Gatluak Puot Well with first-degree criminal sexual conduct, attempted first-degree criminal sexual conduct, and indecent exposure following allegations that he touched his penis to a six-year-old girl's lips.

At Well's court trial, R.B. testified that her six-year-old sister, J.B., lived with her. Well lived in the same apartment building. On May 26, 2019, Well was at R.B.'s apartment. While R.B. was preparing dinner, J.B. came into the kitchen and told her that Well had hurt her. R.B. asked for details, and J.B. stated that Well got mad at her and "put his potty spot on her mouth—on her lips." R.B. told Well to leave. Before leaving, Well said "I need to apologize." R.B. called 911.

J.B. testified that she had been watching television in the living room on that day when Well put "his private part on [her] lips." A forensic interviewer testified that during an interview, J.B. stated that Well's "penis touched her lips."

An officer testified that R.B. conducted a controlled telephone call with Well. During the conversation, Well admitted that he had been at R.B.'s apartment and stated

that he had been upset with J.B. because she had taken a shower and did not dry her hair. He also stated that J.B. was walking around “like some hot thing in front of him.” The next day, officers went to Well’s residence. Well denied ever being in R.B.’s apartment and claimed to have last seen her a couple of weeks prior to May 26. Well declined to consent to a DNA swab, but officers had obtained a warrant to acquire one.

A forensic scientist at the Bureau of Criminal Apprehension testified that a mixture of three or more individuals’ DNA were found on a swab from J.B.’s lips. Well and J.B. could not be excluded as being contributors to the major mixture, which was a two-person mixture, although 99.9999999996% of the general population was excluded.

On cross-examination, the scientist testified that Well’s DNA could have gotten on J.B.’s lips by any part of his body touching her lips. When asked if it was possible “that he could have touched her hand, and her hand could have touch[ed] her lips and transferred his DNA from him to her hand to her lips,” she replied that secondary transfer in this case was unlikely. Well’s attorney asked, “You are aware of cases where secondary DNA transfer has led to people being accused of crimes they could not have committed?” The prosecutor objected and the district court sustained the objection, stating, “It has nothing to do with this case.” On redirect, the scientist explained that secondary transfer was unlikely because “a significant amount of DNA [was] recovered.”

Well did not testify. The district court found Well guilty of first-degree criminal sexual conduct and indecent exposure, but not guilty of attempted first-degree criminal sexual conduct.

Well moved for a downward dispositional departure, which the district court denied after concluding that Well failed to cooperate “in doing anything,” and was therefore not amenable to probation. The district court sentenced Well to the presumptive sentence of 168 months in prison. This appeal followed.

DECISION

Sufficiency of the evidence

Well first argues that he could not be convicted of first-degree criminal sexual conduct for the act he allegedly committed. Determining whether the evidence is sufficient to prove that Well’s conduct violated the first-degree criminal-sexual-conduct statute requires this court to apply the law to the facts. *See State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016) (stating that application of law requires evaluation of the sufficiency of the evidence).

When reviewing a sufficiency-of-the-evidence challenge, this court examines the record “to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict.” *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). In conducting this review, this court assumes that “the fact[-]finder believed the state’s witnesses and disbelieved any evidence to the contrary.” *Id.* This court will not “disturb a verdict if the [fact-finder], 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 the defendant was proven guilty of the offense charged.” *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (quotation omitted).

The district court found Well guilty of first-degree criminal sexual conduct, in violation Minn. Stat. § 609.342, subd. 1(a) (2018). The state had to prove that Well engaged in “sexual penetration” with a complainant under 13 years of age and he is more than 36 months older than her. *See* Minn. Stat. § 609.342, subd. 1(a). “Sexual penetration” means, among other things, “fellatio.” Minn. Stat. § 609.341, subd. 12(1) (2018). “Fellatio constitutes sexual penetration if there is any contact between the penis of one person and the mouth, tongue or lips of another person.” *State v. Ptacek*, 766 N.W.2d 355, 359 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009) (concluding district court did not err in instructing jury with this definition of fellatio).

J.B. testified that Well touched his penis to her lips. R.B.’s and the forensic interviewer’s testimonies corroborated J.B.’s claim. The district court, acting as the fact-finder, stated that it believed J.B.’s testimony that Well put his “private parts” on her lips. Thus, the evidence is sufficient to support Well’s conviction.

But Well argues that the statute is reasonably susceptible to more than one interpretation because the word “fellatio” has several meanings. He argues that with no clear definition, he did not have fair warning that he would be charged with first-degree criminal sexual conduct for the act he committed. Caselaw, however, defines fellatio to include the act Well committed, and this court is “bound by supreme court precedent and the published opinions of the court of appeals.” *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

Evidentiary ruling

Well argues that the district court denied him his due-process right to present a complete defense by limiting his cross-examination of the DNA witness. Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Ali*, 855 N.W.2d 235, 249 (Minn. 2014). Even when, as here, an appellant claims that the district court’s exclusion of evidence denied him his “constitutional right to a meaningful opportunity to present a complete defense,” this court still reviews for an abuse of discretion. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted).

When the erroneous exclusion of evidence deprives a defendant of a constitutional right, this court then reviews whether the exclusion was harmless beyond a reasonable doubt. *State v. Munt*, 831 N.W.2d 569, 583 (Minn. 2013). To conclude that an error was harmless beyond a reasonable doubt, we must be satisfied that the fact-finder would have reached the same verdict if the evidence had been admitted. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994). The state bears the burden of proving that the error was harmless. *State v. Hannon*, 703 N.W.2d 498, 505 (Minn. 2005).

Well claims that, because he denied committing the offense, he had to explain how his DNA was found on the victim’s lips. Well asserts that if he had been allowed to question the witness about cases in which transfer occurred, the outcome would have been different.

Due process requires that every defendant must have “a meaningful opportunity to present a complete defense.” *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quotation omitted). But this right is “subject to the limitations imposed by the rules of evidence.” *State v. Mosley*, 853 N.W.2d 789, 798 (Minn. 2014). “Evidence must be relevant to be admissible, and there is no constitutional right to present irrelevant evidence.” *State v. Thiel*, 846 N.W.2d 605, 615 (Minn. App. 2014), *review denied* (Minn. Aug. 5, 2014). Evidence is relevant if it makes the truth of any material fact more or less probable. Minn. R. Evid. 401.

Here, the district court ruled that evidence regarding “cases where secondary DNA transfer has led to people being accused of crimes they could not have committed” was not relevant to the case. But Well claims that he could explain, by way of secondary transfer, how his DNA was found on the victim’s lips. He asked the scientist if it was possible “that he could have touched [the victim’s] hand, and her hand could have touched her lips and transferred his DNA from him to her hand to her lips.” The scientist stated that it was possible, but unlikely in this case because “there was [a] significant amount of DNA recovered.” Thus, the evidence showed that it was unlikely that secondary transfer led to Well’s DNA being on the victim’s lips. As the district court determined, the evidence was irrelevant to the issue of DNA in this matter.

Further, as the state points out, the district court was aware of and considered secondary transfer. In its findings of fact and order, the district court stated that while it was “possible” that Well’s DNA was on J.B.’s lips after any part of his body touched her lips, or any part of his body touched J.B.’s hands and her hands touched her lips, “the

presence of his DNA on [J.B.]’s lips is nonetheless consistent with [her] testimony that [Well] put his penis on her lips.” Thus, even if the district court abused its discretion by prohibiting Well’s questioning on secondary transfer in other cases, the error was harmless because excluding the evidence did not affect the verdict.

Sentence

The district court imposed the presumptive sentence, denying Well’s motion for a dispositional departure.

Well now claims that the district court committed plain error by not considering a downward durational departure sua sponte. He claims that this case involved conduct that was significantly less serious than the type of conduct normally observed in committing this type of crime.

Failing to raise this sua sponte on this record did not constitute plain error by the district court. The crime committed was first-degree criminal sexual conduct of a young child, and there was nothing to suggest it was such an extraordinary case that the district court should have, on its own initiative, considered a durational departure. And because Well did not move the district court to consider a durational departure, he has forfeited this issue on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that only those issues presented and considered by the district court may be considered on appeal).

Affirmed.