

*This opinion is nonprecedential except as provided by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
A23-1238
A23-1240**

State of Minnesota,
Respondent,

vs.

Patrick Dean Nielsen,
Appellant.

**Filed August 19, 2024
Affirmed
Smith, Tracy M., Judge**

Redwood County District Court
File Nos. 64-CR-20-798, 64-CR-21-105

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

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota; and

Travis J. Smith, Special Assistant Redwood County Attorney, Slayton, Minnesota (for respondent)

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

These are consolidated appeals from final judgments of conviction, following a consolidated jury trial, for attempted and completed second-degree criminal sexual conduct. Appellant Patrick Dean Nielsen argues that his convictions must be reversed for insufficient evidence. Alternatively, Nielsen argues that his convictions must be reversed and the cases remanded for a new trial because the district court abused its discretion by admitting the minor complainant's out-of-court statements as prior consistent statements. We affirm.

FACTS

In November 2020, respondent State of Minnesota charged Nielsen with two counts of second-degree criminal sexual conduct. The state alleged that, earlier that month, Nielsen had engaged in sexual contact with his longtime girlfriend's 11-year-old daughter at their residence. In February 2021, the state charged Nielsen with two additional counts of second-degree criminal sexual conduct against the minor. The state alleged that, in the summer of 2020, Nielsen had engaged in sexual contact with the minor during a camping trip. The state later amended the complaint related to the camping incident by adding two counts of attempted second-degree criminal sexual conduct. The district court conducted a consolidated jury trial on the charges in November 2022.

Camping Incident

The minor testified about the camping incident as follows. In the summer of 2020, the minor went camping with her mother, her younger siblings, and Nielsen, whom, at the

time, the minor considered to be her “dad” and who is the biological father of the minor’s siblings. One night during the camping trip, the family went to sleep in the same bed in a camper, but, at some point during the night, the minor’s mother and siblings left the bed. The minor described waking up to Nielsen attempting to touch her genitals and breasts:

[H]e was like trying to put his hand in my pants and I was like pushing his hand away, but he is stronger than me and then he came up and kind of like started going up my shirt and then I tried to push . . . his hand down and then . . . I looked to him and said, “I’m not mom” and then I got up.

The minor indicated that Nielsen had put his hand under her shirt and touched her, as defense counsel articulated, “around [her] stomach” or “just below [her] breast area.” The minor also identified a photo of a diagram of the female anatomy that was used during a forensic interview in which she had participated. The minor recalled marking the crotch area on the diagram when the forensic interviewer asked her where Nielsen had touched her.

After she got out of bed, the minor woke up her mother and told her what had happened. The minor’s mother testified that the minor said that Nielsen had “tried . . . touching her side” and that she (the minor) had told Nielsen, “I’m not mom,” before he “pulled his hand away.” The minor’s mother testified that the minor never said that Nielsen had “touched her private parts.”

November Incident

The minor testified about the November incident as follows. On the night of the incident, Nielsen climbed up the ladder into the minor’s loft bed to, he said, “cuddle” her. The minor testified that Nielsen had been drinking. Nielsen lay down on the bed and began

“spooning” the minor. The minor testified that Nielsen “was up in the same area as before, like not right in that area, but next to it.” The prosecutor questioned the minor as follows:

Q: Okay, and you said . . . that he touched you around the same area, . . . what do you call . . . a woman’s breast area?

A: Boobs.

Q: So, did his hand touch your boobs?

A: Um, not like right on it.

. . . .

Q: . . . [W]hen you say, “right on it,” can you describe what you mean? On what?

A: No, it wasn’t right on it.

Q: Okay, . . . so, not right on your, as you would call it, “boob,” does that mean on your nipple or something different?

A: No, like . . . like not on, like not like this, like it was kind of like below it, I don’t, I don’t know how to explain it.

After Nielsen touched her, the minor left her room and told her mother. The minor’s mother testified that the minor said that Nielsen had “touched her boob” and that she (the minor) felt uncomfortable.

Forensic Interview

At trial, the district court heard arguments on Nielsen’s hearsay objection to the admission of a video recording of the minor’s forensic interview. The state argued that the statements in the forensic interview were admissible as prior consistent statements under Minnesota Rule of Evidence 801(d)(1)(B), which defines an out-of-court statement as “not hearsay” if the statement is “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.” Nielsen argued that the forensic interview was inadmissible hearsay because the minor’s statements in the forensic interview were inconsistent with her trial testimony.

The district court initially found that the forensic interview was “relatively consistent . . . with [the minor’s] testimony.” It added:

[M]y notes do indicate that . . . , on the issue of the November incident, . . . there was testimony from her regarding touching next to the, and I’m going to use her words, “boob area,” . . . right below it . . . , there was nothing in her testimony about the pants . . . on the November incident. On . . . the campground incident, . . . there was testimony about touching near the waist, pants area then and the shirt area and she did in response to some questions identify the . . . photo of the printout . . . , indicating that she did make the mark on there of the area of the touching.

The district court also determined that the minor’s credibility had been challenged.

The district court then asked defense counsel whether there were specific timestamps of portions that he would ask to be redacted from the video recording. Defense counsel asked the district court to redact the portions “around 23 to 24 minutes” and “between 50 and 52 minutes,” both of which relate to the camping incident. The state maintained that all of the minor’s statements in the forensic interview were prior consistent statements. The district court agreed with the state, determining that the entire forensic interview was admissible under rule 801(d)(1)(B). The video recording was played for the jury.

Verdicts

With respect to the November incident, the jury found Nielsen guilty of both counts of second-degree criminal sexual conduct. With respect to the camping incident, the jury found Nielsen not guilty of both counts of completed second-degree criminal sexual conduct but guilty of both counts of attempted second-degree criminal sexual conduct.

Posttrial Motion and Sentencing

After the verdicts, Nielsen moved for a judgment of acquittal or a new trial. In a memorandum supporting his motion, Nielsen argued that the district court erred by admitting the forensic interview under rule 801(d)(1)(B).

Following a hearing, the district court filed an order denying Nielsen's motion. As to the camping incident, the district court wrote: "During the forensic video, the victim uses her hand and positions it directly on the lower portion of her breast area below the areola area." The district court "found this consistent with the victim's testimony," noting, "[D]uring trial, [defense counsel] had the victim stand and demonstrate to the Courtroom, including counsel, the Court, and the jury, where Defendant touched her breast area. The victim demonstrated for the jury, placing her hand below the areola area but still on the lower portion of her breast area." The district court, relying on "testimony and gestures during trial and in the forensic interview," also found that the minor's trial testimony about the November incident was consistent with her statements in the forensic interview. Finally, the district court stated that the minor's credibility had been challenged at trial, including "at numerous points during her cross-examination."

The district court stayed imposition of sentence for both the attempted criminal sexual conduct during the camping incident and the completed criminal sexual conduct during the November incident, placed Nielsen on probation for five years, and ordered him to serve 120 days in jail.

Nielsen appeals.

DECISION

Nielsen challenges (1) the sufficiency of the evidence to support his convictions and (2) the admission of the forensic interview at his trial. We address each issue in turn.

I. The evidence is sufficient to support Nielsen’s convictions.

Nielsen argues that his convictions must be reversed because the evidence presented at trial is insufficient to prove that he engaged in the prohibited conduct. “When evaluating the sufficiency of the evidence, appellate courts carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016) (quotation omitted). “The evidence must be viewed in the light most favorable to the verdict, and it must be assumed that the fact-finder disbelieved any evidence that conflicted with the verdict.” *Id.* “The verdict will not be overturned if the fact-finder, upon application of the presumption of innocence and the State’s burden of proving an offense beyond a reasonable doubt, could reasonably have found the defendant guilty of the charged offense.” *Id.*

A. Attempted Second-Degree Criminal Sexual Conduct (Camping Incident)

To sustain a conviction for attempted second-degree criminal sexual conduct, the state needed to prove that Nielsen attempted to engage in sexual contact with the minor. *See* Minn. Stat. § 609.343, subd. 1(a), (g) (2020); *see also* Minn. Stat. § 609.17, subd. 1 (2020) (defining attempt). “Sexual contact” under section 609.343, subdivision 1, includes “the intentional touching by the actor of the complainant’s intimate parts” “committed with

sexual or aggressive intent.”¹ Minn. Stat. § 609.341, subd. 11(a)(i), (b)(i) (2020). “Intimate parts” include “the primary genital area, groin, inner thigh, buttocks, or breast.” *Id.*, subd. 5 (2020). An attempt is committed when a defendant, “with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime.” Minn. Stat. § 609.17, subd. 1.

In this case, the minor’s trial testimony established that Nielsen tried to put his hand in her pants near her genitals and that he put his hand under her shirt and moved it up toward her breasts. Nielsen argues that, because the minor did not testify that he touched her intimate parts, her trial testimony is insufficient to prove that he committed attempted second-degree criminal sexual conduct. But Nielsen was convicted of *attempted* second-degree criminal sexual conduct for the camping incident, so the state needed to prove only that he *attempted* to touch the minor’s intimate parts. The minor’s trial testimony established that Nielsen tried to touch her genitals and breasts. Viewing the evidence in the light most favorable to the verdict, we conclude that the state proved beyond a reasonable doubt that Nielsen committed attempted second-degree criminal sexual conduct.

¹ In his brief, Nielsen does not challenge that the evidence proves that he acted with sexual or aggressive intent. Issues not briefed are forfeited. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *rev. denied* (Minn. Aug. 5, 1997). Accordingly, Nielsen has forfeited any challenge to the sufficiency of the evidence to prove sexual or aggressive intent.

B. Completed Second-Degree Criminal-Sexual-Conduct (November Incident)

To sustain a conviction for second-degree criminal sexual conduct, the state needed to prove that Nielsen engaged in sexual contact with the minor. *See* Minn. Stat. § 609.343, subd. 1(a), (g).

Nielsen contends that there is no evidence that he touched the minor's intimate parts. We disagree. At trial, the minor demonstrated where Nielsen had touched her during the November incident. The minor testified that Nielsen had touched her "in the same area as before, like not right in that area, but next to it," and, although the parties did not make a record of the minor's trial demonstration, the district court, in its order denying Nielsen's posttrial motion, noted that, as to the camping incident, the minor had demonstrated that Nielsen had touched her "below the areola area but still on the lower portion of her breast area." In the forensic interview, the minor, gesturing to the lower part of her breast, said that Nielsen "came up and then he, like, put his hand under [her] shirt again. And then . . . [she], like, kind of like tried to, like, move his hand a little bit, but then he, like, moved his hand back up." In addition, the minor's mother testified that the minor immediately informed her that Nielsen had "touched her boob." Viewing the evidence in the light most favorable to the verdict, we conclude that the state proved beyond a reasonable doubt that Nielsen committed second-degree criminal sexual conduct.

II. The district court properly admitted the statements in the forensic interview as prior consistent statements.

Nielsen argues that he is entitled to a new trial because the district court abused its discretion by admitting the minor's statements made in the forensic interview as prior

consistent statements. A district court's ruling on the admissibility of evidence as a prior consistent statement "rest[s] within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (quotation omitted). "On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *Id.* (quotation omitted).

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted" and is generally inadmissible unless an exception or exclusion applies. Minn. R. Evid. 801(c), 802. The Minnesota Rules of Evidence categorically exempt certain out-of-court statements from being classified as hearsay. Minn. R. Evid. 801(d). If a witness's credibility is challenged, a prior out-of-court statement made by the witness that is reasonably consistent with the witness's trial testimony is not hearsay and is admissible as substantive evidence under rule 801(d)(1)(B). *See State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn. App. 2000), *rev. denied* (Minn. Feb. 24, 2000). "The trial testimony and the prior statement need not be verbatim." *Id.* at 109. But a prior statement is not reasonably consistent where the inconsistencies in the prior statement "directly affect the elements of the criminal charge" by providing evidence of a more serious offense. *Id.* at 110.

Nielsen first disputes that the minor's credibility was challenged, asserting that, although he cross-examined the minor, it was merely to reiterate what she had stated during her testimony. The state contends that defense counsel challenged the minor's credibility on multiple occasions, starting with the opening statement. In that statement, defense counsel suggested that the minor, "by her own words and her statements doesn't know

what's happening"; stated that some of her statements were "unclear"; and told the jury that it would "have to listen very closely to the words and to the facts to [see] how those words may change when the stories are told today, compared to when they were told when." Later, during cross-examination of the minor, defense counsel asked her, "[H]as your memory changed at all in the last couple of years since this happened?" She responded, "I don't remember stuff as good as I did." The credibility of a witness is not limited to whether a witness is truthful. *See Zulu*, 706 N.W.2d at 924. "A prior consistent statement might bolster credibility by . . . demonstrating accuracy of memory." *Id.* (quotation omitted). We are satisfied that the minor's credibility was challenged here.

Second, Nielsen challenges the district court's determination that the minor's statements were consistent. He asserts that the minor testified only about what he calls "innocent touches" whereas the forensic interview included her statements that Nielsen touched her intimate parts. We are not persuaded. In the argument portion of his brief, Nielsen does not identify any specific statements that he claims are inconsistent. In other sections of his brief, however, he suggests that the minor's statements regarding the November incident are inconsistent because at trial she testified only that Nielsen touched her below her breast but in the forensic interview she alleged that he did more. We disagree. As the district court determined, in both her forensic interview and her trial testimony, the minor communicated that Nielsen had touched the lower part of her breast during the November incident.

As for the camping incident, Nielsen suggests that the minor, during the forensic interview, reported experiencing more touching than she testified to during her trial

testimony. At trial, the minor testified that Nielsen tried to put his hand in her pants and that he put his hand under her shirt, and in the forensic interview she said that Nielsen “put his hand in [her] pants” and touched her “[k]ind of like on [her], like, [her] boobs and stuff.” These accounts are reasonably consistent. Moreover, any additional detail in the forensic interview did not directly affect the *attempted* second-degree criminal sexual conduct of which Nielsen was convicted. The forensic interview is reasonably consistent with the minor’s trial testimony, and we discern no abuse of discretion in the district court’s admission of the forensic interview.²

Affirmed.

² The state urges us to apply the plain-error standard of review, rather than the abuse-of-discretion standard of review. Because Nielsen is not entitled to relief under the abuse-of-discretion standard, we do not address the state’s plain-error argument. And, because the district court did not err by admitting the forensic interview as prior consistent statements, we do not address Nielsen’s challenges to the admissibility of the forensic interview on alternative grounds.