

*This opinion is nonprecedential except as provided by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
A23-1628**

State of Minnesota,
Respondent,

vs.

Tirson Lamberty Castro,
Appellant.

**Filed August 19, 2024
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Ramsey County District Court
File No. 62-CR-21-656

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

John Choi, Ramsey County Attorney, Anna R. Light, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Cochran, Judge; and Frisch,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

In this direct appeal from appellant's convictions for first-degree and attempted second-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to prove first-degree criminal sexual conduct, and (2) the district court erred

by entering convictions and imposing sentences for both offenses. We affirm in part, reverse in part, and remand.

FACTS

In February 2021, respondent State of Minnesota charged appellant Tirson Lamberty Castro with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2018), and attempted second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2018). The complaint alleged that between May 4, 2019 and March 31, 2020, appellant engaged in sexual penetration of the minor complainant, M.R., with whom he had a significant relationship. The complaint also alleged that between August 1, 2019 and March 31, 2020, appellant attempted to engage in multiple acts of sexual contact with M.R. over an extended period of time.¹ At appellant’s May 2023 jury trial, the district court admitted three exhibits and the jury heard testimony from five witnesses, including M.R.—who was 19 years old at the time of trial.

At trial, M.R. established that when she was approximately 13 years old, appellant began dating her mother, C.A. At that time, M.R., C.A., and M.R.’s brother lived with appellant for two periods of time during C.A.’s four-year relationship with appellant. M.R. testified that she “didn’t really like [appellant] because [she] wanted [her] mom and [her] dad to be together.”

¹ At trial, the jury was told to consider only acts which occurred between May 3, 2019 and March 31, 2020, for both counts. The criminal complaint was amended before sentencing to reflect the same.

M.R. testified to several incidents of sexual abuse, starting with the first incident which occurred at appellant's apartment in St. Paul, Minnesota. At that time, M.R. was 15-years old. M.R. testified that she had been sleeping on a couch, while her brother slept on an adjacent couch, when she woke up to appellant touching her under her clothes. She recalled feeling confused because "[i]t was like a bad dream or something." She described how appellant had used his hands and mouth to touch her breasts and vagina; and "inserted his fingers inside [her] vagina." M.R. also recalled that appellant had pulled her pants down and pulled her shirt up. M.R. next explained that the assault stopped when she "became fully aware" of what was happening, "pushed [appellant] off," and "went to the bathroom." Once in the bathroom, M.R. stated that she "[t]ried to wake [her]self up" to determine whether "this was real . . . or a dream?"

M.R. later clarified that despite those feelings, she knew that she was not in a dream because "in a dream, you eventually wake up and [she] never woke back up." And she agreed that her feelings were caused by "the effects of coming out of sleep." M.R. later explained that her brother did not wake up because he was a "heavy sleeper." When asked why she had not told anyone about the abuse, M.R. replied that she "fel[t] scared" that she could not trust anyone, and that she would not be believed. This caused M.R. to feel "alone" and depressed.

M.R. testified to a second incident at the St. Paul apartment, which also occurred when she was 15-years old. M.R. recalled that she woke up in the early morning to find appellant naked and attempting "to put his penis inside [her] mouth." M.R. testified that before appellant could do so, she ran to the bathroom and washed her mouth. M.R. also

testified to an incident at a hotel when she awoke in the early morning to appellant attempting to put his hands under her blanket. M.R. stated that there were other times when appellant engaged in similar behavior but she could not remember where those incidents occurred.

Eventually, when M.R. was 16-years old, she told her then-boyfriend of the abuse. M.R.'s then-boyfriend told his school's guidance counselor, and the guidance counselor reported the abuse. C.A. was alerted of the report and confronted M.R., who confirmed that the report was true. C.A. testified that M.R. had told her that appellant had "tr[ie]d to do things to her" while she was sleeping, including when appellant "was naked and put his private area on her face and was trying to get [her] to do things to him." M.R. had also explained to C.A. that appellant had told her "'Ma, I need you,'" which C.A. testified was what appellant normally said to C.A. "when he wanted sex." When C.A. confronted appellant, he responded that it was M.R. who "wanted him" and that he had rejected her. C.A. denied knowing about the sexual abuse while it occurred. But she noted that M.R. constantly rejected appellant's attempts to hug her by stating "don't touch me," and that M.R. became reclusive and exhibited poor hygiene around the time of the abuse.

A Dakota County child-protection social worker, J.B., testified to conducting a forensic interview with M.R. A video recording of the interview was played for the jury, and the jury was provided a transcript of the same. M.R.'s statements about the alleged sexual abuse in the forensic interview largely adhered to her testimony at trial.

In the interview, M.R. stated that, on appellant's couch at the St. Paul apartment, appellant had touched his mouth and hands to her breasts and vagina. She stated that both

appellant's mouth and fingers went inside her vagina. She explained that she "woke up to [appellant] [] waking [her] up" and telling her that he "needed [her.]" While M.R. told appellant "no," he "started forcing [her] and then . . . lifted up [her] shirt and pulled down [her] pants and stuff like that and [she] didn't know what to do [be]cause [she] was like still asleep." M.R. also explained that, while her brother had been asleep on the couch next to her, she did not believe that her brother heard or saw anything. She reasoned that this was because she could not speak, as she felt like she was in "a nightmare or something" and was "trying to process it." When asked whether she was asleep for the entire incident, M.R. stated, "[T]owards the end I started waking up and like I kinda realized like okay this is real and I kinda just like pushed him off and like ran to the bathroom."

M.R. told J.B. about the other instances of abuse, when appellant would attempt to touch her under her blanket while she was sleeping, and when appellant woke her up while he was "fully naked" and "rubbing his penis against [her] mouth." M.R. admitted that, to end the abuse, she would tell appellant to stop and then run to the bathroom. Finally, M.R. explained that she had told no one of the abuse for fear that someone would judge her.

The jury found appellant guilty as charged. At sentencing, the district court convicted and sentenced appellant to 144 months in prison for first-degree criminal sexual conduct, concurrent with 83 months in prison for attempted second-degree criminal sexual conduct.

This appeal follows.

DECISION

I. The evidence was sufficient to establish first-degree criminal sexual conduct.

Appellant challenges the sufficiency of the evidence supporting his conviction of first-degree criminal sexual conduct. When considering a sufficiency-of-the-evidence challenge, we view the evidence in the light most favorable to the verdict “to determine whether the facts in the record 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. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotation omitted). In doing so, this court “assume[s] the jury believed the [s]tate’s witnesses and disbelieved any evidence to the contrary.” *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). “This is especially true when resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury.” *State v. Epps*, 949 N.W.2d 474, 486 (Minn. App. 2020) (quotation omitted), *aff’d*, 964 N.W.2d 419 (Minn. 2021). Appellate courts will not reverse a guilty verdict if “upon application of the presumption of innocence and the [s]tate’s burden of proving an offense beyond a reasonable doubt, [the fact-finder] could reasonably have found the defendant guilty of the charged offense.” *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016).

To prove a violation of first-degree criminal sexual conduct, the state must prove beyond a reasonable doubt that appellant (1) sexually penetrated M.R., (2) had a significant relationship with M.R., and (3) committed the offense when M.R. was under the age of 16. See Minn. Stat. § 609.342, subd. 1(g). “Sexual penetration” is defined as, among other

things, “sexual intercourse, cunnilingus, fellatio, or anal intercourse”; or “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body[,]” and perpetrated without the complainant’s consent. Minn. Stat. § 609.341, subd. 12 (2018). Appellant asserts that there is insufficient evidence to establish that he sexually penetrated M.R. because (1) M.R. is not a credible witness and (2) no other evidence corroborates M.R.’s testimony. We are not persuaded.

M.R.’s Credibility

First, appellant argues that while the evidence might show that appellant engaged in “some ‘sexual abuse,’” M.R.’s testimony does not establish that appellant engaged in sexual *penetration*. Generally, “a conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). In prosecutions for criminal sexual conduct, the complainant’s testimony does not require corroboration to be believed. Minn. Stat. § 609.347, subd. 1 (2018). And appellate courts will defer to the jury’s credibility determinations absent “any unusual circumstances that would justify a determination” that the alleged victim’s testimony was not credible. *State v. Balsley*, 999 N.W.2d 880, 887 (Minn. App. 2023), *rev. granted on other grounds* (Minn. Feb. 28, 2024).

M.R. testified, consistent with her forensic interview, that, when she was 15-years old, she had been sleeping on one of two couches in appellant’s St. Paul apartment when she woke up in the early morning to appellant touching her under her clothes. M.R. described how appellant penetrated her by touching her vagina with his mouth and

“insert[ing] his fingers inside [her] vagina.” And she described that the abuse ended when she ran to the bathroom.

Despite the consistencies in M.R.’s prior statements and testimony at trial, appellant argues that M.R. was not a credible witness. He points to M.R.’s statements that she felt like the abuse was “just a dream” and that only “part of it was real.” And he argues that M.R.’s testimony that she was not dreaming because “this” (the sexual abuse) was real, does not specify whether “this” means sexual penetration.

Based on the trial record, we are not persuaded to disturb the jury’s implicit credibility determinations. Although M.R. provided testimony that she felt like she was in a dream, she also testified that her eyes were open when she saw appellant sexually abusing her. And when directly asked, “[W]ere [you] awake while this was happening?” M.R. responded “Yes.” Reading M.R.’s testimony as a whole, it is apparent that “this” means that the first incident of sexual penetration was real, and not a dream.

Moreover, the jury heard this testimony and M.R.’s responses to defense counsel’s rigorous cross-examination, which highlighted M.R.’s dislike for appellant; that her brother, who slept on an adjacent couch, did not wake during the abuse; and that M.R. told no one about the abuse while it occurred. Still, the jury found appellant guilty of first-degree criminal sexual conduct based on sexual penetration. Because we assume that the jury believed the state’s witnesses, *Ortega*, 813 N.W.2d at 100, we defer to that credibility determination and will not reweigh M.R.’s credibility on appeal, *State v. Olson*, 982 N.W.2d 491, 495 (Minn. App. 2022) (explaining that appellate courts “defer[] to the fact-finder’s credibility determinations and will not reweigh the evidence on appeal”).

Nevertheless, appellant cites *State v. Huss*, for the proposition that because an alleged victim's prior inconsistent statements require reversal, M.R.'s uncertainty as to whether the abuse was "real," or if she was dreaming, similarly requires reversal. See *State v. Huss*, 506 N.W.2d 290 (Minn. 1993). But *Huss* is inapt. In that case, the victim was a young child who gave contradictory testimony on events central to the prosecution, and who was exposed to "a highly suggestive book" about sexual abuse. *Id.* at 292-93. Here, M.R.'s testimony was not inconsistent, M.R. was 15 years old at the time of the abuse and 19 years old at the time of trial, and M.R. was not exposed to "a highly suggestive book" on sexual abuse.

In sum, the facts here do not present "any unusual circumstance[]" that would justify a determination" that M.R.'s testimony was not credible. See *Balsley*, 999 N.W.2d at 887.

Corroborating Evidence

Appellant next asserts that there is insufficient evidence in the record to corroborate M.R.'s statements that appellant engaged in sexual penetration. First, he argues that M.R.'s statements to her then-boyfriend, C.A., and J.B., about the abuse, do not prove that penetration occurred—only that some form of sexual abuse occurred. Similarly, he argues that *his* statements, to C.A., that M.R. had initiated the sexual contacts, do not support a finding of sexual penetration. Third, appellant argues that M.R.'s poor hygiene does not suggest sexual penetration. And fourth, appellant emphasizes that no one witnessed, or knew of, the abuse while it occurred. We are not persuaded for five reasons.

First, M.R.'s testimony did not require corroboration to be believed. See Minn. Stat. § 609.347, subd. 1.² Second, C.A. testified that appellant had told her it was M.R. who had instigated the sexual abuse. But M.R. recalled that, during the sexual abuse, appellant had stated ““Ma, I need you,”” which C.A. explained means “he wanted sex.” Third, M.R.'s testimony resembles her statements to J.B., that appellant had penetrated her vagina with his mouth and hands. It is inconsequential whether M.R.'s admissions to her then-boyfriend, and C.A., concerning the abuse, specifically detailed penetration. Fourth, M.R.'s poor hygiene was one of many factors that the jury was allowed to consider when determining whether appellant sexually penetrated M.R., and supports her testimony that she experienced depression following the abuse.

Fifth, appellant cites *State v. Butenhoff*, 155 N.W.2d 894 (Minn. 1968), to argue that, because no one knew of or witnessed appellant's abuse, while it was happening, M.R.'s testimony lacks corroboration. But *Butenhoff* is inapposite, as it involved a seven-year-old victim who admitted that the alleged assault might not have been an assault. 155 N.W.2d at 897-98. In that case, the Minnesota Supreme Court noted that “the inconsistencies in [the child's] testimony [were] so great and so frequent that it is hardly

² Appellant cites *State v. Ani*, for the proposition that a court may affirm a criminal-sexual-conduct conviction only when the victim's testimony is uncontradicted and strongly corroborated. See *State v. Ani*, 257 N.W.2d 699 (Minn. 1977). And he asserts that because M.R.'s testimony lacks corroboration, his conviction for first-degree criminal sexual conduct must be reversed. But in *Ani*, the Minnesota Supreme Court emphasized that corroboration is not needed to prosecute first-degree criminal sexual conduct. *Ani*, 257 N.W.2d at 700. And even if it were, like *Ani*, M.R.'s testimony was positive, uncontradicted, and corroborated by other evidence. See *id.*

conceivable that a jury could see fit to accept the child's version and bring in a guilty verdict." *Id.* at 897.

No such inconsistencies exist here. M.R. explained that her brother had not witnessed the abuse because he was a heavy sleeper. And she explained that she told no one about the abuse because she trusted no one. But once she trusted her then-boyfriend, she told him. *Butenhoff* was also decided before the legislature pronounced that a victim's testimony does not require corroboration to be believed. See 1975 Minn. Laws. ch. 374, § 8, at 1249 (enacting Minn. Stat. § 609.347, subd. 1 (1975)).³

Viewing the evidence in the light most favorable to the verdict, and assuming the jury believed respondent's evidence and disbelieved any contrary evidence, the evidence sufficiently proved that appellant sexually penetrated M.R. Accordingly, the evidence proves first-degree criminal sexual conduct.

II. The district court erred by entering convictions for both first-degree and attempted second-degree criminal sexual conduct.

Appellant next challenges his conviction for attempted second-degree criminal sexual conduct, arguing that it must be reversed because it is a lesser-included offense of his first-degree criminal sexual conduct conviction. Respondent agrees.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2018). This includes "an attempt to commit a lesser degree of the same crime" or "a crime necessarily

³ Appellant's remaining cited caselaw is also not relevant because Minn. Stat. § 609.347, subd. 1, did not apply. See *State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978) (involving aggravated robbery); *State v. Gluff*, 172 N.W.2d 63, 64 (Minn. 1969) (same).

proved if the crime charged were proved.” *Id.*, subd. 1(3)-(4); see *State v. Hackler*, 532 N.W.2d 559, 559 (Minn. 1995) (explaining that “[i]f the lesser offense is a lesser degree of the same crime or a lesser degree of a multi-tier statutory scheme dealing with a particular subject, then it is an ‘included offense’”). And a defendant cannot be “convicted of two counts of criminal sexual conduct (different sections of the statute or different subsections) on the basis of the same act or unitary course of conduct.” *State v. Folley*, 438 N.W.2d 372, 373 (Minn. 1989) (vacating one of two convictions for criminal sexual conduct when both were based on the same evidence of the same acts); *State v. Kobow*, 466 N.W.2d 747, 751 (Minn. App. 1991) (stating that second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct); see also Minn. Stat. § 609.04, subd. 1(3) (stating that “an *attempt* to commit a lesser degree of the same crime” is an “included offense” (emphasis added)). Accordingly, appellant may not be convicted of both first-degree criminal sexual conduct and attempted second-degree criminal sexual conduct if the offenses were based on a unitary course of conduct and were not separate criminal acts. See *State v. Kemp*, 305 N.W.2d 322, 326 (Minn. 1981).

“The inquiry into whether two offenses are separate criminal acts is analogous to an inquiry into whether multiple offenses constituted a single behavioral incident under Minn. Stat. § 609.035.” *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). That inquiry considers time, place, and whether the conduct was “motivated by an effort to obtain a single criminal objective.” *State v. Johnson*, 141 N.W.2d 517, 525 (Minn. 1966).

The parties agree that the prosecutor relied on M.R.’s allegations of penetration at appellant’s St. Paul apartment to satisfy both the “penetration” element in first-degree

criminal sexual conduct, and the “multiple acts” element of attempted second-degree criminal sexual conduct—as they occurred during the same timeframe. See Minn. Stat. §§ 609.342, subd. 1(g); .343, subd. 1(h)(iii). For example, the prosecutor told the jury:

[W]ith regards to the first charge of Criminal Sexual Conduct in the First Degree, that’s related to the penetration. The cunnilingus and the insertion of the finger into the vagina . . . this was the first contact that occurred, this penetration; and it was at the [St. Paul apartment] . . . the second count relates to attempted sexual contact, . . . [and] what I want you to know is sexual contact can be both the penetration, as well as the sexual contact. And you heard from the judge, it’s not a defense that these acts were completed.

And the district court instructed the jury as follows:

[Appellant is] charged with an attempt to commit the crime of Criminal Sexual Conduct in the Second Degree. It is not a defense to this charge that the crime was actually committed, even if you find that the crime was committed. [Appellant is] guilty of an attempt to commit the crime if [he] intended to commit it.

Moreover, the jury was not given a special verdict form in which to specify which acts it attributed to each criminal offense. Respondent advised the district court of this issue prior to sentencing and, on appeal, concedes that appellant’s offenses are not separate behavioral incidents. Because the jury was encouraged to consider M.R.’s allegations of penetration when determining appellant’s guilt for both first-degree and attempted second-degree criminal sexual conduct, and because nothing in the record suggests that it declined to do so or reached a contrary factual conclusion, we are persuaded that the factors of time, place, and single criminal objective are satisfied.

Therefore, based on the facts presented here, we reverse appellant's conviction for attempted second-degree criminal sexual conduct, and remand to the district court to vacate the same while leaving in place the jury's guilty verdict on this count. *See State v. Harding*, 304 N.W.2d 14, 14-15 (Minn. 1981) (vacating lesser of defendant's offenses of first- and second-degree criminal sexual conduct when "the evidence of the two distinct acts of penetration was used to convict defendant of both counts charged"); *see also State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (explaining that when a conviction is vacated pursuant to Minn. Stat. § 609.04, the underlying finding of guilt remains intact). Because we reverse appellant's conviction for attempted second-degree criminal sexual conduct we do not reach appellant's argument related to his sentence for that offense.

Affirmed in part, reversed in part, and remanded.