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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0238**

State of Minnesota,
Respondent,

vs.

John Henry Remker,
Appellant.

**Filed February 4, 2013
Affirmed
Larkin, Judge**

Olmsted County District Court
File No. 55-CR-08-8574

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant
Public Defender, St. Paul, Minnesota (for defendant)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and
Klaphake, Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his convictions for second-degree criminal sexual conduct, arguing that the evidence is insufficient to support the convictions. We affirm.

FACTS

Respondent State of Minnesota charged appellant John Henry Remker with two counts of second-degree criminal sexual conduct. The case was tried to a jury in August 2011. The following evidence was presented at trial.

From March 29 through April 1, 2004, D.M., then eight years old, was in his grandmother's care, in his home, while his parents vacationed in Las Vegas. Remker, D.M.'s grandfather, also stayed at D.M.'s home while D.M.'s parents were away. D.M. testified that he had a nightmare and, forgetting that his parents were away, went to their bedroom to seek comfort. D.M. lay down in bed, and Remker "started touching [his] penis and testicles area." D.M. testified that Remker's hand was inside his underwear and "was rubbing it." D.M. realized "that something was wrong" and left the room.

D.M. did not tell anyone about the incident until December 2007, when an incident in gym class triggered a memory of the 2004 incident. D.M. told a school official about the incident, who in turn reported the incident to the police. Rochester Police Officer Josh Thompson interviewed D.M., who told him that his grandfather "had put his hands down his pants" and had rubbed his "privates" while his parents were on a trip to Las Vegas. Thompson testified that D.M. was "teary-eyed and crying through the majority of the interview."

Thompson also interviewed Remker, who did not admit to touching D.M. in the bedroom. Thompson testified that he asked Remker “whether something like this could have happened and it could have been accidental on his part.” Thompson testified that Remker “said that could have happened, but kept talking about how his conscience is clear.”

D.M.’s mother, J.M., testified that she did not learn of the 2004 incident until December 2007. But she testified that during her trip to Las Vegas, she spoke to D.M. on the telephone. D.M. cried and asked her to come home. J.M. testified that “It’s not like [D.M.] to ever cry when we’ve been gone.” J.M. also testified that two years later, she took a trip to San Francisco. During that trip, D.M. got “really mean” with Remker, and “wouldn’t let grandpa stay” at the house.

Remker’s wife testified for the defense and stated that she did not recall D.M. coming into the bedroom and would have heard him if he had entered and lain down in the bed. Remker’s wife also testified that D.M. did not have an “emotional outburst” and did not cry when J.M. spoke to him on the telephone from Las Vegas.

The jury found Remker guilty of both counts. The district court stayed imposition of sentence on the first count and placed Remker on probation for 25 years. Remker appeals.

DECISION

Remker argues that his convictions must be reversed because they were based solely upon the uncorroborated testimony of D.M., which was of “dubious veracity.”

In considering a claim of insufficient evidence, this court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *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). The reviewing court 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 the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

In a prosecution for criminal sexual conduct, the testimony of a complainant need not be corroborated, even when the complainant is a minor. Minn. Stat. § 609.347, subd. 1 (2002); *State v. Hesse*, 281 N.W.2d 491, 492 (Minn. 1979) (stating that “there is no requirement of corroboration” in a sex case involving a child as a victim). 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.” *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (quotation omitted).

The state charged Remker with two counts of second-degree criminal sexual conduct. Under the first count, the state had to prove that (1) Remker engaged in sexual contact with D.M. and (2) D.M. was under 13 years of age and Remker was more than 36 months older than D.M. *See* Minn. Stat. § 609.343, subd. 1(a) (2002). “Sexual contact” includes “the intentional touching by the actor of the complainant’s intimate parts” or the

“touching of the clothing covering the immediate area of the intimate parts” with “sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(a)(i), (iv) (2002). “‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being.” Minn. Stat. § 609.341, subd. 5 (2002).

Under the second count, the state had to prove that (1) Remker engaged in sexual contact with D.M. and (2) Remker had a significant relationship to D.M. and D.M. was under 16 years of age at the time of the sexual contact. *See* Minn. Stat. § 609.343, subd. 1(g). “Sexual contact” includes “the intentional touching by the actor of the complainant’s intimate parts” or the “touching of the clothing covering the immediate area of the intimate parts” with “sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(b)(i), (iv) (2002). “Significant relationship” includes a situation in which the actor is a grandparent of the complainant. Minn. Stat. § 609.341, subd. 15(2) (2002).

Remker argues that D.M.’s testimony regarding the 2004 incident is not credible because “D.M. did not promptly report the abuse.” Remker further argues that D.M.’s testimony was not corroborated “by any evidence of his emotional condition or of a change in behavior following the alleged incident.” Remker relies on *State v. Kemp*, 272 Minn. 447, 138 N.W.2d 610 (1965) and *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), to argue that his conviction must be overturned because the uncorroborated, noncredible testimony of a complainant cannot support a conviction. *See Kemp*, 272 Minn. at 450, 138 N.W.2d at 612 (stating that “we cannot escape our duty to [reverse the conviction] where it is made to appear that the evidence to overcome the presumption of innocence is so completely dependent upon a single witness whose testimony, considered in the light

of the record as a whole, is of dubious veracity”). Both cases are readily distinguishable and therefore unpersuasive.

In *Kemp*, the supreme court reversed a conviction in the interests of justice because the record revealed “easily available and material prior inconsistent statements” that defense counsel never used to impeach the complainant and a statement from an alibi witness who was not called to testify. *Id.* at 449-50, 138 N.W.2d at 611-12. In *Huss*, the supreme court overturned a conviction for insufficient evidence where a three-year-old complainant’s testimony “was contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts.” *Huss*, 506 N.W.2d at 292. The court noted, however, that “even given this contradictory testimony, we might not be persuaded to reverse absent the repeated use [by the complainant’s mother and therapist] of a highly suggestive book on sexual abuse.” *Id.*

In this case, Remker does not make the type of ineffective-assistance-of-counsel argument relied on by the supreme court in *Kemp* to justify reversal. Additionally, unlike the child complainant in *Huss*, D.M.’s testimony was not contradictory and Remker does not direct us to anything in the record to suggest that D.M.’s testimony was inconsistent with his prior statements or other verifiable facts. Nor does Remker argue that D.M. disclosed the abuse only after undue influence by means of exposure to suggestive materials or interview techniques.

Rather, Remker argues that D.M.’s testimony lacked credibility because he did not promptly report the abuse, and instead “disclosed the allegation about [three and a half] years later to a school administrator.” But the jury was aware that D.M. did not disclose

the 2004 abuse until December 2007. D.M. testified that he was eight years old when his grandfather put his hand down D.M.'s underwear and rubbed his penis and testicle area. He further testified that he did not disclose the incident until December 2007, after an incident in gym class triggered the memory. The state asked D.M. why he did not tell someone sooner. D.M. replied: "I think I had been trying to forget what had happened, possibly, like subconsciously block it since it was bad." The fact that the jury convicted Remker indicates that the jury believed D.M.'s testimony regarding both the abuse and his explanation for the delayed disclosure. Under these circumstances, this court will not substitute its judgment for the jury's credibility determination. *See State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) ("[It] is well-settled in Minnesota that it is the province of the jury to determine the credibility and weight to be given to the testimony of any individual witness.").

Remker's argument that D.M.'s testimony was uncorroborated is unavailing. Because D.M.'s testimony alone is sufficient to sustain Remker's convictions, corroboration was unnecessary. *See* Minn. Stat. § 609.347, subd. 1 (stating that the testimony of a complainant need not be corroborated in a criminal-sexual-conduct prosecution); *see also Hesse*, 281 N.W.2d at 492 (recognizing the constitutionality of Minn. Stat. § 609.347, subd. 1, and explaining that "the goals of the corroboration requirement [in a criminal sexual conduct case] are served by the jury requirement and by the trial judge's power to grant relief in cases in which the evidence is legally insufficient"). We nonetheless observe that D.M.'s testimony was corroborated by other witnesses who testified that D.M.'s parents were in Las Vegas at the time D.M. said the

abuse occurred, that Remker was staying at D.M.'s house at the time, that D.M. was upset when his mother called from Las Vegas, and that D.M. did not want Remker to stay at the house two years later when his parents were in San Francisco. *See State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) (“The testimony from others about [the complainant’s] demeanor, emotional condition, and change in behavior after the sexual assault also is strong corroborative evidence.”), *review denied* (Minn. June 29, 2004). In addition, Officer Thompson testified regarding D.M.’s prior statement describing the incident, which was consistent with D.M.’s trial testimony. *See State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990) (finding, in a prosecution for criminal sexual conduct, that the consistency of the complainant’s testimony and prior statements “as to all significant details to be strongly corroborative”), *review denied* (Minn. Mar. 16, 1990).

In sum, the evidence was sufficient for the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, to reasonably conclude that Remker was guilty of both counts of second-degree criminal sexual conduct. Thus, this court will not disturb the verdicts.

Affirmed.