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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1681**

State of Minnesota,
Respondent,

vs.

Steven Delray Cerkowniak,
Appellant.

**Filed January 13, 2014
Affirmed
Bjorkman, Judge**

Kanabec County District Court
File No. 33-CR-11-138

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Amy R. Brosnahan, Kanabec County Attorney, Mora, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his convictions of two counts of first-degree criminal sexual conduct and one count of attempted first-degree criminal sexual conduct. Appellant

argues that (1) the evidence is insufficient to support his convictions, (2) his trial counsel was ineffective, and (3) the district court erred by sentencing him on both counts of first-degree criminal sexual conduct because the record contains insufficient evidence that they were based on separate behavioral incidents. We affirm.

FACTS

In 2001 and early 2002, when M.P. was five years old, she occasionally spent the night at the home of M.S., her best friend. M.S. lived with her mother and her stepfather, appellant Steven Cerkowniak. “More than twice” during those sleepovers, while M.P. was sleeping next to M.S., Cerkowniak penetrated M.P.’s vagina with his hands. Cerkowniak also touched his penis to the outside of her vagina. And on one other occasion, Cerkowniak attempted to place his mouth on her vagina, but M.P. resisted and he gave up. These contacts stopped when M.P. and her father moved away in 2002. Later that year, M.P. told her mother about the incidents with Cerkowniak, but her mother did not believe her and did not take any action. In 2011, M.P. reported the incidents to her grandmother, who contacted the authorities.

Cerkowniak was charged with two counts of first-degree criminal sexual conduct (penetration and sexual contact with person under age 13), attempted first-degree criminal sexual conduct, and second-degree criminal sexual conduct. Sixteen-year-old M.P. testified at trial. To corroborate her testimony, the state also presented the testimony of the forensic interviewer who met with M.P. during the investigation, and two other teenage females who described incidents of sexual misconduct by Cerkowniak similar to the charged offenses. Cerkowniak’s mother-in-law, who resided with his

family February through August 2001, and M.S. both testified that M.P. never spent the night at their home. Cerkwoniak argued that M.P. must have fabricated the abuse or been abused by someone else.

The jury found Cerkwoniak guilty on all counts. The district court imposed two consecutive 144-month prison sentences for the first-degree criminal-sexual-conduct convictions and a consecutive 72-month sentence for attempted first-degree criminal-sexual-conduct conviction.¹ This appeal follows.

D E C I S I O N

I. Sufficient evidence supports Cerkwoniak’s convictions.

When reviewing a sufficiency-of-the-evidence challenge, we carefully analyze the record to determine whether the jury could reasonably find the defendant guilty of the offense charged based on the facts in the record and the legitimate inferences that can be drawn from them. *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009). In doing so, we view the evidence in the light most favorable to the conviction, presuming the jury believed the state’s witnesses and disbelieved any contrary evidence. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999).

First-degree criminal sexual conduct involves sexual penetration of or sexual contact with a person under the age of 13 by an actor who is more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a) (2000). Sexual penetration includes “sexual intercourse, cunnilingus,” and “any intrusion however slight into the

¹ The district court did not impose a sentence for the lesser-included offense of second-degree criminal sexual conduct.

genital or anal openings . . . of the complainant’s body by any part of the actor’s body.” Minn. Stat. § 609.341, subd. 12 (2000). And sexual contact, as it applies here, includes the intentional touching of the actor’s bare genitals or anal opening to the bare genitals or anal opening of the complainant “with sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(c) (2000) (defining sexual contact with a person under age 13).

The age difference between M.P. and Cerkowniak is undisputed, and M.P.’s testimony, viewed in the light most favorable to the verdict, establishes the other elements of the offenses. Her testimony that Cerkowniak used his fingers to touch the inside of her vagina establishes the elements of count one, first-degree criminal sexual conduct (penetration). Her testimony that Cerkowniak touched his bare penis to the outside of her bare vagina establishes the elements of count two, first-degree criminal sexual conduct (sexual contact with person under age 13). And her testimony that Cerkowniak removed her underwear and forced his head between her legs establishes count three, attempted first-degree criminal sexual conduct (sexual penetration). *See* Minn. Stat. § 609.17, subd. 1 (2000) (“Whoever, 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 is guilty of an attempt to commit that crime . . .”).

Cerkowniak argues that M.P.’s testimony is not sufficient to support his convictions because it was not corroborated and not credible. We disagree. First, a sexual-abuse victim’s testimony need not be corroborated to sustain a conviction. Minn. Stat. § 609.347, subd. 1 (2000). A conviction can rest on the testimony of a single credible witness. *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004). Second, we

defer to a jury's credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). Cerkwoniak has not identified any factors that warrant deviation from this deferential standard, such as exposure of a young victim to “highly suggestive” material, *see State v. Huss*, 506 N.W.2d 290, 292-93 (Minn. 1993), questionable behavior by the victim, *see State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978), or a stranger perpetrator identified with questionable procedures, *see State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969). Rather, the reasons Cerkwoniak urges for discrediting M.P.'s testimony—its “hesitant and equivocal” nature, its conflict with other witnesses' testimony, and the jury's partial rejection of it—are the types of credibility issues that are solely for the jury to decide. *State v. Reichenberger*, 289 Minn. 75, 79-80, 182 N.W.2d 692, 695 (1970); *see also Foreman*, 680 N.W.2d at 538-39 (distinguishing *Huss*, *Langteau*, and *Gluff*, and holding that victim's recantation did not render her testimony incredible or require corroboration).

Moreover, the record contains substantial corroborating evidence. The forensic interviewer testified that M.P. provided a consistent account that when she was “around five” years old and living with her father, a man named Steven touched and penetrated her vagina with his hand, had touched her vagina with his penis, and tried to touch his mouth to her vagina but gave up when she resisted. Also, unchallenged other-acts evidence established that Cerkwoniak engaged in markedly similar conduct—sexually touching the young friends of M.S. while they were sleeping next to her—on multiple other occasions. All of this testimony is consistent with M.P.'s trial testimony and

undermines Cerkwoniak's argument that M.P. fabricated her testimony or was mistaken about who molested her.

Based on our careful review of the record, we conclude that ample evidence supports Cerkwoniak's convictions.

II. Cerkwoniak's trial counsel was not ineffective.

To establish ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). An attorney acts within an objective standard of reasonableness by exercising the customary skills and diligence of a reasonably competent attorney under similar circumstances. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). There is a strong presumption that counsel's representation was reasonable. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Cerkwoniak contends his trial counsel was ineffective for failing to object when the prosecutor asked M.P. during redirect-examination to clarify where Cerkwoniak had touched her, an issue not specifically addressed during cross-examination. Whether to object is a matter of trial strategy, which we generally will not review for competence. *See Bobo*, 770 N.W.2d at 138. Our reluctance to scrutinize trial strategy is not a formalistic, "impregnable barrier to ineffective-assistance claims," *State v. Nicks*, 831 N.W.2d 493, 507 (Minn. 2013), but is "grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible," *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted).

Cerkowniak contends that the failure to object could not have been strategic because the prosecutor's question "elicited the missing element on the penetration count." We are not persuaded. We will not presume that counsel's actions are the result of inattention, particularly when the record indicates a reasonable basis for those actions. *See Pearson*, 775 N.W.2d at 165. Trial counsel may have concluded it was strategically advantageous not to object because an objection may have highlighted M.P.'s brief testimony as to penetration. Or counsel may have determined that an objection was not likely to succeed because the question was part of a line of questioning aimed at further clarifying M.P.'s testimony during cross-examination. *See State v. Whaley*, 389 N.W.2d 919, 926 (Minn. App. 1986) ("Generally, during re-examination, a witness may be fully examined as to all matters brought out in cross-examination.").

Cerkowniak has not demonstrated that defense counsel's failure to object to the state's redirect-examination was anything other than a reasonable trial strategy. Accordingly, we conclude he is not entitled to relief on this basis.

III. The district court did not err by sentencing Cerkowniak on both first-degree criminal-sexual-conduct convictions.

We review the decision to impose multiple sentences for an abuse of discretion and accept the district court's underlying factual findings unless they are clearly erroneous. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

A district court generally may not impose multiple sentences for offenses that were committed as part of a single behavioral incident. *See Minn. Stat. § 609.035*, subd. 1 (2000); *State v. Bauer*, 792 N.W.2d 825, 827 (Minn. 2011). Whether multiple offenses

arose from a single behavioral incident depends on whether the conduct establishing the offenses (1) shared a unity of time and place and (2) was motivated by a single criminal objective. *Bauer*, 792 N.W.2d at 828. “The determination of whether multiple offenses are part of a single behavioral act under section 609.035 is not a mechanical test, but involves an examination of all the facts and circumstances.” *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). The state has the burden of proving that the conduct underlying the offenses did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000).

Cerkowniak contends that the record lacks evidence that the conduct underlying the two first-degree criminal-sexual-conduct offenses “happened at different times.” We disagree. M.P. testified that she spent the night at M.S.’s home on multiple occasions. And “[m]ore than twice” Cerkowniak touched the inside of her vagina with his hands while she slept next to M.S. She also testified that Cerkowniak touched his bare penis to the outside of her bare vagina. She did not testify as to how many times the penile-vaginal contact occurred or whether it occurred at the same time as the incidents of digital penetration. But because M.P.’s testimony established multiple incidents of digital penetration, at least one of those incidents may be considered separate from the penile-vaginal contact for purposes of sentencing. On this record, we conclude the district court did not clearly err by finding that count one (digital penetration) and count two (penile-vaginal contact) occurred during separate behavioral incidents, and did not abuse its discretion by sentencing Cerkowniak on both convictions.

Affirmed.