STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0719

State of Minnesota,
Respondent,

vs.

Jerry Lee Pilsner,
Appellant.

Filed May 27, 2008
Affirmed
Halbrooks, Judge

Scott County District Court
File No. 70-CR-06-1994

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Justice Center, JC340, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent)

Richard L. Swanson, 207 Chestnut Street, Suite 235, P.O. Box 117, Chaska, MN 55318 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.*

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges his convictions of second- and fourth-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.343, subd. 1(g), (h)(iii), .345, subd. 1(b) (2004), on the ground of insufficient evidence. Because we conclude that the evidence is sufficient to support the convictions, we affirm.

FACTS

Prior to the spring of 2005, B.M. spent every other week with her mother, T.P., and her stepfather, appellant Jerry Lee Pilsner. Three other children lived with appellant and T.P.: A.P., their biological son; N.M., T.P's son; and S.P., appellant's daughter from a previous relationship. The children and appellant sometimes engaged in play fighting, tickling, wrestling, and "ice-cube wars" that involved dropping ice cubes down each others' shirts and pants while wrestling.

B.M. stated that some of this wrestling was "fun." But around the time that she became 14 years old, she noticed changes in the "wrestling." After pinning B.M. down, appellant would put ice down B.M.'s pants and "make sure that it would go on my vagina and hold it there." According to B.M., this type of contact occurred about once a week during the weeks she spent with appellant and continued until B.M. moved to her father's home on a full-time basis in the spring of 2005. B.M. estimated that this sexual contact occurred approximately 30 times. Appellant also engaged in sexual talk with B.M., commented about his sexual activities and relationship with T.P., and once directed B.M.

to engage in a sexual conversation with one of his co-workers. B.M. did not report appellant's actions to anyone at the time.

B.M. was suspicious that appellant might be engaging in similar conduct with J.W., her best friend who often visited at appellant's home. B.M. saw appellant wrestling with J.W. on a few occasions and observed appellant on top of J.W. in a manner similar to the way he would pin B.M. Because B.M. was unsure if appellant was touching J.W., she asked her. J.W. responded that appellant was touching her sexually, and it made her uncomfortable. B.M. and J.W. never discussed reporting the situation to anyone.

In the spring of 2005, B.M. and N.M. moved out of their mother's home and moved in with their father. B.M. stated that her reason for moving was her discomfort with her mother's abuse of alcohol and the general turmoil in the home. After B.M. moved in, B.M.'s father noticed that she seemed unusually uptight and tense and had increasing behavioral and anger issues. Normally a straight-A student, B.M.'s grades began to decline in the fall of 2005. On November 17, 2005, B.M. became very upset after a minor accident while parking the car in the garage at her father's home. When B.M.'s father asked her what was going on, B.M. told him that appellant had been sexually touching her for the past few years and that appellant had put ice down her pants and touched her "privates." B.M.'s father immediately called the police. When B.M. told her father that appellant had touched J.W. in a similar manner, her father contacted J.W.'s mother. In response, J.W.'s mother brought J.W. to B.M.'s home to speak to the police.

Scott County Detective Nick Adler initially met with B.M.'s father and then spoke with B.M. B.M. told Detective Adler that appellant had sexual contact with her over a period of several years. According to Detective Adler, B.M. seemed "sad" when she spoke of appellant's conduct. Detective Adler also spoke with J.W. at B.M.'s home. J.W. told Detective Adler that appellant wrestled with her in the same way that he did with B.M. and that he had put ice cubes and his hand down her pants in her vaginal area. J.W. appeared upset and was crying during her conversation with Detective Adler.

Scott County Human Services assisted in the investigation and interviewed B.M., J.W., and other family members. T.P. and S.P. declined to speak with the investigators. In addition to describing how appellant put ice down her pants, B.M. also told investigators that appellant put food, including bread and trail mix, down her pants when the ice maker was broken. Following their investigation, Scott County Human Services concluded that maltreatment had occurred.

The county attorney filed a complaint on January 18, 2006, charging appellant with: (1) felony second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2004); (2) felony second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2004); and felony fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(b) (2004).

Appellant waived his right to a jury trial and tried the matter to the district court. The district court found appellant guilty of all three charges. "Due to the complexity of [the] case, involving multiple felony level charges, multiple witnesses, and multiple days of testimony," the district court extended the time in which to issue its findings of fact in

support of the verdict. The district court issued findings on December 1, 2006. This appeal follows.

D E C I S I O N

Appellant argues that the evidence presented at trial is insufficient to support his convictions. Appellant does not dispute that he was engaged in the "wrestling" described at trial. But he asserts that the evidence does not support the verdict that his actions were sexual and violated criminal-sexual-conduct laws.

In a challenge to the sufficiency of the evidence, an appellate court will not disturb the jury's verdict if the jury, considering the presumption of innocence and the requirement of proof beyond a reasonable doubt, could have reasonably concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). An appellate court reviews 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). In reviewing determinations of credibility, the finder of fact is charged with the exclusive function of weighing the credibility of witnesses, particularly where conflicting testimony is important. *State v. Kramer*, 668 N.W.2d 32, 38 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). When reviewing a bench-trial verdict, an appellate court conducts the same analysis that it would in reviewing a jury verdict. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999).

B.M. testified at length about her history with appellant. According to B.M., appellant was always very physical with her, and would wrestle and play with them on a

regular basis. B.M. stated that she initially enjoyed the wrestling matches, during which appellant would hold her down and tickle her, finding the interaction to be "fun."

But B.M. stated that as she got older, the wrestling matches changed. B.M. told the district court that instead of appellant dropping ice cubes down her pants, he began to put his hand down her pants and hold ice against her vaginal area. According to B.M., this began when she was 14 years old and took place approximately once a week until she moved out. Appellant argues that the open nature of their "wrestling" is evidence that it was not sexual. But B.M. testified that "if other children were around, [appellant] would position himself above her so that the others would not know what was happening." B.M. stated that she tried not to be alone with appellant but did not tell anyone because she was afraid of being disbelieved; in addition, she did not want to upset her mother or get into trouble.

In addition to her testimony about appellant's sexual contact, B.M. testified that appellant engaged in sexual talk with her. According to B.M., appellant commented about his sexual activities and his sexual relationship with T.P. B.M. also testified that appellant called her names, including "slut," "skank," and "whore," and she described a time when appellant directed her to engage in sexual talk with one of his co-workers on the telephone. As her relationship with appellant changed, B.M. felt increasingly confused, and she said "I didn't know what to do." Considering B.M.'s testimony concerning her reasons for not telling anyone about the sexual abuse, the district court found that it was "reasonable to conclude that [B.M.'s] decision to vacate [appellant's] residence in the Spring of 2005 was based on more than just her mother's problems with

alcohol. B.M.'s decision to distance herself from [appellant] at that time is powerful circumstantial evidence that supports her testimony about the sexual abuse."

Although their relationship had begun to deteriorate, B.M. testified that when her mother suggested a birthday dinner in May 2006, B.M. was excited and "glad that she wanted to do something with me." B.M. stated that at dinner T.P. brought up B.M.'s report of sexual abuse and insisted that appellant had done nothing sexual. According to B.M., her mother "kept saying over and over" that "'You know he didn't do it. Cops like to pressure you for things that—I know that your dad is the one telling you to say it,' that he didn't want me around [you]." B.M. felt "uncomfortable," and so she stated at one point, to "get it over with," that "maybe he didn't" mean anything sexual. B.M. stated that she made this statement to her mother because she "was sick of her talking about it," and she felt pressured.

T.P. pressured B.M. again during a phone call (that T.P. secretly recorded at appellant's attorney's request) to state that appellant had not done anything of a sexual nature. B.M. denied ever recanting her report of sexual abuse. B.M. acknowledged that she said, "maybe" he didn't mean it sexually, but she never denied that it happened. When questioned why she did not tell her mother that appellant had molested her, B.M. responded, "Because she's my mom. I didn't want to offend her. I wanted to talk to her, but I didn't want to talk [to her] about that."

Appellant introduced the audio recording of the phone conversation between T.P. and B.M. at trial, representing that it was a copy of the original recording and that the prosecution had been provided with a copy. The prosecutor did not object to the

recording, and the district court played it in court. During the playback, the district court became concerned that the recording had been redacted. After the district court inquired about the completeness of the recording, T.P. acknowledged that she had edited the 60-minute recording to a 15-minute compilation of "bits and pieces." The district court then ordered appellant to produce the recording in its entirety.

After listening to the complete conversation, the district court found that T.P. tried to "entice B.M. to recant by offering her the opportunity to go on vacations with the family and to have unrestricted access to a boyfriend of whom her biological father disapprove[d]." The district court disagreed with appellant's argument that B.M.'s statements on the tape constituted a recantation. The district court found that "[B.M.] was simply agreeing with T.P. that she had made a statement at an earlier time in response to pressure from T.P. to say that [appellant's] acts 'might' not have been sexual." The district court concluded its analysis of the recording by saying, "T.P.'s questioning of B.M. is relentless and desperate; B.M.'s reluctance to give in to T.P.'s pressuring of her is painfully obvious."

Appellant argues that B.M.'s testimony was "inconsistent" and contends that B.M. made up the story of sexual abuse to avoid trouble with her father. But the district court made very specific findings regarding B.M.'s testimony as well as the conflicting evidence presented by appellant. The district court found B.M.'s testimony at trial to be "direct and straightforward, with occasional emotional moments during which she was crying." In addressing B.M's description of the sexual abuse, the district court stated that it was "detailed and distinctive, indicative of personal experience as opposed to a

fabrication. Notably, she consistently reported the abuse to multiple individuals, including her father, law enforcement, and child protection personnel, and her testimony at the trial was essentially consistent with her earlier statements." The district court found B.M.'s testimony to be "credible" and noted that her "explanation for her delayed reporting was reasonable, given her age and circumstances." Although appellant suggests that we should question B.M.'s credibility, it is the function of the fact-finder to judge the credibility of witnesses, particularly where there is conflicting testimony, and we defer to those judgments. *Kramer*, 668 N.W.2d at 38.

J.W. testified that she initially enjoyed spending time at appellant's residence with her best friend, B.M. J.W. stated that she was "uncomfortable with the wrestling matches" and that she was not used to that kind of physical interaction and found it to be "weird." J.W. testified that she participated in some wrestling and tickling with appellant but was increasingly uncomfortable with his touching of her and sitting on her. J.W. testified that appellant would put ice down her pants as well as B.M.'s. According to J.W., appellant's contact with her became sexual when she was 15 and he began holding ice over her vaginal area inside and outside of her underwear. She testified that she could feel appellant's hand on her vaginal area, but it was hard to get away, despite her attempts to move. J.W. also stated that appellant had touched her breasts with his hands on multiple occasions. J.W. told the district court that she was "creeped out" and felt that it was not right but did not tell her parents because she was certain they would not let her see B.M.

Again, appellant argues that J.W.'s failure to report is an indication that her testimony is inaccurate and should not be found credible. But the district court found J.W.'s testimony "straightforward and believable," and stated that it "corroborates the testimony of B.M." The district court noted that there was "no evidence that [B.M. and J.W.] coordinated their statements to the police or planned their testimony together." Instead, the testimony "indicates that they had minimal discussions about the abuse at the time that it was happening and that they had essentially no discussions about it between that time and the time of their separate interviews with Detective Adler."

To support his theory that his conduct was not sexual, appellant called as witnesses his daughter, S.P.; C.B., one of S.P.'s friends; and A.M., a former friend of B.M. S.P. testified that she had never observed any inappropriate sexual contact between appellant and B.M. S.P. confirmed the "wrestling" and ice-cube wars that took place but asserted that it was all "fun." But S.P. admitted on cross-examination she had talked with both appellant and T.P. about the case prior to her testimony. S.P. acknowledged that she was unaware of any reason B.M. had for fabricating her story of sexual abuse. And the district court noted that appellant "stared at S.P. intently during her testimony and that S.P. seemed cautious and somewhat evasive on the witness stand." In general, the district court found the testimony of S.P., C.B., and A.M. to be "characterized by inconsistencies, bias, and minimal personal knowledge on the part of C.B. and A.M."

The district court found the prosecution's witnesses credible and appellant's actions characterized by "obvious and unartful attempts to manipulate the presentation of evidence . . . [which] significantly undermines the credibility of his case and testimony."

The record supports the findings of the district court, and viewed in a light most favorable to the conviction, the record clearly supports the verdict.

Affirmed.