STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0761

State of Minnesota,
Respondent,

vs.

Marion Joseph Ash III,
Appellant.

Filed August 5, 2008
Affirmed
Halbrooks, Judge

Itasca County District Court
File No. 31-CR-06-4516

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

John J. Muhar, Itasca County Attorney, Itasca County Courthouse, 123 Fourth Street Northeast, Grand Rapids, MN 55744 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2006), on the ground that the evidence is insufficient to support his conviction. In addition, appellant argues that his conviction should be reversed because (1) the district court refused to allow him to present evidence of the victim's prior sexual conduct, (2) the district court abused its discretion by allowing the victim's special-education teacher to testify about the victim's IQ, and (3) the prosecutor committed prosecutorial misconduct. We affirm.

FACTS

Appellant Marion Ash first met A.O. when he noticed a "for sale" sign at her family's home. A.O. was 17 years old and enrolled in special-education classes in the 11th grade. According to the trial testimony of Denise Thompson, A.O.'s special-education teacher, A.O.'s IQ score was 52, which classifies her as "moderately mentally impaired."

Appellant, who was then 43 years old, delivered newspapers, and the home where A.O. lived with her parents was on his delivery route. A boy helping appellant on this paper route suggested that A.O. might be a good person to replace the boy when he accepted another job. Appellant took the boy's suggestion, and after speaking with A.O.'s parents, they agreed that A.O. could help appellant deliver newspapers on Saturday mornings.

A.O. initially struggled with the work, but according to appellant, she ended up doing very well. After approximately one month of delivering newspapers, A.O.'s parents decided that it was easier for A.O. and one of her sisters to stay at appellant's house on Friday nights because the work involved very early Saturday morning hours. As they worked together, a friendship developed between A.O. and appellant.

This friendship grew more intimate and eventually became romantic. Appellant testified, "One day we were just standing there talking and the next second we're kissing." Appellant and A.O. had sexual intercourse on two occasions, which appellant stated was "part of a normal relationship." Appellant testified that he knew that A.O. was in special-education classes, but stated that he felt that she had "basically the same limitations" as he did, including "problems with reading and writing and math . . . three of the hard—hardest subjects out there." A.O.'s mother testified that she told appellant that A.O. had a disability and offered him the opportunity to look at her individualized education plan (IEP). Although appellant knew that A.O. had these difficulties, he testified that she was "just as normal as anybody else."

When A.O. told her parents about the relationship with appellant, A.O.'s mother contacted the police. Officer Gregory Snyder of the Itasca County Sheriff's Department spoke with A.O.'s mother on October 23, 2006, and was present during an interview with A.O. on October 25, 2006. In that interview, A.O. told police about the sexual intercourse and said that appellant took a nude photo of her on a digital camera. According to Officer Snyder, A.O. indicated that she did not agree to the photo and only saw it through the back display of the digital camera. Officer Snyder also reported that

A.O. indicated that the times appellant had sex with her, she felt it was forced on her. Based on this information, police obtained a search warrant for appellant's residence. Police investigated appellant's residence and recorded appellant admitting that he had sex with A.O.

On October 27, 2006, A.O.'s mother told a police investigator that A.O. had romantic feelings for appellant and that the sexual intercourse had been consensual. A.O.'s mother apologized for wasting the officers' time, but the investigator told her that he would continue the investigation. A complaint was filed, and a warrant was issued for appellant's arrest. Appellant was charged with two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2006).

Before trial, appellant stipulated that he and A.O. had sexual intercourse. Appellant also sought to have A.O.'s prior sexual activity entered into evidence and argued that evidence of her prior sexual activity established that A.O. had the capacity to consent. The prosecutor argued that the rape-shield law prohibited admission of A.O.'s prior sexual activity. The district court agreed and refused to admit any such evidence.

Appellant testified at trial that he believed that A.O. knew what sex meant and that she understood the difference between rape and consensual sex. A.O.'s parents also testified that they had talked to A.O. about sex, and she understood what "yes and no means or force." A.O. took the stand at trial but had a great deal of difficulty testifying, often responding that she "did not remember" to questions. Thompson testified about A.O.'s ability level in school, her difficulty with basic skills, and the correlation between A.O.'s IQ score and her ability to function in school.

In his rebuttal argument, the prosecutor commented on the burden required of the prosecution to convict appellant. Appellant objected off the record, but the district court allowed appellant to note his objection on the record after the jury began its deliberations. The jury found appellant guilty of both charges. At sentencing, the prosecutor sought consecutive sentences, but the district court denied that motion and sentenced appellant to concurrent sentences of 74 and 108 months. This appeal follows.

D E C I S I O N

I.

Appellant argues that the evidence presented at trial was insufficient to support the jury's verdict because the evidence did not support the conclusion that A.O. lacked the capacity to give reasoned consent to sexual intercourse. In considering a claim of insufficient evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jurors to reach the verdict that they did. *State v. Brown*, 732 N.W.2d 625, 628 (Minn. 2007). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). Each sufficiency-of-the-evidence challenge is viewed on a case-by-case basis. *Id.* (citing *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979)).

Appellant was convicted of two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2006). This specific provision of the statute criminalizes sexual penetration when the accused "knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically

helpless." Minn. Stat. § 609.344, subd. 1(d). A "mentally impaired" person as that term is used in Minn. Stat. § 609.344, subd. 1(d), is "a person, as a result of inadequately developed or impaired intelligence or a substantial psychiatric disorder of thought or mood, [who] lacks the judgment to give a reasoned consent to sexual contact or to sexual penetration." Minn. Stat. § 609.341, subd. 6 (2006). Because appellant stipulated that he and A.O. had sexual intercourse on two occasions, the only issue before the jury was whether A.O. had the judgment to give reasoned consent.[1]

Appellant asserts that evidence of A.O.'s cognitive abilities is not sufficient, by itself, to prove that she lacked the capacity to consent to sexual intercourse. He argues that because A.O.'s parents testified that she had the capacity to consent, his conviction lacks sufficient support in the record. But A.O.'s father's testimony was equivocal concerning A.O.'s capacity to reasonably consent to sexual intercouse. When asked if A.O. would ever be competent to consent to sex, he answered, "I don't know. I guess if that's judged on that, then I guess I shouldn't have it either, because I can't read and spell and I have disabilities, but that don't mean that every disability I have is judged [sic] my whole life period." A.O.'s father added, "She's not incapable of doing everything." When asked if A.O. knows the difference between consensual sex and non-consensual sex, A.O.'s father replied that "[s]he knows what it is for that part of it, yeah."

[1] From the record on appeal, it does not appear that appellant argued that he did not know that A.O. was mentally impaired. The record suggests the contrary—that he was aware of A.O.'s mental disability. Because appellant concedes that fact in his argument, we do not address the sufficiency of the evidence on that element.

A.O.'s mother testified that A.O. has the ability to consent to sexual relations and that she had talked to A.O. about sex "so that when other kids or other people would approach her, she wouldn't look like she didn't know anything." According to A.O.'s mother's testimony, A.O. "knows the difference between rape and consensual sex" and "understands what it means to say yes to having [sex] or no to not having [sex]." Admittedly, A.O.'s mother's testimony is in contradiction to the verdict, but in a sufficiency-of-the-evidence review, we must assume the jury was persuaded by other evidence. *Taylor*, 650 N.W.2d at 206; *In re Welfare of J.R.M.*, 653 N.W.2d 207, 210 (Minn. App. 2002).

A.O. testified that she has an understanding of the consequences of sexual intercourse, what rape is, and her ability to say no to sexual intercourse. But A.O. was never asked directly if she consented to sex with appellant. She had a difficult time testifying at trial, and the jury observed her struggle to understand the questions posed to her. The jury was entitled to draw its own conclusion that A.O.'s mental abilities rendered her incapable of reasonably consenting to sexual activity with appellant based on her limited communication skills, her demeanor, and her difficulty in understanding and answering questions. *State v. Hitch*, 356 N.W.2d 820, 821-22 (Minn. App. 1984).

The jury also had the benefit of Thompson's testimony about A.O.'s abilities in school. Thompson testified that A.O. has difficulty crossing the street safely, reading directions, performing basic math operations, and communicating effectively, as well as performing basic life skills like shopping in a store and money management. Thompson did not testify about A.O.'s ability to consent. Although there is conflicting evidence,

resolving all conflicts in evidence in favor of the verdict, our careful analysis of the record demonstrates that the jury could have reasonably concluded that appellant was guilty of the charged offenses. *State v. Hooper*, 620 N.W.2d 31, 39 (Minn. 2000).

Appellant asserts that Thompson's testimony is insufficient to support the conclusion that A.O. is "mentally impaired" as defined by Minn. Stat. § 609.341, subd. 6. He argued during trial that, without the benefit of a psychological expert, the state could not meet its burden of proof on that element. But appellant misstates the current state of the law on the necessity of expert testimony in a case of this nature. "There is a nationwide consensus that expert testimony" to demonstrate an inability to form reasoned consent "is not required." *People v. Thompson*, 48 Cal. Rptr. 3d 803, 810 (Cal. Ct. App. 2006) (citing *Jackson v. State*, 890 P.2d 587, 591-92 (Alaska Ct. App. 1995); *see also Commonwealth v. Fuller*, 845 N.W.2d 434, 439-40 (Mass. App. Ct. 2006), *review denied* 848 N.E.2d 1211 (Mass. June 7, 2006); *State v. Kingsley*, 383 N.W.2d 828, 830 (N.D. 1986); *State v. Summers*, 853 P.2d 953, 956-57 (Wash. Ct. App. 1993); *State v. Perkins*, 689 N.W.2d 684 (Wis. Ct. App. 2004)).

Although this is a close case, we conclude that the evidence is sufficient to support the conviction, even without expert testimony concerning whether A.O. is capable of giving reasoned consent to sexual contact. *See* Minn. Stat. § 609.341, subd. 6 (2006). Because the factual inquiry required by the statute is complex and nuanced, it is foreseeable that, in a different case, the absence of expert testimony might cause this court to conclude that the evidence is insufficient to support a conviction.

It seems beyond dispute that expert testimony concerning the thought processes of a mentally disabled person would assist the trier of fact in making a finding on the issue of capacity to consent to sex. *See* Minn. R. Evid. 702; *State v. Hitch*, 356 N.W.2d 820, 822 (Minn. App. 1984) (affirming admission of state's expert evidence concerning mentally disabled victim's "difficulty in appraising the nature of her [sexual] conduct"); *cf. State v. Bouwman*, 328 N.W.2d 703, 705 (Minn. 1982) (holding that, in light of insanity defense, expert psychiatric testimony is admissible on issue of criminal defendant's capacity to form intent). This case is different from *State v. Frank*, in which the supreme court affirmed the exclusion of evidence concerning the effects of "excessive alcohol consumption by the victim" of criminal sexual conduct on her "ability to withhold consent" to sex, reasoning that "[m]ost jurors have some experience with the effects of excessive alcohol consumption." 364 N.W.2d 398, 400 (Minn. 1985). In contrast, it is unlikely that a juror is or has been mentally disabled, and few jurors are likely to have experience assisting a mentally disabled person with the decision whether to consent to sex.

Furthermore, it appears that a mentally disabled person's capacity to consent to sex depends on several variables and is not subject to bright-line determinations. *See* Note, *Criminal Law & the Capacity of Mentally Retarded Persons to Consent to Sexual Activity*, 83 Va. L. Rev. 799, 818-22 (1997). The social science literature appears to indicate that, "although IQ can be related to sexual knowledge, relying heavily upon IQ as an 'overall determinant' of capacity to consent is unwise" because "[r]eliance on IQ disregards adaptive functioning, a key definitional component of mental retardation, and

it also does not take into account the effect that sex education might have on consensual ability." *Id.* at 821 (citing American Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* 39-40 (4th ed. 1994)). Although the well-recognized concept of "mental age" may be a "better predictor of sexual knowledge than IQ," it "is subject to the same criticisms" as IQ. *Id.* (citing Marita P. McCabe, *Sex Education Programs for People with Mental Retardation*, 31 Mental Retardation 377, 382 (1993)). We therefore encourage prosecutors and defense counsel to consider such testimony.

The nature of the factual inquiry also means that the court's opinion does not necessarily preclude a finding, at some time in the future, that A.O. has the capacity to consent to sex. As a practical matter, this court's affirmance of appellant's conviction (assuming it is known and understood) will tend to discourage other persons from engaging in sexual conduct with A.O., even under the best of circumstances and with the best of motives. But our opinion need not be read to foreclose the possibility that, with additional time, teaching, and life experience, A.O. someday might be able to decide whether she wishes to engage in sexual conduct with another person.

II.

Appellant argues that the district court abused its discretion by refusing to allow him to present evidence of A.O.'s prior sexual activity as a means of establishing her capacity to consent. "Rulings on evidentiary matters rest within the sound discretion of the district court, and we will not reverse a district court's evidentiary ruling absent a clear abuse of discretion." *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004).

Minn. R. Evid. 412(1), commonly known as the rape-shield rule, generally prohibits in a "prosecution for acts of criminal sexual conduct . . . evidence of the victim's previous sexual conduct." *See also* Minn. Stat. § 609.347, subd. 3 (2006) (the legislative codification of Minn. R. Evid. 412).

Minn. Stat. § 609.347, subd. 3, states:

> In a prosecution under sections 609.109, 609.342 to 609.3451, 609.3453, or 609.365, evidence of the victim's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order under the procedure provided in subdivision 4. The evidence can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature and only in the circumstances set out in paragraphs (a) and (b). . . .
>
> (a) When consent of the victim is a defense in the case, the following evidence is admissible:
>
> (i) evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and
>
> (ii) evidence of the victim's previous sexual conduct with the accused.
>
> (b) When the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct is admissible solely to show the source of the semen, pregnancy, or disease.

Despite the clear language of the statute, when due process, the right to confront an accuser, or the right to present evidence conflict with Minn. Stat. § 609.347 (2006), those rights will allow admission of evidence otherwise excluded by the statute. *State v.*

Friend, 493 N.W.2d 540, 545 (Minn. 1992); *see also State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986) (stating that the rule should not prohibit admission of evidence when it is constitutionally required by the defendant's right of due process, the defendant's right to confront his accusers, or his right to offer evidence in his own defense). But even when constitutional issues are present, the district court must balance the probative value of the evidence against the potential for unfair prejudice. *Benedict*, 397 N.W.2d at 341.

Here, Minn. Stat. § 609.347 is a bar to the admission of evidence of A.O.'s prior sexual activity unless the district court determined that such evidence was necessary to vindicate appellant's constitutional rights and that admission of the evidence would not be more unfairly prejudicial than probative. *Id.* at 341. The district court stated that it failed to see how "the fact that [A.O.] may or may not have had sex with a 15-year-old on a prior occasion indicates that she has that ability to reasoned consent." The district court concluded that the probative value of that evidence was "minute compared to the prejudice." The district court was within its discretion in determining that the proffered evidence of A.O.'s single act of sexual intercourse with a 15-year-old did not have a level of probative value to help determine whether A.O. had the capacity to consent to sexual intercourse with appellant that outweighed the potential of unfair prejudice of such evidence.

III.

Appellant argues that the district court abused its discretion by allowing Thompson to testify concerning A.O.'s IQ score because Thompson was not qualified to do so by training or experience. On appeal, this court reviews for an abuse of discretion a

district court's determination of whether a witness is qualified to offer expert testimony. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

Minn. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A witness may qualify to testify as an expert on the basis of formal education or knowledge gained through occupational experience. *Kastner v. Wermerskrischen*, 295 Minn. 391, 394, 205 N.W.2d 336, 338 (1973). The qualifications of an expert generally do not go to the admissibility of the opinions but instead to their weight. *See Ruether v. State*, 455 N.W.2d 475, 477 (Minn. 1990).

To be admissible, expert testimony must be helpful to the finder of fact. *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989); *Helterbridle*, 301 N.W.2d at 547. "If the jury is in as good a position to reach a decision as the expert, expert testimony would be of little assistance to the jury and should not be admitted." *Hennum*, 441 N.W.2d at 798 (quoting *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982)).

The district court handled this matter as a pretrial issue. The district court conducted an in-camera review of the evidence that the prosecutor sought to admit through Thompson and heard arguments regarding the admissibility of her testimony. Although the district court concluded that the IQ-test report was reliable hearsay, the district court excluded the report itself. The district court allowed Thompson to testify about the report and her reliance on it, as well as the consistency of Thompson's

observations of A.O. with the IQ-test results. Thompson acknowledged in her testimony that she was not qualified to administer an IQ test, but stated that she regularly uses the results of such tests to develop educational programs for her students. Thompson was also asked by the prosecutor about the accuracy of A.O.'s IQ score of 52:

> Q: So what is your opinion, is that IQ score accurate based upon your knowledge?
>
> A: Yes. IQ scores usually do not change very much over the years. And in fact, in our special ed. testing, we only have to have three on record, and after that—which usually happens at a young age, because students are identified, not always, but most of the time in my—for my students at a young age. And once we get three on record, we just have to do a record review, because they do not anticipate that score to change at all, and I do not expect hers to change anyway.
>
> Q: Well, do you—based upon what you know about [A.O.], do you think that that score is—is consistent—is that consistent with your opinion?
>
> A: Absolutely. Everything that was in that report, everything that I have seen that score is definitely on track as far as appropriately displaying her performance and her skills.

We conclude that the scope of this evidence was sufficiently limited by the district court. Thompson was never asked about A.O.'s capacity to reasonably consent to sexual activity. She testified about the meaning of A.O.'s IQ score within the confines of her special-education program, based on Thompson's 20 years of experience. Therefore, the district court properly exercised its discretion in allowing Thompson to testify in this limited way.

IV.

Appellant's last claim on appeal is that the prosecutor committed misconduct during his rebuttal argument that warrants reversal of appellant's convictions. Appellant asserts that the prosecutor made comments that impermissibly shifted the burden of proof to the defense, focusing specifically on the prosecutor's following statements:

> Remember that CSI effect we talked about, folks?
>
> Apparently, the defense is of the view that you can't—you couldn't possibly find the defendant guilty if there's no psych eval here. Remember that?
>
> You're supposed to make the decision based upon the evidence that's presented to you. All these doo-dads and gadgets are not here. There's no—there's no psychological evaluation on the narrow issue of whether—of whether [A.O.] can give—can give reasoned consent to sexual penetration, and you've got to tell—you've got to decide based upon what you have. Yep, you do. And you guaranteed me you're—you're not going to hold me to a standard beyond a reasonable doubt. That's what the law is.
>
> . . . .
>
> Don't hold the State to a burden like CSI. The Judge tells what you what the—what the law is. The instructions are proof beyond a reasonable doubt, not perfect case, not watch the evening news at 9:58.

Read in the context of the prosecutor's entire rebuttal argument, this is no more than a request that the jury not look for something beyond the state's burden of proof. *See State v. Walsh*, 495 N.W.2d 602, 607 (Minn. 1993) (stating that when reviewing alleged

prosecutorial misconduct during a closing argument, a reviewing court should look at the whole argument in context, not just selective phrases or remarks).

Affirmed.