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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0314

State of Minnesota,
Respondent,

vs.

Jose Luis Teodoro-Bernal,
Appellant.

Filed April 7, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-07-102487

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

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

Considered and decided by Ross, Presiding Judge; Halbrooks, 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 third-degree criminal sexual conduct on the grounds that (1) none of the mandatory waiver conditions were met before he was found guilty by an 11-person jury and (2) the state presented no corroborating evidence for the victim's trial testimony, which appellant alleges conflicted with her prior statements and was internally inconsistent. Appellant also raises additional issues in his supplemental pro se brief. We affirm.

FACTS

Appellant Jose Luis Teodoro-Bernal was charged with third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2006). The charge stemmed from offenses that were alleged to have occurred from January 1 through May 20, 2007, against A.M. The district court found appellant competent to proceed, and his jury trial commenced October 23, 2007.

The state's first witness was A.M., appellant's half-sister. A.M. testified through an interpreter and stated that she was 43 years old. A.M. came to the United States from El Salvador in November 2006 to find work. She has a first-grade education and can neither read nor write. She testified that she is not good with dates, times, or numbers. Appellant, who was in the United States legally, paid for A.M. to be smuggled into California. Appellant met A.M. in Los Angeles, and they flew to Minneapolis, where appellant resided.

In Minneapolis, A.M. and appellant lived in his van; sometimes they stayed with appellant's friend, P.S., in a room rented by the latter. After one or two weeks, P.S. moved out of the rooming house. Appellant and A.M. continued to live in the room that P.S. had vacated. A.M. testified that appellant's behavior toward her changed after P.S.'s departure. He became "really jealous," "angry," and did not want A.M. to have friends of either sex.

At some point after P.S.'s departure, appellant kissed A.M. on her mouth, making her uncomfortable. On a different occasion, appellant, who slept on the floor of the room, got into bed with A.M., hugged her, told her that he loved her and that they should have sexual relations. A.M. refused because appellant was her brother. But she testified that appellant "would get mad or he would threaten me." Specifically, appellant told her that she did not know anyone in Minneapolis, that she was alone, that he would prevent her from going to work, that he would take away her telephone, that he would not let her communicate with her children in El Salvador, that he would kill her family, and that he would kill her. A.M. stated that she felt "bad" and had sexual intercourse with appellant "because I knew that if I didn't, he would throw me out on the street and I didn't have anyone here for me." A.M. did not remember the date of this incident.

A.M. estimated that appellant sexually assaulted her "20 or 30 times" between January and March 2007. She also stated that she did not "really remember, because during that time I just felt like I was going crazy." A.M. testified that the sexual assaults consisted of vaginal intercourse, her "jerk[ing] his penis . . . with [her] hand," and one

instance of appellant "put[ting] his mouth on [her] vagina." A.M. also provided the jury with detailed descriptions of appellant's sexual contact with her.

A.M. stated that she "would tell [appellant] no, that [she] didn't like it," and that she never consented to sexual contact with appellant. She testified that "every time he did it to me I felt sick" and that the sexual assaults caused her physical pain. A.M. testified that appellant obtained pills for her to combat the pain. A.M. described her life as "a living hell" and "an alley with no exit." She testified that she had contemplated suicide.

When A.M. threatened to report the assaults to her relatives, appellant told her that "he was a man and that as a woman [she] was beneath him." She testified that she continued to live with appellant because she "had nowhere to go." A.M. did not think she could tell anyone about the sexual assaults because "it was . . . shameful. He was my brother." A.M. testified that appellant threatened to kill her and her children (who were in El Salvador) if she told anyone about the assaults. Appellant also told her that he had made inquiries into the price of having A.M.'s family killed. A.M. stated that she was terrified appellant would follow through on these threats.

A.M. testified that on March 12, 2007, she and appellant argued about the sexual assaults. When appellant tried to rape her again, she "just reached [her] limit. [She] couldn't take that anymore." She grabbed two knives from a table and "threw [herself]" at appellant to scare him. A.M. stated, "I don't know how [but] he got the better of me. I don't know like if it was a kick or a shove or what but I somehow fell against the corner

of some furniture." Appellant fell on top of A.M. Her back was injured, and appellant took her to the hospital. Appellant told A.M. not to say anything to the hospital staff.

At the hospital, A.M. was asked—outside of appellant's presence—if she had been raped. She testified that she said no because she "was scared. I mean where was I gonna go? I mean it was dangerous to say anything. And where was I gonna go? I had this like waist brace that they put on. I couldn't walk, I couldn't move."

Some days after her return from the hospital, appellant again tried to rape A.M. A.M. then asked the landlord if she could change rooms because she "didn't want to live with [appellant] anymore." Appellant moved out that same day, so A.M. did not change rooms. After appellant's departure from the rooming house, A.M. had a conversation with the landlord about why she had wanted to change rooms. A.M. told the landlord that appellant was abusing her. When the landlord asked A.M. why she did not contact the police, A.M. said that she did not have anywhere to go.

A.M. eventually contacted law enforcement "because [the landlord] made [A.M.] feel more empowered to call the police." She also stated that she called the police because appellant "called me so much that my telephone was suspended." A.M. testified that she called 911 "22 or 25 days" after her hospital stay. She told the operator that one day, appellant grabbed her by force and raped her; that she was able to get up and take two knives, but didn't "do anything" to appellant; that appellant pushed her, she fell, and she hurt her spine. She told the operator that this had happened about a month ago. She asked the operator if appellant could be arrested or deported to El Salvador.

At some point after the 911 call, a police officer[1] visited A.M. A.M. could not give the officer an exact date or time that she was raped. Appellant's attorney asked A.M. on cross-examination if she remembered telling the officer that "it happened six to seven times [over] approximately a 2-month period." A.M. stated that she did not remember "because I, like at that moment, you know, I felt like I was going crazy, like I was just going out of my mind." A.M. told the officer that she had been raped vaginally by appellant and that she had been forced to masturbate him. She could not give the officer a reason why she had waited to call 911, and she was not sure if she had told the officer about her conversations with the landlord.

At some point, A.M. obtained an order for protection against appellant. In her affidavit, A.M. stated that appellant had been raping her since January 2007, but appellant testified that she "didn't say the exact date or month" because she didn't remember. She did not know how "January of 2007" came to appear in the affidavit but suggested that the translator may have been confused.

During cross-examination, appellant's counsel pointed out inconsistencies between A.M.'s trial testimony and her previous statements. Appellant's counsel asked if A.M. had told Sgt. Bernard Martinson about staying with P.S., about staying in appellant's van, or about the pills that appellant obtained for her pain; A.M. did not remember. A.M. admitted that she had not mentioned P.S.'s name before the day of her trial testimony. She also admitted telling the 911 operator that "one day" appellant had grabbed her and raped her. A.M. did not remember telling a police officer that she had

[1] This officer did not testify at trial.

been raped by appellant six to seven times over a two-month period. Appellant's counsel asked A.M. if it was true that she had not reported being forced to masturbate appellant; appellant stated that she had told the police about that. A.M. explained that she did not tell the police about appellant's performing oral sex on her because she was afraid. She admitted that she had told the hospital staff that she had fallen, not that she had been pushed or tripped; she also admitted she had not mentioned her wielding of knives during the altercation.

Appellant's counsel also attempted to establish that A.M. had motive to fabricate allegations against appellant. Appellant's counsel elicited testimony from A.M. that she had no health insurance and that her hospital bill had been paid by the Crime Victims Reparations Board. Appellant also admitted that she had applied for a visa that allows a crime victim to become a lawful temporary resident of the United States.

The state's second witness was M.C., the former landlord of appellant and A.M. M.C. testified through an interpreter. According to M.C., sometime after A.M. went to the hospital in March 2007, A.M. asked to change rooms because she had a problem getting along with her brother. A.M. was "very calm." M.C. gave A.M. permission to change rooms. That same day, appellant came to see M.C. and told her that he wanted to leave the house. Appellant said he had been having problems with A.M. because of her temperament. Later that same day, A.M. visited M.C. again. A.M. was "crying a lot," "very sad," "shaking," and "in a state of despair." A.M. said that appellant "was always raping her" and that she had not told M.C. about the assaults because of appellant's threats. A.M. told M.C. that the last time appellant had tried to sexually assault her, he

had pushed her against a piece of furniture and injured her spine. M.C. did not remember the date of these conversations. M.C. testified that sometime before appellant moved out, she noticed that A.M. was wearing a back brace. A.M. explained that she had slipped in the snow and fallen.

The state's final witness was Sgt. Martinson. He testified that A.M. had called 911 on May 20, 2007—two months after her hospital stay. He also testified that there was no physical evidence of assault due to late reporting of the offense.

Sgt. Martinson took a formal statement from A.M. in July 2007. A.M.'s advocate and an interpreter were also present at the interview. Sgt. Martinson testified that A.M. cried when he asked about sexual activity between her and appellant. Sgt. Martinson's account of what A.M. told him was consistent with her trial testimony.

During cross-examination, Sgt. Martinson testified that A.M. did not tell him that appellant performed oral sex on her and did not mention appellant providing her with pills. She did complain of pain during vaginal intercourse with appellant. Sgt. Martinson testified that at the July 2007 interview, he asked A.M. when things started to get bad for her at the rooming house. A.M. responded, "Around March, I think."

Appellant called no witnesses and did not testify. The jury returned a guilty verdict. This appeal follows.

D E C I S I O N

I.

Appellant argues that his constitutional right to be tried by a 12-person jury was violated. Appellant's claim is based on the trial transcript; when the jury was polled,

only 11 responses were recorded. But the omission of the 12th juror's name and verdict has since been corrected. There is no error for this court to address.

II.

Appellant challenges the sufficiency of the evidence supporting his conviction on the grounds that there is no evidence corroborating A.M.'s testimony and that corroboration is necessary because A.M.'s credibility is "questionable." We disagree.

When considering a challenge to the sufficiency of the evidence, we "must make a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005). The reviewing court must assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003). We 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). Deference is to be given to the jury's determinations of witness credibility and the weight to be given each witness's testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Minnesota law provides that in a prosecution for third-degree criminal sexual conduct, "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2006). A conviction can rest on the uncorroborated testimony of a single witness. *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977). But "in an individual case the

absence of corroboration might mandate a holding on review that the evidence was legally insufficient." *Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986).

We disagree with appellant that A.M.'s testimony was uncorroborated. A.M. provided the jury with detailed descriptions of the sexual assaults. *See id.* (noting that "strong corroborating evidence" can include "detailed descriptions by the victim of the incidents"). Her testimony was also corroborated by the testimony of M.C. and Sgt. Martinson that A.M. was crying and upset when she told them about the sexual assaults. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (noting that "significant corroborating evidence" includes "testimony by others as to the victim's emotional condition at the time she complained"); *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) ("Testimony from others about a victim's emotional condition after a sexual assault is also corroborative evidence."), *review denied* (Minn. Aug. 17, 2004).

Appellant also argues that there are inconsistencies within A.M.'s trial testimony and between her trial testimony and her previous statements. But inconsistencies and credibility determinations are for the jury to assess. *State v. Pippitt*, 645 N.W.2d 87, 92 (Minn. 2002). Nor are inconsistencies in a victim's prior statements fatal to the state's case. *See Johnson*, 679 N.W.2d at 387 ("Minor inconsistencies and conflicts in evidence do not necessarily render testimony false or provide the basis for reversal."); *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) ("In fulfilling its factfinding responsibility, the jury is free to accept some aspects of a witness's testimony and reject others."), *review denied* (Minn. June 29, 2004); *State v. Mosby*, 450 N.W.2d 629, 634

(Minn. App. 1990) ("[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event."), *review denied* (Minn. Mar. 16, 1990). Here, the inconsistencies of which appellant complains were brought to the jury's attention. Despite these inconsistencies, the jury—who had also heard of A.M.'s low level of education, her fear of appellant, his threats toward her and her family, her shame at being sexually assaulted by a family member, her status as an illegal immigrant, her lack of a support system in Minneapolis, and her difficulty with dates and numbers—believed A.M. *See State v. Reichenberger*, 289 Minn. 75, 78–79, 182 N.W.2d 692, 694–95 (1970) (noting that complaining witness made prior statements inconsistent with her trial testimony, but that the jury's guilty verdict had support despite such inconsistencies).

Minnesota law provides that a person "who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor uses force or coercion to accomplish the penetration." Minn. Stat. § 609.344, subd. 1(c). At trial, A.M. was adamant that appellant had penetrated her sexually without her consent, using force or coercion. She provided detailed descriptions of the sexual assaults. She consistently alleged that appellant had raped her; she told her landlord, the 911 operator, and two police officers. Because the jury reasonably could have concluded that appellant penetrated A.M. sexually and used force or coercion to accomplish the penetration, we will not disturb its verdict.

III.

Appellant, in his supplemental pro se brief, raises several additional arguments.

A. Probable cause

Appellant argues that the district court based its finding of probable cause on insufficient evidence. Although the district court appears to have found probable cause at the August 20, 2007 omnibus hearing, the hearing transcript is not in the district court file. We cannot presume error in the absence of an adequate record. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (declining to consider an allegation of error in the absence of a transcript). We therefore do not reach the merits of this claim.[2]

B. Presumption of innocence

Appellant seems to contend that his right to be presumed innocent was violated because the district court's finding of probable cause was based on insufficient evidence. As discussed above, appellant has not provided an adequate record for us to reach the merits of his probable-cause claim. We therefore do not reach the merits of his presumption-of-innocence claim.

C. Disqualification of district court

Appellant argues that the district court should have disqualified itself. Appellant cites *Coolidge v. New Hampshire*, in which the Supreme Court held that a state attorney general, who was actively involved in a criminal investigation and later prosecuted the case, was not a "neutral and detached magistrate" for the purpose of issuing a warrant. 403 U.S. 443, 449–50, 91 S. Ct. 2022, 2029 (1971). Appellant seems to be arguing that

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[2] We note that appellant's argument might be better characterized as a sufficiency-of-the-evidence argument, which has already been addressed.

because the district court found probable cause, it should have been disqualified from presiding at appellant's trial. Because appellant cites to no authority to support this proposition, and because prejudicial error is not obvious on mere inspection, we do not reach the merits of appellant's claim. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

D. *Miranda*

Appellant appears to claim that the state violated his right against self-incrimination. *See State v. Caldwell*, 639 N.W.2d 64, 67 (Minn. App. 2002) (citing *Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 1612–13 (1966)) ("Statements made during a custodial interrogation cannot be admitted into evidence unless the suspect is given the *Miranda* warning and intelligently waives the right against self-incrimination."), *review denied* (Minn. Mar. 27, 2002). But no statement made by appellant to law enforcement seems to have been admitted at trial. Appellant's *Miranda* argument is therefore without merit.

E. Competency evaluation

Appellant contends that the district court failed to make findings on the record regarding his competency evaluation. On August 22, 2007, the district court ordered a competency evaluation of appellant. At the September 12, 2007 hearing, the district court noted that it had "received a report from psychological services which indicates . . . that according to the psychologist that [appellant] is competent to proceed, though she does allow there are some difficulties and some limitations." The district court file does

not contain the psychological report, and there is no indication that either party objected to the report or requested a hearing pursuant to Minn. R. Crim. P. 20.01, subd. 3.

Appellant's argument seems to be that the district court failed to make required findings of fact. But Minn. R. Crim. P. 20.01, subd. 4(1), provides: "If the court determines that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed." Here, the district court determined that appellant was competent to proceed. Because no other findings were required and because appellant did not challenge the report in accordance with rule 20, appellant's argument is without merit.

F. Evidence of victim's fear

Appellant contends that it was error to admit M.C.'s testimony that A.M. was afraid of him. Appellant did not object to this testimony at trial. Appellant cites *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982), for the proposition that M.C.'s testimony was inadmissible hearsay because "defense counsel failed to offer defense of accident, suicide or self-defense." But *Blanchard* concerned hearsay evidence about a homicide victim's fear of the defendant. 315 N.W.2d at 433. Unlike a homicide victim, A.M. was available for cross-examination. Appellant's argument is without merit.

G. Warrantless arrest

Appellant claims that he was arrested without a warrant "for a traffic violation and later arrested [for] felony criminal sexual assault." The circumstances of appellant's arrest are not clear. The complaint merely indicates that he was arrested and "interviewed with an interpreter per *Miranda*." The record here is not sufficient to

determine the merits of appellant's claim. *See State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006) (stating that "if an allegation is outside of the record, it must be disregarded"), *review denied* (Minn. Jan. 24, 2007).

H. Ineffective assistance of counsel

Appellant makes several arguments related to the performance of his trial counsel. We address each of these arguments in turn.

1. Failure to challenge warrantless arrest

Appellant's contention that his attorney improperly failed to challenge his warrantless arrest relies upon the illegality of his arrest. As discussed above, the record is not sufficient to determine the merits of this claim.

2. Elicitation of client's guilt

Appellant assigns error to his trial counsel's cross-examination of Sgt. Martinson, contending that his attorney impliedly admitted his guilt during the following exchange:

> Q. And you specifically asked [A.M.]—She told you there was a vaginal penetration. Right?
> A. Yes—and other things.
> Q. And the other things were the digital masturbation of his penis, isn't that correct?
> A. That occurred, yes.

Appellant characterizes his attorney's questions as an implication that appellant "had sexual penetration with [A.M.]." We disagree. Appellant's counsel was merely asking Sgt. Martinson what A.M. had told him for the purpose of pointing out alleged inconsistencies in A.M.'s testimony. Because appellant's trial counsel clearly did not

imply that appellant had done what A.M. had said, we conclude that appellant's argument is meritless.

3. Meaningful defense

Appellant makes an unclear argument regarding his right to present a meaningful defense. Appellant cites Minn. R. Crim. P. 9.02, subd. 1(3)(a), which sets forth certain disclosures a defendant must make to the prosecuting attorney.

Assuming appellant's argument is that his trial counsel failed to conduct an adequate defense, we conclude that argument to be without merit. Appellant's trial counsel cross-examined the state's three witnesses, drawing attention to inconsistencies in A.M.'s statements. The attorney also argued objections and received favorable evidentiary rulings. With the exception of the two issues mentioned above, appellant does not allege that his counsel committed any errors; nor does appellant show that these errors affected the result of the proceeding. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

Assuming that appellant's argument is that his trial counsel failed to comply with rule 9.02, subdivision 1(3)(a), this contention is also without merit. The district court file does not contain any notice of defense, but appellant's trial counsel was only required to provide a notice of defense to the prosecution if appellant was intending to rely upon "any defense, other than that of not guilty." Minn. R. Crim. P. 9.02, subd. 1(3)(a). Appellant was found competent to stand trial and pleaded not guilty. He did not testify. In closing argument, appellant's trial counsel argued that A.M. was lying and that appellant had never sexually assaulted A.M. There is no indication that appellant relied

on a defense other than that of not guilty. Appellant's argument regarding his right to present a meaningful defense is therefore without merit.

I. Due process and equal protection

Appellant asserts, without further explanation, that he was denied due process and equal protection of the law. An assignment of error in a brief based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *Modern Recycling*, 558 N.W.2d at 772. We therefore do not address the merits of this claim.

Affirmed.