STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0334

State of Minnesota,
Respondent,

vs.

Dallas Britt,
Appellant.

Filed May 12, 2009
Affirmed in part and reversed in part
Collins, Judge[*]

Mower County District Court
File No. CR-06-347

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

Kristen Nelsen, Mower County Attorney, Mower County Courthouse, 201 First Street Northeast, Austin, MN 55912 (for respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant challenges his convictions of and sentences for three counts of third-degree criminal sexual conduct, arguing that the evidence was insufficient to support the findings of guilt. Alternatively, appellant contends that (1) two of the three convictions must be reversed because Minnesota law does not permit multiple convictions for multiple penetrations within a single behavioral incident and (2) the sentences for two of the three convictions must be vacated because Minnesota law does not permit multiple sentences for offenses occurring during a single behavioral incident. We affirm in part and reverse in part.

FACTS

Appellant Dallas Britt was convicted of three counts of third-degree criminal sexual conduct stemming from a December 2004 incident. The victim, S.A., had left the home she shared with her boyfriend following an argument and was walking along the road carrying bags of her belongings. Britt stopped his car and S.A. got in to be driven around to her friends' and relatives' homes, where she hoped to find a place to stay.

According to S.A., Britt soon began complimenting her on her looks and making sexually suggestive remarks. S.A., who was 40, responded that Britt, age 20, was too young for her, but Britt said, "Oh, come on you would like somebody young, wouldn't you?" to which S.A. replied, "No." Britt persisted in his innuendos and drove to a remote rural field entrance, where he parked. When Britt tried to kiss her, S.A. said, "No, this ain't going to happen. You're too young." But with one hand Britt grabbed S.A.'s hands

and held them above her head, and he slipped his other hand inside S.A.'s pants and penetrated her digitally. Britt then unbuttoned and removed S.A.'s pants. S.A. again protested, saying, "No, this can't be happening." Britt pushed S.A. over onto the seat and inserted his penis into her vagina, her anus, and again into her vagina. S.A. denied consenting in any way, and testified that she had "told him over and over it wasn't going to happen." Thereafter, Britt drove back to town, and when S.A. got out of the car at a pop machine, Britt drove off and threw one or more of S.A.'s bags from the car.

S.A. accepted a ride from a passer-by and told him that she had been raped. The man described S.A. as being disoriented and "shook up" and that it looked like she had been crying. The man suggested that S.A. call the police, but she requested that he take her home and said that she would have her boyfriend take her to the hospital.

At the hospital, a nurse interviewed her and performed a sexual-assault examination. S.A. reported three forms of penetration during the interview: digital, vaginal, and anal. S.A. also spoke with a sheriff's deputy while at the hospital. She was upset and crying, but she was able to identify the person who had sexually assaulted her as "Dallas."

Conversely, Britt testified that soon after he picked her up, S.A. began flirting with him and he parked along the side of the road. It was only after Britt complied with S.A.'s request for a back massage and she turned to face him that he attempted to unbutton her pants. When he was unable to do so, S.A. unbuttoned and removed her pants herself. According to Britt, S.A. freely consented to and fully cooperated with him in each act of penetration. Thereafter, while driving back to town, Britt began to panic as he thought of

his girlfriend. And then, when S.A. got out of the car at the pop machine, he drove off in order to end the encounter.

When initially questioned by a deputy, Britt denied knowing or having sexual contact with S.A., and stated that "it would be a magic trick" if examination of S.A. were to produce evidence of Britt's pubic hair or semen. But when the police came to collect a DNA sample approximately one year later, Britt admitted having sexual intercourse with S.A., and claimed that the encounter was consensual. Analysis confirmed a match between Britt's DNA sample and the semen collected during S.A.'s sexual-assault examination.

Britt waived his right to a jury trial and had a bench trial on one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(1) (2004) (force or coercion, causing personal injury), and three counts of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2004) (force or coercion)—a separate count for each discrete form of sexual penetration. Britt stipulated to the three acts of penetration as alleged, but he persisted in contending that all had been consensual. The district court acquitted Britt of first-degree criminal sexual conduct but found him guilty of each count of third-degree criminal sexual conduct. The prosecutor filed a sentencing memorandum, requesting that Britt be sentenced separately for each form of penetration. The district court entered three judgments of conviction and executed concurrent sentences of 68 months', 78 months', and 98 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Britt argues that the evidence is insufficient to prove the essential element of force or coercion under Minn. Stat. § 609.344, subd. 1(c) (2004). 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 the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when the resolution of a matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant is guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

> "Coercion" means words or circumstances that cause the complainant reasonably to fear that the actor will inflict bodily harm upon, or hold in confinement, the complainant or another, or force the complainant to submit to sexual penetration or contact, but proof of coercion does not require proof of a specific act or threat.

Minn. Stat. § 609.341, subd. 14 (2004).

In addition to the acts of penetration to which Britt stipulated, the state was required to prove that Britt "use[d] force or coercion to accomplish the penetration[.]"

Minn. Stat. § 609.344, subd. 1(c) (2004). Assuming, as we must, that the district court believed the testimony that supports the conviction and disbelieved testimony to the contrary, the evidence includes that (1) Britt knew that S.A. was alone and was unable to reach friends or family in order to find a place to stay for the night; (2) Britt, as the driver, had complete control over where they went and chose to drive to a dark, rural area before making his sexual advances; (3) throughout their time together, S.A. repeatedly told Britt that he was too young and that she would not have sex with him; (4) Britt grabbed S.A.'s hands and held them over her head as he digitally penetrated her and tried to remove her pants; (5) in response, S.A. said, "No, this can't be happening"; and (6) Britt pushed S.A. into position before penetrating her with his penis vaginally and anally.

We previously affirmed a criminal sexual conduct conviction which involved similar facts. In *State v. Kasper*, the victim accepted a ride from the defendant and the defendant drove onto a dirt road, removed the victim's pants, and sexually penetrated her. 405 N.W.2d 540, 541 (Minn. App. 1987), *aff'd on other grounds*, 409 N.W.2d 846 (Minn. 1987). The victim was visibly shaken when she later identified the defendant to law enforcement. *Id.* at 542. On appeal, we held that the victim's testimony sufficiently established that the defendant had used force or coercion. *Id.*

Although not identical to this case, *Kasper* is informative. As in *Kasper*, the district court heard testimony that Britt offered assistance to the victim, drove to an isolated area knowing that she was dependant on him for a ride, pulled down her pants, and sexually penetrated her. S.A. repeatedly and consistently expressed her refusal to

engage in sexual activity with Britt, and Britt disregarded S.A.'s protest as he pulled her pants down. These circumstances are sufficient to allow a reasonable fact-finder to conclude that Britt intentionally created an atmosphere of fear. *See State v. Carter*, 289 N.W.2d 454, 455 (Minn. 1979) (holding that defendant had not used actual force or verbalized threats of force, but had intentionally created an atmosphere of fear, which caused victim to submit). As in *Kasper*, the evidence here is sufficient to establish that Britt used coercion to accomplish the sexual penetration.

II.

Britt next argues that two of the three third-degree criminal sexual conduct convictions must be vacated because they represent one count for each form of penetration, and Minnesota law does not permit more than one judgment of conviction for multiple penetrations within a single behavioral incident. "[W]hen the defendant is convicted on more than one charge for the same act . . . the court [is] to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time." *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (quotation omitted).

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be any of the following: (1) A lesser degree of the same crime; or (2) An attempt to commit the crime charged; or (3) An attempt to commit a lesser degree of the same crime; or (4) A crime necessarily proved if the crime charged were proved; or (5) A petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Minn. Stat. § 609.04, subd. 1 (2004).

Although Britt did not raise this issue before the district court, in *State v. Foley*, the Minnesota Supreme Court chose to hear an appeal addressing the applicability of Minn. Stat. § 609.04, notwithstanding the fact that the issue was not raised before the district court. 438 N.W.2d 372, 373 (Minn. 1989). Subsequent decisions by our court have followed suit. *See, e.g.*, *State v. Clark*, 486 N.W.2d 166, 170 (Minn. App. 1992).

Here, the state rightly concedes that two of the three convictions should be reversed under Minn. Stat. § 609.04 and *State v. Dudrey*, 330 N.W.2d 719, 721-22 (Minn. 1983) (holding that only one conviction should be permitted where defendant performs multiple forms of penetration during same behavioral incident and that multiple forms of penetration are better considered as factors supporting upward sentencing departure). Two of the three convictions must be reversed because all three convictions stemmed from Britt's course of conduct in a single incident, at the same time, in the same place. Thus, we reverse the adjudicated convictions of third-degree criminal sexual conduct charged under counts 3 and 4 of the complaint.

Because we reverse two of the three convictions, nullifying the corresponding sentences, we need not address whether the imposition of multiple sentences for the three convictions was erroneous.

III.

The state contends that remand for resentencing for the surviving count of third-degree criminal sexual conduct is the appropriate remedy. But multiple *acts* of penetration could not be used to support departure from the presumptive sentence because they were separately charged in the complaint. *State v. Jackson*, 749 N.W.2d

353, 358 (Minn. 2008). Here, because the complaint charges each form of penetration as a separate offense, reliance on those multiple *forms* of penetration for an upward departure is likewise prohibited and, therefore, remand would be to no avail.

We affirm Britt's conviction and sentence of 68 months' imprisonment for third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2004), as charged under count 2 of the complaint. Because the count 2 conviction and sentence are not affected by the reversal of the other two convictions, remand for resentencing is unnecessary.

Affirmed in part and reversed in part.