STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1616

State of Minnesota,
Respondent,

vs.

Baofeng NMN Wang,
Appellant.

Filed August 18, 2009
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-K9-07-000361

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

Susan Gaertner, Ramsey County Attorney, Philip C. Carruthers, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Robert J. Shane, Shane Law Office, 700 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellant challenges his convictions of two counts of second-degree criminal sexual conduct, arguing that there was insufficient evidence to support the convictions, and that the district court erred in instructing the jury as to the elements of the second count. Because there was sufficient evidence to support appellant's convictions, and because any error in the jury instructions did not affect his substantial rights, we affirm.

FACTS

On February 11, 2008, a jury found appellant Baofeng Wang guilty of two counts of criminal sexual conduct in the second-degree, in violation of Minn. Stat. § 609.343, subd. 1(a) (2006). This statute provides that a perpetrator commits criminal sexual conduct in the second-degree when he or she engages in sexual contact with another person who is under 13 years of age. The perpetrator must be more than 36 months older than the victim at the time of the offense. Minn. Stat. § 609.343, subd. 1(a). Count I pertained to acts committed against Y.L. and Count II pertained to acts committed against J.L. J.L. and Y.L. were in the same Chinese language class and were friends, but were not otherwise related. The alleged criminal conduct took place over the course of approximately one year, beginning in 2000. Charges were brought against appellant after J.L. reported the conduct to police in 2006. J.L.'s statements indicated that Y.L. was also a victim of appellant, and police subsequently contacted Y.L. for further information.

Appellant's convictions originate from activity that took place in his apartment. Appellant was an art teacher who provided private art lessons. At trial, appellant's wife

testified that she was sometimes present in the apartment during the lessons, but that other times she would return to find him alone with one of his students.

Y.L. and J.L. were both students of appellant's. Y.L. was born October 17, 1989. At the time of the trial she was 18 years old. The police contacted Y.L. after learning from J.L. that appellant may have had an inappropriate relationship with her. Y.L. became acquainted with appellant when appellant and Y.L.'s mother were in the same English class, and she began taking private lessons from appellant when she was ten years old. The lessons lasted for approximately one year, and took place once a week. For the first few months of the lessons, Y.L.'s mother would wait inside the apartment while her daughter attended the lessons, but Y.L. later asked her mother to wait in the car, which she did. Y.L. testified at trial that appellant started touching her sexually after her mother began waiting outside; he started by touching her back, and then later began touching her under her bra in the back and on top of her bra in her front. Y.L. also stated that he attempted to show her his penis but that she looked away so as to avoid seeing it. Y.L. testified that the lessons ended after she started crying and told her mother that appellant had been touching her. Y.L.'s mother testified that Y.L. had told her of the abuse, but that she did not report the abuse to police at the time because she was concerned about the potential impact on the family's application for permanent-resident status in this country. Appellant testified that he did not commit such acts.

J.L. was born December 12, 1987. She was 20 years old at the time of the trial. J.L. testified at trial that she and appellant became acquainted after he taught art class at the Minhua Chinese Academy, where she was a student. She also testified that she began

receiving private lessons from him when she was 11 years old, before entering the sixth grade, and that the lessons continued until the summer before she entered eighth grade. She stated that the lessons took place either once a week or every other week. Over the period of several months, appellant began touching J.L. in a sexual manner, beginning a few months after her initial lesson. She described the touching as progressing in nature over the course of several lessons; he began by touching her back, then around her waist, then moving under her shirt and on her stomach, finally touching her breasts both over and under her bra. J.L. also testified that once appellant had progressed to touching her breasts, he engaged in similar conduct during each subsequent lesson.

J.L. eventually learned that her friend Y.L. had taken lessons from appellant and that he had touched her sexually also. J.L. also told her close friend at the time, N.J., about appellant's conduct. At trial, N.J. testified that when they were in middle school J.L. had told her that appellant had "molested" her. J.L. said she did not report the abuse to her parents at the time because she was embarrassed and did not want to upset them. J.L. eventually told them of the abuse the summer before she went to college. Her mother heard her crying in her room one day and asked her what was wrong. J.L. then told her mother what had happened during the art lessons with appellant, and they went to the police the next day to make a report. Appellant testified at trial that he did not engage in any of the above conduct.

At the conclusion of the trial, the district court instructed the jury separately as to the elements of second-degree criminal sexual conduct with respect to each victim. The instructions involving Count II included "[a]nd fifth, Mr. Wang's acts – act, took place

between January 1, 2000 and January 1, 2001 in Ramsey County." Count II pertains to acts committed against J.L., who turned 13 years old on December 12, 2000. Appellant now appeals from these convictions, arguing that (1) there was insufficient evidence to support his convictions, and (2) since part of the jury instruction for Count II asked the jury to consider a period of time during which J.L. was already 13 years old, the district court committed plain error affecting his substantial rights.

D E C I S I O N

I. The evidence was sufficient to support appellant's convictions.

When hearing a sufficiency-of-the-evidence claim, the reviewing court 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). The reviewing court must assume that "the jury 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 resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

A. Count I – *Y.L.*

Appellant argues that there is insufficient evidence to support a conviction for acts committed against Y.L. because of (1) inconsistencies between Y.L.'s testimony at trial and statements made in other instances, and (2) a lack of corroboration of her testimony.

Appellant alleges that because Y.L. told her mother and a police officer that appellant had touched her under her bra, whereas her testimony indicated that he only

touched her on top of her bra, this inconsistency was such that the jury could not reasonably have concluded that appellant was guilty. However, due to the length of time between the criminal act and the trial, it is not surprising that there would be some inconsistencies in the victim's statements. Furthermore, much of Y.L.'s testimony was consistent, including the general nature of appellant's conduct and where and under what conditions the crime took place. She testified at trial and told police that appellant had touched her in a sexual manner, that the touching took place at his apartment during art lessons, and that it grew more serious in nature as the lessons continued.

Although there may have been some minor inconsistencies in her testimony, "the jury is to determine the weight and credibility of the testimony of individual witnesses." *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). As to a lack of corroboration, there is no requirement that a victim's testimony be corroborated in a criminal prosecution. *State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984). In any event, there was corroboration in this case. Y.L.'s mother testified that Y.L. had come to her upset and crying approximately a year after the lessons began, and told her of appellant's conduct. In sum, there was sufficient evidence for a jury to convict appellant on this count.

B. Count II – *J.L.*

Appellant argues that the state did not prove beyond a reasonable doubt that J.L. was under the age of 13 when appellant engaged in criminal sexual conduct with her, which is one element of the crime. Appellant argues that Officer Churness's testimony that J.L. had reported to him that the abuse occurred "at some point…during the late months of the year 2000" and the fact that at age 18, J.L. told Officer Printz that the

abuse had happened "about five years ago" demonstrate that the abuse took place when J.L. was already 13 years old.

Appellant's arguments are contradicted by J.L.'s actual testimony at trial. At trial, J.L. testified that she began art lessons with appellant in his home when she was 11 and that he began touching her a few months following the first lesson. She also testified that the nature of the touching grew more serious as the lessons continued, and that once appellant had progressed to touching her breasts, he committed similar acts at all subsequent lessons. Specifically, she testified that "every lesson after [appellant] touched my breasts initially, [touching of a sexual nature] would happen at least one time per lesson." She also testified that she believed she was 12 years old when appellant used his hands to compare the size of her breasts. Additionally, Officer Churness's testimony that J.L. told him appellant had touched her chest area and breasts in the late months of 2000 indicates that most of appellant's illegal conduct took place before J.L. turned 13 years old, which did not occur until December 12, 2000.

A single violation of the statute is enough for conviction provided that it occurred prior to J.L.'s 13th birthday. It is up to the jury to evaluate the credibility and weight of witness testimony. *Daniels*, 361 N.W.2d at 826. Thus, based on the testimony of J.L., which we must assume the jury believed, as well as corroborative testimony, there was sufficient evidence for the jury to convict appellant of Count II.

II. Although the district court committed plain error in the portion of its instructions for the time period after J.L. had turned 13, this error did not affect appellant's substantial rights.

At trial, appellant's counsel did not object to the jury instructions at issue in this appeal. As a result, the court reviews the issue under the plain error standard. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). If these three prongs are met, a correction of the error occurs only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Appellant's appeal here pertains only to Count II regarding J.L. When instructing the jury on Count II, the district court provided the following challenged instruction: "[a]nd fifth, Mr. Wang's acts – act, took place between January 1, 2000 and January 1, 2001 in Ramsey County." Appellant argues this instruction was plain error affecting his substantial rights because it gave the jury the ability to find him guilty even if the offense occurred after J.L. had turned 13 years old. He argues that since the evidence regarding J.L.'s age at the time of the abuse is uncertain, this court should conclude that the jury instruction affected the fairness and integrity of the judicial proceeding, and the verdict should be reversed. We disagree.

J.L. turned 13 on December 12, 2000. Since the jury instructions gave the date range of January 1, 2000 to January 1, 2001, this period included a short amount of time during which J.L. was already 13 years old. This was plain error. A jury instruction is erroneous if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn.

2005). However, in addressing the third prong of the plain error test, this court considers whether the error was prejudicial and affected the outcome of the case. *See Griller*, 583 N.W.2d at 741. Plain error is prejudicial if there is a "'reasonable likelihood that the giving of the instruction in question would have a significant effect on the verdict of the jury.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770 (1993)).

"[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Jones*, 347 N.W.2d 796, 801 (Minn. 1984). Additionally, jurors are presumed to have followed court instructions. *State v. James*, 520 N.W.2d 399, 405 (Minn. 1994). At trial, the judge instructed the jury as to all five elements of second-degree criminal sexual conduct, including that, at the time of the offense, J.L. must have been under 13 years of age. The judge also instructed the jury that all elements of the crime must be proved beyond a reasonable doubt.

When viewed in their entirety, the jury instructions in this case clearly stated that the jury must find that appellant had committed as least one act before J.L. turned 13 years old. Specifically, the instructions said: "[t]hird, that at the time of Mr. Wang's act, [J.L.] had not reached her 13th birthday." The instructions then stated that if any element had not been proved beyond a reasonable doubt, appellant is not guilty: "if you find that any element has not been proved beyond a reasonable doubt, then Mr. Wang is not guilty of criminal sexual conduct in the second degree as charged in Count II." If the jury had not found this element to be true beyond a reasonable doubt, it would not have been able to return a guilty verdict. J.L. testified at trial that the lessons began when she was 11 years old, and that the touching began a few months after the start of the lessons. She

also testified that the touching progressed in nature, that it occurred repeatedly, and that she believed she was 12 years old when appellant touched her breasts with his hands. Therefore, there is no reasonable likelihood that the challenged jury instruction had a significant effect on the jury's verdict.

Affirmed.