

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1055**

In the Matter of the Welfare of: T. J. P., Child

**Filed February 9, 2010
Affirmed
Larkin, Judge**

Anoka County District Court
File No. 02-JV-09-331

Marie L. Wolf, Interim Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Karen L. Henke, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

LARKIN, Judge

Appellant claims that the evidence was insufficient to support the district court's finding that he committed second-degree criminal sexual conduct, arguing that the victim's testimony was inconsistent and implausible. We affirm.

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

FACTS

On August 3, 2008, fifteen-year old appellant T.J.P. and his brother visited their grandmother, J.P., at her home. Five-year old A.E.B., T.J.P.'s cousin, also was present at J.P.'s home. A.E.B. asked T.J.P. to play a computer game with her in the master bedroom. T.J.P. helped A.E.B. log onto the computer and played the game with A.E.B. for approximately 30 minutes. T.J.P. occasionally left the bedroom, but he conceded that he was alone in the bedroom with A.E.B. for approximately 15 minutes.

T.J.P.'s mother picked him up from J.P.'s house at approximately 6:00 p.m. A.E.B. spent the night at J.P.'s home. When J.P. put A.E.B. to bed, A.E.B. told her that T.J.P. had "played the penis game with her." A.E.B. said that she was on the bed in the master bedroom and that T.J.P. put his penis between her legs. J.P. reported this conversation to A.E.B.'s mother the next morning.

A.E.B. was evaluated at the Midwest Children's Resource Center on August 4. A.E.B.'s physical examination revealed no signs of abuse. During a videotaped interview of A.E.B., A.E.B. stated that T.J.P. rubbed his penis against her buttocks while they were in the master bedroom. A.E.B. claimed that T.J.P. took her pants and underwear off, removed his jeans, and then rubbed his penis against her buttocks area. A.E.B. said that she was lying on her stomach on the bed in the master bedroom when the contact occurred and that T.J.P. was on top of her. A.E.B. indicated that T.J.P.'s penis rubbed against her buttocks area but did not penetrate her anus. She stated that her bottom "felt bad" from this contact. She told the interviewer that T.J.P.'s penis rubbed against her vaginal area and almost went inside of her vagina. A.E.B. stated that she saw T.J.P.'s

penis and that it “didn’t have hair on it” and that he told her that this was their “little game.” A.E.B. said she was too scared to scream for her grandmother, that she didn’t want her grandmother to be mad at T.J.P., and that she asked T.J.P. to stop but he would not do so. A.E.B. also told the interviewer that approximately one year earlier she saw T.J.P. with another cousin, who was five-years old, and that this cousin had her pants off and T.J.P.’s penis was exposed.¹

The state filed a delinquency petition charging T.J.P. with first-degree criminal sexual conduct, and the case was tried to the district court. J.P. testified that T.J.P. and A.E.B. used the computer in the master bedroom for approximately 30 minutes on August 3, but that she did not observe any improper conduct or unusual activity between them. She testified that during the time that T.J.P. and A.E.B. were in the bedroom, she was in the living room watching television or in the breezeway smoking. She further testified that the doors to the bedrooms in her home remain open at all times and that voices of people in the master bedroom can be heard by people in the living room.

The district court found that during A.E.B.’s interview, it was apparent that she was a “talkative, demonstrative child who was very active and whose attention was difficult to focus,” and that she “often [made] spontaneous comments that were not necessarily related to the question.” But the district court also found that A.E.B. used age-appropriate language to describe body parts during her interview and trial testimony and that the basic allegation by A.E.B.—that T.J.P. rubbed his penis against her buttocks—was consistent throughout her initial disclosure to her grandmother, her

¹ A.E.B. testified at trial that this incident never happened.

interview at Midwest Children's Resource Center, and her testimony during trial. The district court acknowledged that, in an attempt to discredit A.E.B.'s statement that T.J.P.'s penis "didn't have hair on it," T.J.P. presented evidence that he had pubic hair. Nonetheless, the district court found that A.E.B.'s statement was not necessarily inconsistent with the evidence establishing that T.J.P. has pubic hair. While the district court determined that there was reasonable doubt as to whether T.J.P. engaged in sexual penetration with A.E.B. and that the state therefore failed to prove beyond a reasonable doubt the charge of first-degree criminal sexual conduct, the district court concluded that the evidence was sufficient to establish T.J.P.'s guilt on a lesser-included offense of second-degree criminal sexual conduct.

T.J.P. was adjudicated delinquent and this appeal follows.

D E C I S I O N

"In reviewing a claim of insufficient evidence, this court must ascertain whether given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *In re Welfare of J.G.B.*, 473 N.W.2d 342, 344-45 (Minn. App. 1991) (quotation omitted). "The reviewing court cannot retry the facts, but must view the evidence in a light most favorable to the state and must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence." *Id.* at 345 (quotation omitted). "These standards apply to the review of a jury trial as well as a court trial." *Id.* The factfinder, not the reviewing court, determines the weight and credibility of a witness's testimony. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985).

The district court found T.J.P. guilty of second-degree criminal sexual conduct, which provides that “[a] person who engages in sexual contact with another person is guilty [of the crime] if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant.” Minn. Stat. § 609.343, subd. 1(a) (2008). “Sexual contact” includes “the intentional touching by the actor of the complainant’s intimate parts”² when “committed with sexual or aggressive intent.” Minn. Stat. § 609.341, subd. 11(b)(i) (2008).

T.J.P. argues that A.E.B. was an unreliable witness and that her version of the events did not establish beyond a reasonable doubt that he committed second-degree criminal sexual conduct. The determination of whether A.E.B. was a reliable witness is left to the factfinder, not to this court. *See State v. White*, 357 N.W.2d 388, 390 (Minn. App. 1984) (“[T]he factfinder must choose between conflicting factual accounts and determine the credibility, reliability, and weight given to witnesses’ testimony.”).

As argued by T.J.P., A.E.B.’s credibility was called into serious question. First, T.J.P. asserts that A.E.B. was coached by her father prior to testifying at trial. Second, she admitted that she lied about T.J.P.’s alleged sexual contact with her cousin. Third, A.E.B.’s testimony that T.J.P. had no hair on his penis was countered by evidence that T.J.P. has pubic hair. And lastly, the door to the bedroom where the incident occurred was open the entire time that T.J.P. and A.E.B. were in the bedroom, and their grandmother was present in the home and noticed no improper or unusual conduct.

² Intimate parts include “the primary genital area, groin, inner thigh, buttocks, or breast of a human being.” Minn. Stat. § 609.341, subd. 5 (2008).

The district court carefully considered this evidence, noting that there was no physical evidence and that the issue was whether A.E.B.'s testimony and statements, together with circumstantial evidence, were sufficient to establish T.J.P.'s guilt beyond a reasonable doubt. The district court acknowledged that there were reasons to doubt A.E.B.'s credibility, referring to the "apparent" issues with her trial testimony and recorded statement, including her inability to accurately remember and relate events in her past and the possibility that she fabricates incidents. However, the district court concluded that

[t]hese issues are not surprising considering the age of A.E.B., the nature of the subject matter, the embarrassment, shame or guilt such abuse would instill in A.E.B. and the potential fear that she may have had that she might be punished or that she may get in trouble for what happened.

The district court ultimately concluded that A.E.B. was credible, reasoning that her initial allegation was made spontaneously, her description of the abuse was consistent, her description of the physical sensations associated with the abuse suggested that she actually experienced the abuse, and that she lacked a motive to fabricate the abuse. The district court also reasoned that there was no evidence of an alternative basis for A.E.B.'s detailed knowledge of sexual activity. The district court noted that T.J.P. admitted that he was alone in the bedroom with A.E.B. and reasoned that the abuse could have happened quickly when J.P. was not in the immediate area.

It is apparent that the district court carefully considered the evidence, including the legitimate challenges to A.E.B.'s credibility. The district court determined that "A.E.B.'s statement and testimony that [T.J.P.] rubbed his bare penis against her bare buttocks are

credible” and that the evidence was sufficient to prove that T.J.P. committed second-degree criminal sexual conduct. We will not disturb this determination on appeal. The testimony of a victim alone is sufficient to sustain a conviction for criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2008). The evidence, viewed in the light most favorable to the finding of guilt, is sufficient to sustain the district court’s finding that T.J.P. committed the offense of second-degree criminal sexual conduct.

Affirmed.

Dated:

Judge Michelle A. Larkin