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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-217**

State of Minnesota,
Respondent,

vs.

Daniel Majak Bol,
Appellant.

**Filed March 16, 2010
Affirmed
Stauber, Judge**

Olmsted County District Court
File No. 55CR075811

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

Mark A. Ostrem, Olmsted County Attorney, Richard W. Jackson, Jr., Assistant County Attorney, Rochester, Minnesota (for respondent)

Marie Wolf, Interim Chief Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from his conviction of third-degree criminal sexual conduct (penetration
of complainant between the ages of 13 and 15 when the actor is more than 24 months

older), appellant argues that (1) the district court deprived him of his right to fully present a mistake-of-age defense by excluding evidence that the complainant misrepresented her age to others; (2) the district court deprived appellant of a fair trial in allowing the prosecutor to suggest to the jury that appellant's use of an interpreter was unnecessary and a ruse; and (3) the evidence was insufficient to support his conviction. We affirm.

FACTS

In March 2007, 14-year-old D.D. decided to skip her high school classes to meet 26-year-old appellant, Daniel Bol. Although they had never met, appellant and D.D. had become acquainted through a series of telephone calls. According to D.D., she arranged for appellant to pick her up at school on March 20, 2007, and then forged a letter from her mother excusing her from classes.

Appellant picked up D.D., and the pair went to appellant's apartment where they engaged in sexual intercourse and oral sex. Appellant then dropped D.D. off at school where rumors of the sexual encounter soon spread to D.D.'s school counselor. The counselor confronted D.D. about skipping school and informed her that she would be suspended from school and that D.D.'s parents would be contacted. D.D. then told her mother that she had skipped school to be with appellant.

D.D.'s mother contacted the police about the incident, and Officer Joel Blahnik met with D.D. to take a statement. D.D. told Officer Blahnik that she had met a man named Abraham Jongror, and they exchanged telephone numbers. According to D.D., she called the number a few months later, and appellant answered. Appellant told her that he was Jongror's cousin and that Jongror was unavailable. Appellant also told D.D.

that he had just turned 18. The pair proceeded to speak regularly by telephone, and after a few months, D.D. made arrangements to meet appellant.

D.D. told Officer Blahnik that appellant picked her up at school on March 20, 2007, and took her to his apartment where he prompted D.D. to perform oral sex. D.D. also stated that she had sexual intercourse with appellant twice before he took her back to school. D.D. further stated that appellant was aware that she was only 14 because she told him her age.

After taking D.D.'s statement, Officer Blahnik met with appellant who acknowledged picking D.D. up from school. However, appellant denied having sex with D.D., stated that D.D. had never been to his apartment, and claimed that he just took D.D. to Wal-Mart. Appellant also claimed that he was told by D.D. that she was going to turn 18 next month and that she would be graduating from high school and beginning community college next year.

In response to appellant's claim that D.D. had never been to his apartment, Officer Blahnik applied for a warrant to search appellant's apartment. In the warrant application, Officer Blahnik listed several unique items in appellant's bedroom that had been described by D.D. A search warrant was issued, and upon execution, law enforcement found many of the items described in the warrant application. Appellant was subsequently charged with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(c) (2006) (use of force or coercion to accomplish penetration) and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2006)

(penetration with complainant between ages 13 and 15 where actor is more than 24 months older). Appellant pleaded not guilty, and the matter proceeded to trial.

At trial, D.D.'s testimony was consistent with her statement to law enforcement. Appellant testified in his defense and requested an interpreter for his own testimony. Appellant testified that, during his initial conversation with D.D., she told him that she was 17 years old and that she would soon turn 18. According to appellant, he picked D.D. up from school on March 20, 2007, but that they did not go back to his apartment. Appellant also denied having sex with D.D. and testified that in one of his telephone conversations with D.D., he described his bedroom to D.D.

The jury found appellant guilty of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (penetration with complainant between the ages of 13 and 15 where the actor is more than 24 months older), but not guilty of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(c) (use of force or coercion to accomplish penetration). The district court then stayed imposition of sentence for 15 years, placed appellant on probation, and ordered him to serve 180 days in jail as a condition of probation. Appellant subsequently appealed, and appellant's jail time was stayed pending appeal.

D E C I S I O N

I.

“[E]very criminal defendant has the right to be treated with fundamental fairness and ‘afforded a meaningful opportunity to present a complete defense.’” *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S.

479, 485, 104 S. Ct. 2528, 2532 (1984)). However, “the accused ‘must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id.* at 195 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)). “Thus, even when a defendant alleges that his constitutional rights were violated, evidentiary questions are reviewed for abuse of discretion.” *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999).

At trial, appellant raised a mistake-of-age defense in addition to relying on the defense of fabrication. In support of his defense, appellant testified that D.D. told him that she was 17 years old. Appellant also introduced his statement to law enforcement that D.D. claimed that she was 17 years old and on the verge of graduating from high school. To further support his defense, appellant sought to present evidence that D.D. misrepresented her age to appellant’s cousin and also on her MySpace page. The state sought to exclude this evidence as irrelevant because appellant was unaware of the MySpace representations. The district court granted the state’s motion on the basis that that evidence was irrelevant under *Powe v. State*, 389 N.W.2d 215 (Minn. App. 1986), *review denied* (Minn. July 31, 1986).

Appellant argues that D.D.’s alleged misrepresentations to others regarding her age was relevant because it supports appellant’s claim that D.D. lied to him about her age. Thus, appellant argues that the district court deprived him of his constitutional right to present his mistake-of-age defense by excluding evidence that D.D. misrepresented her age to others. We disagree.

In *Powe*, the defendant was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b). 389 N.W.2d at 217. On appeal, the defendant argued that he was denied his constitutional right to a fair trial by the district court's exclusion of evidence relating to statements by individuals that the victim had lied about being an adult and being older than 16 years of age. *Id.* at 219. In rejecting appellant's claim, this court held that:

The evidence concerning [the victim's] alleged false representations to others in the community about being an adult, made outside the presence of [the defendant], was not relevant to [the defendant's] claim that *he* believed she was 16 or older. [The defendant] was allowed to testify about representations [the victim] allegedly made in his presence and his reasons for believing she was 16 or older.

Id. at 220.

Here, it is undisputed that the alleged misrepresentations D.D. made to appellant's cousin occurred after the alleged sexual assault. Moreover, appellant made no claim that he was aware of D.D.'s MySpace page prior to the alleged incident. Thus, as in *Powe*, the evidence concerning D.D.'s alleged false representations of her age was not relevant to appellant's claim that *he* believed D.D. was 17 years old. Appellant testified that D.D. told him that she was 17 years old, and appellant also introduced his statement to law enforcement that D.D. claimed that she was 17 and on the verge of graduating from high school. Accordingly, appellant was not deprived of his right to fully present his mistake-of-age defense because the evidence supporting appellant's claim that *he* believed D.D. was 17 years old was admitted into evidence.

II.

At trial, the state objected to appellant's request for an interpreter, arguing that "the use of an interpreter in fact insulates a defendant from particularly a cross based on detail." The district court overruled the objection, but noted that if appellant made some assertion during his testimony "that there's some aspect of . . . his defense that's based on a lack of facility in English, . . . then the State . . . would be allowed to rebut that with evidence that they think shows that his English is excellent."

During his direct testimony, appellant did not discuss his language skills. But toward the beginning of its cross-examination, the state focused on appellant's English-language skills. Appellant argues that the prosecutor's questions about his English-language abilities were both irrelevant and an improper attack on appellant's credibility. Thus, appellant argues that he is entitled to a new trial because the district court abused its discretion in allowing the prosecutor to proceed with the questions concerning his English-language abilities.

We disagree. The questions asked by the prosecutor established what appellant understood of his cell phone records, and that appellant had the ability to communicate with the investigator. These were key facets of the state's case. In light of appellant's use of an interpreter, these questions eliminated any concern the jury may have regarding appellant's ability to meaningfully engage in the interview with the investigator and understand his cell phone records. The prosecutor never raised any questions to the jury about appellant's need for an interpreter nor did he argue that appellant's need for an interpreter was a ruse. The record also reflects that the prosecutor made no mention of

appellant's use of an interpreter in his closing arguments. The district court did not abuse its discretion in allowing the prosecutor's limited cross-examination on appellant's English-language proficiency.

III.

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 a light most favorable to the conviction, was sufficient to permit the [factfinder] to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that the factfinder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This court will not disturb the verdict if the factfinder, 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).

Appellant was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b) (2006). This statute provides that "[a] person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the complainant is at least 13 but less than 16 years of age and the actor is more than 24 months older than the complainant." *Id.* The statute further provides that "[i]n any such case it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older." *Id.*

Appellant argues that his conviction must be reversed because he established his belief that D.D. was 16 years old or older. To support his claim, appellant cites (1) his trial testimony that D.D. told him that she was 17 years old and (2) his consistent statement to the investigator, which was played to the jury. But in contrast to appellant's testimony, D.D. specifically testified that she told appellant that she was 14 years old. The issue is one of credibility, and the jury apparently found D.D.'s testimony to be credible and appellant's testimony on the issue not to be credible. Because the weight and believability of witness testimony is an issue for the jury, this court defers to the jury's credibility determinations. *Wedan v. State*, 409 N.W.2d 266, 268 (Minn. App. 1987), *review denied* (Minn. Sept. 23, 1987). Accordingly, there is sufficient evidence to sustain appellant's conviction of third-degree criminal sexual conduct.

Affirmed.