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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1424**

State of Minnesota,
Respondent,

vs.

Sanjeeb Shrestha,
Appellant.

**Filed May 18, 2010
Affirmed
Harten, Judge***

Hennepin County District Court
File No. 27-CR-08-46049

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Derk Karl Schwieger, Derk Karl Schwieger LLC, Bloomington, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Harten, Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct, arguing that the evidence was insufficient and that his right to a jury trial was violated. Because ample evidence supports the conviction and the record shows that appellant lawfully waived a jury trial, we affirm.

FACTS

On 31 July 2008, appellant Sanjeeb Shrestha, 34, a nursing assistant, was working in a hospital. Among the patients was J.S., an 80-year-old woman who was recovering from back surgery. J.S.'s sister, S.R., was visiting J.S. in her hospital room. At one point during her visit, S.R. pulled the blankets up to J.S.'s chin and left the room to speak with the physical therapist. Appellant entered the room as S.R. left.

When S.R. returned to J.S.'s room, she saw appellant standing next to the bed, the blankets turned down to J.S.'s knees, and appellant's hand moving around inside J.S.'s underwear. S.R. immediately reported the incident to hospital personnel and later reported it to the police.

On 10 September 2008, appellant was charged with fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2008) (engaging in sexual conduct with someone known to be physically helpless). On the first day of his trial, appellant waived his right to a jury trial. After a bench trial, the district court convicted appellant of fourth-degree criminal sexual conduct. Imposition of his sentence was

stayed for two years with conditions of 160 hours of community service, no contact with the victim or her family, and restitution.

Appellant challenges his conviction, asserting that the evidence was insufficient and that his right to a jury trial was violated.

D E C I S I O N

1. Sufficiency of the Evidence

This court “review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions. [It] will reverse a finding of guilt only if the district court could not reasonably conclude that the defendant is guilty of the offense charged.” *State v. Marinaro*, 768 N.W.2d 393, 397 (Minn. App. 2009) (quotation and citation omitted).

After hearing the evidence and arguments of counsel, the district court made “a general finding of guilty” because it believed the testimony of S.R., the state’s chief witness, and did not believe appellant’s testimony. Credibility determinations are the province of the district court in bench trials. *Id.* Credibility determinations are generally not disturbed on appeal, and a district court’s determination is given the same weight as a jury’s verdict. *City of Grand Rapids v. Jarvi*, 410 N.W.2d 83, 84 (Minn. App. 1987).

S.R. testified that, on the day in question, J.S. had physical therapy but was very sleepy because of her medication and went to sleep as soon as she was put back in bed. S.R. then covered her with blankets up to her chin and left the room to talk with the physical therapist. A man whom S.R. identified as appellant entered J.S.’s room as S.R. left.

S.R. testified further that, after talking to the physical therapist in the hall for a few minutes, she returned to J.S.'s room where she saw that the blankets were turned down to J.S.'s knees and that appellant was moving his right hand around inside J.S.'s underwear. She went on to testify that appellant appeared startled when he saw her in the room, jumped around, looked at the monitors, and started to hum.

Appellant testified that he had entered J.S.'s room to take her vital signs, noticed that she was in a poor position, and was repositioning her when S.R. saw him.

The district court made extensive findings as to the testimonial credibility of both S.R. and appellant. The district court found S.R.'s testimony to be credible because: (1) she did not know appellant and had no motive to fabricate testimony against him; (2) she reported the incident immediately to two nurses and a physical therapist, and later to two police officers; (3) her emotional reactions after the incident and during her courtroom testimony were appropriate to the situation; (4) the report dealt with matters embarrassing to both S.R. and J.S.; (5) J.S. was unaware of the incident and knew of it only from S.R.'s report; and (6) S.R.'s testimony was positive and her reports were consistent. The record shows that J.S.'s testimony was corroborated by the testimony of the nurse to whom S.R. first reported the incident, the physical therapist, the charge nurse, and the police officer whom S.R. later informed.

The district court found that appellant was not credible because his testimony conflicted with that of other witnesses on four points: (1) he described J.S. as alert while S.R., the physical therapist, and the supervising nurse who saw J.S. testified that she was asleep; (2) he denied that he moved the bed covers, contrary to the testimony of both the

nurse and S.R.; (3) he claimed to have entered the room once during the physical therapy session in response to a call button, but the physical therapist said he had been in the room twice and that the therapist had not used the call button to summon him; and (4) he testified that, after the nurse told him to leave J.S.'s room, he waited outside the door, but the nurse testified that she later located him in a utility room. The district court also noted that appellant could not be employed as a nursing assistant if the incident was proved and therefore he had a motive to fabricate testimony.

We see no basis to disturb the district court's credibility determination.

Appellant also argues that the evidence is insufficient because J.S.'s DNA was not found on appellant's hands. But the nurse testified that it is hospital protocol for staff to use a hand sanitizer on entering and leaving a patient's room, and the forensic expert testified that hand washing may remove DNA. Thus, evidence of the absence of DNA appears inconsequential.

At the sentencing hearing, the district court remarked that "the offense as described was a momentary lapse in judgment just for one moment in time, apparently, and I take that into account [in sentencing appellant]." Appellant relies on this remark to support his argument that the district court was uncertain of appellant's guilt. But the sentencing hearing transcript displays no uncertainty of the district court regarding appellant's guilt: the district court reiterated its view that S.R.'s testimony was credible and noted that appellant consistently denied the offense. The district court neither said nor implied that it was uncertain that appellant committed the offense.

The verdict is supported by sufficient evidence.

2. Right to a Jury Trial

We review de novo a waiver of the right to a jury trial. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. 18 June 2002).

The defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.

Minn. R. Crim. P. 26.01, subd. 1(2)(a). “Rule 26.01 . . . clearly requires a jury trial in the absence of defendant’s intelligent and recorded waiver. *Tlapa*, 642 N.W.2d at 74 (quotation omitted).

Appellant acknowledges that he and his trial counsel submitted a written waiver to the district court and his counsel questioned him on the record, but nevertheless argues that his counsel and the district court could have taken more time to impress on him the importance of the waiver of the right to a jury trial because he has been in the United States for only five years and English is his second language.

Appellant testified that he understood that, in order to convict him in a jury trial, twelve people would have to find him guilty beyond a reasonable doubt, that he would have the opportunity to subpoena witnesses, that he was leaving the decision up to the judge, and that his attorney had reviewed these matters with him on the morning of the trial and the previous evening.

During the trial, appellant testified that he came to this country in 2004, that he attended ESL (English as a Second Language) training and received an advanced level pass; then he trained to be a nursing assistant, and, at the time of trial, was taking nursing

courses at the Minneapolis Community and Technical College. Appellant expressed himself fluently while testifying and never appeared to lack understanding or to require clarification of a question. The transcript provides no indication that appellant's command of English is such that he needed further explanation of the waiver of his right to a jury trial.

We conclude that appellant was lawfully convicted as charged.

Affirmed.