STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1576

State of Minnesota,
Respondent,

vs.

Keon Nunn,
Appellant.

Filed September 14, 2010
Affirmed in part and reversed in part
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-08-2224

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

Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, 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

KALITOWSKI, Judge

Appellant Keon Nunn challenges his convictions of first-degree criminal sexual conduct, third-degree criminal sexual conduct, kidnapping, and false imprisonment, arguing that: (1) the evidence was insufficient to support the kidnapping and false imprisonment convictions, and (2) the district court abused its discretion by refusing to admit certain evidence regarding D.J.D.'s mental illness. We affirm appellant's convictions of first-degree criminal sexual conduct and third-degree criminal sexual conduct, but reverse his convictions of kidnapping and false imprisonment.

D E C I S I O N

I.

Appellant argues that the evidence is insufficient to support his convictions of kidnapping and false imprisonment. Because the record shows that the confinement of D.J.D. was completely incidental to the conduct supporting appellant's convictions of criminal sexual conduct, we agree.

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 jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume "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).

Kidnapping

Minn. Stat. § 609.25, subd. 1 (2008), provides in pertinent part:

> Whoever, for any of the following purposes, confines or removes from one place to another, any person without the person's consent . . . is guilty of kidnapping . . . :
> . . . .
> (2) to facilitate commission of any felony or flight thereafter; or
> (3) to commit great bodily harm or to terrorize the victim or another; . . . .

But it does not constitute kidnapping when the confinement or removal of the victim is "completely incidental to the perpetration of a separate felony." *State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003). In *State v. Welch*, the defendant approached the victim in a park and engaged her in conversation before he threw her to the ground, straddled her, slammed her head into the ground several times, and choked her. 675 N.W.2d 615, 616-17 (Minn. 2004). After the victim kicked him, the defendant ran away. *Id*. at 617. The defendant was convicted of kidnapping under section 609.25, subdivision 1(2), and attempted second-degree criminal sexual conduct. The supreme court, citing the newly issued *Smith* opinion, reversed the defendant's kidnapping conviction after determining that the confinement that formed the basis of the kidnapping conviction was the "very force and coercion" that supported the attempted criminal-sexual-conduct conviction. *Id*. at 620.

Here, viewing the evidence in the light most favorable to the verdict, the record shows that D.J.D. approached appellant and another man at a bus stop to buy crack cocaine. The two men got into D.J.D's truck and instructed her to drive a mile and a half

to a white house. When the other man went into the house, appellant put both hands around D.J.D.'s neck, removed D.J.D.'s clothing, climbed on top of her, and sexually assaulted her. When the second man returned, D.J.D. escaped from the truck before the two men drove away.

On this record, appellant confined D.J.D. for purposes of the kidnapping statute when he put his hands around her neck, removed her clothes, and climbed on top of her. But like in *Welch*, these actions were the same acts of "force and coercion" that supported appellant's three criminal-sexual-conduct convictions. *See* Minn. Stat. § 609.342, subd. 1(c) (2008) (offense of first-degree criminal sexual conduct under this subdivision requires victim to have reasonable fear of imminent great bodily harm); subd. 1(e)(i) (2008) (offense of first-degree criminal sexual conduct under this subdivision requires use of force or coercion to accomplish sexual penetration); Minn. Stat. § 609.344, subd. 1(c) (2008) (offense of third-degree criminal sexual conduct under this subdivision requires use of force or coercion to accomplish sexual penetration). Therefore, because the confinement of D.J.D. was completely incidental to the commission of the criminal-sexual-conduct offenses, the evidence is insufficient to support a separate conviction for kidnapping.

The state argues that appellant also confined or removed D.J.D. when, as the two men drove the truck away, D.J.D. jumped into the truck bed and rode in the back. Specifically, the state asserts that this action constituted confinement or removal for the purpose of flight after the commission of a crime under section 609.25, subdivision 1(2). We disagree. The evidence does not support a finding that D.J.D. was confined or

removed at this point because she was not in the back of the truck when it began to drive away, but willingly jumped onto the moving truck.

False imprisonment

Minn. Stat. § 609.255, subd. 2 (2008), provides, "Whoever, knowingly lacking lawful authority to do so, intentionally confines or restrains . . . any . . . person without the person's consent, is guilty of false imprisonment . . . ." False imprisonment is a lesser included offense of the crime of kidnapping. *State v. Keenan*, 289 Minn. 313, 317, 184 N.W.2d 410, 412 (1971).

As discussed above, any confinement of D.J.D. was incidental to the commission of the criminal-sexual-conduct offenses. And because any conduct that can be described as "restraint" under section 609.255 falls within the conduct described as "confinement or removal" under section 609.25, we conclude that the evidence is insufficient to support appellant's false-imprisonment conviction. *See State v. Niska*, 514 N.W.2d 260, 266 (Minn. 1994).

In sum, because any confinement or restraint of D.J.D. was completely incidental to the commission of the criminal-sexual-conduct offenses, the evidence is insufficient to support separate convictions of kidnapping and false imprisonment. We therefore reverse appellant's convictions of kidnapping and false imprisonment.

II.

Appellant argues that the district court's refusal to allow certain evidence concerning D.J.D.'s mental health deprived appellant of the opportunity to present a complete defense. Specifically, appellant argues that the district court abused its

discretion by: (1) denying appellant's motion to admit D.J.D.'s medical records; (2) denying appellant's motion for an adverse psychological exam of D.J.D.; (3) limiting the cross-examination of D.J.D. regarding her mental illness; and (4) denying appellant's request to present expert testimony regarding the characteristics and symptoms of D.J.D.'s mental illnesses as they relate to D.J.D.'s ability to perceive and recall events.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). We will not reverse a matter based on an evidentiary error unless the error substantially influenced the jury to convict. *State v. Morgan*, 477 N.W.2d 527, 529 (Minn. App. 1991), *review denied* (Minn. Jan. 17, 1992).

Medical records and cross-examination

In a pretrial motion, appellant sought to admit D.J.D.'s medical and criminal records for purposes of challenging D.J.D.'s ability to recall and perceive events. The district court properly reviewed the records in camera. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (providing that the proper procedure for determining the relevance and materiality of confidential documents is a district court's in camera review of the records). Furthermore, the district court reserved ruling on their admissibility until after direct examination of D.J.D. in order to carefully evaluate their relevance and materiality to appellant's defense. Following direct examination of D.J.D., the district court determined that the evidence would have been cumulative of D.J.D.'s testimony that she

is diagnosed with mental illness, takes psychotropic medications, and has received social security disability payments for her mental illness since 1998.

We conclude that the record supports the district court's determination that the evidence was cumulative. *See Morgan*, 477 N.W.2d at 530 (stating that it was not error to deny admission of medical records that simply restated what the jury already knew with regard to victim's addictive and depressive disorders); *McCarthy's St. Louis Park Cafe Inc. v. Minneapolis Baseball and Athletic Ass'n*, 258 Minn. 447, 451, 104 N.W.2d 895, 899 (1960) (providing that it is within the district court's discretion to limit the undue introduction of cumulative evidence). Furthermore, appellant failed to show any connection between D.J.D.'s diagnoses and the alleged sexual assault, other than unsupported allegations regarding D.J.D.'s ability to tell the truth. Thus, this evidence may have confused or prejudiced the jury. *See* Minn. R. Evid. 403 (providing that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); *Morgan*, 477 N.W.2d at 530 (stating that the evidence was likely to cause confusion in the jury by distracting attention from the events of the night in question and transforming the trial into a competency determination).

We further conclude that the district court did not err by limiting the cross-examination of D.J.D. to information elicited on direct exam because, as discussed above, information regarding D.J.D.'s mental health was already before the jury. *See Morgan*, 477 N.W.2d at 530 (determining that the district court did not abuse its discretion by denying cross-exam of victim regarding history of mental illness and substance abuse

when the "basic evidence" on those issues was already before the jury). Thus, the district court did not abuse its discretion by denying admission of D.J.D.'s medical records and limiting the cross-examination to information elicited on direct exam.

Expert testimony and adverse psychological exam

Minn. R. Evid. 702 states that an expert may provide opinion testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." But "[i]f the subject of the testimony is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions about that subject," then the testimony does not meet rule 702's helpfulness test. *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

Appellant argues that because a lay juror does not have knowledge of and experience with multiple mental illnesses, the course of treatment for such illnesses, and the interaction of substance abuse with such illnesses, the district court erred by refusing to allow expert testimony under rule 702. But appellant fails to show that such evidence was necessary for the jury to evaluate D.J.D.'s ability to tell the truth.

The district court conducted a brief competency hearing and determined that D.J.D. was competent to testify. Significantly, the jury was able to hear D.J.D.'s testimony at trial, as well as appellant's extensive impeachment of D.J.D. with inconsistent prior statements. And as discussed above, the jury was aware of D.J.D.'s diagnoses, knew that she was treated with numerous psychotropic medications both at the time of the incident and the time of trial, and heard testimony that D.J.D. was addicted to

crack cocaine at the time of the incident. Thus, in light of the evidence available to the jury, the record supports the district court's determination that allowing an expert to testify generally regarding the characteristics and symptoms of D.J.D.'s mental illnesses would "lend an unwarranted stamp of scientific legitimacy" to the alleged falsity of D.J.D.'s allegations. *See Morgan*, 477 N.W.2d at 530.

Finally, we conclude that the district court did not err by denying appellant's request for an adverse psychological examination of D.J.D. Appellant failed to show that evidence developed in a psychological examination would be relevant to or probative of the events in question. Moreover, the introduction of such evidence would likely be prejudicial and confusing. *See Morgan*, 477 N.W.2d at 530 (determining that the district court did not abuse its discretion by refusing to allow an adverse psychological examination to develop evidence on victim's ability to tell the truth because such evidence would be prejudicial and confusing). In sum, it was within the district court's broad discretion to limit evidence regarding D.J.D.'s mental health.

Affirmed in part and reversed in part.