STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0854

State of Minnesota,
Respondent,

vs.

Travis Kyle Mayer,
Appellant.

Filed June 16, 2014
Affirmed in part, reversed in part, and remanded
Smith, Judge

Le Sueur County District Court
File No. 40-CR-12-569

Lori Swanson, Attorney General, Michael T. Everson, Assistant Attorney General, St. Paul, Minnesota; and

Brent A. Christian, Le Sueur County Attorney, Le Center, Minnesota (for respondent)

Daniel L. Gerdts, Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hudson, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm appellant's conviction of attempted third-degree criminal sexual conduct because the district court impartially discharged its duties and because the evidence is legally sufficient to support the conviction. But we reverse appellant's

sentence, which is an improper upward durational departure, and remand for the district court to impose a sentence within the Minnesota Sentencing Guidelines.

FACTS

On May 2, 2012, the Le Sueur County Department of Human Services contacted the City of Le Center Police Department regarding an alleged instance of child abuse. Following an investigation, respondent State of Minnesota charged 23-year-old appellant Travis Kyle Mayer with one count of attempted third-degree criminal sexual conduct. Approximately six months later, the state amended the complaint to include one count of attempted first-degree criminal sexual conduct.

Mayer waived his right to a jury trial, and a two-day bench trial followed. The district court sequestered the witnesses, and the trial testimony painted two completely different pictures: one in which an adult caught Mayer with his pants down, using physical force to partially disrobe and mount the alleged victim, 13-year-old G.S., and one in which there was absolutely no sexual contact between Mayer and G.S.

The first picture was painted primarily by G.S. and her mother, A.S. Both G.S. and A.S. testified that on April 29, 2012, Mayer came to the family's home on G.S.'s invitation; A.S. testified that G.S. referred to Mayer as her boyfriend. Both G.S. and A.S. testified that, on April 29, Mayer told them he was 17 years old. Both G.S. and A.S. testified that G.S. and Mayer went upstairs, to G.S.'s bedroom, to listen to music. Both G.S. and A.S. testified that A.S. instructed them to leave the bedroom door and window open. A.S. testified that she checked on G.S. and Mayer two times: the first time, the door was open; the second time, the door was closed and locked. G.S. testified that

Mayer closed and locked the door. G.S. and A.S. both testified that when A.S. discovered the locked door, A.S. kicked the door open. G.S. testified that while the door was closed, Mayer tickled her, tried to kiss her, and touched her in "[p]rivate places he's not supposed to." G.S. testified that she protested, repeatedly telling Mayer to stop, but Mayer "wouldn't stop." G.S. testified that Mayer pulled her shirt and bra up to her neck, and was pulling her pants and underwear down when A.S. entered. A.S. testified that when she kicked open the door, she saw Mayer on top of G.S., and G.S. in a "defensive position," with her pants pulled down and her shirt and bra around her neck. G.S. and A.S. both testified that when A.S. kicked open the door, Mayer jumped back from G.S. and quickly pulled up his pants.

G.S. testified that she immediately ran to the bathroom, crying. A.S. testified that after she kicked open the door, she first stepped outside to collect herself; she then returned to G.S.'s room, where G.S. and Mayer were waiting. A.S. yelled at both of them, and G.S. ran to the bathroom. A.S. testified that she chastised Mayer, and then followed G.S. to the bathroom; there, A.S. noticed marks on G.S.'s neck and G.S. told her that Mayer was "trying to force [her.]" A.S. testified that after hearing this, she ran outside, told her boyfriend to stop working on her truck, jumped in the truck, and pursued Mayer. A.S. testified that she confronted Mayer as he walked down a nearby road; Mayer said nothing. A.S. testified that while she spoke with Mayer, her boyfriend pulled up in his truck.

The second picture was painted by Mayer. Mayer testified that he and G.S. were frequently at the home of mutual friends: Mayer was friends with the 17-year-old

daughter, and G.S. was friends with the 13-year-old daughter. Mayer testified that in early April 2012, he questioned G.S. about a rumor that G.S. was telling people she and Mayer were dating; G.S. denied making such statements. Mayer testified that he knew G.S. was 13 years old, and G.S. knew he was 23 years old. Mayer testified that he met G.S.'s mother, A.S., at a bar in October 2011, but the two had not stayed in touch. He testified that a few nights before the alleged incident, Mayer realized that A.S. was G.S.'s mother, and he asked G.S. for A.S.'s phone number. Mayer and A.S. exchanged text messages for approximately two hours and, because A.S.'s boyfriend, J.T., was curious about who she was texting with, A.S. ultimately invited Mayer over for lunch that Sunday, April 29. Mayer testified that, on the 29th, J.T. "kept giving [him] looks," so he spent little time with A.S. and instead engaged with G.S., G.S.'s brother, and J.T.'s mother. Mayer admitted to listening to music in G.S.'s bedroom on three occasions, but denied any physical contact with G.S.; he testified that he accepted G.S.'s invitations to hear her music because he "took it kind of like friends with her mom," and he has "a hard time telling a kid no." Mayer testified that during the last song, A.S. joined him and G.S. in G.S.'s bedroom, apologized for spending so little time with Mayer, and mentioned inviting him over again, when J.T. was gone. Mayer testified that he then arranged for a friend, T.S., to pick him up.

The state called T.S. as a rebuttal witness and, after T.S. testified that he never picked Mayer up as described, and did not have a working phone on the relevant date, both parties rested. The district court informed counsel that it wanted to hear from A.S.'s boyfriend, J.T. Defense counsel challenged the district court's authority to call a witness,

but the district court decided to call J.T. "in the interest of justice." The district court elaborated, stating that it had "never in [its] life heard such radically different stories. And since [it has] somebody who . . . runs the risk of 10 years in prison, [it is] going to find out as much as [it] possibly can before [it makes] this decision."

After the district court verified that J.T. had complied with the sequestration order, both counsel examined J.T. J.T. testified that Mayer came to the house to visit G.S., and G.S. and Mayer "were holding hands, and giving each other hugs." He also testified that while he was working on A.S.'s truck, A.S. came out for a cigarette and said that G.S. and Mayer "were up in the room with . . . the door shut." Shortly thereafter, A.S. again exited the house, "slammed the door, jumped in [her truck], and told [him] to get the jack out." He testified that before he could remove the jack, A.S. "started, kicked in reverse, and went backwards." A minute or two later, he drove after A.S. in his own truck, and found her "screaming" at Mayer. He testified that Mayer eventually walked away, and he and A.S. both drove home.

Concluding that "Mayer did attempt to engage in sexual penetration with G.S.," but that "[t]here is a reasonable doubt about the use of force," the district court found Mayer not guilty of attempted first-degree criminal sexual conduct and guilty of attempted third-degree criminal sexual conduct. The district court denied Mayer's motion for a new trial, and sentenced him to 108 months' imprisonment—a sua sponte 37-month upward durational departure. Subsequently, the district court granted Mayer's motion to amend the sentence in light of the statutory maximum, sentencing Mayer to 90 months' imprisonment—a 19-month upward durational departure.

D E C I S I O N

I.

"[A] criminal defendant has a constitutional right to a fair and impartial judge." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). Mayer claims that the district court was not impartial, as demonstrated by its decision to call and question witnesses, and its sua sponte sentencing departure.

A district court is presumed to discharge judicial duties in each case with neutrality and objectivity; such presumption is overcome only if the party alleging bias provides evidence of favoritism or antagonism. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008); *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). In determining whether the presumption is overcome, relevant factors include "whether the trial judge considered arguments and motions made by both sides, ruled in favor of a complaining defendant on any issue, and took actions to minimize prejudice to the defendant." *Hannon*, 752 N.W.2d at 522.

A careful examination of the record establishes that the presumption of judicial impartiality is not overcome. First, the district court found the state did not meet its burden of proof on the issue of force, and acquitted Mayer of the most serious charge, attempted first-degree criminal sexual conduct. Second, the district court granted Mayer's motion to amend his sentence, decreasing it by 18 months. Third, the district court made multiple trial rulings in Mayer's favor, including admitting an exhibit over the state's objection and allowing Mayer to call a witness of questionable relevance. It is undisputed that the district court asked follow-up questions of *both* parties' witnesses,

and that the district court acted within its authority by calling J.T. as a witness. *See* Minn. R. Evid. 614. Although Mayer highlights an instance in which the district court attempted to turn a witness over to the prosecutor when it was defense counsel's turn, the record demonstrates that in another instance the district court attempted to turn a witness over to defense counsel when it was the prosecutor's turn. Because Mayer's assertions of judicial bias are not supported by the record, he fails to overcome the presumption that the district court properly discharged its duties. Mayer is not entitled to relief on this ground.

II.

Mayer next argues that the evidence is insufficient to support his conviction. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis of the record to determine whether the fact-finder reasonably could find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant is guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A person is guilty of attempting to commit a crime if the person, "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1 (2010). Absent an affirmative defense, a person is guilty of third-degree criminal sexual conduct if he or she "engages in sexual penetration with another person" and "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." Minn. Stat. § 609.344, subd. 1(b) (2010). "Consent by the complainant is not a defense." *Id.*

Mayer argues that the evidence is insufficient to establish that he attempted to engage in sexual *penetration* with G.S., rather than merely sexual *contact*. *Compare* Minn. Stat. § 609.344, subd. 1(b) (defining third-degree criminal sexual conduct) *with* Minn. Stat. § 609.345, subd. 1(b) (2010) (defining fourth-degree criminal sexual conduct). Although the state contends that there is "ample evidence" of attempted sexual penetration, the state relies heavily on evidence which the district court explicitly found not credible. Specifically, the district court found that A.S. "had no credible evidence" that Mayer used force with G.S. The district court did not make an explicit finding regarding G.S.'s credibility on the issue of force, but concluded that, as to the charge of attempted first-degree criminal sexual conduct, the state did not meet its burden of proof on the element of force. *See* Minn. Stat. § 309.342, subd. 1(e) (2010).

Because consent is not a defense to the type of third-degree criminal sexual conduct at issue, force is not necessary to establish an attempt to commit the crime. Excluding any evidence of force, viewed in the light most favorable to the verdict, the

evidence establishes the following facts. Mayer knew that G.S. was 13 years old and that she had a romantic interest in him. Mayer accepted an invitation to visit G.S.'s home, and represented to G.S.'s mother that he was 17 years old. Mayer accompanied G.S. to her bedroom, and sat with G.S. on her bed. Despite instructions to the contrary, Mayer closed and locked the door to G.S.'s bedroom. G.S. believed that, before A.S. kicked open the door, Mayer was trying to have sex with her. Mayer tickled and kissed G.S., and made marks on her neck. Mayer pulled G.S.'s shirt and bra up to her neck, pulled her pants down, and was in the process of pulling down her underwear. Mayer's own pants were down, and he was on top of G.S. Based on these facts, the fact-finder could reasonably conclude that Mayer was attempting to sexually penetrate G.S. Therefore, the conviction is supported by sufficient evidence and Mayer is not entitled to relief on this ground.

III.

Finally, Mayer challenges his sentence, arguing that the district court violated his Sixth Amendment right to a jury trial, as recognized in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), when it imposed a sentence that is an upward durational departure from the Minnesota Sentencing Guidelines. The state correctly concedes this issue, and we remand to the district court for resentencing in accordance with this opinion.

Affirmed in part, reversed in part, and remanded.