STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1248

State of Minnesota,
Respondent,

vs.

James Ervin Roark,
Appellant.

Filed June 16, 2014
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-12-28439

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant challenges the sufficiency of the evidence to support his conviction of second-degree criminal sexual conduct after he engaged in sexual contact with a minor. We affirm.

FACTS

The state charged appellant James Ervin Roark with criminal sexual conduct in the first degree, in violation of Minn. Stat. § 609.342, subd. 1(a), and Minn. Stat. § 609.17 (2010) (count one); criminal sexual conduct in the second degree, in violation of Minn. Stat. § 609.343, subd. 1(a), (2010) (count two); and criminal sexual conduct in the second degree, in violation of Minn. Stat. § 609.343, subd. 1(a) (count three). Counts 1 and 3 stemmed from sexual conduct involving T.D.T., occurring between January 1, 2010, and May 14, 2012. Count 2 resulted from alleged sexual conduct with T.T., T.D.T.'s sister, occurring on or around May 1, 2012, through May 31, 2012.

In July 2012, the mother of T.D.T. and T.T. questioned her children about whether appellant had ever done anything to them. At the time of questioning, T.D.T. was 13 years old, and T.T. was 9 years old. Appellant, a long-time family friend, would babysit both T.D.T. and T.T., and, as a result, both girls spent multiple weekends at appellant's house. These weekend visits typically involved T.D.T. and T.T. spending the night.

In response to her mother's questioning, T.D.T. started to cry and told her mother that appellant had touched her. Law enforcement then interviewed T.D.T.'s mother regarding the statements made by T.D.T. T.D.T.'s mother told a law enforcement officer

that in July 2012, T.D.T. told her that appellant "had his hands down her pants and that he was trying to pull her pants down. [T.D.T.] also stated that he was trying to pin her down, like trying to force her to lay down, she was trying to get up, and he was forcing her down."

Shortly thereafter, T.D.T. was interviewed at CornerHouse. During this interview, T.D.T. stated that while she was sleeping at appellant's house, she awoke to appellant on top of her. T.D.T. stated she tried to push him off, but appellant had pinned her down. Appellant then attempted to pull down T.D.T.'s pants, and she tried to scream, but he covered her mouth. When asked what happened after appellant covered her mouth, T.D.T. replied, "Nothing."

T.D.T. then stated that appellant attempted a similar act the year before: "I had woke [sic] up and saw him on top of me again and he was like trying to kiss on my neck and stuff like that and trying to pull my pants down and tried to pull his pants down." T.D.T. said that, during this incident, she was lying on her stomach, and appellant was "trying to pull [her] pants down and have sex with [her]." T.D.T. stated that appellant had on underwear but his pants were down. She also felt appellant's private parts "moving" on her buttocks. T.D.T. kicked appellant and was able to escape.

T.D.T. then described the most recent incident. T.D.T. was sleeping at appellant's house and woke up to appellant "doing it, he was on top of me doing um moving up and down doing ejaculation. And then I woke up and I felt-felt something wet on top of my pants." T.D.T. stated she went to the bathroom and confirmed there was a wet spot on her pants. Lastly, when asked about whether any contact had ever happened on her skin,

T.D.T. described, with the assistance of an anatomically correct doll, that appellant "tried to have like sex with me like this. But when he did I had felt like something like tried to go inside my butthole and so I pulled my pants back up." This incident occurred approximately two years ago, in 2010. T.D.T. also stated that appellant told her that he would hurt her family if she told anyone about the incident.

On February 1, 2013, appellant waived his rights to a jury trial and agreed to a stipulated-facts trial on only count 3 under Minnesota Rule of Criminal Procedure 26.01, subdivision 3, and *Dereje v. State*, 812 N.W.2d 205 (Minn. App. 2012), *rev'd*, 837 N.W.2d 714 (Minn. 2013), *cert. denied*, 134 S. Ct. 1772 (2014). The parties agreed to submit the matter to the district court on stipulated evidence. Accordingly, the parties submitted six exhibits that included the police report with supplements, a transcript of T.D.T.'s video interview with CornerHouse, the video recording of the CornerHouse interview, a transcription of a statement by appellant, the audio recording of appellant's statement, and a non-verbatim summary of the conversation that the prosecutor had with T.D.T. in preparation for the trial.

Under the terms of the agreement, if the court found appellant guilty of count 3, the remaining counts of the complaint would be dismissed and appellant would be sentenced to 72 months in prison. Based on its review of the documentary evidence, the district court found appellant guilty of second-degree criminal sexual conduct (count 3) and sentenced him to a 72-month prison sentence, a downward departure from the presumptive sentence of 119 months for an individual with his criminal history score. This appeal followed.

D E C I S I O N

Although the issue was not raised by either party, we note, as an initial matter, that under the supreme court's recent decision in *Dereje v. State*, 837 N.W.2d 714 (Minn. 2013), the procedure used by the district court was not a valid stipulated-facts trial under the Minnesota Rules of Criminal Procedure. While the parties stipulated to a body of documentary evidence, the evidence contained conflicting versions of the events. *See Dereje*, 837 N.W.2d at 721 ("[T]he submission of documentary evidence presenting contradictory versions of events cannot constitute a valid trial on stipulated facts under Minn. R.[]Crim. P. 26.01, subd. 3."). Nevertheless, despite the invalidity of the stipulated-facts trial, we conclude appellant's trial was not procedurally defective because it complied with the requirements for a valid bench trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 2. *See id.* ("But because the trial here met the requirements for a bench trial in Minn. R.[]Crim. P. 26.01, subd. 2, . . . [defendant's] bench trial was not procedurally defective.").

Appellant challenges the sufficiency of the evidence to support his conviction. In considering an insufficient-evidence claim, this court analyzes the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that he did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). When reviewing the sufficiency of the evidence, we apply the same standard to bench and jury trials. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 215 (Minn. App. 2004).

A verdict will not be disturbed if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We consider "the facts in evidence and the legitimate inferences which could be drawn from those facts" in reviewing the sufficiency of the evidence. *State v. Robinson*, 604 N.W.2d 355, 365-66 (Minn. 2000) (quotation omitted). In conducting this analysis, we assume that the fact-finder believed the state's witnesses and disbelieved any contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

A person is guilty of second-degree criminal sexual conduct if he "engages in sexual contact with another person" who is under 13 years of age and the actor is more than 36 months older than that person. Minn. Stat. § 609.343, subd. 1(a).[1] It was undisputed that T.D.T. was under 13 years of age and appellant was more than 36 months older than T.D.T. at the time of the allegations contained in count 3 of the complaint. "Sexual contact" is defined as "the intentional touching by the actor of the complainant's intimate parts" or "the clothing covering the immediate area of the intimate parts," committed with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(i), (iv) (2010). "Intimate parts" is defined as "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5 (2010).

[1] T.D.T. alleges that the sexual contact took place on or around January 1, 2010, through May 14, 2012. Because the 2008 version of the second-degree criminal sexual conduct statute is identical to the 2010 version, we cite the 2010 version.

Appellant argues that T.D.T.'s uncorroborated and inconsistent testimony is not sufficiently reliable to satisfy the "sexual contact" requirement in Minn. Stat. § 609.343, subd. 1(a). Although T.D.T. did make inconsistent statements concerning whether appellant touched her breasts and vagina and the location of some of the incidents, these inconsistencies do not rise to the level of unreliability as appellant asserts. "[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event." *State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). And inconsistencies in testimony go to witness credibility, which is an issue for the fact-finder, not this court. *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005).

A review of the record reveals the most significant inconsistencies in T.D.T.'s statements occurred in January 2013 during T.D.T.'s interview with the prosecutor. The prosecutor's conversation summary listed that T.D.T. stated that appellant touched her vagina and breasts. Yet, in the CornerHouse interview, the interviewer asked T.D.T. whether appellant had touched her breasts or vagina, and she said no. The district court, however, did not rely on these incidents as the basis for the sexual contact requirement for its conviction. Rather, it relied on the incidents involving contact between appellant's penis and T.D.T.'s buttocks and appellant's ejaculation on T.D.T.'s buttocks for its sexual contact finding. And all of these incidents were consistently and similarly described by T.D.T. when questioned by her mother and in her video-recorded interview with CornerHouse.

T.D.T. described to the CornerHouse interviewer three separate incidents of abuse. Each of these incidents involved appellant touching T.D.T.'s clothed or unclothed buttocks. One incident involved appellant ejaculating on T.D.T.'s clothed buttocks, and another incident involved appellant's unclothed penis touching T.D.T.'s unclothed buttocks. If believed, these statements are sufficient to support appellant's conviction. *State v. Foreman*, 680 N.W.2d 536, 537, 539 (Minn. 2004) (holding the uncontradicted testimony of a victim is sufficient to support a second-degree assault conviction, even when the victim temporarily recanted her accusation prior to trial); *see State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990) ("It is well established that a conviction can rest upon the testimony of a single credible witness.").

The district court found that the state submitted credible evidence that supported the sexual contact requirement. The court also recognized the inconsistencies in T.D.T.'s statements, but it highlighted the fact that all of T.D.T.'s statements described a similar actus reus: appellant mounting T.D.T. in a "bedroom and having sexual contact with her buttocks and or the clothing over her buttocks." It further found that "[n]otwithstanding the various inconsistencies in T.D.T.'s statements the Court nevertheless concludes that T.D.T. is telling the truth." The district court partially rested this conclusion on the basis that no evidence was produced indicating that T.D.T. had a reason to be dishonest.

Moreover, the district court specifically found T.D.T.'s statements to be more credible than appellant's statements. In addition to reviewing the other exhibits submitted in this case, the district court watched the video-recorded statement of T.D.T. and listened to the audio recording of appellant's statement. The district court found that

appellant's statement was "evasive and not informative. It is self-serving." It is the province of the fact-finder alone "to determine the credibility and weight to be given to the testimony of any individual witness." *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). This court will not reweigh credibility determinations made by the district court. *State v. Green*, 719 N.W.2d 664, 673-74 (Minn. 2006). Thus, because this court defers to the district court's determinations of witness credibility, appellant's argument, which essentially asks this court to set aside the district court's credibility findings, fails on appeal. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating appellate courts defer to district court's credibility determinations), *review denied*, (Minn. July 15, 2003).

After reviewing the record, we conclude that the district court's findings of fact are supported by the evidence and are not clearly erroneous. *See State v. Vail*, 274 N.W.2d 127, 133 (Minn. 1979) (refusing to set aside findings of fact made during a bench trial unless clearly erroneous). There is sufficient evidence in the record to support appellant's conviction of second-degree criminal sexual conduct.

Affirmed.