STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1910

State of Minnesota,
Respondent,

vs.

Pao Yang,
Appellant.

Filed November 13, 2012
Affirmed
Hooten, Judge

Ramsey County District Court
File No. 62-CR-10-8216

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

John J. Choi, Ramsey County Attorney, Sonja Beddow, Certified Student Attorney, Peter Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Worke, Judge.

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

HOOTEN, Judge

Appellant was charged by amended complaint with one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010) for

sexually abusing his niece, who was a minor under the age of 16, over an extended period of time. Appellant waived his right to a jury trial and agreed to a court trial. Appellant challenges his conviction of second-degree criminal sexual conduct, arguing that there was insufficient evidence of guilt. He also challenges his sentence, arguing that the district court abused its discretion by denying his request for a downward dispositional departure. We affirm.

FACTS

At the time of trial, the victim, N.L., was 16 years old and in the tenth grade. N.L. testified that from the time she was 12 years old and continuing for about one year, appellant, who lived at the same residence as N.L. and was married to N.L.'s sister, touched her vaginal area under her underwear, usually while standing next to her bed. According to N.L., the abuse occurred "maybe every other night or any night that he could get a chance to," and occurred in her bedroom, which was located in the basement of the home.

N.L. and appellant never spoke during these encounters. Rather, N.L. would pretend that she was asleep and would try to get him away from her by moving around. She stated that these efforts were occasionally successful. N.L. eventually began pushing her bed against the door to keep appellant out of her bedroom and a family member installed a lock on her bedroom door. She was sure appellant was the individual coming into her room by observing "glimpses of him" while pretending to be asleep, so as to be sure that "he wouldn't be able to see me seeing him." N.L. never told appellant to stop because she was afraid.

N.L.'s brother-in-law testified that when he lived at N.L.'s residence during the late summer and early fall of 2008,[1] he observed appellant walk into the basement and thought he wanted to use the basement bathroom. However, after following appellant downstairs, he observed appellant leave N.L.'s room. Appellant asked him if he wanted to use the weight machines that were in the basement. The brother-in-law thought this was suspicious because appellant would normally have been sleeping and probably would not ask about weight equipment.

N.L.'s brother, who also lived at the residence, observed appellant step into N.L.'s bedroom in the basement in May or June of 2008. He asked appellant what he was doing and appellant responded that he was waking N.L. for school. When the brother questioned appellant about why he would wake N.L. up at five in the morning, appellant stated that the electricity must have failed. However, the brother noted that the electricity had not failed and that it was not appellant's responsibility to wake N.L. for school.

Around the end of February 2009, N.L. informed her sister-in-law about the abuse by appellant. The day after her disclosure, members of N.L.'s family held a meeting where N.L. disclosed details about the abuse. The family decided not to call the police, but requested that appellant leave the residence. On February 27, 2009, appellant's wife, one of N.L.'s sisters, was involved in an altercation with appellant after she asked him why he was so overly concerned about N.L. After learning from her mother that her brother-in-law saw appellant leave N.L.'s room, she confronted appellant, who told her

[1] The brother-in-law and N.L.'s sister were between homes and slept on the living room floor with their daughter. One had to walk by the living room in order to go downstairs.

that he was looking for his fishing pole in N.L.'s bedroom. Appellant's wife noted that his fishing equipment was kept in the storage room. Two days later, when she again confronted appellant about this incident, he stated that he had been looking for his fishing bag.

On March 18, 2010, at the request of law enforcement, an interview with N.L. was arranged at the Midwest Children's Resource Center (MCRC). Sara Wirkkala, a registered nurse at MCRC, had earlier met with N.L. relative to truancy issues on December 16, 2008. At that time, N.L. denied that she had been sexually assaulted. On April 5, 2010, N.L. told Wirkkala that she was molested by appellant when she was 11 or 12 years old and that the first occasion of sexual abuse involved appellant tucking her into bed late at night and placing his hands on the skin of her vagina, or "down there." She explained that she did not say anything while this happened and that she pretended that it did not happen after he left. She further claimed that "every night" appellant touched the outside part of her vagina under her clothing.

At trial, Wirkkala testified that it is not uncommon for victims or children not to resist or to pretend to sleep during the incidents of sexual assault given the consequences and meaning of what was happening. She explained that victims often delay reporting sexual abuse because they do not know what to do and because of the effects of the abuse on the family. Wirkkala also testified that adolescents are often not able to recall specific dates on which sexual abuse begins and ends unless the abuse is a one-time event or associated with something significant. Finally, Wirkkala testified that it was not surprising for N.L. to allege that the abuse occurred on a nightly basis because it may

have happened frequently enough to feel like it occurred every night. She explained that it is common for adolescents to be dramatic.

The district court found appellant guilty. After denying appellant's request for probation, the district court sentenced appellant to the presumptive executed sentence of 90 months in prison.

D E C I S I O N

1. Sufficiency of the Evidence

Appellant first argues that the state's evidence was not sufficient to find him guilty beyond a reasonable doubt because N.L. had a motive to fabricate and provided inconsistent testimony. Appellant focuses on N.L.'s inconsistent testimony regarding the regularity of his criminal conduct. He notes N.L.'s testimony at trial was that he came downstairs to her bedroom and molested her every other night whereas in her second interview with MCRC, she stated that he molested her every night.

In considering a claim of insufficient evidence, this court is limited to a thorough review of the record "to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The same standard of review is applied to bench trials and jury trials. *State v. Cox*, 278 N.W.2d 62, 65 (Minn. 1979). We assume the fact-finder "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 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988). We defer to the fact-finder on determinations of credibility. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995). "Minor inconsistencies and conflicts in evidence do not necessarily render testimony false or provide the basis for reversal." *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (citing *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983)), *review denied* (Minn. Aug. 17, 2004).

While there were inconsistencies with regard to the frequency of the abuse as relayed by N.L., appellant cannot reasonably argue that N.L.'s version of the abuse is "fantasy." Rather, a thorough review of the evidence establishes that N.L. provided consistent testimony that appellant's criminal conduct involved multiple acts committed over an extended period of time. The fact that the state's evidence did not consistently describe the regularity of the alleged criminal conduct does not by itself erode N.L.'s credibility.

Also, appellant unfairly characterizes N.L.'s testimony. Initially, N.L. testified on direct examination that she was molested in her room "maybe every other night or any night he could get a chance to." N.L. later testified that she told Wirkkala that it happened every night "because I believe at that time it was happening every night, but it wasn't — but as the time progressed it happened every other night or so." The reasonable import of N.L.'s testimony amounts to an allegation that appellant would come into her room quite often, or as regularly as every other night. N.L. testified about her "every other night" claim on both direct and redirect examination and reasonably stated that it felt as if it was happening every night. Wirkkala explained that it was not

surprising for N.L. to believe that the abuse was happening every night given the regularity of appellant's actions. Moreover, N.L.'s testimony included details about the incidents, such as her efforts to move around in bed in an attempt to keep appellant from touching her, her recollection that she pretended to be asleep in order to keep appellant from realizing that she saw him, and her efforts to push her bed next to the door to keep appellant from entering.

Under these circumstances, this court will not second-guess the district court's assessment that N.L.'s statements were credible. *See Stufflebean*, 329 N.W.2d at 319 (noting that inconsistent testimony does not serve as proof of false testimony at trial, especially "when the testimony goes to the particulars of a traumatic and extremely stressful incident"); *see also State v. Beard*, 380 N.W.2d 537, 541 (Minn. App. 1986) (concluding that minor inconsistencies between victim's testimony and previous statements were not grounds for reversal where there was sufficient evidence to sustain the convictions and the victim's testimony, taken as a whole, was consistent and credible), *review denied* (Minn. Mar. 3, 1986).

We also find no merit to appellant's claim that because there was no corroborating evidence proving that he molested N.L., he cannot be found guilty beyond a reasonable doubt. Corroboration of the testimony of a victim of second-degree criminal sexual conduct is not required. *See* Minn. Stat. § 609.347, subd. 1 (2010) (stating that "the testimony of a victim need not be corroborated" in a prosecution under section 609.343); *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (stating that "a conviction can rest on the uncorroborated testimony of a single credible witness") (quotation omitted).

Moreover, appellant's suggestion that N.L.'s testimony was uncorroborated is not supported by the record. N.L.'s brother-in-law observed appellant exit N.L.'s bedroom one night and N.L.'s brother saw appellant attempt to enter N.L.'s room. Appellant also provided inconsistent and incredible explanations to his wife and N.L.'s brother-in-law and brother about the reasons he either entered or exited N.L.'s room during the night or early morning. The evidence was sufficient to establish appellant's guilt beyond a reasonable doubt.

Appellant also argues that N.L. had a motive to fabricate because she did not get along with her family. It is well settled that the "credibility of individual witnesses and the weight to be given to each witness' testimony are issues for the [fact-finder] to determine." *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997); *see also State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) (refusing to disturb jury's weighing of credibility after jury heard and rejected testimony about an alleged motive for the victim to fabricate), *review denied* (Minn. Mar. 16, 1990). As set forth above, the record supports the district court's credibility determinations, which included the rejection of appellant's argument that N.L. was fabricating her claims of abuse.

2. Dispositional Departure

Finally, appellant argues that the district court abused its discretion when it imposed the presumptive executed 90-month prison sentence. Appellant asserts that he is willing to participate in treatment and comply with conditions of probation. As such, appellant's request for probation represents a motion for a downward dispositional departure.

We apply an abuse-of-discretion standard to review a district court's decision not to impose a downward dispositional departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). The district court must order the presumptive sentence unless "substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only a "rare case" warrants reversal of a district court's refusal to depart. *Id.*

When considering a downward dispositional departure, a district court focuses "on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). "[A]menability to probation is a sufficient basis for a downward dispositional departure." *State v. Donnay*, 600 N.W.2d 471, 474 (Minn. App. 1999) (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)), *review denied* (Minn. Nov. 17, 1999). In considering whether a defendant is particularly suitable to individualized treatment in a probationary setting, courts consider "'[n]umerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.'" *Heywood*, 338 N.W.2d at 244 (quoting *Trog*, 323 N.W.2d at 31). However, the existence of mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

In addition to noting the seriousness of the offense and its negative impact on N.L.'s family, the district court concluded that appellant failed to demonstrate his amenability to treatment given his continued refusal to accept responsibility and his

willingness to blame others.[2] The district court specifically concluded that there were no "substantial and compelling" reasons to depart from the guidelines and that appellant's primary motivation for expressing a willingness to participate in therapy was to avoid prison. The district court did not abuse its discretion by denying appellant's request for a downward dispositional departure.

Affirmed.

[2] The state argued that appellant blamed his wife for getting him into trouble.