STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1106

State of Minnesota,
Respondent,

vs.

Jeffery Floyd Athey,
Appellant.

Filed June 10, 2013
Affirmed
Stoneburner, Judge

Douglas County District Court
File No. 21CR111113

Lori Swanson, Minnesota Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Chad Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Connolly, Judge; and Rodenberg, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of fourth-degree criminal sexual conduct, arguing that the district court erred by admitting certain DNA evidence over appellant's objection based on lack of foundation. We affirm.

FACTS

In relevant part, complainant C.R. alleged that appellant Jeffery Floyd Athey slapped her face and touched her vagina without consent while she was intoxicated and sleeping. C.R. and Athey were alone in C.R.'s house briefly while her boyfriend drove another person home after the group had returned to C.R.'s house from an evening of drinking at a local bar. C.R. went to bed. She remembers Athey slapping her face and telling her to get out of bed to drink more beer with him. She said no, fell back asleep, and woke up to Athey's hands in her vagina. At trial, Athey admitted touching C.R.'s inner thigh but denied touching or penetrating her vagina.

Swabs for DNA analysis were taken from C.R.'s vagina by a nurse who performed a sexual-assault examination. Those samples were sealed and delivered to law enforcement officers, who forwarded the samples to the Bureau of Criminal Apprehension (BCA) for testing. Officer Melrose, one of the investigating officers, testified that he swabbed Athey's fingers and thumbs for possible DNA evidence. He did not recall swabbing Athey's cheek to obtain a "control" DNA sample, but he sent all samples taken from Athey to the BCA with a document identifying the source of each sample. The document that arrived at the BCA identifies swabs from Athey's fingers, thumbs, and from his cheek.

BCA forensic scientist Marlijn Hoogendoorn profiled four DNA samples received by the BCA: one from C.R. and three from Athey. She concluded that neither C.R. nor Athey could be "excluded from being possible contributors to the DNA mixture obtained from the hand swabs" of Athey, although 99.1% of the general population could be

excluded from being contributors. Hoogendoorn testified that the amount of DNA other than his own found on Athey's hand would probably not be transferred from contact such as a handshake or slapping a person. Using the swabs identified as having come from Athey's cheek as control samples of Athey's DNA, Hoogendoorn testified that she did not identify DNA that could have come from Athey in DNA retrieved from the swabs taken from C.R.'s vagina.

Athey objected to Hoogendoorn's testimony regarding the control sample of his DNA, arguing that there was no evidence in the record that such a sample was collected from him. In response to the objection, the state was permitted to recall Officer Melrose, who testified that he recalled swabbing Athey's fingertips and thumbs but did not recall taking a swab from Athey's cheek, and his report does not indicate that he took the cheek sample. But Officer Melrose testified that when taking swabs from someone's fingers for DNA testing, it is a "routine course of business" to also take and submit a control sample from that person. Officer Melrose testified that, consistent with routine practice, he would have taken a sterile swab out of its package and swabbed the inside of the person's mouth for such a sample.

The jury found Athey not guilty of the charge of third-degree criminal sexual conduct (penetration) but guilty of the lesser-included offenses of fourth- and fifth-degree criminal sexual conduct (sexual contact with incapacitated person and nonconsensual sexual contact, respectively). Athey was sentenced for fourth-degree criminal sexual conduct, and this appeal followed.

D E C I S I O N

On appeal, Athey argues that the district court abused its discretion by admitting evidence about a control DNA sample taken from him because there was insufficient evidence offered at trial that a control sample from his cheek was actually taken from him. Athey argues that the written documents that accompanied the samples sent by Officer Melrose to the BCA, identifying from whom the samples were taken and from which part of the body they were taken, do not fall within the business-records exception to the hearsay rule because the record was prepared solely for the purpose of litigation. The only authority cited by Athey is the business-records exception to the hearsay rule, Minn. R. Evid. 803(6).

Athey did not object to the foundation for admission of evidence concerning the DNA samples taken from C.R. or samples taken from his hands. Athey's conviction is supported by evidence that C.R.'s DNA was found on his fingertips, in addition to C.R.'s testimony that Athey touched her vagina. Whether or not the state produced evidence that a control sample of Athey's DNA was taken is irrelevant to his conviction. The only use of the control sample was exculpatory: providing evidence that he did not penetrate C.R.

Athey argues that "[w]ithout the DNA evidence it is probable that [Athey] would have elected not to testify in his defense," which opened him to cross examination on all aspects of what happened with C.R., putting him "in a position of having to provide his recollection of what occurred between [him] and [C.R.]." We find no merit in this argument. The DNA evidence that may have caused Athey to testify is the evidence that

C.R.'s DNA was on his fingers. Testimony about a control sample of Athey's DNA could not have motivated him to testify because that evidence was exculpatory.

We do not reach the issue of whether the district court abused its discretion by admitting evidence about the control sample because Athey cannot establish any prejudice from the admission of that evidence such that, even if the evidence was erroneously admitted, any error was harmless beyond a reasonable doubt. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (stating that it is appellant's burden to show that the district court abused its discretion by admitting certain evidence and that appellant was thereby prejudiced); *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (stating that if there is no reasonable possibility that wrongfully admitted evidence affected a guilty verdict, the error was harmless).

Affirmed.