STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0822

State of Minnesota,
Respondent,

vs.

Craig Matthew Rowland,
Appellant.

Filed December 17, 2012
Affirmed
Worke, Judge

Sherburne County District Court
File No. 71-CR-10-1032

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Timothy A. Sime, Assistant County Attorney, Gretchen A. Ziehl, Assistant County Attorney, Elk River, Minnesota (for respondent)

Frederic Bruno, Bruno Law, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

WORKE, Judge

Appellant challenges his third-degree criminal-sexual-conduct conviction, arguing that (1) the evidence was insufficient to support his conviction, (2) the district court failed

to obtain a valid waiver of appellant's right to a jury trial, (3) the district court erred by allowing an investigator to testify regarding his recollection of appellant's statements, (4) the district court erred by failing to issue mandatory findings of facts within seven days after its general finding of guilt, and (5) the district court erred by denying appellant the opportunity to submit a written closing argument. We affirm.

D E C I S I O N

Sufficiency of the evidence

Following a bench trial, the district court found appellant Craig Matthew Rowland guilty of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(d) (2008). Appellant challenges the sufficiency of the evidence. This court "review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions." *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

In considering a claim of insufficient evidence, this court's review is limited to an analysis of the record to determine whether the evidence, viewed in a light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009). 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, 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 assume that "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). And we defer to the fact-finder's credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002).

Appellant's conviction was premised on his sexually penetrating the victim while she was asleep. "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor knows or has reason to know that the complainant is . . . physically helpless." Minn. Stat. § 609.344, subd. 1(d). "Physically helpless" is defined, for purposes of third-degree criminal sexual conduct, as when "a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9 (2008).

The district court found that appellant sexually penetrated M.S. while knowing or having reason to know that M.S. was asleep. Appellant argues that the state failed to show that he sexually penetrated M.S. because there was no physical evidence of a sexual assault. Appellant is correct in his assertion that there was no physical evidence of a sexual assault. The nurse who performed the sexual-assault examination on M.S. testified that she did not find any injuries. The nurse noted that M.S.'s behavior was "controlled, quiet, cooperative, alert, oriented times three and responsive to questions"; M.S. was not hysterical, tearful, or nonresponsive. BCA reports indicated that semen was not detected on any of the swabs taken during M.S.'s exam. DNA profiling was performed on blood found on M.S.'s skirt, blood found on M.S.'s shirt, and semen found on the bedsheet. Appellant's blood was identified on M.S.'s skirt. Appellant's DNA did

not match anything else tested; appellant's profile did not match the semen on the sheet. The DNA obtained from the sheet was a mixture of DNA from at least two individuals, but appellant and M.S. were excluded as contributors.

The lack of physical evidence alone does not render the evidence insufficient. M.S. testified that on July 11, 2010, she spent the day boating with two friends, B.D. and W.A. That night, M.S. and B.D. went to a bar. Appellant, also M.S.'s friend, was at the bar and returned with B.D. and M.S. to W.A.'s house. Sometime after midnight, M.S., B.D., and appellant went into a bedroom to sleep. M.S. recalled falling asleep between B.D. and appellant. M.S. woke up and appellant was on top of her pushing his penis inside of her vagina. M.S. yelled "What the f**k," grabbed her "skirt and clothes," and left the room. The district court found M.S.'s testimony credible; this evidence was sufficient to support appellant's conviction. *See 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).

Appellant argues that M.S.'s testimony was not corroborated, but the testimony of a victim of criminal sexual conduct need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2008). Additionally, Minnesota caselaw has consistently held that a victim's prompt reporting of an incident, her emotional state, detailed description of the incident, and consistent statements to others are corroborating circumstances. *See, e.g., State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (affirming conviction when victim's testimony about sexual assault was corroborated "by others as to the victim's emotional condition at the time she complained"); *State v. Johnson*, 679 N.W.2d 378, 387 (Minn.

App. 2004) (stating that testimony from others about a victim's emotional condition after a sexual assault is corroborative evidence), *review denied* (Minn. Aug. 17, 2004). B.D. and W.A. corroborated M.S.'s testimony that she immediately reported the sexual assault to them.

Appellant next asserts that the evidence is insufficient to show that he knew or had reason to know that M.S. was asleep. While it would be difficult to prove his knowledge directly, the circumstantial evidence is sufficient to satisfy this element of the offense. *See Black's Law Dictionary* 636 (9th ed. 2009)(defining circumstantial evidence as that "based on inference and not on personal knowledge or observation"). Circumstantial evidence is "entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). But a conviction based on circumstantial evidence receives stricter scrutiny than a conviction based on direct evidence. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). We apply a two-step process to evaluate the sufficiency of circumstantial evidence. *State v. Andersen*, 784 N.W.2d 320, 329-30 (Minn. 2010). We identify the circumstances proved, and in doing so "we defer . . . to the [fact-finder's] acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *Id.* at 329. We then examine "the reasonableness of all inferences that might be drawn from the circumstances proved[,]" including "inferences consistent with a hypothesis other than guilt." *Id.* As in direct-evidence cases, the fact-finder "is in the best position to evaluate the evidence[,]" and we "will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

All four people present in the house at the time of the assault testified that they were asleep in the moments preceding the assault. Appellant testified that he and M.S. went into a bedroom, and B.D. went into W.A.'s bedroom. After appellant and M.S. engaged in consensual sexual foreplay, he fell asleep and woke up to M.S. getting out of bed. B.D. testified that at some point she entered the room occupied by appellant and M.S. and fell asleep on the bed on which M.S. and appellant were lying. M.S. testified that she, B.D., and appellant went into a bedroom together to sleep. M.S. recalls falling asleep between B.D. and appellant. The circumstances show that everyone in the house went to bed with the intention to sleep, and that it was early the next morning when M.S., B.D., and appellant went to bed. This evidence was sufficient for the fact-finder to reasonably infer that appellant had reason to know that M.S. was asleep.

Waiver

Appellant next argues that his constitutional rights were violated because he did not validly waive his right to a jury trial. "Whether a criminal defendant has been denied the right to a jury trial is a constitutional question that we review de novo." *State v. Kuhlmann*, 806 N.W.2d 844, 848-49 (Minn. 2011).

A criminal defendant is guaranteed the right to a jury trial under the state and federal constitutions. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant may waive his right to a jury trial "personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a). A waiver of one's right to a jury trial must be voluntary, knowing, and intelligent. *State v. Ross*, 472

N.W.2d 651, 653 (Minn. 1991). Before accepting a waiver, the district court must be satisfied that the defendant was informed of his rights, and that he "understands the basic elements of a jury trial." *Id.* at 654.

On July 14, 2010, the day that the complaint was filed, appellant appeared before a district court judge who advised appellant that he was entitled to a jury trial. On July 18, 2011, appellant's attorney informed the district court judge presiding over appellant's trial that appellant waived his right to a jury trial. The district court approved a written waiver signed by appellant that states: "Having been advised by the [c]ourt of my right to trial by jury and having had an opportunity to consult with counsel, I do hereby, with the approval of this [c]ourt, waive my right to trial by jury."

The district court failed to comply with rule 26.01. The oral waiver was not communicated personally; rather, appellant's attorney informed the district court that appellant waived his right to a jury trial. *See State v. Halseth*, 653 N.W.2d 782, 786 (Minn. App. 2002) (stating that waiver of a fundamental right must be on the defendant's own behalf; an attorney cannot waive a fundamental right). Nor did the district court properly advise appellant before accepting appellant's written waiver. It is insufficient that a different district court judge advised appellant of his right to a jury trial one year earlier. *See State v. Kuhlmann*, 780 N.W.2d 401, 404 (Minn. App. 2010) (stating that although the district court had earlier advised the defendant of his right to a jury trial, the district court failed to specifically advise him of his right to a jury trial at the time that the defendant's attorney advised the district court of the defendant's waiver), *aff'd*, 806 N.W.2d 844. Because rule 26.01 must be strictly construed, the district court erred by

accepting appellant's waiver. *See State v. Ulland*, 357 N.W.2d 346, 347 (Minn. App. 1984); *see also State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986) (requiring strict compliance with rule to ensure that a waiver is voluntarily and intelligently made).

Because appellant did not object to the district court's failure to obtain his waiver of his right to a jury trial, we review for plain error. *See State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007) (stating that the plain-error analysis allows an appellate court to consider an unobjected-to error that affects a criminal defendant's substantial rights); *see also* Minn. R. Crim. P. 31.02 ("Plain error affecting a substantial right can be considered . . . on appeal even if it was not brought to the [district] court's attention."). We must determine whether there was plain error that affected appellant's substantial rights. *Kuhlmann*, 806 N.W.2d at 852. If plain error affected appellant's substantial rights, we will address the error only if it seriously affected the fairness and integrity of the judicial proceedings. *Id.* at 852-53.

This error was plain because it contravenes a rule. *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). An error affects substantial rights if the error was prejudicial and affected the outcome of the case. *Kuhlmann*, 806 N.W.2d at 853. Arguably, the outcome of this case might have been different if the evidence had been presented to a jury. There was no physical evidence supporting the complainant's version of events, and appellant and the complainant were the only witnesses. Because the district court resolved this case based on credibility determinations, the evidence as viewed by twelve individuals may have resulted in a different verdict. But we conclude that appellant was not prejudiced. He received a proper court trial—he was not denied his right to testify,

confront and question witnesses, or to compel witnesses to testify in his defense. Additionally, appellant was represented by counsel and present in the courtroom at the time of his waiver. And the choice to waive a jury trial was most likely a strategic move in order to present the evidence to a sole trier of fact. Thus, even though the district court plainly erred in failing to secure appellant's personal waiver of his right to a jury trial, appellant's substantial rights were not affected and he fails to meet the plain-error standard for reversal.

Admission of evidence

Appellant also argues that the district court abused its discretion in allowing an investigator to testify regarding appellant's statement. Appellant suggests that the best-evidence rule required that his recorded statement be admitted, rather than the investigator's recollection of appellant's statement. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. . . . [A]ppellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

The "best-evidence" rule states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." Minn. R. Evid. 1002. But the state is not required to introduce a tape or transcript of a police interview with a criminal defendant. *See Bauer*, 598 N.W.2d at 368 (holding that the state is not required by operation of the best-evidence rule to introduce any part of a recording of a defendant's statement heard by police when police testify as to the contents of the

statement). The best-evidence rule is inapplicable here. The investigator testified regarding appellant's statement to him. "[A] witness with first-hand knowledge of what was said in a conversation may permissibly testify as to what he heard." *Id.* Therefore, the district court did not abuse its discretion in admitting the investigator's testimony regarding his recollection of appellant's statement.

Written findings

Appellant next argues that the district court did not comply with Minn. R. Crim. P. 26.01, subd. 2(b) by failing to timely issue written findings of fact after its general finding of guilt. We review criminal rule interpretations de novo. *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998).

In a case tried without a jury, "[t]he court, within 7 days after making its general finding in felony and gross misdemeanor cases, must in addition make findings in writing of the essential facts." Minn. R. Crim. P. 26.01, subd. 2(b). This court has determined that the time requirements of rule 26.01 are directory rather than mandatory. *State v. Thomas*, 467 N.W.2d 324, 326 (Minn. App. 1991). This court also held that a conviction will not be reversed because of a technical error unless appellant was "prejudiced through the impairment of substantial rights essential to a fair trial." *Id.* Appellant fails to demonstrate such prejudice.

On August 19, 2011, the district court found appellant guilty. On August 31, 2011, the district court issued written essential findings of fact: that on or about July 12, 2010, appellant and M.S. were at W.A.'s residence; that appellant sexually penetrated M.S. while she was asleep; and that appellant had reason to know that M.S. was asleep.

The state concedes that the district court's findings were issued 5 days outside of the rule 26.01 directive. But appellant fails to show that the five-day delay affected the fairness of his trial or the validity of the court's findings. Additionally, on September 1, 2011, appellant moved for judgment of acquittal or for a new trial, and to vacate the verdict. On December 20, 2011, the district court denied appellant's motion, supporting its order with detailed findings of fact. Appellant fails to demonstrate prejudice by failing to show how this error denied him a fair trial.

Written closing argument

Finally, appellant cites to Minn. R. Crim. P. 26.03, subd. 12(i), arguing that the district court denied him an opportunity to submit a written closing argument. We review criminal rule interpretations de novo. *Nerz*, 587 N.W.2d at 24-25. The rule states that "[t]he defendant may make a closing argument." Minn. R. Crim. P. 26.03, subd. 12(i). Appellant's attorney presented an oral closing argument that, when transcribed, encompassed seven pages. Appellant's due-process rights were not violated when he did not submit a written closing argument.[1]

Affirmed.

[1] Nothing in the record indicates that the district court refused to accept written submissions.