STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1532

State of Minnesota,
Respondent,

vs.

Patrick Harold Smith, Sr.,
Appellant.

Filed December 16, 2008
Affirmed
Toussaint, Chief Judge

Kandiyohi County District Court
File No. 34-CR-05-1625

Lori Swanson, Attorney General, Ann K. Bloodhard, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2130; and

Boyd A. Beccue, Kandiyohi County Attorney, 415 Southwest Sixth Street, P.O. Box 1126, Willmar, MN 56201 (for respondent)

John E. Mack, Mack & Daby, P.A., P.O. Box 302, New London, MN 56273 (for appellant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

TOUSSAINT, Chief Judge

Appellant Patrick Harold Smith, Sr. challenges his convictions of second-degree criminal sexual conduct for the sexual abuse of two of his daughters, M.O. and A.K. Because: (1) the evidence is sufficient to uphold appellant's convictions; (2) appellant's prosecution was not barred by the statute of limitations; and (3) appellant was not deprived of the effective assistance of trial counsel, we affirm.

D E C I S I O N

I.

When considering a challenge to the sufficiency of the evidence, "we must make a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Pendleton,* 706 N.W.2d 500, 511 (Minn. 2005). We assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Asfeld,* 662 N.W.2d 534, 544 (Minn. 2003). We defer to the jury's determinations on witness credibility and on the weight to be given each witness's testimony. *State v. Bliss,* 457 N.W.2d 385, 390 (Minn. 1990).

Appellant was convicted of violating Minn. Stat. § 609.343, subd. 1 (2004), which provides, in relevant part:

> A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:
>
> . . . .

> (h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:
>
> . . . .
>
> > (iii) the sexual abuse involved multiple acts committed over an extended period of time.

"Sexual contact" for purposes of section 609.343, subdivision 1, clause (h), is "the intentional touching by the actor of the complainant's intimate parts," or "the touching by the complainant of the actor's . . . intimate parts," committed with "sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(b)(i),(ii) (2004). "[T]ouching of the clothing covering the immediate area of the intimate parts" constitutes "sexual contact." *Id.*, subd. 11(b)(iv) (2004). "Intimate parts" means "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5 (2004). If a defendant is the victim's "parent," he or she is in a "significant relationship" with the victim. Minn. Stat. § 609.341, subd. 15 (2004).

Here, the jury heard M.O. testify that appellant, her father, engaged in sexual contact with her, on multiple occasions, before she was 16, by taking her hand and placing it on his erect penis, under his clothing. The jury also heard A.K. testify that appellant, her father, engaged in sexual contact with her, on multiple occasions, before she was 16, by having her touch his penis, and touching her breasts, buttocks, and vaginal area under her clothing. The victims' testimony alone supports the jury's conclusion that appellant was guilty of second-degree criminal sexual conduct. *See State v. Vick*, 632 N.W.2d 676, 691 (Minn. 2001) (finding sufficient evidence to support second-degree

criminal-sexual-conduct conviction where defendant rubbed victim's buttocks and vagina over and under clothing for minutes at a time); *State v. Jones*, 500 N.W.2d 492, 495 (Minn. App. 1993) (finding sufficient evidence to support second-degree criminal-sexual-conduct conviction where defendant touched victim's buttocks), *review denied* (Minn. June 9, 1993); *State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. App. 1993) (finding sufficient evidence to support second-degree criminal-sexual-conduct conviction, based on victim's testimony alone, where defendant French kissed victim and touched her buttocks).

Appellant argues that his convictions cannot be upheld because "[t]here is no physical evidence of any sexual conduct" and "no extrinsic evidence of any kind implicating [appellant]." But corroboration of a victim's testimony is not required in a prosecution for second-degree criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2004). The absence of physical evidence does not prevent a jury from convicting an accused of sexual abuse. *State v. Mosby*, 450 N.W.2d 629, 635 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990). Here, there being no allegation of penetration, and considering the time that elapsed before M.O. and A.K. reported the abuse and the fact that the sexual contact occurred when appellant was alone with M.O. and A.K., the absence of physical evidence is understandable.[1]

[1] The fact that M.O. and A.K. did not immediately report the incidents does not necessarily render their testimony unreliable. *See State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987) ("[S]exually abused children . . . will often not report the abuse, and . . . if it is disclosed, it will usually come out in group sessions, treatment, or in school.").

The fact that appellant engaged in French kissing with M.O. and A.K., had an erection while molesting M.O., and would not allow A.K. to get away from him, shows that he had "sexual or aggressive intent."[2] *See Christopherson*, 500 N.W.2d at 798 (holding that defendant's French kissing of victims showed sexual intent).

Additionally, appellant's opportunity to commit sexual abuse is a form of corroborating evidence. *See State v. Luna*, 320 N.W.2d 87, 89 (Minn. 1982) (stating that corroborating evidence included evidence that defendant knew victim's mother was at work and was seen in vicinity of victim's house shortly before offense was committed). The record establishes that appellant alone cared for the children while his wife ran errands, and that during a period of six months, he was often home with the children because he was unemployed. Although witnesses testified that appellant was never alone with one child, the jury could have reasonably concluded that appellant would have had occasional opportunities to be alone with one child throughout the years that the sexual contact took place. *See Bliss*, 457 N.W.2d at 390 (stating that reviewing court must defer to jury's credibility determinations).

Appellant claims that because M.O. and A.K. were unable to give specific time designations for the abuse, their testimony contained inconsistencies. But a specific time designation is not a material element in a sexual-abuse case. *State v. Waukazo*, 269 N.W.2d 373, 375 (Minn. 1978) ("[I]t is not always possible to know with certainty when an offense or offenses occurred. This is especially true in [criminal sexual conduct] cases

[2] It should be noted that kissing on the mouth alone does not generally constitute "sexual contact" because it does not involve the touching of "intimate parts."

where there is a minor victim who does not complain to the authorities immediately."); *State v. Warborg*, 395 N.W.2d 368, 370 (Minn. App. 1986). Moreover, inconsistencies in a witness's testimony are not a basis for reversal. *State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983).

Since appellant completely denied having sexual contact with his daughters, the testimony in this case was contradictory and called for the jury to make conclusions regarding the witnesses' credibility. The jury chose to believe M.O. and A.K.'s testimony over those of appellant, his wife, and their other children. We must defer to the jury's credibility determinations and ability to weigh contradictory evidence. *See, e.g., Marshall v. State*, 395 N.W.2d 362, 365 (Minn. 1986) ("Despite the minor inconsistencies in the state's case and the relative inconclusiveness of the supporting evidence, we defer to the jury's right to believe the complainant and disbelieve the defendant . . ."), *review denied* (Minn. Dec. 17, 1986) (quotation omitted).

Appellant claims that M.O. and A.K. fabricated allegations of sexual abuse because they "harbored feelings of resentment and vengeance" after they disagreed with their parents in the late summer of 2005 regarding their brother's funeral and estate. But again, we must defer to the jury's determinations regarding credibility and weight of the evidence. It was reasonable for the jury to conclude that M.O. and A.K. did not report the abuse out of revenge, but because they spent much time together following the death of their brother and discovered that they had both been victimized by appellant.

Appellant contends that because the complaint charging him with second-degree criminal sexual conduct lacked specificity, his right to be informed of the specific charges

against him was violated. *See State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984) ("A defendant is informed of the nature and cause of the accusation against him if the indictment contains such descriptions of the offense charged as will enable him to make his defense . . ." (quotation omitted)). We are not obligated to address this argument because it was not raised before the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that this court will generally not consider matters not argued and considered in district court). But even if we were to address this issue, appellant's argument fails.

Appellant is correct that "as a general proposition, an indictment or complaint should be as specific as possible with respect to time." *Waukazo*, 269 N.W.2d at 375. But the "precise time at which the offense was committed need not be stated in the indictment, but may be alleged to have been committed at any time before the finding thereof," where the time is not a material ingredient in the offense. Minn. Stat. § 628.15 (2004). A review of the seven-page amended complaint in this matter indicates that it was factually detailed, contained dates, and would have allowed appellant to defend against the charges. *See Becker*, 351 N.W.2d at 926 ("The complaint must state the essential facts constituting the offense charged.")

Viewing the evidence in a light most favorable to the verdict, presuming that the jury believed the prosecution's witnesses and disbelieved any contrary evidence, and deferring to the jury's credibility determinations, we conclude that the evidence was sufficient to uphold appellant's convictions of second-degree criminal sexual conduct.

II.

Appellant claims that the prosecution failed to prove that the incidents of sexual contact occurred within the time period set forth in the statute of limitations. But appellant failed to raise a statute-of-limitations defense below, and we need not address it on appeal. *Roby*, 547 N.W.2d at 357; *see also* Minn. R. Crim. P. 10.03 (stating that defendant's failure to raise available defense in pretrial motion constitutes waiver of defense). In any event, appellant's claim fails on the merits.

Statutory interpretation is a question of law, which this court reviews de novo. *State v. Al-Naseer*, 734 N.W.2d 679, 683-84 (Minn. 2007). Minn. Stat. § 628.26(e) (Supp. 1995) provides that, if a victim was under the age of 18 years at the time the offense was committed and the victim failed to report the offense within nine years of its commission, a complaint must be filed "within three years after the offense was reported to law enforcement authorities." *See State v. Soukup*, 746 N.W.2d 918, 921 (Minn. App. 2008) (analyzing identical language of 1995 version of statute of limitation for first-degree criminal sexual conduct), *review denied* (Minn. June 18, 2008); *see also* Minn. Stat. § 628.26(d) (Supp. 1993) (providing, that if victim failed to report the offense within seven years, complaint must be filed "within three years after the offense was reported to law enforcement authorities").

When the offense is continuing, the statute of limitations begins to run when the offense ends. *Soukup*, 746 N.W.2d at 921. The complaint here alleged that appellant committed multiple acts of sexual contact with M.O. between 1988 and 1993, and with A.K. between 1991 and 1996. For the purpose of applying the statute of limitations,

1993 is the year of the offense for M.O., and 1996 is the year of offense for A.K.

M.O. and A.K. reported the sexual abuse to law enforcement on August 20, 2005, more than nine years after the commission of the offenses. The complaint against appellant was required to have been filed within three years, before August 20, 2008. The complaint was filed in September of 2005, clearly within the time frame of the statute of limitations. Appellant has no statute-of-limitations defense.

III.

Appellant sought postconviction relief in the district court based on his claim that he was denied the effective assistance of trial counsel. An appellate court "will disturb the postconviction court's decision only if the court abused its discretion" but reviews legal determinations de novo. *Stutelberg v. State,* 741 N.W.2d 867, 872 (Minn. 2007).

For a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Miller,* 666 N.W.2d 703, 716 (Minn. 2003). "There is a strong presumption that an attorney acted competently." *Dukes v. State,* 621 N.W.2d 246, 252 (Minn. 2001). Appellate courts do not review matters of trial strategy for competence. *State v. Doppler,* 590 N.W.2d 627, 633 (Minn. 1999). "What evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel." *State v. Mems,* 708 N.W.2d 526, 534 (Minn. 2006).

First, appellant claims that his trial counsel should have asked the district court to review A.K.'s crisis-center records in camera to determine if she had previously disclosed

whether or not she had been sexually abused. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (holding, in child-sexual-abuse case where defendant requested access to welfare department's records relating to contacts with victims and their family members, proper procedure was for district court to examine records in camera to determine whether information contained in records would assist defense, while still protecting state's interest in protecting confidentiality). Here, the presentation of evidence was a matter of trial strategy properly left to the trial attorney's discretion. As the district court noted, the "contents of any [crisis center] records are not known and [their] effect upon the outcome [of the trial] is purely speculative."

Second, appellant claims that his trial counsel had notice of several individuals who were willing to testify to his good character and reputation, but did not contact any of these individuals. Again, calling witnesses was a matter of trial strategy properly left to the trial attorney's discretion. As the district court noted: "The trial counsel called nine witnesses. Most of the witnesses' testimony focused on lack of opportunity and impaired credibility of the victims . . ." Appellant has not shown that the verdicts against him would have been different had additional witnesses testified to his character.

Third, appellant claims that his trial counsel failed to raise the statute-of-limitations defense that "would have been an absolute bar to prosecution." But, appellant's prosecution was not barred by the statute of limitations, as discussed above.

The district court did not err in denying appellant's motion for a new trial based on his claim of ineffective assistance of counsel. Appellant's trial attorney's representation did not fall below an objective standard of reasonableness, and appellant has not proven

that, but for the trial attorney's representation, the outcome of the jury trial would have been different.

Affirmed.