STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2272

State of Minnesota,
Respondent,

vs.

James David McBroom,
Appellant.

Filed December 1, 2009
Affirmed
Larkin, Judge

Scott County District Court
File No. 70-CR-07-28751

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Scott County Justice Center, 200 West Fourth Street, Shakopee, MN 55379 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of third- and fifth-degree criminal sexual conduct, arguing that the district court abused its discretion by excluding evidence of the victim's prior sexual conduct. Because the district court's evidentiary ruling was within its discretion and appellant's pro se claims are unavailing, we affirm.

FACTS

On the evening of November 10, 2007, appellant James David McBroom and his roommate, A.P., went to a bar in Farmington. There, they encountered S.B. A.P. invited S.B. to a party at his house, and she accepted the invitation. S.B. rode to A.P.'s residence with McBroom and A.P. After arriving at A.P.'s house, S.B. asked for a glass of water and then went outside to smoke a cigarette. When she reentered the house, a glass of water was sitting next to her purse. S.B. drank the water. Thereafter, her vision became blurry, she felt dizzy, and could not focus. S.B. asked A.P. if she could lie down, and A.P. responded that she could lie down in his room.

S.B. fell asleep in A.P.'s room but later woke up in a bed in a different room. When she woke up, she heard someone breathing and spitting. And she felt someone squeeze her breast in a rough manner, insert fingers into her vagina, and make repeated attempts to insert a penis into her vagina. She was initially unable to see who was touching her because her shirt was pulled up over her face. She tried to scream, but a hand covered her mouth. S.B. pulled her shirt down from over her face and saw McBroom in the bed with her; he was unclothed below his waist.

S.B. asked McBroom where A.P. was, and McBroom told S.B. that A.P. was asleep downstairs. McBroom then smiled and asked S.B. if she wanted another glass of water. S.B. got dressed and went downstairs and found A.P. A.P. drove S.B. to her car, and S.B. then drove to a friend's house and told her friend what had happened. She also told another friend about the incident in an effort to find out McBroom's name. S.B. wanted to go to a hospital or clinic immediately but was afraid to go through the investigative process alone.

On November 12, S.B. went to a hospital and was interviewed and examined by a nurse. S.B. had a bowel movement and took a shower after the assault, but before she went to the hospital. During her examination, S.B. reported pain and bleeding from her vagina, pelvic pain, breast pain, and bruising on her arms. The nurse observed that S.B.'s perineum and vaginal lips were swollen and opined that the swelling was consistent with S.B.'s report of a drug-assisted sexual assault.

Vaginal, perineal, rectal, and breast swabs were obtained from S.B. during the examination. The Bureau of Criminal Apprehension (BCA) found semen on the vaginal, perineal, and rectal swabs. A BCA report indicated that the perineal swabs contained DNA that matched samples from J.J.H., a third party. The BCA also found DNA evidence on the vaginal and rectal swabs that was consistent with a mixture of DNA from two or more individuals. The predominant male DNA profile from the vaginal and rectal swabs matched J.J.H.'s profile. The BCA was unable to exclude S.B. as the source for the remainder of the rectal sample, but noted that "an additional source of DNA may also be present." Both McBroom and A.P. were excluded as the source of any of the DNA.

At trial, the parties stipulated that the BCA's analysis of S.B.'s vaginal, perineal, rectal, and breast swabs did not reveal the presence of McBroom's saliva or DNA. The parties also stipulated that BCA analysis of blood and urine samples obtained from S.B. did not reveal the presence of alcohol or any other controlled substance in S.B.'s system. These stipulations were read to the jury.

McBroom was charged with first-degree criminal sexual conduct (using force or coercion to accomplish sexual penetration resulting in personal injury to the victim), third-degree criminal sexual conduct (sexual contact where the actor knows or has reason to know the victim is mentally impaired, mentally incapacitated, or physically helpless), and fifth-degree possession of a controlled substance. The state later amended the complaint to add a charge of fifth-degree criminal sexual conduct (engaging in nonconsensual sexual contact). The state filed a second amended complaint, replacing the first-degree criminal-sexual-conduct charge with a charge of third-degree criminal sexual conduct (use of force or coercion to accomplish sexual penetration).

Prior to trial, the state moved the district court for an order prohibiting McBroom from asking any questions in the presence of the jury that referenced the victim's previous sexual conduct. The district court heard arguments on the motion and took the matter under advisement. The district court later issued an oral order preventing McBroom from (1) making any reference to S.B.'s alleged sexual activity with her boyfriend or anyone else "prior to or after the events at issue in this case," (2) offering evidence that S.B.'s boyfriend's DNA profile was found on S.B.'s vaginal swabs, or

(3) offering evidence that any other DNA profile was found on any samples taken from S.B.

A jury trial was held, and McBroom was found guilty of all of the charges. The district court sentenced McBroom to 140 months on his conviction for third-degree criminal sexual conduct (force or coercion), followed by ten years of conditional release, and to a concurrent sentence of 21 months on his drug conviction. This appeal follows.

D E C I S I O N

I.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant 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). Even when it is claimed that the exclusion of evidence deprived a criminal defendant of his or her constitutional rights, the appellate court reviews the ruling under an abuse of discretion standard. *See State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006) (citing *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999)) (applying abuse of discretion standard when defendant claimed exclusion of evidence deprived him of constitutional right to present a complete defense).

Evidence of a victim's previous sexual conduct is not admissible in a prosecution for criminal sexual conduct except by court order pursuant to the rape-shield statute, Minn. Stat. § 609.347, subd. 3 (Supp. 2007). *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). But such evidence is admissible

"in all cases in which admission is constitutionally required by the defendant's right to due process, his right to confront his accusers, or his right to offer evidence in his own defense." *State v. Benedict*, 397 N.W.2d 337, 341 (Minn. 1986) (citing *State v. Caswell*, 320 N.W.2d 417 (Minn. 1982)). In determining whether to admit evidence of the victim's prior sexual conduct, the district court must balance the state's interest in guarding the victim's privacy against the accused's constitutional rights. *Caswell*, 320 N.W.2d at 419.

Under the rape-shield statute, evidence of an alleged victim's previous sexual conduct is admissible only for limited purposes:

> (a) When consent of the victim is a defense in the case, the following evidence is admissible:
>
> (i) evidence of a victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue. In order to find a common scheme or plan, the judge must find that the victim made prior allegations of sexual assault which were fabricated; and
>
> (ii) evidence of the victim's previous sexual conduct with the accused.
>
> (b) When the prosecution's case includes evidence of semen, pregnancy, or disease at the time of the incident or, in the case of pregnancy, between the time of the incident and trial, evidence of specific instances of the victim's previous sexual conduct is admissible solely to show the source of the semen, pregnancy or disease.

Minn. Stat. § 609.347, subd. 3. Section 609.347 also sets out specific procedures that must be followed to obtain admission of such evidence. *Id.*, subd. 4 (2006) (requiring a motion setting forth an offer of proof, a hearing outside of the presence of the jury, and a

determination whether the evidence is admissible under the statute and whether its probative value is substantially outweighed by its inflammatory or prejudicial nature).[1]

McBroom sought to offer evidence of the DNA found during S.B.'s medical examination and S.B.'s statement to the physician that her most-recent consensual sexual encounter occurred one to two days before the assault. McBroom argued that the presence of DNA, despite S.B.'s report that she had taken a shower after the assault, indicated that S.B. had sexual intercourse after the assault and before the examination. McBroom argued that this evidence showed that he was not the source of the injuries observed during S.B.'s examination and cast doubt on S.B.'s credibility. After hearing arguments on two occasions and considering the relevant caselaw, the district court granted the state's motion to exclude the proffered evidence.

McBroom argues the trial court's ruling was an abuse of discretion because "while it prohibited [him] from presenting evidence of [S.B.'s] other sexual activities on the weekend of the alleged sexual assault, it did not also prohibit the state from using the absence of this evidence to its advantage." McBroom claims that the state was able to attribute the pain and injuries that S.B. described to the jury and that the nurse observed during S.B.'s examination solely to appellant, leaving the jury with "the misimpression that the state had medical proof that [S.B.] was sexually assaulted," and allowing "the state to create the misimpression that there was no forensic evidence" despite the facts

[1] Minn. R. Evid. 412 contains an almost identical procedure. The differences between the rule and the statute are not consequential in this case. *Compare* Minn. R. Evid. 412 *with* Minn. Stat. § 609.347, subds. 3-4.

that her vaginal swab showed the presence of her boyfriend's DNA and her rectal swab showed DNA from an unknown source.

The record reflects the district court's thoughtful consideration of the evidentiary issue. The district court found that S.B. and other witnesses placed McBroom at A.P.'s residence with S.B. at the time of the alleged assault. The district court also noted that McBroom himself admitted in a statement to law enforcement that he engaged in consensual sexual activity with S.B., including oral sex and sexual intercourse. The district court therefore determined that identity was not a central issue and identified the primary issue as one of consent, "even though [] McBroom apparently now denies that the incident took place at all." The district court then concluded that McBroom failed to make a sufficient showing in support of admission of the evidence. The district court also concluded that the evidence's probative value was minimal and was substantially outweighed by its prejudicial nature. *See id.*, subd. 3 (stating that prior-sexual-conduct evidence can be admitted only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature).

The district court did not abuse its discretion. McBroom failed to demonstrate that the proffered evidence was admissible under Minn. Stat. § 609.347 (2006 & Supp. 2007). McBroom did not present evidence "tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue." *Id.*, subd. 3(a)(i). And McBroom offered no evidence that McBroom and S.B. previously engaged in sexual conduct. *See id.*, subd. 3(a)(ii) (stating that when consent of the victim is a defense, evidence of the victim's previous sexual conduct with the accused is

admissible). Because the case involved evidence of semen, the district court considered whether the evidence was admissible under Minn. Stat. § 609.347, subd. 3(b), which allows evidence regarding the victim's prior sexual conduct when the prosecution's case includes evidence of semen, pregnancy, or disease, "solely to show the source of the semen, pregnancy, or disease." The district court correctly concluded that the proffered evidence was not admissible. Even though the BCA found evidence of semen, the state did not offer that evidence at trial and there was, therefore, no need to show the source of the semen.

McBroom argues that the district court's exclusion of evidence of S.B.'s prior sexual conduct violated his right to present a defense and to confront the witnesses against him. As support for this argument, McBroom cites a footnote to Fed. R. Evid. 412, the federal rape-shield rule, which provides that a criminal defendant may introduce "evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of . . . injury or other physical evidence[.]" However, the Minnesota rule contains no similar provision. *Compare* Fed. R. Evid. 412 *with* Minn. R. Evid. 412. Moreover, the supreme court has rejected the argument that Minn. R. Evid. 412 should be read to include an injury exception. *State v. Carpenter*, 459 N.W.2d 121, 126 (Minn. 1990). In *Carpenter*, the defendant argued that he should be allowed to offer evidence of the victim's prior sexual conduct to show the cause of her torn hymen. *Id.* at 125-26. The supreme court noted that while "[t]he Federal Rules of Evidence and several states have included 'injury' in their rape shield laws[,] Minnesota has not," and rejected the argument that the Minnesota rule and statute

should be read to include an injury exception. *Id.* at 126. The district court relied on *Carpenter* and correctly determined that evidence of S.B.'s prior sexual conduct was not admissible to show the source of her injuries.

Finally, appellant's argument that the prosecutor was allowed to misrepresent the existence of forensic evidence is not persuasive. McBroom claims that he wished to introduce the forensic evidence "to cast doubt on [S.B.'s] entire story." But Minn. Stat. § 609.347 does not allow an alleged victim's credibility to be generally attacked through exploration of his or her prior sexual conduct. The district court's order preventing McBroom from impugning S.B.'s credibility through evidence of prior sexual conduct was not an abuse of discretion.

II.

McBroom asserts a variety of claims in his pro se reply brief and makes a variety of arguments, ranging from identifying inconsistencies in S.B.'s statement to claiming that the state presented insufficient evidence from the BCA analysts at trial. We interpret these arguments as a challenge to the sufficiency of the evidence to sustain the convictions.

When considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v.*

Bias, 419 N.W.2d 480, 484 (Minn. 1988). We must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"Assessing the credibility of a witness and the weight to be given a witness's testimony is exclusively the province of the jury." *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006); *see also Pieschke*, 295 N.W.2d at 584 (explaining that in sufficiency of the evidence cases, an appellate court construes the record most favorably to the state, especially where resolution depends on conflicting testimony because "weighing the credibility of witnesses is the exclusive function of the jury"). "[T]he jury is free to question a defendant's credibility, and has no obligation to believe a defendant's story." *State v. Ostrem*, 535 N.W.2d 916, 923 (Minn. 1995). A witness's credibility is not for this court to consider on appeal. *State v. Garrett*, 479 N.W.2d 745, 747 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992).

McBroom and S.B. offered conflicting accounts of what happened on the night of the assault. While McBroom did not testify at trial, a recording of his statement to the police was played to the jury, thereby placing his version of the events before the jury. In his statement, McBroom claimed that he and S.B. engaged in consensual sexual contact.

McBroom also presented evidence that S.B's injuries could have been caused by a means other than nonconsensual sexual contact. Contrary to McBroom's claim that the sexual contact was consensual, S.B. testified that she did not consent to sexual contact with McBroom.

The jury was presented with evidence that favored McBroom but apparently did not find it persuasive. Instead, the jury's verdict indicates that it found S.B.'s testimony persuasive, and we will not interfere with the jury's credibility determination. Moreover, the testimony of a victim alone is sufficient to sustain a conviction for criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 ("the testimony of a victim need not be corroborated"); s*ee State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. App. 1993) (holding victim's testimony alone was sufficient to support conviction for sexual assault). S.B.'s testimony is sufficient to sustain McBroom's conviction.

McBroom also claims that his court-appointed stand-by counsel was ineffective. McBroom argues that stand-by counsel told him that he had served subpoenas as McBroom requested, when in fact he had not done so, thereby sabotaging McBroom's case. Ineffective assistance of counsel requires that two things be proven: objective deficiency of counsel and actual prejudice. *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The standard to which stand-by counsel will be held has not been determined. *State v. Clark*, 722 N.W.2d 460, 468 (Minn. 2006) (citing *State v. Richards*, 552 N.W.2d 197, 207 (Minn. 1996)). McBroom cites no authority for the proposition that stand-by counsel was obligated to arrange for the service of subpoenas. And McBroom cites no

authority in support of his proposition that stand-by counsel's alleged failure to subpoena a witness was objectively unreasonable. An attorney's decision not to subpoena a witness is generally entrusted to the attorney's discretion. *See State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (holding that matters of trial strategy, including "[w]hich witnesses to call at trial and what information to present to the jury" properly rest within the discretion of trial counsel). McBroom's claim of ineffective assistance of stand-by counsel is therefore unavailing.

McBroom also argues that lie-detector tests should have been administered, either to himself or to S.B. However, caselaw clearly prohibits the admission of a defendant's willingness or unwillingness to take a polygraph test. *See, e.g., State v. Anderson*, 261 Minn. 431, 437, 113 N.W.2d 4, 8 (1962) (affirming exclusion of defendant's willingness to submit to polygraph). Caselaw also prohibits the admission of the results of a polygraph examination. *See, e.g., State v. Kolander*, 236 Minn. 209, 222, 52 N.W.2d 458, 465 (1952) ("[T]he results of a lie-detector test [are not] admissible."). McBroom's arguments concerning polygraph testing are therefore also unavailing.

McBroom makes a number of other arguments that cannot be classified as legal claims. Because none of these arguments have legal merit, we do not address them.

Affirmed.

Dated:

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Judge Michelle A. Larkin