STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1657

State of Minnesota,
Respondent,

vs.

Clayton Thomas Byrne,
Appellant.

Filed July 17, 2017
Affirmed
Randall, Judge[*]

Yellow Medicine County District Court
File No. 87-CR-15-471

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Keith Helgeson, Yellow Medicine County Attorney, Amanda C. Sieling, Assistant County Attorney, Granite Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Bjorkman, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

RANDALL, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct. Appellant argues that (1) the evidence was insufficient to support his conviction, (2) the district court impermissibly relied on his prior criminal-sexual-conduct conviction to find that his testimony lacked credibility without first determining whether that prior conviction was admissible for impeachment purposes, and (3) he received ineffective assistance of trial counsel. We affirm.

FACTS

In August 2015, appellant Clayton Thomas Byrne sent text messages to eleven-year-old B.O., who was visiting her father in Texas. Appellant was friends with B.O.'s mother, E.O., and he regularly spent time with E.O. and her family. Appellant's text messages to B.O. stated that she could "lay" with him and that they could cuddle. Appellant also sent a text that said, "One problem though . . . my hands might w[a]nder."

On September 9, 2015, B.O. had returned from Texas and was staying at her mother's home in Minnesota. On that date, appellant, B.O., B.O.'s brother, and B.O.'s friend, R.P., were watching a movie in E.O.'s living room. Appellant, B.O., and R.P. were sitting on the couch, and B.O.'s brother was sitting in a nearby chair. B.O. was sitting in the middle of the couch, between appellant and R.P. During the movie, appellant sent B.O. multiple text messages, one of which stated, "Nice bottom btw." Appellant pulled B.O.'s legs onto his lap and began massaging them. B.O. was wearing tight leggings. Appellant

touched B.O.'s vagina over her leggings, which included "put[ting] his finger up her vagina, pushing hard."

B.O. then stood up, walked across the room to show her brother something on her phone, and went into the kitchen. When R.P. entered the kitchen, B.O. told her that appellant had touched her "private parts." B.O. returned to the living room and sat on the couch with her legs crossed. Next, appellant sent B.O. three text messages: "Sorry was that ok with u?"; "Guess[ing] that's a no…"; and "Can u at least answer the question please[?]" She did not respond to these messages, and appellant left shortly thereafter.

In the following days, B.O. sent her sister a text message describing appellant's act. B.O. also told E.O. what had happened. Later, after E.O.'s boyfriend told appellant that E.O. was upset, appellant sent E.O. a text message that said, in part, "[T]he closest thing that ever happened that maybe could be considered sexual was I massaged her leg when she [laid] it across my lap and I didn't even go any higher [than] the knee I may have crossed the line and I'm sorry." Around this time, B.O. gave a statement to police regarding the incident. Police subsequently interviewed appellant, who acknowledged being at E.O.'s home, knowing that B.O. was 11 years old, massaging her legs on the couch, and sending B.O. text messages. Appellant denied touching B.O.'s vagina.

Respondent State of Minnesota charged appellant with one count of second-degree criminal sexual conduct and one count of fifth-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.343, subd. 1(a), .3451, subd. 3(a)(1) (2014). Appellant waived his right to a jury trial, and a court trial was held. At the start of trial, the defense consented to the district court admitting appellant's prior conviction of third-degree criminal sexual conduct into

evidence. This prior conviction was intended to satisfy the predicate-offense element of the fifth-degree criminal-sexual-conduct charge. Following trial, the district court filed its findings of fact, conclusions of law, and order, finding appellant guilty of both counts. The district court then entered a judgement of conviction only on the second-degree count and sentenced appellant accordingly. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports appellant's conviction.

Appellant argues that the evidence was insufficient to prove beyond a reasonable doubt that he committed second-degree criminal sexual conduct against B.O. Specifically, appellant challenges the district court's findings that B.O.'s testimony was credible while appellant's contradicting testimony lacked credibility.

When reviewing the sufficiency of the evidence, "we view the evidence in the light most favorable to the verdict and assume that the factfinder disbelieved any testimony conflicting with that verdict." *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (quotation omitted). "The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the [factfinder] could reasonably have found the defendant guilty of the charged offense." *Id.* (quotation omitted). We apply "the same standard of review in bench trials and in jury trials in evaluating the sufficiency of the evidence." *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

To convict appellant of second-degree criminal sexual conduct, the state was required to prove that (1) appellant engaged in sexual contact against B.O., (2) B.O. was under 13 years of age, and (3) appellant was more than 36 months older than B.O. *See* Minn. Stat. § 609.343, subd. 1(a). The definition of "sexual contact" includes intentionally touching the clothing covering the immediate area of the complainant's genitals. Minn. Stat. § 609.341, subd. 11(a)(iv) (2014). The record establishes, and appellant does not challenge on appeal, that B.O. was under 13 years of age and appellant was more than 36 months older than B.O. on September 9, 2015. Therefore, we need only determine whether sufficient evidence supports the district court's finding that appellant intentionally touched the clothing covering the immediate area of B.O.'s vagina.

At trial, B.O. testified that she was wearing tight leggings when appellant touched her vagina. This type of action constitutes "sexual contact" under Minn. Stat. § 609.341, subd. 11(a)(iv). As the district court found, B.O.'s testimony regarding appellant's conduct was corroborated by B.O.'s statements to R.P., B.O.'s sister, E.O., and police. These numerous statements were made shortly after the event in question and consistently described appellant's action against B.O. In addition, the district court noted that B.O.'s testimony was further corroborated by a number of text messages that appellant sent B.O. before and after he committed this act. Based in part on this corroborating evidence, the district court found B.O.'s testimony credible and appellant's contradicting testimony not credible.

II. The district court did not rely on appellant's prior conviction to find that his testimony lacked credibility.

Appellant argues that the district court impermissibly relied on his prior criminal-sexual-conduct conviction to find that his testimony lacked credibility without first determining whether this prior conviction was admissible for impeachment purposes.

Evidence that a witness has been convicted of a felony is admissible for impeachment if the court "determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). In deciding whether such evidence is admissible for impeachment purposes, the district court examines:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). Generally, a district court's ruling regarding the admissibility of a defendant's prior conviction for impeachment purposes is reviewed under a clear-abuse-of-discretion standard. *State v. Swanson*, 707 N.W.2d 645 654 (Minn. 2006).

In this case, the district court did not rule on the state's pretrial motion to impeach appellant through his prior criminal-sexual-conduct conviction. At the start of trial, the district court explained that the state was required to prove that appellant had previously been convicted of a predicate offense under count II. *See* Minn. Stat. § 609.3451, subd. 3(a)(1). The district court then asked defense counsel, "Are you making any motion to stipulate to [appellant's prior] conviction or [do] you just want to let [the state] put it in as

part of [its] case?" Defense counsel replied, "I think we'll just let [the state] put it in, your Honor." Later, during an investigating officer's testimony, the state offered, and the district court admitted, a certificate of appellant's prior conviction.

Consistent with the district court and parties' comments at the beginning of trial, the record establishes that appellant's prior conviction was admitted as substantive evidence to prove that appellant had previously been convicted of a predicate offense. Other than its questions to establish foundation for the certificate of prior conviction, the state's only reference to appellant's prior criminal-sexual-conduct conviction came in its closing argument: "[I]t was shown that [appellant] has been previously convicted of a Third Degree Criminal Sexual [Conduct]." Contrary to appellant's claim, there is no indication that the district court relied on this substantive evidence in evaluating appellant's credibility. Instead, the district court found that appellant's testimony was not credible "in light of his prior text messages to [B.O.], which appear to be grooming her for some type of sexual contact, and of his post-event texts which appear to be apologizing or covering up what he had done."

The record does not support appellant's assertion that the district court impermissibly relied on this prior conviction when assessing his credibility. Pursuant to the parties' agreement at the start of trial, the district court admitted the certificate of appellant's prior conviction as substantive evidence. There is no indication the district court relied on such substantive evidence in finding that appellant's testimony lacked credibility.

III. Appellant did not receive ineffective assistance of trial counsel.

In his pro se supplemental brief, appellant argues that he received ineffective assistance of trial counsel. In making this argument, appellant provides the following reasons to support his assertion that his trial counsel's performance was inadequate: (1) advising appellant to proceed with a court trial, (2) ineffective cross-examination of the state's witnesses, (3) eliciting evidence of appellant's prior criminal-sexual-conduct conviction on direct examination, and (4) ineffective closing argument.

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate by a preponderance of evidence that (1) counsel's performance was deficient, such that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). An insufficient showing on one of these requirements defeats a claim of ineffective assistance of counsel. *Gates*, 398 N.W.2d at 561-62. An attorney provides reasonable assistance "upon exercising the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotation omitted). There is a strong presumption that an attorney acts competently. *Id.* As a general rule, matters of trial strategy do not provide a basis for an ineffective-assistance-of-counsel claim. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Despite appellant's grievances regarding his trial counsel's effectiveness and decisions at trial, appellant fails to articulate any supported prejudice arising from his

counsel's performance. Each of appellant's complaints relate to matters of trial strategy. Generally, trial strategy does not provide the basis for an ineffective-assistance-of-counsel claim.

Affirmed.