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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1967

State of Minnesota,
Respondent,

vs.

Joseph William Erie,
Appellant

Filed November 6, 2017
Affirmed
Worke, Judge

Scott County District Court
File No. 70-CR-15-16553

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

WORKE, Judge

Appellant was convicted of first- and second-degree criminal sexual conduct. He argues that his conviction on the first-degree charge should be reversed because the evidence was insufficient to prove an element of the offense. We affirm.

FACTS

Appellant Joseph William Erie was charged with first- and second-degree criminal sexual conduct. According to the complaint, in June 2015, Erie was babysitting four-year-old A.H. and her sister at his home. A.H.'s sister walked into the kitchen and saw A.H. with her shorts halfway down her buttocks and Erie standing directly behind A.H. When Erie saw the sister, he pulled A.H.'s shorts up. As the girls left the kitchen, A.H. told her sister that Erie had "put his pee pee in [her] butt."

At Erie's jury trial, A.H. testified that Erie touched her bare buttocks with his "private part." A.H. also indicated that Erie spat on his penis before touching her. There was also evidence that Erie's DNA was found just above and below A.H.'s anal opening. And a registered nurse testified that a physical exam conducted on A.H. the day the assault was reported showed redness around A.H.'s anus.

A.H.'s sister testified that when she walked into the kitchen, she saw that A.H.'s pants and underwear were pulled down. She testified that Erie was standing behind A.H. and his "pee pee was in [A.H.]'s butt."

The jury found Erie guilty of first- and second-degree criminal sexual conduct. Erie moved for a directed verdict on the first-degree conviction, arguing that, based on the

state's evidence, no reasonable jury could have found that he touched A.H.'s anal opening with his bare genitals. The district court denied Erie's motion. This appeal followed.

D E C I S I O N

Erie was convicted of first- and second-degree criminal sexual conduct, but he challenges only the sufficiency of the evidence supporting the first-degree criminal-sexual-conduct conviction, arguing that the evidence failed to prove that he touched his bare genitals to A.H.'s anal opening. We disagree.

Direct evidence "proves a fact without inference or presumption." *Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (quotation omitted). Testimony from a person who perceived a fact through her senses is direct evidence. *State v. Williams*, 337 N.W.2d 387, 389 (Minn. 1983). Here, A.H.'s sister testified that she saw Erie touch A.H.'s anal opening with his bare genitals. This is direct evidence. Thus, we apply the traditional standard of review to Eric's insufficient-evidence claim. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Under the traditional standard, this court reviews the record to determine "whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume that "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 court "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*, 684 N.W.2d at 476-77 (quotation omitted).

A person is guilty of first-degree criminal sexual conduct when he engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age and he is more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a) (2014). Sexual contact with a person under 13 includes the intentional touching of the complainant's bare genitals or anal opening by the actor's bare genitals or anal opening with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(c) (2014).

The sister's testimony that she saw Erie's "pee pee . . . in [A.H.]'s butt" is direct evidence that Erie touched his bare genitals to A.H.'s anal opening. Erie attempts to undercut the sister's testimony by arguing that it was contradicted by A.H. when she said that Erie put his penis "on" her buttocks. But this statement was itself contradicted by A.H.'s sister who testified that A.H.'s exact words after the incident were, "[Erie] put his pee pee *in* my butt." (Emphasis added.) The jury was "in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony." *State v. Hughes*, 749 N.W.2d 307, 312 (Minn. 2008) The jury believed that there was proof beyond a reasonable doubt that there was sexual contact between Erie's bare genitals and A.H.'s anal opening.

Based on the record, there is no reason to disturb the jury's verdict. The jury believed the sister's testimony with support from other evidence at trial, such as DNA evidence and the physical examination showing redness around A.H.'s anal opening, and reasonably concluded that Erie was guilty of first-degree criminal sexual conduct.

Affirmed.