STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1259

State of Minnesota,
Respondent,

vs.

Aaron Leeroy McCulloch,
Appellant.

Filed July 23, 2018
Affirmed
Reyes, Judge

St. Louis County District Court
File No. 69VI-CR-16-1172

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

Mark S. Rubin, St. Louis County Attorney, Sharon Chadwick, Assistant County Attorney, Virginia, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

REYES, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the evidence is insufficient to support his conviction. We affirm.

FACTS

On the evening of August 13, 2016, A.E. attended a concert with her father and consumed several beers to the point of intoxication. After the concert, A.E.'s father dropped her off at her apartment building, where she encountered appellant Aaron Leeroy McCulloch, a resident of the building. A.E. and appellant talked outside the apartment building, and then A.E. invited appellant to her apartment.

A.E. and appellant consumed beers and shots of tequila in A.E.'s apartment, played video games, and then began kissing. A.E. testified that she consented to the contact until appellant bit down hard on her left breast, causing severe pain and leaving a large bruise. According to A.E., appellant then followed her to the kitchen, and when she told him she receives disability benefits and does not work, he became angry and hit her in the face, causing the back of her head to smash into the kitchen cabinets and leaving facial scratches.

A.E. did not remember much of what followed. She next remembered lying face-down on her bed, naked, while appellant penetrated her anally with his penis and pushed her face into the bed. A.E. said that her head struck the wall next to her bed, that she felt pain in her anal area, that she told appellant no and to stop, and that she cried loudly while being penetrated. The last thing A.E. remembered was appellant striking her hard on her lower back and bruising her. When she awoke later that day, appellant was gone. A.E. spent the rest of the day in her apartment by herself.

The next day, A.E.'s father went to her apartment to check on her. He noticed marks on A.E.'s neck and face, and it appeared to him that she had been beaten up. He convinced her to go to the hospital for treatment.

At the hospital, A.E. reported that appellant had sexually assaulted her. The hospital staff took swab samples from A.E.'s vagina, perineum, rectum, cervix, mouth, and left breast. Subsequent forensic testing of the cervical swab by the Minnesota Bureau of Criminal Apprehension found semen and a DNA mixture inclusive of both A.E. and appellant and exclusive of 99.999 percent of the human population. The forensic testing found semen on the anal and perineal swabs, and amylase, an enzyme in saliva, on the swab of her left breast. DNA testing was not performed on the anal or perineal swabs because they lacked sufficient quantities of semen, or on the breast swab. The hospital staff took photographs of the scratches on A.E.'s shoulder, face, and neck, and of the bruises on her lower-middle back, knee, leg, and left breast.

Law-enforcement officers responded to A.E.'s report of sexual assault. They collected the swab samples and recorded a statement from A.E., who identified appellant as the perpetrator. The officers located appellant at his apartment, and after he admitted having sexual contact with A.E., they arrested him and transported him to jail. Following a *Miranda* warning, appellant waived his rights and agreed to be interviewed.

Appellant told the officers that he and A.E. drank and played video games in her apartment, and that, after they kissed, she led him to her bedroom where they attempted sexual intercourse in different positions. Appellant claimed that he could not achieve an erection because of his guilty feelings over having a girlfriend, and that A.E. felt rejected and began acting strangely, so he panicked and left. The officers asked appellant if he had thrown A.E. into a wall, and appellant initially said no. After further questioning, appellant said that he does not get violent, that he did not remember doing anything violent, and that

he did not think he would throw A.E. into a wall. The officers asked appellant if he bit A.E., and appellant said he did not remember. Appellant told the officers that he did not think that A.E. had passed out.

Respondent State of Minnesota charged appellant with (1) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(i) (2016) (causing personal injury and use of force or coercion), and (2) first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(e)(ii) (2016) (causing personal injury to a physically helpless victim).[1] Following trial, a jury found appellant not guilty of first-degree criminal sexual conduct with a physically helpless victim, but guilty of first-degree criminal sexual conduct for use of force or coercion. The district court entered a conviction of first-degree criminal sexual conduct and sentenced appellant to 90 months' imprisonment. This appeal follows.

D E C I S I O N

I. The jury's acquittal of first-degree criminal sexual conduct against a physically helpless victim does not constitute a reason to question A.E.'s credibility.

Appellant argues that the jury's acquittal of one first-degree criminal-sexual-conduct charge provides cause to question A.E.'s credibility because the state did not present evidence corroborating her testimony. We disagree.

Appellate courts must assume that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Hall*, ___ N.W.2d ___, ___ 2018 WL

[1] The state also charged appellant with third-degree assault in violation of Minn. Stat. § 609.223, subd. 1 (2016), which the state later dismissed.

2407194, at *6 (Minn. App. May 29, 2018) (quoting *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989)). "This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "[I]t is well-settled that a conviction can rest on the uncorroborated testimony of a single credible witness." *Staunton v. State*, 784 N.W.2d 289, 298 (Minn. 2010) (quoting *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969)). But reviewing courts may raise doubts about the sufficiency of the evidence when the victim's testimony is uncorroborated and additional reasons exist to question the victim's credibility. *See State v. Foreman*, 680 N.W.2d 536, 538-39 (Minn. 2004).

In general, "acquittals . . . shed no light on which circumstances the jury believed or disbelieved . . . [and] only demonstrate that the jury believed the state failed to establish the elements of [the offense.]" *State v. Montermini*, 819 N.W.2d 447, 461 (Minn. App. 2012). Here, the district court instructed the jury that, as an element of first-degree criminal sexual conduct against a physically helpless victim, the state had to prove beyond a reasonable doubt that appellant knew or had reason to know that A.E. was physically helpless. The evidence presented included appellant's statement that he did not believe A.E. passed out because she had spoken to him the entire time. The state submitted no physical evidence or expert testimony to establish the precise cause of A.E.'s memory loss. As a result, the jury's acquittal on the charge of criminal sexual conduct with a physically helpless victim demonstrates only that the state failed to sufficiently prove appellant's knowledge of A.E.'s condition; it does not show that the jury found A.E.'s testimony not

credible. Nor does it constitute an "additional reason" to question A.E.'s credibility. Therefore, this is not a case in which the uncorroborated testimony of a victim is insufficient to support the conviction. *See Foreman*, 680 N.W.2d at 538-39. Moreover, we observe that the state presented substantial corroboration of A.E.'s trial testimony, including forensic evidence, photographs of her injuries, and her prior consistent reports of sexual assault.

II. The evidence is sufficient to support appellant's conviction of first-degree criminal sexual conduct.

Appellant concedes that he "intentionally penetrated A.E.,"[2] but he argues that the evidence was insufficient to prove that (1) the penetration occurred without her consent; (2) he used force or coercion to accomplish the penetration of A.E.; and, (3) he caused personal injury to her. We disagree.

Our review of a sufficiency-of-the-evidence challenge is "limited to a painstaking analysis of 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. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005) (quotation omitted). We will not disturb the verdict if the jury, in acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

[2] Appellant argues in his pro se supplemental brief that the DNA evidence is insufficient to prove that he anally penetrated A.E. However, because appellant admits that he vaginally penetrated A.E., and the statute draws no distinction between vaginal and anal penetration, Minn. Stat. § 609.341, subd. 12 (2016), his contention that he did not anally penetrate the victim is irrelevant to his conviction.

conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

To convict appellant of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i), the state had to prove beyond a reasonable doubt that appellant (1) committed sexual penetration of A.E.; (2) used force or coercion to accomplish the sexual penetration; and (3) caused personal injury to A.E. *State v. O'Brien*, 364 N.W.2d 901, 904 (Minn. App. 1985), *aff'd as modified*, 369 N.W.2d 525 (Minn. 1985). Under the statute defining criminal "sexual penetration," the state also had to prove that appellant committed either sexual intercourse, anal intercourse, or intrusion into A.E.'s genital or anal openings, without her consent. *See* Minn. Stat. § 609.341, subd. 12.

A. The evidence is sufficient to prove that A.E. did not consent to the sexual penetration.

Appellant argues that the evidence is insufficient to prove that A.E. did not consent to the penetration because his version of the events, as told to the investigating officers, is "at the very least as credible as A.E.'s version." We are not persuaded.

For first-degree criminal sexual conduct, consent is defined as "words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor." Minn. Stat. § 609.341, subd. 4(a) (2016). "Corroboration of the victim's testimony is not required to show lack of consent." *Id*. at subd. 4(c).

A.E. testified at trial that she did not consent to either sexual intercourse with appellant or any further sexual contact after appellant bit her breast. Appellant identifies no evidence contradictory to A.E.'s testimony other than his own statements. Because we

defer to the jury's credibility determinations, *Pieschke*, 295 N.W.2d at 584, appellant's contention that his account is as credible as the victim's account is unavailing. The evidence presented is sufficient to support the jury's verdict that appellant's penetration of A.E., which he admits to, was committed without her consent.

B. The evidence is sufficient to prove that appellant used force or coercion to accomplish the sexual penetration of A.E.

Appellant argues that the evidence is insufficient to prove that he used force or coercion to accomplish the sexual penetration of A.E. because she had limited memory of the assault, did not specifically testify that appellant used force, and the yellow color of the bruise on A.E.'s lower back indicates that the bruise was older than the date of the reported assault.[3] We disagree.

As an element of first-degree criminal sexual conduct, the state must prove that "the actor use[d] force or coercion to accomplish sexual penetration." Minn. Stat. § 609.342, subd. 1(e)(i). To establish the use of force to accomplish sexual penetration, the state had to prove that appellant either inflicted, attempted to inflict, or threatened to inflict bodily harm on A.E., or committed or attempted to commit another crime against her. *See* Minn. Stat. § 609.341, subd. 3 (2016). To establish the use of coercion to accomplish sexual penetration, the state had to prove that appellant either caused A.E. to reasonably fear that he would inflict bodily harm on her, or used confinement or superior size or strength to

[3] Appellant also argues in his pro se supplemental brief that the yellow color of the bruise on A.E.'s lower back, when compared to the other bruises photographed on A.E.'s body, shows that it was not caused during the reported assault. We address appellant's pro se argument here.

cause A.E. to submit to sexual penetration against her will. Minn. Stat. § 609.341, subd. 14 (2016). "Bodily harm" is defined, for the purposes of criminal sexual conduct, as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2016).

Here, the state presented evidence to the jury of photographs of the bruises on A.E.'s body taken the day after the assault, including one showing a bruise on her lower back. Appellant presented no evidence and called no witnesses to place the age of the bruises in doubt. A.E. testified that she did not have the bruises before the night of the assault, and that appellant caused the bruise on her lower back by striking her "really hard" while penetrating her. An examining nurse testified for the state that she could not determine the age of the bruises based on their color and did not know whether a yellow color suggested a particularly advanced stage of healing.

The state also introduced other evidence that appellant used force or coercion to accomplish the sexual penetration of A.E. Contrary to appellant's assertion, A.E. specifically testified about appellant's use of force or coercion, which included the infliction of physical pain. A.E. testified that she remembered appellant "forcing himself on me, pushing me face down on the bed . . . , [and] forcing [his penis] into my anal area." A.E. testified that the penetration caused "a lot of pain," that she was scared and crying, and that she told appellant to stop. When reporting the sexual assault, A.E. provided the investigating officers with the same details and told them that she felt appellant "shoving my back down and kind of hurting me, and then I felt him putting himself in my anal area." A.E. also testified that her head banged against the wall next to her bed while being

penetrated. Based on this record, we conclude that the evidence is sufficient for the jury to find that appellant used force or coercion to accomplish the sexual penetration of A.E.

C. The evidence is sufficient to prove that appellant caused personal injury to A.E.

Appellant argues that the evidence is insufficient to prove that he caused personal injury to A.E. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (quotation omitted). Appellant cites neither legal authority nor the record in support of his argument. Nevertheless, even if we considered appellant's argument on the merits, his argument is unpersuasive.

Personal injury is defined as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy." Minn. Stat. § 609.341, subd. 8 (2016). Bodily harm is defined in Minn. Stat. § 609.02, subd. 7, as "physical pain or injury, illness, or any impairment of physical condition." Pain or minimal injury is sufficient to establish bodily harm under section 609.02. *State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003). Bruising constitutes "bodily harm" and "personal injury." *State v. Sollman*, 402 N.W.2d 634, 636 (Minn. App. 1987). "[I]njuries need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute 'personal injury' . . . ." *Id*. This court has concluded that "personal injury" was sufficiently proven when the evidence showed that the victim's "injuries occurred on the night of the

alleged assault and that they either were caused by the actual sexual act or were sufficiently related to the assault." *Id.*

Here, the photographic evidence overwhelmingly demonstrates that A.E. sustained scratches and bruising on multiple locations of her body. A.E. testified that none of the scratches or bruises were present before the night of the assault. In addition, she experienced physical pain many times during the assault, including when appellant bit her breast, struck her face, and penetrated her. The evidence is sufficient to prove that appellant caused personal injury to A.E.

For these reasons, we conclude that the evidence is sufficient to support appellant's conviction of first-degree crime sexual conduct for use of force or coercion.

Affirmed.