STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1792

State of Minnesota,
Respondent,

vs.

Marshall Andrew Reed,
Appellant.

Filed November 19, 2018
Affirmed in part and remanded
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-16-18053

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

On direct appeal from a judgment of conviction and sentence for attempted fifth-degree criminal sexual conduct, appellant Marshall Andrew Reed argues that the district

court erred in refusing to instruct the jury on the defense of abandonment and in imposing ten years of conditional release as part of his sentence. Because Reed failed to meet his burden of production for the abandonment instruction, we affirm his conviction. As to Reed's appeal from his sentence, because the warrant of commitment erroneously includes a conditional-release term, we remand for correction.

FACTS

Early one morning in April 2016, 19-year-old M.R. was on the light rail, going to work at the Mall of America. She was sitting in a window seat with the window on her left. There was one seat between her and the aisle, and it was unoccupied.

Reed was sitting a few seats behind M.R. He later got up, walked a few steps forward to look at the map, and then sat next to M.R. in the seat between her and the aisle. After Reed sat next to her, M.R. started to feel brushing on her leg and rib cage that she described to be a "rubbing" and a "sexual touch." She first thought it was Reed's backpack on his lap that was touching her but quickly realized that Reed's right hand was reaching across his body and under the backpack to touch her. She could see Reed's fingers out of the corner of her eye. The touching did not involve heavy pressure and was not a squeezing or a pinching; what M.R. felt was "dragging fingers."

M.R. was sitting in the back-end area of the car where sixteen seats were grouped together. In that area, there were eight other passengers besides Reed. Although the touching went on for several minutes, M.R. did not ask anyone for help because she was "scared" and "frozen." She was so "frozen and stuck in [her] head" that she did not react in any way to the touching except "checking [her] phone and trying to readjust [her]self."

As Reed's hand moved up toward her breast, however, M.R. pushed Reed with her elbow and told him to stop. Reed did not touch M.R. thereafter but continued to sit next to her. M.R. subsequently could see him touching himself briefly in the crotch area.

The light rail arrived at the airport, and five passengers who were sitting near M.R. got off. M.R. was worried that she was going to be left alone with Reed in the light rail car until she got to her destination. A few minutes later, when the light rail stopped at another station, she stepped off the light rail car onto the platform and got into the car behind. She finally got to work and called the police.

Reed was tried for the charge of attempted fifth-degree criminal sexual conduct. At trial, the jury viewed the surveillance video from the light rail car during M.R.'s testimony. M.R. identified herself and Reed in the video. She testified that there was not good camera "angling in the train." The cameras did not provide a clear line of sight to the front right side of M.R.'s body where the touching and the elbow-pushing took place. And M.R. did not clearly manifest her emotional distress on the video. However, during her testimony, M.R. explained to the jury what was happening moment to moment behind the obstruction in the camera's line of sight. And, from the back angle, M.R.'s hand can be seen moving at the moment M.R. testified that she pushed Reed away with her elbow.

Before making her closing argument, defense counsel asked the court to instruct the jury on the defense of abandonment. The court denied the request. After repeated viewings of the surveillance video, the jury returned a guilty verdict. At sentencing, the district court sentenced Reed to 35 months' imprisonment and there was no mention of conditional

release. But the later-issued warrant of commitment stated that "[c]onditional release after confinement has been set at 10 years."

On appeal, Reed seeks reversal of his conviction or, alternatively, remand to remove the conditional-release term.

D E C I S I O N

I. The district court did not abuse its discretion in refusing to instruct the jury on the defense of abandonment.

Declining to give "a requested jury instruction lies in the discretion of the trial court and will not be reversed absent an abuse of that discretion." *State v. Palubicki*, 700 N.W.2d 476, 487 (Minn. 2005). On appeal, a defendant seeking reversal bears the burden of showing that the district court abused its discretion. *See State v. Nunn*, 561 N.W.2d 902, 907 (Minn. 1997). And, to be entitled to a new trial, the defendant must also establish that the district court's abuse of discretion prejudiced the outcome of his trial. *Id.*

To receive a jury instruction on an affirmative defense, "[a] defendant must meet a burden of production by making a prima facie showing that [his] defense applies." *State v. Moser*, 884 N.W.2d 890, 905 (Minn. App. 2016). In determining whether the prima facie showing has been made, "the evidence is viewed in the light most favorable to the party requesting the instruction." *State v. Edwards*, 717 N.W.2d 405, 410 (Minn. 2006). If a defendant meets his burden with supporting evidence, "[the] trial court's refusal to give a jury instruction constitutes an abuse of discretion." *Turnage v. State*, 708 N.W.2d 535, 546 (Minn. 2006).

Reed sought a jury instruction on the affirmative defense of abandonment. Abandonment is defined by statute as "a defense to a charge of attempt that the crime was not committed because the accused desisted voluntarily and in good faith and abandoned the intention to commit the crime." Minn. Stat. § 609.17, subd. 3 (2014). However, "[a]n attempt is not voluntarily abandoned within the scope of § 609.17, subd. 3, if a defendant refrains from carrying out his criminal act because of intervening circumstances." *State v. Cox*, 278 N.W.2d 62, 66 (Minn. 1979).

M.R. testified that she pushed her elbow against Reed and told him to stop before he stopped touching her. Finding no evidence to the contrary, the district court concluded that the abandonment instruction was not supported by evidence because M.R.'s reaction against the touching constituted an intervening circumstance. Reed disagrees, arguing that the surveillance video is the supporting evidence of abandonment.

Reed puts forth the video as evidence that, contrary to M.R.'s testimony, the intervening circumstance did not exist. He emphasizes what the video does *not* show. The video does not show M.R.'s elbow being forcefully pushed against Reed or passengers reacting to her saying "stop." However, those facts do not establish that M.R. did not elbow Reed or tell him to stop. First, the cameras were not positioned to capture everything—the immediate area surrounding M.R.'s elbow was blocked from view. Second, M.R. testified that she did not say stop "loud enough" for others to hear. Third, the video affirmatively shows M.R.'s hand moving at the time she testified that she elbowed Reed to stop.

To be entitled to the abandonment instruction, Reed must make a prima facie showing that he discontinued touching M.R. voluntarily and in good faith. *See* Minn. Stat.

§ 609.17, subd. 3. That the video in this case may not fully capture the intervening circumstance testified to by M.R. does not make the video evidence that Reed voluntarily and in good faith abandoned his intention to commit the crime. *Cf. State v. Strommen*, 648 N.W.2d 681, 683, 689-90 (Minn. 2002) (requiring that jury be accurately instructed on abandonment when store's clerk testified that defendant had told co-robber who had been trying to open the cash register, "Come on. Don't be stupid," and "I didn't want this. I just wanted liquor," and when defendant obeyed the clerk's request that he not come behind counter). Because Reed did not meet his burden of production, the district court did not abuse its discretion in refusing to instruct the jury on the abandonment defense. Because the exclusion of the abandonment instruction was not an abuse of discretion, there is no need to conduct the prejudice analysis. We affirm Reed's conviction.

II. Reed's sentence does not include conditional release.

Reed also argues that the district court erred in imposing ten years of conditional release.[1] When the district court orally pronounced Reed's sentence, the conditional-release term was not included. But the warrant of commitment states that "[c]onditional release after confinement has been set at 10 years." "When an orally pronounced sentence varies from a written sentencing order, the orally pronounced sentence controls." *State v.*

[1] The state agrees that the district court should not have imposed a conditional-release term. But because this court has an obligation to decide cases in accordance with the law, we nevertheless will independently review the issue. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that it is the responsibility of appellate courts to decide cases in accordance with the law, regardless of whether the parties choose to contest an issue).

Staloch, 643 N.W.2d 329, 329 (Minn. App. 2002). Therefore, under *Staloch*, Reed's sentence does not include the conditional-release term.

Moreover, the district court was not authorized to impose the ten-year conditional-release term in this case. Minn. Stat. § 609.3455 mandates conditional release for certain crimes:

> [W]hen a court commits an offender to the custody of the commissioner of corrections for a violation of section 609.342, 609.343, 609.344, 609.345, or 609.3453, the court shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for ten years.

Minn. Stat. § 609.3455, subd. 6 (2014). In *State v. Noggle*, the supreme court held that a ten-year conditional-release term imposed for a crime not within the plain language of section 609.3455 is unauthorized by law. 881 N.W.2d 545, 550 (Minn. 2016). Reed was convicted of an attempted violation of section 609.3451. Violation of section 609.3451, attempted or completed, is not listed in the ten-year conditional-release provision. Minn. Stat. § 609.3455, subd. 6. Therefore, we remand for the correction of the warrant of commitment.

Affirmed in part and remanded.