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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1834

State of Minnesota,
Respondent,

vs.

Elijah Rashad Jackson,
Appellant.

Filed October 29, 2018
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-16-24380

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the district court abused its discretion in denying him a *Schwartz* hearing and that the evidence was insufficient to prove that the victim's injuries were related to appellant's criminal sexual conduct; he also challenges his sentence, arguing that he should not have been sentenced for the nonconsensual dissemination of private sexual images because the dissemination arose from the same behavioral incident as the criminal sexual conduct. Because we see (1) no abuse of discretion in the denial of the *Schwartz* hearing, (2) sufficient evidence to support appellant's conviction of first-degree criminal sexual conduct, and (3) no error in the sentence for nonconsensual dissemination of private sexual images, we affirm.

FACTS

Appellant Elijah Jackson and K.B. had an intermittent relationship beginning when they were 11 or 12. In 2014, when they were about 22, they had a child. Their relationship ended in March 2016, although they continued to see each other.

In August and early September 2016, appellant sent K.B. text messages accusing her of having sex with other men and threatening to kill K.B. and the child. On September 11, K.B. found appellant at her home when she returned with the child after spending the night with her parents. Appellant saw text messages from another man on K.B.'s cell phone. He physically assaulted K.B., hitting her in the face repeatedly, choking her, applying pressure to her neck, and throwing her to the floor. He asked her if she had

had sex with the man whose name was on her phone. When she answered in the affirmative, he said that she was going to have sex with him and then forced her and the child into the basement. Appellant sexually assaulted K.B., who stated that she had neither the energy nor the will to resist appellant because she feared further assault of herself and danger to the child, and appellant committed first-degree criminal sexual conduct on her.

Some friends of K.B. arrived in a car. When K.B. told appellant they would call the police if she did not go out to them, he let her leave. In the car, K.B. called the police. Her face was swollen, and she was bruised and bleeding. Police took her to the hospital, where she spent several days. The DNA in seminal fluid found on her matched appellant's.

Appellant took K.B.'s cell phone and used it to send naked photos of K.B. to K.B.'s friend, her mother, her stepfather, and her grandmother. The police found K.B.'s cell phone when they arrested appellant.

He was charged with first-degree criminal sexual conduct, first-degree assault, felony domestic assault—strangulation, and nonconsensual dissemination of private sexual images. The first-degree assault charge was dismissed, and a charge of third-degree criminal sexual conduct, a lesser included offense, was added.

A jury found appellant guilty of all four charges. His motion for a new trial or a *Schwartz* hearing was denied. Appellant waived his *Blakely* rights, and the district court issued findings of fact on aggravating factors. Appellant was sentenced to 240 months in prison on the first-degree criminal-sexual-conduct charge, an upward durational departure from the presumptive 144 months, and to a concurrent year and a day in prison for nonconsensual dissemination of private sexual images.

He challenges his conviction of first-degree criminal sexual conduct, arguing that the denial of his motion for a *Schwartz* hearing was an abuse of discretion and that the conviction was not supported by sufficient evidence, and he challenges his sentence, arguing that the nonconsensual dissemination of private sexual images was part of the same behavioral incident as the first-degree criminal sexual conduct and therefore should not have been sentenced.

DECISION

1. Denial of the *Schwartz* Hearing

A *Schwartz* hearing is "a procedure for inquiring into jury conduct that may have prevented a fair trial." *State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008) (citing *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 104 N.W.2d 301 (1960)). "[T]o obtain a *Schwartz* hearing, the defense has the burden of adducing sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted). "The standard of review for denial of a *Schwartz* hearing is abuse of discretion." *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998). K.B.'s phone number was on some of the exhibits, where one of the jurors saw it. During the week after the jury found appellant guilty, that juror used the number to text K.B. that he was worried about her and was "sending her virtual hugs." K.B. did not respond to the juror's text, and no evidence of further texts was produced during the next two months. K.B. informed the prosecutor of the text; the prosecutor informed the district court and appellant's counsel. This incident is the sole basis for appellant's request for a *Schwartz* hearing, at which that juror would have been required to testify.

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties, or in order to correct an error made in entering the verdict on the verdict form.

Minn. R. Evid. 606(b). The district court concluded that there was "no evidence to support examining the deliberative process" of the jury in a *Schwartz* hearing.

Appellant argues that the juror who texted K.B. was motivated by sympathy, not by the evidence, and thus did not follow the instruction to perform his function as a juror without bias, prejudice or sympathy. But the district court noted that "*Schwartz* hearings are to inquire about what happened during jury deliberation, not [what] occurred after the verdict," that the juror sent the text after the verdict had been given, that "a juror is free to contact whomever he likes post-verdict," and that appellant "need[ed] a prima facie case with evidence standing alone that there was juror misconduct." *See Everson*, 749 N.W.2d at 349. Because a juror may not testify concerning his mental processes in connection with the verdict under Minn. R. Evid. 606(b), there could be no evidence of juror misconduct.

Appellant's view that he was entitled to a *Schwartz* hearing because the jury's decision was controlled by sympathy for the victim, not by the evidence, was rejected in

State v. Martin, 614 N.W.2d 214 (Minn. 2000). In *Martin*, the request for a *Schwartz* hearing was based on the jurors' desire to speak to the victim's family, which the defendant said showed "sympathy took the place of evidence." *Id.* at 226. *Martin* affirmed the district court's denial of a *Schwartz* hearing because such a hearing would require jurors "to testify as to matters that might have occurred during the course of their deliberations that led them to reach the verdict that they did and, of course, that would be off limits." *Id.*

The district court did not abuse its discretion in denying appellant's request for a *Schwartz* hearing.

2. Sufficiency of the Evidence

In a sufficiency-of-the-evidence challenge, this court is "limited to ascertaining whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). We review the record in the light most favorable to the verdict and assume that any evidence supporting the conviction was believed while any evidence contrary to the conviction was disbelieved. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998). Evidence must be sufficient to prove each element of the charged offense beyond a reasonable doubt. *State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011).

One element of first-degree criminal sexual conduct is that the sexual conduct must cause personal injury. Minn. Stat. § 609.342, subd. 1(e)(i) (2016). Personal injury is "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 as "physical

pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2016). Appellant argues that the state failed to show both that K.B.'s bodily harm was caused by his sexual conduct and that K.B. suffered severe mental anguish.[1]

It is "criminal sexual conduct in the first degree if the actor uses force or coercion to accomplish sexual penetration and causes personal injury in the process." *State v. Reinke*, 343 N.W.2d 660, 661 n.1 (Minn. 1984). K.B. testified that appellant's physical violence ceased before they went to the basement, where the criminal sexual conduct occurred. Appellant argues that therefore his sexual conduct did not cause K.B.'s personal injuries and he is not guilty of first-degree criminal sexual conduct. But "[the personal] injuries need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute 'personal injury' within the meaning of [the statute]." *State v. Sollman*, 402 N.W.2d 634, 636 (Minn. App. 1987). Thus, the jury was instructed that, "It is not necessary that the personal injury be caused in the process of accomplishing sexual penetration. The personal injury does not have to occur simultaneous with the act of sexual penetration. However, the state must prove that the personal injury is sufficiently related to the act."

Appellant argues that the state failed to prove K.B.'s injuries were "sufficiently related" to the sexual penetration because they were completely separate incidents: K.B. testified that they were done in separate rooms and for separate purposes.[2] This argument

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[1] We note that either inflicting bodily harm caused by sexual conduct or causing severe mental anguish would be independently sufficient to support appellant's conviction.

[2] Specifically, he argues that the purpose of the bodily injuries was retaliation for her exchanging text messages with another man, while the sexual conduct was retaliation for

ignores K.B.'s testimony that she submitted to appellant's sexual conduct because she had been weakened and intimidated by the assault: "I had just got beaten up really bad, so I was afraid that it was going to continue or he was going to do something worse to me"; "I had already been beat up really bad, so I didn't have a lot of energy to continue to try to fight"; "I thought he was going to choke me again, beat me up, kill me." K.B.'s acquiescence to the sexual conduct was not unrelated to the assault. We must assume that the jury believed the state's evidence supporting the verdict. *See Brocks*, 587 N.W.2d at 42. K.B.'s testimony establishes a sufficient relationship between the assault and the sexual conduct.

Appellant also argues that the state failed to prove K.B.'s mental anguish was severe and was caused by the sexual conduct, not by the assault. But, in addition to her testimony about the immediate effects of appellant's acts during the assault and the sexual conduct, K.B. also testified that (1) she feared for herself and the child during those acts; (2) she needed therapy afterwards; and (3) she experienced insomnia, sadness, and day-to-day difficulties as a result. From K.B.'s testimony, a jury could reasonably conclude that she suffered severe mental anguish due to appellant's sexual conduct.

Appellant's argument that the assault, not the sexual conduct, caused her mental anguish relies on his assertion that the assault and the sexual conduct should be viewed as two completely separate incidents. This argument is not persuasive because K.B. testified

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her having sex with that man. But appellant admits that K.B.'s relationship with another man was the cause of both the physical and the sexual assault.

explicitly that she submitted to the sexual conduct because she had been beaten badly, did not have energy, and feared further harm to herself and danger for her daughter.

Particularly when viewed in the light most favorable to the verdict, *see id.*, the evidence was sufficient to support the jury's verdict that appellant was guilty of first-degree criminal sexual conduct.

3. Sentence for Nonconsensual Dissemination of Private Sexual Images

Appellant's presumptive sentence for first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(1) (2016) offense was 144 months in prison. *See* Minn. Sent. Guidelines 4.B (2016). He was sentenced to an upward departure of 240 months in prison and also to a concurrent year and a day for the nonconsensual dissemination of private sexual images. Appellant argues that, because the sentence for dissemination was part of the same behavioral incident as the first-degree criminal sexual conduct, he should not have been sentenced for it under Minn. Stat. § 609.035, subd. 1 (2016) ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses."). Whether offenses are part of a single behavioral incident is a mixed question of law and fact; thus, the facts are reviewed for clear error and the application of the law to those facts is reviewed de novo. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014).

Here, the issue is resolved by a statutory exception to Minn. Stat. § 609.035, subd. 1. Minn. Stat. § 609.035, subd. 6 (2016) provides:

> Notwithstanding subdivision 1, a prosecution or conviction for committing a violation of sections 609.342 to 609.345 with force or violence is not a bar to conviction of or punishment

> for any other crime committed by the defendant as part of the same conduct.

Thus, appellant's conviction of and punishment for violation of Minn. Stat. § 609.342, subd. 1(e)(1), was not a bar to his punishment for the nonconsensual dissemination of private sexual images even if that offense was part of the same behavioral incident.[3]

Affirmed.

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[3] We note that the sentences could have been imposed consecutively without departing from the Sentencing Guidelines. *See* Minn. Stat. § 609.035, subd. 6 (providing that, if consecutive sentences are imposed under this subdivision, "the consecutive sentences are not a departure from the Sentencing Guidelines.")