STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1974

State of Minnesota,
Respondent,

vs.

Jallah Sallah Kollie,
Appellant.

Filed September 17, 2018
Affirmed
Smith, Tracy M., Judge

Becker County District Court
File No. 03-CR-17-55

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

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

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

Considered and decided by Kirk, Presiding Judge; Reilly, 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

Appellant Jallah Kollie appeals his conviction of first-degree criminal sexual conduct. He argues that there was insufficient evidence to prove the injury element of the

crime and that the district court erred in admitting recorded interviews of the victim, who also testified at trial, as substantive evidence. We affirm.

FACTS

In September 2016, Kollie worked for Lake Homes and Program Development (Lake Homes), an organization that operates homes for adults with developmental disabilities or related conditions. The facility he worked at had two floors, with four residents on each floor. The residents of the upper floor are "mobile," "able to manipulate stairs," and "take care of their own needs." They would "frequently come down [to the lower floor] and visit the residents who lived there and socialize with the residents and staff." The residents on the lower floor "were non-ambulatory or elderly, so their physical needs were more intense." Kollie was a direct-support professional on the lower floor, and his responsibilities included making sure clients on that floor had their health and well-being needs met.

The victim in this case, J.K., was a client of Lake Homes in September 2016. She lived on the upper floor of the facility where Kollie worked. She had a diagnosis of "moderate mental retardation and autism spectrum disorder," but was "independent with all of her cares, maybe [needing] some verbal cues [regarding] what kinds of clothes might be appropriate or if it was the time [of] day for her shower." She was capable of "taking care of her own personal needs. She could shower on her own [and] if she was menstruating," she could take care of that as well. When she had her period, staff members would not "need to do anything for her as it relate[d] to taking care of those needs," nor did she need help with "toileting when she went to the bathroom."

On September 13, 2016, Kollie was working on the lower floor at the Lake Homes facility. He was the only staff member working on that floor, and Wilmot Karyou, another direct-support professional, was the only staff member working on the upper floor. Around 5:00 p.m., Karyou was preparing dinner in the upper-floor kitchen when he saw Kollie come upstairs for the first time that evening. Kollie told Karyou that J.K. had brought him a television remote control because two of the upstairs clients had been fighting over it and that Kollie was returning it to the upstairs television. Kollie then went back downstairs, but he came back up about 15 to 20 minutes later.

When Kollie came back upstairs, Karyou first thought Kollie had gone to the medication room, which is located on the upper floor. However, five minutes passed and Kollie did not return to the stairwell. Karyou shouted Kollie's name down the hallway, and Kollie responded that he was in the bathroom helping J.K. Karyou was "a little bit concerned trusting [Kollie]," so, after seven or eight more minutes had passed, he went back to the hallway, saw that Kollie had not exited the bathroom, and pushed the bathroom door open.

When Karyou opened the door, he saw J.K. standing naked in the bathroom with Kollie. Karyou saw blood on the tub, on J.K.'s legs, and on tissues in the trash can. Karyou asked Kollie what he was doing, and Kollie said J.K. was menstruating. Karyou told Kollie that it was not his job to help J.K. and to go back downstairs to his post. Kollie complied with that command.

Karyou then called his supervisor, who, in turn, called the Lake Homes hiring manager, Barbara Tevogt, asking her to come to the facility. In the interim, J.K. showered,

and Karyou asked her a couple of questions about what had happened in the bathroom. Specifically, Karyou asked "if [Kollie] touched her," "why did he do that," and "was [this] the first time." Karyou did not ask J.K. any questions "about where she was touched or what she was touched with or what had happened." When Tevogt arrived, she interviewed J.K. and recorded the conversation. J.K. told Tevogt that a man had "touched [her] when [she] should not do [sic]," that the man wore glasses,[1] worked on the lower floor, and was "the man downstairs." When asked where the man touched her, J.K. said "my body," "where the pee and the poop go."

The assault was reported to the police, and, on September 14, Officer Randy Haken went to the Lake Homes facility and interviewed Karyou once and J.K. twice. Karyou was allowed to be present for both interviews of J.K. In the interviews, J.K. reiterated that someone had touched her on her "private parts" and that the assailant wore glasses. She also indicated that the attacker wore a condom, which he then removed and threw in the trash. Officer Haken also spoke with Kollie that evening. Kollie denied ever being in the bathroom and said he did not know why Karyou or J.K. would make up a story about him.

A sexual-assault exam was conducted on September 15. The exam did not find any of Kollie's DNA on or in J.K. But a search for injuries revealed a "half-a-centimeter skin break on the floor of [J.K.'s] vaginal opening." This injury indicated that "the skin ha[d] been broken apart." It would have taken "a considerable amount of force" striking the

[1] Kollie wore glasses throughout trial, though he claimed that they were a new acquisition since the time of the assault.

tissue to have caused such a tear. The exam also determined that J.K. was not having her period when the assault occurred.

Kollie was charged with first-degree criminal sexual conduct and third-degree criminal sexual conduct. The state moved for an order determining J.K.'s competence to testify and admitting recordings of Tevogt's and Haken's interviews of J.K. as substantive evidence. Following a hearing, the district court ruled that J.K. was competent to testify. The court reserved ruling on the admissibility of the recordings until trial, when the purpose and specific sections of the statements would be known, but indicated that it was otherwise inclined to admit the statements.

A jury trial was held on August 7 and 8, 2017. Prior to opening statements, the district court expanded on its preliminary ruling regarding the recordings. The court concluded that there was compliance with the statute permitting those recordings to be used as substantive evidence and specifically noted that "the statements do have sufficient evidence of reliability" because they "were made near in time to the incident[,] . . . [t]hey were given on more than one occasion, and there are some inconsistences that can be subject to cross-examination concerning the statements." Regarding factors potentially weighing against the admission, the court said:

> The court [did] not find that there was any significant delay between giving of the statement and the initial report of the evidence[,] [a]nd the court believe[d] that any leading nature of the questions that may have been contained in the statement were related somewhat to the mental[] impair[ment], mental state or condition, and ability to understand.

The morning of the second day of trial, Kollie's counsel asked to "rehear the motion about playing the audio and stuff." He indicated that "the defendant objects to playing all of the audio and stuff . . . because I don't know if I made clear that we objected to that." When asked what portions were objected to, counsel indicated he was objecting to "the playing [of] the statements [sic] . . . that was recorded by Barb Tevogt. I just want to make it clear that the defendant objects to that." He also indicated that there was "[n]o new basis" for the objection. The district court noted the objection but permitted the state to play the recordings by Tevogt and Haken to the jury.

The jury found Kollie guilty of both charges. The district court sentenced Kollie on the first-degree-criminal-sexual-conduct conviction.

Kollie appeals.

D E C I S I O N

I. The evidence was sufficient to prove that Kollie caused personal injury to J.K.

An element of first-degree criminal sexual conduct is that the defendant caused "personal injury" to the victim. Minn. Stat. § 609.342, subd. 1(e) (2016). Personal injury is defined as "bodily harm," which includes "physical pain or injury." Minn. Stat. §§ 609.02, subd. 7, .341, subd. 8 (2016). "[T]he threshold for what constitutes bodily harm . . . is minimal . . . ." *State v. Struzyk*, 869 N.W.2d 280, 289 (Minn. 2015); *see, e.g.*, *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985) (finding sufficient evidence of bodily harm based on a bruise); *State v. Johnson*, 152 N.W.2d 768, 773 (Minn. 1967) (concluding there was sufficient evidence to constitute bodily harm when victim experienced pain from being struck and shoved, despite lack of permanent or serious injury).

Kollie argues the evidence was insufficient to prove beyond a reasonable doubt that he caused personal injury to J.K. He argues the state attempted to prove this element of first-degree criminal sexual conduct through circumstantial evidence and, therefore, the heightened circumstantial-evidence standard of review applies. The state argues there was direct evidence of personal injury, making the heightened standard inapplicable. We conclude that, under either the direct-evidence or the circumstantial-evidence standard, the evidence was sufficient to prove that Kollie caused personal injury.

A. Direct Evidence

When considering whether there is sufficient evidence to support an element proved by direct evidence, Minnesota appellate courts "conduct a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted).

Kollie argues there was no direct evidence of personal injury because "J.K. was unaware she even had a tear to her vaginal wall, and therefore, she did not testify that Kollie caused her the injury," nor did she do so in her recorded statements. To the extent J.K. stated that Kollie hurt her, Kollie argues that, given the context of that testimony, "J.K.'s responses appear to be her way of explaining that her entire body was touched and not an attempt to explain any specific injury."

We are unpersuaded. J.K. testified that the attacker "hurt [her] body" and, when asked what he touched her with, elaborated that "[h]e hurt [her] whole body." Viewing the evidence in the light most favorable to the verdict, this is direct evidence that J.K.

experienced physical pain, and physical pain is sufficient to prove personal injury. *See Johnson*, 152 N.W.2d at 773 (holding that experiencing pain was sufficient evidence to constitute bodily harm). The direct evidence is, therefore, sufficient to meet the personal-injury element of first-degree criminal sexual conduct.

B. Circumstantial Evidence

When considering whether there is sufficient evidence to support an element proved by circumstantial evidence, Minnesota appellate courts engage in a two-step inquiry. *State v. Petersen*, 910 N.W.2d 1, 6 (2018). First, the court identifies the circumstances proved by the state, "giving deference to the factfinder's acceptance of the State's evidence," and assuming that "the factfinder disbelieved any testimony conflicting with [the] verdict." *Id.* at 6-7 (quotations omitted). Second, the court determines, without deference to the factfinder, "whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Id.* at 7 (quotation omitted).

Kollie argues that the state "fail[ed] to eliminate the rational hypothesis that Kollie did not cause the small half centimeter tear to J.K.'s vaginal wall." Specifically, Kollie points to two pieces of evidence: the sexual-assault nurse examiner's testimony that the injury could have "happen[ed] from a finger with a sharp fingernail" and J.K.'s interview statement that she had recently been "peeing a lot of blood." Kollie argues that, taken together, this evidence leads to the reasonable inference that the injury "could have been caused by a sharp fingernail."

The alternative hypothesis is not rational. In the course of establishing its case, the state proved that:

(1) When Karyou discovered Kollie in the bathroom with J.K., Karyou saw blood on J.K.'s legs, on the tub, and on a wet wipe in the trashcan;
(2) J.K. had blood in her urine around the time of the assault;
(3) J.K. was not menstruating at the time of the assault;
(4) Two days after the assault, J.K. had a half-centimeter long tear of skin on the floor of her vaginal opening;
(5) Two days after the assault, there was a spot of blood beside the tear;
(6) A considerable amount of force would have had to strike the tissue to make such a tear;
(7) The tear could only have been caused by penetration of the vaginal opening;
(8) Thirty percent of rapes involves some kind of injury to the vaginal tissue;
(9) The tear was consistent with J.K.'s description of the assault.

Taken together, these circumstances lead to only one reasonable conclusion—that Kollie caused the tear in the floor of J.K.'s vaginal opening while he was committing the assault. Although it is technically possible that the injury could have occurred prior to the assault or between the assault and the sexual-assault exam, without any support in the record, such a conclusion is purely speculative. Moreover, the fact that J.K. saw blood and believed she was beginning her period on the day of the assault renders Kollie's alternative hypotheses not rational. An alternative hypothesis that is mere conjecture is not sufficient to attack a conviction, even one based on circumstantial evidence. *See State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) ("Even in cases based on circumstantial evidence, however, we have recognized that the jury is in the best position to evaluate the evidence, and we will not overturn a conviction based on circumstantial evidence on the basis of mere

conjecture.") (quotations omitted). We conclude that there was sufficient circumstantial evidence to prove the element of personal injury.

II. The district court did not abuse its discretion in admitting the recorded interviews of J.K.

Kollie argues the district court erred in admitting the audio recordings of the interviews of J.K. conducted by Tevogt and Haken. Again, the parties dispute the standard of review. The state argues that Kollie failed to preserve this issue for appeal and therefore it is subject to plain-error review. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (describing plain-error standard of review for unobjected-to errors). Kollie argues that he preserved the issue and therefore the decision should be reviewed under the abuse-of-discretion standard for evidentiary rulings. *See State v. Wilson*, 900 N.W.2d 373, 384 (Minn. 2017) ("[E]videntiary questions are reviewed for abuse of discretion." (quotation omitted)). We assume, without deciding, that Kollie preserved the issue and review the district court's decision to admit the recordings for an abuse of discretion.

Generally, out-of-court statements cannot be offered as evidence to prove the truth of the matter asserted. Minn. R. Evid. 802. However, both the Minnesota Rules of Evidence and the Minnesota Statutes carve out various exceptions to this rule. The district court relied on one statutory exception when it decided to admit the recordings in this case:

> An out-of-court statement made by . . . a person who is mentally impaired . . . alleging, explaining, denying, or describing any act of sexual contact or penetration . . . is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to

> whom the statement is made provide sufficient indicia of reliability; and
> (b) the . . . person mentally impaired . . . :
> (i) testifies at the proceedings; . . . and
> (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

Minn. Stat. § 595.02, subd. 3 (2016). In determining whether there are "sufficient indicia of reliability," courts must look at the totality of the circumstances. *State v. Scott*, 501 N.W.2d 608, 618 (Minn. 1993).

Kollie argues that the recordings do not satisfy Minn. Stat. § 595.02, subd. 3, because the circumstances of the statement do not provide "sufficient indicia of reliability." Specifically, Kollie argues that "the court never evaluated the reliability of J.K.'s statements in light of the role and presence Karyou played in this case and the giving of the three statements," and therefore the court never considered that Karyou could have "exerted influence over J.K. to falsely implicate Kollie" so that Karyou could cover up his own misconduct. This is possible, according to Kollie, because Karyou was present for Officer Haken's two interviews of J.K.

We do not believe the district court abused its discretion in admitting the statements. The court's examination of the reasons for and against admitting the recordings demonstrates that the court appropriately considered the circumstances in which the interviews occurred, and it determined that those circumstances provided sufficient indicia of reliability to make the recordings admissible. Moreover, a review of the recordings

indicates that, although Karyou was present for the two interviews with Officer Haken, he did not play any role in those interviews, neither asking J.K. questions nor assisting her with answering. Considering the circumstances as a whole, we conclude that the district court was within its discretion to admit the recordings as substantive evidence.

Affirmed.