**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1992**

State of Minnesota,
Respondent,

vs.

Dwayne Andre Garner,
Appellant.

**Filed December 17, 2018**
**Affirmed in part, reversed in part, and remanded**
**Florey, Judge**

Goodhue County District Court
File No. 25-CR-16-3043

Lori Swanson, Minnesota Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Stephen Betcher, Goodhue County Justice Center, Red Wing, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

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

**FLOREY**, Judge

Appellant Dwayne Andre Garner challenges his convictions of third-degree criminal sexual conduct, domestic assault, and fifth-degree assault. He argues that (1) the district court erroneously admitted prior out-of-court statements as substantive evidence to

prove he committed third-degree criminal sexual conduct; (2) the state failed to prove that the complainant, C.M.K., suffered bodily harm as required for the domestic assault and fifth-degree assault charges; and (3) the district court erred by entering a conviction and sentence for fifth-degree assault because it is a lesser-included offense of domestic assault. Appellant also raises a number of pro se arguments. We affirm appellant's conviction of third-degree criminal sexual conduct, but we reverse the convictions of domestic assault and fifth-degree assault. We remand to the district court to vacate those two convictions and amend the warrant of commitment accordingly.

## FACTS

In November 2013, appellant met C.M.K. on the internet. At the time, C.M.K. was 52 years old and living in Maine. She had two adult sons, three grandchildren, and a mother who also lived there. Her primary means of support was supplemental social-security income that she received as a result of a disability.

After communicating with appellant frequently via Skype and text, C.M.K. traveled to Minnesota in 2015 to meet him for the first time. Shortly thereafter, C.M.K. moved to Minnesota to be with him. In February 2016, C.M.K. moved into an apartment in Cannon Falls, Minnesota, that appellant had picked out for her. The apartment complex was reserved for senior citizens and/or persons with a disability. Appellant had a house in Rochester and, unbeknownst to C.M.K., was married at that time.

C.M.K. testified that once she moved to Minnesota, she and appellant did not spend much time together. Shortly after her move, appellant left the state to attend a 30-day work

training. While he was away, C.M.K. sent him over $1,000 to help pay for his living expenses, and as a result, she fell behind on rent.

In November 2016, appellant returned to Minnesota and came to live with C.M.K. at her apartment. C.M.K. testified at trial that during this period, he became physically abusive toward her. She testified that he would occasionally "slap [her] in the face" or grab her by the throat, and that he would demand that she call him "sir."

The property manager of C.M.K.'s apartment building, A.C., testified at trial that after appellant began staying at C.M.K.'s apartment more frequently, A.C. observed a change in C.M.K.'s demeanor. A.C. described C.M.K. as becoming "very emotional," "crying a lot," and coming in to her office to see her more often. A.C. stated that she began doing walk-throughs of the apartment complex more frequently and would hear loud yelling coming from C.M.K.'s unit. She also began to notice multiple bruises on C.M.K. A.C. eventually went to the police station to retrieve pamphlets on domestic abuse, which she slipped under C.M.K.'s door, because she was concerned for C.M.K.'s safety.

On December 22, 2016, appellant arrived at C.M.K.'s apartment at around 10:30 p.m. C.M.K. testified at trial that on the night of December 22, appellant appeared to be angry with her. She stated that shortly after he arrived to her apartment, he placed a call to another woman with whom he began laughing and apparently having a good time. C.M.K. testified that this upset her. She stated that she began crying and eventually left to go for a walk. She decided to sleep on the couch that night, while he slept in her bed, in order to get some space from him.

C.M.K. testified that, on the morning of December 23, while she was standing in her living room looking out the window, appellant came up from behind her, grabbed her by her arms, and forcibly took her into her bedroom. She told him no and tried to resist his force by holding on to the wall, but appellant was able to overcome her resistance. C.M.K. testified that appellant then sat her down on her bed and forced her to perform oral sex on him.

At trial, C.M.K. testified several times that she "did not remember" what happened after appellant pulled his pants down. Immediately after testifying that appellant "put it in [her] mouth," she then stated, "[a]ll I remember is he took it out and he said—I had my mouth closed; and he said, open your mouth. He said, I'm so stressed. That's all I remember. I blacked out. That's all I remember."

C.M.K. testified that after appellant forced her into her room to perform oral sex, she felt "numb," but that she had to attend a pre-scheduled meeting with A.C. and appellant to discuss her past-due rent. A.C. testified that C.M.K. arrived at her office nearly an hour early before the meeting. According to A.C., C.M.K. was pacing back-and-forth, crying, and visibly upset. A.C. testified that C.M.K. "stormed out" in the middle of the meeting crying.

A.C. further testified that, after C.M.K. left the meeting, appellant told A.C. that he was planning to end his relationship with C.M.K. and work on sending her back to Maine. Appellant stated that he had not yet told C.M.K. of his intentions. After appellant left A.C.'s office, C.M.K. returned a few minutes later crying. A.C. described C.M.K. as "a mess, crying, hysterical." R.C., who was responsible for the maintenance of the apartment

building, walked into A.C.'s office around the same time. C.M.K. then told A.C. and R.C. what had happened in her apartment earlier that morning. A.C. testified that "[C.M.K.] said that [appellant] pulled his pants down and that he shoved his penis in her mouth."[1] Likewise, R.C. testified that C.M.K. reported that appellant "grabbed her by the hair, he dragged her in the room, he pulled his dick out, shoved it in her mouth. And that's her words."[2]

Despite C.M.K.'s fear about reporting the incident to law enforcement, A.C. and R.C. insisted that they call the police. Approximately 20 minutes after A.C. called the police, Officer Fluhrer and Lieutenant Berg of the Cannon Falls Police Department arrived at A.C.'s office. While questioning C.M.K. about what had happened that morning in her apartment, the officers observed that she was crying and visibly upset. Officer Fluhrer testified that C.M.K. reported that "her boyfriend was up in the apartment and that he had physically assaulted and forcibly had her perform acts, sexual acts on her [sic] that morning."[3] After briefly speaking with C.M.K., the two officers went up to C.M.K.'s apartment unit to speak with appellant.

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[1] Defense counsel did not object to this portion of A.C.'s testimony as hearsay or otherwise.
[2] Defense counsel did not object to this portion of R.C.'s testimony as hearsay or otherwise.
[3] Defense counsel did not object to this portion of Officer Fluhrer's testimony as hearsay or otherwise. Defense counsel did, however, later object "to any further use of [the officers'] body cam videos" on the grounds of hearsay and cumulative evidence. The district court judge overruled the objection, stating: "I don't believe that it's hearsay, and I note that there were transcripts provided and [C.M.K.] was more than open to being cross-examined on what she said on these. As far as whether this is cumulative or being asked and argued or something like this, I note that this is a Court trial and that I have confidence that I can sift through this; and I'm going to allow this testimony in."

Officer Fluhrer testified that appellant invited the officers in and agreed to speak with them. Appellant told the officers that C.M.K. was angry with him because he was moving out, but denied having ever assaulted her. When asked what time he had arrived at C.M.K.'s apartment, appellant told the officers it was around 6:00 or 7:00 a.m. that morning. He stated that he had then gone downstairs to speak with A.C. about C.M.K.'s rent. Later, during the same exchange with the officers, appellant stated that he had *not* been up to C.M.K.'s apartment before the meeting with A.C. Surveillance footage, which the officers eventually obtained, showed appellant entering C.M.K.'s apartment around 10:30 p.m. the night before and not leaving the apartment complex at any point before the next morning.

The officers removed appellant from C.M.K.'s apartment and detained him in their squad car while they conducted further investigation. When Lieutenant Berg returned to the squad car to interview appellant, he advised him of his right to remain silent and the right to consult with an attorney. Appellant stated that he understood his rights and wished to speak with him. According to appellant, C.M.K. was upset with him because he told her he was ending their relationship. Throughout the exchange, appellant continued to present inconsistencies in his story. At the end of the interview, Lieutenant Berg placed appellant under arrest for the sexual assault of C.M.K.

That day, Officer Fluhrer returned to C.M.K.'s apartment to get a DNA sample from her mouth that would be submitted to the Bureau of Criminal Apprehension for review. At appellant's request, Lieutenant Berg escorted him to a Mayo Clinic where photos were

taken of his body and a physical examination was conducted by a Mayo doctor, including the taking of a DNA swab.

On December 27, 2016, appellant was charged with third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(c) (2016); domestic assault, in violation of Minn. Stat. § 609.2242, subd. 1(2) (2016); and fifth-degree assault, in violation of Minn. Stat. § 609.224, subd. 1(2) (2016). Appellant waived his right to a jury trial, and in April 2017, a three-day bench trial was held. The state called C.M.K., A.C., R.C., Officer Fluhrer, and Lieutenant Berg to testify. The state also offered the officers' video recordings of C.M.K.'s prior statements as well as their recordings of appellant's two interviews. The defense called appellant to testify.

The district court found appellant guilty of all three counts as charged. The judge stated that he found C.M.K. to be credible and believed her testimony. Although the results of the DNA swabs of C.M.K. and appellant were not available at the time of trial, the district court judge found that the results would not have impacted his decision either way.

In September 2017, appellant was sentenced to the presumptive 48-month prison term for the third-degree criminal-sexual-conduct conviction, and concurrent 90-day sentences for the domestic assault and fifth-degree assault convictions. This appeal followed.

## D E C I S I O N

### I. There was sufficient evidence for the district court to find appellant guilty of third-degree criminal sexual conduct.

#### A. The district court did not commit plain error by admitting C.M.K.'s prior out-of-court statements as substantive evidence.

Appellant asks this court to grant him a new trial because the district court erred by admitting prior out-of-court statements as substantive evidence. He contends that, although his trial counsel failed to object to the admission of most of C.M.K.'s prior out-of-court statements, the issue is not waived on appeal because the court's error was plain and prejudicial. According to appellant, the only way the district court could have found him guilty of third-degree criminal sexual conduct was to rely on C.M.K.'s prior statements as substantive evidence.

"Rulings on evidentiary matters rest within the sound discretion of the trial court, and [appellate courts] will not reverse a trial court's evidentiary ruling absent a clear abuse of discretion." *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). However, "[i]n the absence of an objection, [an appellate court] may review the admission of evidence for plain error." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (citing Minn. R. Crim. P. 31.02). The three-prong plain-error standard requires the defendant to show (1) error; (2) that was plain; and (3) that affected the defendant's substantial rights. *Id.*; *see also State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Minnesota Rule of Evidence 801(d)(1)(B) provides that a prior out-of-court statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the

declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B).

In considering whether to admit a prior consistent statement, the district court must determine (1) whether the witness's credibility has been challenged; (2) whether the prior statement would "bolster the witness' credibility with respect to that aspect of the witness' credibility that has been challenged"; and (3) whether the prior statement and trial testimony are consistent. *State v. Fields*, 679 N.W.2d 341, 347-48 (Minn. 2004) (quoting *Nunn*, 561 N.W.2d at 909). Trial testimony and prior statements need not be verbatim to be considered consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

The trial court properly admitted C.M.K.'s prior out-of-court statements as non-hearsay under Minn. R. Evid. 801(d)(1)(B). Although appellant contends that the defense did not challenge C.M.K.'s credibility on the particular issue of penetration, our review of the trial transcripts indicates otherwise. During C.M.K.'s cross-examination, defense counsel challenged her recollection of the event in the following exchange:

> Q: Did you state to the officers that you had kept your mouth shut when [appellant] was attempting to get head, I guess?
>
> A: Yes, I did.
>
> Q: And then today I think on three or four occasions you said, after that I just don't remember what happened, fair enough?
>
> A: I blacked out. I don't remember if I did or not.

> Q: I'm just wanting to know what your recollection is; and if it's a blackout, it's a blackout, okay?

Similarly, in *Nunn*, which appellant cites in support of his argument, the Minnesota Supreme Court concluded that the prior consistent statements of the state's witnesses were admissible because the witnesses were subject to cross-examination and their credibility had been challenged by the defendant who disputed their recollection of the events. 561 N.W.2d at 909. The supreme court held that the district court did not commit error in admitting the prior out-of-court statements because they corroborated the witness' in-court testimony with respect to the disputed events and were helpful to the trier of fact in evaluating the witness' credibility. *Id.*

Second, as the district court indicated, the prior out-of-court statements strengthened C.M.K.'s credibility with regard to the challenged element of penetration. During C.M.K.'s trial testimony describing the sexual assault, she specifically stated that appellant "put it in [her] mouth." There is no doubt that the district court found her testimony credible. Indeed, when announcing the verdict, the district court judge stated:

> There was not much, if any, physical evidence presented by the State, which makes [C.M.K.'s] and Mr. Garner's statements very important to me. I really focused on those statements that [C.M.K.] and Mr. Garner made. Primarily here in the courtroom in their testimony under oath, but also their statements to law enforcement that we listened to or watched. I did so to determine credibility and also to look at consistency, motive. . . . I really focused on [C.M.K.]. She is the accuser. Whether or not she was credible, given what I just said about the evidence, weighed heavily upon me. . . . I found her credible. I believe her.

Pursuant to Minnesota law, testimony of a victim in a prosecution for third-degree criminal sexual conduct need not be corroborated. *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) (citing Minn. Stat. § 609.347, subd. 1 (2016)). However, "[t]he absence of corroboration in an individual case . . . may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt." *Johnson*, 679 N.W.2d at 387 (citations omitted).

In the present case, C.M.K.'s statement under oath that appellant forced her to perform oral sex was corroborated by testimony of each of the state's witnesses. As we have stated before, "[a] prompt complaint by a victim is corroborative evidence of a rape" and "[t]estimony from others about a victim's emotional condition after a sexual assault is also corroborative evidence." *Id.* Here, the evidence was sufficient as a matter of law for the court to convict appellant of third-degree criminal sexual conduct. The record at trial established that C.M.K. was visibly upset, crying, and hysterical as she recounted the incident to A.C., R.C., and the two responding officers shortly after she was assaulted.

Finally, C.M.K.'s trial testimony and prior out-of-court statements were primarily consistent with one another. Although C.M.K. presented some inconsistencies during her cross-examination, stating, for example, that she did not remember what happened after appellant pulled down his pants, her in-court testimony that he "put it in [her] mouth" was consistent with her out-of-court statements to A.C., R.C., and the two officers. A.C. and R.C. both testified that C.M.K. told them that appellant "shoved" his penis "in her mouth." Lieutenant Berg testified that C.M.K. reported to him and his partner that appellant "beats on her and forced himself on her that morning." Similarly, Officer Fluhrer testified that

C.M.K. reported that appellant "had physically assaulted and forcibly had her perform acts, sexual acts on her [sic] that morning."

C.M.K.'s description of the assault, of the night leading up to the assault, and of her volatile relationship with appellant, have also been consistent. Further, all of the state's witnesses conveyed a similar impression of C.M.K. on the morning of the offense, corroborating her testimony that appellant sexually assaulted her. *Id.* (affirming the defendant's conviction of third-degree criminal sexual conduct, based, in part, on corroborating testimony, notwithstanding the victim's recantation of the allegations). Because we conclude that C.M.K.'s prior out-of-court statements qualified as non-hearsay under Minnesota Rules of Evidence 801(d)(1)(B), the district court did not commit plain error in admitting the statements as substantive evidence.

**B. The district court's admission of C.M.K.'s prior out-of-court statements was not prejudicial.**

Even if we were to conclude that the district court's admission of the prior out-of-court statements was error, our decision to affirm the conviction would not change. In order to satisfy the third prong of the plain-error standard, "a defendant must show prejudice that forms the basis for a reasonable likelihood the error substantially affected the verdict." *Manthey*, 711 N.W.2d at 504.

The district court expressly provided that its verdict rested primarily on C.M.K.'s trial testimony, stating that it found her to be credible and believable. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (holding that great deference is given to the trial court's determinations of witness credibility, and the appropriate weight to be

given to witness testimony rests within the province of the factfinder), *aff'd*, 508 U.S. 366 (1993); *Johnson*, 679 N.W.2d at 387 ("[T]he inconsistencies and related credibility determinations [are] for the [factfinder] to assess."); *see also State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) ("It is a well-established rule that a conviction can rest upon the testimony of a single credible witness."). Because the district court's admission of C.M.K.'s prior out-of-court statements did not affect its verdict, we conclude appellant was not prejudiced. Appellant's conviction of third-degree criminal sexual conduct is affirmed.

## II. There was insufficient evidence of bodily harm for the district court to find appellant guilty of domestic assault or fifth-degree assault.

Appellant asks this court to reverse his convictions for domestic assault and fifth-degree assault because, he argues, the state failed to prove beyond a reasonable doubt that C.M.K. suffered bodily harm. In considering a claim of insufficient evidence, the appellate courts review the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach its verdict. *State v. Olhausen*, 681 N.W.2d 21, 25-26 (Minn. 2004). The appellate court must assume the "[fact-finder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

The state charged appellant with domestic assault (intentionally inflicts or attempts to inflict bodily harm upon another), in violation of Minn. Stat. § 609.2242, subd. 1(2), and fifth-degree assault (intentionally inflicts or attempts to inflict bodily harm upon another), in violation of Minn. Stat. § 609.224, subd. 1(2). Thus, to establish appellant's guilt of either charge, the state was required to prove that appellant intentionally inflicted or

attempted to inflict bodily harm on C.M.K. "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2016).

Appellant contends that neither moving C.M.K. from one room to another, nor forcing her to perform oral sex, satisfies the statutory definition of bodily harm. He argues that the state must have shown C.M.K. suffered physical pain or injury in order to reach a conviction.

We conclude there was insufficient evidence of bodily harm as defined in Minn. Stat. § 609.02, subd. 7. "Only a minimal amount of physical pain or injury is necessary in order to satisfy the definition of bodily harm." *State v. Tscheu*, 758 N.W.2d 849, 859 (Minn. 2008) (quotation omitted). While we acknowledge this relatively low threshold, and give great deference to the factfinder's credibility determinations, evidence of bodily harm in the record is speculative, at best.

At trial, C.M.K. testified that appellant used force to get her from the living room to the bedroom. She stated that he did not "dig" his hands into her, but that "he had a good, hard grip" on her. Although there was testimony at trial that appellant had been physically abusive toward C.M.K. on prior occasions, there were no allegations of physical harm or injury on the morning in question. Based on our review of Minnesota case law and the statutory definition of "bodily harm," we conclude there was insufficient evidence to convict appellant of the two assault charges. Although we reverse the convictions of

domestic assault and fifth-degree assault, we, by no means, take lightly the emotional harm and trauma C.M.K. experienced as a result of appellant's actions.[4]

Because we reverse both of the assault convictions, we need not address whether the district court erred by entering a conviction and sentence for fifth-degree assault.

## III. Appellant's pro se arguments are without merit.

Appellant raises a number of issues in his *pro se* brief. He claims (1) ineffective assistance of trial counsel; (2) that he was coerced into saying incriminating statements in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); (3) that exculpatory evidence was suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) a number of Fourteenth Amendment violations. Having carefully reviewed these issues, we conclude they are all without merit.

**Affirmed in part, reversed in part, and remanded.**

[4] We note that appellant was not charged with domestic assault (fear), under Minn. Stat. § 609.2242, subd. 1(1), which would have required a different analysis as to the issue of whether appellant's actions placed C.M.K. in fear of immediate bodily harm. Because the state charged appellant with domestic assault (bodily harm), under Minn. Stat. § 609.2242, subd. 1(2), our analysis is limited to whether appellant intentionally inflicted or attempted to inflict pain or injury on C.M.K. Based on the record, we conclude that the requisite elements under domestic assault (bodily harm) were not met.