STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0160

State of Minnesota,
Respondent,

vs.

Gerald Karl Ackerson,
Appellant.

Filed December 24, 2018
Affirmed
Kalitowski, Judge[*]

Clay County District Court
File No. 14-CR-16-1623

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

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Florey, Judge; and Kalitowski, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

Appellant Gerald Karl Ackerson challenges his conviction of first-degree criminal sexual conduct, arguing that insufficient evidence supported the conviction.[1] We affirm.

D E C I S I O N

Ackerson argues that the state failed to provide sufficient evidence of the penetration and injury elements for first-degree criminal sexual conduct (CSC). An appellate court examining a sufficiency-of-the-evidence challenge "conduct[s] 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." *Lapenotiere v. State*, 916 N.W.2d 351, 360-61 (Minn. 2018) (quotation omitted). This court "extend[s] a broad review of questions of fact when reviewing the sufficiency of the evidence, and leave[s] the weight and credibility of the testimony in the province of the jury." *Id*. at 361 (quotations and citation omitted). In order to find Ackerson guilty of first-degree CSC—mentally-impaired victim/personal injury, the state had to prove that he (1) "engage[d] in sexual penetration," (2) with the victim A.F., (3) caused her "personal injury," and (4) knew or had reason to know that A.F. was mentally impaired. *See* Minn. Stat. § 609.342, subd. 1(e)(ii) (2014) (listing elements).

[1] Appellant also appealed his "conviction" of third-degree criminal sexual conduct, but the district court, after erroneously entering a conviction for that charge, vacated it. Ackerson therefore has no third-degree conviction to appeal. *See State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002) (concluding that verdict of guilt, without recorded judgment of conviction, is not final, appealable judgment).

Penetration element

"'Sexual penetration' means any of the following acts committed without the complainant's consent . . . (2) any intrusion however slight into the genital or anal openings . . . by any part of the body of another person." Minn. Stat. § 609.341, subd. 12(2)(ii) (2014). The record indicates that A.F. is a vulnerable disabled adult who suffers from traumatic brain injury, preventing her from "us[ing] protective reactions," and making it difficult to "ambulate, stay vertical, [and] reposition" herself. At trial, A.F. testified that Ackerson pulled her into a vacant apartment, "pulled [her] pants down" and, after she "pushed him away and said no," he "put his penis in [her]—or tried to put it in [her] vagina." A.F. testified that she felt Ackerson's penis "in between my vagina and my anus. . . . It hurt. . . . Down there on my vagina." Three other witnesses testified at trial that A.F. told them a similar account of the assault and the sexual assault nurse examiner testified about how A.F. had stated during her examination that Ackerson started "jabbing his penis in [her] butt."

Ackerson argues that the evidence is "more consistent" with attempted CSC because A.F. repeatedly used the word "tried" when describing the allegations. But Ackerson's argument ignores A.F.'s testimony and the evidence presented against this contention. *See Poehler v. Cincinnati Ins. Co.*, 899 N.W.2d 135, 141 (Minn. 2017) (stating that courts "may consult the dictionary definitions" of words and "apply them in the context of [a] statute"); *The American Heritage Dictionary of the English Language* 919, 1636 (4th ed. 2006) (defining "slight" as "[s]mall in size, degree, or amount," and "intrude" as "[t]o put or force in inappropriately"). Here, A.F.'s testimony and the testimony of other witnesses supports

a finding that Ackerson made, at the very least, a "slight" "intrusion" into her "genitals" and "anal opening."

Ackerson also contends that insufficient evidence supports the penetration element because of a lack of corroborating DNA evidence. But in a prosecution for first-degree CSC, "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2014). And we "assume as we must that the jury believed the State's witnesses and disbelieved conflicting evidence," and recognize that "the jury is in the best position to evaluate the evidence." *State v. Tscheu*, 758 N.W.2d 849, 859, 861 (Minn. 2008). Here, the jury evaluated the evidence, including A.F.'s statement about Ackerson "jabbing" his penis "in [her] butt." Looking at the evidence in a light most favorable to the verdict, we conclude that sufficient evidence supports the "penetration" element. *See State v. Shamp*, 422 N.W.2d 520, 526 (Minn. App. 1988) (concluding evidence sufficient to prove penetration where victim testified that defendant touched her genital area, rubbed his fingers between the folds of skin over her vagina, but did not insert his fingers "all the way"), *review denied* (Minn. App. June 10, 1988).

Personal-injury element

"'Personal injury' means bodily harm as defined in section 609.02, subdivision 7," Minn. Stat. § 609.341, subd. 8 (2014), which defines "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition," Minn. Stat. § 609.02, subd. 7 (2014). In *State v. Bowser*, the supreme court affirmed a conviction for first-degree CSC where the defendant made a sufficiency-of-the evidence challenge and the victim testified that "she felt considerable pain when defendant first penetrated her and the evidence also

established that she suffered some personal injury in the form of the laceration of her hymen, which resulted in bleeding." 307 N.W.2d 778, 779 (Minn. 1981). The supreme court concluded that "[e]ither the pain or the minimal injury would be sufficient to establish bodily harm under section 609.02 and therefore personal injury under section 609.341, subd. 8." *Id.*

Here, A.F. repeatedly testified at trial that "it hurt" in her genital and anal areas when Ackerson "jabbed" her with his penis and that it continued hurting after the assault. And the nurse-examiner's report, entered into evidence without objection, states that a "[b]right red secretion" was found in A.F.'s underwear and notes "bruising . . . to [A.F.'s] left forearm, abrasion . . . to left knee, two areas of bruising noted to left anterior thigh. Swelling, bleeding noted to anus." The report concludes that A.F.'s "examination [wa]s consistent with" her claim of assault. Based on this evidence, we conclude that A.F. suffered both "pain" and "minimal injury," proving "physical injury."

Ackerson argues that because A.F. testified that she had a hemorrhoid at the time of the assault that could have caused her pain, "the state failed to prove [he] caused the injury." Ackerson forfeits this argument because he fails to cite to law to support the contention that a preexisting condition forecloses proving personal injury. *See Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017) (stating that "assignment of error on mere assertion, unsupported by argument or authority, is forfeited and need not be considered unless prejudicial error is obvious on mere inspection"), *review denied* (Minn. Apr. 26, 2017). Moreover, even if we considered the argument that the bleeding A.F. suffered resulted from a hemorrhoid, the pain she felt during and after the assault still supports a

finding that she suffered "physical injury" caused by Ackerson. *See Tscheu*, 758 N.W.2d at 861 (affirming CSC conviction where victim experienced discomfort during penetration due to existing hemorrhoids); *Bowser*, 307 N.W.2d at 779 ("Either the pain or the minimal injury would be sufficient to establish bodily harm . . . and therefore personal injury."). We conclude the evidence sufficiently establishes, beyond a reasonable doubt, that Ackerson sexually penetrated A.F. and caused her personal injury.

Affirmed.