STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1411

State of Minnesota,
Respondent,

vs.

Thomas Robert Tichich,
Appellant.

Filed September 16, 2019
Affirmed
Klaphake, Judge[*]

Hennepin County District Court
File No. 27-CR-17-5883

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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

Aaron J. Morrison, Wold Morrison Law, Minneapolis, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hooten, Judge; and Klaphake, 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

KLAPHAKE, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing the evidence is insufficient to prove that he sexually penetrated the victim and that he should have received a probationary sentence. Because the only reasonable interpretation of the circumstantial evidence is that appellant sexually penetrated the victim and because the district court did not abuse its discretion by imposing the presumptive guidelines' sentence, we affirm.

D E C I S I O N

Appellant Thomas Robert Tichich claims that the circumstantial evidence that he sexually penetrated the victim is inadequate, mandating reversal of his conviction. To convict Tichich of third-degree criminal sexual conduct, the state was required to prove that he engaged in sexual penetration while he knew or had reason to know that the victim, A.D., was physically helpless. Minn. Stat. § 609.344, subd. 1(d) (2016). Sexual penetration, as defined here, is the act of fellatio. Minn. Stat. § 609.341, subd. 12(1) (2016).

In reviewing a claim of insufficient evidence, we view "the evidence in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). We must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). When we review a

conviction based on circumstantial evidence, we apply a two-step analysis to weigh the sufficiency of the evidence, first identifying the circumstances proved "by resolving all questions of fact in favor of the jury's verdict" in deference to the jury's credibility determinations, and then independently considering the "reasonable inferences that can be drawn from the circumstances proved." *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). "To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt." *Id*. at 601.

Tichich argues that the circumstantial evidence that he sexually penetrated A.D. is insufficient because his conduct could have been a form of non-penetrative self-gratification. Viewing the evidence in the light most favorable to the verdict, we disagree. The circumstances proved at trial include that after spending the evening with a group of friends drinking and socializing at a bar, Tichich stayed overnight at Y.R.'s nearby home along with A.D., the victim. A.D. had consumed an excessive amount of alcohol and was lying unconscious on a couch in the early morning when Tichich, naked, approached A.D., aligned his genitals with her face and was seen from behind by Y.R. thrusting his hips toward A.D.'s face. Y.R.'s two photos of Tichich admitted at trial clearly depict him engaging in the conduct described by Y.R., and forensic testing identified Tichich's DNA in the area around A.D.'s mouth. *Cf. State v. Lockhart*, 376 N.W.2d 249, 251-52 (Minn. App. 1985) ("thrusting into [victim's] pelvis" over bedcovers included within definition of "sexual" contact for purposes of criminal sexual conduct offense), *review denied* (Minn.

Dec. 30, 1985). Y.R. testified that from her vantage point, she believed Tichich was "trying to have" oral sex with A.D. while A.D. was unconscious.

From these facts, the only reasonable inference from the circumstances proved is that Tichich penetrated A.D.'s mouth with his penis. He was seen wearing no clothing, in a sexual position, making physical gestures suggestive of "trying to have" oral sex with a helpless person. Y.R. observed the act and testified that Tichich was having oral sex. The jury, by virtue of its verdict, accepted Y.R.'s testimony and rejected Tichich's testimony that he was merely masturbating and had no contact with A.D.'s mouth. Given his proximity to A.D.'s face and the appearance of his DNA in the area around A.D.'s mouth, the only reasonable inference is that he was having sex with A.D. while she was unconscious, a criminal act. We therefore reject Tichich's suggestion that it would be reasonable to infer that his conduct did not involve penetration. The evidence is sufficient to convict Tichich of third-degree criminal sexual conduct.

Tichich next argues that the district court abused its discretion by refusing to grant his motion for a downward dispositional departure from the presumptive 48-month sentence imposed. *See State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001) (requiring "clear abuse" of discretion to reverse sentencing departure), *review denied* (Minn. Aug. 22, 2001). The district court must impose the presumptive sentence unless "identifiable, substantial, and compelling circumstances" justify departure. Minn. Sent. Guidelines 2.D.1 (2016). It is a "rare case" that warrants reversal of a district court's refusal to depart from the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In deciding whether to depart, the district court must focus on the offender "as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Particular amenability to probation is a proper ground to support a district court's departure decision, *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014), and includes consideration of "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Even when there are grounds for a dispositional departure, however, an appellate court "will not ordinarily interfere with" imposition of a presumptive sentence. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

This case does not merit overriding the district court's sentencing decision. Tichich, a former police officer, has no prior record, expressed remorse at sentencing, had an apparently respectful attitude in court, and has the support of his family, whom he thanked at sentencing. In a case where, among other factors, a psychiatrist and the probation officer who drafted the presentence investigation report recommended a probationary sentence, in part because they had concluded that the offender "would be abused seriously if he were in some type of correctional institution," the supreme court affirmed a district court's decision to impose a sentence that constituted a downward dispositional departure from the presumptive sentence for first-degree arson. *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981). But in a different case, the supreme court rejected a sexual-assault offender's reliance on a mental health assessment that concluded the offender would be an appropriate candidate for outpatient treatment, stating that "the mere fact that the person

who prepared a report for the district court reached a certain conclusion does not necessarily justify departing from the presumptive disposition under the guidelines." *Soto*, 855 N.W.2d at 309 (quotations omitted). Rather, the district court must consider the appropriate sentencing factors, and when they fail to demonstrate a particular amenability to probation "relative to other defendants," it is an abuse of discretion for the district court to impose a probationary sentence. *Id*. at 313. Tichich's presentence investigation report does not recommend imposition of a probationary sentence, instead concluding that while Tichich has mental health and chemical dependency issues, they did not "negate or excuse the choices he made." Relying on that report and the other sentencing factors, the district court found no grounds to depart from the presumptive sentence. That decision was not an abuse of discretion.

Affirmed.