STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0117

State of Minnesota,
Respondent,

vs.

Peter Roy Byrnes,
Appellant.

Filed January 21, 2020
Affirmed
Reyes, Judge

Ramsey County District Court
File No. 62-CR-17-6439

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Christa J. Groshek, Lucas J.M. Dawson, Kindra M.S. Szymanski, Groshek Law, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

REYES, Judge

In this direct appeal from his conviction of and sentence for attempted second-degree criminal sexual conduct, appellant argues that (1) the district court erred by denying his motion for a judgment of acquittal because the state failed to present sufficient evidence to prove beyond a reasonable doubt that he attempted sexual contact and (2) the district court abused its discretion by denying his motion for a downward durational departure. We affirm.

FACTS

R.R. and A.R. are teenage sisters and step-granddaughters of appellant Peter Roy Byrnes. A 15-year-old A.R. told a camp counselor that appellant sexually touched her years ago. The camp counselor contacted law enforcement, who interviewed A.R. E.R., father to both R.R. and A.R., asked a 12-year-old R.R. if appellant also interacted inappropriately with her. R.R. confirmed that he had. The Midwest Children's Resource Center then interviewed R.R., who stated that, since she was around six years old, appellant repeatedly exposed his penis and asked her to hold it and check underneath to see if it was blue. R.R. always refused. Sometimes appellant would immediately desist, but other times he would keep asking her and would reassure her that her siblings held his penis so it was okay for her to do so. Appellant never touched R.R. sexually, and she never touched his penis.

Respondent State of Minnesota charged appellant with one count of attempted second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a)

(2018),[1] for his offenses against R.R., and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), for his offenses against A.R. Only the charge related to R.R. is at issue here. The district court held a two-week jury trial at which appellant testified and offered evidence of his good character through his wife and two daughters. Appellant's expert in memory retention characterized R.R.'s version of events as unreliable. R.R., A.R., their parents, the camp counselor, and various police agents involved with interviewing R.R. all testified.

After the jury found appellant guilty, he filed motions for judgment of acquittal or, alternatively, a new trial. The district court denied these motions, convicted appellant, and imposed the presumptive sentence of 18 months in prison. This appeal follows.

D E C I S I O N

I. The district court did not err by denying appellant's motion for a judgment of acquittal because sufficient evidence supports the jury's verdict.

Appellant argues that (1) he did not act with specific intent for second-degree criminal sexual conduct; (2) his actions did not constitute a substantial step; and (3) in the alternative, he abandoned his attempt.[2] We address each issue in turn.

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[1] The state charged appellant under this version of the statute, and the statute has not changed since 2007, but the alleged conduct occurred from 2011 to 2018.

[2] We note that, even though appellant did not argue the lack of attempt elements at trial, a defendant may always challenge sufficiency for the first time on appeal. *State v. Pakhnyuk*, 926 N.W.2d 914, 918-919 (Minn. 2019) (explaining that defendant who challenges sufficiency of evidence raises essentially same argument on appeal as presented to jury at trial, that he was not guilty).

A. Standard of Review

As an initial matter, appellant objects to using either a direct or circumstantial sufficiency of the evidence standard of review and contends that the de novo standard of review should apply to determining whether the district court erred by denying his motion for judgment of acquittal. Although appellant correctly asserts that the de novo standard controls our review of a judgment of acquittal, a district court properly denies the motion when sufficient evidence sustains a conviction. *State v. DeLaCruz*, 884 N.W.2d 878, 890 (Minn. App. 2016), *review denied* (Minn. Aug. 7, 2018).

When analyzing the sufficiency of the evidence, we apply the traditional direct-evidence standard of review when the state presents direct evidence of an offense based on personal knowledge or observation. *State v. Olson*, 887 N.W.2d 692, 700 (Minn. App. 2016). A heightened, two-step circumstantial standard of review applies when the direct evidence is insufficient to independently prove the commission of the crime. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). Under the circumstantial-evidence standard of review, we first determine the circumstances proved and all reasonable inferences, construing the evidence in the light most favorable to the verdict. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013). Second, giving no deference to the factfinder's choice between reasonable inferences, we determine whether these circumstances proved are consistent with guilt and inconsistent with any reasonable alternative hypothesis. *Id.* at 599.

We may apply different evidentiary standards of review to different elements of the same statute. *State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010) (noting previous

application of circumstantial standard to element of premeditation, despite direct evidence establishing other elements of offense) (citing *State v. Leake*, 699 N.W.2d 312, 320 (Minn. 2005)). Here, the circumstantial-evidence standard applies to determining whether appellant had the requisite intent to commit second-degree criminal sexual conduct, as it requires ascertaining his state of mind, which generally must be inferred from the nature of a defendant's actions. *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010); *see also State v. McAllister*, 862 N.W.2d 49, 53 (Minn. 2015) (noting rarity of being able to establish defendant's state of mind through direct evidence). However, the direct-evidence standard of review applies to whether appellant's actions constituted a substantial step towards commission of the crime or abandonment based on R.R.'s testimony that she observed appellant stand by her bed, expose his penis, and ask her to touch it. *See Loving*, 891 N.W.2d at 638, 643.

B. Attempt Elements

"A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if" the victim is under 13 years old and the person is more than three years older than the victim. Minn. Stat. § 609.343 subd. 1(a). The statute for attempt provides that "[w]hoever, with *intent* to commit a crime, does an act which is a *substantial step* toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime." Minn. Stat. § 609.17, subd. 1 (2018) (emphasis added). We examine intent, substantial step, and abandonment in turn.

1. Intent

Appellant correctly asserts that second-degree criminal sexual conduct requires a specific intent to have "sexual contact," which includes "the touching by the complainant of the actor's . . . intimate parts" with "sexual . . . intent." Minn. Stat. § 609.341, subd. 11(a) (2018). Sexual intent is an "actor perceiv[ing] himself to be acting based on sexual desire or in pursuit of sexual gratification." *Austin*, 788 N.W.2d at 792. Therefore, under the circumstantial-evidence standard of review, we look at whether the nature of appellant's actions sufficiently indicated this specific, sexual intent. *Id.*

The circumstances proved include appellant (1) tucking R.R. into her bed at night; (2) opening his bath robe and exposing his penis; (3) asking R.R. to touch his penis; (4) asking R.R. to check to see if underneath his penis was blue; (5) telling R.R. that it was okay for her to hold his penis because her siblings had done so previously; (6) insisting that R.R. touch his penis by asking her repeatedly during the same encounter; and (7) doing these acts over a span of years.

These circumstances proved are consistent with the jury finding that appellant intended to attempt to engage in sexual contact with R.R. by asking her to touch his penis. Further, the circumstances proved are inconsistent with any other reasonable alternative hypothesis. *See Silvernail*, 831 N.W.2d at 598-99.

Appellant argues that the established facts demonstrate only an intent to commit fifth-degree criminal sexual conduct because his request to R.R. to touch his penis is insufficient to establish a specific intent to have sexual contact with R.R. We disagree.

A person is guilty of fifth-degree criminal sexual conduct if they engage in "lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451 (2018). But appellant did more than expose his genitals. After exposing himself, he asked R.R. to touch his penis. Appellant offers no argument as to why his additional request does not escalate this conduct beyond fifth-degree criminal sexual conduct. For the first time, during oral argument, appellant argues that asking R.R. to touch his penis was a joke made in poor taste. This court may only consider issues presented to and assessed by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we were to consider this argument, it is not a reasonable alternative hypothesis based on the circumstances proved. There is no evidence of appellant laughing, smiling, or joking when he posed his question. He plainly asked R.R. to touch his penis and waited for her reply. Moreover, appellant did not desist after making the inquiry, as one would expect someone joking to do, and made the request on multiple separate occasions.

2. Substantial Step

Appellant argues that he merely solicited another to commit the crime, which is an insufficient form of preparation to establish a substantial step. *State v. Lampe*, 154 N.W. 737, 739 (Minn. 1915). Appellant's argument is not convincing.

The Minnesota Supreme Court has stated that each case involving whether a defendant took a substantial step establishing attempt must be decided on its particular facts. *State v. Dumas*, 136 N.W. 311, 314 (Minn. 1912). It declined to adopt a broad rule. *Id.* Instead, the *Dumas* court provides a general principle defining attempt as

> an intent to commit [a crime], followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be something more than mere preparation, remote from the time and place of the intended crime; but if they are not thus remote, and are done with the specific intent to commit the crime, and directly tend in some substantial degree to accomplish it, they are sufficient to warrant a conviction.

Id. Here, the district court instructed the jury that "substantial step" means "an act by a person who intends to commit a crime . . . if the act itself clearly indicates the intent to commit that specific crime."

The most relevant case appellant cites is *State v. Meemken*, involving a conviction of attempted second-degree criminal sexual conduct because defendant placed his hand on a child's leg and asked the child if he could touch her. 597 N.W.2d 582, 586 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). This court held that asking to touch the child was more than mere solicitation because the question involved the act of touching the child. *Id.* Appellant argues that because he asked R.R. to touch his penis, without touching her, his action qualifies as preparation and not attempt. We are not persuaded.

Under a plain reading of the relevant statutes, physical contact is not required to conclude that appellant took a substantial step toward having sexual contact with R.R. Second-degree criminal sexual conduct requires appellant to engage in "sexual contact" with R.R. *See* Minn. Stat. § 609.343, subd. 1(a). The attempt statute does not require sexual contact, but only an attempt to have sexual contact. *See* Minn. Stat. § 609.17, subd. 1. Moreover, the nature of appellant's conduct required no further action on his part to complete the crime. Appellant stood by R.R.'s bed, exposed his penis, and then asked

her to touch it. The sole factor preventing the completion of appellant's request was R.R.'s refusal to touch appellant's penis. Because *appellant* had to act no further for R.R. to touch his penis and accomplish second-degree criminal sexual conduct, we conclude that there was sufficient evidence for the jury to reasonably find that appellant's actions constituted a substantial step toward engaging in sexual contact with R.R.

3. Abandonment

Abandonment is an affirmative defense to attempt that appellant forfeited by not arguing it at trial. *See* Minn. Stat. § 609.17, subd.3 (2018); *Thiele*, 425 N.W.2d at 582; *see also State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (clarifying that "forfeiture" describes failure to make timely assertion of a right). By not arguing abandonment at trial for strategic purposes, appellant never shifted the burden to the state to prove the absence of abandonment, and, as a result, the jury never considered this argument, and neither will we. *See State v. Yang*, 644 N.W.2d 808, 819 (Minn. 2002).

II. The district court did not abuse its discretion by denying appellant's request for a downward durational departure.

Appellant argues that the district court abused its discretion by denying his motion for a downward durational departure because this case presented relatively less-serious facts than a typical second-degree criminal-sexual-conduct case. Appellant's argument is misguided.

Appellant cites a supreme court case upholding the district court's grant of a downward durational departure as within the bounds of its discretion because the defendant's acts of grabbing a victim's breast and professing his desire to have sex with

her was less serious than the typical case. *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). Appellant also distinguishes the present case from a more egregious situation in which, because the defendant used coercion and violence to have sex with his victim, the supreme court denied his appeal seeking a downward departure. *See State v. Solberg*, 882 N.W.2d 618, 627 (Minn. 2016).

This court reviews a district court's denial of a request for a downward durational departure for an abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). As long as the district court had valid reasons to impose a presumptive sentence, we will not disturb its decision, even if there were reasons to depart from it. *State v. Kindem*, 313 N.W.2d 6, 7-8 (Minn. 1981). We must affirm its decision if the record shows it carefully evaluated the testimony and information presented. *State v. Van Ruler*, 378 N.W.2d 77, 80, 81 (Minn. App. 1985). The district court need not explain its decision to impose the presumptive sentence. *Id.* at 80. "[I]t would be a rare case which would warrant reversal of the refusal to depart." *Kindem*, 313 N.W.2d at 7.

Here, the district court carefully considered appellant's arguments and remained flexible with timing to allow appellant to fully present his case. We see no reason to disturb the deference we usually accord to district courts in making a departure decision. *See Van Ruler*, 378 N.W.2d at 80-81; *Kindem*, 313 N.W.2d at 6. We conclude that the district court did not abuse its discretion by not granting the departure.

Affirmed.