STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1011

State of Minnesota,
Respondent,

vs.

Abel Michael Johnston,
Appellant.

Filed July 13, 2020
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-18-1266

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

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

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

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

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

ROSS, Judge

A jury found appellant Abel Johnston guilty of first- and second-degree criminal sexual conduct after watching a video-recorded statement that his daughter made to an investigator and hearing her testify that Johnston grabbed her breasts and buttocks and penetrated her vaginally with his finger. The district court imposed prison sentences

followed by two concurrent terms of lifetime conditional release. On appeal, Johnston challenges the sufficiency of the evidence supporting the guilty verdicts, the district court's admission of the recorded statement, and the district court's imposition of lifetime conditional-release terms. We affirm in part because sufficient evidence supports the guilty verdicts and the district court properly admitted the recording. But we reverse in part and remand for the district court to replace the two lifetime conditional-release terms with one ten-year conditional-release term and one lifetime term.

FACTS

The state charged appellant Abel Johnston with first- and second-degree criminal sexual conduct, *see* Minn. Stat. §§ 609.342, subd. 1(g), .343, subd. 1(h)(iii) (2014), alleging generally that Johnston sexually abused his daughter by groping her and digitally penetrating her when she was 13 and 14 years old. The jury heard the following evidence at trial.

Victim's Testimony

Johnston's daughter, A.J., whom we will refer to as "Victim," was 19 years old at the time of trial. Victim recounted how her parents divorced early in her life and how she began spending more time with Johnston when she was about 11 years old. She and her younger sister stayed at Johnston's home every other weekend, where they sometimes drank alcoholic beverages with Johnston and K.J., Johnston's wife, whom we will call "Stepmother." Victim said that she was rarely "blackout" drunk or "super[ ]drunk," but she acknowledged previously telling an investigator that she got "super[ ]drunk" with Johnston "all the time." She expressed regret about her drinking, saying, "[I]t makes you a little bit

out of control and like you don't process things as fast. So I don't really think through anything. So, you know, I used to get drunk. That's when a lot of the stuff would happen, a lot of touching."

Victim told the jury how Johnston began by touching her breasts and buttocks over her clothing, but that he eventually started putting his hands beneath her clothing. Victim estimated that Johnston grabbed her breasts and buttocks "20, 25 times probably." One night, when Victim was perhaps 12 years old and after she had been drinking, Johnston slid his hand down her pants and penetrated her vagina with his finger. She recalled one other instance when Johnston penetrated her vagina with a finger, but she said it might have been accidental.

For years, Victim told nobody about what had happened because she "thought people would be mad at [her]." She had an older and younger sister. She eventually told her best friends in high school, then her older sister and mother in 2017. After confessing to her therapist that she intended to kill herself, Victim was hospitalized. She told doctors about Johnston's conduct.

Sisters' Testimony

Older Sister recalled that Johnston and Stepmother allowed Older Sister to try alcohol in their home. But she never saw Victim or Younger Sister drink in Johnston's home. In 2017, Victim told Older Sister about what Johnston had done. Younger Sister recalled that Johnston drank while she and Victim were visiting and that Stepmother sometimes drank also. Younger Sister drank occasionally, but she never saw Victim drunk in Johnston's home.

Mother's Testimony

Victim's mother testified, telling the jury that Victim changed drastically in 2017, cutting her hair, neglecting her grades, changing her wardrobe, gaining weight, and becoming distant and rude. Mother learned from Older Sister what Victim had said. She spoke with Victim, who began crying and told Mother about Johnston's touching her. Mother learned during summer 2017 of Victim's plans to commit suicide, prompting Mother to hospitalize her.

CornerHouse Interview

The state sought to admit a video recording of statements Victim made in a CornerHouse interview during the criminal investigation. Johnston objected, arguing that the evidence was inadmissible as a prior consistent statement, *see* Minn. R. Evid. 801(d)(1)(B), largely because Victim's trial testimony was inconsistent with her CornerHouse statements on several points. The district court overruled Johnston's objection and allowed the jury to view the recorded interview.

In her interview, Victim recalled "getting like super drunk" with Johnston "all the time" and said that "every time we got drunk, [Johnston] would get really touchy." She said that Johnston would touch her chest or buttocks in "inappropriate ways," eventually "going underneath [her] clothes" to touch her breasts and buttocks. She recounted how "there was one time that he, like, actually put his fingers inside [her] and asked [her], like, how did that feel?" But she told her interviewer that this was the second time her father had digitally penetrated her, and that "the first time it happened, it seemed mostly like an accident."

Johnston's Defense

Stepmother testified in Johnston's defense. She told the jury that she saw Johnston give his daughters a "sip of champagne once" on New Year's Eve. She denied having seen him give the girls alcohol on any other occasion or ever seeing either of them intoxicated.

Johnston testified in his own defense. He told the jury that he was frequently absent while Victim and Younger Sister visited. He admitted giving his daughters champagne once but otherwise denied giving them alcohol or drinking with them. He denied engaging in any of the alleged criminal sexual conduct.

Verdict, Convictions, Sentences & Appeal

The jury found Johnston guilty of first- and second-degree criminal sexual conduct. The district court entered convictions on both charges and sentenced Johnston to concurrent prison terms of 144 months and 90 months followed by 99-year terms of conditional release on each conviction.

Johnston appeals.

D E C I S I O N

Johnston challenges his convictions, arguing that the evidence was not sufficient to support the guilty verdicts, that the district court abused its discretion by admitting the CornerHouse interview, and that the district court erroneously imposed lifetime conditional-release terms. We affirm the convictions and one of the lifetime conditional-release terms, but we reverse and remand for the district court to replace the other one with a ten-year term.

I

We are not persuaded by Johnston's contention that the evidence does not support the jury's guilty verdicts for first- and second-degree criminal sexual conduct. To find Johnston guilty of first-degree criminal sexual conduct, the jury had to find that he had a significant relationship with Victim and sexually penetrated her when she was younger than 16 years old. Minn. Stat. § 609.342, subd. 1(g). To find Johnston guilty of second-degree criminal sexual conduct, the jury had to find that he had a significant relationship with Victim and engaged in multiple acts of sexual contact with her over an extended period of time when she was younger than 16 years old. Minn. Stat. § 609.343, subd. 1(h)(iii). Johnston's arguments focus on the penetration and contact elements.

Johnston argues specifically that Victim's testimony was inherently incredible. Because the state's case rested on that testimony as direct evidence that Johnston committed the crimes, we review the sufficiency of the evidence following the customary approach. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). We examine the record to decide whether the evidence—viewed in a light favorable to the jury's verdict, giving due regard for the state's duty to prove each element beyond a reasonable doubt, and assuming the jury believed all inculpatory evidence and disbelieved all exculpatory evidence—is sufficient to support the verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012). Johnston's challenge fails on this standard.

Johnston's assertion that Victim's testimony was not credible invites us to impermissibly invade the jury's province. Deciding witness credibility is a function for jurors, who receive all the evidence and who, unlike a panel of appellate judges, have the

opportunity to intently watch each witness testify, perceiving delivery, tone, expression, body language, and the myriad, nuanced, indescribable truth-assessing observations absent from the cold record on review. *See State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005). But Johnston insists that, when a witness's testimony is inherently incredible, we face an exceptional circumstance requiring us to deem the testimony unworthy of belief. The supreme court long ago announced that an appellate court would declare testimony unworthy of belief "[o]nly in exceptional cases . . . and then only when the question is free from doubt." *First Tr. Co. of St. Paul v. McLean*, 93 N.W.2d 517, 520 (Minn. 1958) (quotation omitted). This is not an exceptional case free from doubt.

Johnston points out inconsistencies or inaccuracies in Victim's testimony based on selected testimony from other witnesses, and he calls them "contradictory." The difficulty with his argument about other witnesses' testimony is that determining which witness and which testimony to believe is the jury's role. *See State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992). And "a conviction can rest on the uncorroborated testimony of a single credible witness." *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). As for apparent inconsistencies or inaccuracies in Victim's own testimony, this too is an issue of credibility to be determined by a fact-finder, not us. *See State v. Juarez*, 837 N.W.2d 473, 487 (Minn. 2013). Johnston emphasizes that Victim could not recall how much alcohol she drank, where in the home the penetration occurred, who was present, what she was wearing, or specifically when the abuse occurred. Even if these criticisms, if accurate, would lead us to reverse (they would not for the reasons discussed), the record belies them. Although some details were lacking, Victim *did* testify that she was seated on

Johnston's couch or in front of the couch when he groped her and penetrated her, that the potentially accidental penetration happened in the living room, and that Stepmother and Younger Sister were present at home when Johnston penetrated her. Her testimony was reasonably specific as to Johnston's criminal conduct, and Johnston identifies no genuinely incredible material statement.

Johnston maintains that the evidence allows only two inferences: either Victim was so drunk while she was allegedly sexually assaulted that her testimony was incredible as a matter of law, or she lied about her intoxication so as to leave her testimony incredible as a matter of law. This dichotomy is an illusion. It overlooks a third possibility—one we suppose the jury accepted: Victim became occasionally intoxicated when Johnston gave her alcohol but not too intoxicated to accurately perceive and recall Johnston's criminal sexual conduct. Although Victim described herself as having been "super[ ]drunk" in Johnston's home, she did not suggest that she was incomprehensibly intoxicated during every moment of every visit. And the extent to which a witness's intoxication bears on her credibility is a matter for the jury. *See State v. Jones*, 347 N.W.2d 796, 800–01 (Minn. 1984).

Johnston's arguments have identified reasons to believe Johnston's denials and disbelieve Victim's allegations. But these arguments did not persuade the jury as a matter of fact, and they cannot persuade us as a matter of law.

II

Johnston's argument that the district court erred by admitting Victim's CornerHouse interview likewise does not persuade us to reverse his convictions. He argues that the

district court abused its discretion because Victim's interview statements were inconsistent with her trial testimony and therefore inadmissible. We review the district court's admission of evidence for an abuse of discretion. *State v. Davis*, 864 N.W.2d 171, 179 (Minn. 2015). A district court abuses its discretion if its ruling is based on an error of law. *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). We will not reverse based on an error of law unless the error prejudiced the defendant. *See Davis*, 864 N.W.2d at 180.

Johnston's argument focuses on an exclusion from the hearsay definition. A statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination . . . 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). A prior statement need not be identical to be "consistent" under this rule; the admission of a videotaped statement is proper so long as it is "reasonably consistent" with the witness's trial testimony. *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (quotation omitted). Johnston cites five purported inconsistencies that he asserts rendered the interview statements inadmissible. We address them in turn.

First, Johnston argues that Victim's testimony and statements were inconsistent as to her age at the time of penetration. Victim's testimony that she "believe[d] [she] was 12 years old" is reasonably consistent with her interview statement that she was "[s]omewhere around 13 or 14." Both statements express Victim's uncertainty about her specific age, and they are literally consistent since age 12 is in fact "somewhere around" ages 13 and 14. The testimony and statement equally address an element of the offense—Victim being under 16 years old. *See* Minn. Stat. § 609.342, subd. 1(g).

Second, Johnston says that Victim had a hazy recollection of the abuse at trial but recalled the abuse clearly in her CornerHouse interview. We see no inconsistency. She testified one-and-a-half years after she gave her CornerHouse interview. Given that the interview was a year and a half closer in time to the events described, one might reasonably expect (as Victim indeed expressed in her testimony) that the interview would tend to be more precise in details. We add that the alleged discrepancy bears upon no underlying claim of fact.

Third, Johnston opines that Victim's testimony and statements were inconsistent about whether she knew Johnston's conduct was wrong when it happened. But her testimony that she felt "uncomfortable" and "weird but . . . didn't know why" is reasonably consistent with her interview statements describing how she "started feeling sick" about Johnston's sexual contact and "uncomfortable" when he penetrated her; the testimony and statements alike demonstrate Victim's understanding that the conduct was harmful and wrong.

Fourth, Johnston points to the supposed order in which Victim reported the abuse to others—at trial it was friends, Older Sister, then Mother, and in her interview statement it was Older Sister, Mother, then friends. But the merely apparent inconsistency is clarified by the different contexts in which Victim was speaking. Unlike when she testified at trial, the CornerHouse interviewer had questioned, "[How'd] ya end up here today?" Victim's ordering of confidants described how she came to be interviewed, a circumstance unrelated to the order in which she told her friends.

Fifth, Johnston highlights how much Victim drank. He points to no inconsistency. Victim's testimony that she drank "enough to get [her]self drunk" and sometimes black out is reasonably consistent with her statement that Johnston "got [her] drunk a lot" and that she stumbled from drinking.

None of Johnston's cited circumstances amount to substantive inconsistencies, and the core of Victim's testimony and statements were reasonably consistent. We conclude that the district court properly admitted the CornerHouse interview and that we have no need to consider the question of prejudice.

III

We have found one error that must be corrected. The district court adjudicated convictions on both counts and imposed concurrent prison sentences, each with separate 99-year conditional-release terms. Johnston argues that the sentences were improper because he was adjudicated simultaneously and therefore lacked the "prior sex offense conviction" required to impose lifetime conditional release under Minnesota Statutes section 609.3455, subdivision 7(b) (2014). He argues alternatively that the district court erred by imposing *two* lifetime conditional-release terms. Only his alternative argument prevails.

We first must decide whether Johnston had a qualifying "prior sex offense conviction" under section 609.3455. This is a question we answer de novo. *See State v. Brown*, 937 N.W.2d 146, 156 (Minn. App. 2019), *review denied* (Minn. Feb. 18, 2020). If the district court commits a defendant to the commissioner of corrections for a violation of Minnesota Statutes sections 609.342 or 609.343, "and the offender has a . . . prior sex

offense conviction," then the commissioner must place the defendant on conditional release "for the remainder of the offender's life." Minn. Stat. § 609.3455, subd. 7(b). Johnston argues that the district court mischaracterized one of his convictions as a "prior" conviction because he was convicted simultaneously of *both* the first- and second-degree offenses.

Caselaw addresses this. In *State v. Nodes*, the supreme court held that a plea-based conviction "occurs when the district court accepts the guilty plea and the acceptance is on the record" and that section 609.3455, subdivision 7(b), "unambiguously includes a conviction for a separate behavioral incident entered before a second conviction" as a "prior sex offense conviction." 863 N.W.2d 77, 80–82 (Minn. 2015); *see also* Minn. Stat. § 609.02, subd. 5 (2014) (defining "conviction" as "any of the following accepted and recorded by the court: (1) a plea of guilty; or (2) a verdict of guilty by a jury or a finding of guilty by the court"). The *Nodes* court concluded that a lifetime conditional-release period applied when two convictions occurred in "rapid succession." 863 N.W.2d at 82.

We considered *Nodes*'s effect on convictions simultaneously adjudicated in *State v. Brown*, holding that the district court could not impose a lifetime conditional-release term if there was "no temporal gap whatsoever between [the] district court's adjudication of offenses" because in that case no "prior" conviction preceded the other. 937 N.W.2d at 156–57. Unlike the plea-based conviction in *Nodes*, a jury determined Brown's guilt. *Id.* at 152. We premised our simultaneous-conviction holding on the district court's joint recognition of the jury's verdicts, which was as follows:

> [Y]ou were convicted on June 22, 2018, of the crimes of criminal sexual conduct in the [first and second degree]. *And standing convicted of those crimes, so you're going to be*

> *convicted today on both counts*, it is the sentence of law and the judgment of this court that as punishment, therefore, you shall be committed to the Commissioner of Corrections of this state for a period of 216 months on Count 1 and 140 months on Count 2. Count 2 will run concurrently with Count 1.

Id. at 155–56. This is consistent with our understanding that a jury-verdict-based conviction "occurs only after the district court judge accepts, records, *and adjudicates* the jury's guilty verdict." *Pierson v. State*, 715 N.W.2d 923, 925 (Minn. 2006) (emphasis added).

Johnston argues that *Nodes* and *Brown* compel us to reverse because the district court and the state never addressed "*which* conviction was in fact the 'prior' conviction and which conviction was the subsequent conviction." His argument fails on this record. The jury returned its guilty verdicts on January 29, 2019, but the district court did not formally accept the verdicts and adjudicate any conviction at that time. At the sentencing hearing, the state asked the district court to enter convictions on both counts and to "sentence [Johnston] on both counts -- Count II [for second-degree criminal sexual conduct] *first*," contending that the offenses were not part of a single behavioral incident. (Emphasis added.) Johnston opposed the request, arguing that the offenses were part of a single behavioral incident. The district court eventually stated:

> Abel Michael Johnston, with regard to Count II Criminal Sexual Conduct in the Second Degree involving a significant relationship and multiple acts against the victim under 16, the jury has found you guilty of that offense --
>
> I will commit you to the Commissioner of Corrections for a period of 90 months. . . .

> With regard to Count I Criminal Sexual Conduct in the First Degree – penetration with a victim under 16 where there is a significant relationship, I hereby commit you to the Commissioner of Corrections for a period of 144 months. That will run concurrent with the sentence on Count II, again followed by a period of conditional release and lifetime registration.

The district court accepted the jury's verdict on the second-degree criminal-sexual-conduct charge first and pronounced the sentence for that offense. Only after it accepted the verdict and pronounced a sentence on that charge did it address Count I for first-degree criminal sexual conduct. This case is unlike *Brown*, where the district court adjudicated two convictions simultaneously, 937 N.W.2d at 155, and more like *Nodes*, where two convictions occurred in "rapid succession." 863 N.W.2d at 82.

Johnston argues that his convictions are not separate behavioral incidents because the evidence "*never* identified when the alleged instances of abuse occurred." The state bore the burden of proving by a preponderance of the evidence that Johnston's offenses were not part of a single behavioral incident. *See State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). Whether offenses occurred as part of a single behavioral incident presents a mixed question of law and fact. *State v. Patzold*, 917 N.W.2d 798, 810 (Minn. App. 2018), *review denied* (Minn. Nov. 27, 2018). The question is whether the conduct shares a unity of time and place and whether it was motivated by a single criminal objective, *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995), although Johnston's argument concerns only timing. At sentencing, the state relied on Victim's trial testimony, arguing that it proved the sexual contact happened before the penetration. And the district court, apparently convinced by the argument, adopted the state's recommended sentencing

approach. The record supports the separate-incident determination because Victim's testimony established that the sexual contact preceded the penetration. She testified about the sexual contact before the sexual penetration and explained that after the sexual penetration she avoided Johnston by "running upstairs . . . and sitting on [her] chair, tr[ying] to seclude [herself]." The district court's sentencing decision necessarily implies a finding that the contact preceded the penetration, and that finding is not clearly erroneous. *See Patzold*, 917 N.W.2d at 810.

Johnston implies that the date of offense listed in digital court records—January 1, 2012, for both charges—renders his conduct a single behavioral incident and requires that his convictions be treated as simultaneous. He implies relatedly that the district court committed some type of an ex post facto violation by imposing a sentence irrespective of the listed January 1 offense date. He cites no authority permitting, let alone requiring, a district court to sentence a defendant according to a placeholder offense date listed in digital records rather than according to the facts in the record.

Because the district court convicted Johnston first for second-degree criminal sexual conduct and second for first-degree criminal sexual conduct, Johnston had a "prior sex offense conviction" justifying one lifetime conditional-release term under Minnesota Statutes section 609.3455, subdivision 7(b). Although Johnston's primary sentencing argument fails, his alternative argument that the district court impermissibly entered two lifetime conditional-release terms prevails. The district court's sentencing order imposed 99-year terms of conditional release on both the first- and second-degree convictions. Under *Nodes* and *Brown*, only the second-in-time conviction for first-degree criminal

sexual conduct was subject to a lifetime conditional-release term. The appropriate sentence for second-degree criminal sexual conduct includes a ten-year conditional-release period. *See* Minn. Stat. § 609.3455, subd. 6 (2014). We therefore reverse in part for the district court to amend Johnston's sentence accordingly.

Affirmed in part, reversed in part, and remanded.