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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1334**

State of Minnesota,
Respondent,

vs.

Jeffrey Alan Korolchuk,
Appellant.

**Filed September 8, 2020
Affirmed
Slieter, Judge**

Ramsey County District Court
File No. 62-CR-18-3938

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Jeffrey Alan Korolchuk appeals his conviction for fourth-degree criminal sexual conduct. He argues that the state provided insufficient evidence to establish the nonconsensual element of the offense and that the district court plainly erred in instructing

the jury. Because there exists sufficient direct evidence for the jury to have found Korolchuk guilty of fourth-degree criminal sexual conduct and the district court properly instructed the jury, we affirm.

FACTS

The state charged Korolchuk with fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(o) (2016), based on an allegation from victim M.D. that he inappropriately touched her during a massage session on February 24, 2018. The following facts derive from the jury trial.

M.D. purchased a membership from Massage Envy and she received one massage from the facility and attempted to schedule subsequent massages with that same therapist. Because the therapist she requested was unavailable, she scheduled a one-hour massage with Korolchuk, who, she was told, had a similar massage style as her preferred masseuse.

M.D. arrived for her appointment and Korolchuk asked her to disrobe to her underwear, cover herself with the provided blanket, and wait for him to reenter the room. Most of the massage was normal with occasional small talk between M.D. and Korolchuk. After approximately 50 minutes, Korolchuk asked M.D. to roll on to her back, and he began massaging her neck. After “maybe 30 seconds,” Korolchuk’s “hands were on [her] breasts” that were still under the blanket. He caressed her breasts “and then started playing with [her] nipples.” She testified that she was in shock and froze. Korolchuk then moved his right hand down her stomach, under the sheet, and he started rubbing “over [her] underwear on [her] clitoris” for “probably five seconds.” He then asked her, “Do you want me to finish?” Thinking he meant finish the massage, she answered “yes,” to which he

answered, "Okay. You have to be fast." After realizing what he meant by "finish," she said, "no; we are done. The massage is over," and pointed to a clock on the wall. Korolchuk left the room so she could get dressed. He met her in the hallway outside the massage room, handed her a glass of water, and said, "Next time book an hour and a half massage." M.D. left Korolchuk a tip because she "was on autopilot," and then left the building.

After leaving, she sat in her car and texted her son's father. She texted, "This dude just tried to give me a happy ending massage! I don't even know how I'm feeling right now! LOL." He responded "Are you for real, that's crazy," and she replied, "Yeah dude, I'm seriously in shock! That is so illegal, he could get in so much trouble for that!"

Korolchuk testified that he was massaging M.B.'s shoulders and asked her if she wanted him to go lower, and she nodded affirmatively. He went down to the fatty breast tissue, but was still massaging above the nipples and above the blanket line. The massaging exposed her right nipple, and M.D. did not move the blanket back to cover herself. Korolchuk asked M.D. again if she wanted him to go lower, and she again nodded affirmatively. At this point he was fully massaging M.D.'s breasts and playing with her nipples, which he did for "two whole minutes or so" while M.D. maintained her smile and relaxed expression. He testified that, "I said, 'is this okay?' And she did nod again for the third time." He then flipped the blanket off with his wrist and did a "swim stroke" down her stomach, with "the last couple strokes [of his] fingertips grazing the top of her underwear line." Then he asked M.D., "Do you want me to finish you?" She said "yes." He then lifted up the blanket and "told her that she would have to be really quick." At this

point, M.D. looked at the clock and commented that they were out of time and giggled. Korolchuk testified that this “was the first indication I got that maybe she wanted to discontinue the service.” Korolchuk admitted that his actions were done with sexual intent.

The jury found Korolchuk guilty of fourth-degree criminal sexual conduct. The district court sentenced Korolchuk to 24 months in prison which was stayed for seven years subject to probationary conditions. Korolchuk appeals.

D E C I S I O N

I. The state provided sufficient evidence to establish that the sexual conduct was nonconsensual.

Korolchuk argues that the state provided insufficient circumstantial evidence to establish that the sexual contact was nonconsensual.

A person is guilty of fourth-degree sexual conduct if “the actor performs massage or other bodywork for hire, the complainant was a user of one of those services, and nonconsensual sexual contact occurred during or immediately before or after the actor performed or was hired to perform one of those services for the complainant.” Minn. Stat. § 609.345, subd. 1(o). Sexual conduct is a general intent crime and “includes any of the following acts committed with sexual or aggressive intent: (i) the intentional touching by the actor of the complainant’s intimate parts.” Minn. Stat. § 609.341, subd. 11(b) (2016); *see also State v. Bookwalter*, 541 N.W.2d 290, 295-96 (Minn. 1995) (concluding that first-degree sexual conduct is a general intent crime). This includes “touching of the clothing covering the immediate area of the intimate parts.” Minn. Stat. § 609.341, subd. 11(b)(4).

“Intimate parts” includes the breast. *Id.* at subd. 5 (2016). “Corroboration of the victim’s testimony is not required to show a lack of consent.” *Id.* at subd. 4(c) (2016).

We apply the direct-evidence standard in reviewing the sufficiency of evidence, contrary to Korolchuk’s claim to do otherwise, because the elements of his conviction were supported by direct testimony. “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). When applying this standard, “our review on appeal is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). “We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that a defendant was proven guilty of the offense charged.” *Bernhard v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). This standard aligns with the foundational principle that “credibility of a witness is peculiarly within the competence of the jury, whose common experience affords sufficient basis for the assessment of credibility.” *State v. Morales-Mulato*, 744 N.W.2d 679, 687 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Apr. 29, 2008).

M.D. informed the jury that she did not consent to any of Korolchuk’s sexual touching. M.D.’s testimony is sufficient evidence because the jury found her credible as reflected by its guilty verdict. Her testimony is further strengthened by the prior consistent

statements she made to three other witnesses: her aunt, the Massage Envy clinic administrator, and the Ramsey County Sheriff's Office investigator. The jury heard Korolchuk's consent defense though, as again reflected by its guilty verdict, it did not find it credible. We defer to the credibility determinations made by the jury. The state provided sufficient evidence to support the jury's finding of Korolchuk's guilt of fourth-degree criminal sexual conduct.

II. The district court did not err with its jury instructions.

Korolchuk argues that the district court erred by not instructing the jury that it must find that Korolchuk intended his sexual contact to be nonconsensual. Because fourth-degree criminal sexual conduct is a general intent crime which requires the state to prove that the victim did not consent, the district court did not err with its jury instructions.

A district court has "considerable latitude" in selecting the language for its jury instructions. *State v. Gatson*, 801 N.W.2d 134, 147 (Minn. 2011) (quotation omitted). But a district court abuses its discretion if its jury instructions "confuse, mislead, or materially misstate the law." *State v. Taylor*, 869 N.W.2d 1, 14-15 (Minn. 2015) (quotation omitted). Appellant did not object to the jury instructions at trial. Unobjected-to jury instructions are reviewed by appellate courts for "plain error affecting substantial rights or an error of fundamental law." *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012) (quotation omitted). "Under the plain-error standard, we review the jury instructions to determine whether there was error, that was plain, and that affected [appellant's] substantial rights." *Id.* If these three elements are met, then appellate courts can reverse if "reversal is required to ensure fairness and the integrity of the judicial proceedings." *Id.*

(quotation omitted). “Failure to properly instruct the jury on all elements of the offense charged is plain error.” *State v. Watkins*, 820 N.W.2d 264, 268 (Minn. App. 2012) (quotation omitted), *aff’d on other grounds* (Minn. Dec. 4, 2013). Appellate courts review questions of statutory interpretation *de novo*. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017).

The district court instructed the jury based upon the pattern jury instructions which, relevant to Korolchuk’s claimed error, includes the following two elements: “First, the defendant intentionally touched M.D.’s intimate parts or the clothing covering the immediate area of M.D.’s intimate parts,” and, “Sixth, M.D. did not consent to the sexual contact.” This instruction follows Minn. Stat. § 609.345, subd. 1(o) and 10 *Minnesota Practice* CRIMJIG 12.123 (2019) (following the statute’s language verbatim).

Korolchuk has provided no legal authority to suggest that the instruction provided by the district court is improper.¹ Because the instruction provided by the district court to the jury required the state to prove that Korolchuk intentionally made sexual contact with the victim and that the victim did not consent, the court did not err in its instructions.

Affirmed.

¹ Korolchuk, in claiming the district court erred in its instructions, cites *State v. Dorn*, in which our supreme court held that the *mens rea* requirement for assault-harm “requires only that general intent to do the act that results in bodily harm.” 887 N.W.2d 826, 831 (Minn. 2016). *Dorn* supports the validity of the district court’s instructions in that the state was required to prove that Korolchuk intended the sexual act with the requisite intent. The state was not required to prove that he intended nonconsensual contact.