STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2014

State of Minnesota,
Respondent,

vs.

Oscar Garcia-Espino,
Appellant.

Filed November 23, 2020
Affirmed
Reilly, Judge

Hennepin County District Court
File No. 27-CR-19-12608

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Soren Paul Petrek, Bridge Litigators, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Reyes, Judge.

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

REILLY, Judge

In his direct appeal from his conviction for second-degree criminal sexual conduct, appellant argues that (1) the evidence was insufficient to support his conviction beyond a reasonable doubt, and (2) the district court's jury instructions were erroneous. We affirm.

FACTS

This appeal arises out of appellant Oscar Garcia-Espino's conviction for engaging in sexual contact with L.M. from approximately January 2010 to December 2016, when she was under 13 years old and appellant was more than 36 months older than she. Appellant was in a romantic relationship with the sister of L.M.'s stepfather, and L.M. visited appellant's house for family parties when she was younger. When L.M. was 7 or 8 years old, she slept over on appellant's couch following a party. In the middle of the night, appellant sat on the couch, put his arm around L.M., and put his hand on her vagina over her clothes. When she tried to get away, appellant grabbed her arm and pulled her toward him. On a second occasion when L.M. was under 10 years old, appellant followed her into a bathroom during a family gathering, shut the door behind him, and touched her vagina over her pants. Appellant also touched L.M.'s chest area over her clothes and directly on her bare skin, and grabbed L.M.'s hand and made her touch his penis over his clothes. On a third occasion, when L.M. was 10 or 11 years old, appellant touched her vagina over her clothing at a party.

In 2019, when L.M. was about 14 years old, L.M. disclosed the sexual contact to a school counselor and to her mother, R.M. R.M. reported L.M.'s allegations to the police. A police officer arranged for L.M. to be interviewed at CornerHouse, a nonprofit agency that conducts forensic interviews and "provide[s] therapy for kids and families who have experienced trauma." Elizabeth Eagle, a forensic interviewer with CornerHouse, interviewed L.M. in April 2019. About a month later, L.M. had a second CornerHouse interview with Stephany Randolph.

Respondent State of Minnesota charged appellant with one count of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2016) (sexual contact—significant relationship—complainant under age 16—multiple acts), and one count of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2016) (sexual contact—complainant under age 13 and perpetrator more than 36 months older than the victim). The complaint alleged that the criminal sexual conduct occurred between approximately January 1, 2012, and December 31, 2016. The state later amended the complaint to allege that the criminal sexual conduct occurred between approximately January 1, 2010, and December 31, 2016.

The district court conducted a jury trial in October 2019. L.M., her mother, an investigating police officer, and Randolph testified. The state also presented recordings and transcripts of L.M.'s CornerHouse interviews with Eagle and Randolph. Randolph testified that "[i]t is not uncommon for a child or teen to come back for what we call a follow-up interview." Randolph noted that there were some inconsistencies between L.M.'s two interviews, but explained that "sometimes when someone experiences something traumatic, especially over and over again, . . . they sometimes recall different events at different times." Randolph also testified that "[i]t is not all that common for kids to disclose [abuse] immediately," and "a lot of kids don't tell right away when they've been abused."

Appellant, his significant other, his son, his brother, and a defense expert testified on appellant's behalf. Appellant denied the allegations against him. Appellant acknowledged that L.M. may have stayed overnight at his home but testified that he never

touched L.M. inappropriately at any time. Appellant's significant other testified that she had been in a relationship with appellant for more than 20 years. She could not remember any specific instances when L.M. stayed over at her home, but acknowledged that appellant could have invited L.M. to sleep over. Appellant's son testified that he could not remember L.M. sleeping over at the home and stated that he never observed any behavior on L.M.'s part suggesting that she was afraid of appellant.

The jury found appellant guilty of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (sexual contact—complainant under age 13 and perpetrator more than 36 months older than the victim), and not guilty of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (sexual contact—significant relationship—complainant under age 16—multiple acts). The district court imposed sentence. This appeal follows.

D E C I S I O N

I. Sufficient evidence supports appellant's conviction for second-degree criminal sexual conduct.

A. The direct-evidence standard of review applies.

The parties disagree about the appropriate standard of review. The state argues that the conviction is sustained by direct evidence from L.M.'s testimony. Appellant argues that a heightened standard of review applies. Direct evidence is evidence "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). In contrast, circumstantial evidence is "evidence from which the factfinder can infer whether

the facts in dispute existed or did not exist." *Id*. (quotation omitted). We apply a heightened standard of review when direct evidence of guilt on a particular element is not sufficient to support the verdict by itself. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017).

Here, the traditional standard of review applies. At trial, L.M. described three separate incidents of sexual contact, and her testimony is direct evidence of the events. *See State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App. 2017) ("Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence."). Because the state introduced direct evidence, we need not apply a heightened standard of review.

B. Sufficient evidence supports the conviction beyond a reasonable doubt.

Appellant challenges the sufficiency of the evidence underlying his conviction for second-degree criminal sexual conduct. In evaluating the sufficiency of the evidence, reviewing courts "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). Appellate courts review the evidence "in the light most favorable to the conviction" and "assume the jury believed the State's witnesses and disbelieved any evidence to the contrary." *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). Appellate courts "will not disturb the verdict if the jury, acting with due regard for the

presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense." *Id*.

The jury found appellant guilty of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343 (2016), which provides that a person is guilty of the crime if:

> the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced.

Id., subd. 1(a). "Sexual contact" includes "the intentional touching by the actor of the complainant's intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i) (2016). "Intimate parts" includes "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id*., subd. 5 (2016).

Sufficient evidence supports the criminal-sexual-conduct conviction. It is uncontested that appellant, who was born in 1973, is more than 36 months older than L.M., who was born in 2005. L.M. testified that when she was 7 to 8 years old, appellant sat on the couch where she had been sleeping, put his arm around her, and touched her vagina over her clothes. When she tried to get away, appellant grabbed her arm and pulled her back toward him. Appellant moved his hand around on her clothes and tried to put his hand inside of her pants to touch her bare vagina. On another occasion, appellant followed L.M. into a bathroom, touched her vagina over her pants, and touched her breasts under her clothes. Appellant also grabbed L.M.'s hand and made her touch his penis and rub his

penis over his clothes. When she was about 10 or 11 years old, appellant touched L.M.'s vagina over her clothing at a party.

Appellant argues that L.M.'s testimony is uncorroborated and not credible. Appellant relies on *State v. Huss* for the proposition that in rare cases, the testimony from a child sex-abuse victim may be insufficient to support a conviction without corroboration. 506 N.W.2d 290, 292 (Minn. 1993). In that case, the three-year-old victim's testimony was "particularly troublesome" because she could not identify appellant as her abuser in court, her "testimony was contradictory as to whether any abuse occurred at all, and was inconsistent with her prior statements and other verifiable facts," and the victim's mother and therapist exposed her to a "highly suggestive book on sexual abuse" that may have "improperly influenced the child's report of events." *Id*. at 292-93. *Huss* is readily distinguishable from this case. Here, L.M. identified appellant as her assailant and described multiple episodes of unwanted sexual contact when she was 7 to 11 years old. The circumstances present in *Huss* are not present here.

Appellant also argues that L.M.'s testimony is not credible because she delayed reporting the assault to her mother and gave inconsistent reports to the two CornerHouse interviewers. L.M. testified that she told no one about the sexual contact because she was scared and did not know "what else [appellant] could have done." Randolph, the CornerHouse forensic interviewer, explained that it is "not all that common for kids to disclose [abuse] immediately," and "a lot of kids don't tell right away when they've been abused." Randolph stated that victims sometimes delay reporting a sexual assault out of "[f]ear of the person that harmed them" or "[f]ear of people finding out." Randolph

testified that it is not unusual to see inconsistencies between sexual-assault reports because "sometimes when someone experiences something traumatic, especially over and over again, they . . . sometimes recall different events at different times."

Appellant's arguments do not persuade us. Generally, "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); *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) ("It is a well-established rule that a conviction can rest upon the testimony of a single credible witness."); *see also* Minn. Stat. § 609.347, subd. 1 (2016) (stating that in a prosecution for a second-degree criminal-sexual-conduct crime under section 609.343, "the testimony of a victim need not be corroborated").

The jury heard testimony presented by both the state and the defense, including testimony from L.M., R.M., the investigating police officer, a CornerHouse interviewer, appellant, appellant's family members, and a defense expert witness. Appellant testified on his own behalf and denied the charges. The jury credited the testimony presented by the state, and disbelieved the defense evidence and testimony to the contrary. The jury is in the best position to assess witness credibility. *State v. Profit*, 591 N.W.2d 451, 467 (Minn. 1999). It is not the role of this court on appeal to reweigh the evidence or to assess the credibility of the witnesses. *See State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009) ("Our precedent does not permit us to re-weigh the evidence."). Further, a reviewing court will defer to the jury's credibility determinations even in the face of contrary evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Deferring to the jury's assessment of witness credibility and assuming that "the jury believed the state's witnesses and

disbelieved any evidence to the contrary," *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013) (quotation omitted), we conclude that sufficient evidence supports appellant's conviction of second-degree criminal sexual conduct beyond a reasonable doubt.

C. The jury's verdicts are not legally inconsistent.

Appellant argues that the jury's verdicts are inconsistent. As a general rule, "[n]othing in the constitution requires consistent verdicts." *State v. Bahtuoh*, 840 N.W.2d 804, 820 (Minn. 2013) (quotation omitted). Thus, "a defendant who is found guilty of one count of a two count indictment or complaint is not entitled to a new trial or a dismissal simply because the jury found him not guilty of the other count, even if the guilty and not guilty verdicts may be said to be logically inconsistent." *Id*. at 821 (quotation omitted). "A defendant is entitled to a new trial only if the verdict is legally inconsistent, as opposed to merely logically inconsistent." *State v. Christensen*, 901 N.W.2d 648, 651 (Minn. App. 2017). Whether a jury's verdicts are legally inconsistent is a question of law that we review de novo. *Bahtuoh*, 840 N.W.2d at 820 (citation omitted).

The jury's verdicts are not legally inconsistent. To be legally inconsistent, a defendant must be convicted on two (or more) offenses, and "proof of the elements of one offense negates a necessary element of another offense." *State v. Cole*, 542 N.W.2d 43, 51-52 (Minn. 1996). The jury found appellant guilty of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), and not guilty of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii). Subdivision 1(a) criminalizes sexual contact when "the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Subdivision 1(h)(iii) provides that a

person is guilty of second-degree criminal sexual conduct if "the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and . . . the sexual abuse involved multiple acts committed over an extended period of time." The elements of the two crimes are different, and subdivision 1(h)(iii) has additional elements not present in subdivision 1(a), such as the provision that the actor is in a significant relationship with the victim.

Here, nothing about the jury's guilty verdict on the criminal-sexual-conduct charge under Minn. Stat. § 609.343, subd. 1(a), negates a necessary element of criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii). The jury determined the state proved the elements of subdivision 1(a) beyond a reasonable doubt but did not satisfy its burden related to the elements of subdivision 1(h)(iii). Thus, we conclude that appellant's verdicts are not legally inconsistent.

II. A new trial is not necessary to ensure the fairness, integrity, or public reputation of judicial proceedings.

Appellant argues that the district court erred in failing to provide a unanimity instruction regarding the separate alleged acts of sexual contact with L.M. upon which the jury's verdict for second-degree criminal sexual conduct could have been based. Appellant did not request a unanimity instruction at trial or object to the jury instructions given by the district court. A defendant's failure to propose specific jury instructions or object to instructions generally constitutes a forfeiture of that issue on appeal. *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998). We may review the jury instructions for plain error. *State*

v. Crowsbreast, 629 N.W.2d 433, 437-38 (Minn. 2001) (providing that an unpreserved claim of an omitted specific-unanimity jury instruction is reviewed for plain error).

Under the plain-error test, we examine the instructions to determine whether there was (1) an error, (2) that was plain, and (3) that affected appellant's substantial rights. *State v. Gunderson*, 812 N.W.2d 156, 159 (Minn. App. 2012). If these elements are satisfied, we will reverse if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014). Granting a new trial ensures the fairness, integrity, or public reputation of judicial proceedings where the evidence of the defendant's guilt is not overwhelming, and where the plain error prevented the jury from fully considering a defense theory that it might have believed. *State v. Huber*, 877 N.W.2d 519, 528 (Minn. 2016). Accordingly, under the plain-error standard, appellate courts are to correct only "particularly egregious errors" in which a "miscarriage of justice would otherwise result." *Id*. (quotation omitted).

Even if the three plain-error elements were satisfied here, we are not persuaded that any such error was so egregious as to cause a miscarriage of justice. At trial the state presented strong evidence of appellant's guilt through L.M.'s testimony, and so any error in failing to provide a unanimity instruction did not prevent the jury from considering appellant's position that he did not engage in the charged conduct. Appellant had an opportunity to rebut L.M.'s testimony. He testified on his own behalf at trial, and presented testimony from several other defense witnesses. The district court's jury instructions did not affect appellant's ability to present a complete defense. Instead, the jury clearly found L.M. credible, and did not believe appellant's testimony to the contrary. In light of the

substantial and consistent testimony of the victim at trial, reversal of appellant's conviction would not be merited, and granting a new trial under these circumstances would be futile and a waste of judicial resources. *Id*. at 527. Because a new trial would not be necessary to ensure the fairness or integrity of judicial proceedings, we affirm appellant's conviction.

Affirmed.