This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0990

State of Minnesota,
Respondent,

vs.

Norbert Pius D'Cruz,
Appellant.

Filed June 27, 2022
Affirmed
Worke, Judge

Washington County District Court
File No. 82-CR-20-2841

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

Kevin M. Magnuson, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Stephen V. Grigsby, Northfield, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges his criminal-sexual-conduct convictions, arguing that his due-process rights were violated and the state failed to meet its burden to prove his guilt beyond a reasonable doubt. Appellant also claims judicial bias. We affirm.

FACTS

In July 2020, 13-year-old O.N.S. told her stepsister that when she was nine years old her stepfather, appellant Norbert Pius D'Cruz, digitally penetrated her vagina while she was showering at their house. O.N.S. then reported the assault to her father, and law enforcement was contacted.

Investigators interviewed D'Cruz and O.N.S.'s mother, T.D. D'Cruz told investigators that he did "exactly what [T.D.] told me or showed me how to [bathe O.N.S.]" D'Cruz then stated that because he was an adult man, his "fingers are stronger when [he] was cleaning [O.N.S.'s] private below." D'Cruz also told investigators that while he washed O.N.S.'s intimate parts, he digitally penetrated her vagina because he was following the instructions given by T.D. regarding O.N.S.'s intimate parts. D'Cruz then told investigators that when T.D. instructed him to bathe O.N.S., she told him "[t]o make sure you go inside," when washing O.N.S.'s intimate parts and that before he did, he "checked [h]is heart" and decided "okay, I will do that."

D'Cruz was charged with first-degree criminal sexual conduct—penetration or contact with a person under 13 years of age, in violation of Minn. Stat. § 609.342, subd. 1a (2014), and second-degree criminal sexual conduct—sexual contact with a person under 13 years of age, in violation of Minn. Stat. § 609.343, subd. 1a (2014).

At a court trial, O.N.S. testified that D'Cruz had participated in bathing her on several occasions. D'Cruz and T.D. would help wash O.N.S. and sometimes D'Cruz would bathe her on his own. O.N.S. testified that while D'Cruz bathed her, he would touch her chest, vaginal area, arms, and legs. She stated that D'Cruz washed her vagina once while

he bathed her alone. O.N.S. testified that D'Cruz put "his middle finger as like a motion kind of in there." When asked to confirm where "in there" was, O.N.S. stated "[i]n my vagina." She stated that D'Cruz's finger was "really in there, kind of a lot."

The district court found D'Cruz guilty as charged. The district court convicted and sentenced D'Cruz for only first-degree criminal sexual conduct because it determined that second-degree criminal sexual conduct was an included offense and "part of a singular behavioral incident."[1]

D'Cruz moved for a downward sentencing departure. The district court determined that there were aggravating factors to support an upward sentencing departure, including: (1) D'Cruz, as O.N.S.'s stepfather, was in a position of trust over O.N.S., and (2) the offenses took place within O.N.S.'s "zone of privacy," while O.N.S. was bathing, "in her own bathroom, in her home."

The district court denied D'Cruz's motion. And although it had found aggravating factors, the district court determined that they did not establish substantial and compelling circumstances to warrant imposition of an upward departure. The district court imposed a presumptive guidelines sentence of 172 months in prison. This appeal followed.

DECISION

Section 609.342

D'Cruz argues that the language of section 609.342, subdivision 1a—defining the first-degree criminal-sexual-conduct offense of which he was convicted—is

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[1] *See* Minn. Stat. § 609.04, subd. 1 (2014) (providing that an "actor may be convicted of either the crime charged or an included offense, but not both").

unconstitutionally overbroad and thereby violates his substantive due-process rights. The state argues that D'Cruz "forfeited the argument by failing to raise it below." *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts do not address issues raised for the first time on appeal).

An appellate court ordinarily does not consider issues raised for the first time on appeal, even when those issues involve constitutional questions of criminal procedure or challenges to a statute. *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). But it is within the discretion of an appellate court to address such unpreserved issues when the interests of justice require their consideration and doing so would not work an unfair surprise on a party. *Id.*; *see also* Minn. R. Crim. P. 28.02, subd. 11.

The interests of justice do not require us to address the issue D'Cruz failed to raise below. We, therefore, decline to consider D'Cruz's statutory challenge.

Bona fide medical purpose

D'Cruz argues that the state failed to prove that the sexual penetration was not for a bona fide medical purpose. The "bona fide medical purpose" defense applies to conduct undertaken for the treatment of a medical condition performed or directed by a medical professional. Minn. Stat. § 609.348 (2014) (providing that "[s]ections 609.342 to 609.351 . . . do not apply to sexual penetration or sexual contact when done for a bona fide medical purpose").

The phrase "medical purpose implies some objective basis for believing sexual contact or penetration is justified." *See State v. Poole*, 489 N.W.2d 537, 542 (Minn. App. 1992) (quotation marks omitted), *aff'd*, 499 N.W.2d 31 (Minn. 1993). When a "bona fide

medical purpose" defense is asserted, the sexual penetration is not criminal unless the trier of fact finds, "beyond a reasonable doubt[,] that the act charged was not done for a medical purpose in good faith." *See* 10 *Minnesota Practice*, CRIMJIG 12.57 (2014).

Here, the "bona fide medical purpose" defense does not apply. O.N.S. testified that she had never been taken to the doctor regarding concerns about her vaginal hygiene. T.D. testified that when O.N.S. was nine years old, she did not take her to the doctor for vaginal issues. The district court concluded that "O.N.S.'s testimony was credible and persuasive." The district court determined that D'Cruz's claim that he was bathing O.N.S. as instructed by T.D. was "unconvincing." The district court noted that O.N.S., then nine years old, was capable of washing herself. Also, it noted that D'Cruz was not instructed to use his bare hands to wash O.N.S.'s intimate parts or to penetrate O.N.S.'s vagina. Because the sexual penetration here had no connection with a "bona fide medical purpose," the defense does not apply.

Sufficiency of the evidence

D'Cruz argues that the state presented insufficient evidence to convict him of the criminal-sexual-conduct offenses and to prove the aggravating factors of position of trust and zone of privacy. We consider each individually.

In evaluating sufficiency-of-the-evidence challenges, we "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). When a conviction is based on circumstantial evidence, rather than direct

evidence, we apply a higher level of scrutiny. *State v. Salyers*, 858 N.W.2d 156, 160 (Minn. 2015). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.*

Direct evidence

When an element of an offense is supported by direct evidence, this court reviews the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach its verdict. *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). We assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

To convict D'Cruz of first-degree criminal sexual conduct, the state had to prove beyond a reasonable doubt that (1) D'Cruz engaged in sexual penetration or sexual contact with O.N.S., (2) O.N.S. was under 13 years old at the time of the penetration or contact, (3) D'Cruz is more than 36 months older than O.N.S., and (4) the act took place in Washington County. *See* Minn. Stat. § 609.342, subd. 1a. Digital penetration of a "complainant's body" is sexual penetration. *See* Minn. Stat. § 609.341, subd. 12(2)(i) (2014).

O.N.S.'s testimony that D'Cruz put his fingers in her vagina established the sexual-penetration element of the offense. *See State v. Foreman*, 680 N.W.2d 536, 539 (Minn.

2004) (stating that uncorroborated testimony of a single credible witness may be sufficient to support a conviction). And the state established that O.N.S. was under 13 years of age when the criminal-sexual conduct took place, D'Cruz is at least 36 months older than O.N.S., and D'Cruz intentionally penetrated O.N.S. at their shared home.

Because the direct evidence presented by the state was sufficient in proving the act of sexual penetration, it was not required to further establish that D'Cruz acted with sexual intent. *See State v. Bookwalter*, 541 N.W.2d 290, 296 (Minn. 1995) (stating that first-degree criminal sexual conduct requires a showing of "the general intent to sexually penetrate the victim"). "When a statute simply prohibits a person from intentionally engaging in the prohibited conduct, the crime is considered a general-intent crime." *State v. Fleck*, 810 N.W.2d 303, 308 (Minn. 2012). For general-intent crimes, "it is enough that the offender intend to do the act proscribed. It is not necessary that he intend the resulting harm or know that his conduct is criminal. So long as the offender has voluntarily done the act, the crime has been committed." *State v. Wilson*, 830 N.W.2d 849, 853 (Minn. 2013) (quotation omitted).

The district court was not required to determine that D'Cruz had sexual intent when he digitally penetrated O.N.S.'s vagina, only that he intended to do so. D'Cruz told investigators that T.D. instructed him "[t]o make sure you go inside," when washing O.N.S.'s intimate parts and that before he did, he "checked [his] heart" and decided "okay, I will do that." The record here supports the district court's reasonable conclusion that D'Cruz was guilty beyond a reasonable doubt.

Circumstantial evidence

The district court also found D'Cruz guilty of second-degree criminal sexual conduct. The state relied on circumstantial evidence to show D'Cruz's sexual intent. *See State v. Austin*, 788 N.W.2d 788, 792-93 (Minn. App. 2010) (stating that second-degree criminal sexual conduct is a specific-intent crime requiring evidence that "the defendant intend the specific result of touching intimate body parts"), *rev. denied* (Minn. Dec. 14, 2010).

We review the sufficiency of circumstantial evidence by conducting a two-step analysis. *State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). First, we "identify the circumstances proved" by the state. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We assume that the district court "resolved any factual disputes in a manner that is consistent" with its verdict. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). Second, we "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt." *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (quotation omitted). We do not defer to the district court's choice between reasonable inferences. *Silvernail*, 831 N.W.2d at 599. We must reverse the conviction if a reasonable inference other than guilt exists. *Loving*, 891 N.W.2d at 643. But we will uphold the verdict if the circumstantial evidence forms "a complete chain" which leads "directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Petersen*, 910 N.W.2d 1, 7 (Minn. 2018) (quotation omitted).

The circumstances proved include: (1) D'Cruz told investigators that before he went into the bathroom with O.N.S., that "because [he's] a man of prayer . . . [he] checked [his] conscience just to be sure. [And] felt it was okay"; and (2) he also told investigators that he may "have hurt [O.N.S.] being a man, my fingers are stronger when I was cleaning her private below," and that he "didn't stay long doing it, it was very short." Investigators then asked D'Cruz what instructions T.D. gave him to wash O.N.S. D'Cruz stated that he was told to "wash the vaginal area . . . gently." D'Cruz told investigators that he was also instructed to "go inside . . . because [O.N.S.] does not clean out the buildup in her vaginal area." T.D. then told investigators that "we rubbed the vagina area with the hand but not like the finger." Investigators asked T.D. to clarify if "the vagina area" meant "the vaginal canal" like where a tampon goes. T.D. and D'Cruz replied "no, no, no not the canal." The district court determined that D'Cruz was influencing T.D.'s answers during their interview with investigators, noting that during T.D.'s testimony and interview "she attempted to justify [D'Cruz]'s actions as innocent bathing conduct."

We next consider whether the circumstances proved are consistent with D'Cruz's guilt and preclude any rational hypothesis inconsistent with his guilt.

The district court determined that D'Cruz admitted to intentionally touching O.N.S.'s chest and vaginal area. And the district court determined that D'Cruz did so with sexual intent because O.N.S. was old enough to bathe herself and D'Cruz admittedly assisted in bathing O.N.S. in a manner inconsistent with the way demonstrated by T.D. Specifically, T.D. never instructed D'Cruz to use his fingers when bathing O.N.S. The record supports the district court's determinations. The sexual contact here was not an

"accidental touching or touching in the course of caregiving." *See State v. Vick*, 632 N.W.2d 676, 691 (Minn. 2001) (stating that the "nature of the touching" could demonstrate an actor's sexual intent). Based on the circumstances proved, there is no rational hypothesis other than D'Cruz's guilt.

Aggravating factors

D'Cruz argues that the state presented insufficient evidence to prove the aggravating sentencing factors of position of trust and zone of privacy.

Here, the presumptive sentence was 144 months in prison, with a range between 144 and 172 months. The district court sentenced D'Cruz to 172 months in prison.

"All three numbers in any given cell [on the sentencing guidelines grid] constitute an acceptable sentence based solely on the offense at issue and the offender's criminal history score—the lowest is not a downward departure, nor is the highest an upward departure." *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008). "[A]ny sentence within the presumptive range . . . constitutes a presumptive sentence." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). "This court will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range." *Id.*

Here, the district court imposed a presumptive sentence. But it also found there to be aggravating factors. It determined that D'Cruz "was in a position of trust over O.N.S." because as O.N.S.'s stepfather, D'Cruz was responsible for O.N.S.'s care when T.D. was not home. The district court also determined that D'Cruz committed the offenses "within O.N.S.'s zone of privacy" because D'Cruz's criminal sexual conduct occurred while

O.N.S. was "in her own bathroom, in her home." It noted that these acts took place while "O.N.S. was bathing, one of the most private acts any person engages in." The district court determined that an upward sentencing departure would have been supported by these aggravating factors. But it chose to impose a presumptive sentence, which was within its discretion to do so. *See State v. Olson*, 459 N.W.2d 711, 716 (Minn. App. 1990) (stating that even if there are grounds to support a departure, the district court is not required to depart and if the presumptive sentence is imposed, we will not interfere with that decision), *rev. denied* (Minn. Oct. 25, 1990).

Judicial bias

D'Cruz argues that statements made about "his national origin" were the result of judicial bias. The state argued that "[t]here is a much higher risk for [D'Cruz]. He knows he's facing a potential prison sentence. He's not American . . . he was an immigrant here. He has ties outside of the [c]ountry. There's certainly a concern for flight."

"A judge shall perform the duties of judicial office . . . without bias or prejudice." Minn. Code Jud. Conduct Rule 2.3(A). The district court is prohibited from manifesting bias or prejudice based on a party's "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." *Id.*, 2.3(B). Appellate courts presume that the district court judge discharged all judicial duties in a proper manner. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). And we objectively review the facts and circumstances surrounding a claim of judicial bias. *State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008). The presumption that

a judge discharged all judicial duties in an objective and neutral manner may be overcome only if the party alleging bias produces evidence of favoritism or antagonism. *Id.* at 603.

On July 30, 2021, the district court pronounced the sentence and denied D'Cruz's request for a stay pending appeal. The district court considered several factors in support of its decision to deny D'Cruz's request, including: the severity of the conviction, the length of the imposed sentence, the "likelihood that [D'Cruz] would fail to appear for the judgment following the conclusion" of the appeal, and that D'Cruz recently sold his home and was currently living in a hotel "increased the [district] [c]ourt's concern about the ties to this community and the possibility of flight."

On August 3, 2021, D'Cruz submitted a letter requesting that the district court "accept this letter as a motion to reconsider the stay." D'Cruz's motion stated that he hoped "such notions about national origin did not taint the trial." On August 9, D'Cruz filed a notice of appeal. On August 13, the district court informed the parties that it was "in receipt of a letter filed . . . purportedly on behalf of [D'Cruz]." The district court informed the state that it could, but was not required to, respond to what it interpreted as a "request for leave to bring a motion for reconsideration." The state did not submit a responsive motion. On August 23, the district court denied D'Cruz's motion. The order noted that the "August 3 letter does not demonstrate compelling circumstances requiring the [district] [c]ourt to entertain such a motion." *See* Minn. R. Gen. Prac. 115.11 (stating that "only upon a showing of compelling circumstances" are motions for reconsideration permitted).

The district court's order did not include reference to D'Cruz's national origin; it was not tainted by bias or prejudice based on D'Cruz's race or national origin. The record does not support D'Cruz's judicial-bias claim.

Affirmed.