STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1076

State of Minnesota,
Respondent,

vs.

Reuben B. Woods,
Appellant.

Filed June 13, 2011
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-08-32387

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant challenges his criminal-sexual-conduct conviction, arguing that: (1) the evidence was insufficient to sustain a conviction; (2) the district court abused its

discretion by excluding evidence of the victim's sexual past; and (3) the district court abused its discretion by not granting a *Schwartz* hearing. Appellant also raises several arguments in a pro se brief. We affirm.

D E C I S I O N

Sufficiency of the Evidence

Appellant Reuben B. Woods challenges the sufficiency of the evidence to sustain his criminal-sexual-conduct conviction. In considering a claim of insufficient evidence, review by this court is limited to a thorough review 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). An appellate court "cannot retry the facts, but must take the view of the evidence most favorable to the state." *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). The jury is in the best position to weigh the evidence and evaluate the credibility of witnesses; therefore, its verdict must be given due deference. *State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980). An appellate court assumes that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And the reviewing court 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. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

Appellant was convicted of third-degree criminal-sexual conduct against J.P., a vulnerable adult. Third-degree criminal-sexual conduct is the use of force or coercion to accomplish sexual penetration. Minn. Stat. § 609.344, subd. 1(c) (Supp. 2007). "Force" means "the infliction, attempted infliction, or threatened infliction by the actor of bodily harm" which results in the victim "reasonably believ[ing] that the actor has the present ability to execute the threat." Minn. Stat. § 609.341, subd. 3 (2006). "Coercion" means "words or circumstances," which "cause the [victim] reasonably to fear that the actor will inflict bodily harm upon the [victim] or . . . causes the [victim] to submit to sexual penetration . . . against the [victim's] will." *Id.*, subd. 14 (2006). "Consent" means

> words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

Id., subd. 4(a) (2006).

Appellant contends that J.P. consented to the sexual encounter, and raises several concerns about the evidence leading to his conviction. Appellant questions the credibility of J.P.'s testimony, which was the only testimony about the assault. J.P., age 22, suffers from a rare neurological disorder characterized by various developmental deficiencies: J.P. has a poor short-term memory, is easily confused, reads only at a third-grade level, and requires constant supervision. J.P. volunteered at a nursing home where appellant was employed. J.P. testified that appellant asked her to go with him into a room in the basement of the nursing home. Once in the room, appellant asked J.P. to perform oral

sex and inserted his penis into her mouth. J.P. further testified that appellant told her to get under a desk, told her to turn around under the desk, unzipped her pants, inserted his fingers into her vagina and engaged in anal sex. J.P. testified that she continually asked appellant to stop and told him that he was hurting her, but that appellant did not stop. J.P. also testified that she was fearful that appellant might have a weapon in his pocket. J.P. stated that appellant stopped only when she answered a cell-phone call from her father during the assault. J.P. did not report the incident to her father at the time; she reported the incident to her mother the following day when she realized that her mother would see her bloodied underwear in the laundry.

Appellant asserts that J.P.'s testimony is unreliable due to her cognitive deficiencies. Appellant also argues that the circumstances surrounding J.P.'s report of the alleged abuse are dubious: she did not report the incident to her father when she answered her cell phone and only confessed to her mother when she feared that she would get in trouble. Appellant further contends that J.P. gave inconsistent accounts of the circumstances surrounding the assault: J.P. initially told social services that appellant previously called her and invited her to his house for sex, but said nothing about this invitation at trial and did not recall reporting this to social services. Finally, appellant argues that the medical evidence demonstrated that the lacerations in J.P.'s anus were inconclusive as to whether forced or consensual sexual contact occurred.

Appellant's arguments are without merit. J.P's testimony was sufficient to enable the jury to convict appellant of third-degree criminal-sexual conduct by force or coercion. And, in a criminal-sexual-assault case, "testimony by a victim need not be corroborated."

Minn. Stat. § 609.347, subd. 1 (Supp. 2007). Additionally, "[i]n light of [] conflicting testimony, it [is] the exclusive function of the jury to weigh the credibility of the [victim]." *State v. Haala*, 415 N.W.2d 69, 79 (Minn. App. 1987), *review denied* (Minn. Dec. 22, 1987); *see also State v. Voorhees*, 596 N.W.2d 241, 252 (Minn. 1999) (stating that inconsistencies must be resolved in favor of the jury's verdict). Accordingly, the evidence presented at trial was sufficient to sustain appellant's conviction.

Evidence of Victim's Sexual History

Appellant also challenges the district court's decision to preclude evidence of J.P.'s sexual history. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Appellant bears the burden of establishing that the district court abused its discretion and that he was prejudiced. *See id.* A district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999) (quotation omitted).

Evidence of prior sexual conduct of a victim "shall not be admitted nor shall any reference to such conduct be made in the presence of the jury." Minn. R. Evid. 412(1). An exception exists, however, when "consent of the victim is a defense in the case" and the evidence is of "the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue, relevant and material to the issue of consent." Minn. R. Evid. 412(1)(A)(i). But the evidence is admissible "only if the probative value of the evidence is not substantially outweighed by its inflammatory or prejudicial nature." Minn. Stat. § 609.347, subd. 3

(Supp. 2007). Finally, the court must find by a preponderance of the evidence that the facts offered by the defendant are true. *Id.*

Appellant argues that the district court abused its discretion by disallowing the evidence of J.P.'s interview with social services in which J.P. disclosed a sexual encounter with another coworker. Appellant contends that the events were strikingly similar in nature to his interaction with J.P.: J.P. met the other man at work, like she met appellant; the other man is black, like appellant; and J.P. engaged in anal sex with the man. Considering these similarities, appellant asserts that this evidence was relevant to whether J.P. consented to the sexual encounter with appellant and, in turn, whether appellant committed a crime. Appellant further argues that the probative nature was not substantially outweighed by the prejudicial impact.

But "[t]o qualify as a *pattern* of clearly similar sexual behavior, the sexual conduct must occur regularly and be similar in all material respects." *State v. Davis*, 546 N.W.2d 30, 34 (Minn. App. 1996) (emphasis added), *review denied* (Minn. May 21, 1996). Appellant's proffered evidence consisted of one isolated incident. One incident does not equate to regular conduct, regardless of how similar it was to the incident at issue here; thus, the evidence would not have established a pattern of sexual conduct. Additionally, the interview does not establish that J.P. consented to anal sex with the other man; J.P.'s own statements seem to indicate that she was again confused by the request for sexual favors from another person, and this confusion is symptomatic with her cognitive disability. Likewise, appellant's reliance on the factual distinction that J.P. "refused to indicate an unwillingness" to engage in sexual conduct in both incidents is also

unconvincing. The probative value is substantially outweighed by the prejudicial impact; therefore, the district court did not abuse its discretion by disallowing evidence of J.P.'s alleged past sexual conduct.

Alternatively, appellant asserts that this evidence was admissible to demonstrate an additional source of J.P.'s sexual knowledge. As support, appellant cites to the supreme court's decision in *State v. Benedict* in which the court stated that a defendant should be allowed "some leeway in questioning the victim . . . to show that someone else . . . was the source of . . . knowledge of sexual matters" when the jury might otherwise infer that the experience with the defendant was the lone source of knowledge. 397 N.W.2d 337, 341 (Minn. 1986). But appellant failed to raise this issue before the district court and is precluded from arguing it for the first time on appeal. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (stating that this court will generally not consider matters not argued to and considered by the district court).

Schwartz Hearing

Appellant finally argues that the district court abused its discretion by failing to order a hearing to allow him to question a juror who became ill during deliberations. A jury's deliberations are inviolate. *State v. Hoskins*, 292 Minn. 111, 125, 193 N.W.2d 802, 812 (1972). But cases must be decided "strictly according to the evidence presented and not by extraneous matters or by the predilections of individual jurors." *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002). "A defendant who has reason to believe that the verdict is subject to impeachment shall move the court for a summary hearing." Minn. R. Crim. P. 26.03, subd. 19(6) (2008). Such a hearing, referred to as a "*Schwartz* hearing,"

allows a defendant to question jurors under oath to determine whether any jury misconduct occurred or whether any outside influence improperly affected the verdict. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). A defendant is entitled to a *Schwartz* hearing once he establishes a prima facie case of juror misconduct. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). A prima facie case of misconduct exists when evidence which, "standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* This court reviews the denial of a *Schwartz* hearing for an abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

Appellant's jury deliberated for nearly two days before the court deputy informed the district court that one of the jurors, S.C., was feeling ill. Within minutes, the deputy returned with two verdicts and informed the district court that S.C. was being taken to the hospital. The jury convicted appellant of third-degree criminal-sexual conduct (force or coercion) and acquitted appellant of third-degree criminal-sexual conduct (mental impairment). The remaining jurors were polled and confirmed the truth and accuracy of their verdicts. The following day, the district court summoned S.C. to be polled. Appellant requested a *Schwartz* hearing to determine if S.C's medical condition influenced her verdicts. The court denied appellant's request and polled S.C., who confirmed the truth and accuracy of the verdicts.

Appellant asserts that the jury was deadlocked and then suddenly reached a unanimous verdict around the time that S.C. became ill. Appellant argues that there is a reasonable probability that S.C.'s illness affected her verdict, and thus a *Schwartz* hearing

should have been granted. But advancing a reasonable probability is considerably different than establishing a prima facie case. Additionally, the evidence that a district court may consider in a *Schwartz* hearing is limited. *State v. Buchmann*, 380 N.W.2d 879, 883 (Minn. App. 1986). Indeed, Minn. R. Evid. 606(b) governs the polling of jurors and precludes a district court from inquiring about "any matter . . . occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith." Instead, the scope of a *Schwartz* hearing is limited to "question[ing] whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict." *Id.* Here, appellant did not seek to probe whether any prejudicial information, outside influence, or threats of violence impacted the verdict; thus, appellant's desire to inquire into whether the juror rushed her verdict so she could get to the hospital would have been impermissible. Accordingly, appellant cannot establish a prima facie case of juror misconduct warranting a *Schwartz* hearing. The district court did not abuse its discretion.

Pro Se Arguments

Appellant also raises several issues in his pro se brief, but does not cite to any caselaw. If a brief contains no argument or citation to legal authority in support of its

allegations raised, the allegations are waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Consequently, appellant's pro se arguments are waived in this case.

Affirmed.