STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1161

State of Minnesota,
Respondent,

vs.

Dany Roberto Siguantay Pirir,
Appellant.

Filed March 19, 2012
Affirmed
Randall, Judge[*]

Dakota County District Court
File No. 19HA-CR-09-3392

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

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, Hastings, Minnesota (for respondent)

Bruce M. Rivers, Rivers & Associates, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RANDALL, Judge

Appellant challenges his convictions of four counts of first-degree criminal sexual conduct, arguing that the evidence is insufficient to sustain the jury's verdict, that the district court abused its discretion by imposing a 360-month sentence, and that the district court further erred by denying his petition for postconviction relief. We affirm.

FACTS

Appellant Dany Roberto Siguantay Pirir was charged with four counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2008)[1] for alleged sexual assaults of his live-in girlfriend's daughter committed between 2005 and 2009. Count I alleged sexual assaults occurring in 2005, Count II alleged assaults occurring in 2006, Count III alleged assaults occurring in 2007, and Count IV alleged assaults occurring in 2008 and the first six months of 2009.

A jury trial was held in January 2010. At the close of the trial, the jury found appellant guilty on all four counts. The district court sentenced appellant to 144 months on Counts I and II, 234 months on Count III, and 360 months on Count IV. All sentences were to run concurrently. A direct appeal was filed, and we stayed the appeal to allow appellant to file a petition for postconviction relief with the district court. Appellant filed his petition, arguing that he did not receive effective assistance of counsel because his trial attorney "did not investigate the case or call any witnesses at trial and he did not

[1] Here, the four counts range in date from 2005 until 2009. However, because the applicable portion of the statute did not change in the relevant time period, we cite to the 2008 statute, which governs Count IV.

request a court certified interpreter when [appellant] had difficulty understanding the proceedings." The district court denied appellant's petition without a hearing, and we dissolved the stay. This appeal now follows.

D E C I S I O N

Appellant was charged with and convicted of four counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii). Under the statute, a person is guilty of first-degree criminal sexual conduct if (1) the actor engages in sexual penetration with the complainant; (2) the actor has a significant relationship to the complainant; (3) the complainant is under 16-years old at the time of the penetration; and (4) the abuse involves multiple acts committed over an extended period of time. Minn. Stat. § 609.342, subd. 1(h)(iii).

I.

Appellant argues that the evidence is insufficient to sustain his convictions as a matter of law based on allegedly inadequate corroboration, inconsistencies in the victim's statements, and the evidence put forth by the defense on cross examination. These arguments do not persuade us.

In considering a claim of insufficient evidence, an appellate court's review 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. 1990); *see also State v. Anderson*, 379 N.W.2d 70, 75 (Minn. 1985) (reviewing circumstantial evidence). An appellate court must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). A 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).

Corroboration of Victim's Testimony

Appellant's primary sufficiency-of-the-evidence argument rests on his assertion that the victim's testimony lacked sufficient corroboration. In a prosecution for a violation of Minn. Stat. § 609.342 (2008), "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2008). However, Minnesota caselaw indicates that corroboration may be required *if* the evidence would otherwise be insufficient. *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987). In *Blair*, we held that corroboration was not required because the victim's positive testimony of sexual abuse—which was "apparently accepted" by the fact-finder—was sufficient to sustain the convictions. *Id.*

Here, the victim's birthday is December 8, 1993. The victim testified that appellant began touching her vagina when she was nine-years old, or approximately

2002. She stated that "[t]here would be more touching of the private parts more often and then it turned into sex." When questioned further, the victim testified that appellant "would start touching [her] vaginal area more and more and he would put his fingers inside that area, and then he would start having sex with [her]." When asked how old she was when this happened, she responded that she was nine-years old. Later on during her testimony, the victim stated that she was nine-years old when appellant first had sexual intercourse with her. She testified that it would happen "[e]very day, every other day" until June 2009, when the victim was 15-years old. The victim confirmed on cross examination that appellant had sexual intercourse with her on a regular basis—every day or every other day—from the time she was nine years old until she was approximately 15-and-a-half years old. She estimated that she and appellant had engaged in sexual intercourse "more than a hundred times a year" in that span.

The victim's testimony was consistent that appellant had engaged in sexual intercourse with her on a regular basis throughout the relevant time period. Just as in *Blair*, this positive testimony of sexual abuse—seemingly believed by the fact finder—is enough to sustain the convictions. Appellant's lack-of-corroboration argument fails. *See Blair*, 402 N.W.2d at 158 (holding that corroboration is not necessary when victim's positive testimony of sexual abuse was sufficient to sustain the convictions).

Even if this case did present a situation where corroboration of the victim's testimony was necessary, we conclude that sufficient corroboration was present. "The entire conduct of the accused may be looked to for corroborating circumstances, and if from those circumstances the connection of the accused with the crime may fairly be

inferred, the corroboration is sufficient." *State v. Harris*, 405 N.W.2d 224, 228 (Minn. 1987) (quotation omitted) (discussing corroboration of accomplice testimony). Here, the record contains letters seemingly sent from appellant to the victim in which appellant declares his love for the victim, tells her that she showed him what love was all about, and recalls how people told him they were a "great couple." The record also contains a printed version of a PowerPoint presentation recovered from appellant's computer containing photographs of the victim with captions including statements that she was his "life," that her lips were her "candies," that she looked "hot," and that his relatives knew that she was his "woman." This evidence, when viewed in its entirety and in the light most favorable to the verdict, is sufficient to satisfy a corroboration requirement, if one applies.

Alleged Inconsistencies in Victim's Testimony

Appellant also challenges the sufficiency of the evidence based on alleged inconsistencies in the victim's testimony. However, the only alleged inconsistency articulated by appellant goes to the date that the alleged penetration began. Appellant is charged with four counts of criminal sexual conduct, alleging that penetration occurred in between 2005 and 2009. As described above, the victim consistently testified that the sexual penetration began in either 2002 or 2003, when she was nine-years old, well before the dates that led to the charges. Appellant's argument that the inconsistencies in the victim's testimony render the evidence insufficient to sustain the convictions is

unavailing.[2] *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (stating existence of inconsistencies in the state's evidence does not require reversal of a jury's guilty verdict); *see also State v. Jackson*, 741 N.W.2d 146, 153 (Minn. App. 2007) ("Inconsistent testimony is more a sign of human fallibility in perception than testimonial falsity, especially in cases involving a traumatic or stressful event."), *review denied* (Minn. Oct. 21, 2008). The alleged inconsistencies highlighted by appellant are minor, especially in light of the sheer number of sexual assaults perpetrated by appellant and the length of time covered by the charges.

Evidence Elicited Through Cross-Examination

Appellant's final sufficiency-of-the-evidence argument centers around the testimony elicited through cross-examination and appellant's statements made to the police. When reviewing a claim of insufficient evidence, we must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *Moore*, 438 N.W.2d at 108. Appellant's arguments that his own testimony and the testimony elicited through cross-examination by defense counsel renders the evidence insufficient to support the verdict, is circular, and not supported by the record.

II.

Appellant argues that the district court abused its discretion by sentencing him to the statutory-maximum 360-month sentence. Appellant contends that the sentence is

[2] Appellant also argues that the state failed to prove that penetration occurred in 2005, that the state failed to prove that penetration occurred before December 8, 2006, and that December 8 to December 31 cannot be considered an "extended period of time" under the statute. However, these arguments center on the date penetration began, and are similarly unavailing.

unfair because "[h]ad the conduct been charged in only one count as is such in many similar cases, [a]ppellant would not have received the statutory maximum." A trial court has discretion to depart—either upward or downward—from the presumptive sentence "only if" compelling circumstances are present. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). It is a "rare" case that would warrant reversal of a refusal to depart from the sentencing guidelines. *State v. Hennum*, 441 N.W.2d 793, 801 (Minn. 1989); *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

It appears that the district court utilized what is known as the *Hernandez* method when sentencing appellant. "Under the *Hernandez* method, when a defendant is sentenced for multiple offenses on the same day, a conviction for which the defendant is first sentenced is added to his or her criminal-history score for another offense for which he or she is also sentenced." *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). "[I]nterpretation of the sentencing guidelines is a question of law reviewed de novo." *State v. Rivers*, 787 N.W.2d 206, 212 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010).

"The [Minnesota sentencing] guidelines provide that [m]ultiple offenses are sentenced in the order in which they occurred." *Williams*, 771 N.W.2d at 522 (alteration in original) (quotation omitted). In accordance with this policy, appellant was first sentenced on Count I, for conduct in which he engaged in 2005. Because appellant had a criminal-history score of zero, he received the mandatory-minimum sentence of 144 months. *See* Minn. Stat. § 609.342, subd. 2(b) (2004) (stating that unless a longer mandatory-minimum sentence is otherwise required or the Sentencing Guidelines provide

for a longer presumptive executed sentence, "the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of" first-degree criminal sexual conduct). First-degree criminal sexual conduct was a Severity Level IX offense under the 2005 Sentencing Guidelines. Minn. Sent. Guidelines IV (Supp. 2005). Appellant therefore received two points added to his criminal-history score for his conviction on Count I. *See* Minn. Sent. Guidelines II.B.1.a (Supp. 2005) (stating an offender receives two points for a Severity Level IX-XI conviction).

Sentencing on Count II was governed by the 2006 Sentencing Guidelines. Appellant had a criminal-history score of two, and therefore under the guidelines would have received a 110-month presumptive sentence. *See* Minn. Sent. Guidelines IV (2006) (sentencing guidelines grid). However, as with Count I, the legislature had established a mandatory-minimum executed sentence of 144 months for first-degree criminal sexual conduct. Minn. Stat. § 609.342, subd. 2(b) (2006). The district court therefore sentenced appellant to the mandatory-minimum of 144 months. Appellant received an additional two points to his criminal-history score for his conviction on Count II. *See* Minn. Sent. Guidelines II.B.1.a, IV (2006). Sentencing on Count III was governed by the 2007 Sentencing Guidelines. Appellant's criminal-history score with regard to Count III was four, and he received the guidelines sentence of 234 months. *See* Minn. Sent. Guidelines IV (Supp. 2007) (Sex Offender Grid). Because of the conviction, another two points were added to appellant's criminal-history score. Sentencing on Count IV was governed by the 2008 Sentencing Guidelines. Appellant had a criminal-history score of six, and he

received the guidelines sentence of 360 months. *See* Minn. Sent. Guidelines IV (2008) (Sex Offender Grid).

By focusing on the 360-month sentence in isolation, appellant's argument misconstrues the procedural history of the case. Appellant was charged with, convicted of, and sentenced for four counts of first-degree criminal sexual conduct. *See State v. Suhon*, 742 N.W.2d 16, 24 (holding that multiple acts of sexual assault against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place), *review denied* (Minn. Feb. 19, 2008). Under the sentencing guidelines, the district court could have imposed consecutive sentences, bringing the total to 882 months. *See* Minn. Sent. Guidelines II.F.2 (2010) (stating that consecutive sentences are permissive for multiple offenses, even when the offenses involve a single victim, and that sentencing in such a manner is not a departure). Instead, the district court sentenced appellant to concurrent, *presumptive* sentences on each count. Appellant's concurrent guideline sentences do not unfairly exaggerate the criminality of his conduct. *See State v. Williams*, 337 N.W.2d 387, 391 (Minn. 1983) (holding that when deciding whether a sentence unfairly exaggerates a defendant's criminality, appellate courts "generally will not review the trial court's exercise of its discretion in cases where the sentence imposed is within the presumptive sentence range").

Rather, appellant's argument regarding the length of his sentence seems to challenge either the state's decision to charge appellant with four counts—rather than a single count of first-degree criminal sexual conduct for the entire period—or the sentencing grid for criminal sexual conduct. Neither argument is applicable.

With regard to the sentencing grid, the legislature has the "unquestioned authority to declare which acts or what course of conduct shall be deemed inimical to the public welfare so as to constitute a crime and to establish the appropriate punishment therefor." *State v. Mathiasen*, 273 Minn. 372, 378, 141 N.W.2d 805, 810 (1966). The legislature, in creating the sentencing grid, has established that the presumptive sentence for a person with a criminal-history score of six or more who is convicted of first-degree criminal sexual conduct is 360 months. *See* Minn. Sent. Guidelines IV (2010) (Sex Offender Grid).

III.

Appellant's final assertion of error is that the district court abused its discretion by denying his petition for postconviction relief without a hearing. Appellant's petition was based on the alleged ineffective assistance of trial counsel for counsel's failure to investigate the case by obtaining statements from and calling three potentially exculpatory witnesses, and counsel's failure to request an interpreter for appellant during the trial. An appellate court will not disturb a postconviction court's decision absent an abuse of discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A person convicted of a crime may petition the district court for postconviction relief "to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate." Minn. Stat. § 590.01, subd. 1 (2010). The petition must contain "a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2010). The district court must

grant a hearing on the petition unless the petition, files, and records "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). "Unless otherwise ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." *Id.*, subd. 3 (2010).

To succeed on a postconviction petition asserting an ineffective-assistance-of-counsel claim, the petitioner must "affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotations omitted). There is a strong presumption that "counsel's performance fell within a wide range of reasonable assistance." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quotation omitted). Appellant raised two bases for his ineffective-assistance claim: (1) a failure to investigate the case or call witnesses at trial and (2) the attorney's failure to request a court certified interpreter when appellant had difficulty understanding the proceedings. We address each claim in turn.

Failure to Interview or Call Alibi and Character Witnesses

Appellant argues that he received ineffective assistance from his trial counsel based on an alleged failure to investigate the case and call three specific witnesses. Specifically, appellant asserts that trial counsel "failed to conduct [a] basic minimum investigation required to effectively defend the case" by not calling B.P., R.M., and K.M.,

who allegedly "could have cast doubt on the [victim's] credibility and bolster the theory of [the] defense." Neither B.P. nor R.M. was interviewed by trial counsel, and K.M. was interviewed but not called as a witness.

However, "[w]hat evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). That trial counsel did not call the three witnesses is not conclusive for an ineffective-assistance-of-counsel claim.

The extent of counsel's investigation is also generally considered to be a matter of trial strategy, and therefore not a basis for an ineffective-assistance claim. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). A reviewing court may conduct an examination of trial strategy when it implicates a defendant's fundamental rights. *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). Criminal defendants have a fundamental right to a fair trial. *State v. Dorsey*, 701 N.W.2d 238, 252 (Minn. 2005).

"When determining whether alleged failure to investigate constitutes ineffective assistance of counsel, [appellate courts] consider whether the decision was based on trial strategy or whether it demonstrated that counsel's performance fell below an objective standard of reasonableness." *Williams*, 764 N.W.2d at 31; *see also Opsahl*, 677 N.W.2d at 421 (holding that defense counsel's failure to investigate two alternative suspects was trial strategy when police had abandoned their investigation of those suspects); *Hodgson v. State*, 540 N.W.2d 515, 518 (Minn. 1995) (holding that defense counsel's decision not

to present evidence that someone else may have committed the murder and not to investigate leads was trial strategy). "[A] court must [also] assess the evidence that a proper investigation would have discovered and determine whether that evidence likely would have changed the outcome of the trial." *Gates*, 398 N.W.2d at 562 (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370-71 (1985)).

Because appellant's conviction is based primarily on the victim's testimony, and the testimony was inconsistent with some of the victim's earlier statements, appellant argues that additional information from the three witnesses would have bolstered his credibility and provided an alibi. He asserts that "[h]ad the trial attorney contacted the three witnesses and called them to testify at trial, they would have provided testimony to support [the defense's strategy that the victim was not telling the truth] and undermined the credibility of the State's witnesses."

Even if the investigation conducted by trial counsel was not as thorough as it should have been, appellant's argument that the testimony of the three witnesses would have changed the outcome of the trial is not persuasive. The victim's testimony established that the instances of sexual assault occurred at all times of the day, nearly every day of the week. Appellant argues that the outcome of the trial would have been different if the witnesses had been called to testify because "[the victim]'s credibility would have been severely compromised, and [a]ppellant would likely have been acquitted." But the alleged inconsistencies in the victim's testimony were presented to the jury through cross examination. It is unclear how appellant's alibi for the hours when he was at work, "a therapist's perspective" on the relationship between appellant and the

victim's mother, and a neighbor's observation of the family would have changed the outcome of the trial.

Failure to Request an Interpreter

It is the policy of the State of Minnesota that "the constitutional rights of persons disabled in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings." Minn. Stat. § 611.30 (2010). Pursuant to this policy, the legislature has provided a procedure for the appointment of interpreters "to avoid injustice and assist persons disabled in communication in their own defense." *Id.* Under the statute, the term "persons disabled in communication" includes a person who, "because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, or the seizure of the person's property, or is incapable of presenting or assisting in the presentation of a defense." Minn. Stat. § 611.31 (2010).

Appellant acknowledges that, at the beginning of trial, he told the district court that he did not require an interpreter. His affidavit, submitted in support of his postconviction petition, nonetheless asserts that during the trial he told his attorney that he needed an interpreter, and trial counsel—who was fluent in Spanish—told appellant that he would "explain anything that [appellant] didn't understand in Spanish." It is undisputed that a court-certified interpreter *was never requested to the district court*.

This court has recognized that an attorney's failure to request a court-certified interpreter may satisfy the first prong of the *Strickland* test because persons disabled in communication are "entitled to interpretive assistance to facilitate full participation in the

defense." *Cooper v. State*, 565 N.W.2d 27, 30 (Minn. App. 1997) (observing postconviction court's finding that counsel's actions in not providing an ASL interpreter at pre-trial meetings between counsel and defendant "fell below an objective standard of reasonableness"), *review denied* (Minn. Aug. 5, 1997). However, "a defendant claiming ineffective assistance ordinarily must [also] show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotation omitted). Appellant does not—and cannot—identify any facet of trial that may have proceeded differently had an interpreter been present. It is true that prejudice need not be shown in circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 30-31 (quotation omitted). Appellant concedes that he turned down the initial inquiry regarding his need for an interpreter. There is nothing in the record that establishes that appellant ever communicated his later decision that he needed an interpreter to the district court.[3] Appellant concedes that his attorney was fluent in Spanish. Importantly, he makes no argument that his attorney did not sufficiently explain the proceedings when requested to do so. His petition for postconviction relief on the basis of ineffective assistance of counsel was properly dismissed.

Affirmed.

[3] Defense counsel should have let the district court decide.