STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1299

State of Minnesota,
Respondent,

vs.

Rodolfo Mauricio Villalobos-Mena,
Appellant.

Filed May 23, 2011
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CR-09-56436

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

John N. Nelson, Jr., John N. Nelson & Associates, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Judge; and Connolly, Judge.

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

KLAPHAKE, Judge

Appellant Rodolfo Mauricio Villalobos-Mena was convicted of and sentenced on one count of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(2)

(2008). Appellant challenges his conviction, arguing that the evidence was not sufficient to sustain the verdict and that he was denied his right to effective assistance of counsel.

Because the record evidence is sufficient to permit the jury to conclude beyond a reasonable doubt that appellant was guilty of the offense and because after reviewing the record we conclude that appellant's counsel was not ineffective, we affirm.

D E C I S I O N

Sufficiency of the Evidence

We review a claim of insufficient evidence to determine whether, given the record evidence and legitimate inferences drawn from the evidence, a jury could conclude beyond a reasonable doubt that the defendant was guilty of the offense. *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010). We view the evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and disbelieved contrary evidence. *Id.*

In order to prove the offense here, the state had to show that the victim, E.H., was less than 13 years old and that appellant was more than 36 months older than E.H. The record evidence here was that E.H. was 8 years old and appellant was 44 years old at the time of the offense. Second, the state had to prove sexual penetration, defined as "any intrusion into the genital or anal openings . . . of the complainant's body by any part of the actor's body." Minn. Stat. § 609.341, subd. 12(2)(i) (2008). E.H. testified that appellant placed his fingers into her vagina and anus. Thus, record evidence supports the jury's verdict.

Appellant argues that "[c]onvictions based on circumstantial evidence warrant particular scrutiny." The jury's verdict here does not depend on circumstantial evidence: E.H.'s testimony is direct evidence of the offense. *See State v. Clark*, 739 N.W.2d 412, 421 n.4 (Minn. 2007) ("'Direct evidence' is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. 'Circumstantial evidence' is . . . evidence based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony. ") (quotations omitted)).

Appellant's real objection is not so much to the circumstantial nature of the evidence, but to the jury's acceptance of E.H.'s testimony as more credible than that of appellant's witnesses, who generally testified as to his good character. "[W]eighing the credibility of witnesses is a function exclusively for the jury." *State v. Pippitt*, 645 N.W.2d 87, 94 (Minn. 2002). This is particularly true when a witness's credibility has been impeached in some way. *Id.*; *see also State v. Folkers*, 581 N.W.2d 321, 326 (Minn. 1998) (rejecting defendant's argument that impeachment rendered witness testimony unworthy of belief as a matter of law.)

Based on the record here, and assuming that the jury believed E.H.'s testimony and discounted that of witnesses to the contrary, there is sufficient evidence to sustain appellant's conviction.

Ineffective Assistance of Counsel

Appellant raised the issue of ineffective assistance of his trial counsel at sentencing, when his counsel conceded that he had erred by failing to introduce a

transcript of the Cornerhouse interview of E.H.'s younger sister, An.H., in order to impeach the Cornerhouse interviewer. Trial counsel argued that the defense theory of the case was that the Cornerhouse interview technique was suggestive and "tainted the memory of" E.H. and that he could have demonstrated the suggestive technique by cross-examining the interviewer about her interview of An.H., because, as he alleged, it showed the interviewer implanting or suggesting answers to An.H. The district court refused to enter a judgment of acquittal based on this, saying that at most the statement would have impeached An.H., "who was not the victim [and it] would have been a very collateral matter."[1]

A criminal defendant is guaranteed the right to reasonably effective counsel. U.S. Const. amend. VI; *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). We review a claim of ineffective assistance of counsel de novo, as a mixed question of fact and law. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show two things: poor performance by counsel and prejudice to the defendant. *Id.* Put another way, "an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and . . . a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotations omitted). Both prongs must be proved or the claim fails. *Id.*

[1] At oral argument, appellant's counsel argued that trial counsel also erred by failing to call a rebuttal witness. There is nothing in the record to support the existence of such a witness or the content of this hypothetical testimony. We therefore do not consider it.

It is presumed that counsel's representation was reasonable. *Pearson*, 775 N.W.2d at 165. Further, the appellate court will not second-guess matters of trial strategy, including "which witnesses to call or what information to present to the jury." *Id.* We consider defense counsel's decision not to attempt to introduce the transcript as a matter of trial strategy, even if quickly regretted. And further, the district court opined that it "most likely would not have let [trial counsel] use [the transcript] for the purpose of just attacking the CornerHouse process."

In any event, appellant has not shown that defense counsel's decision not to use the transcript prejudiced him. In order to show prejudice, a defendant must demonstrate that, but for counsel's errors, it is reasonably probable that the result would have been different. *Rhodes*, 657 N.W.2d at 842. The Cornerhouse interviewer was extensively cross-examined by defense counsel on the subject of whether Cornerhouse's interview technique was suggestible or tainted the evidence. The jury viewed the Cornerhouse interviews conducted with E.H., during which the interviewer used the same techniques. And, as the district court pointed out, the effect of introducing a transcript of An.H.'s interview would tend to impeach An.H. She testified and was cross-examined by defense counsel; her testimony was extremely limited and contradictory.

Finally, a review of more than 900 pages of trial transcript assures us that defense counsel vigorously and competently defended appellant throughout the trial.

Affirmed.