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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1312**

State of Minnesota,
Respondent,

vs.

Leonard James Fisherman, Jr.,
Appellant.

**Filed August 26, 2013
Affirmed
Willis, Judge***

Itasca County District Court
File No. 31-CR-11-1755

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

Kirk M. Anderson, Special Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Willis,
Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the evidence was insufficient to sustain the verdict and that the district court abused its discretion in its evidentiary rulings. In his pro se brief, appellant argues that he was denied a fair trial because of ineffective assistance of counsel and prosecutorial misconduct, and that the district court erred by not vacating two of his convictions. We affirm.

FACTS

On June 21-22, 2011, T.R., a 15-year-old girl, spent the evening socializing with a group of friends and relatives, including her 29-year-old cousin, appellant Leonard James Fisherman, Jr. After midnight, T.R. and Fisherman were dropped off at the former Willow Beach Supper Club, an abandoned building located on Highway 2 between Deer River and Ball Club, ostensibly to wait for a friend to join them.

Fisherman struck T.R. several times and forced her to the ground. He then dragged her across the driveway and ordered her to perform fellatio on him. When she refused, he struck her several more times until she acquiesced. After that, Fisherman told her to get undressed. When she refused, he drew a knife and ordered her to take off her clothes. After she did so, he penetrated her with his penis. Next, Fisherman ordered her to turn over, but she got up and ran to a nearby home, wearing only her bra and socks.

The homeowner let T.R. into the house and called 911. T.R. was so frightened that she vomited several times. The paramedics took T.R. to the emergency room, where

Dr. Byron Hoffman performed a sexual-assault examination and obtained DNA samples from T.R.'s vagina and perineum. He also did a physical examination, noting facial bruising, blood around her nose, and a cut on her lip. He observed no tears, bruising, bleeding, or other signs of physical injury to her vagina or perineum.

Fisherman was charged with three counts of first-degree criminal sexual conduct. According to trial testimony, deputies from the Itasca County Sheriff's Department went to the Willow Beach Supper Club and found a bag of snacks and a partially full bottle of Captain Morgan rum, consistent with T.R.'s description of events. One of the deputies discovered an area behind the supper club where the grass had been flattened and where there were signs of a struggle, including "dirt kicked up in several spots." He also found several items of clothing and a pair of shoes. Another deputy returned to the supper club the following day because T.R. reported that her purse was missing. He recovered T.R.'s purse and a hat belonging to Fisherman. In the purse, the deputy found a prescription bottle containing suspected methamphetamine that matched T.R.'s description of a bottle that Fisherman had placed in her purse.

Investigator Mark Weller, an investigator with the sheriff's department, interviewed T.R. several times. He took pictures of her injuries in the emergency room and again two days later. At trial, Investigator Weller described T.R.'s injuries in the emergency room as including puffed lips, dried blood on her lips, "debris" in her forehead, swelling, and purplish-red cheeks. During a subsequent interview, T.R. told Investigator Weller that Fisherman had choked her; Investigator Weller saw bruising on her neck. Investigator Weller testified that T.R. was credible because "[s]he gave a good

statement. She described what had happened in detail. She had a good memory. She could even describe things inside [the] vehicle[.]” T.R. described what she was wearing, and her description matched the clothing found at the supper club. Finally, her injuries were consistent with her description of the incident.

The Bureau of Criminal Apprehension (BCA) performed a DNA analysis on the biological materials recovered during T.R.’s sexual-assault examination. A BCA forensic scientist testified that DNA from two or more individuals was recovered from the swab of T.R.’s vagina. The predominant profile, or major contributor of the DNA, was T.R.; but Fisherman could not be excluded as a contributor to the minor profile of DNA, although 99.9998% of the general population would be excluded. The DNA testing revealed some anomalies, but the BCA scientist testified that this could be because T.R. and Fisherman are related, the sample was contaminated, or there was a third contributor, although T.R. denied having intercourse during the 30 days before the assault. The BCA scientist was cross-examined by a second defense attorney, who has considerable expertise in DNA technology.

No witness testified that the assault took place in Itasca County, and Fisherman made no objection to the absence of such testimony. Witnesses described the location of the Willow Beach Supper Club by reference to local roads. The district court instructed the jury that it must find each element of the crime proved beyond a reasonable doubt and that it was an element of all three crimes that the acts occurred in Itasca County.

The jury convicted Fisherman of three counts of first-degree criminal sexual conduct. Before sentencing, Fisherman discharged his attorney because he was

dissatisfied with the attorney's representation. The district court adjudicated Fisherman guilty on count three, Minn. Stat. § 609.342, subds. 1(e)(i), 2(a) (2010) (actor causes personal injury to the complainant and uses force or coercion to accomplish sexual penetration) and dismissed the other convictions. The district court then imposed a sentence of 360 months, at the high end of the presumptive-sentence range under the Minnesota Sentencing Guidelines. This appeal follows.

D E C I S I O N

I. The evidence is sufficient to sustain Fisherman's conviction.

We review a claim of insufficiency of the evidence to determine whether, “given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged.” *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (quotation omitted). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the state's witnesses and rejected contrary evidence. *Id.*

Fisherman raises two challenges to the sufficiency of the evidence: first, he argues that the state failed to prove that the case was properly venued; and second, he contends that the state failed to prove beyond a reasonable doubt that T.R. was physically injured, an element of the offense of which Fisherman was convicted.

1. Venue

Venue is a necessary element of a criminal conviction. A criminal offense must be charged in the county in which the alleged crime was committed. Minn. Const. art. 1, § 6; Minn. Stat. § 627.01, subd. 1 (2012). “[T]he state must prove beyond a reasonable

doubt that the charged offense ‘was committed’ in the county where the case is being tried.” *State v. Pierce*, 792 N.W.2d 83, 85 (Minn. App. 2010).

But venue may be proved by circumstantial evidence. *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). “[I]n a jury trial if evidence of location within a county is admitted and no objection is made when the case is submitted to the jury, direct evidence is not essential.” *State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989) (quotation omitted). In *Larsen*, witnesses referred to a well-known lake located within the county; this was deemed to be sufficient evidence of venue. *Id.* Likewise, in *Bahri*, the evidence placed the scene of the crime at a well-known area of Minneapolis, within the borders of Hennepin County. 514 N.W.2d at 583. A jury is permitted to make reasonable inferences regarding venue based on the totality of the surrounding circumstances. *Id.* at 582. When a district court has instructed a jury that venue must be established beyond a reasonable doubt and the crime area is well-known and identifiable, a reviewing court can infer that the evidence of venue was sufficient. *Id.* at 583. Here, a physical, identifiable location was provided—the Willow Beach Supper Club on Highway 2—and the case was investigated by the Itasca County Sheriff’s Department and tried at the Itasca County Courthouse. Similar information was sufficient to establish venue in *Larsen*. 442 N.W.2d at 842.¹

¹ Fisherman relies on this court’s decision in *State v. Brown*, No. A09-1920, 2010 WL 2733099, at *1 (Minn. App. July 13, 2010). In addition to the fact that this case is not published authority, the testimony there referred only to “a Target store parking lot,” not a well-known, unique location. *Id.*

2. *Physical injury*

Fisherman was convicted of violating Minn. Stat. § 609.342, subd. 1(e)(i), which provides that a person who sexually penetrates another, causing personal injury to the victim while using force or coercion to accomplish sexual penetration, is guilty of first-degree criminal sexual conduct. “Personal injury” is defined as bodily harm, severe mental anguish, or pregnancy. Minn. Stat. § 609.341, subd. 8 (2010). “Bodily harm” is defined by reference to Minn. Stat. § 609.02, subd. 7 (2010), and includes “physical pain or injury, illness, or any impairment of physical condition.” *Id.*

The amount of physical pain or injury necessary to establish bodily harm is minimal. *State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003). In *State v. Johnson*, it was sufficient that the victim felt pain after being struck in the chest and was bruised while being pulled from his car. 277 Minn. 230, 232, 237, 152 N.W.2d 768, 770, 773 (1967). In *State v. Mattson*, a bruise on the victim’s breast was sufficient to establish personal injury. 376 N.W.2d 413, 414-15 (Minn. 1985). Here, Fisherman struck T.R. several times; the emergency-room doctor and the sheriff’s deputies observed bruising and swelling on her face, neck, and arms, and the photographs taken in the emergency room show a blackened eye, a bruise on her arm, and visible swelling on her face. This evidence is sufficient to show “personal injury” within the meaning of the statute.²

² Fisherman argues that the jury was confused by the concept of “dangerous weapon” because they asked the district court whether appellant’s hands could be a dangerous weapon. Although the jury also found Fisherman guilty of violating Minn. Stat. § 609.342, subd. 1(d) (accomplishing penetration by threatening the victim with or using a dangerous weapon), this is not the charge for which the district court adjudicated him guilty and sentenced him.

Fisherman also questions T.R.'s credibility, but the jury is the ultimate judge of credibility. *State v. Morales-Mulato*, 744 N.W.2d 679, 687 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008). The evidence here is sufficient to sustain the jury's verdict.

II. The district court did not abuse its discretion in its evidentiary rulings.

Fisherman argues that the district court erred by admitting (1) expert testimony from Dr. Hoffman; (2) "vouching testimony" from Investigator Weller; and (3) the DNA evidence. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 465 (Minn. 2009). A defendant challenging an evidentiary ruling has the burden of establishing that the district court abused its discretion and that the defendant was prejudiced by the ruling. *Id.*

1. Dr. Hoffman's testimony

Fisherman objects to Dr. Hoffman's testimony on two grounds: first, he argues that Dr. Hoffman was not qualified or identified as an expert witness; and second, he argues that through his testimony, Dr. Hoffman vouched for T.R.'s credibility.

The prosecutor asked Dr. Hoffman to explain what he meant when he said that T.R.'s vaginal examination was normal. Dr. Hoffman testified that he observed no tears, bruising, bleeding, or sign of entry, but he said that this was not surprising because such symptoms often are not found in a sexual-assault victim.

Expert testimony is admissible when the witness is qualified as an expert, there is foundation for the opinion, and the expert's testimony is helpful to the jury. *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). The district court's first ruling dealt with Dr.

Hoffman's qualification as an expert witness. Dr. Hoffman, a physician, had practiced for more than 20 years, had performed at least ten sexual-assault examinations, and had continuing medical training in the treatment of sexual-assault victims. Dr. Hoffman's opinion was helpful to the jury; a layperson may not be aware that a sexual-assault victim often does not have physical injuries consistent with trauma. *See id.* at 294 (approving use of expert testimony on sexual-assault victim behaviors as helpful to the jury).

In *Obeta*, the supreme court reaffirmed the prohibition against using expert testimony to enhance a victim's credibility or to support the ultimate question of whether a person was sexually assaulted. *Id.* But Dr. Hoffman's testimony did not address T.R.'s credibility or support a finding of sexual assault; rather, it explained why a medical examination would not necessarily show physical injuries after a forced sexual assault. The district court's decision to admit the testimony was not an abuse of discretion.

2. *Investigator Weller's testimony*

Fisherman argues that the district court abused its discretion by permitting Investigator Weller to explain why he found T.R. credible. It is generally improper for a witness to vouch for the credibility of another witness. *State v. Burrell*, 697 N.W.2d 579, 600 (Minn. 2005). Credibility determinations are the province of the jury. *Id.*; *State v. Koskela*, 536 N.W.2d 625, 630 (Minn. 1995). But a defendant may "open the door" by introducing the subject, thereby giving the state the right to respond in a manner that would otherwise be impermissible. *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006).

Here, defense counsel's pointed questions about T.R.'s credibility opened the door to the prosecutor's inquiry. Defense counsel asked Investigator Weller during cross-examination whether (1) T.R. had "a good and accurate memory of what happened on June 22nd"; (2) he found T.R. "to be credible and accurate on June 24"; and (3) T.R.'s trial testimony was "consistent" with what she told him during his interview. On re-direct, the prosecutor asked Investigator Weller why he believed T.R.; Investigator Weller gave a number of reasons, including her ability to recall details that were supported by physical evidence found at the assault scene.

Because Fisherman did not object at trial to this testimony, we review for plain error. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). Even if this exchange amounted to plain error, there is no indication that Fisherman's substantial rights were affected or that the fairness, integrity, or public reputation of the proceedings was called into question because of this very limited examination. *See State v. Jackson*, 714 N.W.2d 681, 690 (Minn. 2006) (stating that a defendant is prejudiced when there is a reasonable likelihood that the error significantly affected the jury's verdict); *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). The jury heard T.R.'s testimony, and the district court instructed the jurors that they were the sole judges of credibility. Fisherman has not sustained his burden of establishing that he was prejudiced by the district court's admission of this testimony. *Burrell*, 772 N.W.2d at 465.

3. *DNA evidence*

Fisherman asserts that the district court erred by admitting the DNA evidence, but it appears that his real objection is that the evidence was not reliable. Fisherman did not

object at trial to admission of this evidence. *See State v. Schneider*, 597 N.W.2d 889, 894 (Minn. 1999) (stating that counsel’s failure to contest admissibility of DNA evidence waived objection to its admission and amounted to trial strategy). In *Schneider*, defense counsel chose to vigorously cross-examine the state’s experts, rather than object to the admissibility of DNA evidence. *Id.* Defense counsel contested the credibility of the state’s witnesses and the reliability of the results, based on “numerous concerns . . . regarding the collection and DNA analysis of the five blood samples from the murder scene.” *Id.* at 895. The supreme court viewed this not as an error in admitting evidence but as a question for the jury, whose role it is to “consider all evidence presented and afford it proper weight in arriving at the verdict.” *Id.* Here, defense counsel followed the same strategy: he did not object to what is no longer a novel scientific test but instead chose to thoroughly cross-examine the state’s witnesses and point out contradictions and inconsistencies in their testimonies. Admission of the evidence was not an abuse of discretion.

III. Fisherman was not deprived of his right to a fair trial because of ineffective assistance of counsel.

In his pro se brief, Fisherman argues that he was denied his right to a fair trial because his trial counsel was ineffective. Fisherman cites several examples of alleged ineffective assistance: his trial counsel (1) refused to submit certain motions to the district court; (2) did not try to get the DNA results suppressed and did not request a *Frye-Mack* hearing; (3) gave him police photographs of the scene for the first time on the day before the trial; (4) advised him not to testify; (5) failed to produce a WalMart video and receipt

showing that a knife found on Fisherman when he was arrested was purchased after the incident; (6) in closing argument, stated that “I’m not saying [he] is a good guy” and “I’m not saying he’s a law-abiding guy”; (7) was told by the judge to quit objecting; and (8) did not sufficiently challenge the credibility of Investigator Weller and T.R.

A defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant who claims that he did not receive effective assistance of counsel “must show that (1) his counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Nissalke*, 801 N.W.2d 82, 111 (Minn. 2011) (quotation omitted). Tactical decisions, such as which witnesses to call or what evidence to present, are viewed as matters of trial strategy left to the discretion of counsel and do not demonstrate that counsel’s performance was ineffective. *Id.*

Most of the errors cited by Fisherman are matters of trial strategy; despite Fisherman’s claims, defense counsel vigorously cross-examined the state’s witnesses. Fisherman’s inability to recall the evening cannot be attributed to his counsel’s delay in providing him with the police photographs of the scene. Fisherman, who was in violation of his home monitoring for another offense on the day of the assault and who had a criminal history that could be used to impeach him, was fully advised of his right to testify and waived this right after questioning by the district court.

Although claims of ineffective assistance of counsel are often raised in a postconviction setting in order to address the need for more evidence, the issues raised by

Fisherman can be addressed from the record before this court. *See Robledo-Kinney v. State*, 637 N.W.2d 581, 585-86 (Minn. 2002) (stating that postconviction court may not consider matters that were known and could have been raised on direct appeal; a postconviction hearing is necessary only if additional facts must be developed). Based on the record before us, Fisherman was not deprived of his right to effective assistance of counsel.

IV. Fisherman's remaining pro se issues are without merit.

Fisherman argues that the prosecutor committed misconduct in his closing argument by relying heavily on the DNA results and Dr. Hoffman's and Investigator Weller's testimony. Fisherman cites no particular incident of alleged misconduct, and the prosecutor's reliance on the testimony of witnesses is not misconduct, even if Fisherman disagrees with their testimony. *See State v. Palmer*, 803 N.W.2d 727, 741 (Minn. 2011) (stating that pro se appellant waives appellate issue when there is no citation to legal authority and no argument in support of claims).

Fisherman argues that two of the three convictions must be vacated because the convictions were part of a single behavioral incident. *See Minn. Stat. § 609.04* (2010). But the warrant of commitment on file in the district court confirms that Fisherman was convicted of one count of first-degree criminal sexual conduct and that the remaining counts were dismissed.

Affirmed.