

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0246**

State of Minnesota,
Respondent,

vs.

Fengwu Li,
Appellant.

**Filed October 15, 2012
Affirmed
Harten, Judge***

Blue Earth County District Court
File No. 07-CR-11-1642

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

Ross E. Arneson, Blue Earth County Attorney, Steven J. Kelm, Assistant County Attorney, Mankato, Minnesota (for respondent)

Christopher P. Rosengren, Rosengren Kohlmeyer Law Office, Chtd., Mankato, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Harten,
Judge.

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

UNPUBLISHED OPINION

HARTEN, Judge

Appellant, a masseur at a massage parlor, challenges his conviction of fourth-degree criminal sexual conduct that the jury found him to have committed when he massaged a female patron. Appellant claims that the district court incorrectly determined that the bona fide medical purpose defense is available only when a massage is directed by a physician, or a physician's assistant, or is associated with a prior medical condition, and abused its discretion by refusing to instruct the jury on the bona fide medical purpose defense. Because we see no abuse of discretion by the district court and conclude that the evidence was sufficient to allow the jury to reach its verdict, we affirm.

FACTS

On 3 May 2011, A.D. received a full-body massage performed by appellant Fengwu Li, a massage-parlor employee. After the massage, she paid the bill and left. She later told her friend, A.B., that appellant had repeatedly manipulated and grabbed her vagina, buttocks, and breasts during the massage and that she had made no objection. A.B., with A.D.'s consent, went to the massage parlor and spoke to appellant, told him A.D.'s massage "wasn't okay," and obtained from him a refund of A.D.'s money.

Appellant was arrested and charged with criminal sexual conduct in the fourth degree in violation of Minn. Stat. § 609.345, subd. 1(o) (2010) (an individual who performs massage for hire is guilty of fourth-degree criminal sexual conduct if nonconsensual sexual contact occurs during the performance).

One exception to this statute is the “bona fide medical purpose” defense. *See* Minn. Stat. § 609.348 (2010) (the statute does not apply to contact “done for a bona fide medical purpose”). The district court denied appellant’s request to have the jury instructed on this exception.

The jury found appellant guilty of fourth-degree criminal sexual conduct. Appellant challenges his conviction, arguing that the district court’s refusal to instruct on the bona fide medical purpose defense was an abuse of discretion and that the evidence was insufficient to convict appellant.

D E C I S I O N

1. Jury Instruction

The refusal to give a requested jury instruction is within the discretion of the district court and will not be reversed absent an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of our analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

The “bona fide medical purpose” defense applies to massages directed by a physician or physician’s assistant or given because of a medical condition. Minn. Stat. § 609.348. Appellant argues that the medical purpose defense “should not be limited exclusively” to those situations. But Minn. Stat. § 609.348 specifies that only sexual contact occurring for a “bona fide medical purpose” is outside the prohibition of the criminal statutes. We cannot change a statute. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (“[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.”), *review denied* (Minn. 18 Dec. 1987).

Moreover, the district court was obliged to instruct the jury on the law, not on appellant's view of the law. *See State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988) (a jury instruction must "fairly and adequately explain[] the law of the case").

Here, it is clear that the bona fide medical purpose exception is inapplicable. A.D. testified that her massage had no bona fide medical purpose. She testified that she went "to go get a massage to release stress from studying for finals" and she answered, "No," when asked if there was a medical reason for the massage and if she had massages for back problems. Because the massage appellant performed on A.D. had no connection with a medical purpose, the statutory bona fide medical purpose defense to criminal sexual conduct did not apply.

Appellant also argues that the district court impermissibly shifted the burden of proving an element of the crime to him because "the state is required to prove the absence of a 'bona fide medical purpose' before it may convict a defendant of criminal sexual conduct." But sexual contact done for a bona fide medical purpose is the converse of one element of the crime, i.e., sexual contact "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a) (2010) (defining "sexual contact" for purposes of Minn. Stat. § 609.345, subd. 1(o), as an act "committed with sexual or aggressive intent"). The jury was instructed that (1) "if the prosecution fails to prove beyond a reasonable doubt any of the elements of a charge, then [appellant] is not guilty"; (2) the first element of the charge was that "[appellant] intentionally touched [A.D.'s] intimate parts or the clothing covering the immediate area of [her] intimate parts with sexual or aggressive intent"; and (3) "[i]f you find that any element has not been proven beyond

reasonable doubt, [appellant] is not guilty.” Thus, sexual contact done with sexual or aggressive intent excludes sexual contact done for a bona fide medical purpose: by proving the former, the state necessarily disproved the latter. The burden of proof was not shifted to appellant.

The district court did not abuse its discretion by refusing to instruct the jury on the bona fide medical purpose defense to criminal sexual conduct.

2. Sufficiency of the Evidence

In considering a claim of insufficient evidence, our review is limited to a painstaking analysis 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 their verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). “Assessing witness credibility and the weight given to witness testimony is exclusively the province of the jury.” *State v. Pendleton*, 759 N.W.2d 900, 909 (Minn. 2009). “We 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) (quotation omitted).

A.D. testified in extensive and consistent detail about appellant's contact with her buttocks, breasts, and vagina, saying that this contact occurred over her thong underwear but under the rest of her clothes. She also testified that she has had "up to fifty" massages and that no comparable contact ever occurred before. Appellant testified that he did not have any contact with A.D.'s buttocks, breasts, or vaginal area.

This court must assume that the jury believed A.D.'s testimony and disbelieved appellant's testimony. *See Moore*, 438 N.W.2d at 108; *Pieschke*, 295 N.W.2d at 584. A.D.'s testimony, particularly when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach its verdict.

Appellant also argues that A.D. implicitly consented to any contact he had with her because she did not make any objections either during the massage or afterwards. But, in the context of Minn. Stat. § 609.345, "consent" means "words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor" and does not mean "that the complainant failed to resist a particular sexual act." Minn. Stat. § 609.341, subd. 4(a) (2010). Appellant does not claim that A.D. indicated her consent by words or overt actions.

The district court did not abuse its discretion in refusing to instruct the jury on the bona fide medical purpose exception to criminal sexual conduct, and the jury's verdict is supported by sufficient evidence.

Affirmed.

Dated: 9 October 2012

/s/
James C. Harten, Judge