STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0199

State of Minnesota,
Respondent,

vs.

Adam Allen LaFountain,
Appellant.

Filed May 6, 2008
Affirmed
Wright, Judge

Swift County District Court
File No. 76-CR-06-65

Lawrence Hammerling, Chief Appellate Public Defender, Leslie Rosenberg, Assistant Public Defender, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robin Finke, Swift County Attorney, 114 14th Street North, Benson, MN 56215 (for respondent)

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Johnson, Judge.

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

WRIGHT, Judge

Following a jury trial, appellant was convicted of third-degree criminal sexual conduct for having consensual sex with a 13-year-old girl. At the time of the offense,

appellant was 19 years old. *See* Minn. Stat. § 609.344, subd. 1(b) (2004) (engaging in sexual penetration with person at least 13 but less than 16 years of age, when actor is more than 24 months older). On appeal, appellant argues that the evidence was insufficient to support the conviction because he proved by a preponderance of the evidence the affirmative defense of mistake of age. *See id.* (providing that "it shall be an affirmative defense, which must be proved by a preponderance of the evidence, that the actor believes the complainant to be 16 years of age or older"). Appellant also challenges the district court's rejection of his request for a downward dispositional departure and its imposition of the presumptive guidelines sentence of 36 months' imprisonment. We affirm.

FACTS

In spring 2005, 13-year-old A.J. went to the home of Charlene West with her older brother to smoke marijuana and drink alcohol. Appellant Adam LaFountain, who was 19 years old, was staying at West's house and was a friend of A.J.'s brother.

A.J. testified that she and LaFountain had sex about five or six times at West's house. The encounters were not planned and "just happened." A.J. acknowledged that she never told LaFountain her age and that he never asked. The two did not talk much; they never saw each other except at the parties at West's house. And LaFountain never met any of A.J.'s friends. When A.J. realized that she was pregnant, she did not tell anyone. She was able to conceal the pregnancy from everyone, including her mother, until about a week before she gave birth on December 25, 2005.

A.J.'s mother was a friend of West and testified that, sometime in March or April 2005, she told LaFountain: "You're older than my daughter." But she did not tell LaFountain how much older, nor did he ask. A.J.'s mother testified that she wanted to know what LaFountain's "intentions" were, but she admitted that she thought it might be acceptable for her daughter to date LaFountain.

LaFountain testified that he believed A.J. was at least 16 years old because she was associating with older people at West's home and because she drank alcohol and smoked marijuana. LaFountain testified that he "slightly" remembered having the telephone conversation with A.J.'s mother when she told him that he was older than A.J., but his testimony is not clear as to when that conversation took place. LaFountain claimed that West did not tell him how old A.J. was until after they had sex for the last time. He also claimed that he did not have sex with A.J. after he discovered her age and that he rarely saw her after that.

LaFountain acknowledged having "problems" with the law in the past, but he testified that he has always accepted responsibility for his actions. He testified that he did not find out that A.J. was pregnant until after their child was born.

The district court properly instructed the jury on the elements of the offense and on the affirmative defense of mistake of age. Following their deliberations, the jury returned a guilty verdict.

At sentencing, LaFountain moved for a downward dispositional departure, arguing that he had already served more than one year in custody, his problems are attributable to his serious chemical dependency, he is not a violent or predatory person, and he has the

support of family, including A.J. and her family. LaFountain proposed that he receive credit for time served and remedial sanctions that would include "working, paying child support; seeking and completing long-term chemical dependency at an adult level and aftercare; [and] abiding by conditions of a very strict probation regimen." In the alternative, LaFountain sought a sentence at the low end of the presumptive guidelines range.

The state opposed the departure motion, arguing that LaFountain is unamenable to probation given his inability to control his chemical dependency. The state also noted that, according to the sex-offender evaluation, LaFountain presents a high-moderate risk to reoffend.

In denying LaFountain's motion for a downward departure, the district court stated:

> [I]t's clear that you have a major chemical dependency problem, and there's probably no way it's going to be addressed unless you're in prison taking a chemical dependency program. To not send you there would be just setting you up to fail again; and you have a long criminal history, many prior crimes, so it wouldn't make any sense not to have you get these problems addressed in a prison setting.

The district court imposed a sentence of 36 months' imprisonment, which is the low end of the presumptive guidelines range. This appeal followed.

D E C I S I O N

I.

LaFountain argues that his conviction should be reversed because he proved by a preponderance of the evidence a mistake-of-age defense. His claim is "akin to a

challenge to the sufficiency of the evidence." *State v. Kramer*, 668 N.W.2d 32, 37 (Minn. App. 2003), *review denied* (Minn. Nov. 18, 2003). When reviewing a challenge to the sufficiency of the evidence, we conduct a painstaking analysis of the record to determine whether the fact-finder could reasonably find the defendant guilty of the offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the verdict and disbelieved any contrary evidence. *Id.* We will not disturb the verdict if the fact-finder, 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. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

LaFountain asserts that he believed A.J. was at least 16 years old and that he had no reason to suspect otherwise. He points to uncontroverted evidence that he was never told how old she was and that he never saw her outside West's home, where everyone was at least LaFountain's age or older and where everyone, including A.J., was smoking marijuana and drinking alcohol. Thus, LaFountain asserts, everything about A.J. depicted a young woman of legal age to consent, including her behavior, life-style, manner of acting, choice of friends, and sexual behavior.

But LaFountain had the burden to establish by a preponderance of the evidence that he believed A.J. was at least 16 years old when he engaged in sexual activity with her. Minn. Stat. § 609.344, subd. 1(b) (2004). While it is undisputed that no one advised

LaFountain of A.J.'s age, it is also undisputed that he never asked her age. Even when A.J.'s mother informed him that he was older than her daughter, LaFountain did not inquire further or ask exactly how much older. From this evidence, the jury could reasonably infer that LaFountain's lack of inquiry was tantamount to willful blindness—believing that A.J. was younger than 16 years old, but choosing not to ask her age. *See Kramer*, 668 N.W.2d at 38 (noting that defendant did not ask complainant's age, even though she had made several references to applying to an arts high school).

The jury had an opportunity to observe the witnesses and to assess their demeanor and appearance. *Powe v. State*, 389 N.W.2d 215, 219 (Minn. App. 1986), *review denied* (Minn. July 31, 1986). In particular, the jury had an opportunity to observe A.J. testify at trial and to judge by her manner and appearance whether to accept or reject LaFountain's testimony that he believed she was at least 16 years old. When viewing the evidence in the light most favorable to the verdict with the assumption that the jury believed all evidence in support of its verdict and disbelieved any evidence to the contrary, the evidence is sufficient to support the jury's rejection of LaFountain's mistake-of-age defense.

II.

LaFountain argues that the district court abused its discretion by denying his motion for a downward dispositional departure. When sentencing an offender, the district court must impose the presumptive guidelines sentence unless "substantial and compelling circumstances" justify a downward departure. Minn. Sent. Guidelines II.D. Even when a mitigating factor is present, the district court's decision not to depart rests

within its discretion and will not be reversed absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). The Minnesota Supreme Court has observed that a reviewing court will reverse the imposition of a presumptive guidelines sentence only in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

LaFountain requested probation rather than an executed sentence of incarceration, citing as mitigating factors his remorse and acceptance of responsibility for his actions and his desire to avoid prison and obtain treatment outside the correctional system. He was given an opportunity to fully present his arguments for departure, which included his recognition that he needed treatment, his desire to take responsibility for his child, and that he is not a violent or predatory offender.

The state opposed LaFountain's request for a downward dispositional departure, arguing that LaFountain is not amenable to probation because he has been unable to abstain from substance abuse and has an extensive criminal record in light of his youth. The presentence investigation report and the psychosexual evaluation linked LaFountain's criminal history to his persistent substance abuse and his inability to address his chemical dependency. The report recommended imposing the presumptive guidelines sentence.

The district court expressly considered LaFountain's lengthy criminal history and major chemical dependency and concluded that they likely would not be addressed outside a prison setting. In doing so, the district court rejected LaFountain's argument that he is amenable to probation. In light of the entire record, including the district

court's careful consideration of the appropriate sentence for LaFountain, this is not one of the "rare" cases that warrants reversal of the district court's imposition of the presumptive guidelines sentence. *See id*. Indeed, the district court soundly exercised its discretion when it denied LaFountain's departure motion and imposed a sentence at the bottom of the presumptive guidelines range.

Affirmed.