STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1481

State of Minnesota,
Respondent,

vs.

Devito Lyndon Lenow,
Appellant.

Filed August 31, 2010
Affirmed
Bjorkman, Judge

Stearns County District Court
File No. 73-CR-08-14173

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Shumaker, Judge; and Larkin, Judge.

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

BJORKMAN, Judge

Appellant Devito Lyndon Lenow challenges the sufficiency of the evidence supporting his conviction of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2008). We affirm.

FACTS

On October 16, 2008, appellant's nine-year-old cousin, C.B., had a day off from school. C.B.'s mother, J.D., asked her sister, appellant's mother, B.L., to take care of C.B. Appellant was also home that day.

C.B. was helping appellant make his bed in the basement. According to C.B., appellant threw C.B. on the bed, and pulled down both his own and C.B.'s pants and underwear. Appellant then rubbed his penis against C.B.'s buttocks while holding C.B. down with his hands so tight around C.B.'s waist that it hurt. C.B. managed to push appellant off of him.

About a week later, a friend spoke to J.D. about possible molestation incidents involving appellant and other children. J.D. asked her sons if anyone had touched them. Without prompting, C.B. said that nothing had happened on October 16. Because J.D. had not asked him about that date, she pressed C.B. for more details. C.B. did not initially want to tell her what had happened, but J.D. continued to ask C.B. about what had happened that day. J.D. questioned C.B. over the course of several hours, during which time both of them became emotional. Finally, C.B. admitted that appellant had

touched him, stating that he had kept quiet because appellant gave him money and told him not to talk about the incident.

J.D. took C.B. to the hospital the next day. The examination did not reveal any physical evidence of abuse. At the hospital, J.D. spoke with Officer Nicholas Carlson of the St. Cloud Police Department. They spoke outside C.B.'s presence, and J.D. was extremely upset during the conversation, requiring Officer Carlson to calm her down several times. Officer Jolene Thelen interviewed appellant, who denied sexually assaulting C.B.

Officer David Missell later interviewed C.B. Officer Missell had received training from CornerHouse on how to interview juvenile victims of sexual abuse, and he spoke with C.B. in a dedicated interview room. Officer Missell also went to B.L.'s house, noting that the layout of the basement was consistent with C.B.'s description.

Appellant was arrested and charged with second-degree criminal sexual conduct. He waived his right to a jury and tried the case to the district court on January 27, 2009. At trial, the state and appellant offered testimony regarding the alleged offense and the relationship between the families. J.D. testified that she had a close relationship with her extended family, but B.L. stated that relations between J.D. and the rest of the family were strained. B.L. testified that J.D. became angry when family members stopped taking her telephone calls. B.L. described one conversation in which J.D. told her, "F-you, Mother F---ers. You don't have to talk to me and you just mad I'm back with my boyfriend. I don't give a f--k. That's why I'm gonna work with [the boyfriend] against you all and take [C.B.] downtown to say some sh-t about [appellant]." C.B. accused

appellant of sexual assault approximately one week after this conversation. B.L. also testified that during the day in question, C.B. was alone with appellant for only a short period of time, as little as 20 seconds.

The state called J.D. as a witness, and the defense impeached her testimony on cross-examination with evidence that she had prior felony convictions and a conviction of lying to the police. C.B. testified about the incident. Appellant also testified, denying that he sexually assaulted C.B.

The district court found appellant guilty of the charged offense. The district court specifically found that C.B.'s testimony was credible and that "[w]hile there are minor inconsistencies in his recollection, on the whole, his memory is clear, and his narrative of the facts has survived several separate interviews." The district court expressly found that B.L.'s testimony was not credible, finding that her judgment was obscured by her animosity toward J.D.

Prior to sentencing, appellant submitted a letter to the district court, asking it to reconsider its judgment based in part on appellant passing a polygraph examination. The district court interpreted the letter as a pro se motion for a new trial or amended findings and denied the motion. The district court imposed a 48-month stayed sentence. This appeal follows.

D E C I S I O N

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 the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict

that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that "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 primarily on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). 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). This standard of review applies to both jury and court trials. *State v. Hofer*, 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000).

Appellant challenges the reliability and sufficiency of the evidence. Appellant specifically questions whether the statements C.B. made to J.D. are sufficiently reliable or were the product of coercion. While testimony of child-abuse victims may implicate concerns about coercion and inaccuracy, the district court had the opportunity to observe C.B.'s testimony and demeanor and specifically found that his testimony was credible. The district court noted that C.B. corrected his mother about whether the assault occurred on a school day or a vacation day and explicitly found that C.B.'s testimony, despite minor inconsistencies, was consistent and credible.

To support his argument that C.B.'s statements were coerced, appellant points to several cases in which the manner of questioning minor victims of sexual assault was challenged. *See, e.g.*, *Washington v. Schriver*, 255 F.3d 45, 51, 57–60 (2d Cir. 2001) (criticizing the use of "leading" and "suggestive" interrogation techniques); *State v.*

Michaels, 642 A.2d 1372, 1379–80 (N.J. 1994) (same). But these cases involved interrogation by the state or its agents. The due-process concerns that are implicated in cases of state interrogation are not raised here. J.D. questioned her own son. J.D. testified that she did not try to lead C.B.'s testimony but urged him to tell the truth. And the district court expressly found that J.D.'s testimony on cross-examination was credible.

Appellant also argues that his conviction lacks competent evidentiary support based on evidence that J.D. had a motive to fabricate the assault. We disagree. The district court specifically found that B.L.'s testimony on this point was not credible. The district court found that while B.L. is generally truthful, family conflicts involving J.D. clouded B.L.'s judgment and rendered her testimony unreliable. It is well-settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997).

The district court had the opportunity to evaluate the credibility of both C.B. and his mother, as well as the defense witnesses, and made credibility determinations accordingly. On this record, we conclude that a fact-finder could reasonably find appellant guilty of the charged offense.

Affirmed.