STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1120

State of Minnesota,
Respondent,

vs.

Timothy Joseph Dewane,
Appellant.

Filed May 29, 2012
Affirmed
Muehlberg, Judge*

Stearns County District Court
File No. 73-CR-10-8662

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

Janelle P. Kendall, Stearns County Attorney, Treye D. Kettwick, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

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

MUEHLBERG, Judge

Appellant Timothy Joseph Dewane was charged with attempted third-degree criminal sexual conduct, and with fourth- and fifth-degree criminal sexual conduct, based on allegations that he engaged in nonconsensual sexual contact with J.S. while she was asleep. *See* Minn. Stat. §§ 609.344, subd. 1(d) (engaging in sexual penetration with person who is physically helpless), 609.17 (defining crime of attempt), 609.345, subd. 1(d) (engaging in sexual contact with person who is physically helpless), 609.3451, subd. 1(1) (engaging in nonconsensual sexual contact with another) (2010). Following a two-day trial, the jury acquitted appellant of attempted third-degree criminal sexual conduct, but found him guilty of fourth- and fifth-degree criminal sexual conduct. The district court thereafter sentenced him to 78 months in prison. On appeal, appellant argues that the evidence was insufficient as a matter of law to prove beyond a reasonable doubt that he engaged in sexual contact with J.S. We affirm.

FACTS

On the evening of September 24, 2010, J.S. went out with two friends. J.S. had been married for nine years, but was separated from her husband. He was watching the children that night, so J.S. packed an overnight bag and planned to spend the night at the house where her friends rented a room.

Over the course of the evening, the three friends went to two St. Cloud bars. J.S. testified that she had four to five beers and returned to her friends' house sometime after

1:00 a.m. J.S. went to sleep on the couch in the living room, while her friends went to sleep in their room upstairs.

J.S. testified that she woke up to find her pants and underwear on only one leg and a man she did not know sitting between her legs, trying to slide her pants off. J.S. testified that he had touched her buttock and possibly her inner thigh but did not testify that he had penetrated her. J.S. asked the man what was going on. She pushed or kicked the man off with her leg, jumped off the couch, and pulled up her pants. She noticed that the man was pulling his pants up too. She ran upstairs to find her friends.

J.S.'s friends went downstairs and found appellant sleeping on the other couch. One of her friends woke appellant and asked "What did you do to her?" Appellant denied knowing what the friend was talking about. J.S. began to curse and yell at appellant. One friend called the police and took J.S. outside to wait on the front porch.

Meanwhile, the landlord, who had been working in his room off of the kitchen, took appellant into the kitchen. He had met appellant several times, and knew that he was a good friend of another renter, C.B.,[1] and that he slept on the couch occasionally.

Three officers responded to the call, and one spoke to J.S. in his squad car. She told him that she woke up to find appellant between her legs, taking off her pants. The officer took J.S. to the hospital, where she was interviewed and examined by a physician's assistant. J.S. told the assistant the same story she had told the officer. The

[1] C.B. testified at trial that appellant was like a brother to her. C.B. claimed that she returned home that morning at about 5 a.m., turned on the light in the living room but quickly turned it off when she realized that a woman was sleeping on the couch. C.B.'s timing, however, appeared a little off because the officers were dispatched to the house at 4:48 a.m.

assistant testified that there was no physical evidence that J.S. had been penetrated. The officer and the physician's assistant both testified that J.S. did not appear to be under the influence of alcohol when they spoke to her.

Appellant was arrested and taken to jail. After he was given a *Miranda* warning, appellant told the officer that he was drunk when he arrived at the house and went to the couch where he always sleeps. He sat on the couch and realized that a woman was already there. Appellant claimed that the woman put her feet on his lap, leaned forward, and kissed him. Appellant claimed that there was no other sexual contact between him and J.S.

D E C I S I O N

"Appellate review of a sufficiency claim is 'limited to ascertaining 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. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009) (quoting *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978)). This court must view the evidence in the light most favorable to the verdict, and assume that the jury believed the state's witnesses and disbelieved any evidence to the contrary. *Id.*

Appellant argues that his conviction must be reversed because it is based solely on the uncorroborated and incredible testimony of J.S. He emphasizes that both he and J.S. had been drinking. He attempts to cast doubt on J.S.'s testimony by reasoning that the landlord was in his room nearby, but heard no noise coming from the living room even

though J.S. claimed that she shoved appellant with her leg, swore at him, and demanded to know what he was doing.

But, as the state notes, a guilty verdict may be based on the testimony of a single witness. *See State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (stating that "a conviction can rest on the uncorroborated testimony of a single credible witness" (quotations omitted)); *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002) (stating that "[e]ye witness testimony, standing alone, can support a guilty verdict"). Moreover, the testimony of a victim of criminal sexual conduct need not be corroborated. Minn. Stat. § 609.347, subd. 1 (2010).

In this case, J.S.'s reporting of the incident was emotional, immediate, and without hesitation, and the jury clearly found her credible. The witnesses who testified at trial described J.S. as "shaking," "panicking" and barely able to speak; "crying, upset, and frantic"; and crying and breathing heavily. The officer who took J.S. to the hospital and the physician's assistant who examined her both testified that she did not appear to be under the influence of alcohol when they spoke to her, soon after the incident. J.S.'s report of the incident was prompt, emotional, detailed, and consistent.

Minnesota cases have consistently held that a victim's prompt reporting of an incident, her emotional state, detailed description of the incident, and consistent statements to others are corroborating circumstances. *See, e.g., State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (holding that victim's testimony about sexual assault was corroborated "by others as to the victim's emotional condition at the time she complained"); *State v. Johnson*, 679 N.W.2d 378, 387 (Minn. App. 2004) ("Testimony

from others about a victim's emotional condition after a sexual assault is also corroborative evidence"), *review denied* (Minn. Aug. 17, 2004); *Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986) (noting that "strong corroborating evidence" may include "a prompt complaint of the incident, evidence of the victim's physical and emotional condition, or detailed descriptions by the victim of the incidents"), *review denied* (Minn. Dec. 17, 1986) J.S.'s testimony was consistent with her prior statements and was corroborated by the testimony of multiple witnesses.

The cases cited by appellant in support of his claim of insufficient evidence are wholly distinguishable. Nothing in the record raises "grave doubts" about appellant's guilt or questions about the validity of J.S.'s accusations. *Cf. State v. Huss*, 506 N.W.2d 290, 293 (Minn. 1993) (reversing conviction of criminal sexual conduct where child victim's testimony was contradictory as to whether any abuse occurred at all, where testimony was inconsistent with child's prior statements and other verifiable facts, and where highly suggestive book on sexual abuse was repeatedly used and may have improperly influenced child's report of events); *State v. Housley*, 322 N.W.2d 746, 751 (Minn. 1982) (reversing conviction of first-degree assault where defendant shot plainclothes police officer who gained entry into defendant's home in attempt to execute search warrant and evidence failed to establish beyond reasonable doubt that defendant's fear of great bodily harm had been unreasonable).

Finally, appellant's testimony at trial was that J.S. consented to some contact with him, that he and J.S. kissed or "made out," but that they did not have any other sexual contact. From his testimony, it would appear that he disagrees with J.S.'s claim that she

was asleep and that when she woke up appellant was in the process of removing her pants and underwear. But J.S. testified that when she woke up, her pants and underwear were partially off, appellant was touching her buttock and inner thigh, and she immediately pushed him off. The only reasonable inference to be drawn is that she was asleep when her leg was removed from her pants and underwear, and that appellant had some sexual contact with her when she was physically helpless.[2] *See State v. Berrios*, 788 N.W.2d 135, 141-42 (Minn. App. 2010) (rejecting defendant's claim that complainant was not physically helpless because she did, in fact, withhold her consent during the incident, she was able to remember certain details, and there is evidence that she consented to sex with defendant, where evidence established that complainant was in and out of consciousness due to her intoxication and where jury presumably accepted as credible complainant's testimony that she did not consent to sexual activity and that defendant penetrated her while she was unconscious).

Because the evidence was sufficient to prove appellant's guilt beyond a reasonable doubt, we affirm his conviction.

Affirmed.

[2] A person is physically helpless if she "is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9 (2010). "A person who is . . . physically helpless . . . cannot consent to a sexual act." *Id.*, subd. 4(b) (2010).