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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1953**

State of Minnesota,
Respondent,

vs.

Phillip Jackson,
Appellant.

**Filed January 27, 2014
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. 27-CR-11-22412

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Phillip Jackson challenges his conviction of first-degree criminal sexual
conduct, arguing that (1) the district court abused its discretion by allowing a police

officer to offer opinion testimony; (2) the district court failed to give proper jury instructions; and (3) the evidence was insufficient to support his conviction. We affirm.

DECISION

I.

Appellant argues that the district court abused its discretion by allowing a police officer to testify that (1) a photo of appellant showed a scar on the right side of appellant's face, and (2) a photo of appellant "resembled" the description that the victim, K.D., gave to police in 1995. We disagree.

Rulings concerning the admissibility of evidence are subject to an abuse-of-discretion standard of review. *Bernhardt v. State*, 684 N.W.2d 465, 474 (Minn. 2004). The party who challenges an evidentiary ruling has the burden of establishing that the district court abused its discretion and that the party was prejudiced by the ruling. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

A competent witness may testify as to matters of which he has personal knowledge. Minn. R. Evid. 601, 602. And a lay witness may provide testimony in the form of "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701. "Under this rule the emphasis is not on how a witness expresses himself or herself—*i.e.*, whether in the form of an opinion or a conclusion—but on whether the witness personally knows what he or she is talking about and whether the testimony will be helpful to the jury." *State v. Post*, 512 N.W.2d 99, 101 (Minn. 1994). Whether the testimony is helpful to the jury is determined

by the “distinction . . . between opinions as to factual matters,” which are helpful, “and opinions involving a legal analysis or mixed questions of law and fact,” which are not helpful. Minn. R. Evid. 704, 1977 comm. cmt.

Here, we conclude that the district court did not abuse its discretion by allowing the officer to testify that a photo of appellant depicted a scar on the right side of appellant’s face. The officer did not offer an opinion at all; he was describing a photograph that the prosecutor had asked him about. Thus, no error occurred by the introduction of this testimony.

We further conclude that the district court did not abuse its discretion by allowing the officer to testify that a photo of appellant “resembled” the description K.D. gave of her attacker in 1995. The officer testified about his observations and inferences, not about subjects involving “scientific, technical, or other specialized knowledge” or about the legal status or criminal nature of appellant’s conduct. Minn. R. Evid. 702. After DNA matching K.D.’s attacker was discovered, the officer created a photo lineup of potential perpetrators so that K.D. could attempt to identify her assailant. The statement that the photo of appellant “resembled” K.D.’s 1995 description was in regard to the photo lineup procedure implemented by the officer.

Moreover, the testimony did not involve the officer’s legal opinion or analysis. The testimony related to a factual matter—the identity of the man who attacked K.D. *Compare State v. Salazar*, 289 N.W.2d 753, 755 (Minn. 1980) (holding that no error occurred where witness opined that the defendant was defending himself because the purpose of the question was not intended to elicit a legal opinion, merely testimony of

what the witness had seen), *with State v. Larson*, 389 N.W.2d 872, 876 (Minn. 1986) (holding that the victim’s testimony was not helpful to the jury where the victim opined as to whether the defendant’s conduct “fit” into the statutory definition of criminal sexual conduct). Because the officer opined about his personal inferences, which did not involve any legal analysis or an opinion that appellant was guilty of the crime charged, no error occurred by the introduction of this testimony.

But even if the district court erred in admitting this testimony, we cannot say this error warrants reversal. *See Post*, 512 N.W.2d at 102 n.2 (stating that if the district court erred in admitting evidence, the reviewing court determines “whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict”). The state did not rely on the officer’s testimony to establish identity. K.D. admitted that she did not get a good look at the man who attacked her, and she admitted that she could not identify appellant in the photo lineup. The officer testified to these facts as well. Appellant was identified because his DNA matched the DNA that was found on K.D.’s body and the DNA found in the hallway where K.D. was attacked. Moreover, the district court instructed the jury that any witness who had experience in an occupation who expressed their opinion was “entitled to neither more nor less consideration . . . than any other evidence.”

Based on this record, we conclude that the district court did not abuse its discretion, and that the verdict is unattributable to the officer’s disputed testimony.

II.

Appellant argues that counsel impeached K.D. with prior inconsistent statements, and the district court erred when it refused to instruct the jury that K.D.'s impeachment should be considered to test her credibility. We disagree.

Refusal to give a proposed jury instruction lies within the discretion of the district court and there will be no error on appeal absent an abuse of that discretion. *State v. O'Hagan*, 474 N.W.2d 613, 620 (Minn. App. 1991), *review denied* (Minn. Sept. 25, 1991). "The jury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988). Moreover, an appellant must show the district court's error in failing to give a requested instruction materially prejudiced his or her rights. *Peterson v. State*, 282 N.W.2d 878, 881 (Minn. 1979).

Upon review of the record, we conclude that there was only one statement in which proper foundation for impeachment may have been established. *See* Minn. R. Evid. 613(b) (stating that a party may use extrinsic evidence of a witness's prior inconsistent statement for impeachment purposes, but only if "the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon"). K.D., who laid in the hallway where she was attacked for several hours after the attack occurred, testified at trial that she did not see anyone else when she was in the hallway. In 1995, K.D. told police that she saw a woman, but that the woman did not stop and ask if she needed help. During the trial, defense counsel began asking K.D. whether she had seen anyone in the hallway the night

she was attacked. Defense counsel then switched topics, and did not ask K.D. to explain why her testimony was inconsistent with the 1995 police report. The prosecution then presented the 1995 police report, established that K.D. had made an inconsistent statement, and afforded K.D. an opportunity to explain the inconsistency.

The district court refused to read appellant's requested instruction, which stated: "[e]vidence of any prior inconsistent [statement and/or conduct] should be considered only to test the believability and weight of the witness's testimony." The district court reasoned that K.D. had not been impeached with prior inconsistent statements. Given the nonconfrontational nature of defense counsel's questioning, and the manner in which foundation was laid for impeachment, we cannot conclude that the district court abused its discretion. Moreover, any error that may have occurred by the district court's refusal to read this jury instruction was harmless. In its closing argument, defense counsel urged the jury to consider K.D.'s inconsistent statements in assessing her credibility. And the district court expressly instructed the jury to consider "any impeachment of the witness's testimony" in determining the credibility of a witness.

III.

In his pro se supplemental brief, appellant argues that there was insufficient evidence presented at trial to sustain his conviction. We disagree.

Where there is a challenge to the sufficiency of the evidence, our review on appeal 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 the verdict which they did.

State v. Webb, 440 N.W.2d 426, 430 (Minn. 1989). In conducting that review, we 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). And this court 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 the defendant was guilty of the charged offense. *Bernhardt*, 684 N.W.2d at 476-77.

Appellant was convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a), (c), (e)(i) (1994). A conviction under these provisions requires proof of the following elements: (1) sexual penetration; (2) the complainant is under 13 years old and the defendant is more than 36 months older than the complainant; (3) circumstances existing at the time of the act that caused the complainant to have a reasonable fear of imminent great bodily harm; (4) the defendant caused personal injury to the complainant; and (5) defendant used force or coercion to accomplish sexual penetration. Minn. Stat. § 609.342, subd. 1(a), (c), (e)(i).

We conclude that the evidence at trial was sufficient for the jury to reasonably conclude that all of these elements were present. At trial, K.D. testified that her attacker raped her, specifically stating that his penis sexually penetrated her vagina. This testimony sufficiently supports the element of sexual penetration. *See* Minn. Stat. § 609.341, subd. 12 (1), (2) (1994) (defining “sexual penetration” as sexual intercourse, or any intrusion however slight into one’s genital openings); *see also State v. Mosby*, 450 N.W.2d 629, 634-35 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990) (affirming first-degree criminal sexual conduct conviction on the element of sexual penetration

where the only evidence regarding penetration came from victim's testimony). Moreover, seminal fluid was found in K.D.'s vagina, further establishing that sexual penetration occurred. The evidence presented at trial also supports the statute's age requirement. When the attack occurred, K.D. was 12 years old and appellant was 32 years old.

The elements of reasonable fear of imminent great bodily harm, personal injury, and force or coercion are also supported by the evidence. K.D., who was 4 feet 10 inches, and 75 pounds at the time of the attack, testified that as she walked down a dark hallway a man grabbed her, put a thin blade to the back of her neck, told her that he would kill her if she did not cooperate, pulled down her pants, forced her on the ground, and raped her. K.D. further testified that she believed this man was going to kill her. The medical reports submitted into evidence showed that K.D. had small superficial scratches on her back. And K.D. testified that she was in so much pain after the attack that she could not get up from the floor.

Assuming the jury believed this testimony, as the standard of review requires, this evidence supports appellant's conviction. *See Dale v. State*, 535 N.W.2d 619, 623-24 (Minn. 1995) (concluding that there was sufficient evidence that defendant used force or coercion where defendant placed victim in headlock, threatened to kill her unless she had sex with him, told her he had a knife, poked her with an object, and forcibly restrained her); *State v. Booker*, 348 N.W.2d 753, 755 (Minn. 1984) (concluding that there was sufficient evidence of reasonable fear of imminent great bodily harm where victim testified that defendant said he had a knife, and victim feared that she might die if she did

not comply with his demands for sex); *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981) (concluding that sufficient evidence of personal injury existed when the victim felt considerable pain with sexual penetration and had a laceration that resulted in bleeding).

Finally, we reject appellant's argument that his conviction should be reversed because K.D. was not a credible witness. The jury is the sole judge of credibility, and it is free to accept or reject any part of a witness's testimony. *See State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977). Here, the verdict establishes that the jury found K.D. credible. We will not reverse the jury's determination on appeal. *Bernhardt*, 684 N.W.2d at 476-77.

We conclude that the evidence is sufficient to prove that appellant committed first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a), (c), (e)(i).

Affirmed.