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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0654**

State of Minnesota,
Respondent,

vs.

David Edwin Radtke,
Appellant.

**Filed February 19, 2013
Affirmed
Ross, Judge**

Sibley County District Court
File No. 72-CR-11-123

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

Bryce Anthony Donald Ehrman, Sibley County Attorney, Donald E. Lannoye, Assistant County Attorney, Winthrop, Minnesota (for respondent)

Paul Engh, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury found foreign exchange host-parent David Radtke guilty of third-degree criminal sexual conduct after his 16-year-old foreign exchange student testified that

Radtke penetrated her vagina with his finger while she slept on his couch. Radtke appeals from his conviction, arguing that the district court should have suppressed his postarrest inculpatory statements to police because he made them while he was detained for an unconstitutionally excessive postarrest period before presentment to a judge. He also contends that the victim's testimony is not sufficient to convict him because that testimony merely recounted a dream. Because Radtke made his challenged statements to police long before any constitutionally significant period had elapsed and because the evidence belies his assertion that the victim's testimony necessarily recounted a dream, we affirm.

FACTS

David Radtke was hosting a 16-year-old foreign exchange student, A.P., in his home in May 2011. Late one evening he came upon A.P. resting. She lay face-down on the couch in Radtke's living room, wearing shorts. Radtke asked A.P. to make room for him to sit. He sat with a pillow on his lap and with A.P.'s legs draped over the top. Radtke began to caress A.P.'s legs. A.P. did not voice any objection, and she soon fell asleep. Radtke continued to touch A.P. According to A.P.'s eventual trial testimony, Radtke inserted his finger into her vagina, and she woke up to the feel of him removing it. She got up and went to her room.

Days later, Radtke knocked on the door to A.P.'s room and asked her forgiveness for having "touched her inappropriately." Radtke, a Lutheran pastor, told A.P., "I have sinned." A.P. told Radtke that she would not forgive him. Radtke then told his wife that he had experienced "a lapse in judgment" and touched A.P. "on the butt." A.P. spoke

with friends at school about the incident and with school officials. She gave an ambiguous statement as to whether penetration had occurred, saying, “I mean I wasn’t sure if it was real or not and I just woke up.”

The day after A.P. spoke with officials, Radtke traveled to Wisconsin to interview for a pastor’s position. Minnesota police contacted Wisconsin police, who found Radtke and interrupted the interview, arresting him. They took him to a Wisconsin jail at about 6:35 p.m. on May 23. The next day, Wisconsin Detective Brian Drumm advised Radtke of his *Miranda* rights and interviewed him at the jail for about 45 minutes, beginning just before noon. Detective Drumm told Radtke that Radtke would attend an extradition hearing that same day, but he did not appear before a judge until about 1:30 p.m. the next day.

During the 45-minute police interview, Radtke acknowledged that he had touched A.P. “inappropriately . . . on her rear” and that he had “rubbed on her vagina,” but he denied that his finger had penetrated her. He also admitted to “feeling her underwear” and that it was “possible” that A.P. had perceived penetration. He conceded that his hand was “intentionally under her shorts.” When Detective Drumm stated, “[O]bviously this was what I would call a sex act. This was something that was done for sexual arousal,” Radtke agreed. He also agreed with Detective Drumm’s characterization of the incident as an “intentional sexual act.”

When the interview ended, Radtke asked the detective for “the specifics” about the charges. Detective Drumm told him that the charges were two counts of third-degree criminal sexual conduct and that Radtke would receive a copy of the complaint when he

went “upstairs” to see the judge. After Wisconsin police presented Radtke to a judge the next afternoon, Radtke was extradited to Minnesota. The state charged Radtke with two counts of third-degree criminal sexual conduct in violation of Minnesota Statutes section 609.344 (2010).

Radtke’s unsuccessful defense at trial focused on discrediting A.P.’s accusation. A.P. testified that she was awake and not dreaming when she felt Radtke’s finger leaving her vagina. Radtke’s counsel highlighted inconsistencies between her testimony and her statements to a friend and a social worker saying that she might have been dreaming. But A.P. concluded, “Once I woke up I knew there was a finger in my vagina.” The jury found Radtke guilty on both counts.

Radtke appeals.

D E C I S I O N

Radtke argues that his statements to Detective Drumm should have been suppressed because the state failed to present him before a judge within six hours of his arrest, and, he maintains, this violated his constitutional rights under the Fourth Amendment. He also argues that the evidence was insufficient to prove penetration. Neither argument persuades us.

I

We see no constitutional bar to the admission of Radtke’s inculpatory statements to Detective Drumm. Where, as here, the facts are not in dispute, we review de novo a district court’s suppression decision. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). Radtke argues that the state’s failure to present him before a judge within six

hours of his arrest violated his rights under the Fourth Amendment to the United States Constitution as clarified in *Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558 (2009). But Radtke misreads *Corley* and its effect on Minnesota law.

The two fundamental problems with Radtke’s reliance on *Corley* are, first, that it is not a constitutional case, and second, that it interprets federal procedural rules and statutes that arise from the common law and that govern the admission of evidence only in federal district courts, not in Minnesota district courts. In *Corley*, the United States Supreme Court interpreted a federal statute mandating that “a confession . . . shall not be inadmissible solely because of delay in bringing [a] person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made . . . within six hours [of arrest].” *Corley*, 556 U.S. at 310, 129 S. Ct. at 1564 (quoting 18 U.S.C. § 3501(c)). The Court held that Congress intended to retain a federal rule of criminal procedure that arose from the common law requiring suppression of statements obtained after an “unreasonable delay” in presenting the defendant before a federal magistrate judge. *See id.* at 322, 1571. It concluded that the effect of section 3501(c) was only to modify that rule by creating a safe harbor for confessions obtained in cases where the accused was presented to a magistrate within six hours. *Id.* It is clear from this that *Corley* does not create a six-hour “bright line” constitutional limit as Radtke maintains.

The *Corley* Court also reiterated that the federal suppression rule it was discussing had derived from the Court’s “supervisory power to establish and maintain ‘civilized standards of procedure and evidence’” and had not depended on “any constitutional

issue.” *Id.* at 307 (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). This validates our own supreme court’s understanding that the federal suppression rule was not constitutionally required and did not apply to the states. *State v. Waddell*, 655 N.W.2d 803, 811 (Minn. 2003). Radtke’s assertion that the inapplicability of the federal suppression rule to the states “has been overruled by *Corley*” simply finds no support in the authority he cites.

Minnesota has its own approach to suppression after a postarrest presentment delay. Under Minnesota law, persons arrested without a warrant “must be taken before a judge with all practicable speed.” Minn. Stat. § 629.14 (2010). The state must meet a 36-hour time limit, excluding the day of arrest. Minn. R. Crim. P. 4.02, subd. 5(1). Rather than automatically suppress postarrest statements obtained after 36 hours, district courts deciding a suppression motion have discretion to suppress after they “consider, among other things, how reliable the evidence is, whether the delay was intentional, where the delay compounded the effects of other police misconduct, and the length of the delay.” *State v. Wiberg*, 296 N.W.2d 388, 393 (Minn. 1980). Radtke asks us to disregard *Waddell* and *Wiberg* in light of *Corley*. The argument has no merit. To the extent he is asking us to read *Corley* as incidentally overruling *Wiberg* and *Waddell*, nothing in *Corley* supports the position. To the extent he is asking us to disregard *Wiberg* and *Waddell* as erroneously decided, the argument seems baseless, but in any event it is an argument he must make to the supreme court. *See Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (“This court, as

an error-correcting court, is without authority to change the law.”), *review denied* (Minn. June 17, 1998).

Applying *Wiberg*, we hold that the district court rightly decided that Radtke has no grounds for suppression. We recognize that Radtke was not taken before a judge until after the expiration of the 36-hour time limit of rule 4.02. But he made the challenged statement to police well within the 36-hour period and he was presented to a judge only 1.5 hours after the period expired. Applying the nonexhaustive list of factors stated in *Wiberg*, the evidence that resulted from the confession was reliable, no evidence suggests that the delay was intentional, no evidence suggests any police misconduct, and the length of the delay was barely in excess of the limit. Radtke’s statement was preceded by *Miranda* warnings, which Radtke understood. His recounting of events was consistent and specific, and he appeared engaged and articulate. He does not contend that his confession was coerced and no evidence would suggest it. He argues on appeal that a confession in his circumstances might be offered in response to his religious recognition of sin rather than a legal recognition of criminal conduct, but this presumes his awareness that he intentionally touched A.P. in an immoral manner, and this evidence bears on his mental state even if it alone would not support his conviction of a crime. Given that Radtke made his statements to Detective Drumm nearly a full day before the time limit expired, it would be impossible to conclude that the delay was intended to elicit the inculpatory statements. The district court appropriately declined to suppress them.

II

We next address Radtke's contention that the trial evidence was insufficient to convict him of third-degree criminal sexual conduct. We consider claims of insufficient evidence by reviewing the record to determine whether the evidence, viewed in a light most favorable to the verdict, supports the jury's finding of guilt. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). When the facts are disputed at trial, as they were here, we assume that the jury believed the inculpatory evidence and disbelieved contradicting exculpatory evidence. *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005).

To find Radtke guilty of third-degree criminal sexual conduct, the jury must find that penetration occurred, that A.P. was between 16 and 18 years old, that Radtke and A.P. had an age difference of at least 48 months, and that Radtke was in a position of authority over her. *See* Minn. Stat. § 609.344, subd. 1(e) (2010). Radtke challenges only the element requiring the state to prove penetration. He argues that A.P. merely dreamed that penetration occurred and that a conviction cannot rest on a victim's dream. But A.P.'s testimony belies Radtke's contention that the jury heard insufficient evidence to find that penetration had occurred.

A.P. testified at trial that she was awake when she felt penetration. She testified that she felt Radtke's finger leaving her vagina after she awoke, not that she dreamt that penetration occurred. Radtke's counsel attempted to impeach her testimony, referencing statements she had previously made to a friend and to a social worker suggesting that she was uncertain about whether she may have been dreaming. A.P. responded to this challenge by asserting that she was certain that she was awake. Radtke asks us on appeal

to determine that A.P.'s testimony is not credible because it contradicts her earlier statements. This is a plausible defensive argument to a jury serving as fact-finder; but our role on appeal is not to retry the facts on the disputed evidence or to reassess witness credibility. *See State v. Bliss*, 457 N.W.2d 385, 391 (Minn. 1990). We agree with the unstated premise of Radtke's argument, which is that the jury had a reasonable basis to conclude that A.P.'s testimony was not credible in light of prior statements. But it also had a reasonable basis to conclude otherwise, excusing the alleged inconsistencies and believing A.P.'s testimony. The jury also saw a video recording of Radtke's confession, in which he admitted that A.P. might have felt penetration while he intentionally touched her beneath her shorts in a manner that led him to seek A.P.'s forgiveness. We hold that sufficient evidence supports the jury's guilty verdict.

Affirmed.