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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1503**

Ger Thao, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 5, 2008
Affirmed
Willis, Judge**

Hennepin County District Court
File No. 04064562

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Mike Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges the denial of his petition for postconviction relief, in which he claims prosecutorial misconduct and insufficiency of the evidence. We affirm.

FACTS

On the evening of September 22, 2004, Officer John Ratajczyk of the Brooklyn Center Police Department approached a car that was parked apart from other vehicles in a dimly lit area of the parking lot of the Brooklyn Center Regal Theater. The officer saw that the car's windows were fogged over and that there appeared to be someone in the car. He ran a computer check on the car's license-plate number and learned that the car belonged to appellant Ger Thao.

As Officer Ratajczyk approached the car, he saw a male and a female in the back seat. When he asked the two for identification, the female identified herself as L.X. and said that she was 13 years old, and the male identified himself as "Tommy" and said that his date of birth was March 10, 1988. Officer Ratajczyk went to his squad car, accessed a photograph of Thao from the Minnesota Driver Vehicle Services website, recognized the man in the car as Thao, and learned that Thao's actual birth date is March 10, 1972, which made him 32 years old on that evening.

Another police officer arrived at the scene and interviewed L.X. L.X. told that officer that she and Thao had engaged in oral sex while in the theater parking lot. She also told the officer that she and Thao had engaged in oral sex earlier that morning at her home. Officer Ratajczyk arrested Thao, who was subsequently charged with third-degree

criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(b) (2004), and fourth-degree criminal sexual conduct, in violation of Minn. Stat. § 609.345, subd. 1(b) (2004).

Thao waived his right to a jury trial, and a bench trial was held in late January 2005. L.X. testified that she met Thao in an Internet chat room, gave him her phone number, and told him that she was 13 years old, and that Thao told her that his name was Tommy and that he was 16 years old. L.X. invited Thao to come to her home on the morning of September 22, 2004, and Thao arrived there at approximately 5:00 a.m., after L.X.'s mother had left for work. L.X. testified that while she and Thao were sitting on a sofa that morning, Thao touched her breasts and her vagina, both over and under her clothes, and she touched his penis with her hands and her mouth. Later that day, Thao met L.X. after school and drove her and her friend M.Y. to a park in St. Paul. After spending some time at the park, Thao took M.Y. home before he and L.X. drove to the Brooklyn Center Regal Theater. L.X. testified that while she and Thao were parked at the movie theater, they engaged in the same type of sexual contact that had occurred earlier that morning at her home.

The district court found Thao not guilty of third-degree criminal sexual conduct but guilty of fourth-degree criminal sexual conduct. On March 10, 2005, the district court sentenced Thao to a stayed prison term of one year and one day and placed him on probation for five years. Thao did not file a direct appeal, but he petitioned for postconviction relief on December 8, 2007. The postconviction court denied the petition, and Thao appeals.

DECISION

A petition for postconviction relief is a collateral attack on a judgment that carries a presumption of regularity and cannot be lightly set aside. *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). A petitioner seeking postconviction relief has the burden of establishing, by a fair preponderance of the evidence, facts that warrant relief. Minn. Stat. § 590.04, subd. 3 (2004); *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993). An appellate court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). On factual issues, this court determines whether the evidence is sufficient to sustain the postconviction court's findings, and on legal issues, this court exercises de novo review. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

I. Thao is not entitled to postconviction relief on his prosecutorial-misconduct claim.

Thao argues that the postconviction court abused its discretion by denying relief on his prosecutorial-misconduct claim. Thao claims that the prosecutor committed two instances of misconduct: (1) by eliciting testimony from M.Y., who was with L.X. and Thao on September 22, 2004, suggesting that Thao had touched M.Y. inappropriately during that afternoon and (2) by introducing a written list of the names and ages of young girls (including L.X.) that was found next to Thao's home computer, implying either that he had engaged in inappropriate relationships with other young girls or that he had been attempting to initiate such relationships. At trial, Thao objected to M.Y.'s testimony and the district court ruled that the objection was "[s]ustained as to any touching." Thao also

objected to the admission of the list of names. He conceded that the list was admissible to show that L.X.'s name is included but argued that the names of other girls were irrelevant. The district court sustained the objection and admitted the list for the purpose of showing that L.X.'s name is included but ruled that other names would be disregarded.

Thao argues that M.Y.'s testimony and the list of names constitute evidence of other crimes or bad acts, commonly known as *Spreigl* evidence, and that the prosecutor's presentation of this evidence was misconduct because the state failed to comply with the requirements for introducing *Spreigl* evidence. The postconviction court determined that although "it was technically improper for the prosecutor to elicit or allude to evidence of other misconduct without the prefatory procedural steps required for so-called *Spreigl* evidence," even if the requirements had been met, the evidence would have been excluded in exactly the same manner that it was excluded during trial, "with the same exposure to the [district] court." The postconviction court concluded that even if the prosecutor's presentation of the evidence were misconduct, the effect was "negligible or non-existent, and would therefore be no basis for relief."

Generally, when presented with a claim of prosecutorial misconduct, this court will grant a new trial only if the alleged misconduct, "when considered in light of the whole trial, impaired the defendant's right to a fair trial." *Francis v. State*, 729 N.W.2d 584, 590 (Minn. 2007). Thao claims that his right to a fair trial was impaired "because the [district] court as the fact-finder at trial was tainted by its very exposure to this highly prejudicial evidence." In support of his argument, Thao cites *In re Welfare of J.P.L.*, in which this court criticized, in dictum, the rules governing juvenile-delinquency

proceedings that allow the same judge to preside at pretrial evidentiary hearings and at trial. 359 N.W.2d 622, 625 (Minn. App. 1984). This court explained:

In any court trial, whether a juvenile matter or criminal matter where the defendant has waived a jury, allowing the same judge who has considered a defendant's confession and then suppressed it to decide the defendant's guilt or innocence requires the assumption that the contents of the confession do not lurk in the judge's subconscious. Such a rigid assumption is a legal fiction.

....

Expecting a judge who is entitled to see and examine a confession before suppressing it on constitutional grounds to go on to decide the guilt or innocence of a defendant based solely on the state's other evidence without using that confession, subconsciously or consciously, to corroborate the state's other evidence, is unrealistic. Such an expectation asks for objectivity that logically cannot be delivered.

Id. Thao claims that, as was suggested in *J.P.L.*, it is “unreasonable” to expect that the district-court judge here would be able to remain objective and ignore the “prejudicial evidence” that the judge ultimately ruled inadmissible during the trial. He concludes, therefore, that he is entitled to a new trial.

Thao has identified nothing in the record suggesting that the district-court judge allowed the excluded evidence to improperly influence him in his role as the fact-finder. Instead, Thao essentially asks this court to conclude, in light of the language in *J.P.L.* quoted above, that, as a matter of law, a defendant in a bench trial has been denied a fair trial whenever the judge who decided his guilt was exposed to evidence that the judge found to be inadmissible. This argument is unavailing.

As the postconviction court aptly noted, judges in bench trials are routinely relied on to make evidentiary rulings and then, if they exclude the evidence, not to consider that evidence when deciding the case on its merits. And in such situations, our judicial system presumes that judges are capable of disregarding inadmissible evidence and considering only evidence that has been admitted. *See State v. Dorsey*, 701 N.W.2d 238, 247 (Minn. 2005).

Thao also claims that the alleged misconduct denied him a fair trial because, had the state given him notice that it would be presenting M.Y.'s testimony suggesting that he had touched her inappropriately and the written list of names, he would have moved to suppress that evidence, and, assuming that the district court granted the motion, he "probably would not have elected a court trial with the judge who had been exposed" to the evidence. He concludes that the alleged misconduct, therefore, had the effect of "undermin[ing] his waiver of the constitutional right to a jury trial." But Thao did not present this argument to the postconviction court, and, accordingly, we need not consider it on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts generally will not decide issues that were not presented to the district court). And in any event, the record shows that Thao was well aware when he elected to waive his right to a jury trial that the district-court judge might be exposed to evidence ultimately determined to be inadmissible during the course of the trial. After Thao told the district court that he wanted to waive his right to a jury trial, the following exchange occurred:

THE COURT: Now, sometimes during a trial, there will be objections to evidence. And if there are, then I have to decide whether the evidence comes in to the trial, and if I

decide it doesn't, then the jury would never even hear about it. But in a court trial, of course, I'd have to hear about it because I'd have to decide whether it's admissible. So if some evidence were offered and you objected to it and . . . I decided that it shouldn't come in to evidence, then I would have to disregard it. . . . You'd have to have confidence that I'd be able to do . . . that.

Now, I think I can do it, but I can't be sure. . . . But in a jury trial . . . the jury would never even hear about that evidence. Do you understand that?

DEFENDANT THAO: Yes.

THE COURT: Do you have any questions about any of these things?

DEFENDANT THAO: I not, but I trust—I trust that you will do your best.

The alleged instances of misconduct did not impair Thao's right to a fair trial, and, thus, the postconviction court did not abuse its discretion by denying relief on Thao's prosecutorial-misconduct claim. *See Francis*, 729 N.W.2d at 590.

II. The evidence was sufficient to support Thao's conviction.

Thao argues next that the postconviction court abused its discretion by denying relief on his claim that the evidence was insufficient to support his conviction. When assessing the sufficiency of the evidence, this court reviews criminal bench trials in the same manner as jury trials. *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008), *pet. for cert. filed* (U.S. May 28, 2008). We are limited to determining “whether the facts in the record and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt.” *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (quotation omitted). This court views the evidence in the light most favorable to the conviction and assumes that the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary. *State v.*

Moore, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb a conviction 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. *See State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007).

Thao contends that the testimony presented against him was not credible and was not corroborated by physical evidence. It is well established that appellate courts do not retry the facts and that resolution of conflicting testimony is the exclusive function of the fact-finder. *See State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002). It is equally well established that “a conviction can rest on the uncorroborated testimony of a single credible witness.” *See State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quoting *State v. Hill*, 285 Minn. 518, 518, 172 N.W.2d 406, 407 (1969)); *see also* Minn. Stat. § 609.347, subd. 1 (2004) (providing that in a prosecution for fourth-degree criminal sexual conduct, the testimony of a victim need not be corroborated). The supreme court, however, has commented that “[t]he absence of corroboration in an *individual* case . . . may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt.” *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (quotation omitted); *see also State v. Huss*, 506 N.W.2d 290, 292-93 (Minn. 1993) (concluding that the testimony of an alleged victim of child sex abuse was insufficient because it was uncorroborated and of questionable credibility in light of evidence that the victim had been exposed to highly suggestive material before testifying); *State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978) (remanding for a new trial in the interests of justice when the only evidence against a defendant was the

victim's uncorroborated testimony, which contained "unexplained" weaknesses). Thao claims that in light of certain inconsistencies in L.X.'s accounts of what happened on September 22, 2004, and because of a lack of physical evidence to corroborate the accusations, the circumstances here call for a reversal. We disagree.

Thao points out that L.X. told one of the officers that she had performed oral sex on Thao during the evening of September 22, later told a detective who investigated the case that she had not, and testified at trial that she did not remember whether or not she performed oral sex on Thao that evening. But these inconsistencies all relate to whether any sexual penetration occurred. *See* Minn. Stat. § 609.341, subd. 12(1) (2004) (defining sexual penetration as including cunnilingus and fellatio). Fourth-degree criminal sexual conduct, unlike third-degree criminal sexual conduct, does not require proof of sexual penetration but simply proof that there was "sexual contact," which includes the intentional touching of a victim's "intimate parts" or the clothing covering the immediate area of the victim's intimate parts. *See* Minn. Stat. §§ 609.344, subd. 1, .345, subd. 1, .341, subd. 11(a)(i), (iv) (2004). With regard to the question of whether any sexual contact occurred, L.X. was completely consistent in stating that Thao touched her breasts and vagina both over and under her clothes on the evening of September 22. Nor does the absence of physical evidence to corroborate L.X.'s allegations make the evidence insufficient to support Thao's conviction. As the district court aptly noted, the absence of physical evidence—although relevant to the charge of third-degree criminal sexual conduct because the presence of such evidence would tend to corroborate the allegations of sexual penetration—"wouldn't necessarily tell us much of anything" regarding the

fourth-degree charge because sexual contact without sexual penetration would likely not produce physical evidence. In fact, the district court stated that the reason for the not-guilty verdict on the charge of third-degree criminal sexual conduct was that the absence of physical evidence created a reasonable doubt as to whether sexual penetration occurred.¹

Thao argues alternatively that even if the evidence against him was “technically sufficient, grave doubts about [his] guilt remain,” which warrant a new trial in the interests of justice. In “extraordinary” cases, the courts have reversed convictions or granted new trials because of grave doubts about a defendant’s guilt. *See State v. Housley*, 322 N.W.2d 746, 751 (Minn. 1982); *State v. Kallestad*, 296 Minn. 483, 484, 206 N.W.2d 557, 557 (1973); *State v. Boyce*, 284 Minn. 242, 261, 170 N.W.2d 104, 116 (1969); *State v. Johnson*, 277 Minn. 368, 375-76, 152 N.W.2d 529, 533 (1967). The “grave doubts” that Thao suggests exist are based on his arguments regarding the inconsistencies in L.X.’s accounts and the absence of physical evidence. But as we have already concluded, the inconsistencies and absence of physical evidence fail to show that the evidence was insufficient to support Thao’s conviction of fourth-degree criminal sexual conduct. There was ample evidence to support the conviction, and we conclude that there is nothing here that raises grave doubts about the conviction and suggests that this is an extraordinary case requiring reversal in the interests of justice. The

¹ We note that an absence of physical evidence does not require a conclusion that the evidence was insufficient to support a conviction of third-degree criminal sexual conduct because even sexual penetration might not produce any physical evidence. *See* Minn. Stat. § 609.341, subd. 12 (providing that sexual penetration occurs regardless of whether there is any emission of semen).

postconviction court did not abuse its discretion by denying postconviction relief on Thao's claim that the evidence was insufficient to support his conviction.

Lastly, Thao makes a series of arguments in his pro se supplemental brief, claiming that (1) Officer Ratajczyk lied in his police report when he stated that he had informed Thao of his "full *Miranda* rights," (2) the statements and testimony of the witnesses against him contained various lies, (3) the district court made "many false assumptions" in finding Thao guilty, and (4) L.X. has allegedly recanted her allegations. These arguments were not presented to the postconviction court, and, therefore, we will not consider them on appeal. *See Roby*, 547 N.W.2d at 357. Even if the arguments were properly before us, all would require this court to weigh the evidence and evaluate the credibility of witnesses, which is the exclusive function of the fact-finder. *See State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006).

Affirmed.