STATE OF MINNESOTA
IN COURT OF APPEALS
A10-275

State of Minnesota,
Respondent,

vs.

Daniel Jonathan Morris,
Appellant.

Filed January 18, 2011
Affirmed
Kalitowski, Judge

Washington County District Court
File No. 82-CR-08-7704

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

Peter Orput, Washington County Attorney, Sarah E. Kerrigan, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

KALITOWSKI, Judge

On appeal from convictions of two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct, appellant Daniel Jonathan

Morris argues that (1) the district court erred by granting the state's motion to permit the complainant to testify outside appellant's presence; (2) the district court abused its discretion by ruling that the state could impeach appellant with a prior conviction if he chose to testify; and (3) the evidence was not sufficient to sustain the verdicts. Appellant makes additional arguments in a pro se supplemental brief. We affirm.

D E C I S I O N

I.

Appellant argues that the district court erroneously granted the state's motion to allow the complainant, then nine years old, to testify outside his presence via closed-circuit television.

A criminal defendant has the right to confront the witnesses against him. U.S. Const. amend. VI; Minn. Const. art. I, § 6. But in a proceeding in which a child less than 12 years of age is alleging, denying, or describing physical abuse, sexual contact, or sexual penetration performed with or on the child, Minnesota law allows the child to testify outside the defendant's presence if the defendant's presence "would psychologically traumatize the witness so as to render the witness unavailable to testify." Minn. Stat. § 595.02, subd. 4(a)(1), (c) (2008); *see State v. Conklin*, 444 N.W.2d 268, 272 (Minn. 1989) (holding that section 595.02, subdivision 4(c), is a permissible exception to the federal and state confrontation clauses). We review de novo whether a defendant's right to confront the witnesses against him has been violated. *Danforth v. State*, 761 N.W.2d 493, 495 (Minn. 2009).

Here, the district court conducted a hearing on whether the complainant should testify by closed-circuit television. The complainant's psychotherapist testified, and the district court reviewed the complainant's therapy records and the report of the complainant's guardian ad litem. The district court found: (1) the complainant was fearful of testifying in appellant's presence; (2) if the complainant were to testify in appellant's presence, she would experience negative emotional and psychological effects, such as anxiety, shame, and embarrassment, and possible physical manifestations, including nausea; and (3) testifying in appellant's presence would likely cause a "significant setback" to the progress that the complainant had made in therapy.

Appellant does not contend that the district court's findings are clearly erroneous. Rather, appellant argues that the findings are insufficient to support a conclusion that the complainant "would be so traumatized that she would be unable to testify." But the law does not require that the complainant be traumatized to the point of incapacitation before the district court can permit her to testify outside appellant's presence. The supreme court has concluded that the requirements of section 595.02, subdivision 4(c), are met if the district court determines that defendant's presence would cause "psychological traumatization" to the child witness and that this traumatization would be "substantially caused by the presence of the defendant rather than by other reasons," such as mere nervousness, excitement, or reluctance to testify. *Conklin*, 444 N.W.2d at 273-74 & nn. 4-5.

Here, the district court made findings—uncontested on appeal—as to the likely traumatic effects that testifying in appellant's presence would have on the complainant.

Because these findings are sufficient to support the district court's decision to allow the complainant to testify outside appellant's presence, we conclude that appellant's right to confront the witnesses against him was not violated.

II.

Appellant argues that the district court abused its discretion by ruling that appellant could be impeached with a prior conviction of first-degree driving while impaired if he chose to testify. *See State v. Williams*, 771 N.W.2d 514, 518 (Minn. 2009) (stating that an appellate court reviews a district court's decision to admit evidence of a defendant's prior convictions for an abuse of discretion).

Minn. R. Evid. 609 provides generally that any felony conviction that is not stale may be used to impeach a witness if the probative value of the evidence outweighs its prejudicial effect. *See also* Minn. R. Evid. 403 (stating grounds for exclusion). It is undisputed that the prior conviction at issue was not stale. In determining whether the probative value of impeachment evidence outweighs its prejudicial effect, a district court is to consider five factors (the *Jones* factors): "(1) the impeachment value of the prior crime; (2) the date of the conviction and the defendant's subsequent history; (3) the similarity of the past crime with the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue." *Williams*, 771 N.W.2d at 518 (citing *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

Before trial, the district court ruled that the state could impeach appellant with his prior conviction of first-degree driving while impaired if he chose to testify. In making its decision, the district court stated: "I do not believe that the prejudicial effect is

significant; the probative value also isn't real significant. Nevertheless, I agree that it's important that the jury get to see [appellant] as a whole person." The district court also noted that this case would turn on credibility.

The district court erred by not addressing all of the *Jones* factors. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (stating that a district court errs if it fails to demonstrate on the record that it has considered and weighed the *Jones* factors). In determining whether this error is harmless, we conduct our own review of the *Jones* factors. *See id.* at 655-56.

As to the first *Jones* factor, the supreme court has stated that "impeachment by prior crime aids the jury by permitting it to see the 'whole person' of the testifying witness and therefore to better judge the truth of his testimony." *Williams*, 771 N.W.2d at 518. Appellant argues that the "whole person" rationale results in this factor always weighing in favor of admission. But this court is without authority to change the law. *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *review denied* (Minn. June 17, 1998). Appellant also argues that his prior conviction of driving while impaired is not probative of his veracity. But a crime need not involve truth or falsity to have impeachment value under the "whole person" rationale. *Williams*, 771 N.W.2d at 518. We conclude that the first *Jones* factor weighs in favor of admission.

Appellant concedes that the second and third factors weigh in favor of admission.

The fourth and fifth factors weigh in favor of admission where credibility is a "central issue" in the case. *Swanson*, 707 N.W.2d at 655-56. It is undisputed that

credibility was a central issue here. The jury needed to determine whether to believe the testimony and prior statements of the complainant or the videotaped police interview of appellant, in which he denied the allegations of criminal sexual conduct. *See State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980) (stating that credibility is a central issue where the jury must choose between defendant's credibility and that of another person). And had appellant testified, he presumably would have denied the allegations. *See State v. Ihnot*, 575 N.W.2d 581, 587 & n.3 (Minn. 1988) (assuming defendant would have denied charges). We therefore conclude that the fourth and fifth factors weigh in favor of admission.

We agree with the district court's acknowledgment that appellant's prior conviction is not of significant probative value in determining his credibility. But, as the district court properly concluded, any unfairly prejudicial effect is also weak. Thus, although we may disagree with the state's decision to seek admission of the prior conviction, because the *Jones* factors weigh in favor of admission, we cannot say the district court abused its discretion by ruling that the state could impeach appellant with the prior conviction if he chose to testify.

III.

Appellant challenges the sufficiency of the evidence to sustain the guilty verdicts. Specifically, appellant argues that the complainant's testimony is implausible, lacks corroboration, lacks detail, and is inconsistent. Appellant does not contend that the complainant's testimony, taken as true, fails to satisfy the elements of the charged offenses.

When considering a challenge to the sufficiency of the evidence, our review is limited to a careful analysis of the record to determine whether the evidence, when viewed in the light most favorable to the verdict, was sufficient to permit the jury to reach a guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that the jury believed the evidence supporting the verdict and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). 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, reasonably could conclude that the defendant is guilty of the charged offenses. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). Deference is to be given to the jury's determinations of witness credibility and the weight to be given to each witness's testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990).

Here, the complainant testified that she, her four-year-old brother, their mother, appellant (her mother's boyfriend), and appellant's ten-year-old son lived together during the summer of 2008. On evenings when the mother was not present, appellant would babysit the children. The complainant stated that on several of these occasions, appellant sexually penetrated and engaged in sexual contact with her. The abuse took place on the living-room couch and in the complainant's bedroom, sometimes in the presence of one or more of the other children.

Appellant argues that it is implausible that he could have sexually abused the complainant without the other children noticing. But the complainant testified that although the other children were sometimes present in the living room during the abuse,

they were engaged in playing videogames. The complainant also testified that some of the abuse occurred when she and appellant were alone in her bedroom. She told a medical doctor that the other children were asleep, watching television, or playing videogames when the abuse occurred. And she told the social worker that the other children did not see the abuse. From this evidence, the jury could have concluded that the other children (1) were not always present during the abuse and (2) did not see the abuse that happened when they were present.

Appellant argues that the complainant's version of events lacks corroboration. Minnesota law provides that the testimony of a victim need not be corroborated in a prosecution for criminal sexual conduct. Minn. Stat. § 609.347, subd. 1 (2008). But "in an individual case the absence of corroboration might mandate a holding on review that the evidence was legally insufficient." *Marshall v. State*, 395 N.W.2d 362, 365 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986). We conclude that there is corroboration for the complainant's version of events. First, the complainant provided two medical doctors, a social worker, and the jury with detailed descriptions of the sexual abuse, including that appellant wore boxers and that he used his hands to "keep [her] private open." *See id.* (noting that strong corroborating evidence includes "detailed descriptions by the victim of the incidents"). Second, the statements of other witnesses corroborate the complainant's version of events: (1) the complainant's mother testified that appellant often supervised the complainant and the other children in the evenings when the mother was not present; (2) appellant admitted to lying on the living-room couch with the complainant "a couple [of] times"; (3) appellant stated that it was possible

he might have mistaken the complainant for her mother one night while he was drunk; (4) appellant's son told police that appellant, in the presence of the other children, sometimes pulled the complainant onto the living-room couch and tickled her; and (5) appellant's son told police that appellant sometimes wore boxers.

Appellant argues that the complainant's version of events lacks details; specifically, that she testified that she did not remember if she felt pain during the abuse. But the jury could have attributed the complainant's inability to remember certain details to her active attempts to forget the abuse and to her being told by appellant and her mother not to disclose the abuse.

Finally, appellant argues that the complainant's testimony is inconsistent with statements she made to the medical doctors and the social worker. There are inconsistencies between the complainant's testimony and her previous statements to the medical doctors and the social worker. But this court must resolve any inconsistencies in favor of the jury verdict. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990); *see also State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (upholding criminal-sexual-conduct conviction despite inconsistency between child complainant's testimony and prior statement). Furthermore, inconsistencies in the complainant's statements are not fatal to the state's case. *See State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990) ("[I]nconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event."), *review denied* (Minn. Mar. 16, 1990). Again, the jury could have attributed the inconsistencies to the

complainant's active attempts to forget the abuse and to her being told by appellant and her mother not to disclose the abuse.

Appellant's sufficiency-of-the-evidence arguments improperly invite this court to invade the jury's exclusive province of determining witness credibility. In reviewing the sufficiency of the evidence, we must assume that the jury accepted the complainant's account as credible. We conclude that the evidence is sufficient to sustain appellant's convictions of two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct.

IV.

Appellant makes additional arguments in a pro se supplemental brief. Appellant's first argument involves the video- and audio-recorded testimony of the complainant, which was taken before jury selection. Because the complainant's face was not visible during all of her testimony, the recording was not presented to the jury. Instead, the complainant testified live via closed-circuit television. Appellant now contends that the recorded testimony is more favorable to him. But having successfully moved the district court to prevent the jury from viewing the recorded testimony, appellant is precluded from changing his position on appeal. *See State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983) (holding that defendant "cannot on appeal raise his own strategy as a basis for reversal").

Appellant also argues that a juror was biased against him, citing a prospective juror's statement during voir dire that "where there's smoke, there's fire." But because this person was not selected as a juror, appellant's argument is without merit.

Finally, appellant appears to challenge the complainant's credibility and to explain how the evidence is inconsistent with his guilt. We interpret these arguments as challenges to the sufficiency of the evidence and reject them for the above-stated reasons.

Affirmed.