STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2236

State of Minnesota,
Respondent,

vs.

Jeremy John Friederichs,
Appellant.

Filed October 1, 2012
Affirmed
Hudson, Judge

Otter Tail County District Court
File No. 56-CR-10-677

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Daniel A. Eller, Eller Law Office, Waite Park, Minnesota; and

Michael J. Dolan, Thornton, Reif, Dolan, Bowen & Klecker, P.A., Alexandria, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HUDSON, Judge

Appellant challenges his convictions of first- and second-degree criminal sexual conduct, arguing that: he was deprived of his right to confront witnesses against him when the district court denied discovery of Facebook account information and cell-phone records without conducting an in camera review; the district court abused its discretion by failing to grant a new trial on the basis of newly discovered evidence; and the evidence is insufficient to sustain his conviction. We affirm.

FACTS

The state charged appellant Jeremy John Friederichs with three counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct, arising from allegations that he engaged in sexual contact with his 13-year-old daughter, D.R. (then known as D.S.F.), at a lake cabin in Otter Tail County in 2009. D.R., who is appellant's daughter from his previous relationship with R.R., was visiting appellant at the cabin along with I.F., appellant's three-year-old son with his then wife, T.F.

Before trial, the parties agreed to defense discovery of limited pages from D.R.'s Facebook account. But the defense also moved, over the state's objection, for: discovery of the contents of D.R.'s computer; more complete access to D.R.'s Facebook account and that of her mother, R.R.; and access to D.R.'s cell-phone records. The district court reviewed the contents of the computer hard drive and ordered disclosure of certain information, including D.R.'s statement drafted in preparation for her police interview

regarding the incident. But without conducting an in camera review, the district court denied discovery of the additional Facebook information and cell-phone records, including text-messaging records, concluding that the defense had failed to make a plausible showing that those confidential records contained information material to appellant's defense.

Appellant waived his right to a jury trial, and the district court conducted a bench trial. D.R. testified that, in early July 2009, as part of her regular visitation with appellant, she was visiting the lake cabin, where appellant was living during his separation from T.F. She testified that I.F. had previously been at the cabin but had since been returned to his mother. D.R. testified that appellant asked her to walk around in a swimsuit and to try on some of T.F.'s clothes, which made her uncomfortable. She testified that early one morning, when she was sleeping downstairs, appellant yelled at her to come upstairs and told her to lie down and take off her clothes. She testified that she started to cry, but she complied. She testified that appellant then climbed on top of her, started to masturbate, penetrated her vagina two to three times, and ejaculated on her stomach. She also testified that appellant held a gun to her head and told her to be quiet or he would kill her. She testified that she went back downstairs and stayed away from appellant until a few days later, when he drove her home.

D.R. testified that she did not immediately tell anyone about the incident, even though her mother, R.R., called her on her cell phone every day at the cabin, including after the incident. She testified that later that summer, when she was supposed to visit her father, she cried and did not want to go, but her mother made her go. She also

testified that when her father asked to go to her school conference that fall, she started crying in class.

D.R. testified that a few months later, she told two friends, M.M. and N.C., about the incident over the telephone. In December 2009, when she was staying with T.F., M.M. urged her to also tell T.F., who then called R.R., and the incident was reported to police. D.R. testified that, in early 2010, she wrote about the incident on her computer and showed her mother the journal entry as a way of telling her about the incident. Her mother then sent the entry to Detective Marlys Adams of the Otter Tail County Sheriff's Department, who was investigating the incident.

D.R. testified that she did not set up a Facebook account until fall 2009 and that she did not make many cell-phone calls or send any texts from the cabin, where the service was sporadic. She testified that she commented only indirectly on MySpace and Facebook about the incident, such as how sad she was.

R.R. testified that, before the incident, there had been no problems with D.R.'s informal visitation arrangement with appellant, but that when she picked up D.R. after the incident, D.R. stated that she never wanted to return to the cabin. R.R. testified that appellant did not call and ask for more visitation, but that when appellant's mother had called later that summer asking to see D.R., D.R. had cried. R.R. noticed that in fall 2009, D.R. lost interest in activities and began having more problems in school. She testified that she allowed D.R. to spend the second semester of the 2009-10 school year living with T.F. in Shakopee because it was a more protective environment.

R.R. testified that Detective Adams had suggested that D.R. make a journal entry about the incident, and because D.R. could not remember her email password, D.R. sent her mother the entry as a Facebook message, and her mother then forwarded it to Detective Adams. R.R. testified that D.R. showed her the journal entry but did not otherwise discuss the incident with her.

M.M. testified that D.R. told her about the incident in late July by phone, crying, stating that appellant had penetrated her vagina three times and masturbated on her. M.M. was not sure if D.R. mentioned that appellant was wearing a condom. She testified that, despite frequently texting M.M., D.R. did not text her about the incident or write about it on Facebook.

N.C. testified that D.R. called him in December 2009 and told him that appellant had chased her around the house, pinned her down, and raped her, but she did not mention anything about a gun. He testified that D.R. was crying and told him that she needed to tell someone about the incident, but he should not tell anyone else.

T.F. testified that when D.R. told her about the incident in late December, D.R. was crying and could barely speak. T.F. testified that D.R. told her that appellant had ejaculated on her, held a gun to her head, and threatened to kill her if she told anyone. T.F. testified that she owns three handguns, but she had them in her custody at the time of the incident.

Detective Adams testified that when she was assigned the case, she contacted a police detective from the Marshall Police Department, who performed a preliminary interview of D.R. Adams also interviewed D.R. and M.M. and noted several

discrepancies between the information in D.R.'s interviews and M.M.'s interview, which related to whether appellant wore a condom, what kind of underwear he wore, and the time the incident occurred during the night. Detective Adams testified that when D.R. described the incident, she was "crying hysterically" and stated that appellant had penetrated her and ejaculated on her. Adams testified that the computer journal entry, which she had asked D.R. to make, was the only documentation she received from D.R., who also told Adams that she did not previously journal about the incident. Adams confirmed that the journal entry came originally from D.R.'s Facebook account and was forwarded to her by R.R. A forensic examination of the computer showed that the journal entry was created in January 2010.

Appellant testified on his own behalf. He denied that the incident occurred and produced a calendar showing his version of a timeline relating to D.R.'s stay at the cabin. He testified that I.F. was with them the whole time and disagreed with R.R.'s testimony that I.F. was not in the car when he dropped D.R. off after the visit. He testified that after the incident, nobody in his family had contact with D.R., disagreeing with D.R.'s and R.R.'s testimony that D.R. visited his family later that summer. He testified that he believed that D.R. made up a story implicating him because she wanted to live permanently with T.F., who had substantial funds based on her status as a profit sharer for Mystic Lake Casino. Appellant also testified that he had been in contact with B.R., a man who had a recent relationship with T.F. According to appellant, B.R. indicated that he could "help [appellant] out," but asked for a payment of $10,000 and did not show up at meetings scheduled with appellant's attorney.

The district court found appellant guilty of two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b), (g) (2008), and two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(b), (g) (2008). The district court found appellant not guilty of first-degree and second-degree criminal sexual conduct involving a dangerous weapon, determining that the state had not proved beyond a reasonable doubt that appellant was armed with a dangerous weapon at the time of the incident.

Appellant moved for a new trial based on newly discovered evidence, producing three affidavits from the defense's private investigator. The affidavits contained unsworn allegations from three potential witnesses: B.R.; R.K., another friend of D.R.'s; and A.W., D.R.'s former babysitter. According to the allegations, B.R. described D.R. as a liar who could not be trusted; R.K. stated that D.R. had been in touch with her while D.R. was at the cabin after the incident; and A.W. asserted that D.R. was deceitful and expressed a preference to live with T.F. because of a "lavish lifestyle." The district court denied the motion, concluding that the allegations were of insufficient weight to grant a new trial; that the defense's failure to learn of the evidence resulted from lack of due diligence; and that, even if favorable to the defense, the evidence would not necessarily be material or produce a result more favorable to appellant. The district court sentenced appellant to 156 months, and this appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion by denying his motion to compel discovery of the Facebook accounts and cell-phone records without conducting an in camera review, and that this denial violated his constitutional right to confront the witnesses against him. U.S. Const. amend. VI. A district court has considerable discretion in granting or denying evidentiary discovery requests, and its decision will not be reversed absent an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But that discretion is subject to judicial review if it conflicts with a defendant's constitutional rights, including the Sixth Amendment right to confrontation. *State v. Wildenberg*, 573 N.W.2d 692, 696 (Minn. 1998).

Generally, the district court balances a state's compelling interest in protecting child-abuse information against a defendant's confrontation rights by conducting an in camera review of that information. *Pennsylvania v. Ritchie*, 480 U.S. 39, 60–61, 107 S. Ct. 989, 1003 (1987). Nonetheless, a criminal defendant seeking in camera review of confidential records must make "some plausible showing that the information sought would be material and favorable to his defense." *State v. Burrell*, 697 N.W.2d 579, 605 (Minn. 2005) (quotation omitted). It must be shown that the sought-after information "could be related to the defense" and that the documents to be reviewed were "reasonably likely to contain" such information. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (denying in camera review because defendant provided "no theories on how the [confidential] file could be related to the defense or why the file was reasonably likely to

contain information related to the case"). Such a showing must go beyond mere "argument or conjecture." *State v. Evans*, 756 N.W.2d 854, 873 (Minn. 2008).

Appellant cites *Wildenberg*, in which the supreme court concluded that a defendant's right to confrontation was violated when he was denied access to personal journals of an alleged child sex crime victim, concluding that "[w]ithout the journals in evidence or [the victim] subject to cross-examination regarding their content, the jury was left to speculate that they contained" information relating to criminal sexual conduct. 573 N.W.2d at 697–98. Appellant maintains that D.R. had only a limited expectation of privacy in her cell-phone records and Facebook account because no statutory privilege attached to that information. But the supreme court in *Wildenberg* recognized that, although an alleged child sex crime victim's "journals are not statutorily privileged . . . the state obviously has a compelling interest in protecting the privacy interests of" an alleged victim. *Id*. at 697.[1]

Appellant requested an in camera review of all records of D.R.'s and R.R.'s Facebook accounts and D.R.'s cell-phone records between the incident and trial, arguing that this evidence was material and favorable to the defense. He based the request, in part, on one discoverable posting on D.R.'s Facebook page, which included a comment

[1] We have recently held that a defendant has a reasonable expectation of privacy in concealed photographs and digital information that are stored on his cell phone. *State v. Barajas*, 817 N.W.2d 204, 216–17 (Minn. App. July 23, 2012). Because the information relating to the Facebook accounts and cell-phone records could be obtained through means other than an examination of D.R.'s computer or cell phone, *Barajas* does not control the result in this case. *Id.* at 216. But we note that appellant has failed to allege how any information on R.R.'s Facebook account, other than R.R.'s possible communication with D.R., would be relevant to his defense. *Burrell*, 697 N.W.2d at 605.

asking, "Why do people believe rumors and lies?" But the district court found that (1) "[i]t would be a great stretch to create a nexus between this statement and the alleged crime[]"; (2) although D.R.'s journal entry relating to the incident was sent from her Facebook account, that entry was already subject to discovery on D.R.'s computer; and (3) the defense had made no showing that access to R.R.'s Facebook account or D.R.'s cell-phone records would reveal additional information material to the case.

We agree with the district court. Unlike the child's discoverable journals in *Wildenberg*, which contained information regarding sexual activity between the child and the defendant, the Facebook accounts and cell-phone records are not alleged to have contained such potentially material information, which would be material to appellant's defense. *Wildenberg*, 573 N.W.2d at 697. Appellant argues that the records could cast doubt on D.R.'s credibility by showing that she contacted other people immediately after the incident, contradicting her testimony that she had no such contact. But D.R. acknowledged that her mother called her the day after the incident, and appellant has made no showing that the cell-phone records would indicate that D.R. made additional calls during that period. Finally, appellant argues generally that new technology "has become the source of potentially inculpatory and exculpatory evidence of [d]efendants and witnesses." But the availability of electronic technology does not amount to the required showing that certain records would contain information material and favorable to appellant's defense. The district court did not abuse its discretion by denying the motion for discovery of the cell-phone records and Facebook accounts without in camera review.

II

Appellant argues that the district court abused its discretion by denying his motion for a new trial based on the defense investigator's affidavits, which, he argues, constitute newly discovered evidence. This court reviews a district court's decision to deny a new-trial motion based on a claim of newly discovered evidence for an abuse of discretion. *Race v. State*, 417 N.W.2d 264, 266 (Minn. 1987). Newly discovered evidence warrants a new trial only if all of the following are established:

> (1) that the evidence was not known to the defendant or [his] counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). The district court denied the motion, concluding that the statements were not sworn; the individuals were known to the defense; the failure to discover the information was due to a lack of diligence; and the statements did not rise to the level of evidence that would support a new trial.

We conclude that the district court did not abuse its discretion in denying the motion for a new trial based on newly discovered evidence. All three potential witnesses were known to the defense before trial. Although appellant's attorney attempted to contact B.R. before trial, appellant does not argue that he previously attempted to contact R.K. or A.W. In addition, the allegations in the affidavits, while tending to impeach portions of D.R.'s testimony, did not relate to the individual's knowledge of the crime itself or appellant's participation in it. *See Pippitt* v. *State*, 737 N.W.2d 221, 228 (Minn.

2007) (concluding that affidavit was "merely impeaching" and did not support grant of a new trial when it contained no statements alleging that affiant had direct knowledge of the crime or the defendant's involvement in it).

Moreover, the proposed evidence was doubtful. First of all, it was unsworn. *See Miles v. State*, 800 N.W.2d 778, 784 (Minn. 2011) (concluding, in postconviction context, that newly discovered unsworn statements did not contain "sufficient indicia of reliability" to warrant new trial). Second, B.R. had indicated that he wished to be paid for his testimony, which tends to discredit his allegations. And third, because the allegations do not relate directly to D.R.'s testimony about the circumstances of the incident, and there were no other witnesses, appellant has failed to show that the proposed evidence tending to impeach D.R.'s veracity would have produced a more favorable result.

Larrison test

Appellant also argues that the district court erred by failing to consider his additional argument that the affidavits amounted to newly discovered evidence in the form of supposedly false testimony. To be granted a new trial based on newly discovered evidence of false testimony "(1) the court must be reasonably well-satisfied that the trial testimony was false; (2) without the false testimony, the jury might have reached a different conclusion; and (3) the petitioner was taken by surprise at trial or did not know of the falsity until after trial." *Ferguson v. State*, 645 N.W.2d 437, 442 (Minn. 2002); *see*

Larrison v. United States, 24 F.2d 82, 87–88 (7th Cir. 1928).[2] Appellant argues that D.R.'s testimony that she had contact with only her mother for several days after the incident was untrue, based on R.K.'s allegation that she was in communication with D.R. when D.R. was at the cabin with appellant, including after the incident. Appellant argues that this allegation is also consistent with M.M.'s testimony that, while D.R. was at the lake with appellant, M.M. had "almost daily" contact with D.R. But at most, R.K.'s allegation could be viewed as impeaching, rather than demonstrating that D.R.'s testimony was false. *See Pippitt*, 737 N.W.2d at 227–28 (concluding that *Larrison* analysis was inapplicable when newly discovered evidence was merely impeaching and did not nullify witness's trial testimony). D.R. acknowledged that she spoke to her mother after the incident, but did not then tell her about it, which is consistent with her testimony that she did not tell anyone until later that fall, as well as M.M.'s and N.C.'s testimony that D.R. told them about the incident at that time. Therefore, the district court did not err by failing to conduct a *Larrison* analysis because it would not have been appropriate. *Id.*

Appellant additionally argues that the district court should have granted a new trial in the interests of justice because D.R.'s credibility "is the central focus" of the case, and in retrospect, it appears that D.R. was untruthful. But determining the credibility of witnesses is the exclusive province of the fact-finder. *Dale v. State*, 535 N.W.2d 619,

[2] Although *Larrison* has since been overruled, *United States v. Mitrione*, 357 F.3d 712, 718 (7th Cir. 2004), Minnesota still applies the *Larrison* test. *Reed v. State*, 793 N.W.2d 725, 737 (Minn. 2010).

623 (Minn. 1995). On this record, appellant has failed to show the existence of facts that would warrant a new trial in the interests of justice.

III

Appellant argues that the evidence is insufficient to sustain his conviction. When considering a challenge to the sufficiency of the evidence, this court performs "a painstaking review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in the light most favorable to the verdict, were sufficient to allow the [fact-finder] to reach its verdict." *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005). In evaluating the reasonableness of the fact-finder's decision to convict, this court defers to the fact-finder on the issues of witness credibility and the weight to be assigned each witness's testimony. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). The same standard of review on the sufficiency of the evidence applies to bench trials, in which the district court is the trier of fact, and to jury trials. *Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999).

Appellant argues that D.R.'s testimony was inconsistent, emphasizing that the district court disbelieved her testimony that appellant used a gun during the incident. But the district court, as fact-finder, was entitled to accept D.R.'s testimony in part and reject it in part. *State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006). The district court noted M.M.'s testimony that D.R. stated that appellant told her to get on the bed or he would shoot her, which differed from D.R.'s testimony. But the district court specifically "[did] not find this or other slight inconsistencies to be significant deviations from [D.R.'s] principally consistent description of events." Therefore, even though the district court

may not have believed D.R.'s testimony about the use of a gun, it was free to credit other portions of her testimony about the incident.

Appellant also points out inconsistencies between D.R.'s testimony and that of M.M. and N.C. regarding appellant's use of a condom and whether appellant chased D.R. around the room. And appellant suggests that D.R.'s computer journal entry should be given little weight because it was not created contemporaneously with the incident. But "[i]nconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *Mems*, 708 N.W.2d at 531; *see also 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). The fact-finder's role is to assess inconsistencies and determine what weight to give them. *State v. Steinke*, 292 N.W.2d 243, 244 (Minn. 1980).

N.C., M.M., and T.F. testified that D.R. appeared very upset and was crying when she told them about the incident. R.R. noted a change in D.R.'s school activities and testified that D.R. did not want to communicate further with appellant. The district court also found, based on D.R.'s and R.R.'s testimony, that D.R.'s mother forced her to visit appellant's family later that summer, implicitly rejecting appellant's testimony that this visit never occurred. Finally, the district court found that appellant's calendar, which purported to show that I.F. was at the cabin the whole time with appellant, was not credible, based on the contrary testimony of D.R., R.R., and T.F. We conclude that these

findings are not clearly erroneous and that, taken in the light most favorable to the verdict, the evidence is sufficient to support appellant's conviction.

Affirmed.