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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2035**

State of Minnesota,
Respondent,

vs.

Hoang Xuan Nguyen,
Appellant.

**Filed November 13, 2012
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-09-58834

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

Michael O. Freeman, Hennepin County Attorney, Debra J. Lund, Theresa R. White,
Assistant County Attorneys, Nicholas Thompson, Certified Student Attorney,
Minneapolis, Minnesota (for respondent)

Arthur R. Martinez, Minneapolis, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from his conviction of second-degree criminal sexual conduct,
appellant argues that the evidence was insufficient to support his conviction because the

state failed to prove beyond a reasonable doubt that appellant acted with sexual or aggressive intent. Because we conclude the evidence is sufficient to support the district court's findings, we affirm.

FACTS

The state charged appellant Hoang Xuan Nguyen with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct arising from allegations that he engaged in sexual contact with his wife's granddaughter, then five-year-old B.M.¹ The complaint alleged that, on November 28 or 29, 2009, B.M. spent the afternoon at appellant's house while B.M.'s mother, L.M., was at work. When L.M. picked up her daughter and brought her home, B.M. complained that it hurt when she urinated and that her "grandpa" had touched her vagina. The police were called, and Officer Jeffrey Bailey responded. B.M. told Officer Bailey that appellant had put his hand down her pants and put his fingers inside of her vagina. B.M. was transported to Children's Hospital where a forensic interview was conducted by a nurse, Leah Mickschl. Mickschl reported that B.M. had small abrasions on her labia minora and labia majora. B.M. told Mickschl that her "grandpa" had put his hands down her pants and that "now it hurts to go potty."

A bench trial was held on June 7 and 8, 2011. At trial, B.M., now six years old, testified that, while she and appellant were watching television, appellant "put his hands in my pants." She said, "[h]e makes me hurt, and then when I go home, uhm, I pee and

¹ Appellant refers to C.M. as his wife, although they are not legally married. C.M. is B.M.'s grandmother. B.M. calls appellant "grandpa."

that hurts,” adding that, “he put his hand in my stuff, but I forgot what it’s called.” She also recalled telling her mother and the nurse at the hospital that her “grandpa” touched her “stuff.”

B.M.’s mother, L.M., testified that when she went to pick B.M. up from appellant’s house, she noticed that both of B.M.’s ears were very red. She asked B.M. what happened, but B.M. said that she did not know. L.M. took B.M. home and asked her to change her clothes to get ready for bed. L.M. testified that B.M. began crying and said, “grandpa, he put his hand in my vagina.” L.M. stated that B.M. said she tried to stop appellant from touching her but that he did not stop. L.M. observed B.M.’s vagina and saw that it was “red,” like a “tear or something.”

B.M.’s 16-year-old brother, R.H., and B.M.’s 14-year-old brother, D.H., both testified that they were at appellant’s house on the day of the incident. D.H. spent most of the day in the upstairs of the house, while R.H. spent most of the day in the basement near appellant’s bedroom. Both brothers testified that B.M. spent most of the day watching television with appellant in his basement bedroom. R.H. testified that the bedroom door was open, but that he was watching television in the other room and did not hear or see anything suspicious.

Officer Bailey testified that he interviewed B.M. following the incident and that B.M. said she was watching television with “grandpa” and that “grandpa put his hand down her pants and put it inside—or, put his fingers inside of her.” Officer Bailey asked B.M. if appellant had asked her to touch his penis, and B.M. responded, “nothing like that happened.”

Leah Mickschl testified that B.M. told her that her “grandpa” “put his hand under her pants . . . rubbed on her potty and now it hurts to go potty.” In the course of her examination, Mickschl observed a “superficial abrasion between the labia minora and labia majora.”

Officer Tracy Aaron Martin testified that he took appellant’s statement during a police interview on November 30, 2009, and a video and transcript of the interview was admitted into evidence. During the interview, appellant repeatedly denied intentionally touching B.M.’s vagina and specifically denied touching B.M. under her clothes. Appellant stated that he accidentally touched her vagina on top of her clothes while picking her up.

At the close of the trial, the district court found the state had failed to prove penetration beyond a reasonable doubt, and found appellant guilty of second-degree criminal sexual conduct, but not guilty of first-degree criminal sexual conduct. The district court concluded that the contact was “sexual” because there was no other reasonable explanation for the contact. This appeal follows.

D E C I S I O N

Appellant argues that the evidence was insufficient to sustain his conviction. Specifically, appellant contends that there was insufficient evidence to conclude that he touched B.M. intentionally or with sexual or aggressive intent. In considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v.*

Webb, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court will not disturb the verdict 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 the defendant was proven guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). The standard of review is the same for bench trials and jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998).

When a conviction is based on circumstantial evidence, we review that conviction applying heightened scrutiny. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We must determine “whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt.” *Id.* (quotation omitted). In reviewing circumstantial evidence, the reviewing court first identifies the “circumstances proved.” *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (quotation omitted). In identifying the circumstances proved, “we defer, consistent with our standard of review, to the [fact-finder’s] acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate.” *Id.* (quotation omitted). The second step is to “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved” while giving “no deference to the fact finder’s choice between reasonable inferences.” *Id.* at 329–30 (quotation omitted). “[T]he circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis except that of guilt.” *Id.* at 330.

The state contends that this court should not apply a heightened-scrutiny standard to the circumstantial evidence in this case, arguing that the Minnesota Supreme Court’s decision in *Al-Naseer* extending the circumstantial evidence test to cases where a single element relies exclusively on circumstantial evidence should be limited to cases involving the element of premeditation in a murder conviction. But the court in *Al-Naseer* stated that “the test for reviewing the sufficiency of the evidence in cases involving circumstantial evidence is *most evident* in first-degree murder cases,” indicating that the supreme court was not limiting the use of the circumstantial evidence test to the element of premeditation in murder cases, but rather was using those cases as an example.² *Al-Naseer*, 788 N.W.2d at 474 (emphasis added). Moreover, Minnesota courts have recently applied heightened scrutiny to circumstantial evidence in multiple cases involving both direct and circumstantial evidence but not involving premeditation or murder. *See, e.g., State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012) (applying heightened scrutiny to circumstantial evidence supporting one element of theft-by-swindle conviction); *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011) (applying heightened scrutiny to circumstantial evidence of intent to sell narcotics); *State v. Nelson*, 812 N.W.2d 184, 188–89 (Minn. App. 2012) (applying heightened scrutiny to circumstantial evidence that sexual predator had a new primary residence). Therefore,

² The state relies on *State v. Austin* to support its argument that the circumstantial evidence test should not be extended to criminal sexual conduct cases. 788 N.W.2d 788, 791 (Minn. App. 2010), *review denied* (Minn. Dec. 14, 2010). However, that case is inapposite because it does not discuss the standard of review to be applied to circumstantial evidence. *Id.*

we apply a heightened-scrutiny analysis of circumstantial evidence to the facts of this case.

Viewing the evidence in the light most favorable to the conviction, the circumstances proved are that appellant spent the afternoon with B.M. and that he rubbed her vagina under her clothes, causing a minor abrasion on the inside of B.M.'s labia. We must next determine whether the reasonable inference to be drawn from these circumstances is consistent with appellant's guilt, in other words, whether appellant touched B.M. with sexual or aggressive intent. Minn. Stat. § 609.343 (2008) makes it a crime to engage in "sexual contact" with someone under the age of 13 when the actor is more than 36 months older than the complainant. *Id.*, subd. 1(a). "Sexual contact" is defined as "any of the following acts . . . committed with sexual or aggressive intent: the intentional touching by the actor of the complainant's intimate parts, or . . . the touching of the clothing covering the immediate area of the intimate parts" Minn. Stat. § 609.341, subd. 11(a) (Supp. 2009). The "intimate parts," includes the "primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5 (2008).

The district court concluded that appellant's version of events was not credible because, during his police interview, he initially denied touching B.M. at all, but then changed his story to say he accidentally touched B.M.'s vagina on top of her clothes. Appellant disputes this finding, arguing that he consistently denied touching B.M. sexually. On appellate review, the court must defer to the fact-finder in making credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002) (citing *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995)). We accept the district court's

findings of fact concerning statements given to the police unless the findings are clearly erroneous. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995). Here, the district court viewed appellant's police interview in chambers and observed the conflicting testimony of several witnesses. From all of the testimony and evidence, the district court concluded that the victim's version of the facts was believable, and that appellant's version was not. Because there was sufficient evidence and testimony in the record to find B.M.'s version of events more credible than appellant's version, the district court did not err in finding appellant's version of events not credible.

Appellant next argues that the victim's testimony, by itself, was not sufficient to prove beyond a reasonable doubt that he acted with the requisite sexual or aggressive intent. Although appellant concedes that intent may be proved by circumstantial evidence, he argues that there must be additional corroborative evidence in the record to sustain his conviction. We disagree.

A sexual abuse victim's testimony need not be corroborated to sustain a conviction. Minn. Stat. § 609.347, subd. 1 (2008); *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977). "Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction." *State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984) (citing *State v. Hesse*, 281 N.W.2d 491, 492 (Minn. 1979)). On appeal, Minnesota courts have upheld criminal sexual conduct convictions on the basis of uncorroborated victim testimony in a number of cases. *See, e.g., State v. Kraushaar*, 470 N.W.2d 509, 513 (Minn. 1991) (holding testimony from five-year-old victim was sufficient to sustain conviction); *State v. Jones*, 500 N.W.2d 492, 495 (Minn.

App. 1993) (holding that testimony of three-year-old victim was sufficient to sustain conviction even though testimony was “vague”), *review denied* (Minn. June 9, 1993).³ And in this case, B.M.’s testimony at trial was corroborated by both physical evidence and B.M.’s prior consistent statements to her mother, the investigating police officer, and the nurse who examined her.

Moreover, sexual or aggressive intent need not be proved by evidence of words or conduct on the part of the actor other than the actor’s inappropriate contact with the victim. In *Kraushaar*, a young child alleged her father touched her bottom inappropriately. *Kraushaar*, 470 N.W.2d at 510–11. The defendant argued that he only touched her in the course of caregiving and did not touch her sexually. *Id.* at 511. The only other evidence of sexual intent was a child psychologist’s interpretation of the child’s drawings depicting genitalia and the child’s sexualized behavior. *Id.* at 512. Based on this evidence, the supreme court affirmed the conviction. *Id.* Here, evidence that appellant, alone with B.M. in the bedroom, rubbed her vagina enough to cause

³ Appellant relies on an unpublished case for his argument that sexual intent must be proved by evidence other than the testimony of the alleged victim. In *In re Welfare of T.R.A.*, A07-1422, 2008 WL 2496939 (Minn. App. 2008), the appellant was adjudicated delinquent upon the allegation of a three-year-old family member that appellant touched her “under her belly button” while he was babysitting her. *Id.* at *1. But the district court found that the act “was done without the aggressiveness of a typical sexual predator” and that it was an act of an “inquisitive adolescent.” *Id.* at *2, *3. On appeal, the Court of Appeals reversed the delinquency adjudication, finding that the evidence was insufficient to support the finding that the touching occurred with the requisite sexual intent given the district court’s findings. *Id.* at *4. *In re Welfare of T.R.A.* is distinguishable from the facts in this case since the district court here did not find that appellant’s actions were innocent or inquisitive. Moreover, unpublished opinions are not precedential. See Minn. Stat. § 480A.08, subd. 3(c) (2008); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009).

external abrasions, was sufficient to give rise to the inference that appellant touched B.M. with sexual intent while negating possible innocent explanations for the contact. *See State v. Vick*, 632 N.W.2d 676, 691 (Minn. 2001) (holding that the nature of the touching “negated the possibility of an innocent explanation”). Because no additional evidence other than the evidence of appellant’s conduct and the surrounding circumstances was necessary to prove sexual or aggressive intent, the district court’s findings were not clearly erroneous.

In addition, appellant argues that inconsistencies in B.M.’s statements about the incident render her testimony insufficient to support the conviction. First, appellant focuses on the fact that the examining nurse testified that B.M. told her that the abuse happened “in a store” when in fact it occurred at appellant’s house. The nurse also testified that B.M. told her she had a younger brother, when in fact she has two older brothers. However, minor inconsistencies as to collateral details are not sufficient to render a child-victim’s testimony not credible. *See State v. Bergeron*, 290 Minn. 1, 2, 185 N.W.2d 894, 895 (1971); *State v. Levie*, 695 N.W.2d 619, 627 (Minn. App. 2005). Moreover, “inconsistencies are a sign of human fallibility and do not prove testimony is false, especially when the testimony is about a traumatic event.” *State v. Mosby*, 450 N.W.2d 629, 634 (Minn. App. 1990), *review denied* (Minn. Mar. 16, 1990).

Second, appellant argues that conflicting evidence as to whether the appellant penetrated B.M. with his fingers suggests that B.M.’s testimony lacked sufficient credibility. Specifically, appellant points out that the responding police officer testified that B.M. told him that appellant put “five fingers” inside her, and yet there was no

physical evidence of penetration. However, at trial Officer Bailey testified that he believed the victim misunderstood his question and was actually describing the level of pain she experienced during the incident. Moreover, the district court acquitted appellant of the charge of first-degree criminal sexual conduct because it concluded that the state had not proved penetration beyond a reasonable doubt. Appellant contends that, because the district court found that there had been no penetration, it should also have found that there had been no inappropriate contact. But this argument lacks evidentiary support and logical coherence. There is sufficient evidence in the record for the district court to find that appellant touched B.M. That finding is not inconsistent with the district court's separate finding that appellant did not penetrate B.M.; nor is one finding necessarily dependent on the other.

Returning to the analysis of the circumstantial evidence in the record, when viewed in the light most favorable to the conviction, the evidence shows that appellant touched B.M.'s vagina under her clothes. Based on all of the evidence, the district court reasonably concluded that appellant's statement that he touched B.M. accidentally was not credible. Therefore, the only reasonable inference to be drawn from these circumstances is that appellant touched B.M. with sexual or aggressive intent. Because the evidence is sufficient to prove all elements of the crime beyond a reasonable doubt, we affirm.

Affirmed.