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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1076**

State of Minnesota,
Respondent,

vs.

Orin Nigel Kelly,
Appellant.

**Filed July 1, 2024
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-22-2809

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Smith, Tracy M., Judge;
and Slieter, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

In this direct appeal from a final judgment of conviction for third-degree criminal
sexual conduct, appellant argues that the evidence is insufficient to support the guilty

verdict because there are reasons to question the complainant's credibility, rendering her testimony insufficient absent corroboration. We affirm.

FACTS

In February 2022, respondent State of Minnesota charged appellant Orin Nigel Kelly with one count of third-degree criminal sexual conduct. The following facts are derived from the evidence produced at the jury trial and documents in the district court record.

A.N.'s Testimony

A.N., the complainant in this case, testified at trial as follows. On the night of June 12, 2021, a group of people, including A.N., gathered at an apartment in the Uptown neighborhood of Minneapolis. Kelly was not at the apartment at this time. The apartment belonged to J.J., who was in a casual sexual relationship with A.N. at the time but who, by the time of trial, had become A.N.'s boyfriend.

At the apartment, A.N. consumed approximately two to three alcoholic drinks before she left with others to go to a bar. At the bar, A.N. had more alcoholic drinks and she felt "buzzed" but not "too intoxicated."

In the early morning hours of June 13, A.N. returned to J.J.'s apartment where she continued drinking and socializing with people in J.J.'s living room, and, later, the bedroom. A.N. began to feel tired, so she used cocaine to "wake [herself] up a little bit." A.N. had also taken mushrooms the previous morning.

When the effects of the cocaine started to wear off, A.N. became "very tired." A.N. tried to fall asleep behind people who were sitting on the edge of the bed, and her friend

covered up A.N. before leaving to go up to the rooftop to smoke. A.N. testified that she did not recall having any interactions with Kelly up until this point.

A.N. remembered falling asleep, and the next thing she remembered was “feeling . . . this rocking back and forth motion.” She remembered “waking up and there was someone inside of [her] and it was a complete stranger.” She testified that she “turned around and . . . there was a stranger there.” She testified that her “dress was up and underwear was off.” When asked if she “ever consent[ed] to having sex with that person,” she responded, “No, absolutely not.” In the courtroom, she identified the person who assaulted her as Kelly. She didn’t have any romantic interest in Kelly or recall flirting with or touching Kelly before she fell asleep.

After the assault, A.N. went to the kitchen, grabbed a knife, and went to “go find [the assailant] and confront them.” She did not find the person who assaulted her, but, in the living room, she found her friend B.P. sleeping on the couch, woke him up, and told him that she “just got raped.” A.N. proceeded to the rooftop and told her friends what had happened. There was a debate about whether they should call the police due to the presence of drugs in the apartment, but, after about ten minutes of discussion, 911 was called twice.

In the first 911 call, A.N. said she “need[ed] to report a rape,” J.J. could be heard repeatedly saying “no” in the background, and the call was ended after 15 seconds.

Approximately two minutes later, A.N. called 911 again and stated:

I was asleep, and then I woke up and, uh, a guy was literally in me, and then he disappeared. Um, I asked him what he was doing, and (inaudible) oh, I was just checking on you, and then he disappeared. And then my underwear are on the floor. When I went to sleep, my underwear were . . . on me.

The officers who responded to the 911 call took A.N. to the hospital for a sexual assault examination.

In the following days, someone told A.N. the name of the man who assaulted her. She searched social media and found two profiles with pictures that matched her memory of the man who assaulted her. A.N. sent the profiles to the police.

A.N. admitted that she did not tell the police or the sexual assault nurse examiner that she had used cocaine the night of the assault or mushrooms the previous morning. She testified that alcohol and cocaine impacted her that night but that the cocaine had worn off by the time she fell asleep before the assault. And although A.N. did not remember some portions of the night well due to her alcohol intake, she remembered other parts of the night “very well,” including waking up during the assault because “it was very traumatic.”

B.P.’s Testimony

A.N.’s friend B.P. testified that, on June 12, he was at J.J.’s apartment and fell asleep on the couch in the living room. He explained that “[A.N.] woke [him] up frightened and saying . . . someone had taken advantage of her, and she asked [him] if [he] knew this person with a beard and pretty much describing the gentleman over on that (indicating) side.” B.P. described A.N.’s demeanor as “very scared” and “in tears, just crying, and very shocked like someone had . . . invaded her privacy.”

N.M.’s Testimony

A.N.’s friend N.M. testified that she was with A.N. at J.J.’s apartment on the night of the incident. N.M. confirmed that, after they returned from the bar, a group gathered in

J.J.'s bedroom and A.N. fell asleep on J.J.'s bed. At some point, N.M. noticed a man, later identified as Kelly, massaging A.N.'s shoulders while she was asleep, and "a couple people told him to like get his hands off of her because she was asleep." When confronted, Kelly stopped massaging, but, when N.M. looked again, "he was rubbing on [A.N.] again, so [N.M.] told him to get his hands off of [A.N.], and [N.M.] threw a cover over [A.N.]" N.M. did not see any interaction between Kelly and A.N. "apart from . . . regular socializing." She testified that she did not see flirting, touching, kissing, or any indication that A.N. was interested in Kelly romantically.

N.M. testified that A.N. was intoxicated but was not slurring her speech. N.M. testified that A.N. lay down on the bed face down and that A.N. was asleep for ten minutes or less before Kelly started massaging her. The group was in the room for about 15 to 20 minutes after Kelly stopped massaging A.N., and A.N. was asleep the entire time.

Eventually the group went up to the rooftop to smoke cigarettes. Later, A.N. appeared on the rooftop, and N.M. stopped her conversation to ask A.N. if she was okay. N.M. testified that A.N. "yelled that she had just got raped." A.N. "looked angry" and "upset." N.M. had never seen A.N. "that level of being upset," and her demeanor seemed consistent with someone who just experienced something traumatic.

Officer Rysavy's Testimony

Officer Rysavy responded to the apartment, and he described A.N. as looking "extremely distraught" and seeming "as if something terrible had happened to her given her facial expressions." A.N. did not seem extremely intoxicated; she was able to remember details of what happened and communicate those details to the officer.

A portion of Officer Rysavy's body-worn camera video was played for the jury. In it, A.N. recounts to the responding officers what happened. She says that she introduced herself to the man who assaulted her at one point, she fell asleep in the bedroom after realizing she was "over [her] limit," her friend saw him acting weird toward her while she was asleep, she woke up during the assault, the man told her he was just checking on her, and he left. A.N. confirmed that when she woke up, the man's penis was in her vagina.

A.N.'s friend told the officers that she saw the man rubbing A.N.'s shoulders while she was asleep, she told the man to stop touching A.N., and she covered up A.N.

Sexual Assault Nurse Examiner's Testimony

The sexual assault nurse examiner testified that A.N. appeared "tired" but engaged in conversation and "was intermittently tearful." A.N. described to the nurse:

[S]he had been out with friends. She realized that she had drank too much. She went to a friend's place and went to bed, and then she woke up to . . . feeling something pushing against her, and then she realized that she was being penetrated. And she saw this . . . person and said, . . . what are you doing? And the person said, well, I'm just checking on you. And so she was kind of groggy at that point, and then she realized what was happening and ran out of the room, pushed him off of her, ran out of the room and . . . the suspect ran off.

Sergeant Schmidt's Testimony

Sergeant Schmidt interviewed A.N. and N.M. He also obtained surveillance video from the apartment, which showed Kelly walking, rather than running, away from the building after the incident. A.N. told Sergeant Schmidt that she got back to the apartment before bar close and that she started to feel tired and went into a friend's room to start falling asleep. She did not disclose her cocaine or mushroom use. Initially, A.N. told

Sergeant Schmidt that she remembered seeing Kelly only after she woke up. But later she said that she remembered Kelly acting “weird.” In her statement, she also told the officer that she tried to get away from Kelly in the bedroom. She also told him that Kelly did not say anything to her after she woke up and that he just ran away.

J.J.’s Testimony

J.J. testified that the only interaction he saw between A.N. and Kelly was a conversation. But J.J. acknowledged that he had made a statement to the defense in August 2021 and that his memory and statements had changed from that prior statement.

The Defense’s Paralegal’s Testimony

The defense’s paralegal testified about J.J.’s prior statements to the defense in August 2021 and February 2022. She testified that, during J.J.’s first statement, he said that he saw A.N. and Kelly flirting in the bedroom. J.J. said that he saw Kelly give A.N. a backrub and that he took everyone upstairs because it looked like things were going to progress sexually between Kelly and A.N. In this prior statement, J.J. also said that A.N. was upset with Kelly because Kelly had called her a derogatory name and had given his number to someone else that night.

The paralegal also testified that the second time that the defense spoke with J.J. he said that he could not recall, or did not endorse, most of the things that he told the defense in his first statement. At this point, J.J. was in a romantic relationship with A.N.

Kelly’s Testimony

Kelly provided the following testimony at trial. When he arrived at J.J.’s apartment building, A.N. and J.J. let him into the building and they spoke in the elevator. They went

to the rooftop where Kelly and A.N. engaged in conversation before going down to J.J.'s apartment. In the bedroom, Kelly and A.N. were talking and flirting, Kelly offered to massage A.N.'s back, and A.N. agreed. They moved to the bed, where Kelly continued to massage A.N.'s back while she was awake.

Eventually, J.J. told people to go back up to the roof to smoke, but A.N. said that she wanted to stay in the bedroom. When they were alone, Kelly and A.N. continued to talk, and the physical contact progressed into sexual contact. He and A.N. had consensual sexual intercourse while A.N. was awake. A.N. asked Kelly for more cocaine, but he did not have any, and he was worried because he had missed calls from his girlfriend, so he left.

Verdict and Sentencing

The jury found Kelly guilty. The district court sentenced Kelly to 53 months in prison and ten years of conditional release.

Kelly appeals.

DECISION

Kelly argues that his conviction must be reversed because the evidence presented at trial is insufficient to prove that he engaged in criminal sexual conduct. When an element of an offense is based on direct evidence, appellate review is limited to a careful review of the record to determine “whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016) (quotation omitted). The reviewing court must “assume that the jury believed the state’s witnesses and disbelieved any evidence to

the contrary.” *State v. Friese*, 959 N.W.2d 205, 214 (Minn. 2021) (quotation omitted). The reviewing court will not overturn a conviction if the fact-finder could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the burden of proving an offense beyond a reasonable doubt. *State v. Griffin*, 887 N.W.2d 257, 263 (Minn. 2016). “[D]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

To sustain a conviction of third-degree criminal sexual conduct, the state needed to prove that Kelly engaged in sexual penetration with A.N. knowing, or having reason to know, that A.N. was physically helpless. *See* Minn. Stat. § 609.344, subd. 1(d) (2020). Relevant to this appeal, “[p]hysically helpless’ means that a person is (a) asleep or not conscious.” Minn. Stat. § 609.341, subd. 9 (2020).

In this case, A.N.’s testimony was direct evidence establishing that she was physically helpless during the assault.¹ She testified that she fell asleep and woke up to Kelly penetrating her vagina with his penis. She also testified that she did not consent to the act.

Generally, “a conviction can rest on the uncorroborated testimony of a single credible witness.” *State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (quotation omitted). And in prosecutions for criminal-sexual-conduct offenses, Minnesota law

¹ On appeal, Kelly challenges only whether the evidence was sufficient to prove that A.N. was physically helpless during the assault. He does not challenge the sufficiency of the evidence establishing the other elements of the offense, including whether he knew or had reason to know that A.N. was physically helpless.

dictates that “the testimony of a victim need not be corroborated.” Minn. Stat. § 609.347, subd. 1 (2022). Kelly nevertheless argues that “there were significant reasons for the jury to doubt A.N.’s credibility” and therefore her testimony was not sufficient to prove that she was asleep absent corroboration.

In *State v. Ani*, a criminal-sexual-conduct case, the Minnesota Supreme Court stated, “[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,” but the supreme court held that the circumstances in that case did not require disturbing the jury’s credibility determinations. 257 N.W.2d 699, 700 (Minn. 1977) (quotation omitted). In *Foreman*, the supreme court affirmed the defendant’s conviction based on uncorroborated victim testimony, but it explained that the distinction between cases in which courts will not disturb the jury’s credibility determinations and cases in which testimony may need corroboration is that, in the latter, there are “additional reasons to question the victim’s credibility” outside of the witness’s inconsistent statements. 680 N.W.2d at 539, 541. In *State v. Balsley*, we affirmed the appellant’s conviction for second-degree criminal sexual conduct, explaining that there were not “unusual circumstances that would justify a determination that [the teenage victim’s] testimony was not reliable,” despite “alleged inconsistencies” in the victim’s testimony. 999 N.W.2d 880, 886-88 (Minn. App. 2023), *rev. granted* (Minn. Feb. 28, 2024).

Kelly points out that there were inconsistencies between A.N.’s testimony and prior statements and asserts that the following are additional reasons to doubt A.N.’s credibility: (1) A.N.’s consumption of alcohol and drugs; (2) her admission that her memories of parts

of the evening were unclear; (3) Kelly was seen on surveillance video casually walking out of the building, which, he contends, is “conduct . . . inconsistent with someone who had just been committing a serious crime”; and (4) J.J.’s August 2021 statement undercut A.N.’s claims and corroborated “Kelly’s version of a consensual sexual encounter with an awake and willing partner.”

But A.N.’s inconsistent statements and the “additional reasons” to doubt A.N.’s credibility are distinguishable from the few cases, cited by Kelly, in which corroboration of a witness’s testimony was required, and they do not justify disturbing the jury’s credibility determinations here.

In *State v. Gluff*, an appeal from a conviction for aggravated robbery, the supreme court reversed the conviction and remanded for a new trial because the witness’s identification of the defendant was based on a tainted lineup, the witness observed the defendant for only 30 seconds, and the witness’s initial description to law enforcement did not match the defendant. 172 N.W.2d 63, 64-66 (Minn. 1969). In the case at hand, there are no analogous witness identification issues—Kelly testified that he had sexual intercourse with A.N., and Kelly does not allege any procedural defects analogous to the tainted lineup.

In *State v. Langteau*, an appeal from a conviction for aggravated robbery, the supreme court held that the uncorroborated testimony of the victim was insufficient to find the defendant guilty because the actions by the victim and the defendant were questionable or unexplained, there was no other evidence linking the defendant to the crime, and the jury originally reported no possibility of reaching an agreement before returning a guilty

verdict almost ten hours after the commencement of deliberations and the receipt of additional instructions on the meaning of “reasonable doubt.” 268 N.W.2d 76, 77 (Minn. 1978). There are no similar questionable or unexplained actions here. Further, there is evidence linking Kelly to the crime, and Kelly does not allege any concerns about the jury analogous to those in *Langteau*.²

In *State v. Huss*, the supreme court determined that the testimony of the alleged victim, who was a child, was insufficient to convict the child’s father of criminal sexual conduct because the child’s testimony was contradictory on central matters and the court was concerned that the child’s allegations may have been influenced by repeated exposure to “a highly suggestive book” about sexual abuse. 506 N.W.2d 290, 292-93 (Minn. 1993). Specifically, the court explained that “[t]he child was on the stand for almost an hour before she made any accusation of abuse” and then the child testified that both parents “touched her in a bad way.” *Id.* at 292. The child also denied that she had any “yucky secrets,” but she testified that six people touched her private parts and identified “a hug and a touch to her hair” as “bad touches.” *Id.* She also testified inconsistently with verifiable facts such as her father’s physical features and the recentness of contact with her father. *Id.* Here, the testifying victim, A.N., was an adult. Her testimony about the central issues in this case—whether she was asleep, whether she consented, whether Kelly sexually penetrated her—was consistent during trial and with her prior statements. And the minor inconsistencies

² We also note that, because *Gluff* and *Langteau* concerned convictions of aggravated robbery, not criminal sexual conduct, the supreme court was not required to consider the statute that expressly states that, in a prosecution for criminal sexual conduct, “the testimony of a victim need not be corroborated.” See Minn. Stat. § 609.347, subd. 1.

regarding details surrounding the central issues in this case—whether A.N. introduced herself to Kelly when he arrived at the apartment, whether she saw him earlier on the roof, whether she tried to get away from Kelly when she woke up, whether Kelly said anything to her when she woke up, and her failure to immediately disclose her drug use—do not appear to rise to the level of the inconsistencies in *Huss* and appear to be less serious than the inconsistencies in cases where corroboration has not been required. *Cf. id.*; *State v. Reichenberger*, 182 N.W.2d 692, 694-95 (Minn. 1970) (upholding a conviction for carnal knowledge of a child even though the victim made conflicting statements regarding “whether intercourse had in fact taken place” and how the penetration occurred). Furthermore, unlike in *Huss*, there is no evidence that A.N.’s testimony was influenced by another party.

Ultimately, Kelly’s proposed “additional reasons” to doubt A.N.’s credibility do not rise to the level of seriousness of the reasons cited in cases in which corroboration has been required. Concerns about A.N.’s credibility due to her alcohol and drug intake and her more limited memory about other parts of the night are mitigated by the fact that she immediately told people about the sexual assault. A.N. also testified that she remembered the assault “very well” because it was “very traumatic.” The fact that Kelly walked out of the apartment building, rather than ran out, is not akin to any of the unusual circumstances in the cases discussed above, and the jury could have drawn an inference from that fact in either direction. Finally, J.J.’s prior statement corroborating Kelly’s version of events does not appear to make this case any different from any number of cases in which the testimony of multiple witnesses conflicts and it is left to the jury to determine credibility. Kelly has

not pointed to any unusual additional circumstances that would justify a determination that A.N.'s testimony was unreliable such that this court should disturb the jury's credibility determination and require corroboration.

Finally, even if corroboration were required, we are satisfied that A.N.'s testimony that she was asleep during the assault was sufficiently corroborated. N.M. testified that A.N. was asleep before the assault and that she witnessed Kelly massaging A.N. while A.N. was asleep. N.M.'s prior statement to the police was consistent regarding these facts.

In sum, we conclude that the evidence is sufficient to support Kelly's conviction of third-degree criminal sexual conduct.

Affirmed.