STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1130

State of Minnesota,
Respondent,

vs.

Jeffrey Scott Makarrall,
Appellant.

Filed July 22, 2024
Affirmed
Klaphake, Judge[*]

Stearns County District Court
File No. 73-CR-21-7074

Keith Ellison, Attorney General, Edwin Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larson, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

Appellant Jeffrey Scott Makarrall appeals from his conviction of second-degree criminal sexual conduct, arguing that the evidence was insufficient to convict him because respondent State of Minnesota failed to prove beyond a reasonable doubt that he touched the victim with sexual or aggressive intent. We affirm.

DECISION

Due process requires that the state prove every element necessary to convict the defendant of the crime charged beyond a reasonable doubt. *State v. Burg*, 648 N.W.2d 673, 677-78 (Minn. 2002). Under Minn. Stat. § 609.343, subd. 1a (2020):

> A person who engages in sexual contact with anyone under 18 years of age is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists: . . . (g) the complainant was under 16 years of age at the time of the sexual contact and the actor has a significant relationship to the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

And:

> Sexual contact, for the purposes of sections 609.343, subdivision 1a, clauses (g) and (h) . . . includes any of the following acts *committed with sexual or aggressive intent*:
>
> (i) the intentional touching by the actor of the complainant's intimate parts;
>
> . . .
>
> (iv) in any of the cases listed above, touching of the clothing covering the immediate area of the intimate parts; . . .

Minn. Stat. § 609.341, subd. 11(b) (2020) (emphasis added). Further, "'[i]ntimate parts' includes the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5 (2020).

Because "sexual" and "aggressive" are stated as alternatives, either is sufficient. *See State v. Ahmed*, 782 N.W.2d 253, 256 (Minn. App. 2010) (stating that aggressive intent alone is sufficient). Absent any allegation of aggressive intent, the state must show "sexual intent." Because "sexual intent" is not defined by statute, we construe it "according to [its] common and approved usage." *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010), *rev. denied* (Minn. Dec. 14, 2010); Minn. Stat. § 645.08(1) (2020). "In common usage, an act is committed with sexual intent when the actor perceives himself to be acting based on sexual desire or in pursuit of sexual gratification." *Austin*, 788 N.W.2d at 792. Sexual intent must be established to avoid criminalizing contact that is accidental or that serves an innocuous, non-sexual purpose. *See State v. Vick*, 632 N.W.2d 676, 691 (Minn. 2001) (stating that circumstances of sexual contact "negate[d] the possibility of an innocent explanation such as accidental touching or touching in the course of caregiving"). But a showing of sexual intent does not require direct evidence of the defendant's desires or gratification because a subjective sexual intent typically must be inferred from the nature of the conduct itself. *See State v. Fardan*, 773 N.W.2d 303, 321 (Minn. 2009) (stating that intent is "an inference drawn by the [fact-finder] from the totality of the circumstances").

The first step in evaluating the sufficiency of the evidence is to determine whether the evidence used to sustain the verdict was direct or circumstantial. *See State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is "based on personal knowledge or

observation and . . . if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Circumstantial evidence is evidence from which the jury "can infer whether the facts in dispute existed or did not exist" and thus, "always requires an inferential step to prove a fact that is not required with direct evidence." *Id.* (quotation omitted). The circumstantial evidence test applies here because sexual intent is generally an "inference" drawn by the fact-finder. *See Fardan*, 773 N.W.2d at 321.

Appellate courts apply a two-step analysis to convictions based on circumstantial evidence. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We first "identify the circumstances proved." *Id.* In doing so, we "defer to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id.* at 598-99 (quotation omitted). We also "construe conflicting evidence in the light most favorable to the verdict." *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). "Stated differently, in determining the circumstances proved, [appellate courts] consider only those circumstances that are consistent with the verdict . . . because the jury is in the best position to evaluate the credibility of the evidence even in cases based on circumstantial evidence." *Silvernail*, 831 N.W.2d at 599 (citation omitted).

Second, appellate courts must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* at 599 (quotation omitted). Appellate courts "review the circumstantial evidence not as isolated facts, but as a whole" and "examine independently the reasonableness of all

inferences that might be drawn from the circumstances proved." *Id.* (quotation omitted). If an alternative hypothesis is "untied to the evidence before the jury," that hypothesis is "wholly speculative" and does not warrant reversal. *German*, 929 N.W.2d at 475. Furthermore, "inconsistencies in the state's case or possibilities of innocence" do not require reversal so long as the evidence as a whole "makes such theories seem unreasonable." *Tscheu*, 758 N.W.2d at 858.

I. Circumstances Proved

When uncontroverted circumstances from the state's witnesses "are not necessarily contradictory to the verdict, they constitute circumstances proved." *German*, 929 N.W.2d at 473. The child's credibility is not before this court when determining the circumstances proved because witness credibility is for the jury to determine. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (stating that "[j]uries are generally in the best position to weigh the credibility of the evidence and thus determine which witnesses to believe and how much weight to give their testimony" (quotation omitted)); *see also State v. Stein*, 776 N.W.2d 709, 718 (Minn. 2010) (deferring to the jury's decision whether to credit witness testimony). In criminal-sexual-conduct prosecutions under Minn. Stat. § 609.343, "the testimony of a victim need not be corroborated." Minn. Stat. § 609.347, subd. 1 (2020); *see also State v. Crego*, 395 N.W.2d 140, 141 (Minn. App. 1986) (applying Minn. Stat. § 609.347, subd. 1, to two victims, both ten years of age). Since the child's testimony is consistent with the jury's finding of guilt, this court must assume the jury determined the child was credible and include their testimony in the circumstances proved.

The circumstances proved that are relevant to this charge are as follows. Makarrall, who is the uncle of the child, had the child over to his apartment to hang out with him and his young children. The group played games, during which Makarrall "would throw [the child] on the bed, then get on top of [the child] every time" while playing the games. It was not typical for Makarrall to get on top of the child like that. As he laid on top of the child, Makarrall touched their legs or waist. When throwing the child on the bed, Makarrall would "grab [the child] near [their] butt" and "would grab [their] waist." Later, the child went to look for Makarrall, finding him "under the blankets in the master bedroom." Makarrall told the child to hide with him, and they did. After hiding with him, the child testified "next thing I know his hand is under my shirt and on my chest and he puts his leg around me, told me to be quiet so [the cousin] wouldn't find us." They further testified that Makarrall touched them under their shirt, with direct skin contact, and that Makarrall was "grasping [their] chest" for "over about a minute." After clarification, the child explained that by chest, they meant breast, specifically, their right breast. The interaction stopped when the cousin came in the room and started jumping on top of the blanket.

II. The circumstances proved are consistent only with guilt.

The circumstances proved here are consistent with guilt and are inconsistent with any reasonable alternative hypothesis.

Caselaw supports our conclusion that Makarrall had sexual intent when he touched the child because he grasped the child's breast under their clothes for approximately a minute. *See Vick*, 632 N.W.2d at 691 (noting that the location, duration, and repetition of the touching "negate[d] the possibility of an innocent explanation such as accidental

touching"); *State v. Kraushaar*, 470 N.W.2d 509, 511 (Minn. 1991) (affirming finding of sexual intent even though father claimed any touching occurred only in the context of caregiving where five-year-old child testified he touched her vagina "with his hands in his bed and in her bed"); *Crego*, 395 N.W.2d at 141 (affirming second-degree criminal sexual conduct conviction, citing only the victim's testimony "that she awoke to find that appellant had his hand underneath her panties and was rubbing her, telling her 'you're getting older'"). Although we conclude that the duration and location of the touching alone supports a finding of sexual intent, we also note that the fact that Makarrall asked the child to hide with him, restricted their movement by wrapping his leg around them, and stopped the touching only when someone else came in the room, only supports guilt.

Makarrall argues that there is a reasonable inference that the touching was incidental touching during the course of "horseplay" and therefore does not show sexual intent. This is a hypothesis that would be inconsistent with guilt, but we do not find it reasonable. The record does not support Makarrall's explanation that any contact that occurred was "incidental." The child testified that the touching happened several times, and that the touching of their breast went on for over a minute.

Makarrall's assertions that the child was not sure if the touching was intentional, that the child sat next to him the following day and did not appear uncomfortable, and that the child had an emotional call with their biological father do not change our conclusion that he had the requisite sexual intent. Not only do we find these circumstances to be irrelevant to a finding of sexual intent, but they were also not disputed at trial. Thus, we

assume the jury considered these statements in reaching its conclusion that Makarrall was guilty of second-degree criminal sexual conduct.

Because the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt, the evidence is sufficient to sustain Makarrall's conviction.

Affirmed.