20190280
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 17, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, vs. Ibrahim Ahmed Mohammed, Defendant and Appellant.	)	Supreme Ct. No. 20190280 Dist. Ct. No. 09-2018-CR-02009

APPELLEE'S BRIEF

Appeal from Criminal Judgment
Entered on September 9, 2019
East Central Judicial District, Cass County, North Dakota
The Honorable Steven L. Marquart Presiding

ORAL ARGUMENT REQUESTED

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[¶ 4] Whether the district court properly denied the Defendant's motion for judgment of acquittal.

[¶ 5] STATEMENT OF CASE

[¶ 6] The Defendant appeals from a criminal judgment entered after the district court found him guilty of gross sexual imposition ("GSI") under N.D.C.C. § 12.1-20-03(1)(a). The Defendant contends that the district court abused its discretion in denying his motion for judgment of acquittal because there was insufficient evidence to prove the essential element of force.

[¶ 7] The State asserts that the district court did not abuse its discretion in denying the Defendant's motion. E.W.'s testimony was sufficient to establish that the Defendant compelled her to submit to a sexual act by force.

[¶ 8] **STATEMENT OF FACTS**

[¶ 9] The Defendant was charged in this case with GSI under N.D.C.C. § 12.1-20-03(1)(a) for forcibly committing a sexual act upon E.W. (Appendix "App." at 9.) A court trial was held before the Honorable Steven L. Marquart, district court judge, from May 7-10, 2019. (App. at 7.) The court found the Defendant guilty of GSI as charged. (App. at 10.)

[¶ 10] At trial, E.W. testified that she has hearing impairment, speech problems, a birth defect in her right eye, anxiety, depression, post-traumatic stress disorder, dyslexia, bipolar disorder, and arthritis. (Trial Tr. 128:15-18; 145:13-23; 146:22.) She testified that she has a "DD case manager at Southeast" who is one of her "best friends who didn't care if I have a disability or not." (Trial Tr. 126:8-9; 128:9-18.) E.W. explained that "[a] lot of people looked at me and says, Oh, she wear hearing aid, she does sign language, she has speech problem," but to E.W.'s case manager, it is different—"It's you're special." (Trial Tr. 128: 15-18.)

[¶ 11] Lacey Hubert, director of services at Community Options, testified that her agency works with people who have developmental and intellectual disabilities. (Trial Tr. 116:17-19.) Hubert said that E.W. is one of her clients. (Trial Tr. 116:21.) Hubert coordinates care and services for E.W. and acts as E.W.'s representative payee. (Trial Tr. 116:3-4; 119:2.) Hubert explained that E.W. receives residential in-home services, day support services, and E.W. has a case manager through the State of North Dakota Developmental Disabilities Division. (Trial Tr. 120:1-2; 123:18-22.)

[¶ 12] E.W. testified that on September 3, 2016, she was living in the Fargo high-rise apartment building. (Trial Tr. 130:5-7, 24.) She encountered the Defendant that day when she was outside the building having a cigarette. (Trial Tr. 185:7-11, 19-20.) The Defendant asked E.W. for a cigarette, and she gave him one. (Trial Tr. 186:2-6.) E.W. testified that the Defendant said her name, but she had never met him before and did not know him. (Trial Tr. 185:19-20; 186:21.) However, she described that the building has a directory that lists tenants' names and apartment numbers. (Trial Tr. 191:11-13.)

[¶ 13] Later that evening, E.W. was in her apartment when there was a knock at the door. (Trial Tr. 146:9-12.) When she opened the door, the Defendant pushed himself into the apartment. (Trial Tr. 233:5-7.) E.W. and the Defendant sat down on the couch, and the Defendant started kissing her. (Trial Tr. 134:6-7; 234:24-25; 235:1.) E.W. testified that she kept telling the Defendant "no," and she was scared to move. (Trial Tr. 134:7; 235:10.) E.W. said the Defendant got down in front of her and tried to force her legs open while she crossed her legs and tried to keep them closed. (Trial Tr. 134:7-25.) E.W. said the Defendant started pulling her underwear and shorts down and kissed her vagina. (Trial Tr. 134:22-23; 135:14-20.) E.W. clarified on cross-examination that no sex occurred while she and the Defendant were on the couch. (Trial Tr. 255:1-4, 12-21.)

[¶ 14] E.W. said the Defendant grabbed her by the wrist and pulled her to the bedroom. (Trial Tr. 256:19-20.) She fell into the file cabinet in the living room and fell to the floor. (Trial Tr. 256:19-25; 257:1-6.) E.W. said the Defendant grabbed

her wrist and squeezed it hard, dragging her towards the bedroom. (Trial Tr. 259:19-24; 260:8-11.) E.W. said that it hurt her wrist, noting "my wrist was killing me." (Trial Tr. 260:5-7.) E.W. said the Defendant pushed her onto the bed and raped her from behind, penetrating her vagina with his penis. (Trial Tr. 136:10-16; 137:25; 138:1; 261:15.) E.W. testified: "He was raping me. I kept saying no so many times. He wouldn't listen." (Trial Tr. 136:15-16.) She explained, "I couldn't stop him. He was more stronger than I was. I was screaming. No one was able to help me." (Trial Tr. 136:18-19.) E.W. said when the Defendant finished, he got dressed and left her apartment. (Trial Tr. 137:6-9.) E.W. said her vagina hurt after the incident. (Trial Tr. 139:23-24.)

[¶ 15] E.W. said that after the Defendant left, she told her friends David, Megan, and Mohamed Ali what had happened. (Trial Tr. 140:7-21.) Ali then called the police. (Trial Tr. 140:19-21.) Fargo police officers responded and took a report. E.W. went to Essentia to receive medical care for her wrist. (Trial Tr. 354:13-17.) Essentia did not have a sexual assault nurse examiner ("SANE") available, so E.W. was sent to the emergency room at Sanford for a sexual assault examination ("SANE exam"). (Trial Tr. 354:13-19.) The SANE nurse, Sheila Kringlie, testified that E.W. arrived at Sanford "with a brace on her right wrist from an injury that had occurred during the assault." (Trial Tr. 354:15-17.) Kringlie explained that the SANE exam is a long process. (Trial Tr. 353:6-7.) As part of the process, Kringlie performed a vaginal exam, which Kringlie said is an invasive, sometimes painful procedure using a speculum. (Trial Tr. 362:12-20.) Kringlie said that she took

swabs of E.W.'s vagina, cervix, perineum, and rectum, which were sent to the state crime lab for analysis. (Trial Tr. 363:1-4.) Forensic scientist Stephanie Maier conducted the DNA analysis. Maier testified that male DNA was found on E.W.'s rectal swab, and the DNA matched the Defendant. (Trial Tr. 509:14-16; 527:2-4; 533:11-13; 536:9-13.)

[¶ 16] Officer Robert Essler of the Fargo Police Department testified that he responded to E.W.'s apartment in the early morning hours of September 4, 2016. (Trial Tr. 433:17-19.) He described the apartment as "somewhat well kept," but when he entered E.W.'s bedroom, "it appeared as though all the pillows, the covers and sheets had all been taken off her bed and were kind of strewed about on the floor." (Trial Tr. 437:4-8.)

[¶ 17] The Defendant testified that he had seen E.W. one time before the date of the incident at a gas station when she waved hello to him. (Trial Tr. 599:9-12.) He said that she waved to him but did not talk to him. (Trial Tr. 599:11-12.) The Defendant testified that on September 3, 2016, he was in the parking lot when E.W. asked him for a cigarette. (Trial Tr. 551:23-25.) He said that E.W. told him, "I have a birthday," and invited him to her apartment. (Trial Tr. 552:1-9.) According to the Defendant, once they were inside the apartment, E.W. said "that is my birthday party and I would like to have sex." (Trial Tr. 552:14-16.) He indicated that he and E.W. had consensual sex on the couch and then moved to another couch. (Trial Tr. 552:18-22.) He said that he never went into the bedroom, never pushed E.W., and "[n]ever hurt her at all." (Trial Tr. 552:19-20; 555:17-18.) On rebuttal, Officer

Kyle Seehusen testified that there was only one couch in E.W.'s apartment. (Trial Tr. 610:19.)

[¶ 18] At the close of the trial, the district court found the Defendant guilty. (Trial Tr. 640:8-12.) The court concluded that E.W.'s testimony was sufficient to establish the essential element of force, noting that E.W. said she repeatedly told the Defendant, "No, I do not want this." (Trial Tr. 636:12-13, 24-25.) In addition, the court noted E.W.'s testimony that she is smaller than the Defendant and could not stop him; that the Defendant placed his foot in the door and prevented E.W. from closing it; that E.W. tried to keep her legs closed while on the couch, but the Defendant forced them open; that E.W.'s clothes were removed against her will; E.W. said she was terrified and did not want to go to the bedroom, but she was not strong enough to resist; E.W.'s wrist was injured; and E.W. was thrown to the bed. (Trial Tr. 636:1-23.)

[¶ 19] The court reasoned that although there were some inconsistencies in the statements that E.W. made regarding the details of the assault, "in every prior statement E.W. made she was consistently saying that she did not want this and told the Defendant that." (Trial Tr. 638:6-25; 639:1-3.) The court also acknowledged that E.W. is "simple-minded" and not a person of "ordinary intelligence." (Trial Tr. 638:6-12.) The court concluded that the Defendant "targeted the mental infirmities when he met her for the first time." (Trial Tr. 637:18-19.) The court found E.W.'s testimony "credible and compelling." (Trial Tr. 640:4-5.)

[¶ 20] STANDARD OF REVIEW

[¶ 21] By timely moving for a judgment of acquittal under N.D.R.Crim.P. 29, a defendant preserves the issue of sufficiency of the evidence for appellate review. State v. Schweitzer, 2007 ND 122, ¶ 17, 735 N.W.2d 873. In the case of a bench trial, the defendant's entry of a not guilty plea is adequate to preserve the issue. State v. Himmerick, 499 N.W.2d 568, 572 (N.D. 1993).

[¶ 22] A defendant challenging the sufficiency of the evidence on appeal "must show that the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt." State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988). The Court has noted that its role is "to merely review the record to determine if there is competent evidence that allowed the jury to draw an inference 'reasonably tending to prove guilt and fairly warranting a conviction.'" Id. (quoting State v. Matuska, 379 N.W.2d 273, 275 (N.D. 1985)). The Court does not "weigh conflicting evidence nor judge the credibility of witnesses." State v. Brandner, 551 N.W.2d 284, 286 (N.D. 1996).

[¶ 23] A guilty verdict may be based entirely on circumstantial evidence, but the "evidence must be probative enough to establish guilt beyond a reasonable doubt." Id. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts, and the Court "will not disturb it on appeal unless it is unwarranted." Id. The Court "will reverse the decision of the trier of fact only if the record presents no substantial evidence to support the

verdict." Matuska, 379 N.W.2d at 275. The same standard of review applies to a bench trial as is applied to a jury trial. Brandner, 551 N.W.2d at 286.

[¶ 24] LAW AND ARGUMENT

[¶ 25] I. The district court properly denied the Defendant's motion for judgment of acquittal.

[¶ 26] The Defendant was convicted of GSI under N.D.C.C. § 12.1-20-03(1)(a). The statute requires the State to prove that the defendant engaged in a sexual act with the victim, or caused the victim to engage in a sexual act, and "compel[led] the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being." Id. The Defendant's challenge to the sufficiency of the evidence focuses on the essential element of force.

[¶ 27] The Defendant contends that the trial court erred in denying his motion for judgment of acquittal because there was insufficient evidence to prove that he forcibly compelled E.W. to submit to a sexual act. Noting the trial court's characterization of E.W. as "simple-minded," the Defendant argues that the court improperly lowered the standard required to prove force because of the court's view that E.W. is a vulnerable adult. However, the Defendant's argument is flawed because it fails to recognize three critical factors in this case: (1) E.W.'s limited mental and physical capability to fight the Defendant; (2) E.W.'s testimony that she repeatedly told the Defendant "no"; and (3) the injury E.W. sustained to her wrist as a result of the attack.

[¶ 28] The word "force" is defined in the criminal code simply as "physical action." N.D.C.C. § 12.1-01-04(10). "It is the force or physical action by the defendant which must 'compel' the victim to 'submit' to a sex act for a crime to be committed under N.D.C.C. § 12.1–20–03(1)(a)." State v. Vantreece, 2007 ND 126, ¶ 18, 736 N.W.2d 428. In Vantreece, the Court held that it is not sufficient to prove the element of force "with evidence that the complainant acquiesced in a sexual act" with the defendant. Id. at ¶ 21. The Court concluded that the "prosecution had the burden to introduce substantial evidence for the jury to find the use of force by the defendant sufficient to overcome resistance." Id. However, as Justice Kapsner recognized in her dissent, "resistance" is not a statutory element of GSI. See id. at ¶ 47 (noting that "gross sexual imposition is criminal because of the attacker's conduct, not the victim's resistance").

[¶ 29] The Court has recognized that "a complainant's mental capacity is relevant in a charge of having sex by force to the question of the extent of force required to compel the victim to submit." State v. Vantreece, 2007 ND 126, ¶ 11, 736 N.W.2d 428. Despite the testimony of E.W. and Lacey Hubert from Community Options, the Defendant claims there was no proof that E.W. has developmental delays. The State did not present an expert witness on the subject; however, expert testimony is not always necessary for a reasonable factfinder to glean that a witness is a person with developmental delays. See State v. Kingsley, 383 N.W.2d 828, 830 (N.D. 1986) (concluding that the State minimally met its burden of proving under N.D.C.C. § 12.1-20-03(1)(e) that the victims, by reason of

mental disease or defect, were incapable of understanding the nature of the conduct involved, and holding that "expert medical testimony was not required to establish a prima facie case").

[¶ 30] Many states have recognized that victim and lay witness testimony can be enough to establish that a victim has developmental delays. See e.g. People v. Thompson, 48 Cal. Rptr. 3d 803, 810 (Cal. Ct. App. 2006) (noting the "nationwide consensus" that expert testimony is not required on the issue of whether a rape victim is incapable of giving legal consent to sex); Com. v. Fuller, 845 N.E.2d 434, 440 (Mass. App. Ct. 2006) (holding that the issue was whether the victim with an intellectual disability had the capacity to consent to sex, and "[r]esolution of that question did not require expert testimony concerning the specific etiology of any limitations relevant to her consent"); People v. Cratsley, 615 N.Y.S.2d 463, 464 (N.Y. App. Div. 1994) (disagreeing with the defendant's contention that expert testimony was required in order to establish the victim's cognitive limitations, noting that it has been held in other contexts that "mental capacity may be determined by the jury from circumstantial evidence"); State v. Hunt, 722 S.E.2d 484, 491 (N.C. 2012) (holding that in light of the victim's testimony and the testimony of lay witnesses regarding the victim's condition, "the State was not required to use expert testimony pursuant to Rule 702 to establish the extent of [the victim's] mental capacity to consent to sexual acts").

[¶ 31] In this case, E.W. testified at trial and was on the witness stand for quite some time. The trial court had ample opportunity to observe E.W. and assess

her level of intellectual functioning. E.W.'s vulnerability is readily apparent. The trial court recognized this fact in its explanation of the verdict, describing E.W. as "simple-minded" and not a person of "ordinary intelligence." (Trial Tr. 638:6-12.) The trial court's acknowledgment of E.W.'s mental capacity does not lower the standard of proof on the element of force; however, it is certainly relevant to the court's determination.

[¶ 32] E.W.'s testimony established that she was physically and mentally incapable of fighting off the Defendant. E.W. explained that she has hearing impairment, speech problems, a birth defect in her right eye, anxiety, depression, post-traumatic stress disorder, dyslexia, bipolar disorder, and arthritis. (Trial Tr. 128:15-18; 145:13-23; 146:22.) She explained that she has a "DD case manager at Southeast." (Trial Tr. 126:8-9; 128:9-18.) E.W. testified to several actions she took to communicate her lack of consent to the Defendant: crossing her legs while he tried to pry them open, repeatedly saying "no," and screaming. (Trial Tr. 134:7-25; 136:15-19.) She stated, "I couldn't stop him. He was more stronger than I was. I was screaming. No one was able to help me." (Trial Tr. 136:18-19.)

[¶ 33] This case is distinguishable from Vantreece because E.W. did not acquiesce to the sexual act committed upon her. The Defendant used force when he pulled and squeezed E.W.'s wrist, dragged her into the bedroom, and pushed her down on the bed. E.W. repeatedly told the Defendant "no." This verbal form of resistance clearly communicated E.W.'s lack of consent. Indeed, there is no

requirement in N.D.C.C. § 12.1–20–03(1)(a) that the victim must throw punches or physically attempt to fight off an attack.

[¶ 34] Numerous state courts have held that the prosecution is not required to establish that the victim physically resisted in order to prove forcible rape. See e.g. People v. Barnes, 721 P.2d 110, 120–21 (Cal. 1986) (noting that "[b]y removing resistance as a prerequisite to a rape conviction, the Legislature has brought the law of rape into conformity with other crimes such as robbery, kidnapping and assault," noting that the law does not expect a person to risk injury or death by resisting in defending oneself or one's property from these crimes); Fletcher v. State, 698 So. 2d 579, 580 (Fla. Dist. Ct. App. 1997) (concluding that sufficient evidence existed to support the conviction for involuntary sexual battery, opining that the defendant's "'... her lips said 'no', but her eyes said 'yes' ...'" position "cannot be condoned by this Court nor will it be accepted as a legal defense to a charge of sexual battery"); State v. Campbell, 143 S.W.3d 695, 699 (Mo. Ct. App. 2004) ("A victim is not required to physically resist where she submits to an offensive act out of fear of personal harm"); State v. Jones, 299 P.3d 219, 227 (Idaho 2013) (concluding that "allowing verbal resistance to support a charge of forcible rape is sound policy" because "[r]equiring physical resistance by a rape victim naturally 'increases the likelihood of the attacker's use of violence'"); Farish v. Commonwealth, 346 S.E.2d 736, 739 (Va. 1986) (holding that the prosecution is not required to prove that the victim cried out or physically resisted; however, a defendant is allowed "to use lack of resistance to buttress his consent defense").

[¶ 35] As is common in rape cases, there were no independent witnesses to the Defendant's attack on E.W. Therefore, proof of the offense rested largely on E.W.'s testimony and circumstantial evidence. The Court has long recognized that "the uncorroborated testimony of a victim is sufficient to establish all the elements of the crime of rape." State v. McLain, 312 N.W.2d 343, 347 (N.D. 1981). Nevertheless, several factors corroborated E.W.'s testimony that the Defendant used force.

[¶ 36] Notably, the circumstances surrounding the incident support the implausibility that E.W. would have consented to sex with the Defendant. E.W. and the Defendant were total strangers; they had only met briefly on the date of the incident. Both indicated in their testimony that they had no previous relationship whatsoever. This fact casts doubt on the Defendant's claim that E.W. offhandedly invited him to her apartment to have sex. E.W. testified that the forced intercourse occurred in the bedroom; the Defendant claimed that he was never in E.W.'s bedroom. Officer Essler described E.W.'s apartment as "somewhat well kept," but he observed that E.W.'s bedroom was in a different state. (Trial Tr. 437:4-8.) He said the pillows and sheets were off the bed and strewn on the floor. (Trial Tr. 437:4-8.) The disarray in E.W.'s bedroom fits with E.W.'s description of what happened on the bed.

[¶ 37] Moreover, E.W's physical injury and the fact that E.W. went to the hospital shortly after the incident supports the element of force. E.W. described that her wrist hurt badly after the assault, and she also had pain in her vagina. (Trial Tr.

139:23-24; 260:5-7.) She received medical care for her wrist and submitted to a sexual assault examination, which was lengthy and invasive. The fact that E.W. sought medical care, standing alone, does not prove that the Defendant used force. However, when considered together with the totality of the circumstances, E.W.'s wrist injury, vaginal pain, and her submission to a SANE examination are factors that corroborate the element of force.

[¶ 38] The Defendant has failed to meet the standard for challenging the sufficiency of the evidence. When viewed in the light most favorable to the verdict, the evidence at trial supported a reasonable inference of guilt. The trial court heard the testimony of E.W. and the Defendant, and the court was in the best position to evaluate the witnesses' credibility. The trial court found E.W.'s testimony to be "credible and compelling." (Trial Tr. 640:4-5.) The Defendant has not established any reason to reverse the decision of the trial court.

[¶ 39] CONCLUSION

[¶ 40] Based on the forgoing reasons, the State asks this Court to affirm the judgment of the district court. The State requests oral argument to assist the Court in evaluating this matter and to answer any questions the Court may have.

[¶ 41] Respectfully submitted this 17th day of January 2020.

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[¶ 42] CERTIFICATE OF COMPLIANCE

[¶ 43] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8). The page count is nineteen pages.

[¶ 44] Dated this 17th day of January 2020.

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[¶1] I, Amanda Ross, hereby certify that on January 17th, 2020, the following documents:

Appellee's Brief

[¶2] Were filed electronically with the Clerk of Court through Odyssey® system for electronic service through Odyssey® on the following:

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Dated this 17th day of January, 2020.

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Subscribed and sworn to before me this dated this 17th day of January, 2020.

Notary Public

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State of North Dakota
My Commission Expires Nov. 30, 2022