STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1057

State of Minnesota,
Respondent,

vs.

Scott Edward Weiss,
Appellant.

Filed September 23, 2008
Affirmed, motion denied
Johnson, Judge

Lyon County District Court
File No. K9-05-615

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

JOHNSON, Judge

A Lyon County jury found Scott Edward Weiss guilty of criminal sexual conduct and kidnapping based on evidence that he sexually assaulted two teenagers in the cab of his pickup truck on a dark, isolated, rural road. The district court sentenced Weiss to 45 years of imprisonment. On appeal, Weiss argues that (1) the district court erred by ruling that evidence of his prior convictions could be admitted into evidence by the state if Weiss were to testify, (2) the evidence was insufficient to sustain the convictions, and (3) the district court committed various errors with respect to Weiss's sentence. We conclude that the district court did not err in its pretrial ruling, that the evidence is sufficient to sustain the convictions, and there is no error affecting Weiss's sentence. Therefore, we affirm.

FACTS

A. Events of July 2-3, 2005

On the evening of July 2, 2005, Weiss and a friend, John Rooney, went to a street dance in the city of Balaton, where they stayed until approximately 1:00 a.m. After the dance ended, the two men drove around in Rooney's pickup truck and then visited Rooney's friend, M.M., in the city of Ghent. They arrived at M.M.'s home between 2:00 and 3:00 a.m.

Two teenagers were at M.M.'s home that evening. N.T., a 16-year-old male, was living in M.M.'s home at the time. C.M., 13-year-old female, was a family friend of M.M. who was visiting for the evening. Upon arriving, Rooney woke M.M., and the two

of them talked in the living room. Meanwhile, Weiss sat in the kitchen and drank beer. C.M. and N.T. initially were upstairs playing video games but later went downstairs. Between 3:30 and 4:30 a.m., Weiss, C.M., and N.T. left in Rooney's pickup truck to go buy cigarettes.

According to the testimony of C.M. and N.T., Weiss drove them to a gas station in the city of Marshall, where Weiss bought cigarettes. While driving back to Ghent, Weiss told N.T. and C.M. that he previously had killed people, and he made a comment about a girl who was missing. Weiss told the two teenagers that he had a gun in the back of the truck and that "murder was the easiest thing to get away with." N.T. testified that he nudged C.M. in an attempt to tell her to open the passenger door and jump out, but she did not do so.

C.M. asked Weiss if he was going to kill them. Weiss responded that he would not do so if she took off her shirt. C.M. complied. After Weiss had driven the truck a few miles down a gravel road, Weiss stopped the truck and ordered both C.M. and N.T. to take off their clothes, which they did. N.T. threw his shirt in the back seat of the pickup truck and placed the rest of his clothes on the floor. Both N.T. and C.M. testified that they believed that Weiss would shoot or kill them if they did not comply with his demands.

Weiss told C.M. to perform fellatio on him, and she complied. N.T. saw C.M. performing fellatio on Weiss and heard her make a choking noise. Weiss then told C.M. to do the same to N.T. With C.M. in the middle of the front seat on her hands and knees, she pretended to perform fellatio on N.T. Meanwhile, according to both C.M. and N.T.,

Weiss anally penetrated C.M. C.M. testified that the penetration hurt. N.T. heard C.M. say that it hurt and felt C.M. squeeze his leg. At trial, C.M. was unsure how long the penetration lasted, although she told an examining physician later that day that it had lasted for approximately 10 to 20 minutes. N.T. testified that they were in the pickup truck on the gravel road for approximately 10 or 20 minutes. The distance between Marshall and Ghent is approximately seven miles.

Before the group arrived back at M.M.'s home, Weiss gave C.M. his business card and told her to call him if she "ever needed anything." Weiss instructed them not to tell anyone because if he were arrested, someone "would come and shoot up the house and everyone would be dead."

B. Police Report and Investigation

When Weiss and the two teenagers returned to M.M.'s home, Weiss went inside to get Rooney, and the two men left quickly. C.M. and N.T. called N.T.'s mother and then woke M.M. M.M. testified that N.T. told her that Weiss had threatened him and C.M. with a gun and had "intercourse up to the buttock[s]" with C.M. while she performed fellatio on N.T. N.T.'s mother drove to M.M.'s home and picked up C.M. and N.T. Before going to the hospital, the group went to N.T.'s mothers' house, where C.M. put on clean clothes. N.T.'s mother later gave the doctor at the hospital the clothes that C.M. had been wearing. At the hospital, C.M. was examined by medical professionals and interviewed by police.

Meanwhile, Weiss and Rooney returned to Rooney's residence. Weiss left Rooney's home at approximately 9:30 a.m. that day. That evening, while at a friend's

house, Rooney received a call on his cellular telephone from his sister-in-law asking why deputy sheriffs' cars were at Rooney's house. While still on the telephone with his sister-in-law, Weiss, by coincidence, called Rooney. Rooney asked Weiss why the deputies would be at his house; Weiss said he did not know. Rooney then spoke with a deputy sheriff, who said that the truck would be impounded because "there was a crime committed in" it. In a later telephone call, Weiss told Rooney that he had masturbated in the truck. But in a subsequent telephone call, Weiss told Rooney that he intended to tell the deputy that he had met a girl at the street dance and that she had performed fellatio on him in the pickup truck. Rooney testified at trial that Weiss had not been with another female at the street dance and that he had not borrowed Rooney's truck except during the early morning hours when he drove to Marshall with C.M. and N.T.

A deputy from the Lyon County Sheriff's Department interviewed C.M. and N.T. Using the information on Weiss's business card, the deputy contacted Weiss to arrange a time to question him about the allegations. They agreed to meet on the following day, but Weiss did not show up. He later was apprehended in Omaha, Nebraska. The sheriff's deputy impounded Rooney's truck and found N.T.'s undershirt. The deputy sent several items to a Bureau of Criminal Apprehension (BCA) laboratory for DNA testing. A forensic scientist found semen on the driver's seat cover and the passenger's seat cover of Rooney's truck. The DNA profile of the semen on the driver's seat cover matched Weiss's DNA. The semen sample from the passenger's seat cover did not match Weiss's DNA.

C. District Court Proceedings

Weiss was charged with three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct for assaulting C.M., one count of attempted first-degree criminal sexual conduct with respect to N.T., and two counts of kidnapping for confining and restraining C.M. and N.T.

Prior to trial, Weiss filed a motion in limine to prevent the state from introducing evidence of four prior felony convictions, including three convictions of criminal sexual conduct and one conviction of theft. The district court ruled that the state could not introduce that evidence in its case-in-chief. The district court, however, noted that if Weiss were to testify, some of the prior criminal-sexual-conduct convictions would be admissible. The case was tried from October 17 to 19, 2006. Weiss did not testify. The jury returned guilty verdicts on all counts.

Four months later, the district court conducted a *Blakely* hearing to find facts relevant to sentencing. *See Blakely v. Washington*, 542 U.S. 296, 310, 124 S. Ct. 2531, 2541 (2004). After the hearing, for which Weiss waived his right to a jury, the district court concluded that there were aggravating factors permitting an upward durational departure from the presumptive guidelines sentence. The district court imposed the maximum sentence permitted by statute, sentencing Weiss to a total of 540 months in prison. Weiss appeals.

D E C I S I O N

I. Admissibility of Evidence of Prior Convictions

Weiss first argues that the district court erred when it ruled that, if he were to testify, the state could impeach his testimony by cross-examining him about his prior convictions of criminal sexual conduct. Appellate courts review rulings on the admissibility of impeachment evidence for an abuse of discretion. *State v. Davis*, 735 N.W.2d 674, 679 (Minn. 2007).

The record reflects that Weiss has five prior felony convictions. The state sought to introduce evidence of four prior convictions: third-degree criminal sexual conduct in 1995, first-degree criminal sexual conduct in 1988, second-degree criminal sexual conduct in 1981, and theft in 1986. The state did not seek to introduce evidence of a second conviction in 1988 for first-degree criminal sexual conduct.

The district court ruled that the state could not "introduc[e] evidence of Defendant's prior crimes during its case-in-chief at the upcoming jury trial." But the district court also ruled that "if the defendant elects to take the witness stand that the prior felony convictions, at least on the two criminal sexual conduct charges will be allowed for impeachment purposes." The district court did not specify which two of the four convictions could be introduced, thereby making it difficult for Weiss to know in advance the evidence that would be admitted and to assess the relative strategic advantages and disadvantages of taking the witness stand. Defense counsel did not seek to clarify the ambiguous ruling, which could have assisted his client in making that strategic decision.

After the state rested, Weiss renewed his motion to prohibit the state from impeaching him with evidence of his prior convictions. After hearing arguments, the district court again denied Weiss's motion, stating, without further explanation, that if Weiss testified, the jury would be informed "of his prior felony record," which suggests that the district court would have permitted the state to introduce all four prior convictions. Weiss did not testify; no evidence concerning his prior convictions was introduced.

This issue is governed by Minn. R. Evid. 609. *Davis*, 735 N.W.2d at 679. The rule provides, in relevant part, as follows:

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Minn. R. Evid. 609. In applying rule 609(a)(1), a district court should consider the following factors in weighing the probative value and the prejudicial effect of impeachment evidence:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

Davis, 735 N.W.2d at 680 (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)).

In this case, the district court did not expressly consider and make findings concerning the *Jones* factors. Nonetheless, it is appropriate for this court to analyze the *Jones* factors to determine whether the district court erred in its ruling. *See State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006) (holding that failure to analyze *Jones* factors on the record was harmless error); *State v. Vanhouse*, 634 N.W.2d 715, 719 (Minn. App. 2001) (considering and upholding district court's ruling on admissibility of prior convictions despite absence of explicit findings), *review denied* (Minn. Dec. 11, 2001). Each factor is addressed in turn.

A. Impeachment Value

"A witness may be impeached with evidence of a prior conviction only if the conviction was a felony or if the conviction involved dishonesty." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006) (citing Minn. R. Evid. 609(a)). Convictions for certain crimes, such as forgery, are "automatically" admissible, if they are less than 10 years old, because the crimes involve dishonesty. *State v. Kruse*, 302 N.W.2d 29, 31 (Minn. 1981).

Certain kinds of theft crimes, such as shoplifting, do not directly involve dishonesty or false statements, while other theft crimes, such as swindle, do directly involve dishonesty or false statements. *State v. Sims*, 526 N.W.2d 201, 202 (Minn. 1994). Weiss was convicted of wrongfully obtaining public assistance by means of "false statements and representations or other fraudulent means." *See* Minn. Stat. § 256.98 (1984). Like forgery and theft by swindle, this act involves dishonesty and false statements. Thus, Weiss's theft conviction has considerable impeachment value.

Criminal sexual conduct, though a felony, is not a crime that directly involves dishonesty or false statement and therefore is admissible "only if the probative value of admitting the conviction outweigh[s] its prejudicial effect." *State v. Bettin*, 295 N.W.2d 542, 545 (Minn. 1980). The supreme court repeatedly has held that evidence of any prior felony conviction, including convictions for crimes that do not involve dishonesty, generally has impeachment value because "it allows the jury to see the whole person and thus to judge better the truth of [the witness's] testimony." *Davis*, 735 N.W.2d at 680 (quotation omitted) (upholding admission of multiple convictions of burglary and drug offenses in trial for first- and second-degree murder); *see also State v. Pendleton*, 725 N.W.2d 717, 729 (Minn. 2007) (upholding admission of evidence of prior convictions of fleeing an officer and making terroristic threats in trial for first-degree murder); *Swanson*, 707 N.W.2d at 656 (upholding admission of evidence of convictions of theft of motor vehicle, assault, criminal vehicular operation, and possession of stolen property in trial for murder, kidnapping, and false imprisonment); *State v. Ihnot*, 575 N.W.2d 581, 588 (Minn. 1998) (upholding ruling of admissibility of prior convictions for criminal sexual

conduct in trial for criminal sexual conduct in which defendant did not testify); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993) (upholding admission of evidence of convictions for check forgery, possession of firearm, attempted murder, and aggravated robbery in trial for first-degree murder).

Weiss argues that the "whole person" rule should be abandoned in light of what Weiss describes as widespread criticism. As an example, Weiss cites Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 Drake L. Rev. 1 (1999). We do not engage the issue because we are "bound to follow Minnesota Supreme Court precedent." *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435, 439-40 (Minn. App. 2005), *review denied* (Minn. June 14, 2005). We note, however, that the "whole person" rule is not a recent development in Minnesota law. *See State v. West*, 285 Minn. 188, 195, 173 N.W.2d 468, 472 (1969) ("if a witness has committed a crime the jury should have the right to decide whether that person might also be untrustworthy or immoral when it comes to testifying before a court, whether it be in his own behalf or as a witness in behalf of someone else"); *see also City of St. Paul v. DiBucci*, 304 Minn. 97, 100, 229 N.W.2d 507, 508 (1975) ("Support for the *West* rule rests on a belief that it aids the jury by allowing the jury to see 'the whole person' and thus to judge better the truth of his testimony.").

In light of the caselaw cited above, Weiss's convictions of both criminal sexual conduct and theft have impeachment value. The theft conviction has impeachment value because it involved dishonesty or a false statement, and the convictions of criminal sexual

conduct allow the jury to see Weiss as a whole person. Therefore, the first factor weighs somewhat in favor of the state.

B. Dates of Prior Convictions and Weiss's Subsequent Conduct

One of the four convictions at issue is analyzed solely under rule 609(a)(1) because Weiss was released from confinement within 10 years of the trial. For the 1996 conviction of third-degree criminal sexual conduct, Weiss was incarcerated until 2003, approximately four years before trial. Three of the four convictions at issue, however, also must be analyzed under rule 609(b) because Weiss was convicted and released from confinement for those offenses more than 10 years before the date of trial in this case.

The three convictions that are outside the 10-year window are admissible if their "probative value . . . supported by specific facts and circumstances substantially outweighs [their] prejudicial effect." *Davis*, 735 N.W.2d at 680 (quoting Minn. R. Evid. 609(b)); *see also Gassler*, 505 N.W.2d 66 n.2. Even when a prior conviction is more than 10 years old, however, additional, more recent convictions "can enhance the probative value of older convictions by placing them within a pattern of lawlessness, indicating that the relevance of the older convictions has not faded with time." *Davis*, 735 N.W.2d at 680. In *Vanhouse*, this court permitted the admission of a 15-year-old criminal-sexual-conduct conviction in the trial of an individual who was accused of sexually assaulting several children. 634 N.W.2d at 719-20. The court concluded that two subsequent driving-after-revocation offenses and a subsequent misdemeanor theft offense constituted "continuing misconduct" that "prolong[ed] the probative value of an otherwise stale conviction." *Id.* at 720.

In this case, even though three of the prior convictions the state proffered are outside the 10-year window, they nonetheless retain probative value. Weiss's conviction in 1996 for criminal sexual conduct occurring in late July 1995 shows that "the relevance of the older convictions has not faded with time." *Davis*, 735 N.W.2d at 680. The relevance of Weiss's prior convictions in the 1980s is apparent when considering the periods of time during which Weiss was incarcerated as compared to the periods of time when he was not incarcerated. The record reflects that, between 1981 and 2005, Weiss was in prison for a total of nearly 14 years and at liberty for a total of approximately 11 years. Yet during that 11-year period of time, he was convicted of felonies no fewer than five times. Since being released from prison in February 1993, Weiss has been re-incarcerated at least four times. Since February 1993, the longest period of time during which he was free was the 25-month period between June 2003 and July 2005, which ended when he engaged in the conduct at issue in this case, which occurred only one day after Weiss completed outpatient treatment on his previous criminal-sexual-conduct conviction. In short, Weiss's record of prior convictions demonstrates a continuous "pattern of lawlessness." *Davis*, 735 N.W.2d at 680 (quotation omitted); *see also Bettin*, 295 N.W.2d at 546 (noting that prior conviction for rape "had not lost any relevance by the passage of time" because defendant was imprisoned for the period between offenses).

The supreme court has stated that, when analyzing the second *Jones* factor, the appropriate measure is "the period of unquestioned good behavior." *Ihnot*, 575 N.W.2d at 585. Thus, this factor weighs somewhat in favor of admitting the prior convictions to impeach Weiss.

C. Similarity

Weiss's prior convictions of criminal sexual conduct are similar to the present conviction. However, this similarity does not preclude their admission into evidence. The supreme court has upheld the admission of a prior conviction for criminal sexual conduct in a trial for criminal sexual conduct, noting that "the facts underlying each charge are sufficiently different to minimize any prejudicial effect of admission of the earlier conviction." *Id.* at 586. In *Ihnot*, the defendant was charged with assaulting a young girl between the ages of five and seven, but the victim in the prior conviction, by contrast, was an adolescent. *Id.* at 583.

In this case, there are both similarities and dissimilarities between the prior convictions and the present case. The ages of Weiss's victims are somewhat similar. The victim in the 1988 conviction was a pre-teen girl, while the victim in the 1995 conviction was approximately the same age as C.M. was in 2005. But there also are distinguishing features. The first sexual assault was committed by physical force, while Weiss did not use (but, rather, threatened) physical force against C.M. and N.T. The second and third sexual assaults were committed against relatives, while Weiss is unrelated to both C.M. and N.T. Each of the prior incidents of Weiss's criminal sexual conduct appears to have occurred in a dwelling, while the incident in this case occurred in a vehicle on a deserted road.

Under the flexible test applied in *Ihnot*, the similarities between the present case and Weiss's prior convictions do not preclude their admission into evidence. *See State v. Frank*, 364 N.W.2d 398, 399 (Minn. 1985) (upholding admission of evidence of two

prior rape convictions in trial for first-degree criminal sexual conduct); *State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (upholding admission of evidence of conviction of fourth-degree criminal sexual conduct in trial for first-degree criminal sexual conduct). Nonetheless, the similarity of this conviction to the prior convictions weighs somewhat against admitting them for impeachment purposes.

D. Importance of Defendant's Testimony and Centrality of Credibility

If a defendant has not testified, an analysis of the importance of the defendant's testimony requires a court to consider what the defendant's testimony would have been if he had testified. *State v. Hochstein*, 623 N.W.2d 617, 624 (Minn. App. 2001). When Weiss moved to prohibit the state from introducing his prior convictions, defense counsel stated that Weiss "would like to get up and testify and give his explanation . . . of what happened or didn't happen, and explain how his DNA got . . . on the front seat." But Weiss's counsel did not make a specific proffer that would have allowed the district court, and would allow this court, to know what Weiss's explanatory testimony would have been.

If a defendant's version of the relevant events is centrally important to the jury's verdict, the importance of the defendant's testimony weighs in favor of excluding the impeachment evidence if, "by admitting it, appellant's account of events would not be heard by the jury." *Gassler*, 505 N.W.2d at 67. If, however, the defendant's credibility would have been the main issue for the jury to consider, this would weigh in favor of admitting the impeachment evidence. *Id.*; *see also Pendleton*, 725 N.W.2d at 729 ("'If credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor

of admission of the prior convictions'" (quoting *Swanson*, 707 N.W.2d at 655)); *Ihnot*, 575 N.W.2d at 587 ("if the issue for the jury narrows to a choice between defendant's credibility and that of one other person then a greater case can be made for admitting the impeachment evidence, because the need for the evidence is greater" (quotation omitted)).

Weiss has not identified any information that was uniquely in his possession such that it could not otherwise have been introduced into evidence by the defense. Weiss presumably would have testified about what occurred inside the cab of the pickup truck. We assume that Weiss would have contradicted the testimony of the two teenagers, in which case his credibility would have been a significant issue. *See id.*; *Pendleton*, 725 N.W.2d at 729; *Ihnot*, 575 N.W.2d at 587; *Gassler*, 505 N.W2d at 67. It is conceivable that Weiss would have testified about meeting another woman at the street dance, but Weiss's attorney had an opportunity to examine Rooney on that subject. We are not aware of any other issue for which Weiss's "account of events would not be heard by the jury." *Gassler*, 505 N.W.2d at 67. Thus, these factors cancel one another out and do not weigh in favor of or against admitting the prior convictions.

E. Analysis and Summary

As stated above, the supreme court has adopted and consistently applied a flexible test with respect to the admission of impeachment evidence. The balance of the five *Jones* factors in this case is not meaningfully different from that of cases in which the supreme court has upheld admission of prior convictions. Here, the first and second factors weigh in favor of admissibility, the third factor weighs against admissibility, and

the fourth and fifth factors cancel each other out. Thus, we conclude that the district court did not abuse its discretion in ruling that some or all of the four prior convictions at issue would have been admissible if Weiss had testified.

II. Sufficiency of the Evidence

Weiss argues that the evidence presented at trial was insufficient to support his convictions. Review of a criminal conviction for sufficiency of the evidence consists of "a painstaking analysis 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 their verdict." *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008) (quotation omitted).

A. Convictions of Criminal Sexual Conduct

Weiss challenges the evidence supporting the convictions of criminal sexual conduct on two grounds: first, that the witness testimony was inconsistent and, second, that there was no physical evidence.

First, Weiss asserts that there are several inconsistencies in the testimony of C.M., N.T., and M.M. "Inconsistencies or conflicts between one witness and another do not necessarily constitute false testimony or serve as a basis for reversal." *State v. Colbert*, 716 N.W.2d 647, 653 (Minn. 2006). Furthermore, inconsistencies in testimony generally are insufficient grounds to reverse a conviction. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). We assume that the fact finder "disbelieved any testimony conflicting with that verdict." *State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008), *petition for cert. filed* (U.S. May 28, 2008) (No. 07-11234); *State v. Leake*, 699 N.W.2d 312, 319 (Minn. 2005). Resolution of inconsistencies among eyewitnesses' testimony is the jury's

exclusive function "because it has the opportunity to observe the demeanor of witnesses and weigh their credibility." *State v. Lloyd*, 345 N.W.2d 240, 245 (Minn. 1984); *see also State v. Mems*, 708 N.W.2d 526, 531 (Minn. 2006).

Many of the purported inconsistencies identified by Weiss are better characterized as testimony that is merely ambiguous or lacking in specifics. For example, Weiss argues that C.M. "testified that she was always in the middle" of the front seat of the pickup truck, while N.T. testified that he was sitting in the middle on the way back from Marshall and that C.M. was sitting on the right side. In fact, the testimony was not clearly contradictory. N.T. testified that C.M. was sitting on his right leg. When asked if she was ever sitting between N.T. and the passenger door, she testified, "I don't know." But the testimony of both C.M. and N.T. is consistent in that, at some point, C.M. was in the middle of the front seat being anally penetrated by Weiss while N.T. sat in the passenger seat.

Weiss also alleges inconsistencies in statements made by M.M. and N.T.'s mother. Both M.M. and N.T.'s mother held the belief, based on what N.T. had told them, that C.M. had performed fellatio on N.T. N.T.'s mother also testified that, on the morning of the incident, C.M. told her that she had not performed fellatio on N.T. But the record reflects that N.T.'s mother told the hospital nurse that C.M. had performed fellatio on N.T. When confronted with the nurse's notes and asked why she would tell the nurse that C.M. had performed fellatio on N.T., N.T.'s mother stated, "I guess I'm not sure. That's what I was told." Regardless, N.T.'s testimony at trial was consistent with C.M.'s testimony that C.M. faked performing fellatio on N.T. in response to Weiss's demand.

Other purported inconsistencies relate to peripheral details that are not determinative of Weiss's guilt or innocence. For example, Weiss points out that N.T. testified that C.M. had asked Weiss if she could go with him to get cigarettes, while C.M. could not remember whether she had asked Weiss to go. This type of minor inconsistency is not a basis for a reversal given our standard of review and the deference that this court must give to the credibility determinations of the jury as trier of fact. *See Lloyd*, 345 N.W.2d at 245; *Pieschke*, 295 N.W.2d at 584. Furthermore, some inconsistency in the testimony of C.M. and N.T. is understandable given their ages at the time of the incident, the time of day and remote location at which it occurred, the traumatizing nature of the assault, and the fact that 15 months had elapsed between the incident and the trial. *See State v. Jackson*, 741 N.W.2d 146, 154 (Minn. App. 2007) (upholding rape conviction notwithstanding inconsistencies in victim's statements, noting that inconsistencies were "relatively minor, especially in light of the traumatic nature of the rape and her other consistent testimony"); *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (upholding convictions of attempted criminal sexual conduct on ground that child victim's testimony, although inconsistent, supported jury's verdict).

Second, Weiss argues that the evidence is insufficient because of a lack of physical evidence. This argument is directed at the convictions relating to C.M., not the conviction of attempted first-degree criminal sexual conduct relating to N.T. Weiss points to the fact that there was no semen on C.M.'s clothes, contrary to C.M.'s statement to N.T. and her statement to investigators that Weiss had ejaculated. The record is unclear, however, as to whether C.M. believed that Weiss had ejaculated, and the record

also is unclear as to whether C.M. fully understood what ejaculation meant. When she was asked if she knew at the time of the assault what the term meant, she testified, "I don't know." When asked at trial whether Weiss ejaculated during the assault, she testified that she did not remember.

Weiss also points out that a medical examination of C.M. did not reveal any evidence of penetration. A physician at the Marshall Regional Medical Center examined C.M. He testified that although C.M. told him that she had been penetrated rectally for about 10 to 20 minutes and that it hurt, he found no bruises, contusions, or abnormalities. Based on seven to ten past rectal examinations performed on patients who had alleged anal penetration, the physician expected to find trauma to C.M.'s rectal area.

The lack of physical evidence about which Weiss complains does not require a reversal of Weiss's convictions of criminal sexual conduct with respect to C.M. The jury was permitted to rely on C.M.'s testimony that she perceived penetration and N.T.'s testimony that he saw Weiss penetrate C.M. In *State v. Wright*, 679 N.W.2d 186 (Minn. App. 2004), *review denied* (Minn. June 29, 2004), this court upheld a conviction for sexual assault even though there was no physical evidence of penetration. The examining nurse testified that there is no physical evidence of vaginal penetration in 90 percent of examinations performed upon allegations of sexual assault. *Id.* at 190. Although the medical testimony there was different from this case, the *Wright* case nevertheless demonstrates that a conviction for sexual assault involving penetration can be upheld notwithstanding a lack of physical evidence of penetration. *See id.* at 190; *In re Welfare of D.D.R.*, 713 N.W.2d 891, 906 (Minn. App. 2006) (noting that evidence of sexual

penetration was "thin" given that there was no evidence of trauma to rectum and no semen found on victim or victim's clothing but declining to reverse on that ground.) Notwithstanding the lack of certain physical evidence on C.M.'s body and clothing, there was other physical evidence that supported the jury's verdict, the most important of which was the presence of Weiss's semen in the cab of Rooney's pickup truck.

Thus, we conclude that "the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach their verdict" on both the convictions of first-degree criminal sexual conduct with respect to C.M. and the conviction of attempted first-degree criminal sexual conduct with respect to N.T. *Caine*, 746 N.W.2d at 356 (quotation omitted).

B. Convictions of Kidnapping

Weiss challenges the evidence supporting the kidnapping convictions on the ground that the caselaw does not allow convictions of both criminal sexual conduct and kidnapping. After the jury's verdicts, Weiss moved for a judgment of acquittal or a new trial on the kidnapping charges, arguing that they were merely incidental to the underlying criminal-sexual-conduct offenses. The district court denied the motion, ruling that the kidnapping crimes were "criminally significant."

The kidnapping statute provides:

> Whoever, for any of the following purposes, confines or removes from one place to another, any person without the person's consent or, if the person is under the age of 16 years, without the consent of the person's parents, . . . is guilty of kidnapping: . . . to facilitate commission of any felony or flight thereafter . . . .

Minn. Stat. § 609.25, subd. 1(2) (2004). Weiss argues that the evidence adduced at trial was insufficient because he did not "confine" or "remove" C.M. and N.T. to the degree necessary to satisfy the statute's requirements. Weiss relies on *State v. Welch*, 675 N.W.2d 615 (Minn. 2004), which is based on *State v. Smith*, 669 N.W.2d 19 (Minn. 2003), *overruled on other grounds by Leake*, 699 N.W.2d at 323. In *Smith*, the supreme court held that the "confinement or removal must be criminally significant in the sense of being more than merely incidental to the underlying crime, in order to justify a separate criminal sentence." 669 N.W.2d at 32. The appellant in that case had blocked a doorway while the victim attempted to leave a room, thereby confining the victim only momentarily. The supreme court held that this confinement was "completely incidental" to the ensuing murder of the victim and, thus, insufficient to support a kidnapping conviction. *Id.* at 33. In *Welch*, the appellant threw the victim to the ground, straddled her, slammed her head to the ground, grabbed her hair, and started to choke her. 675 N.W.2d at 616. The attack occurred outdoors, in an open place within a city park, where there was no shelter or any other structure to which the victim was confined. *Id.* The supreme court reversed the kidnapping conviction because the kidnapping was merely the force and coercion necessary to accomplish the offense of attempted second-degree criminal conduct. *Id.* at 620-21.

In this case, Weiss removed C.M. and N.T. to an isolated location. He confined them inside the pickup truck by telling them that he had a gun and threatening to hurt them or kill them. N.T. contemplated an escape, but was unable to do so. Although the sexual assault lasted 10 to 20 minutes, the removal was longer in duration, lasting from

the time Weiss threatened the teenagers to the time he released them at M.M.'s home. Thus, Weiss's removal and confinement of C.M. and N.T. was not merely incidental to the sexual assaults. *See Turnage v. State*, 708 N.W.2d 535, 545 (Minn. 2006) (upholding kidnapping conviction where victim had not consented to being driven to secluded location before being killed); *State v. Budreau*, 641 N.W.2d 919, 930 (Minn. 2002) (same); *State v. Butterfield*, 555 N.W.2d 526, 532 (Minn. App. 1996) ("Because Butterfield did not spend this entire time assaulting [the victim], the kidnapping was not solely incidental to the commission of the sexual assault."), *review denied* (Minn. Dec. 17, 1996). Therefore, the evidence was sufficient to support the kidnapping convictions.

III. Sentencing

Weiss waived his right to a jury trial on the issue whether there were aggravating factors justifying a departure from the sentencing guidelines. Nonetheless, the state retained the burden of proving aggravating factors beyond a reasonable doubt. *See State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006) (citing *Blakely*, 542 U.S. at 304, 124 S. Ct. at 2531, (2004)). Courts review a departure from the sentencing guidelines for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

At the *Blakely* hearing, a Ramsey County Community Corrections employee, Paul Rydel, who served as Weiss's release supervisor, recited Weiss's five prior felony convictions. Rydel also testified that Weiss had completed an outpatient treatment program on July 2, 2005, the day before the assaults on C.M. and N.T. Rydel further testified that Weiss's conduct relating to the assaults on C.M. and N.T. constituted several violations of the terms of his supervised release, including prohibitions on having

contact with minors, drinking alcohol, and leaving the state without Rydel's permission. Rydel testified that Weiss is a danger to public safety. Weiss testified, acknowledging his five prior felony convictions and admitting that he had drunk alcohol and had fled the state.

Based on the evidence presented at the *Blakely* hearing, the district court found "aggravating factors" that permitted "an upward durational departure" from the guidelines sentence. Before sentencing, Weiss's counsel conceded that the district court could sentence Weiss consecutively for the two criminal-sexual-conduct offenses because there were two victims. The district court imposed the maximum sentence allowed by law, sentencing Weiss to 360 months for the sexual assault of C.M., a concurrent sentence of 300 months for sexually assaulting C.M. while threatening great bodily harm, a consecutive sentence of 180 months for the attempted sexual assault of N.T., and two concurrent sentences of 240 months for the two kidnapping convictions. Weiss raises several objections to his sentence, each of which is addressed in turn.

A. Statutory Basis of Upward Departure

Weiss's primary argument concerning his sentence is that the state failed to prove the aggravating factors justifying the departure from the sentencing guidelines. The sentencing guidelines enumerate several possible "reasons for departure," including that the "offender is a 'patterned sex offender' (See Minnesota Statutes, section 609.108)" and that the "Offender is a 'dangerous offender who commits a third violent crime' (See Minnesota Statutes, section 609.1095, subd. 2)." Minn. Sent. Guidelines II.D.2.b.(7)-(8) (2004). Multiple convictions for criminal sexual conduct may be sentenced

consecutively. *Id.* at II.F.2. The district court based its sentence on both the patterned sex offender statute and the dangerous offender statute, citing Minn. Stat. § 609.108 and § 609.1095, subd. 2 (2004).

1. Dangerous Offender

Weiss argues that the upward departure is not authorized by the dangerous offender statute, which provides that a district court may impose an "aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence" if

> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) the court finds that the offender is a danger to public safety and specifies on the record the basis for the finding, which may include:
>
> > (i) the offender's past criminal behavior, such as the offender's high frequency rate of criminal activity or juvenile adjudications, or long involvement in criminal activity including juvenile adjudications . . . .

Minn. Stat. § 609.1095, subd. 2. "Violent crimes" include first-, second-, and third-degree criminal sexual conduct. *Id.* at subd. 1(d) (2004). The statutory maximum sentence for first-degree criminal sexual conduct is 30 years. Minn. Stat. § 609.342, subd. 2(a) (2004). The statutory maximum sentence for an attempt is one-half the maximum sentence of the completed offense, or, in this case, 15 years. Minn. Stat. § 609.17, subd. 4(2) (2004).

The district court found that Weiss previously had been convicted of two counts of first-degree criminal sexual conduct, one count of second-degree criminal sexual conduct, and one count of third-degree criminal sexual conduct. This finding satisfies subdivision 2(1), the first prong of the dangerous offender statute. The finding is supported by Rydel's testimony concerning Weiss's prior convictions.

The district court also found that Weiss is a "danger to public safety." This finding satisfied subdivision 2(2), the second prong of the dangerous offender statute. The finding is also supported by the testimony of Rydel, who testified that Weiss committed his offenses shortly after his release from a halfway house in June 2005.

Thus, the district court's upward departure from the sentencing guidelines was authorized by the dangerous offender provision of Minn. Stat. § 609.1095, subd. 2.

2. Patterned Sex Offender

Weiss also argues that the upward departure is not authorized by the patterned sex offender statute because the state failed to offer sufficient evidence at the *Blakely* hearing. To impose the statutory maximum sentence under Minn. Stat. § 609.108, a district court must determine, among other things, that the offender needs long-term treatment. *Id.*, subd. 1(a)(3) (2004). That finding "must be based on a professional assessment by an examiner experienced in evaluating sex offenders that concludes that the offender is a patterned sex offender." *Id.*

In anticipation of the state's intent to seek a sentence based on Weiss's status as a patterned sex offender, the district court allowed time for the required assessment to be completed by continuing the *Blakely* hearing from November 21, 2006, to February 13,

2007. Weiss contends, however, that the assessment report was not submitted into evidence at the *Blakely* hearing. The district court record is somewhat unclear. It appears that the 11-page assessment report was filed with the office of the district court administrator on January 2, 2007, and, therefore, presumably was available to the district court judge for review. But there was no reference to the report at the *Blakely* hearing, no indication that the report was marked as an exhibit, and no testimony by either of its authors, Dr. Michelle Barnett and Dr. Kelly Wilson. But we need not resolve this issue because we have concluded that Weiss properly was sentenced under the dangerous offender statute. For the same reason, we need not consider Weiss's argument that the district court's reliance on the assessment report violated his rights under the Confrontation Clause. *See* U.S. Const. amend VI; *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66 (2004); *State v. Rodriguez*, 754 N.W.2d 672, 682, (Minn. 2008) (recognizing Sixth Amendment right to confront accusers at sentencing trial).[1]

3. Application of Sentencing Guidelines

Weiss argues that the district court erred under section II.F. of the sentencing guidelines by imposing the sentence on the first-degree criminal-sexual-conduct conviction before the attempted first-degree criminal-sexual-conduct convictions and by failing to use a criminal history score of zero for the consecutive sentence. It is

[1] In this court, Weiss moved to strike portions of the state's brief that refer to the assessment report. Because we have resolved the issue of Weiss's sentence without relying on the assessment report, the motion to strike is denied as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when court did not rely on material).

unnecessary to reach these arguments, however, because the district court had grounds to depart upward from the presumptive guidelines sentence and did so by imposing the statutory maximum sentence. Weiss has not argued that his sentence is not in proportion to the sentencing guidelines, except by contending that that his sentence unfairly exaggerates the criminality of his conduct, an argument that we analyze below in part III.B. We nonetheless have assured ourselves that the enhanced sentence imposed on Weiss is consistent with the objectives of the dangerous offender statute in light of Weiss's extensive history of criminal-sexual-conduct convictions. *See Neal v. State*, 658 N.W.2d 536, 545 (Minn. 2003). Thus, even if Weiss could establish error with respect to the district court's computation of the presumptive guidelines sentence, Weiss has not suffered any prejudice.

B. Unfair Exaggeration

Weiss next argues that, even if the upward departure were properly based on statutory authority and evidence in the record at the *Blakely* hearing, the resulting 540-month sentence unfairly exaggerates the criminality of his conduct.

"A trial court's decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). A district court may impose "multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct." *State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006). Minnesota courts have not provided a

single test for determining whether a sentence unfairly exaggerates criminality, but our review is "guided by past sentences imposed on other offenders." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). We also keep in mind that a district court judge "sits with a unique perspective on all stages of a case, including sentencing, and . . . is in the best position to evaluate the offender's conduct and weigh sentencing options." *Hough*, 585 N.W.2d at 397.

A review of sentences imposed on other offenders leads to the conclusion that the 45-year sentence imposed on Weiss does not unfairly exaggerate the criminality of his offenses. In *O'Meara v. State*, 679 N.W.2d 334 (Minn. 2004), the supreme court approved the imposition of two consecutive 25-year terms (for a total of 50 years) for second-degree criminal sexual conduct with two minor victims. The court reasoned that O'Meara had abused a position of trust, that he committed the offenses shortly after being released from parole for prior criminal-sexual-conduct convictions, and that he was a serious threat to public safety. *Id.* at 341; *see also State v. Coleman*, 731 N.W.2d 531, 533 (Minn. App. 2007) (approving consecutive sentences totaling 240 months for criminal sexual conduct and burglary), *review denied* (Minn. Aug. 7, 2007); *State v. Cermak*, 442 N.W.2d 822, 823 (Minn. App. 1989) (approving 225-month sentence for five counts of first-degree criminal sexual conduct involving minor victims).

Weiss was convicted of committing, and attempting to commit, sexual acts against two young victims. The present convictions bring Weiss's total number of convictions for criminal sexual conduct to nine, arising from five separate incidents. Weiss committed the present offenses only hours after completing outpatient treatment for a

previous criminal-sexual-conduct conviction. The district court found that Weiss was likely to reoffend. Given the district court judge's unique perspective and opportunity to evaluate the offender's conduct in the context of the trial, *Hough*, 585 N.W.2d at 397, we conclude that the sentence imposed on Weiss does not unfairly exaggerate the criminality of his conduct.

C. Kidnapping Sentences

Weiss argues that the sentences on his kidnapping convictions should be vacated on the ground that the conduct supporting the kidnapping convictions is merely incidental to the conduct supporting the convictions of criminal sexual conduct. In support of his argument, he cites *Welch*, 675 N.W.2d at 621.

The relevant procedural history is somewhat unclear. When Weiss raised the "merely incidental" argument in a post-trial motion for judgment of acquittal, the district court denied the motion, thereby sustaining the kidnapping convictions. At sentencing, however, the district court imposed two 20-year sentences for the kidnapping convictions but made them concurrent to the sentences on the convictions of criminal sexual conduct. At the sentencing hearing, the district court stated:

> I intend to impose the maximum sentence on each of the charges against you.
>
> . . . .
>
> Counts VI and VII, the two kidnapping charges, the court has to find that the kidnappings were incidental to the other charges and so that the court does not feel that it has the authority to impose consecutive sentence[s].
>
> Court will make it clear that if the court felt, or if it would be subsequently determined that those crimes were not

> to be incidental, the court would have intended to do consecutive sentences on the two kidnapping charges also.

In the criminal judgment and warrant of commitment, the district court reiterated that the sentences for the kidnapping convictions are to be served concurrently. Thus, it appears that the district court applied different standards to the two arguments made by Weiss. On the question whether Weiss's kidnapping convictions should stand, the district court found that they were *not* merely incidental, but for purposes of sentencing, the district court found that they *were* merely incidental.

As explained above in part II.B., we have concluded that the district court did not err by denying Weiss's post-trial motion for judgment of acquittal on the kidnapping convictions. Although the district court could have relied on the same reasoning to impose consecutive sentences for the kidnapping convictions, the district court did not do so. Rather, the district court imposed concurrent sentences for the kidnapping convictions. The district court did not abuse its discretion by imposing concurrent sentences for the kidnapping convictions. Because the district court imposed concurrent sentences on the kidnapping convictions, Weiss has no argument for reversal under *Welch*, and he has no other argument that the district court erred by imposing concurrent sentences on the kidnapping convictions.

Affirmed, motion denied.