STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0803

State of Minnesota,
Respondent,

vs.

Tane Alexander Finley,
Appellant.

Filed April 28, 2014
Affirmed in part, reversed in part, and remanded
Hudson, Judge
Concurring in part, dissenting in part
Schellhas, Judge

Wright County District Court
File No. 86-CR-12-507

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Tom Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the sufficiency of the evidence to support his convictions of third-degree and fifth-degree criminal sexual conduct after he engaged in sexual contact with the complainant in a car outside a wedding reception. Because the circumstances proved support the alternative rational hypotheses that appellant did not have reason to know that the complainant was mentally incapacitated or physically helpless and that the contact was consensual, we reverse the third-degree criminal sexual conduct conviction. But because the evidence is sufficient to support the jury's finding, based on the complainant's direct testimony, that she did not consent to sexual contact, we affirm the fifth-degree criminal sexual conduct conviction.

FACTS

The state charged appellant Tane Alexander Finley with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2010), and one count of fifth-degree criminal sexual conduct in violation of Minn. Stat. § 609.3451, subd. 1(1) (2010), after an incident that occurred during a wedding reception in Monticello. The complainant, A.M., testified that she went with her aunt to the wedding, where she drank a beer and about three glasses of wine. She testified that when she was dancing, she suddenly lost coordination, experienced a "black shadow," as though she were going to pass out, had excessive thirst, and left the dance floor. She testified that she returned to a table, where she spoke to appellant, the wedding photographer. A.M. remembered walking outside or down a hallway, but she did not remember what

happened next, except that a security guard eventually lifted her to her feet on a grass lawn.

She was taken to a motel, where she apparently slept and experienced soreness on waking. The next day, A.M. went to a hospital where a nurse from the Sexual Assault Response Team (SARS) performed an examination, which showed that A.M. had two bruises on her inner thigh and a vaginal tear. A.M. testified that she later understood, based on her condition and a conversation with a police detective, that there may have been sexual contact between her and another person. She testified on direct examination that she did not consent to that contact, but on cross-examination, she testified that she did not remember whether she had consented to anything. The SARS nurse testified that A.M. indicated that she had experienced memory loss and loss of muscle and bladder control, which was consistent with ingesting a drug used to facilitate assaults.

A security officer testified that when he had performed rounds outside the wedding facility, he discovered A.M. lying on the ground by the road, with appellant standing next to her. He testified that he asked appellant what was going on, and appellant twice stated that he had everything under control. The officer testified that he told appellant to go inside to find someone to help lift A.M., which appellant agreed to do, but appellant did not return to the scene. He testified that other people came out and helped him assist A.M., who had slurred speech, difficulty walking, and appeared very impaired.

A.M.'s aunt testified that A.M. drank about three glasses of wine at the wedding, but did not appear intoxicated. She testified that when she heard that A.M. needed help,

she went outside and passed appellant, who appeared to be in a hurry. She testified that A.M. appeared obviously impaired and very disoriented, which surprised her. The bartender testified that A.M. bought a couple of drinks from him and seemed "like she had a little buzz on," but was not too intoxicated to serve. A catering employee also testified that she saw appellant and A.M. talking and leaving the reception together and that A.M. appeared "a little buzzed," but coherent and not overly intoxicated. The groom testified that he saw appellant "making out" with A.M. on the lawn, but he did not know what else happened.

A BCA analyst testified that A.M.'s vaginal swab showed a low level of amylase, an enzyme found in high levels in saliva. Another BCA analyst testified that blood and urine samples taken from A.M. the day after the incident at about 4:00 p.m. did not test positive for alcohol or other drugs. He testified that drugs used to facilitate assaults, which mimic some of the symptoms of alcohol intoxication, stay in a person's system for about eight to nine hours.

A Wright County sheriff's detective testified that, when he interviewed A.M. at the hospital, she had disconnected memories of that evening, including meeting appellant, kissing him on the cheek, lying in the grass, and hearing the security officer's voice. He also interviewed appellant, who told him that he and A.M. had been lying in the grass, kissing; that he asked if she wanted to go to his car, where he digitally penetrated her vaginal area and she performed oral sex on him; and that she then began acting strange and became unresponsive. Appellant stated in the interview that he told the security

guard that he would find A.M.'s aunt; he went in to find her, saw that A.M. was receiving help, and then left.

Security videotape from the wedding venue, which was played for the jury, showed that A.M. and appellant walked to a grassy area near the parking lot, A.M. sat or fell on the grass, appellant sat next to her, and a few minutes later, he helped her up and they walked toward parked cars. About 40 minutes later, they reappeared on the videotape, A.M. again sat or fell on the grass, and the security guard arrived, spoke to appellant, and helped A.M. to her feet. The videotape shows that appellant entered the building but returned to his car shortly and left.

The jury convicted appellant of both offenses. The district court sentenced appellant on the third-degree criminal sexual conduct conviction to the presumptive guidelines sentence of 48 months.

D E C I S I O N

This court reviews a claim of insufficient evidence to determine whether the record evidence reasonably supports the jury's verdict that the defendant was guilty beyond a reasonable doubt. *State v. Pratt*, 813 N.W.2d 868, 874 (Minn. 2012). We conduct "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction," is sufficient to allow the jurors to reach a guilty verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted).

I

A conviction of third-degree criminal sexual conduct requires, as relevant here, that an actor "engages in sexual penetration with another person" when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. § 609.344, subd. 1(d). Because the parties agree that sexual contact occurred between appellant and A.M. and that she was not mentally impaired, the state was required to prove beyond a reasonable doubt that appellant knew or had reason to know that she was either mentally incapacitated or physically helpless when the contact occurred. *See id.*

A person is physically helpless if she "is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.341, subd. 9 (2010). A person is mentally incapacitated when that "person[,] under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration." *Id.*, subd. 7 (2010). "A person who is mentally incapacitated or physically helpless . . . cannot consent to a sexual act." *Id.*, subd. 4(b) (2010).

Appellant's third-degree criminal sexual conduct conviction, which required proof beyond a reasonable doubt that he knew or had reason to know that A.M. was incapacitated or helpless, was based on circumstantial evidence. *See Bernhardt v. State*, 684 N.W.2d 465, 477 n.11 (Minn. 2004) (defining circumstantial evidence as "evidence

based on inference and not on personal knowledge or observation and all evidence that is not given by eyewitness testimony") (quotation omitted). When evaluating a conviction based on circumstantial evidence, an appellate court performs a two-step analysis. *Ortega*, 813 N.W.2d at 100. First, we identify the circumstances proved, deferring to the jury's acceptance of proof of those circumstances and its rejection of conflicting evidence. *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010). We then independently examine the reasonableness of all inferences that might be drawn from those circumstances, including inferences consistent with a hypothesis other than guilt. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). At this step, "we give no deference to the fact finder's choice between reasonable inferences." *Id.* (quotation omitted). All of the circumstances proved must be consistent with guilt and inconsistent with any rational hypothesis negating guilt. *Andersen*, 784 N.W.2d at 330.

Here, the state proved the following circumstances: that A.M. became disoriented and experienced lack of coordination and muscle control while dancing; that she walked to a grassy area with appellant, fell or sat on the ground, and went with appellant to his car where sexual contact occurred; that about 40 minutes later, a security guard assisted her, and she appeared significantly impaired; that she had fragmentary memories of speaking to appellant, lying on the grass, and being helped to her feet; that appellant went into the building and a few minutes later, left in his car; and that A.M. had bruising and lacerations in her groin and upper thigh areas after the sexual contact.

Appellant argues that these circumstances proved are not inconsistent with an alternative rational hypothesis that A.M. was not physically helpless or mentally

incapacitated, and that he did not know or have reason to know of such a condition. *See* Minn. Stat. §§ 609.344, subd. 1(d), .341, subds. 7, 9. After thoroughly and carefully reviewing the evidence, we agree. The state was required to prove that, at the time of the sexual contact, appellant knew or had reason to know that A.M. was unable to withdraw or withhold consent, or to communicate nonconsent. *Id.*; *see also State v. Blevins*, 757 N.W.2d 698, 701 (Minn. App. 2008). A.M. testified that she drank a moderate amount of alcohol during the wedding; three witnesses testified that she did not appear overly intoxicated at that time. The security footage from the parking lot shows A.M. walking with appellant to a grassy area and then entering a car, where they remained for about 40 minutes. Although the evidence shows that A.M. appeared significantly impaired when they exited the car, it does not establish when sexual contact occurred within that 40-minute period or what her condition was when the sexual contact occurred. And there is no evidence that appellant administered a date-rape drug to A.M. A.M.'s testimony that she did not consent does not demonstrate that she was unable to communicate nonconsent or that appellant knew or reasonably should have known that she was unable to communicate nonconsent. The circumstances proved are not inconsistent with a rational hypothesis that, at the time of sexual contact, A.M.'s physical condition or mental incapacitation did not render her unable to withhold consent or communicate nonconsent, or that appellant did not have reason to know of such a condition. *See* Minn. Stat. § 609.341, subd. 9.

Because the circumstantial evidence supports an alternative rational hypothesis other than guilt, we conclude that, on the record as submitted, the circumstantial evidence is insufficient to support appellant's conviction of third-degree criminal sexual conduct.

II

Appellant was also convicted of fifth-degree criminal sexual conduct, which required the state to prove beyond a reasonable doubt that he engaged in "nonconsensual sexual contact" with another person. Minn. Stat. § 609.3451, subd. 1(1). Consent is present when "words or overt actions . . . indicat[e] a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean . . . that the complainant failed to resist a particular sexual act." Minn. Stat. § 609.341, subd. 4(a) (2010). A.M. provided direct testimony relating to whether she consented to sexual contact with appellant. *See Bernhardt*, 684 N.W.2d at 477 n.11 (stating that "[d]irect evidence is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption") (quotation omitted). On direct examination, she testified that she did not consent, and on cross-examination, she testified that she did not remember whether she consented. The jury has the right to assess witness credibility and was entitled to believe or disbelieve A.M.'s testimony either in whole or in part. *State v. Eggert*, 358 N.W.2d 156, 162 (Minn. App. 1984). We defer to the jury's credibility determinations. *State v. Scruggs*, 822 N.W.2d 631, 645 (Minn. 2012). Based on the verdict, the jury believed the portion of A.M.'s testimony in which she stated that she did not consent to sexual contact. Accordingly, there is

sufficient evidence to sustain appellant's conviction of fifth-degree criminal sexual conduct and we remand for resentencing on that conviction.

Affirmed in part, reversed in part, and remanded.

SCHELLHAS, Judge (concurring in part, dissenting in part)

I concur with the majority's decision to affirm appellant's conviction of fifth-degree criminal sexual conduct, but I respectfully dissent from the majority's decision to reverse appellant's conviction of third-degree criminal sexual conduct. I disagree with the majority's conclusion that the circumstantial evidence is insufficient to support appellant's conviction of third-degree criminal sexual conduct.

A.M. testified that she had been intoxicated before the day in question, October 1, 2011, and that what she experienced in the past when she was intoxicated was different from what she experienced on October 1. A.M. felt as if she had been drugged on October 1. Whether or not A.M. was drugged on October 1, she could recall only some parts of the night, which included talking with appellant, the wedding photographer, who was standing near A.M.'s table; having "a flash of walking down [a] hallway and out" with appellant, although she could not remember why; and waking up while lying on the grass where appellant left her.

My perception differs from the majority's perception of what is shown on a security videotape. Although the videotape is jerky and has limited definition, I perceive that appellant had his arm around A.M. as they walked to a grassy area near the parking lot. Whether appellant was holding up A.M. to facilitate her mobility seems possible but difficult to perceive. Once appellant and A.M. arrive at the grassy area, I perceive that A.M. fell to the ground; I do not perceive that she "sat," a possibility noted by the majority. I further perceive that within a short time, appellant lifted or dragged A.M. to her feet, having to attempt the act more than once. I recognize that, if the jury's

perception of the videotape was the same as the majority's, the jury might have been persuaded to acquit appellant.

But the security videotape was direct evidence of A.M.'s condition as appellant accompanied her through the parking lot and, although our perspective on evidence may differ substantially from the jury's, this court's role on appeal is not to perceive the videotape and determine the weight to give it. *See State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (noting that appellate courts do not weigh evidence or assess witness credibility, these tasks being within exclusive province of jury). This court "cannot retry the facts, but must take the view of the evidence most favorable to the state and must assume that the jury believed the state's witnesses and disbelieved any contradictory evidence." *Id.* We review the record only to decide whether, if the evidence supporting the conviction was believed by the jury, it could support the convictions as a matter of law. *Id.* In this case, any weaknesses or inconsistencies in the evidence that might have persuaded the jury to acquit appellant, did not persuade the jury to acquit.

"If a conviction, or a single element of a criminal offense, is based solely on circumstantial evidence, such evidence, viewed as a whole, must be consistent with guilt and inconsistent with any other rational hypothesis except that of guilt." *State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014). "If the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt, then the evidence is sufficient to sustain the conviction." *Id.* "[A] complainant's testimony need not be corroborated in a prosecution for criminal sexual conduct." *State v. Borg*, 780 N.W.2d 8, 14 (Minn. App. 2010) (concluding that, although the record was "thin,"

because credibility was an overriding consideration, sufficient evidence supported appellant's conviction of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2002)), *rev'd on other grounds*, 806 N.W.2d 535 (Minn. 2011); Minn. Stat. § 609.347, subd. 1 (2010) (providing that testimony of victim in a criminal sexual conduct case need not be corroborated). In deference to the jury in this case, we must conclude that the jury believed A.M.'s testimony and disbelieved any witnesses whose testimony conflicted with A.M.'s. *See Borg*, 780 N.W.2d at 14. Like in *Borg*, A.M. did not remember having sex with appellant and did not remember consenting to having sex with appellant. *See id.* "If believed this evidence is, though uncorroborated, sufficient to sustain appellant's conviction." *Id.*

The jury was in the best position to evaluate the circumstantial evidence, and we should give the jury due deference. *See Fairbanks*, 842 N.W.2d at 307 ("A jury is in the best position to evaluate circumstantial evidence, and its verdict is entitled to due deference."). Based on all the evidence in this case, I conclude that the only reasonable, rational inference was that A.M. was physically helpless under Minn. Stat. § 609.344, subd. 1(d) (2010), when appellant engaged in sexual conduct with her, and that appellant knew or had reason to know of A.M.'s condition. I further conclude that the circumstantial evidence was sufficient to support appellant's conviction of third-degree criminal sexual conduct, and I would affirm both convictions.