STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1956

State of Minnesota,
Respondent,

vs.

Michael Paul Kahn,
Appellant

Filed November 13, 2017
Affirmed
Worke, Judge

Olmsted County District Court
File No. 55-CR-15-4618

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi Lynn Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Johnson, Judge.

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

WORKE, Judge

Appellant challenges his convictions of third-degree criminal sexual conduct and first-degree burglary, arguing that the district court erred by instructing the jury that it could

not consider voluntary intoxication as a defense, the evidence is insufficient to sustain his criminal-sexual-conduct conviction, and the district court abused its discretion by sentencing him to an upward departure. We affirm.

FACTS

On the evening of July 4, 2015, M.B. made herself a drink with "a lot of vodka," and went to her neighbor, T.K.'s, for a party. Appellant Michael Paul Kahn, with whom M.B. was acquainted, was at the party. Throughout the night, M.B. "smoked a little pot" and had probably three drinks similar to her first drink, "[i]f not stronger."

Around 11:30 p.m., M.B. went home and began to feel "really drunk." M.B. undressed and passed out on her bed. The next thing that M.B. remembered is "kind of feeling pressure or force on the back half of [her] body." M.B. "could feel like there was something inside of [her vagina]." She thought she heard someone say, "I'm done or almost done" before she blacked out.

M.B. woke up on her bedroom floor; she saw Kahn, undressed, sleeping on her bed. M.B. crawled out of her bedroom, dressed, and went to work. M.B. attempted to work, but pain in her legs concerned her and she went home. Kahn was standing outside T.K.'s home. M.B. told Kahn that she was "really confused" and did not know what happened last night. M.B. also expressed concern about her boyfriend. Kahn replied, "Well, what do you want me to say, all I can say [is] it's my fault."

The following morning, M.B. went to the hospital and reported that she had been sexually assaulted. M.B. reported to the sexual assault nurse examiner (SANE) that she had woken up in the middle of the night "to someone on top of her, assaulting her, having

sex with her." M.B. reported feeling pain on her hips, both sides, and in her vaginal area. The SANE saw "redness in [M.B.'s] vaginal area," indicative of "trauma or irritation." The SANE collected swabs from M.B. for DNA testing. Although there was male DNA detected on vaginal and perineal swabs, the levels were too low to develop information on its source.

After M.B. reported the sexual assault to police, she engaged in a covert call with Kahn, during which she asked Kahn "if he at least wore a condom to protect [her] and he said yes."

A jury found Kahn guilty of third-degree criminal sexual conduct and first-degree burglary. Because two aggravating factors existed, the district court imposed an upward departure, sentencing Kahn to 130 months in prison. This appeal followed.

D E C I S I O N

Jury instruction

Kahn first argues that the district court erred when it instructed the jury not to consider voluntary intoxication as a defense. Because Kahn did not object to the district court's jury instructions, this court reviews the alleged error only for plain error. *See State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012). Under the plain-error test, this court considers whether the district court's instructions contained "an (1) error (2) that was plain and (3) that affected the defendant's substantial rights." *Id.* If all three of these prongs are established, this court must determine whether it is necessary to "address the error to ensure [the] fairness and the integrity of the judicial proceedings." *Id.* (quotation omitted). If any one of the prongs is not satisfied, this court need not address the remaining prongs.

Montanaro v. State, 802 N.W.2d 726, 732 (Minn. 2011). Kahn fails on the first prong because the district court did not err in instructing the jury.

"If the crime charged has a specific intent as an element and if intoxication is offered by the defendant as an explanation for his actions, then the court must give an instruction on intoxication." *State v. Lindahl*, 309 N.W.2d 763, 766 (Minn. 1981). To receive a requested voluntary intoxication jury instruction: (1) the defendant must be charged with a specific-intent crime; (2) there must be evidence sufficient to support a jury finding, by a preponderance of the evidence, that the defendant was intoxicated; and (3) the defendant must offer intoxication as an explanation for his actions. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001).

Here, Kahn's trial attorney specifically stated that Kahn was not raising a voluntary-intoxication defense.[1] Kahn testified that M.B. sat by him and was "flirting" with him at the party. Kahn testified that when M.B. left the party, he walked to her home because she had shown interest in him. Kahn testified that when he knocked on M.B.'s door and she failed to respond, he walked into her home and entered her bedroom where she was lying on the bed. Kahn testified that he said M.B.'s name, she smiled at him, he asked her if she wanted him to come back, and she said "sure." Kahn testified that he went back to the party to clean up and then returned to M.B.'s bedroom. Kahn testified that he rubbed M.B.'s back, laid on the bed, and felt M.B. put her arm around him. Kahn claimed that the

[1] Kahn argues that the district court erred in giving the jury instruction because third-degree criminal sexual conduct—impaired or helpless victim—is a specific intent crime whereby voluntary intoxication can be considered by the jury. We do not need to address the intent element because Kahn failed to offer intoxication to explain his actions.

alcohol started to "catch up" with him and he felt "woozy" and fell asleep. Kahn testified that the next thing he remembered was waking up naked and M.B. was gone. Kahn's explanation for his actions was more aligned with M.B. consenting to the sexual conduct, rather than his intoxication.

Additionally, while there was evidence that Kahn had been drinking alcohol at the party, it was insufficient to support a jury finding by a preponderance of the evidence that Kahn was intoxicated. There was testimony that Kahn appeared to be "buzzed," but not "belligerently drunk," "stumbling around," or intoxicated to the "point of [i]ncoherenc[e]." Kahn testified that he "wasn't intoxicated," but had "a little buzz going." The only evidence that Kahn was intoxicated was his testimony that he felt the alcohol "catch up" to him and he felt "woozy." He also claimed that he had no recollection of sexual activity with M.B. and "would not know" if he had intercourse with her. This evidence is not sufficient for the jury to find, by a preponderance of the evidence, that Kahn was intoxicated.

Because there was evidence that Kahn had been drinking alcohol, the district court instructed the jury: "It is not a defense to a crime that the defendant was intoxicated at the time of the act if the defendant voluntarily became intoxicated." "District courts are allowed considerable latitude in the selection of language for jury instructions." *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002). Jury instructions must "fairly and adequately explain the law of the case." *Id.* Because Kahn was not offering evidence of intoxication as a defense but rather to explain why he could not remember what happened, this jury instruction fairly explained the law of the case. Therefore, the district court did not plainly

err in instructing the jury that it could not consider Kahn's voluntary intoxication as a defense.

Sufficiency of the evidence

Kahn next challenges the sufficiency of the evidence. "Whe[n] there is a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the verdict to determine if the evidence was sufficient to permit the jury to reach the verdict it did." *State v. Ford*, 539 N.W.2d 214, 225 (Minn. 1995). This court assumes that the jury believed the state's witnesses and disbelieved contrary evidence. *State v. Huss*, 506 N.W.2d 290, 292 (Minn. 1993).

Kahn argues that the state failed to prove that he knew or had reason to know that M.B. was physically helpless or impaired. *See* Minn. Stat. § 609.344, subd. 1(d) (2014) (a person is guilty of third-degree criminal sexual conduct if he engages in sexual penetration with another person knowing or having reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless).

Because the disputed issue is what Kahn knew, this court applies the circumstantial-evidence standard. *See State v. Al-Naseer*, 788 N.W.2d 469, 474 (Minn. 2010); *State v. Ali*, 775 N.W.2d 914, 919 (Minn. App. 2009) (stating that knowledge is generally proved by circumstantial evidence), *review denied* (Minn. Feb. 16, 2010). While a conviction based entirely on circumstantial evidence merits stricter scrutiny, "circumstantial evidence is entitled to the same weight as direct evidence." *State v. Bauer*, 598 N.W.2d 352, 370 (Minn. 1999). The circumstantial-evidence standard requires a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, this court must "identify the

circumstances proved." *Id.* In doing so, this court "defer[s] to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the [s]tate." *Id.* at 598-99 (quotations omitted). Next, this court must "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted). This court does not give deference to a jury's choice between reasonable inferences. *Id.*

Here, the circumstances proved regarding Kahn's knowledge that M.B. was physically helpless include: (1) M.B. and Kahn spent time together at the party; (2) M.B. drank alcohol and "smoked a little pot," at the party; (3) M.B. went home and passed out on her bed; (4) Kahn entered M.B.'s bedroom and saw M.B. lying on her bed; and (5) M.B. felt "pressure or force on the back half of [her] body, felt "something inside of [her vagina], and heard someone say "I'm done or almost done" before she blacked out.

These circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt. Kahn saw M.B. drinking alcohol and smoking marijuana; M.B. did not invite Kahn to her home; Kahn saw M.B. passed out on her bed; Kahn was aware that M.B. woke up during the sexual assault and he told her that he was almost done; and the next morning, M.B. said that she was confused and did not know what happened. The only rational hypothesis deduced from these circumstances is that Kahn engaged in sexual penetration with M.B. knowing that she was passed out.

Kahn also argues that the state failed to prove sexual penetration. *See* Minn. Stat. § 609.344, subd. 1(d). When reviewing sufficiency-of-the-evidence claims, "it is for the jury, not [a reviewing] court, to determine the credibility and weight to be given to the

testimony of witnesses." *State v. Pendleton*, 706 N.W.2d 500, 512 (Minn. 2005). This court "assume[s] that the jury believed the witnesses whose testimony supports the verdict[,] that the jury did not believe evidence to the contrary[,] [and that the] jury properly decides which evidence is credible." *Id.* (citations omitted).

M.B. testified that she felt "pressure or force on the back half of [her] body" and "could feel like there was something inside of [her vagina]." M.B. testified that she thought she heard someone say "I'm done or almost done." M.B. reported to the SANE that she had woken up in the middle of the night "to someone on top of her, assaulting her, having sex with her." M.B. reported feeling pain in her vaginal area. The SANE saw "redness in the vaginal area," indicative of "trauma or irritation." There was also male DNA detected on vaginal and perineal swabs. Moreover, M.B. asked Kahn "if he at least wore a condom to protect [her] and he said yes." Kahn disputed that he heard M.B. ask him if he wore a condom and replied "yes," only to whether he protected her. But we assume that the jury did not believe Kahn's testimony. *See Pendleton*, 706 N.W.2d at 512 (stating that this court "assume[s] that the jury . . . did not believe evidence" contrary to the verdict). Thus, the evidence is sufficient to prove sexual penetration.

Sentence

Finally, Kahn challenges his upward departure. A district court must impose the presumptive guidelines sentence unless "identifiable, substantial, and compelling circumstances" warrant departure. Minn. Sent. Guidelines 2.D.1 (2014). Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more serious than that typically involved in the commission of the offense. *State v.*

Edwards, 774 N.W.2d 596, 601 (Minn. 2009). We review the district court's imposition of an upward departure for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But we review de novo the permissibility of the reasons for an upward departure. *Id.*

Here, the district court imposed an upward departure because Kahn has a prior criminal-sexual-conduct conviction and the jury found that Kahn invaded M.B.'s zone of privacy. Kahn concedes that "the aggravating factors were consistent with the statutory requirements." Kahn argues, however, that the district court failed to explain why the factors made his conduct significantly more serious than a typical third-degree criminal-sexual-conduct offense. But the district court did explain the sentence. *See State v. Rourke*, 773 N.W.2d 913, 919 (Minn. 2009) (stating two requirements for an upward departure: "a factual finding that there exist one or more circumstances not reflected in the guilty verdict," and "an explanation by the district court as to why those circumstances create a substantial and compelling reason" to depart). At the sentencing hearing, the district court noted that M.B. was "truly victimized," and that Kahn had not taken responsibility, blamed the victim, blamed others, and tried to justify his actions and dismiss what happened.

Kahn also argues that his sentence unfairly exaggerates his criminality. However, the district court considered Kahn's criminality when it did not grant the state's request for a 180-month sentence and instead imposed a 130-month sentence, which is double the lower-range sentence of 65 months in prison. The district court did not abuse its discretion by imposing an upward departure.

Affirmed.