**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1281**

State of Minnesota,
Respondent,

vs.

Francios Momolu Khalil,
Appellant.

**Filed July 27, 2020**
**Affirmed**
**Frisch, Judge**
**Concurring in part, dissenting in part, Johnson, Judge**

Hennepin County District Court
File No. 27-CR-18-4880

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Frisch, Judge.

**S Y L L A B U S**

Under Minn. Stat. § 609.341, subd. 7 (2016), a jury may find a complainant "mentally incapacitated" when that person is voluntarily under the influence of alcohol or narcotics and therefore lacks the judgment to give a reasoned consent to sexual contact.

## O P I N I O N

**FRISCH**, Judge

In this direct appeal from final judgment of conviction and sentence for third-degree criminal sexual conduct, appellant Francois Momolu Khalil argues that the district court erred by (1) ruling that the state could impeach him with evidence of his probationary status and prior felony conviction if he chose to testify at trial, (2) denying several discovery requests, (3) instructing the jury that a complainant may be "mentally incapacitated" through the voluntary consumption of alcohol or narcotics, and (4) denying his motion for a downward dispositional departure from the sentencing guidelines. We affirm.

## FACTS

The state charged Khalil with multiple counts of criminal sexual conduct arising from a May 14, 2017 incident. A trial established the following.

Late in the evening on May 13, 2017, complainant J.S. consumed multiple alcoholic beverages and prescription Vicodin, a narcotic. J.S., who was 20 years old at the time, went to a bar in Minneapolis with her friend, S.L. J.S. consumed more alcohol during the drive to the bar. The bouncer denied J.S. entry, recognizing that J.S. was underage and appeared intoxicated.

Khalil, Khalil's cousin, and another man approached J.S. and S.L. outside the bar and invited them to a party. J.S. and S.L. agreed, and Khalil drove everyone to a residence. When they arrived, J.S. and S.L. discovered that there was no party.

J.S. and S.L. entered the residence. S.L. testified that she saw J.S. immediately lie down on a couch and fall asleep shortly thereafter. J.S. testified that she remembers a red

leather couch and cats, but she has no recollection of falling asleep on the couch. S.L. observed Khalil sit next to J.S. on the couch, slowly move behind J.S., and also fall asleep. S.L. testified that J.S. was heavily intoxicated. Khalil's cousin testified that J.S. was sitting upright with Khalil on the couch and talking with the group for some time after they first arrived and that they later "passed out" on the couch together.

At some point in the middle of the night, J.S. testified that she woke up, face down, with Khalil on top of her, and felt a penis penetrating her vagina. J.S. told Khalil, "No, I don't want to." Khalil replied, "But you're so hot and you turn me on." J.S. then lost consciousness again.

Also at some point in the middle of the night, S.L. testified that she attempted to awaken J.S. so they could leave the house but that she was unable to awaken J.S.

At approximately 8:00 a.m., J.S. woke up, saw her shorts around her ankles, and immediately recalled the events of the evening. J.S. located S.L., called for a ride, and left the house. During the ride, J.S. told S.L. that she had been raped.

Thereafter, J.S. reported the incident to police. During his police interview, Khalil stated that he did not remember J.S. and never had sex with her.

The state charged Khalil with two counts of first-degree criminal sexual conduct and two counts of third-degree criminal sexual conduct. Two of the charges against Khalil—count 1 (first degree) and count 3 (third degree)—involve sexual activity with a person when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn. Stat. §§ 609.342, subd. 1(e)(ii), .344, subd. 1(d) (2016).

Before trial, Khalil sought discovery of (1) a telephone call J.S. received as she was standing outside of the bar, (2) medical records of J.S. predating the incident, and (3) copies of photographs of J.S.'s vagina from the sexual-assault examination. The district court denied these requests in part. Also before trial, the state moved for an order allowing impeachment of Khalil with a prior felony theft conviction and his probationary status should Khalil choose to testify at trial. The district court granted the motion. Khalil did not testify at trial.

At trial, Khalil presented evidence that he did not administer drugs or alcohol to J.S.; rather, J.S. voluntarily became intoxicated. During deliberations, the jury asked the district court whether J.S. could be "mentally incapacitated" when she voluntarily consumed alcohol and other substances. Khalil argued that J.S. could not have been "mentally incapacitated" unless she consumed the alcohol and prescription narcotics against her will. The district court disagreed and instructed the jury that J.S. could be "mentally incapacitated" even if she voluntarily consumed the alcohol and narcotics.

The jury found Khalil guilty of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless person in violation of Minn. Stat. § 609.344, subd. 1(d).

Khalil then requested probation instead of a prison sentence, which would have been a downward dispositional departure from the Minnesota Sentencing Guidelines. The district court denied the motion and imposed the presumptive guidelines sentence of 62 months in prison. This appeal follows.

## ISSUES

I. Did the district court abuse its discretion by deciding that the state could impeach Khalil with his prior felony conviction and probationary status if he chose to testify at trial?

II. Did the district court err by denying Khalil's discovery requests?

III. Does the phrase "mentally incapacitated" under Minn. Stat. § 609.341, subd. 7, include a person who is voluntarily under the influence of alcohol or narcotics and "lacks the judgment to give a reasoned consent to sexual contact or sexual penetration?"

IV. Did the district court abuse its discretion in denying Khalil's motion for a downward dispositional departure?

## ANALYSIS

### I. The district court did not abuse its discretion by deciding that the state may impeach Khalil with his prior felony conviction and probationary status if he chose to testify at trial.

Khalil argues that the district court abused its discretion by ruling that the state may offer as impeachment evidence his prior felony theft conviction and accompanying probationary status. Prior-conviction evidence is admissible for impeachment purposes if the crime is a felony "and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1). We "will not reverse a district court's ruling on the impeachment of a defendant with his prior conviction absent an abuse of discretion." *State v. Zornes*, 831 N.W.2d 609, 626 (Minn. 2013). A district court must consider the following factors, commonly known as the *Jones* factors, in determining whether to admit prior-conviction 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; (4) the importance of the

defendant's testimony; and (5) the centrality of the credibility issue.'" *State v. Reek*, 942 N.W.2d 148, 162 (Minn. 2020) (quoting *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978)). "[I]t is error for a district court to fail to make a record of its consideration of the *Jones* factors, though the error is harmless if it is nonetheless clear that it was not an abuse of discretion to admit evidence of the convictions." *State v. Davis*, 735 N.W.2d 674, 680 (Minn. 2007).

In making its ruling, the district court considered each of the five *Jones* factors. First, the district court recognized that a prior crime has impeachment value when it assists "the jury to see the 'whole person.'" *Reek*, 942 N.W.2d at 162 (stating that a prior crime has impeachment value when it "assists the jury to see the 'whole person' and therefore to better judge the truth of the witness's testimony"). Consistent with Minnesota law, the district court found that admission of the prior felony theft conviction "is relevant to a jury's analysis of a defendant's credibility," and "a felony conviction helps the jury see the whole person." We have previously declined to find an abuse of discretion when a district court found that a felony theft conviction would aid the jury in assessing witness credibility. *State v. Skinner*, 450 N.W.2d 648, 653 (Minn. App. 1990), *review denied* (Minn. Feb. 28, 1990). We have also held that the probationary status of a defendant is admissible to show a motive to lie. *State v. Johnson*, 699 N.W.2d 335, 338-39 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). Second, the district court found that the then-recent felony conviction and accompanying probationary status favored admission. Third, the district court found that the prior felony theft conviction was dissimilar to the charged offenses, again favoring admission. "[T]he greater the similarity, the greater the reason for not

permitting use of the prior crime to impeach." *Jones*, 271 N.W.2d at 538. Regarding the fourth and fifth factors, the district court recognized the importance of testimony and the significance of witness credibility in the matter, and concluded that both factors favor admission. Further, the district court offered to instruct the jury on the limited scope of permissible inferences from the impeachment evidence. *See State v. Flemino*, 721 N.W.2d 326, 329 (Minn. App. 2006) (recognizing that cautionary instructions diminish the risk of a jury misusing impeachment evidence).

Khalil argues that the district court abused its discretion in combining its analysis of the fourth and fifth *Jones* factors and that the importance of his testimony weighs in favor of excluding impeachment evidence. In support of this argument, Khalil relies on two law review articles critical of the application of the *Jones* factors under established Minnesota law. *See* Edward E. Gainor, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 Geo. Wash. L. Rev. 762 (1990); *see also* Ted Sampsell-Jones, *Minnesota's Distortion of Rule 609*, 31 Hamline L. Rev. 405 (2008). But the supreme court has conclusively established that "[i]f credibility is a central issue in the case, the fourth and fifth *Jones* factors weigh in favor of admission of the prior convictions." *State v. Swanson*, 707 N.W.2d 645, 655 (Minn. 2006). "[W]e are not in position to overturn established supreme court precedent." *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998).

Moreover, Khalil failed to proffer evidence to the district court establishing the importance of his testimony. Khalil presented evidence in support of his position at trial but did not testify and made no offer of proof as to what his testimony would have been.

Although his testimony could theoretically have been important, which may weigh against the introduction of impeachment evidence, his failure to make an offer of proof as to his proposed testimony limits our ability to assess its importance on review. *Reek*, 942 N.W.2d at 163-64.

Accordingly, the district court did not abuse its discretion by admitting impeachment evidence.

## II. The district court did not err by denying Khalil's discovery requests.

In his pro se supplemental brief, Khalil argues that the district court abused its discretion by denying several discovery requests and in doing so, ultimately deprived him of a fair trial.

"Criminal defendants have a broad right to discovery in order to prepare and present a defense." *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012). A district court may order disclosure of material that is not subject to disclosure without a court order upon a showing that the requested "information may relate to the guilt or innocence of the defendant or negate guilt or reduce the culpability of the defendant as to the offense charged." Minn. R. Crim. P. 9.01, subd. 2(3). We normally do not overturn discovery orders absent clear abuse of discretion. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009).

Khalil first argues that the district court abused its discretion by denying his request to discover phone records related to a phone call J.S. received when standing outside of the bar. The district court denied the request, finding that the requested information was "too distant from the critical question of the victim's state of mind at the time of the offense"

and citing the existence of ample state-of-mind evidence closer in time to the incident. We see no abuse of discretion in the district court's ruling, as Khalil failed to demonstrate how a phone call many hours before the offense and at a different location was probative of J.S.'s state of mind at the time of the incident or otherwise relates to his guilt, innocence, or culpability.

Khalil next argues that the district court abused its discretion by denying his request to inspect J.S.'s medical records related to procedures occurring before the incident and by denying Khalil and his expert the opportunity to review in a location of their choosing photos of J.S.'s vagina. Khalil claims this discovery might show that any physical injury to J.S. was not attributable to Khalil. We need not decide whether the district court abused its discretion, because the jury acquitted Khalil of all charges involving either pain or physical injury. Because information related to the source of pain or physical injury is unrelated to the third-degree criminal-sexual-conduct offense for which the jury convicted Khalil, any error by the district court in its discovery rulings was harmless beyond a reasonable doubt. *See State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) ("An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." (quotation omitted)).

## III. The district court properly instructed the jury.

In his pro se supplemental brief, Khalil challenges the district court's instruction regarding the meaning of "mentally incapacitated." It is criminal misconduct to engage in sexual contact with a person when "the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." Minn.

Stat. §§ 609.342, subd. 1(e)(ii), .344, subd. 1(d). A person is mentally incapacitated when "under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement." Minn. Stat. § 609.341, subd. 7.

During deliberation, the jury wrote a note to the district court inquiring about the "element" of the crime that requires the complainant to be "mentally incapacitated" or "physically helpless."[1] When the district court requested clarification, the jury returned a second note asking:

> [Is it] correct to read the instruction in one of two ways: either "mentally incapacitated" means (1) J.S. was under the influence of alcohol, narcotics, or another substance she "administered herself" *or* (2) only if she was under the influence of alcohol, narcotics, or another substance "none of which had been administered with her knowledge."

Over Khalil's objection, the district court instructed the jury as follows:

> What I do understand is that you've . . . presented two potential interpretations of that particular element . . . . *One, whether or not you can be mentally incapacitated following consumption of alcohol that one administers to one's self or narcotics that one administers to one's self* or separately something else that's administered without someone's agreement. So there's the two that can be voluntary and still constitute mental incapacitation, or the third. *The other interpretation that is within number two is that do all of those substances have to be administered without the person's knowledge in order to constitute mental impairment.* And what I have determined is that first interpretation is correct.

[1] Although the jury specifically asked about count 1, which charged first-degree criminal sexual conduct and for which Khalil was acquitted, the substance of the question regarding the definition of mentally incapacitated equally applies to count 3, third-degree criminal sexual conduct, of which Khalil was convicted. *See* Minn. Stat. § 609.341, subds. 1, 7 (2016) (defining "mentally incapacitated" for purposes of Minn. Stat. §§ 609.341-.351 (2016)).

(Emphasis added.) The district court then circled the first choice listed by the jury, "J.S. was under the influence of alcohol, narcotics, or another substance she 'administered herself,'" and returned the note.

Khalil argues that the district court should have instructed the jury that in order for the complainant to be "mentally incapacitated" under the statute, any substance, *including alcohol or a narcotic*, must be administered without the complainant's knowledge or agreement.[2]

We review jury instructions for abuse of discretion. *State v. Koppi*, 798 N.W.2d 358, 361 (Minn. 2011). A district court abuses its discretion "if it fails to properly instruct the jury on all elements of the offense charged." *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016). A district court "may, in [its] discretion, give additional instructions in response to a jury's question on any point of law." *State v. Murphy*, 380 N.W.2d 766, 772 (Minn. 1986). Whether jury instructions correctly state the law presents a question of statutory interpretation reviewed de novo. *State v. Davis*, 864 N.W.2d 171, 178 (Minn. 2015).

---

[2] The state asserts that even if the district court misinterpreted the meaning of "mentally incapacitated," any such error was harmless because the jury may have found that J.S. was physically helpless. We disagree. When it is impossible to determine whether a jury relied on a theory based upon an incorrect statement of the law, we "cannot conclude beyond a reasonable doubt that the improper instruction did not have a significant impact on the verdict." *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311 (Minn. 2012). The jury specifically inquired about mental incapacitation. Because it is not possible to determine which theory the jury relied upon in reaching its verdict, we must determine whether the district court properly instructed the jury regarding the definition of "mentally incapacitated."

### A. The plain language of the statute supports the jury instruction.

The interpretive question posed by Khalil is whether the qualifying phrase, "administered to that person without the person's agreement," modifies only the immediately preceding clause ("any other substance") or all of the preceding clauses (including "alcohol," "a narcotic," or "anesthetic"). In effect, Khalil argues for an interpretation whereby a person must be administered alcohol, a narcotic, or anesthetic *without that person's agreement* before that person may be considered mentally incapacitated. We reject Khalil's reading of the statute.

The first step in statutory interpretation is to determine whether the language in the statute is ambiguous. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). A statute is ambiguous if it is subject to more than one reasonable interpretation. *Id.* We construe words and phrases "according to rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08(1) (2018); *see In re Estate of Butler*, 803 N.W.2d 393, 397 (Minn. 2011). We do not examine statutory language in isolation; rather, we read and interpret all provisions in the statute as a whole. *State v. Riggs*, 865 N.W.2d 679, 683 (Minn. 2015). "If the legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and we apply the statute's plain meaning." *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019) (quotation omitted).

Khalil was convicted of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d), which required the jury to find two elements: (1) that Khalil engaged in sexual penetration with J.S. and (2) that Khalil "kn[ew] or ha[d] reason to know" that

J.S. was either mentally impaired, mentally incapacitated, or physically helpless. "A person who is mentally incapacitated or physically helpless as defined by [section 609.341] cannot consent to a sexual act." Minn. Stat. § 609.341, subd. 4(b) (2016) (defining "consent"). "'Mentally incapacitated' means that a 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." Minn. Stat. § 609.341, subd. 7.

We first consider the text of the statute. *See Stay*, 935 N.W.2d at 431 (referring first to the text of a statute to determine whether a modifier applied to an earlier clause). The modifier "administered to that person without the person's agreement" does not logically apply to the entire series describing how someone may become incapacitated. The word "administer" means "[t]o give or apply in a formal way"; "[t]o apply as a remedy"; or "[t]o mete out; dispense." *The American Heritage Dictionary* 79 (2d college ed. 1982).[3] In common nomenclature, alcohol is not a substance that is "administered" to a person, either with or without agreement. Alcohol is a substance that is commonly consumed through the volitional acts of drinking and swallowing. It is difficult to conceive of a circumstance in which a complainant may become so intoxicated to the point of lacking "the judgment to give a reasoned consent" through the involuntary administration of alcohol. By contrast,

[3] The legislature last amended the definition of "mentally incapacitated" in 1987. *See* 1987 Minn. Laws ch. 198, § 1, at 442-43. The amendment was enacted, in part to "clarify[] the definition of 'mentally incapacitated.'" *Id.* Accordingly, the 1987 definition is most relevant.

it is not difficult to conceive of a situation whereby a person is administered some "other substance" through involuntary means, such as when a substance is secretly dispensed into a beverage.

Accordingly, the plain meaning of the words chosen by the legislature undermines Khalil's argument that the qualifier "administered to that person without the person's agreement" applies to alcohol. The word "administer" does not modify the word "alcohol."[4] The qualifier most logically and sensibly applies to those circumstances where a complainant consumes "any other substance" without agreement.

Khalil's interpretation is also at odds with other provisions of the criminal-sexual-conduct statutes. The meaning of a word or phrase is informed by its use in the context of a statute. *See State v. Rogers*, 925 N.W.2d 1, 3 (Minn. 2019) (stating that "the meaning of a word is informed by how it is used in the context of a statute"). In setting forth the relevant mens rea, the third-degree criminal-sexual-conduct statute requires only that a defendant "knows or has reason to know *that the complainant is . . . mentally incapacitated*." Minn. Stat. § 609.344, subd. 1(d) (emphasis added); *see State v. Holloway*, 916 N.W.2d 338, 350 (Minn. 2018) (explaining that legislature expressly set forth mens rea requirement in criminal-sexual-conduct statutes and observing that the statutory structure suggests that mens rea does not attach to attendant circumstances described elsewhere in the statute (citing *State v. Wenthe*, 865 N.W.2d 293, 303 (Minn. 2015))). The statute does not require that a defendant *cause* the condition that gives rise to mental

[4] We note that although statutes predating 1967 used the word "administered" in reference to some substances, none discuss "administration" of alcohol.

incapacity, that the complainant become mentally incapacitated through surreptitious means, or even that a defendant have any knowledge of how the incapacitation arose.

The legislative purpose as set forth in the criminal-sexual-conduct statutes, including the third-degree criminal-sexual-conduct statute, focuses on the ability or inability of a complainant to consent to sexual conduct, not the manner in which the complainant becomes unable to consent. A complainant is legally unable to consent to sexual contact under certain circumstances, including when the complainant is (1) under the age of 13, Minn. Stat. § 609.344, subd. 1(a) (2016); (2) "mentally impaired," meaning lacking judgment due to a developmental disability or psychiatric disorder, Minn. Stat. § 609.341, subd. 6; or (3) unable to communicate due to physical helplessness, Minn. Stat. § 609.341, subd. 9. The circumstances of age or mental or physical disability are not within the control of another, and yet, the legislature opted to attach criminal liability for sexual contact as long as the defendant has *reason to know* of circumstances negating the ability of a person to consent.

The statute also provides that a person may become mentally incapacitated when under the influence of an anesthetic, which further demonstrates the legislative purpose to impose criminal liability based on the ability of a complainant to consent as opposed to the manner in which the incapacitation arose. A person typically ingests an anesthetic under the supervision of a medical professional, administered *with* the agreement of the patient. Under Khalil's interpretation, criminal liability would not attach to sexual contact with a voluntarily anesthetized patient even though the patient lacks a reasoned judgment to

consent to such contact. Such a construction is illogical, unreasonable, and antithetical to the purpose of the legislature.[5]

Khalil offers no reason why the means by which a complainant reaches mental incapacity changes the ability to consent to sexual contact. A person is mentally incapacitated upon reaching a level of intoxication sufficient to destroy the judgment necessary to give a reasoned consent. Minn. Stat. § 609.341, subd. 7. It is not reasonable to conclude that mental incapacitation occurs upon *involuntary* intoxication but not *voluntary* intoxication—either way, the incapacitated person lacks the judgment or ability to give a reasoned consent to sexual contact. There is no indication that the legislature intended for voluntary alcohol intoxication to limit or eliminate the ability of a person to ultimately consent *to sexual contact*, which is the clear focus of the text of the criminal-sexual-conduct statutes. We decline to adopt a construction antithetical to the context of the statute. *See* Minn. Stat. § 645.08 (2018) (prohibiting an interpretation "repugnant to the context of the statute").

Finally, Khalil cites no authority to support his reading of the statute. Khalil's sole argument to the district court was that the state's interpretation nullifies the phrase "administered to that person without that person's agreement." This argument implicates the canon against surplusage. When determining legislative intent, we presume that "the legislature intends the entire statute to be effective and certain" and therefore reject an interpretation that would render one provision of the statute meaningless. Minn. Stat.

[5] We note that even early versions of the statute did not provide that administration of a narcotic or anesthetic must be without the complainant's agreement.

§ 645.17(2) (2018); *see State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). The district court correctly rejected Khalil's argument, stating "I think without her agreement would be the situation where somebody slips her something." In addition to alcohol, the statute broadly provides for incapacitation by a "substance." Minn. Stat. § 609.341, subd. 7. A person can thus be administered a "substance," other than alcohol, without the person's knowledge or agreement. In other words, the statute provides that a person may become mentally incapacitated by consuming alcohol but also, *alternatively*, by being administered any other substance without the person's agreement. *See id.*

**B. The statute is not ambiguous.**

The district court speculated in passing that the statute may be ambiguous given its structure. "A statute is ambiguous if it is susceptible to more than one reasonable interpretation." *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018). As set forth herein, the statute is not susceptible to more than one reasonable interpretation and is therefore unambiguous. For completeness, we address the grammatical structure of the statute.

The structure of the statute potentially evokes competing grammar rules. The last-antecedent rule of grammar "instructs that a limiting phrase ordinarily modifies only the noun or phrase that it immediately follows." *Stay*, 935 N.W.2d at 432 (quotation omitted). Although a comma that separates the qualifying phrase from all of the antecedent phrases "provides some evidence that the qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one," the presence of a comma alone is not conclusive. *Butler*, 803 N.W.2d at 397-98 (quotation omitted). The last-antecedent rule

applies "where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all." *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016). As explained herein, applying the phrase "administered to that person without the person's agreement" to the word "alcohol" is a heavy logical lift, which favors application of the last-antecedent canon despite the presence of a comma.

Alternatively, the series-qualifier canon applies when "'the natural construction of the language demands that the [modifying] clause be read as applicable to all'" items in the series. *In re Estate of Pawlik*, 845 N.W.2d 249, 252 (Minn. App. 2014) (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348, 40 S. Ct. 516, 518 (1920)), *review denied* (Minn. June 25, 2014). Where a statute contains a determiner before the last item in the series, however, that determiner "tends to cut off the modifying phrase so that its backward reach is limited." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 149 (2012). Here, the statute contains the determiner "any" before the last phrase in the series. These authorities provide no indication that absence of a comma would override the presence of a determiner, instead simply stating, "The typical way in which syntax would suggest no carryover modification is that a determiner . . . will be repeated before the second element." *Id.*

Overall, the presence of a both a comma and a determiner cautions against reliance on either of these competing grammar rules, particularly where rigid rule application may negate the natural reading of the statute; require a heavy lift to process meaning; and ultimately—as set forth herein—would be contrary to the ordinary way that people speak, write, and read.

To that end, our authorities do not elevate the presence of punctuation over the common sense, reasonable interpretation of statutory text. And none of our authorities identify punctuation as the sole source of statutory ambiguity. For example, in *Stay*, the supreme court focused on the plain text of the statute to discern meaning, which "ma[de] clear" that a modifier applied to only one clause in a series. *Stay*, 935 N.W.2d at 431. *After* analyzing the text, the court reviewed the punctuation of the statute—not to assess clarity or ambiguity, but to reject the defendant's argument that the rules of grammar dictated a contrary result. *Id.* at 431-32. The court ultimately concluded that the plain text of the statute supported only one reasonable interpretation. *Id.* at 432.

Similarly, in *Butler*, the supreme court examined the grammatical construction of the statute but primarily relied upon the rule against surplusage to support a plain reading of the statutory text. 803 N.W.2d at 397-98 ("[M]ore importantly, if the qualifying phrase . . . modifies only the [immediately preceding] phrase . . . then the qualifying phrase would be superfluous."). Again, the court did not find the statute ambiguous based on the presence or absence of a comma. *Id.*

In *Pakhnyuk*, the supreme court also looked first to the plain language of the statute to discern meaning and, when the text revealed more than one reasonable interpretation, turned to rules of grammar advocated by the parties. 926 N.W.2d at 921. The court noted, however, that it had never decided whether the series-qualifier canon was more appropriately applied before or after finding ambiguity. *Id.* at 922 n.2. The court ultimately concluded that none of the grammatical rules, including the series-qualifier rule, clarified the text of the statute. *Id.* at 922-24.

And in *City of Oronoco v. Fitzpatrick Real Estate, LLC*, the supreme court looked to multiple textual clues to determine whether a clause modified an earlier phrase in a series. 883 N.W.2d 592, 595-96 (Minn. 2016). The court explained that "matters like punctuation are not decisive of the construction of a statute" but may provide useful confirmation "where they reaffirm conclusions drawn from the words themselves." *Id.* at 595 (quoting *United States v. Naftalin*, 441 U.S. 768, 774 n.5, 99 S. Ct. 2077, 2082 n.5 (1979)).

Overall, the weight of authority shows that grammatical rules are not absolute and are easily defeated by context. "Punctuation is a minor, and not a controlling element in interpretation." *Barrett v. Van Pelt*, 268 U.S. 85, 91, 45 S. Ct. 437, 439 (1925) (quotation omitted). Grammar rules "are only helpful when the language of the law reflects the ordinary way that people speak and listen, write and read." *Pakhnyuk*, 926 N.W.2d at 922 (quotation omitted). Because the statute is subject to only one reasonable interpretation and is therefore unambiguous as set forth herein, we do not resort to legislative history.[6] *See Save Lake Calhoun v. Strommen*, 943 N.W.2d 171, 180 (Minn. 2020) (finding that a "plain-language statutory reading makes the legislative history irrelevant"); *see also Nelson v. State*, 896 N.W.2d 879, 885 (Minn. App. 2017) ("[A]bsent ambiguity, this court

[6] We note that no evidence exists that the legislature considered materials from the nineteenth century or unadopted recommendations from the 1950s either when it substantially revised the criminal-sexual-conduct statutes in 1975 or when it last amended the definition of "mentally incapacitated" in 1987. We do not rely upon unclear legislative history. *See S. Minn. Beet Sugar Coop. v. County of Renville*, 737 N.W.2d 545, 553 n.3 (Minn. 2007) (declining to rely on "unclear" legislative history in construing statute).

does not resort to legislative history to interpret a statute." (quotation omitted)), *review denied* (Minn. Aug. 8, 2017).

Accordingly, we conclude that Minn. Stat. § 609.341, subd. 7, is subject to only one reasonable and logical interpretation: a complainant may become mentally incapacitated—and therefore lack the judgment to give a reasoned consent to sexual contact—if the complainant is under the influence of (1) alcohol, a narcotic, or anesthetic, however consumed, or alternatively, (2) any other substance, administered to that person without the person's agreement. The evidence at trial established that Khalil knew or had reason to know that J.S. was under the influence of alcohol and to such a degree that she lacked the ability to give a reasoned consent to sexual contact. We see no error in the manner in which the district court instructed the jury.

## IV. The district court properly exercised its sentencing discretion.

Khalil argues that the district court abused its discretion in denying his motion for a downward dispositional departure. "Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision absent a clear abuse of that discretion." *State v. Olson*, 765 N.W.2d 662, 664 (Minn. App. 2009) (quotation omitted). A district court "can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations and citation omitted). "A departure is not mandatory, and an appellate court will reverse a [district] court's refusal to depart only in

a 'rare' case." *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)).

"For a downward dispositional departure, a district court may consider both offender- and offense-related factors." *Id.*; *see State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (applying offense-related factors); *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (applying offender-related factors). A defendant must establish *particular* amenability to probation to justify a dispositional departure in the form of a stay of execution of a presumptively executed sentence. *Soto*, 855 N.W.2d at 308-09. "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). The district court may consider the defendant's age, prior record, remorse, attitude in court, and support of family and friends in determining particular amenability to probation. *Trog*, 323 N.W.2d at 31.

The district court considered and acknowledged both offender- and offense-related factors in assessing the motion.[7] The district court expressly acknowledged Khalil's age, community support, and potential. At the same time, the district court acknowledged that Khalil did not accept responsibility for his actions and that he caused a "huge amount of

[7] Khalil also moved for a downward durational departure from the sentencing guidelines. The district court denied the motion, and Khalil does not contest that ruling on appeal. Khalil complains that the district court improperly stated "there is no such thing as good rape or bad rape. They're all just horrible." Although imprudent, the district court directed its comments to the state in the context of the denial of the durational departure motion, not the dispositional departure motion.

pain" to J.S. that "calls for a prison sentence." Finally, although Khalil argues that he demonstrated that he was amenable to probation, the record does not establish *particular* amenability to probation or that the reasons presented in support of the motion were substantial or compelling, distinguishing Khalil from most others. *See Soto*, 855 N.W.2d at 309. To the contrary, the record shows that Khalil was on probation at the time of the instant offense and the presentence investigation report expressed "great concern" about his potential for future success on probation in light of a psychosexual evaluation showing a higher than average risk of re-offense, demonstrated lack of remorse, minimal acceptance of responsibility, and documented poor choices while on probation. We see no abuse of discretion by the district court in the imposition of a guidelines sentence.

## D E C I S I O N

We conclude that the district court did not err in its evidentiary or discovery rulings or abuse its discretion at sentencing. We hold that, under Minn. Stat. § 609.341, subd. 7, the phrase "mentally incapacitated" includes a person who is voluntarily under the influence of alcohol or prescription narcotic and therefore lacks the judgment to give a reasoned consent to sexual contact.

**Affirmed.**

**JOHNSON**, Judge (concurring in part, dissenting in part)

I agree with parts I, II, and IV of the opinion of the court. But I respectfully disagree with part III.

The issue in part III is the meaning of section 609.341, subdivision 7, of the Minnesota Statutes, which defines the term "mentally incapacitated" to mean, for purposes of criminal-sexual-conduct crimes, "that a 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." Minn. Stat. § 609.341, subd. 7 (2016) (emphasis added). Khalil argues in his *pro se* supplemental brief that the district court's supplemental jury instruction does not accurately reflect the definition of "mentally incapacitated" and that the district court effectively removed an element of the offense, specifically, the requirement that he administered alcohol or a narcotic to J.S. without her agreement. The question raised by Khalil's argument is whether the phrase "administered to that person without the person's agreement" modifies all four of the nouns that precede it ("alcohol, a narcotic, anesthetic, or any other substance") or only the last noun in that series ("any other substance").

The opinion of the court reasons that there is only one reasonable interpretation of the statute: that the modifying phrase modifies only the last item in the series, "any other substance." I believe that there are two reasonable interpretations of the statute. One reasonable interpretation, which is based on the text, grammar, and punctuation of the statute, is that the phrase "administered to that person without the person's agreement" modifies all four nouns in the series that precedes it ("alcohol, a narcotic, anesthetic, or any

other substance"). Another reasonable interpretation is that the phrase "administered to that person without the person's agreement" modifies only the last item in the series of nouns that precede it ("any other substance"). Thus, I would reason that the statute is ambiguous for purposes of this appeal. I would resolve that ambiguity in favor of the interpretation urged by Khalil because that interpretation reflects the likely intent of the legislature when it enacted the definition of "mentally incapacitated" in 1975 and amended it in 1987.

**A.**

"The first step in statutory interpretation is to determine whether the statute's language, on its face, is ambiguous." *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). "'A statute is ambiguous only if it is subject to more than one reasonable interpretation.'" *Id.* (quoting *500, LLC v. City of Minneapolis*, 837 N.W.2d 287, 290 (Minn. 2013)). If a statute is unambiguous, "then we must apply the statute's plain meaning." *State v. Nelson*, 842 N.W.2d 433, 436 (Minn. 2014) (quotation omitted). But if a statute is ambiguous, "then we may apply the canons of construction to resolve the ambiguity." *Thonesavanh*, 904 N.W.2d at 435.

To determine whether a statutory provision is ambiguous or unambiguous, an appellate court should attempt to determine the plain meaning of the statute based on "the common and ordinary meanings" of the words used in the statute. *Id.* at 436; *see also State v. Eason*, 906 N.W.2d 840, 842 (Minn. 2018); *Nelson*, 842 N.W.2d at 436; *State v. Leathers*, 799 N.W.2d 606, 608-09 (Minn. 2011); *Occhino v. Grover*, 640 N.W.2d 357, 359-60 (Minn. App. 2002), *review denied* (Minn. May 28, 2002). Those words and phrases

should be interpreted according to well-accepted rules of grammar. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019); *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019); *In re Estate of Butler*, 803 N.W.2d 393, 397 (Minn. 2011). Rules of grammar include rules about the use of punctuation. *See, e.g.*, *Butler*, 803 N.W.2d at 397-98.

In this case, it is significant that the phrase "administered to that person without the person's agreement" is set off by commas from the remainder of the sentence. Without the commas, it would be natural to read the phrase as modifying only the last item in the series, "any other substance." This is the interpretation suggested by the last-antecedent canon, which is "a rule of grammar under which '[a] pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.'" *See Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236, 244 (Minn. 2016) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012)). But both the United States Supreme Court and the Minnesota Supreme Court have stated that the last-antecedent canon "is not an absolute and can assuredly be overcome by other indicia of meaning." *Butler*, 803 N.W.2d at 397 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380 (2003)). One such indication of a contrary meaning is the presence of a comma between a series and a modifying phrase: "A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to *all the antecedents instead of only to the immediately preceding one*." Norman J. Singer & J.D. Shambie Singer, 2A *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2007) (emphasis added).

In *Butler*, a comma separated a qualifying phrase from two antecedent phrases, and the supreme court reasoned that the comma made the last-antecedent canon inapplicable. *Id.* at 397-98 (citing Singer & Singer, *supra*, § 47.33). The *Butler* court effectively applied the series-qualifier canon, which provides, "'When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.'" *Pakhnyuk*, 926 N.W.2d at 921 (quoting Scalia & Garner, *supra*, at 147). The *Butler* opinion is consistent with the opinions of numerous other courts that have essentially held that the series-qualifier canon, not the last-antecedent canon, applies if a comma separates a modifying phrase from a series. *See, e.g.*, *Sullivan v. Abraham*, 488 S.W.3d 294, 297-99 (Tex. 2016); *State v. Rodriguez-Roman*, 3 A.3d 783, 790-93 (Conn. 2010); *Kasischke v. State*, 991 So. 2d 803, 811-14 (Fla. 2008); *Kevin J. v. Sager*, 999 P.2d 1026, 1028 (N.M. 1999); *In re Sehome Park Care Center, Inc.*, 903 P.2d 443, 447 (Wash. 1995); *State v. Berger*, 392 P.3d 792, 795 (Or. App. 2017).[8]

[8]The opinion of the court reasons that the interpretation arising from the series-qualifier canon is not a reasonable interpretation of the statute. The opinion of the court cites *Stay*, but that opinion is inapplicable because the statute in that case did not have a comma between the modifying phrase and the series. 935 N.W.2d at 430; *see also City of Oronoco v. Fitzpatrick Real Estate, LLC*, 883 N.W.2d 592, 596 (Minn. 2016) (applying last-antecedent canon to statute without comma between modifying phrase and series). In addition, the presence of a determiner does not defeat the application of the series-qualifier canon. The examples in the secondary source cited by the opinion of the court are inapplicable because none of the examples includes a comma between a modifying phrase and a series. *See* Scalia & Garner, *supra*, at 149. Furthermore, the opinion of the court unjustifiably minimizes or disregards rules of grammar on the ground that they "'are only helpful when the language of the law reflects "the ordinary way that people speak and listen, write and read."'" *See supra* p. 20 (quoting *Pakhnyuk*, 926 N.W.2d at 922 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting))). That observation was apt in *Pakhnyuk* because the statute at issue there was "no ordinary sentence"; it was "interrupted by a colon, three semicolons, three line breaks, and three

Thus, considering the text, grammar, and punctuation of section 609.341, subdivision 7, one reasonable interpretation of the statute is that the phrase "administered to that person without the person's agreement" modifies all four nouns in the series that precedes it ("alcohol, a narcotic, anesthetic, or any other substance").

Because there are two reasonable interpretations of section 609.341, subdivision 7, the statute is ambiguous for purposes of this appeal.

**B.**

If a statute is ambiguous, we "look beyond the plain language of the statute to ascertain the intent of the Legislature." *Christianson v. Henke*, 831 N.W.2d 532, 539 (Minn. 2013). In such an inquiry, "our duty is 'to determine what meaning the Legislature intended to ascribe'" to the statute. *Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315, 327 (Minn. 2018) (quoting *Nordling v. Ford Motor Co.*, 42 N.W.2d 576, 582 (Minn. 1950)). In doing so, "we may apply the canons of construction to resolve the ambiguity." *Thonesavanh*, 904 N.W.2d at 435. In interpreting an ambiguous statute, we may seek to ascertain the intention of the legislature by considering former laws on the same subject. *T.G.G. v. H.E.S.*, ____ N.W.2d ____, ____, 2020 WL 3261161, at *5, (Minn. June 17, 2020); *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 77-79 (Minn. 2012); *In re 2010 Gubernatorial Election*, 793 N.W.2d 256, 261-63 (Minn. 2010); *West Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 699 (Minn. 2009).

---

clause numbers set off in parentheses" and was modified in two different ways. *Id.* The statute in this case, however, has no such extraordinary features; it is a single, declarative sentence that is written in "the ordinary way that people . . . read and write." *See Pakhnyuk*, 926 N.W.2d at 922.

Since its territorial days, Minnesota has had one or more statutes setting forth the crime of rape or criminal sexual conduct. *See* Minn. Rev. Stat. (Terr.) ch. 100, §§ 39-41 (1851); Minn. Gen. Stat. ch. 89, §§ 38-40 (1858); Minn. Gen. Stat. ch. 94, §§ 39-41 (1863); Minn. Gen. Stat. ch. 94, §§ 39-41 (1866); Minn. Gen. Stat. ch. 94, §§ 49-51 (1878). When Minnesota became a state, its rape statute focused on whether sexual activity occurred "by force and against her will." Minn. Gen. Stat. ch. 89, § 38 (1858). The first statutory provision specifically relating to sexual activity with an intoxicated person was enacted in 1885. *See* 1885 Minn. Laws ch. 240, § 1, at 311 (publishing Minnesota's criminal code). After that enactment, the crime of rape was defined as follows:

> Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent. A person perpetrating such an act of sexual intercourse with a female of the age of ten (10) years or upwards not his wife,
>
> 1. When through idiocy, imbecility, or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or
>
> 2. When her resistance is forcibly overcome; or
>
> 3. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her; or
>
> 4. When her resistance is prevented by stupor or by weakness of mind, produced by an intoxicating narcotic or anæsthetic agent, *administered by or with the privity of the defendant*; or
>
> 5. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant,

> [i]s punishable by imprisonment in the state prison for not less than five (5) nor more than thirty (30) years.

Minn. Penal Code, tit. 10, ch. 2, § 235 (1886) (emphasis added).

The legislature amended the statute in 1891. 1891 Minn. Laws ch. 88, § 1, at 160-61. As a result, the fourth clause of the statute provided, "When her resistance is prevented by stupor or by weakness of mind, produced by an intoxicating, narcotic or anesthetic agent *administered by or with the privity of the defendant*." Minn. Gen. Stat. ch. 92a, § 6523 (1894) (emphasis added). After a 1905 amendment, the fourth clause provided, "When her resistance is prevented by stupor or by weakness of mind, produced by an intoxicating, narcotic, or anesthetic agent *administered by or with the privity of the defendant*." Minn. Rev. Laws § 4926 (1905) (emphasis added). The fourth clause remained unchanged for more than six decades, although the statute was renumbered on a few occasions. *See* Minn. Gen. Stat. ch. 98, § 8655 (1913); Minn. Gen. Stat. ch. 98, § 10124 (1923); Minn. Stat. § 617.01 (1941).

In 1955, a commission was created by statute "to study . . . crime and corrections in Minnesota, with a view toward revising and codifying existing laws and recommending improvements," including "recodifying the criminal laws of the state . . . in criminal matters." 1955 Minn. Laws ch. 789, § 1(h), at 1222-23. The commission was authorized to appoint an advisory committee. 1955 Minn. Laws ch. 789, § 3, at 1223. The advisory committee issued its report in 1962. Advisory Committee on Revision of the Criminal Code, *Proposed Minnesota Criminal Code* (1962) (hereinafter *1962 Proposed Criminal Code*). The advisory committee recommended the enactment of a statute that would

criminalize sexual activity with or toward another person if "[t]he victim's will to resist is destroyed by drug or intoxicant *administered without her knowledge or consent by the actor or on his behalf*." *1962 Proposed Criminal Code* at 92-93 (proposed section 609.295(3)) (emphasis added). The advisory committee commented that this proposed language was "similar to" the then-existing statute, section 617.01, subdivision 4. *Id.* (proposed section 609.295(3) cmt.). The advisory committee also commented, "If the female takes the drug or drink voluntarily on her own accord, or it is given to her by a third person without participation by the defendant, the [third] clause does not apply." *Id*. A member of the advisory committee wrote contemporaneously that "the content of" the recommended rape statute "reflects generally the present law." Maynard E. Pirsig, *Proposed Revision of the Minnesota Criminal Code*, 47 Minn. L. Rev. 417, 442 (1963). He also wrote that the recommended rape statute would apply "to cases where consent to the act was obtained through trickery or fraud or otherwise misleading the victim, or where consent was obtained by the use of drugs or intoxicants that caused her to give the consent, but which were taken without her knowledge or consent." *Id.*

In 1965, the legislature enacted many of the recommendations in the *1962 Proposed Criminal Code*. *See* 1963 Minn. Laws ch. 753, §§ 1-17, at 1185-1246. But the legislature did not adopt the advisory committee's recommendations concerning rape and related crimes. *See id.* After the 1965 legislative session, the crime of rape remained in section 617.01 without any modifications. *See* Minn. Stat. § 617.01 (1965).

In 1967, the legislature deleted section 617.01 and nearby statutes on related issues and re-enacted them, with modifications, in chapter 609. 1967 Minn. Laws ch. 507, §§ 1-3,

at 1047-48. The legislature replaced the single rape statute in chapter 617 with two statutes: a statute for aggravated rape in section 609.291 and a statute for rape in section 609.292. *Id.* The latter statute made sexual activity with or toward an intoxicated person unlawful if "[t]he victim's will to resist is destroyed by drug or intoxicant and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 609.292(3) (1967). This was the only former statute that specifically made it unlawful to engage in sexual activity with or toward an intoxicated person without regard for whether the person was voluntarily or involuntarily intoxicated.

In 1975, however, the legislature deleted sections 609.291 and 609.292 and enacted a new and entirely different set of statutes setting forth four degrees of the crime of "criminal sexual conduct." 1975 Minn. Laws ch. 374, §§ 2-6, at 1244-48. Each of the four offenses criminalized sexual activity with or toward another person if "[t]he actor knows or has reason to know that the complainant is mentally defective, mentally incapacitated, or physically helpless." Minn. Stat. §§ 609.342-.345 (Supp. 1975). Each of those three terms was defined by statute. Minn. Stat. § 609.341, subds. 6, 7, 9 (Supp. 1975). The term "mentally incapacitated" was defined to mean "that a person is rendered temporarily incapable of appraising or controlling his conduct due to the influence of alcohol, a narcotic, anesthetic, or any other substance *administered to that person without his agreement, or due to any other act committed upon that person without his agreement*." Minn. Stat. § 609.341, subd. 7 (Supp. 1975) (emphasis added).

In 1987, the legislature amended the definition of "mentally incapacitated" to mean "that a 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." 1987 Minn. Laws ch. 198, § 1, at 443 (emphasis added). This definition remains in effect and governs this case. *See* Minn. Stat. § 609.341, subd. 7 (2016).

Thus, a review of the statutory history on this subject reveals that, except for an eight-year period in the 1960s and 1970s, the state's rape and criminal-sexual-conduct statutes that have referred to intoxicating substances always have required evidence that an intoxicating substance was "administered" to the complainant. The pre-1967 statutes were understood to mean that sexual activity with or toward an intoxicated person was *not* prohibited if the person was voluntarily intoxicated. *See 1962 Proposed Criminal Code*, at 93; Pirsig, *supra*, at 442. That understanding was consistent with the then-recently released Model Penal Code, which would have criminalized sexual activity with or toward an intoxicated person because of the person's intoxication only if the intoxicant was administered by the defendant. Model Penal Code § 213.1(1) (Am. Law Inst., Proposed Official Draft 1962).[9] Since 1975, the state's criminal-sexual-conduct statutes have used language very similar to the language of the pre-1967 statutes, which indicates that the legislature intended the current statutes to carry the same meaning as those former laws. "[W]hen the Legislature amends a statute, we presume that the Legislature changed the law," and the presumption "can be overcome only if there is evidence that the Legislature

[9]The American Law Institute is now in the process of revising section 213 of the Model Penal Code. *See* The American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses*, https://www.ali.org/projects/show/sexual-assault-and-related-offenses (last visited July 16, 2020).

did not intend to change the law." *State v. Lopez*, 908 N.W.2d 334, 336 n.3 (Minn. 2018). In the absence of any contrary explanation, we must presume that the legislature intended in 1975 to change the meaning of the 1967 statute, which plainly did not require evidence that an intoxicant was "administered" by anyone other than the complainant. *See id.* It appears that, by restoring language that includes the word "administered," which previously was understood to refer to all types of intoxicants, the legislature in 1975 intended the "administered" clause of the mentally-incapacitated definition to refer to all intoxicants listed in the statute.

This conclusion is consistent with the views of scholars who have studied the subject in depth and have concluded that, throughout the 20th Century and continuing to the present, a majority of states have not specifically criminalized sexual activity with or toward a voluntarily intoxicated person. One leading scholar has stated that if "the woman is affected by the consumption of drugs or intoxicants knowingly and voluntarily taken, . . . about two-thirds of the states have concluded that intercourse resulting from such circumstances does *not* constitute a basis for a rape prosecution; their statutes require that the drugs or intoxicants have been administered by the defendant or some third party without the woman's knowledge and consent." 2 Wayne R. LaFave, *Substantive Criminal Law* § 17.4(b) (3d ed. 2019). Professor LaFave has explained the prevailing view, in part, by referring to the fact that many individuals and many couples intentionally and voluntarily mix intoxicants with intimacy, thereby giving rise to difficult questions about degrees of intoxication and allocation of responsibility. *See* LaFave, *supra*, § 17.3(e); *cf.* Kevin Cole, *Sex and the Single Malt Girl: How Voluntary Intoxication Affects Consent*,

78 Mont. L. Rev. 155, 161-69 (2017). Other scholars generally agree that a majority of states do not criminalize sexual activity with or toward a voluntarily intoxicated person. *See* Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 Brooklyn L. Rev. 1031, 1051 (2017); Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 Ariz. L. Rev. 131, 138-39 (2002). One scholar has specifically stated that Minnesota's definition of "mentally incapacitated" is "limited to include only cases where *another* person administered the intoxicants to the victim" and that "[t]he statute therefore precludes bringing criminal charges in cases where victims voluntarily consumed the intoxicants without the defendant's administering them." Buchhandler-Raphael, *supra*, at 1053.

As stated above, this court's task is to ascertain the legislature's intent when it enacted an ambiguous statute. Our task is not to ascertain what the legislature would do if it were to consider the issue anew. In light of the statutory history and the authorities described above, the most natural conclusion to be drawn is that, in 1975 and again in 1987, the legislature likely intended to enact a statute similar to the statutes that had been in effect in Minnesota before 1967, which were consistent with the laws that then were and still are in effect in most states. Consequently, a person who has engaged in sexual activity with or toward a person intoxicated by alcohol or a narcotic has committed third-degree criminal sexual conduct under the provision for "mentally incapacitated" persons only if the alcohol or the narcotic was "administered to that person without the person's agreement." Minn. Stat. § 609.341, subd. 7. To reach this conclusion is not necessarily to endorse the legislature's policy choices, which are not subject to judicial second-guessing. "It is up to

legislatures, not courts, to decide on the wisdom and utility of legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 101 S. Ct. 715, 726 (1981) (quotation omitted) (quoted in *Essling v. Markman*, 335 N.W.2d 237, 240 (Minn. 1983)).[10]

Thus, I would resolve the ambiguity in section 609.341, subdivision 7, by interpreting the phrase "administered to that person without the person's agreement" as modifying all four of the nouns in the series that precedes it ("alcohol, a narcotic, anesthetic, or any other substance"). Accordingly, I would conclude that the district court erred in its supplemental jury instruction on the meaning of the statutory term "mentally incapacitated." I would further conclude that the district court's error is not a harmless error, for the reasons stated in footnote 2 of the opinion of the court. Therefore, I would reverse and remand for a new trial.

[10]This court has affirmed convictions of criminal sexual conduct toward a complainant who was voluntarily intoxicated on the ground that the complainant was "physically helpless," not "mentally incapacitated." *State v. Berrios*, 788 N.W.2d 135, 141-42 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010); *State v. Taylor*, 365 N.W.2d 368, 368-69 (Minn. App. 1985), *review denied* (Minn. June 14, 1985). By statute, a person is "physically helpless" if he or 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 (2016). This court also has concluded that a complainant is not "physically helpless" if she was able to express refusal to consent and did so. *State v. Blevins*, 757 N.W.2d 698, 699-701 (Minn. App. 2008) (reversing conviction based on evidence that complainant told defendant she did not want to engage in sexual activity).