This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0666

State of Minnesota,
Respondent,

vs.

Ronald Adam Simpson,
Appellant.

Filed April 18, 2022
Reversed
Reyes, Judge

Sherburne County District Court
File No. 71-CR-19-1270

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

Kathleen Heaney, Sherburne County Attorney, Tim Sime, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant argues on direct appeal that (1) the state presented insufficient evidence to convict him of third-degree criminal sexual conduct and (2) the district court gave an erroneous jury instruction defining "mentally incapacitated." We reverse.

FACTS

The following facts are based on the testimony presented at trial. Appellant Ronald Adam Simpson became acquainted with D.G. on Facebook. In September 2019, appellant met with D.G. at a bar near appellant's apartment. D.G. had two or three drinks while waiting for appellant to arrive. When appellant arrived, D.G. and appellant had one drink together at the bar. They then drove in D.G.'s car to appellant's apartment.

D.G. had a couple more drinks at appellant's apartment; appellant had none. Appellant and D.G. kissed on a couch until D.G. began feeling uncomfortable and got up. D.G. did not feel well and could not think clearly because of the alcohol she drank. D.G. sat back down on the couch with appellant, and he motioned for her to perform oral sex on him. She did, even though she was "not feeling good" and "didn't really want to." Appellant asked if he could smoke marijuana. D.G. agreed and asked if she could have some. She "took a hit" and "right away it felt different." She asked appellant what was in the marijuana, and he told her that it was high quality, "medical grade marijuana."

D.G. felt "really out of it" because the marijuana "did something to me that I had not experienced before." She asked appellant if she could lie down in the bedroom, and he showed her its location. D.G. walked to the bedroom and sat down on the bed, leaning against the wall.

Appellant began touching and kissing D.G., and she kissed him back. Appellant took D.G.'s shirt off and kissed her breasts. D.G. laid back and appellant began taking her leggings off. She said "no" and tried pulling her leggings back up. Appellant continued to pull her leggings off in a quick motion. D.G. tried to keep her legs together because she

"didn't want to go that far." Appellant went into the bathroom. She thought they were done, but appellant returned from the bathroom with a condom on. D.G. "tried to fight, but I think I froze." Appellant told her "It's okay, I have a condom on," and he proceeded to penetrate her.

Afterward, appellant went back into the bathroom and D.G. struggled to get up. D.G. vomited and urinated on the floor and appellant told her she had to leave. D.G. sat outside the door of appellant's apartment crying until appellant eventually drove her in her car to a nearby hotel. He left her there in her car and walked home.

D.G. called the police the next day and underwent a sexual-assault examination. Police arrested and questioned appellant. Appellant told police that he and D.G. engaged in consensual sexual contact but denied that they had sexual intercourse. Police searched appellant's apartment and retrieved a used condom from the garbage. Forensic testing on the condom revealed a DNA mixture of two or more individuals. D.G. and appellant could not be excluded from that mixture.

Respondent State of Minnesota charged appellant with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (Supp. 2019), alleging that he engaged in sexual penetration of D.G. while knowing or having reason to know that D.G. was mentally incapacitated or physically helpless. The state later added petty-misdemeanor charges for possessing a small amount of marijuana and drug paraphernalia.

Appellant proceeded to trial in October 2020. At trial, the state asked the district court to instruct the jury with the definition of "mentally incapacitated" set forth by this court in *State v. Khalil*, 948 N.W.2d 156 (Minn. App. 2020), *rev'd* 956 N.W.2d 627 (Minn.

2021). The district court granted the state's motion. At the end of appellant's trial, the district court instructed the jury and defined "mentally incapacitated" and "physically helpless":

> A person is mentally incapacitated if she lacks the judgment to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic or anesthetic, *however consumed*, or any other substance administered without her agreement. A person is physically helpless if she is asleep or not conscious, unable to withhold consent or withdraw consent because of a physical condition, or unable to communicate nonconsent.

(Emphasis added.)

The jury found appellant guilty on all counts. The district court sentenced appellant to 48 months in prison for his criminal-sexual-conduct conviction. It imposed no additional sentence for the petty-misdemeanor offenses. This appeal follows.

DECISION

I. Standard of review.

Appellant argues that the state presented insufficient evidence to convict him of third-degree criminal sexual conduct by failing to prove D.G.'s mental incapacity or physical helplessness. We agree.

When evaluating the sufficiency of the evidence, we undertake a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the jury to reach its verdict. *See State v. Horst*, 880 N.W.2d 24, 40 (Minn. 2016). For the jury to find appellant guilty of third-degree criminal sexual conduct under section 609.344, subd. 1(d), the state had to prove beyond a

reasonable doubt that appellant engaged in sexual penetration with D.G. "know[ing] or [having] reason to know" that D.G. was "mentally incapacitated or physically helpless."

II. The state presented insufficient evidence to prove D.G.'s mental incapacity.

At the time of the incident alleged in the complaint, Minn. Stat. § 609.341, subd. 7 (2018), defined "mentally incapacitated" as meaning "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." Shortly before appellant's trial, this court interpreted that definition to mean that "a complainant may become mentally incapacitated . . . 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." *Khalil*, 948 N.W.2d at 168 (emphasis added). The state tried appellant on the theory that D.G. was mentally incapacitated based on that interpretation, and the district court instructed the jury consistent with that definition.

The Minnesota Supreme Court later rejected that interpretation. It held instead that the statutory definition of "mentally incapacitated" means that "substances (including alcohol) which cause a person to lack judgment to give reasoned consent must be administered to the person *without the person's agreement*." *State v. Khalil*, 956 N.W.2d 627, 642 (Minn. 2021) (emphasis added). A voluntarily intoxicated person was therefore

not "mentally incapacitated" under the version of section 609.341, subd. 7, in effect at the time of appellant's charged offense.[1] *See id.* at 630, 642.

Here, the state did not provide evidence of D.G. being under the influence of any substance administered without her agreement. D.G. testified to being under the influence of alcohol and marijuana but did not testify that she did not agree to consume either substance. We must therefore conclude that the state presented insufficient evidence to prove that D.G. was "mentally incapacitated" as defined by the statute.

III. The state presented insufficient evidence to prove D.G.'s physical helplessness.

A person is "physically helpless" if that person 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 (2018). Consent is defined as "words or overt actions by a person indicating freely given present agreement to perform a particular sexual act with the actor." *Id.* at subd. 4(a).

Two cases guide our analysis on this issue. In *State v. Blevins*, the complainant consumed several alcoholic drinks and became separated from her friends. 757 N.W.2d 698, 699 (Minn. App. 2008). Blevins led the complainant into a crawl space beneath a nearby home. *Id.* The complainant, who testified that she was "pretty drunk," told Blevins that she did not want him to perform oral sex on her and asked him not to do so. *Id.* The

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[1] After the supreme court released its opinion in *Khalil*, the legislature amended the statute to include voluntary intoxication. That amendment took effect September 15, 2021. *See* 2021 Minn. Laws ch. 11, art. 4, § 7.

complainant testified that, because she felt stuck, uncomfortable, and afraid, she "just let it happen" while he performed oral sex on her and had sexual intercourse with her. *Id.* We reversed Blevins' conviction for third-degree criminal sexual conduct because the complainant verbally expressed her nonconsent during the assault, so the "evidence [was] insufficient to demonstrate that she was unable to withhold or withdraw her consent." *Id.* at 701.

In *State v. Berrios*, the complainant testified that she was "falling down drunk" and had to be helped into a bedroom by a classmate. 788 N.W.2d 135, 137 (Minn. App. 2010), *rev. denied* (Minn. Nov. 16, 2010). The next thing the complainant remembered was Berrios pulling down her pants. *Id.* When the complainant said no, Berrios stopped, and the complainant passed out. *Id.* The complainant later woke up vomiting and discovered Berrios on top of her and penetrating her. *Id.* The complainant could not move her body and kept passing out. *Id.* We determined that, although the complainant expressed nonconsent by saying "no," *Blevins* was distinguishable because the complainant in *Berrios* was not conscious when appellant penetrated her. *Id.* at 142.

We agree with appellant that *Blevins* controls here. Like the complainant in *Blevins*, D.G. expressed nonconsent before penetration occurred: she said "no" and tried to hold her legs together when appellant took her leggings off. Unlike the complainant in *Berrios*, D.G. did not testify to being unconscious at any point during the encounter. Furthermore, to support a conviction under section 609.344, subd. 1(d), the state had to prove beyond a reasonable doubt that appellant knew or had reason to know that D.G. was physically helpless at the time of penetration. D.G. testified that she expressed nonconsent more than

once shortly before the penetration occurred, and the state failed to present evidence showing that appellant knew or had reason to know that she became unable to withhold consent or express nonconsent at the time of penetration.

The state cites several nonprecedential opinions applying *Blevins* and *Berrios* to argue that a complainant who expresses nonconsent may still be physically helpless: *State v. Piper*, A15-1610, 2016 WL 4596490 (Minn. App. Sept. 6, 2016), *rev. denied* (Minn. Nov. 23, 2016); *State v. Reff*, A15-0928, 2016 WL 2945959 (Minn. App. May 23, 2016), *rev. denied* (Minn. Aug. 9, 2016); and *State v. Jasso*, A13-0546, 2014 WL 5419722 (Minn. App. Oct. 27, 2014). Those cases are nonbinding and distinguishable. The complainant in *Piper* was roused from her sleep and, as a result, "wasn't really awake" when Piper penetrated her. *Piper*, 2016 WL 4596490, at *3. The record in *Piper* also suggested that Piper penetrated her with his hand while she was asleep. *Id.* *Reff* and *Jasso* are distinguishable because in those cases, penetration occurred before the complainants expressed nonconsent. *See Reff*, 2016 WL 2945959, at *4 (concluding that evidence was sufficient to show that complainant was physically helpless because "unlike the complainant in *Blevins*, [complainant] did not tell Reff to stop before Reff engaged in sexual penetration"); *Jasso*, 2014 WL 5419722, at *3 (noting that during first part of assault, complainant was unable to withhold consent because she was having a panic attack and couldn't breathe). Here, D.G. remained awake and conscious throughout the encounter, she expressed nonconsent to appellant before any penetration occurred, and the state did not provide evidence that appellant knew or reasonably should have known that she became unable to withhold or withdraw consent or unable to communicate nonconsent

after telling appellant “no.” Accordingly, the state failed to present sufficient evidence to prove beyond a reasonable doubt that D.G. was “physically helpless” as defined by section 609.341, subd. 9.

Because the state presented insufficient evidence to show that D.G. was either mentally incapacitated or physically helpless, appellant is entitled to a reversal of his third-degree criminal-sexual-conduct conviction. As a result, we need not address appellant’s argument regarding the district court’s jury instructions.

Reversed.