STATE OF MINNESOTA
IN COURT OF APPEALS
A09-568

State of Minnesota,
Respondent,

vs.

Daniel Brian Dalbec,
Appellant.

Filed October 11, 2011
Affirmed
Shumaker, Judge

Wright County District Court
File No. 86-CR-06-7221

Lori Swanson, Attorney General, James B. Early, Matthew G. Frank, Assistant Attorneys General, St. Paul, Minnesota; and

Mark A. Erickson, Assistant Wright County Attorney, Buffalo, Minnesota (for respondent)

Daniel J. Supalla, Briggs & Morgan, Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

SHUMAKER, Judge

The supreme court reversed this court's decision that structural error had occurred in appellant's trial for third-degree criminal sexual conduct, and remanded the matter for

consideration of the remaining issues. *See State v. Dalbec*, 800 N.W.2d 624 (Minn. 2011), *rev'g* 781 N.W.2d 430 (Minn. App. 2010). The parties did not request supplemental briefing, and we reinstated the appeal and have considered the issues as addressed in the parties' original briefs to this court. Because appellant is entitled to no relief at this point on his remaining claims, we affirm his conviction.

D E C I S I O N

Ineffective Assistance of Counsel

In his original briefs to this court, appellant claimed that his trial attorney was ineffective because he failed to (1) submit a written closing argument; and (2) request removal of the district court judge after appellant allegedly disclosed to his attorney that he was personally acquainted with the judge.

With respect to the first claim, the supreme court held that defense counsel's failure to submit a closing argument did not result in structural error. *Dalbec*, 800 N.W.2d at 629. But the court refused the state's invitation to rule also on whether appellant would be able to meet the *Strickland* test for ineffective assistance of counsel. *Id.* at 629 n.1. The supreme court stated that appellant's claim was not "ripe," because he "has not raised an ineffective-assistance-of-counsel claim in this appeal and has not raised any such claim in a postconviction proceeding." *Id.* The court further stated that whether the ineffective-assistance-of-counsel claim was procedurally barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), "is best addressed by the postconviction court if at some point [appellant] files a petition for postconviction relief asserting such a claim." *Id.* Thus, appellant's claim that his attorney was ineffective for

failing to submit a written closing argument is more appropriately raised in postconviction proceedings and will not be addressed further here.

Appellant's second claim is that his attorney was ineffective for failing to seek removal of the district court judge for a potential conflict of interest because appellant knows the judge and went to school with his children. Appellant claims that he gave this information to his attorney, who stated that he would confer with the judge in chambers regarding the matter. Appellant claims that his attorney went into chambers, returned, and told appellant that there was no conflict with the judge, and that appellant would be prudent to continue with the bench trial.

At this juncture, however, appellant's assertions are unsupported by any evidence in the record. Because resolution of this claim would require additional fact-finding, it, too, is more appropriately raised in a postconviction proceeding. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008) ("When a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, it must be brought on direct appeal or it is *Knaffla*-barred. But an ineffective-assistance-of-counsel claim is not *Knaffla*-barred when the claim requires examination of evidence outside the trial record and additional fact-finding by the postconviction court because it is not based solely on the briefs and trial court transcript." (citation omitted)). Accordingly, we decline to address appellant's ineffective-assistance- of-counsel claims. *See State v. Jackson*, 726 N.W.2d 454, 463 (Minn. 2007) (denying such claims "without prejudice to [appellant's] right to raise them in a postconviction proceeding").

Adequacy of Jury Trial Waiver

A criminal defendant may waive the right to a jury trial and consent to a court trial. Minn. R. Crim. P. 26.01. Rule 26.01 provides, in pertinent part:

> The defendant, with the approval of the court, may waive a jury trial on the issue of guilt provided the defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to trial by jury, and after having had an opportunity to consult with counsel.

Id., subd. 1(2)(a). A waiver made in compliance with rule 26.01 meets the long-established caselaw requirement that the defendant's trial waiver be knowing, voluntary, and intelligent. *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006); *see also State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984) (stating that court "need only ascertain that the waiver was voluntary, knowing and intelligent with awareness of the relevant circumstances and likely consequences").

Appellant argues that his jury trial waiver was invalid because it was not knowing, voluntary, and intelligent, and it did not strictly comply with the court advisory required by rule 26.01. This argument is without merit.

In his original briefs to this court, appellant claimed that the district court could not have advised him of his right to a jury trial before he signed the August 4, 2008 written Waiver of Jury Trial because no hearing was held on that date. But the appellate record now includes a transcript of the August 4 hearing, which establishes that appellant appeared before the court with counsel.[1]

[1] Apparently, the transcript of this hearing was ordered when this appeal was first filed, but was not sent by the court reporter or received by this court until after the parties

At that hearing, defense counsel told the court that appellant wished to waive the right to a jury trial and that he had discussed the right with appellant. With the district court's consent, counsel questioned appellant about his understanding of his right to a jury trial, whether he understood that he did not have to waive the jury, whether he understood that waiver meant that the district court judge would be the only person to consider the facts and decide whether appellant was guilty, whether he had enough time to talk to his lawyer, whether he had any questions about his rights, whether he understood he could not withdraw his waiver once it was accepted by the court, and whether he wished to waive his right and proceed to a court trial. Appellant answered each question in the affirmative.

The district court specifically found that appellant "knowingly, intelligently, and voluntarily surrendered [his] right to a jury trial." Appellant signed the written waiver of a jury trial, as did the district court. The record thus establishes that appellant made a knowing, intelligent, and voluntary waiver of his right to have a jury trial, on the record in open court, in compliance with rule 26.01.

Admission of BCA Reports without Testimony of Analysts

A defendant has a constitutional right to confront witnesses against him at trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In *Crawford v. Washington*, the Supreme Court held that "testimonial" statements from witnesses who do not testify at trial are not admissible and violate the Confrontation Clause, unless the declarant is unavailable and

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submitted their briefs. The transcript of the August 4, 2008 hearing is now included as part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01; Minn. R. Crim. P. 28.02, subd. 8.

the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). Bureau of Criminal Apprehension (BCA) laboratory reports have been held to be testimonial for purposes of *Crawford*. *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006).

Appellant argues that the admission of two BCA reports, Exhibits 11 and 12, violated his confrontation rights under *Crawford*. The state, however, argues that appellant not only forfeited, but also affirmatively waived, his right to object to admission of the BCA reports because he stipulated to the admission of Exhibit 11 (which identified semen taken from a swab of the victim after the sexual assault), and specifically stated that he had no objection to the admission of Exhibit 12 (which included the results of the DNA profiling of the swab and concluded that appellant was a match).

"A defendant may waive his confrontation rights . . . by stipulating to the admission of evidence," or "by fail[ing] to object to the offending evidence." *United States v. Robinson*, 617 F.3d 984, 989 (8th Cir. 2010) (quoting *United States v. Lee*, 374 F.3d 637, 649 (8th Cir. 2004); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2534 n.3 (2009)). Such waivers may be made for tactical or strategic reasons. *See Melendez-Diaz*, 129 S. Ct. at 2542.

A defendant's rights under the Confrontation Clause are not violated by state "notice-and-demand" statutes, which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the

evidence absent the analyst's appearance live at trial." *Id.* at 2541. Thus, after receiving notice of the prosecution's intent to use a forensic analyst's report, a defendant must "assert (or forfeit by silence) his Confrontation Clause right." *Id.* Appellant does not claim surprise or assert that the prosecutor failed to give him notice of his intent to not call the analysts who prepared the exhibits. Because appellant stipulated to the admission of Exhibit 11 and specifically had "no objection" to the admission of Exhibit 12, he waived the right to challenge the admission of these exhibits for violation of his confrontation rights.

Sufficiency of the Evidence

A person is guilty of third-degree criminal sexual conduct when that person "engages in sexual penetration with another person" if "the actor knows or has reason to know" the complainant is "mentally impaired, mentally incapacitated, or physically helpless[.]" Minn. Stat. § 609.344, subd. 1(d) (2006). "Physically helpless" means that a 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 (2006).

Appellant's only challenge is that the evidence in the record is insufficient to support a finding that S.J. was physically helpless at the time of the offense. He concedes that some form of penetration is the only rational explanation for his semen being found in S.J.'s vagina, and that if S.J. had actually been asleep he would have had reason to

know of her condition.[2] But he argues that the evidence is insufficient to prove that she was asleep or unconscious, and thus physically helpless, particularly under the stricter level of scrutiny applied when the evidence is circumstantial.

The state argues that, because there was direct evidence that S.J. was asleep, appellant's circumstantial evidence argument is without merit. The state reasons that the district court's finding that S.J. was physically helpless because she was asleep is supported by S.J.'s testimony that she was, in fact, asleep. S.J. testified that on the night of the party she fell asleep on the couch. "The next thing I remember is, I was waking up and I felt a very uncomfortable pain." The state inquired further:

> Q. And so you don't recall anything about what might have happened?
> A. No.
> Q. Okay. And why is that?
> A. *I was sleeping*.

(Emphasis added.) The district court found S.J. "credibly testified that she was asleep on July 2, 2006 when the sexual penetration occurred."

But, as we suggested in our first *Dalbec* opinion, because S.J. did not remember what occurred in appellant's bedroom, any finding that she was asleep when the penetration occurred can be supported only by circumstantial evidence. *See Dalbec*, 781 N.W.2d at 433-34. In a case released after this appeal was briefed, the supreme court established that the stricter scrutiny for convictions based on circumstantial evidence

[2] We acknowledge that the evidence is extremely thin regarding whether appellant knew or had reason to know that S.J. was physically helpless. But appellate counsel concedes this element and does not make that argument here. This, too, might provide a basis for postconviction relief.

applies even when only a single element rests on circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469 (Minn. 2010). This heightened scrutiny requires us to consider "whether the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Id.* at 473 (quotation omitted). The circumstances proved must form "a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.* (quotation omitted).

Applying this heightened standard of scrutiny, we conclude that the reasonable inferences to be drawn from the circumstances proved are as follows: S.J. was extremely tired and exhausted after a long day of activities, little to eat, and consumption of numerous alcoholic beverages. While she did not appear to be overly intoxicated to witnesses, she remembered nothing after she lay down on a couch and believed that she fell asleep. But she was later observed talking to appellant, who offered her a bed so that she could go to sleep, with a promise that he would sleep on the floor. In the morning, S.J. awoke in appellant's bed with him lying partially naked next to her. S.J.'s clothing was disheveled, and she had a pain in her lower pubic area. S.J. immediately "freaked out," asked appellant what he thought he was doing, opened the locked bedroom door, and started to look for her brother. She told several witnesses that she thought appellant had raped her, and every witness who saw her that morning testified that she was upset, crying, and shaking. She and her brother immediately reported the incident to their parents and to police. S.J.'s version of the incident never wavered or changed. Appellant, on the other hand, claimed through statements to witnesses and in his trial

testimony either that nothing had happened or that he could not remember what had happened.

When viewed in the light most favorable to the verdict, these circumstances and the reasonable inferences to be drawn from them lead to one rational conclusion: at the time appellant sexually penetrated S.J., she was asleep, unconscious, or otherwise unable to withhold consent due to her physical condition. Given her immediate and emotional reaction upon waking up in appellant's bed and her testimony that she was not attracted to appellant and did not consent to having sex with him, any suggestion that she was awake during the assault is pure speculation and not a rational conclusion that can be reached in this case. A person cannot consent or withhold consent if she lacks a conscious awareness of her surroundings. *See Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000) (stating that person is unconscious when she lacks conscious awareness she would possess in normal waking state and would be unable to recount with certainty events that occurred while she was asleep and simultaneous to awakening). Although several witnesses agreed that S.J. was concerned about appearances and about what her parents might think about her sleeping with someone, any inference that S.J. had a motive to lie is negated by her reaction when she woke up to find herself in appellant's bed and by her consistent statements that she did not remember anything about the incident. The only reasonable inference that can be made in this case from the circumstances proved is that S.J. lacked a conscious awareness of her surroundings when she was penetrated by appellant.

This conclusion is entirely consistent with prior cases from this court involving victims of sexual assaults who were intoxicated or asleep at the time of penetration. *See, e.g.*, *State v. Berrios*, 788 N.W.2d 135, 142 (Minn. App. 2010) (concluding that evidence was sufficient to support finding that victim was physically helpless because she was either asleep or unconscious during sexual encounter, even though she was able to recall certain details of other points during the night in question), *review denied* (Minn. Nov. 16, 2010); *State v. Borg*, 780 N.W.2d 8, 14 (Minn. App. 2010) (holding that evidence was sufficient to support conviction of third-degree criminal sexual conduct, where victim was not flirting; went to bed; woke up with pajamas and underwear off one leg; did not remember having sex; and did not consent to sex), *rev'd on other grounds*, ___ N.W.2d ___ (Minn. Sept. 21, 2011). Unlike the victim in *Blevins*, there is no evidence from which it could be inferred that S.J. withheld her consent or was able to do so. *See State v. Blevins*, 757 N.W.2d 698, 701 (Minn. App. 2008) (reversing conviction of third-degree criminal sexual conduct where evidence established that victim withheld consent and was therefore not "physically helpless" within meaning of statute).

We therefore conclude that the evidence was sufficient to establish that S.J. was physically helpless when appellant penetrated her, and affirm his conviction.

Affirmed.