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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-675

State of Minnesota,
Respondent,

vs.

Curtis Mark Wenneson,
Appellant.

Filed April 12, 2011
Affirmed
Wright, Judge

St. Louis County District Court
File No. 69HI-CR-08-1180

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Kirk M. Anderson, Daniel S. Adkins, David L. McCormick, Adkins & Anderson, Chartered, Minneapolis, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and Bjorkman, Judge.

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

WRIGHT, Judge

Appellant challenges his convictions of first-degree criminal sexual conduct, a violation of Minn. Stat. § 609.342, subd. 1(e) (2008), and false imprisonment, a violation

of Minn. Stat. § 609.255, subd. 2 (2008). He argues that (1) his convictions should be reversed because the state failed to establish an essential element of both crimes; (2) the district court abused its discretion by denying appellant's motion for a new trial based on the state's discovery violations, newly discovered evidence, erroneous evidentiary rulings, and inconsistent jury verdicts; and (3) the district court miscalculated appellant's criminal-history score and erroneously sentenced him to 360 months' imprisonment. We affirm.

FACTS

On September 27, 2008, 17-year-old T.J.P. and her neighbor, L.R., went to the home of appellant Curtis Mark Wenneson in Hibbing. The three consumed alcohol together, and L.R. consumed at least two orange 30 mg Adderall pills obtained from Wenneson. Sometime during the evening, T.J.P. and Wenneson entered Wenneson's bedroom to get a deck of playing cards. Wenneson closed the bedroom door behind them, forcefully pushed T.J.P. facedown on the mattress, stuffed a piece of cloth in her mouth, and tied her hands behind her back. While T.J.P. resisted by struggling and kicking the walls, Wenneson removed T.J.P.'s clothing and penetrated her vagina with his tongue, fingers, and penis. After the sexual assault, Wenneson made a deep cut in T.J.P.'s hand with a razor and threatened that the cut was a warning about what would happen to T.J.P. and her family if she reported the sexual assault to anyone. When Wenneson fell asleep, T.J.P. freed herself, dressed, and left the room. When she encountered L.R. in the living room, T.J.P. told L.R. that Wenneson had raped her,

collected her belongings, and left Wenneson's home. She called her grandparents to request a ride and waited for them outside Wenneson's home.

R.C. was driving with her daughter, K.S., when she observed T.J.P. sitting on the curb crying. K.S. recognized T.J.P., and they stopped to speak with her. When T.J.P. explained that she had been assaulted, R.C. telephoned the police. T.J.P. and L.R. joined R.C. and K.S. in the car while waiting for the police to arrive. Shortly thereafter, the police arrived and escorted T.J.P. to a nearby hospital.

At the hospital, Hibbing Police Officer Ryan Riley interviewed T.J.P. and observed that she was upset, had been crying, and was injured. Dr. Julie Montana administered a sexual-assault exam on T.J.P. in the emergency room. Dr. Montana observed that T.J.P. appeared traumatized and had recent bruising on her legs, arm, and hand. T.J.P. also had redness and dryness in her mouth and blood and abrasions in her vaginal opening. Dr. Montana concluded that T.J.P.'s injuries were consistent with T.J.P.'s description of the assault. T.J.P. requested a drug-screening test, which revealed the presence of benzodiazepines, amphetamines, and marijuana. The blood-test results indicated an alcohol concentration of .127.

Subsequent testing of tissue samples disclosed semen in the area surrounding T.J.P.'s vagina and the enzyme amylase, which is present in saliva, feces, and semen, in the area around and inside T.J.P.'s vagina. DNA test results from the semen obtained from T.J.P.'s body closely matched Wenneson's DNA profile.

Hibbing police officers took Wenneson into custody on September 28, 2008. In five police interviews, Wenneson consistently denied having any sexual contact with

T.J.P. He subsequently was charged with first-degree criminal sexual conduct, a violation of Minn. Stat. § 609.342, subd. 1(e)(i); second-degree assault, a violation of Minn. Stat. § 609.222, subd. 1 (2008); terroristic threats, a violation of Minn. Stat. § 609.713, subd. 1 (2008); false imprisonment, a violation of Minn. Stat. § 609.255, subd. 2; and violating predatory-offender-registration provisions, Minn. Stat. § 243.166, subd. 5(a) (2008).[1]

The district court denied Wenneson's pretrial motion in limine to prohibit any reference to T.J.P. as the "victim" during the trial. At trial, the jury heard testimony from T.J.P., R.C., L.R., Dr. Montana, Hibbing police officers, and the forensic scientist who conducted the DNA testing. T.J.P. denied consuming any drugs on the evening of the incident, but she admitted that she drank alcohol. L.R. testified that T.J.P. had cut her own hand and taken an Adderall pill obtained from Wenneson. L.R. also testified that T.J.P. followed Wenneson into the bedroom voluntarily because she wanted to obtain more Adderall. When T.J.P. left Wenneson's bedroom, L.R. testified, T.J.P. showed L.R. an Adderall pill and stated, "He f--ked me, and this is all he gave me." According to L.R., T.J.P. gave L.R. half of the Adderall pill before leaving the residence. The state played redacted recordings of the five police interviews of Wenneson that excluded references to T.J.P.'s injuries, Wenneson's criminal history, and Wenneson's offers to submit to a polygraph.

[1] The predatory-offender registration charge was severed from the other charges for trial and was subsequently dismissed.

After the state rested its case, Wenneson moved for a judgment of acquittal, arguing that the state failed to meet its burden of proof because it presented no evidence that the offenses occurred in St. Louis County, an essential element of the offenses. The district court denied the motion. In its final jury instructions, the district court instructed the jury that "the City of Hibbing is in St. Louis County." The jury convicted Wenneson of first-degree criminal sexual conduct and false imprisonment and acquitted him of terroristic threats and second-degree assault.

Approximately one month after the trial, the state disclosed that T.J.P.'s victim-assault advocate informed the prosecutor during jury deliberations that R.C. had disclosed that her daughter, K.S., observed T.J.P. swallow a pill while waiting for the police in R.C.'s car. After trial, a Hibbing police officer interviewed R.C. and K.S. K.S. told the officer that, while waiting for the police to arrive, T.J.P. removed a 10 mg blue Adderall pill from her bra and swallowed it.

Wenneson moved for judgment of acquittal or a new trial, arguing that (1) the state failed to prove all elements of the offenses beyond a reasonable doubt, (2) the district court violated the rules of evidence by taking judicial notice of an essential element of the offenses when it instructed the jury that Hibbing is located in St. Louis County, (3) the state committed discovery violations and prosecutorial misconduct by failing to inform Wenneson of K.S.'s statements, (4) K.S.'s statements were newly discovered evidence requiring a new trial, (5) the jury verdicts are inconsistent, (6) Wenneson was denied his right to a fair trial because the district court permitted the prosecutor and the witnesses to refer to T.J.P. as the "victim," and (7) the district court

should have admitted in evidence Wenneson's unredacted statements, including references to his willingness to take a polygraph test. The district court denied Wenneson's motion and imposed a sentence of 360 months' imprisonment. This appeal followed.

D E C I S I O N

I.

Wenneson first argues that his convictions should be reversed because, after the state failed to present evidence that the offenses occurred in St. Louis County, the district court impermissibly took judicial notice of this essential element of the offenses by instructing the jury that Hibbing is in St. Louis County.

Because venue is an essential element of any criminal offense, the state must prove beyond a reasonable doubt that the charged offense occurred in the charging county. Minn. Const. art. I, § 6; *State v. Bahri*, 514 N.W.2d 580, 582 (Minn. App. 1994), *review denied* (Minn. June 15, 1994); *State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989). Venue is determined by all reasonable inferences arising from the totality of the circumstances and may be proven by circumstantial evidence. *Bahri*, 514 N.W.2d at 582; *Larsen*, 442 N.W.2d at 842. Evidence that the offense occurred in a well-known city or at a well-known location may demonstrate venue as to a particular county. *See, e.g.*, *State v. Trezona*, 286 Minn. 531, 532, 176 N.W.2d 95, 96 (1970) (holding that evidence offense occurred at particular intersection and airport was sufficient to establish venue); *Bahri*, 514 N.W.2d at 583 (holding that venue was established when state placed offenses in well-known part of city without identifying county); *Larsen*, 442 N.W.2d at 842

(holding that repeated testimony referencing well-known lake was sufficient to establish venue when county was not identified).

At trial, no witness stated that the offenses occurred in St. Louis County. But there is ample circumstantial evidence of this fact. For example, several witnesses testified that the offenses occurred at Wenneson's residence in Hibbing, and Wenneson's address was in evidence. Officers who investigated the case identified themselves as Hibbing Police Department officers. And in one of the recorded interviews, the interviewing officer stated that the interview occurred at the "St. Louis County Jail in Hibbing." Forensic laboratory reports admitted in evidence reflect that the requesting agency was the Hibbing Police Department and identified the county as St. Louis County. Moreover, the case was tried at the St. Louis County courthouse in Hibbing, and several witnesses referred to "Hibbing" as "here." The only reasonable inferences to be drawn from this evidence are that the offenses occurred in Hibbing and that Hibbing is located in St. Louis County. Although the better practice is to offer proof of the name of the county where the offense occurred, the state presented more than sufficient evidence to prove beyond a reasonable doubt that the charged offenses occurred in St. Louis County.

The district court's instruction that Hibbing is located in St. Louis County did not relieve the state of its burden to prove that the charged offenses occurred in St. Louis County. Under circumstances such as those present here, a district court may take judicial notice in a criminal case. *Larsen*, 442 N.W.2d at 842 (observing that district court may properly take judicial notice of venue when record contains indirect evidence such as street address or town name); *see also State v. White*, 300 N.W.2d 176, 178

(Minn. 1980) (holding that district court properly instructed the jury that building defendant entered was a dwelling); *Trezona*, 286 Minn. at 532, 176 N.W.2d at 96 (holding that district court, in bench trial, properly took judicial notice that an intersection and airport were located within the county). Accordingly, the district court did not err by instructing the jury that Hibbing is located in St. Louis County; and there is ample independent, circumstantial evidence of this fact to support this element of the charged offenses.

II.

Wenneson next argues that the district court erred by denying his new-trial motion because (1) the state committed discovery violations by failing to disclose K.S.'s statements before the end of trial or the statements were newly discovered evidence entitling Wenneson to a new trial, (2) references to T.J.P. as the "victim" at trial violated Wenneson's presumption of innocence, (3) the district court erred by admitting redacted recordings of police interviews with Wenneson, and (4) the jury verdicts were inconsistent. We review the district court's denial of a motion for a new trial for an abuse of discretion. *State v. Green*, 747 N.W.2d 912, 917 (Minn. 2008). A district court abuses its discretion by making findings unsupported by the evidence or by improperly applying the law. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009).

A.

In a criminal case, the state has an affirmative duty to disclose evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 86-87, 83 S. Ct. 1194, 1196-97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999); *see also*

Minn. R. Crim. P. 9.01, subd. 1(2), (6) (2009) (requiring that state disclose to defense relevant written or recorded statements and information that tend to negate or reduce defendant's guilt). The state's failure to disclose favorable and material evidence violates due process. *Brady*, 73 U.S. at 87, 83 S. Ct. at 1196-97. To constitute a *Brady* violation, the evidence at issue must be favorable to the accused because it is either exculpatory or impeaching, the state must have suppressed the evidence either willfully or inadvertently, and prejudice to the accused must have resulted. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999)). Whether there is a reasonable probability that the state's failure to disclose the evidence affected the outcome of the case presents a mixed question of fact and law, which we review de novo. *Id.* at 460.

The first two components of the *Brady* test are reflected in Minn. R. Crim. P. 9.01, which requires the state to disclose to the defense any "written or recorded statements which relate to the case" and any "material or information . . . that tends to negate or reduce" the defendant's guilt. Minn. R. Crim. P. 9.01, subd. 1(2), (6); *Pederson*, 692 N.W.2d at 460. The district court concluded that, under the first two prongs of the *Brady* test and the disclosure requirements of Minn. R. Crim. P. 9.01, the state should have disclosed the evidence of K.S.'s statements. We agree. K.S.'s statements were favorable to Wenneson because they could have been used to impeach T.J.P.'s testimony that she had not consumed Adderall on the day of the sexual assault and to corroborate L.R.'s testimony that T.J.P. consumed drugs at Wenneson's home and stated that she received

Adderall in exchange for sexual acts with Wenneson. Moreover, it is uncontested that the state improperly suppressed the evidence until approximately one month after trial.

A new trial is warranted, however, only when there is a reasonable probability that, if the evidence had been disclosed to the defense, the result of the trial would have been different. *Pederson*, 692 N.W.2d at 460. "A 'reasonable probability' is one that is 'sufficient to undermine confidence in the outcome.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)). We are not persuaded that there is a reasonable probability that the undisclosed evidence would have changed the outcome of the case. The state presented an abundance of evidence that Wenneson committed the sexual assault. This robust body of evidence comprised T.J.P.'s testimony about the sexual assault and significant corroborating evidence, including medical and physical evidence of a sexual assault, testimony that T.J.P. promptly reported the sexual assault, and testimony from witnesses that T.J.P. was visibly traumatized after the sexual assault. *See State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984) (holding that victim's testimony about sexual assault was corroborated by medical evidence, evidence that victim promptly reported assault, and witness testimony as to victim's emotional condition). Moreover, evidence establishing the presence of DNA closely matching Wenneson's in T.J.P.'s vaginal area significantly undermined Wenneson's credibility, in light of his repeated denials to police of any sexual contact with T.J.P.

Wenneson argues that K.S.'s statements would have bolstered his defense, which was that T.J.P. went to Wenneson's house to obtain drugs and alcohol in exchange for

sexual activity.[2] Evidence that T.J.P. took an Adderall pill shortly after leaving Wenneson's home, he argues, corroborates L.R.'s testimony regarding T.J.P.'s statement after leaving Wenneson's bedroom about receiving a pill from him and strengthens the defense. But the evidence has limited probative value for at least three reasons. First, witness descriptions of the pill received at Wenneson's house are inconsistent with K.S.'s description of the pill that T.J.P. allegedly swallowed in the car. Second, no other witness in the car at the time—including L.R.—corroborated K.S.'s statements that T.J.P. swallowed a pill. Third, the state's investigation indicated that K.S. was uncertain whether the pill T.J.P. consumed was an Adderall pill. These inconsistencies greatly diminish the value of K.S.'s statement to the defense.

Wenneson also argues that he could have used K.S.'s statements to impeach T.J.P. because the statements establish that T.J.P. consumed drugs on the morning after she left his apartment, contradicting T.J.P.'s claim that she did not consume any drugs. But the impeachment value here also is limited because the record already contained evidence that T.J.P. tested positive for amphetamines on the morning after the sexual assault.

We also consider that a district court has limited discretion to permit additional evidence after jury deliberations have begun because providing such evidence would likely distort the importance of the evidence. *State v. Yang*, 627 N.W.2d 666, 681 (Minn.

[2] We reject the state's argument that this was not Wenneson's defense at trial. In his opening statement and closing argument, Wenneson's counsel asserted that T.J.P. went to Wenneson's home seeking drugs and alcohol, any sexual contact that occurred was consensual, and T.J.P. alleged rape when she did not receive the drugs that she wanted. This adequately establishes that Wenneson's defense was that T.J.P. consented to sexual activity in exchange for drugs.

App. 2001) (citing *United States v. Bayer*, 331 U.S. 532, 537-38, 67 S. Ct. 1394, 1396-97 (1947)), *review denied* (Minn. July 24, 2001). The district court observed that, even if the state had disclosed K.S.'s statements as soon as it learned about them, the district court would not have interrupted jury deliberations to reopen testimony because doing so would have caused significant delay and would have risked distorting the importance of the evidence. The district court's conclusion is sound and supports its decision that Wenneson was not prejudiced by the state's failure to disclose K.S.'s statements before the end of trial.

Because there is no reasonable probability that the outcome of the trial would have been different if the state had disclosed K.S.'s statements to the defense when it first learned of them during jury deliberations, the district court did not abuse its discretion by denying a new trial on this ground.

B.

Wenneson also argues that K.S.'s statements are newly discovered evidence that entitle him to a new trial. A new trial based on newly discovered evidence may be granted when a defendant establishes

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). This analysis requires more than a theoretical possibility that the new testimony might alter the jury's verdict. *State v. Fort*,

768 N.W.2d 335, 345 (Minn. 2009). The evidence must be admissible at trial in order to be deemed capable of producing a different outcome. *Wayne v. State*, 498 N.W.2d 446, 448 (Minn. 1993).

The first prong of *Rainer* is satisfied because it is undisputed that the state failed to disclose K.S.'s statement until approximately one month after trial. As to the second prong, Wenneson argues that he could not have discovered K.S.'s statements because he did not know before trial that K.S. was present when R.C. discovered T.J.P. outside Wenneson's residence. But the record establishes that defense counsel was notified before trial that R.C. would testify at trial and that her daughter was present when R.C. assisted T.J.P., and R.C. testified at trial that her teenage daughter was involved in assisting T.J.P. Yet defense counsel did not pursue this information by interviewing R.C. or K.S. or requesting time to conduct additional discovery as to R.C.'s daughter. Because, with due diligence, the defense could have discovered this evidence before trial, the second prong of *Rainer* is not satisfied.

As to the third prong, the evidence is not cumulative because it provides information about T.J.P.'s behavior on the day of the offense that was not part of the record. Not only does the evidence have impeachment value as to T.J.P., but it also has independent probative value because it corroborates L.R.'s testimony that T.J.P. described an exchange of sexual acts for a pill. The evidence also was not clearly doubtful because K.S. was a disinterested third party with no apparent motivation to lie. But as to the fourth prong, the record already contained unrebutted physical evidence of a sexual assault and evidence supporting the defense theory. When the record is viewed as

a whole, we do not conclude that it is probable that the newly discovered evidence would produce an acquittal or a more favorable result at trial. Accordingly, Wenneson is not entitled to a new trial on this ground.

C.

Wenneson next argues that he is entitled to a new trial because, by permitting trial participants to refer to T.J.P. as the "victim," the district court improperly shifted the burden to Wenneson to prove his innocence. "The presumption of innocence is a fundamental component of a fair trial under our criminal justice system." *State v. Peterson*, 673 N.W.2d 482, 486 (Minn. 2004). The state must prove the elements of an offense beyond a reasonable doubt and may not shift the burden of proof to a defendant. *State v. Brechon*, 352 N.W.2d 745, 750 (Minn. 1984). A criminal defendant's due-process rights are violated if the burden to disprove any element of the charged offense is shifted to the defendant. *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995).

Wenneson contends that, because whether a crime actually occurred is the ultimate issue in a criminal-sexual-conduct case, referring to the complainant as a "victim" violates the presumption of innocence by impermissibly shifting the burden of proof to the defendant. Wenneson identifies no Minnesota authority that requires a new trial to be granted or a conviction to be reversed because the complainant was referred to as a victim. And he identifies no specific instances in the record when T.J.P. was referred to as a victim, except at oral argument, when counsel generally asserted without citation that there were five occasions in a 930-page transcript. The district court instructed the jury before trial began and at the close of trial that it was the state's burden to prove that

Wenneson is guilty of the charged offense and that Wenneson is presumed innocent unless and until the state proves that he is guilty beyond a reasonable doubt. We presume that the jury follows the district court's instructions. *State v. Taylor*, 650 N.W.2d 190, 207 (Minn. 2002). These instructions undermine any inference that Wenneson argues the jury may have drawn from the use of the term "victim" to refer to T.J.P. Accordingly, the district court exercised sound discretion when it denied a new trial on this ground.

D.

Wenneson also argues that he is entitled to a new trial because the district court abused its discretion by admitting redacted recordings of Wenneson's interviews with law enforcement that excluded Wenneson's offers to submit to a polygraph test.

Rulings on evidentiary matters rest within the district court's discretion and will not be reversed absent an abuse of discretion. *State v. Bauer*, 598 N.W.2d 352, 362 (Minn. 1999). Wenneson has the burden to establish that the district court abused its discretion and that he was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

We first address Wenneson's argument that the district court abused its discretion when it admitted and permitted the state to play the recordings. "[R]elevant statements made during a police interview may be admissible, unless precluded by the constitution, statute or rules of evidence." *State v. Tovar*, 605 N.W.2d 717, 725 (Minn. 2000). Wenneson's statements in the interviews are relevant because the statements address the events underlying the charged offenses. *See* Minn. R. Evid. 401 (providing that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence"). The statements are not subject to the hearsay exclusion because they are statements by a party-opponent. *See* Minn. R. Evid. 801(d)(2)(A) (providing that statement by party-opponent is not hearsay). The district court minimized the danger of unfair prejudice by redacting references to Wenneson's past crimes and references to T.J.P.'s injuries. Therefore, the district court properly admitted the interviews.

Wenneson also argues that the district court abused its discretion by redacting his offers to submit to a polygraph test from the recorded interviews. It is well established that the results of a polygraph test along with direct and indirect references to taking or refusing to take a polygraph test generally are inadmissible. *State v. Fenney*, 448 N.W.2d 54, 61 (Minn. 1989); *State v. Winter*, 668 N.W.2d 222, 225 (Minn. App. 2003); *State v. Dressel*, 765 N.W.2d 419, 426-27 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). One limited exception to this rule permits a defendant to present polygraph information as part of the circumstances of a confession. *State v. Schaeffer*, 457 N.W.2d 194, 197 (Minn. 1990). This exception is inapplicable to the circumstances here, which do not involve a confession.

Wenneson argues that the polygraph references should have been admitted under Minn. R. Evid. 106, which provides that, when a recorded statement is introduced, the adverse party may require introduction of any other part of the statement that ought to be considered contemporaneously. This "'rule of completeness' applies only where it is necessary to give the jury a full understanding of the facts and it may not be used to introduce otherwise irrelevant statements." *State v. Mills*, 562 N.W.2d 276, 286-87

(Minn. 1997). Rule 106 of the Minnesota Rules of Evidence does not require a district court to admit the entire recording of a criminal defendant's interview when it includes inadmissible evidence. *Bauer*, 598 N.W.2d at 368. Here, the references to polygraph examinations were properly excluded under the general prohibition against admitting such evidence. *See Mills*, 562 N.W.2d at 286 (holding that defendant's statements were properly excluded because they fell under district court's general exclusion of evidence relating to defendant's psychiatric history).

Accordingly, Wenneson fails to establish that the district court abused its discretion and that he is entitled to a new trial on these grounds.

E.

Wenneson next argues that he is entitled to a new trial because the jury verdicts acquitting him of second-degree assault and terroristic threats are legally inconsistent with the jury verdicts convicting him of first-degree criminal sexual conduct and false imprisonment. Whether verdicts are legally inconsistent presents a question of law, which we review de novo. *State v. Laine*, 715 N.W.2d 425, 434-35 (Minn. 2006).

Legally inconsistent verdicts occur when a necessary element of each offense is subject to conflicting jury findings. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The principle of legally inconsistent verdicts applies in cases involving multiple guilty verdicts. *State v. Leake*, 699 N.W.2d 312, 325-26 (Minn. 2005). Cases involving inconsistencies between a verdict of not guilty on one count and a verdict of guilty on another count are logically, rather than legally, inconsistent. *Id.* at 326. Generally, a defendant is not entitled to a new trial merely because verdicts are logically inconsistent.

State v. Juelfs, 270 N.W.2d 873, 873-74 (Minn. 1978); *Nelson v. State*, 407 N.W.2d 729, 731 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987). The rationale for this rule is that "the jury in a criminal case has the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts." *State v. Perkins*, 353 N.W.2d 557, 561 (Minn. 1984).

Wenneson argues that the verdicts are legally inconsistent because to acquit him of the terroristic-threats and second-degree-assault charges, the jury must have found that he did not cut T.J.P.'s hand or threaten her, which Wenneson argues are required findings to convict him of first-degree criminal sexual conduct. But no element of second-degree assault or terroristic threats duplicates an element of first-degree criminal sexual conduct or false imprisonment such that an acquittal on one of the former offenses conflicts with a guilty verdict on one of the latter.[3] *See State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996) ("Verdicts are legally inconsistent when proof of the elements of one offense negates a necessary element of another offense."). The verdicts are not legally or logically inconsistent. Second-degree assault requires an element—use of a dangerous weapon—

[3] A defendant is guilty of first-degree criminal sexual conduct if the state proves beyond a reasonable doubt that the defendant (1) engaged in sexual penetration with the complainant, (2) caused personal injury to the complainant, and (3) used force or coercion to accomplish the sexual contact. Minn. Stat. § 609.342, subd. 1(e)(i). A defendant is guilty of second-degree assault if the state proves beyond a reasonable doubt that the defendant committed assault with a dangerous weapon. Minn. Stat. § 609.222, subd. 1. A defendant is guilty of terroristic threats if the state proves beyond a reasonable doubt that the defendant threatened, directly or indirectly, to commit a crime of violence with the intent to terrorize another. Minn. Stat. § 609.713, subd. 1. And a defendant is guilty of false imprisonment if the state proves beyond a reasonable doubt that the defendant intentionally confined or restrained an individual without authority and without the individual's consent. Minn. Stat. § 609.255, subd. 2.

that is not required for either first-degree criminal sexual conduct or false imprisonment. *See* Minn. Stat. §§ 609.222, subd. 1 (second-degree assault), 609.342, subd. 1(e)(i) (first-degree criminal sexual conduct), 609.255, subd. 2 (false imprisonment). The jury reasonably could have found that there was not proof beyond a reasonable doubt that Wenneson cut T.J.P.'s hand with the dangerous weapon—the razor—and thus acquitted him of the second-degree assault charge, while also finding that Wenneson caused personal injury, as required for first-degree criminal sexual conduct. Similarly, as to terroristic threats, the jury could have found that there was proof beyond a reasonable doubt that Wenneson committed first-degree criminal sexual conduct and false imprisonment without finding proof beyond a reasonable doubt that he threatened to commit second-degree assault with intent to terrorize another. *See* Minn. Stat. §§ 609.713, subd. 1 (terroristic threats), 609.342, subd. 1(e)(i) (first-degree criminal sexual conduct), 609.255, subd. 2 (false imprisonment).

Because a jury in a criminal case has the power of lenity, we focus our review on whether there is sufficient evidence to sustain the guilty verdicts. *Nelson*, 407 N.W.2d at 731. The state presented ample evidence through the testimony of T.J.P. and other witnesses along with photographic and medical evidence to prove beyond a reasonable doubt the elements of first-degree criminal sexual conduct and false imprisonment. Therefore, the district court did not abuse its discretion by denying Wenneson's motion for a new trial based on inconsistent verdicts.

III.

Wenneson argues that the district court erroneously calculated his criminal-history score, resulting in an excessive sentence. A defendant's criminal-history score is used by the district court to determine a defendant's presumptive sentence. *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). The Minnesota Sentencing Guidelines set forth the procedures by which the district court calculates a defendant's criminal-history score. *Id.*; Minn. Sent. Guidelines II.B. (2008). A criminal-history score is calculated by allocating points for each of a defendant's prior convictions for which a felony sentence was stayed or imposed. Minn. Sent. Guidelines II.B.1. We conduct a de novo review of a district court's interpretation of the Minnesota Sentencing Guidelines. *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

The district court calculated Wenneson's criminal-history score as eight points. In doing so, the district court assigned one point for each of five counts of possession of child pornography of which Wenneson was convicted in 2004; one custody-status point because the instant offense occurred during the initial probationary period for the 2004 convictions; one custody-status point because both the prior convictions and one of the current convictions were for a specified sex offense; and one criminal-history point for the false-imprisonment conviction.

A.

Wenneson first challenges the district court's assignment of two custody-status points. The 2008 sentencing guidelines provide that the district court shall assign a custody-status point if the offender "committed the current offense within the period of

the initial length of stay pronounced by the sentencing judge for a prior felony." Minn. Sent. Guidelines II.B.2.c. Section II.B.2.c. also provides that "[t]his policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence." "Initial length of stay" means "the initial length of a defendant's probationary term pronounced by the sentencing judge." *State v. Maurstad*, 733 N.W.2d 141, 150 (Minn. 2007). An offender who is "initially given probation for a period of years, but [is] subsequently discharged early from probation (before the time period initially pronounced by the court has run out), will receive a custody status point if the offender commits a new offense during the pronounced original period of probation." *Id.* at 149 (emphasis omitted) (quotation omitted); *see also* Minn. Sent. Guidelines cmt. II.B.201 (recommending same).[4] An additional custody-status point is assigned when an offender was under a custody-status condition described in Minn. Sent. Guidelines II.B.2.a.-d. for a specified sex offense and the current offense of conviction is a specified sex offense. Minn. Sent. Guidelines II.B.2.e.

On December 22, 2004, Wenneson was sentenced to five years' probation. In December 2005, his probation agreement was amended, and he was subsequently discharged from probation. Wenneson argues that the amended probation agreement and probation discharge were, in effect, a probation revocation and execution of his sentence, which exclude him from receiving a custody-status point. *See* Minn. Sent. Guidelines

[4] Comments to the sentencing guidelines are merely advisory. *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003).

II.B.2.c. (assigning one custody-status point unless probation is revoked and offender serves executed sentence). But the record reflects that Wenneson's probation was *not* revoked and he *did not* serve an executed sentence. *See* Minn. Sent. Guidelines App. (definition of terms) (defining "executed sentence" as "the total period of time for which an inmate is committed to the custody of the Commissioner of Corrections"). Rather, he was discharged from probation. Therefore, the custody-status-point exception in Minn. Sent. Guidelines II.B.2.c. does not apply. Wenneson committed the instant offenses during his initial term of probation, which ended on December 22, 2009, notwithstanding the subsequent amended agreement and discharge of the 2004 sentence. The district court properly assigned the custody-status point pursuant to Minn. Sent. Guidelines II.B.2.c. And because section II.B.2.c. applies and both his prior and current convictions are sex offenses, the district court correctly assigned a second custody-status point pursuant to Minn. Sent. Guidelines II.B.2.e.

B.

Wenneson next argues that the district court erred by including five criminal-history points for Wenneson's 2004 convictions. He contends that applying the severity standards in the 2008 sentencing guidelines results in an unconstitutional ex post facto punishment.

Both the United States and Minnesota constitutions prohibit the enactment and application of ex post facto laws. U.S. Const. art. I, § 9, cl. 3; Minn. Const. art. I, § 11; *Starkweather v. Blair*, 245 Minn. 371, 386-87, 71 N.W.2d 869, 879-80 (1955); *State v. Grillo*, 661 N.W.2d 641, 644 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

"The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981) (quotation omitted).

It is well established that a statute that provides for enhanced penalties for a repeat offender does not punish the prior offense, but rather stiffens the penalty for the subsequent offense. *State v. Dumas*, 587 N.W.2d 299, 304 (Minn. App. 1998) (citing *Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 1927 (1994)), *review denied* (Minn. Feb. 24, 1999); *see also State v. Findling*, 123 Minn. 413, 415, 144 N.W. 142, 143 (1913) (holding that increased punishment for subsequent offense is not punishment for the first offense a second time, but a more severe punishment for the later offense); *State v. Willis*, 332 N.W.2d 180, 185 (Minn. 1983) (holding that 1982 amendment to DWI law, which allowed past criminal convictions to enhance present crimes, did not punish the past crime but "increased the possible penalty for the latest crime").

The sentencing guidelines in effect when Wenneson committed the instant offense in September 2008 provided that possession of child pornography is a severity level F offense, which is assigned one point per conviction. Minn. Sent. Guidelines II.B.1.a., V. (2008). Wenneson asserts that the 2004 sentencing guidelines assign a weight of one-half point for each of those convictions and the change in the weight assigned to his prior convictions cannot be applied to him without violating the prohibition against ex post facto laws. Therefore, he argues, the district court should have assigned only one-half point for each of his prior convictions.

As an initial matter, we observe that Wenneson cites no authority for his contention that his offenses merited one-half point in 2004. The version of the sentencing guidelines in effect when Wenneson committed the 2004 offenses indicates that possession of child pornography is an unranked offense and, therefore, does not have a standard criminal-history-point assignment. *See* Minn. Sent. Guidelines II.A.03., V. (2004).

The 2008 sentencing guidelines provide that "[t]he appropriate severity level shall be based on the severity level ranking of the prior offense of conviction that is in effect at the time the offender commits the current offense." Minn. Sent. Guidelines cmt. II.B.101; *see also id.*, III.F. ("Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date.") (2008). This policy "applies to offenses that are currently assigned a severity level ranking, but were previously unranked and excluded from the Offense Severity Reference Table." *Id.*, cmt. II.B.103. The sentencing guidelines clearly provide that the criminal-history score for prior convictions is determined by the sentencing guidelines in effect at the time of the new offense. Therefore, the district court properly assigned five criminal-history points for Wenneson's five prior convictions.

C.

Wenneson also challenges the district court's decision to assign one criminal-history point for his conviction of false imprisonment when sentencing Wenneson for the first-degree criminal sexual conduct. Wenneson contends that, because his convictions

arise from a single behavioral incident and first-degree criminal sexual conduct is a higher-level offense than false imprisonment, the district court improperly assigned a criminal-history point for false imprisonment.

"[W]hen a defendant is sentenced for multiple offenses on the same day, a conviction for which the defendant is first sentenced is added to his or her criminal-history score for another offense for which he or she is also sentenced." *Williams*, 771 N.W.2d at 521 (describing method of calculating criminal-history score established by *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981)). Multiple offenses are generally sentenced in the order in which they occurred. Minn. Sent. Guidelines II.B.1.

Wenneson relies on a comment to the sentencing guidelines that provides: "In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, only the offense at the highest severity level should be considered." Minn. Sent. Guidelines cmt. II.B.101. But state law does not prohibit imposing a sentence on both of the offenses at issue here. A conviction for committing first-degree criminal sexual conduct with force or violence does not bar punishment for any other offense the defendant committed in the same course of conduct. Minn. Stat. § 609.035, subd. 6 (2008). The district court properly assigned Wenneson a criminal-history point for his false-imprisonment conviction when sentencing Wenneson for first-degree criminal sexual conduct.

Affirmed.