STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2189

State of Minnesota,
Respondent,

vs.

Jose Santoya Juarez,
Appellant.

Filed November 13, 2012
Affirmed
Stauber, Judge

Kandiyohi County District Court
File No. 34CR10594

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Jennifer Fischer, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of second-degree criminal sexual conduct and sentence of life imprisonment without possibility of parole, appellant argues that Minn. Stat. § 609.3455, subd. 1(8) (2008), is unconstitutional, that the district court erred by

applying the section, and that the evidence is insufficient to convict appellant of kidnapping under Minn. Stat. § 609.25, subd. 1(3) (2008), and criminal sexual conduct under Minn. Stat. § 609.343 (2008). We affirm.

FACTS

On July 27, 2010, 22-year-old S.M. and her friend M.O. went to the Eagles Club in Willmar to play pool with another friend, C.M. The three friends went outside to smoke a cigarette when appellant Jose Santoya Juarez approached them. Appellant spoke with them and then began to touch S.M.'s legs and breasts. M.O. moved in between appellant and S.M. and appellant began touching a tattoo on M.O.'s leg. When S.M. and M.O. went to go inside, appellant asked for a hug. S.M. hugged appellant, and appellant told her that her breasts felt good against his chest. S.M. and M.O. went back inside and were joined by a fourth friend, B.B.

Appellant entered the bar and approached the group. He began grabbing S.M.'s leg, rubbing her thigh, and trying to grab her breast. S.M. resisted appellant's advances, "throw[ing] his hand away" five or six times. Appellant also attempted to touch S.M.'s genital area. At this point, the bartender asked appellant to leave. Appellant left the bar after 10-15 minutes, but "made a fuss about it."

Sometime after, S.M. went outside to have another cigarette. Appellant came up behind S.M., grabbed her by her arm and wrist, and dragged her across the parking lot into a space between two other buildings. The space between the buildings is 22 inches in width with a light pole at one end, blocking the exit. Appellant told S.M. to "be quiet and let him do what he had to do" and indicated that he wanted to have sexual interaction

with her. Appellant told her not to worry, that he knew she wanted it, and that she was "nothing but a whore anyways."

After appellant dragged S.M. into the space between the buildings, appellant attempted to remove S.M.'s tank top, breaking the strap. Appellant grabbed her breasts and touched her genital area. Appellant also hit S.M.'s head against the pavement two or three times. When S.M. would try to get away, appellant would grab her by the ankles and drag her back. At one point, S.M. was on her stomach and grabbed at a tree stump in the alley way attempting to pull away from appellant. Appellant grabbed her pants, trying to pull them off, and S.M. had to let go off the tree stump to stop appellant from removing her pants.

Appellant then pulled his pants down and placed his knees on S.M.'s arms, pinning them to the ground. Appellant attempted to place his penis in S.M.'s mouth and told her to perform oral sex on him. S.M. resisted, told appellant no, and was screaming. At one point, appellant told S.M. if she did not stop screaming, he would make her stop screaming. S.M. removed her phone from her pocket and hit the "talk" button, which dialed C.M.'s phone.

The phone call went to C.M.'s voicemail. C.M., who had noticed that S.M. had been gone longer than expected, listened to the message and could hear S.M. screaming. C.M. and B.B. went outside and walked toward the sound of a woman screaming from the space between the buildings. When they got to the area, they saw appellant on top of S.M. with his pants down. Appellant fled the scene and was later apprehended by Willmar Police Officer Christian Berg.

A grand jury was empaneled and indicted appellant on four counts. Count I charged appellant with attempted first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(c) (2008). The indictment on Count I referenced a sentencing provision that provided "[a] court shall commit a person to the commissioner of corrections for a period of time that is not less than double the presumptive sentence" in certain circumstances. *See* Minn. Stat. § 609.3455, subd. 3a(a) (2008). Count II charged appellant with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2008). The indictment also referenced a sentencing provision that required the court to impose a sentence of life-without-the-possibility-of-release if an offender was convicted under § 609.343, subd. 1(e)(i), if the offender had a prior conviction for a violation of sections 609.342, .343, or .344 and "the fact finder determines that a heinous element exists for the present offense." Minn. Stat. § 609.3455, subd. 2(a)(2) (2008). Count III charged appellant with kidnapping in violation of Minn. Stat. § 609.25 (2008), and Count IV charged appellant with third-degree assault in violation of Minn. Stat. § 609.223 (2008).

Appellant waived his right to a jury trial, and the matter proceeded to a bench trial. Following trial, the district court found appellant guilty on all four counts of the indictment.

Two days later, the district court held a hearing on the *Blakely* issues after appellant waived his right to a jury to decide those issues. At the sentencing hearing, the state argued for an enhanced sentence on three different bases: particular vulnerability of the victim; mandatory life sentence without release for an egregious repeat offender

under Minn. Stat. § 609.3455, subd. 2(a)(2); and mandatory sentencing for certain offenders under Minn. Stat. § 609.3455, subd. 3a. Defense counsel argued that the enhancement factors were already counted as separate offenses and could not, therefore, be used to enhance appellant's sentence. The court heard testimony from S.M.; Jay Vagle, an employee of Kandiyohi County Community Corrections who performed the presentence investigation; and psychologist Dr. Richard Lee. Following the hearing, the district court allowed the parties to submit written argument on the *Blakely* issues. The district court then issued an order finding that S.M. was not particularly vulnerable but that appellant had a prior conviction for criminal sexual conduct and the current crime involved a heinous element as defined by Minn. Stat. § 609.3455, subd. 1(d)(8).

On October 17, the district court held a sentencing hearing. After hearing argument from counsel on appellant's motion for a downward departure and witness testimony, the district court sentenced appellant on Count II to life imprisonment without the possibility of release, pursuant to Minn. Stat. § 609.3455, subd. 2(a)(2). The district court did not impose a sentence on the other three counts. This appeal follows.

D E C I S I O N

I.

The constitutionality of a statute presents a question of law, which appellate courts review de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). In reviewing a constitutional argument, this court presumes that Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary. *State v. Johnson*, 777 N.W.2d 767, 769 (Minn. App. 2010), *aff'd* 813 N.W.2d 1 (Minn. 2012). In

order to successfully challenge a statute as being unconstitutional, a party must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision. *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

Appellant argues that imposing a life-without-possibility-of-release sentence for a non-homicide crime is cruel-or-unusual punishment under the Minnesota Constitution. The Minnesota Constitution differs from the United States Constitution in that it provides that no "cruel *or* unusual punishments be inflicted," whereas the United States Constitution prohibits "cruel *and* unusual" punishments. *Compare* Minn. Const. art. I, § 5 (emphasis added) *with* U.S. Const. amend. VIII (emphasis added). "This difference is not trivial." *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998).

In determining whether a sentence is cruel or unusual, Minnesota courts look to the proportionality of the crime and the sentence. *State v. McDaniel*, 777 N.W.2d 739, 753 (Minn. 2010). In conducting this analysis, a court considers whether the sentence "comports with the evolving standards of decency that mark the progress of a maturing society." *Mitchell*, 577 N.W.2d at 489 (quotation omitted). Courts are directed to "look to standards as expressed by the legislature, since it is the legislature that is constituted to respond to the will and consequently the moral values of the people." *State v. Chambers*, 589 N.W.2d 466, 480 (quotations omitted).

In 2005, the Minnesota Legislature enacted Minn. Stat. § 609.3455. 2005 Minn. Laws ch. 136, art. 2, § 21 at 929. As applied in the present case, the statute provides:

> Notwithstanding the statutory maximum penalty otherwise applicable to the offense, the court shall sentence a person convicted under [certain enumerated offenses,

> including second-degree criminal sexual conduct] to life without the possibility of release if:
>
> (1) the fact finder determines that two or more heinous elements exist; or
>
> (2) the person has a previous sex offense conviction for a violation of section 609.342, 609.3343, or 609.344, and the fact finder determines that a heinous element exists for the present offense.

Minn. Stat. § 609.3455, subd. 2(a) (2008). The statute defines a "heinous element" as including when "the offender, without the complainant's consent, removed the complainant from one place to another and did not release the complainant in a safe place." Minn. Stat. § 609.3455, subd. 1(d)(8) (2008).

Appellant argues that the sentence-enhancement provisions of Minn. Stat. 609.3455 are unconstitutional as applied in the present case because the removal of S.M. from the parking lot and her confinement to the space between the buildings were "completely incidental" to the sexual assault. In making this argument, appellant relies on the supreme court's holdings in *State v. Smith* and *State v. Welch*.

The defendant in *State v. Smith* was charged with and convicted of first-degree premeditated murder and first-degree murder while committing kidnapping. 669 N.W.2d 19, 22 (Minn. 2003), *overruled on other grounds by State v. Leake*, 699 NW2d 312 (Minn. 2005). According to witness testimony, the defendant believed that the victim was trying to set him up to be robbed of wheel rims, so the defendant conspired to assault the victim. 669 N.W.2d at 23. The defendant struck the victim with a flashlight and when the victim tried to flee the room, the defendant's accomplice "blocked his means of escape by standing in the doorway and putting his hands on the walls." *Id.* The

defendant then shot the victim twice—once in the back and once by the shoulder blade—killing him. *Id.* Appellant challenged his conviction of first-degree murder while committing kidnapping, arguing that the evidence was insufficient to sustain the conviction because the confinement was momentary and incidental to the murder. *Id.* at 30. After conducting a thorough review of Minnesota jurisprudence regarding the scope of confinement or removal necessary to sustain a kidnapping conviction, the supreme court held that "where the confinement or removal of the victim is completely incidental to the perpetration of a separate felony, it does not constitute kidnapping." *Id.* at 31-32.

Six months later, the supreme court issued its decision in *State v. Welch*, 675 N.W.2d 615 (Minn. 2004). In *Welch*, the record evidence from a bench trial indicated that the defendant threw the victim to the ground, straddled her, and slammed her head to the ground. 675 N.W.2d at 616-17. The state also presented evidence that the defendant had approached other women in the same area and manner and had masturbated after approaching them. *Id.* at 617. Based on the evidence presented, the district court found the defendant guilty of kidnapping and attempted second-degree criminal sexual conduct. *Id.* at 618. This court affirmed the convictions, and the supreme court granted review. *Id.*

On review before the supreme court, the defendant argued that the state had failed to establish the underlying-felony element of the kidnapping conviction because it had allegedly failed to establish attempted second-degree criminal sexual conduct. *Id.* at 620. Because the court held that there *was* sufficient evidence to sustain the criminal-sexual-conduct conviction, the supreme court rejected this argument. *Id.* While not

briefed, the supreme court then considered what effect, if any, its decision in *Smith* had on appellant's convictions. *Id.* at 620-21. Given that there was no evidence of removal and the confinement evidence was limited to the defendant straddling the victim as she lay on the ground, the supreme court held that its opinion in *Smith* required reversal of the defendant's kidnapping conviction. *Id.* at 621.

Appellant's reliance on *Smith*, *Welch*, and their progeny is misplaced. Unlike the present case, which involves enhancement of a criminal-sexual-conduct sentence on the bases of removal of a victim during the assault, both *Smith* and *Welch* address whether evidence is sufficient to establish kidnapping as *a separate offense*. And while the *Welch* court "embrace[d] the reasoning and concerns set forth in . . . established precedent that kidnaping convictions may unfairly exaggerate the criminality of a defendant's conduct in those cases where the confinement was completely incidental to the crime committed during the course of the kidnapping," 675 N.W.2d at 621 (quotation omitted), this is not what happened here.

The "heinous element" at issue here required the removal of the victim to another place and a failure to release her in a safe place. *See* Minn. Stat. § 609.3455, subd. 1(8). Although this element is similar to the offense of kidnapping, it is an element of the aggravated offense, not a separate offense in and of itself. And appellant's dragging of the victim across a parking lot and into a narrow space between two buildings was hardly necessary or essential to the commission of criminal sexual conduct, as he suggests on appeal.

Appellant's sentence was enhanced not due to his kidnapping conviction, but rather because the statutory elements of section 609.3455 were met. Contrary to appellant's argument, *Smith* and *Welch* do not stand for the proposition that removal of a victim that is incidental to accomplishing criminal sexual conduct may not be considered a "heinous element" of the offense under section 609.3455, and his argument that the statute is unconstitutional on that ground is unavailing.

Appellant makes a number of other arguments regarding the constitutionality of the sentence-enhancement statute, none of which is availing. First, appellant argues that the appellate rights of a person who receives a life-without-possibility-of-release sentence under section 609.3455 are unconstitutionally limited when compared to the appellate rights of a person convicted of first-degree murder who receives the same sentence. *See* Minn. R. Crim. P. 29.03 (providing for direct appeal to the Minnesota Supreme Court in first-degree-murder cases). But appellant and others who receive an enhanced sentence under the statute, have the right to appeal their convictions and sentences to this court. *See* Minn. R. Crim. P. 28.02, subds. 2(1) (appeal of final judgment), 2(3) (appeal of felony sentence). Appellant makes no convincing argument that his appellate rights under Minn. R. Crim. P. 28.02 are insufficient, and we reject his argument that an appeal to this court is insufficient to address any concerns that may be presented by a life sentence under section 609.3455.

Appellant also argues that section 609.3455 "leaves far too much discretion to interpret a statute in the hands of a court." He argues that because he is Hispanic and the state offered no plea agreement, despite the fact that it had allegedly done so in similar

cases, "invites discrimination." But we have rejected the argument that the fact that prosecutors could charge defendants committing the same offense differently, resulting in imposition of different sentences, runs afoul of the Constitution. *See State v. Richmond*, 730 N.W.2d 62, 72 (Minn. App. 2007) (citing *United States v. Batchelder*, 442 U.S. 114, 124, 99 S. Ct. 2198, 2204 (1979)) (rejecting equal-protection challenge based on "the potential for unfettered prosecutorial discretion in electing whether to charge a defendant under the statute with the harsher penalty"), *review denied* (Minn. June 19, 2007). The state is entitled to discretion in its charging decisions, and "[a]lthough a prosecutor 'may be influenced by the penalties available upon conviction, . . . this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.'" *Id.* (quoting *Batchelder*, 442 U.S. at 125, 99 S. Ct. at 2205). "[T]he Equal Protection Clause prohibits selective enforcement only when it is based on an unjustifiable standard such as race, religion, or another arbitrary classification." *Id.* Here, appellant has not presented any evidence of unlawful discrimination or selective enforcement. His contention that section 609.3455, subdivision 2(a)(2), violates his constitutional rights, therefore, is unfounded.

II.

Appellant argues that the district court erred by applying Minn. Stat. § 609.3455 for two primary reasons: (1) no evidence was presented at the *Blakely* hearing regarding removal of the victim; and (2) the evidence that allegedly satisfied Minn. Stat. § 609.3455, subd. 1(d)(8), is the same evidence used to sustain the kidnapping

conviction, resulting in impermissible duplicative punishment. We address each argument in turn.

A. Evidence presented at Blakely hearing

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000). The statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004) (emphasis omitted).

Here, appellant waived his right to a jury at both phases of the trial. Appellant argues that the district court erred by finding a heinous element of removal of the victim without release in a safe place when there was no evidence presented at the *Blakely* hearing regarding appellant removing S.M. from the parking lot. In support of this argument, appellant relies primarily on the supreme court's decision in *State v. Jones*, 745 N.W.2d 845 (Minn. 2008).

When articulating reasons for an upward departure, the district court in *Jones* stated that the defendant had been found guilty of felony neglect and felony child endangerment; that these convictions indicated that the jury found that the defendant deprived the victim of health care or supervision; and that the neglect and endangerment caused the death of the child. 745 N.W.2d at 848. "The [district] court concluded that because the sentencing departure was based on facts reflected in the jury's guilty verdicts

for child neglect and child endangerment, the *Blakely* fact-finding requirements had been satisfied." *Id.* The supreme court rejected this reasoning, because "[n]either the child-neglect verdict nor the child-endangerment verdict reflected jury findings that the neglect or endangerment caused the victim's death," and as a result, the jury did not make the findings needed to support the departure reasons given by the court. *Id.* at 849-50. Here, however, the district court's guilty verdict on the kidnapping charge necessarily included a finding that appellant "confine[d] or remove[d] from one place to another[] any person without the person's consent." *See* Minn. Stat. § 609.25, subd. 1 (defining elements of kidnapping). Contrary to appellant's argument, *Jones* does not stand for the proposition that the fact-finder may not consider evidence introduced in the guilt-or-innocence phase of the trial when determining *Blakely* issues.

Furthermore, such argument is inconsistent with Minnesota statue. The legislature has provided:

> The district court shall allow a unitary trial . . . regarding both evidence in support of the elements of the offense and evidence in support of the aggravating factors when the evidence in support of the aggravating factors:
>
> (1) would be admissible as part of the trial on the elements of the offense; or
>
> (2) would not result in unfair prejudice to the defendant.

Minn. Stat. § 244.10, subd. 5(b) (2008). Here, the evidence of appellant's removal of S.M. from the parking lot and failure to release her to a safe place was admissible "as part of the trial on the elements of the offense." *See id.* (providing that a unitary trial is allowed when evidence in support of the aggravating factors would be admissible during

the guilt-or-innocence phase of the trial). Appellant therefore has not shown that the district court, in making its *Blakely* findings, erred by relying on evidence that was introduced during the guilt-or-innocence phase of the trial.

B. Similarity between Minn. Stat. § 609.3455, subd. 1(d)(8) and Minn. Stat. § 609.25

When determining whether a departure reason is valid, certain limitations must be considered.

> Among the boundaries identified for proper departure is that the reasons used for departing must not themselves be elements of the underlying crime. Departures cannot be based on uncharged or dismissed offenses. Departures cannot be based on conduct underlying an offense of which the defendant was acquitted. And conduct underlying one conviction cannot be relied on to support departure on a sentence for a separate conviction.

Jones, 745 N.W.2d at 849 (quotations and citations omitted). Appellant argues that because appellant's act of removing S.M. from the parking lot and failing to release her in a safe place was the basis for the kidnapping charge and conviction, it cannot be used to enhance his second-degree-criminal-sexual-conduct sentence.

But notwithstanding the restrictions articulated in *Jones*, "there are circumstances in which departures *may* be based on conduct that constitutes an uncharged offense or that underlies another conviction." *State v. Weaver*, 796 N.W.2d 561, 570 (Minn. App. 2011) (emphasis added). The *Jones* court relied, in part, on a Minnesota statute prohibiting cumulative punishment. 745 N.W.2d at 850; *see also State v. Jackson*, 749 N.W.2d 353, 357-58 (Minn. 2008) (noting that a departure may not be based on uncharged criminal conduct and that statute prohibits cumulative punishment for conduct

that constitutes more than one offense). The statute provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." Minn. Stat § 609.035, subd. 1 (2008).

But for certain enumerated crimes—namely firearms offenses, arson, fleeing a peace officer, and criminal sexual conduct committed with force or violence—the legislature has authorized cumulative punishment. *Id.*, subds. 3-6 (2008). "[T]hese statutory exceptions to the prohibition against cumulative punishment 'reflect legislative determinations concerning specific conduct that is eligible for increased punishment even when committed as part of the same behavioral incident.'" *Weaver*, 796 N.W.2d at 570 (quoting *Jones*, 745 N.W.2d at 850). And we have relied on these exceptions to uphold departures based on conduct that underlies another conviction. *See, e.g.*, *State v. Grampre*, 766 N.W.2d 347, 352 (Minn. App. 2009) (affirming district court's consideration of defendant's use of knife as evidence of particular cruelty supporting upward sentencing departure on conviction for criminal sexual conduct, notwithstanding the fact that the use of the knife also supported his conviction of second-degree assault), *review denied* (Minn. Aug. 26, 2009).

Here, appellant was convicted of a violation of statute that applied if, among other things, "the actor uses *force* or coercion to accomplish the sexual contact." Minn. Stat. § 609.343, subd. 1(e)(i) (emphasis added). Appellant's actions of dragging S.M. across the parking lot and telling her if she did not stop screaming, he would make her stop screaming fits within the definition of "force." *See* Minn. Stat. § 609.341, subd. 3 (2008) (defining "force" as "the infliction, attempted infliction, or threatened infliction by the

actor of bodily harm or commission or threat of any other crime by the actor against the complainant or another, which (a) causes the complainant to reasonably believe that the actor has the present ability to execute the threat and (b) if the actor does not have a significant relationship to the complainant, also causes the complainant to submit"). And because appellant was convicted of committing criminal sexual conduct with force or violence, the statutory exception in Minn. Stat. § 609.035, subd. 6, is triggered, and the district court was permitted to consider the removal of S.M. from the parking lot as a "heinous element," notwithstanding the fact that the removal also was evidence supporting the kidnapping conviction. *See Grampre*, 766 N.W.2d at 352 (conducting similar analysis).

Appellant's argument that the district court erred by applying the sentence-enhancement provisions of Minn. Stat. § 609.3455 because the evidence used to establish the heinous element of removal of the victim is the same conduct that formed the basis for the kidnapping charge is also belied by the language of the statute. "A fact finder may not consider a heinous element if it is an element of *the underlying specified violation of section 609.342 or 609.343*." Minn. Stat. § 609.3455, subd. 2(b) (2008) (emphasis added). If the legislature had intended to prohibit a heinous element from being found on the basis of an element of a different offense, it would have so provided. And this court cannot supply what the legislature has deliberately omitted or inadvertently overlooked. *State v. Jones*, 587 N.W.2d 854, 856 (Minn. App. 1999), *review denied* (Minn. Mar. 16, 1999). Because the statute explicitly provides that a heinous element may not be found on the basis of an element of the underlying specified

criminal sexual conduct, the canons of statutory construction dictate that appellant's argument is unavailing. *See State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011) (describing the expressio-unius-est-exclusio-alterius doctrine to provide that omissions in a statute are intentional).

III.

When considering a claim of insufficient evidence, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). A reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

Appellant argues that the evidence presented at trial is insufficient to sustain the appellant's convictions of kidnapping in violation of Minn. Stat. § 609.25, subd. 1(3), and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343. Appellant's challenges to the sufficiency of the evidence are best viewed as two separate arguments: (1) that the state did not establish that appellant intended to kidnap S.M. to commit great bodily harm or terrorize her and (2) appellant's version of the events was more credible than the state's evidence. Each argument is addressed in turn.

C. Evidence of appellant's intent to commit great bodily harm or terrorize

Appellant argues that the evidence is insufficient to sustain his kidnapping conviction because the state failed to establish that appellant intended to commit great bodily harm or terrorize S.M. Appellant bases this argument on the fact that the kidnapping statute provides that a person commits a kidnapping if they remove or confine a person without their consent for the purpose of committing great bodily harm or to terrorize the victim or another person. Minn. Stat. § 609.25, subd. 1(3).

But the statute also provides that a person is guilty of a kidnapping if they remove or confine the victim "to facilitate commission of any felony or flight thereafter." *Id.*, subd. 1(2). Here, the appellant's removal of S.M. from the parking lot without her consent facilitated the commission of the felony of second-degree criminal sexual conduct. And appellant does not argue that there is insufficient evidence on the facilitation-of-a-felony element of the kidnapping conviction. His sufficiency-of-the-evidence argument is unavailing.[1]

D. Credibility

Appellant argues that S.M.'s testimony was not credible and the record evidence more fully supports his version of the events. But it is the province of the fact-finder to determine the weight and credibility to be afforded the testimony of each witness. *State*

[1] Appellant's argument regarding *Smith* and *Welch* advanced on the sentence-enhancement provision (discussed more fully *infra* § I) similarly does not render the evidence insufficient, as the present case is distinguishable from those cases in which the removal and confinement were completely incidental to the underlying felony. Because this argument is not specifically briefed, it is waived and we do not address it further. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

v. Folkers, 581 N.W.2d 321, 327 (Minn. 1998); *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). "This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the [fact-finder]." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). An appellate court therefore must defer to the district court's credibility determination in resolving conflicting testimony. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Appellant's argument on this ground is therefore unavailing.

IV.

Appellant's final challenge is to the district court's refusal to allow a defense witness to testify. The district court found that the witness's testimony lacked proper foundation, was of weak probative value, and any probative value it did have was outweighed by its prejudicial effect. An appellate court reviews a district court's evidentiary rulings for an abuse of discretion. *State v. Morton*, 701 N.W.2d 225, 234 (Minn. 2005).

Appellant offered the testimony to "show that at this time and place [he] had reason to believe that any sexual advances were welcome." Based on the record, the witness would have testified to past sexual interaction between appellant and the victim which led appellant to believe that the charged conduct was consensual.

Evidence of a victim's previous sexual conduct is not admissible in a prosecution for criminal sexual conduct except by court order pursuant to the rape shield statute. Minn. Stat. § 609.347, subd. 3 (2008); *State v. Crims*, 540 N.W.2d 860, 866 (Minn. App. 1995), *review denied* (Minn. Jan. 23, 1996). The statute provides that when consent of

the victim is a defense, the following evidence is admissible: "evidence of the victim's previous sexual conduct tending to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue." Minn. Stat. § 609.347, subd. 3(a)(i). To obtain a court order admitting such evidence, the accused must make a motion at least three days prior to trial "setting out with particularity the offer of proof of the evidence that the accused intends to offer." Minn. Stat. § 609.347, subd. 4(a) (2008). For such evidence to be admissible "the judge must find by a preponderance of the evidence that the facts set out in the accused's offer of proof are true." Minn. Stat. § 609.347, subd. 3.

Here, appellant did not make the motion required under the statute. Therefore, the evidence was inadmissible at trial. *See* Minn. Stat. § 609.347, subd. 4 (stating that "[t]he accused may not offer evidence described in subdivision 3 except pursuant to" a statutorily defined procedure). The district court therefore did not abuse its discretion by not allowing the witness to testify.

Affirmed.