STATE OF MINNESOTA
IN COURT OF APPEALS
A09-185

State of Minnesota,
Respondent,

vs.

Son Kim Oan,
Appellant.

Filed March 23, 2010
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-K8-08-000376

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Lydia Villalva Lijo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

Appellant challenges his convictions for first-degree criminal sexual conduct under Minn. Stat. § 609.342, subds. 1(e)(i) and (ii) (2006), and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (Supp. 2007). Appellant argues that the evidence is insufficient to show that either (1) he caused physical injury to complainant or (2) complainant was physically helpless. Because the evidence was sufficient for the jury to conclude that appellant caused physical injury to complainant and that complainant was physically helpless or mentally incapacitated, we affirm.

FACTS

On September 7, 2007, 18-year-old complainant S.N. went with some friends to a club in downtown Minneapolis. They arrived around midnight. After dancing, complainant became thirsty and went to look for a friend who was carrying her ID and had money. Complainant ran into K.K., an acquaintance. K.K. had come to the club that night to meet up with some friends of his, including appellant Son Kim Oan.

During their conversation, K.K. gave complainant something to drink. K.K. would later testify that he gave her a glass with alcohol or liquor in it, which complainant drank, and then bought her a bottle of water, which she drank "a little" of. Complainant maintains that she did not drink any alcohol that evening, and that K.K. gave her a bottle of water, which was already opened, and that he handed it to her with the cap off. At some point in the early morning hours, complainant woke up to find a man with "longer," "spiky" hair, removing her shorts and underwear. The man then penetrated her vagina

with his penis. Complainant went to the hospital that afternoon and was experiencing vaginal discomfort. A sexual assault nurse examiner subsequently met with complainant.

Appellant was initially charged with two counts of aiding and abetting first-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.05, subd. 1, and .342, subds. 1(e)(i) and (ii) (2006), and two counts of aiding and abetting third-degree criminal sexual conduct in violation of Minn. Stat. §§ 609.05, subd. 1, and .344, subds. 1(c) and (d) (Supp. 2007). The complaint was later amended to include two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(e)(i) and (ii), and two counts of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subds. 1(c) and (d). A jury trial was held and the events following complainant's departure from the club were the most disputed at trial.

Complainant testified that she did not "remember anything after [receiving water from K.K.] until I came to, and they were raping me." K.K. testified that complainant appeared so drunk that she could not walk. Afterwards, complainant threw up in the bathroom. K.K. subsequently called appellant for assistance in removing complainant from the club.

As she was unable to walk, appellant carried complainant on his back while he and K.K. looked for K.K.'s car. After walking around, eventually appellant and complainant waited in a parking lot by the club for K.K. to bring the car. When appellant attempted to set complainant down, she collapsed. Appellant and K.K. placed complainant in the backseat of the car and drove to the home of T.H., where appellant was staying. Several

men lived at the residence. Appellant and K.K. put complainant on a mattress in appellant's room and covered her with a blanket.

At some point, complainant started coming to. She was disoriented, could not move, and could barely open her eyes. Complainant testified that her vision was blurred and, although she could hear two men speaking Vietnamese in the room, she was having trouble hearing and could not tell what they were saying. She believed one of the men had longer, spiky hair with blonde highlights. As complainant was coming to, she felt her shorts and underwear being removed. Complainant called out for her boyfriend, asking where he was, but was told that he was not there and that "[w]e'll take care of you tonight."

Complainant testified that, while she was still having trouble moving and speaking, she cried out for help and continued to call for her boyfriend. Complainant said that one of the men left and the other got on top of her, forced her down and penetrated her with his penis. Complainant testified that she told him to stop and was slapped across the face as the man continued to hold her down. Complainant lost consciousness again at some point.

Complainant woke up to another man named V.H. trying to take off her clothes and "touching [her] everywhere." She was no longer in the bedroom and had been moved to the living room, near a stairwell. Complainant testified that she was crying "because he wouldn't stop trying to take off my clothes," and then K.K. came out and told V.H. to "just let her sleep, man, let her sleep." Complainant testified that V.H. stopped for a little bit, then started to try again, but was ultimately unsuccessful in getting

her clothes off. Complainant testified that she wanted to get away, but she still could not move. Eventually, she was able to sit up, but still did not feel well. Complainant also discovered her underwear was on backwards and her bra was unhooked. Complainant initially believed K.K. was her assailant because he had given her the bottle of water; had long hair with blonde highlights; and asked her if she remembered anything the next morning. Complainant had not previously been introduced to appellant.

Appellant, K.K., and V.H. wanted to go to a café in the morning. Complainant testified that she was scared and decided to just play dumb and go along, hoping to get away. She rode to the café with K.K., then stayed in the car, and used K.K.'s cell phone to call her boyfriend. Her boyfriend sent a friend of his to pick her up.

Appellant testified that the sex was consensual. Appellant stated that when he went back into his room, he first saw complainant sleeping, but then heard her speaking. Appellant did not understand complainant very well, but recognized the name of "Thai."[1] Appellant asked complainant if she meant "Thai in St. Paul" and complainant responded, "no, Thai from Brooklyn Park." Appellant testified that complainant said something else, but he did not understand. Appellant testified that all of a sudden complainant began kissing him and told him "f--k me, f--k me, f--k me." Appellant then had sex with complainant. Appellant testified that complainant did not tell him to stop and "seemed to be helping [him] to take off her pants." Appellant did not wear a condom. Afterwards, appellant left the room for a drink of water and to smoke. Appellant testified that, when he returned, complainant was not in the bedroom, but was instead sitting in the living

[1] We note that the first name of complainant's boyfriend is Thai.

room with V.H. Appellant then went to sleep. When he woke up, he found a used condom on the floor in his room, which he picked up and threw away. Appellant then cooked some noodles for the house and observed complainant sitting next to V.H. Appellant subsequently drove with V.H. to the café. At the time, appellant wore his hair in a long, spiky style.

K.K. testified that after he and appellant had put complainant in appellant's bedroom and left, he observed T.H. go in and come out of the room and then appellant go in and come out. K.K. went in after appellant came out and saw complainant crying softy. She did not speak to him or appear to be awake. Complainant was still covered by the blanket, but K.K. saw that her shorts and underwear were off. K.K. then called out for V.H., who came, and K.K. held the door so others could not get in while V.H. got complainant and took her to the living room. K.K. testified that he did not see V.H. trying to take complainant's clothes off or kiss her. At some point the next morning, appellant told K.K. that complainant wanted to have sex with him. During this time, K.K. also had a longer, spiked hairstyle, but with blonde highlights.

V.H. testified that he also saw T.H. and appellant individually go in and out of the bedroom where complainant was. V.H. said he saw a "young girl half naked" in the room, and that she had no clothes on below her waist. V.H. testified that complainant was crying, "crying like she was—like half awake, half asleep, but she cry." V.H. did not recall moving complainant to the living room and did not remember how she got there. V.H. also testified that when he woke up in the morning, his cell phone, wallet, and keys were no longer in his pants and his zipper was undone. V.H. did not recall how this

happened. When V.H. woke up, complainant was sleeping in his lap. V.H. denied touching complainant or trying to push himself onto her, stating he only "kissed her on her forehead because—because she was crying a lot." Both V.H. and T.H. had shorter hairstyles at this time.

The nurse who examined complainant testified that complainant told her she had been given a bottle of water with the cap already removed and had no recollection after she had something to drink. The nurse explained that when a person talks "about periods of unconsciousness or only remembering bits and pieces" of what happened, it is usually a sign that the person has been drugged, but the nurse did not test for the presence of drugs "[b]ecause this was over 24 hours . . . [and] the majority of drugs that are used with date rapes are out of the system anywhere between 6 and 12 hours." The nurse testified that complainant said "[s]he was crying and asking for her boyfriend, asking these people to stop." She also testified that complainant reported that she was penetrated vaginally with both penis and fingers. The nurse stated that complainant had "multiple bruises on her body," which were "[p]rimarily [located on] her arms and legs, besides the genital region." The nurse testified that complainant's bruises and injuries were consistent with "the types of injuries [that] are often seen with drug-facilitated rapes, because those are often fingerprints of people taking their fingers to hold body parts." The nurse also observed a vaginal tear, which she testified was consistent with the "blunt force trauma" of forcible intercourse and not consensual intercourse. The nurse also swabbed several different areas of complainant's body.

Tests of the swabs showed the presence of semen in complainant's vaginal area, on her buttocks, and on her underwear. The semen came from a single source, i.e. came from one individual and there was no indication of any DNA mixing. All of the samples matched appellant's DNA profile and not K.K., V.H., or T.H.

Appellant was acquitted of the aiding-and-abetting charges and convicted of both counts of first-degree criminal sexual conduct and both counts of third-degree criminal sexual conduct. Appellant was sentenced to prison for 173 months. This appeal follows.

D E C I S I O N

In considering a challenge to the sufficiency of the evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This 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). "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 jury." *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, 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).

I. The evidence was sufficient to support the jury's finding that appellant caused physical injury to complainant for a conviction of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subds. 1(e)(i) and (ii).

A conviction of first-degree criminal sexual conduct under subdivision 1(e) of Minn. Stat. § 609.342 requires proof that the defendant caused "personal injury to the complainant" and that either one of the following circumstances exists: "(i) the actor uses force or coercion to accomplish sexual penetration; or (ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." "Personal injury" is "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy." Minn. Stat. § 609.341, subd. 8 (2006). "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Minn. Stat. § 609.02, subd. 7 (2006). Pain or minimal injury is "sufficient to establish bodily harm under section 609.02." *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981).

Appellant was charged and convicted under both subsections of Minn. Stat. § 609.342, subd. 1(e). Appellant does not dispute that the state proved complainant suffered personal injury and acknowledges that "evidence at trial showed there were bruises on complainant's arms and legs, an abrasion on her left knee, vaginal discomfort and a vaginal tear." Appellant contends, however, that the state failed to show that appellant caused any of these injuries. Appellant argues that (1) complainant could not conclusively identify her attacker(s); (2) the source of her injuries was not entirely known and could have been something other than forcible intercourse; and (3) the sex was consensual.

Appellant's argument is essentially one of identification. In *Walker v. State*, the complainant was only able to identify the race of her assailant. 394 N.W.2d 192, 195 (Minn. App. 1986) (noting facts set forth in companion case of *State v. Hodges*, 384 N.W.2d 175, 180 (Minn. App. 1986), *aff'd as modified*, 386 N.W.2d 709 (Minn. 1986)), *review denied* (Minn. Nov. 26, 1986); *Hodges*, 384 N.W.2d at 180. We concluded the evidence was sufficient to uphold the conviction of first-degree criminal sexual conduct in light of the complainant's testimony regarding the events that had transpired and laboratory tests showing that the seminal fluid stains found on the complainant's robe could only have come from Walker, when compared against samples from the three individuals involved. *Walker*, 394 N.W.2d at 196. Here, complainant could only identify one of her assailants as having longer, spiky hair. At the time of the assault, appellant had long, spiky hair, which complainant observed later that morning. Likewise, testing performed on all of the swabs taken from complainant's body revealed the presence of semen from a single donor and matched appellant's DNA profile. As in *Walker*, complainant's limited ability to conclusively identify appellant as her assailant is corroborated by additional evidence placing him at the scene and to the exclusion of others. *See* 394 N.W.2d at 196 (upholding conviction as testing of all three individuals present on the night of the attack showed that only defendant could have been source of seminal fluid).

Furthermore, appellant's arguments that the injuries could have occurred at other times during the night, such as when he was carrying complainant, are unpersuasive. The nurse who examined complainant testified that her injuries were consistent with drug-

facilitated rape, and the blunt-force trauma of forcible intercourse. The nurse did acknowledge on cross-examination that bruises on complainant's arms may have been caused by the way she was carried; that she could not determine whether complainant was penetrated by more than one person; and that the vaginal tear could possibly have been caused by something other than blunt-force trauma. However, we review the evidence in the light most favorable to the verdict, *Webb*, 440 N.W.2d at 430, and the nurse's direct testimony appears sufficient for the jury to conclude that complainant's injuries were caused by appellant during nonconsensual, forcible intercourse. Notably, "injuries need not necessarily be coincidental with actual sexual penetration, they need only be sufficiently related to the act to constitute 'personal injury' within the meaning of Minn. Stat. §§ 609.341, subd. 8 and 609.02, subd. 7." *State v. Sollman*, 402 N.W.2d 634, 636 (Minn. App. 1987).

Similarly, appellant's contention that he had consensual sex with complainant and his arguments concerning the behavior of other men in the house at the time of the assault are also unpersuasive. In reviewing a challenge to the sufficiency of the evidence, we assume that the jury believed the state's witnesses and disbelieved evidence to the contrary. *Moore*, 438 N.W.2d at 108. Several different accounts of what happened on the morning complainant was assaulted were presented at trial. The task of sorting out these varying accounts is within the province of the jury, reflecting the jury's role in evaluating the credibility of the witnesses as the finder of fact. *See id.* ("The weight and credibility of the testimony of individual witnesses is for the jury to determine."); *see also Sollman*, 402 N.W.2d at 636-37 (deferring to finder of fact regarding the source of

victim's injuries when considering defendant's argument that injuries could have been caused by prior wrestling on the beach instead of from the assault).

Accordingly, we conclude that the evidence is sufficient to sustain the jury's conclusion that appellant caused personal injury to complainant and appellant's convictions under Minn. Stat. § 609.342, subds. 1(e)(i) and (ii) are affirmed.

II. The evidence was sufficient to support the jury's finding that complainant was physically helpless or mentally incapacitated so as to meet the elements of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(ii), and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. (1)(d).

Appellant was charged with first-degree criminal sexual conduct under Minn. Stat. § 609.341, subd. 1(e)(ii), and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d). An element of each of these crimes is that the defendant knew or had reason to know that the complainant was mentally incapacitated or physically helpless. 10 *Minnesota Practice*, CRIMJIG 12.03, 12.23 (2006). A person is mentally incapacitated when that "person[,] under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration." Minn. Stat. § 609.341, subd. 7 (2006). A person is physically helpless if she "is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." *Id.*, subd. 9 (2006). "Consent" is defined as

> words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

Id., subd. 4(a) (2006). "A person who is mentally incapacitated or physically helpless . . . cannot consent to a sexual act." *Id.*, subd. 4(b) (2006).

Appellant contends that the state did not prove complainant was "physically helpless such that she could not withhold her consent; rather she repeatedly and emphatically withheld her consent to the point of physically resisting." Appellant likens this case to *State v. Blevins*, in which we reversed a conviction for third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d), because the evidence was insufficient to show the complainant was physically helpless. 757 N.W.2d 698, 701 (Minn. App. 2008). In *Blevins*, the complainant testified that, although intoxicated, she verbally withheld her consent when the defendant began kissing her and asked if he could perform oral sex on her. *Id.* at 699, 701. The complainant's testimony was corroborated by police officers at trial who testified that complainant reported that she asked the defendant to stop, and by the complainant's best friend. *Id.*

The state contends that (1) *Blevins* is factually distinguishable; (2) this case more closely resembles the unpublished case of *In re Welfare of N.W.*, A08-1474, 2009 WL 2016000 (Minn. App. July 14, 2009); and (3) it was not required to prove complainant was physically helpless, only that the evidence was sufficient to show complainant was mentally incapacitated *or* physically helpless.

We believe the state has the more persuasive argument. As the state points out, complainant appears to have been significantly more intoxicated than the complainant in *Blevins*. In *Blevins*, although the complainant testified that she was "pretty drunk" and "had had a lot to drink," she was able to walk. 757 N.W.2d at 699. We specifically noted in that case that the state did not claim that the complainant "was asleep or not conscious during her encounter . . . or that she was unable to communicate nonconsent to [the] sexual acts." *Id.* at 700. Because the complainant's words expressly stated her nonconsent to the sexual encounter, we concluded that the complainant had withheld her consent and held that the evidence was insufficient to show that she was physically helpless such that she could not withhold or withdraw her consent. *Id.* at 701.

With respect to *In re N.W.*, while unpublished opinions of this court are not binding authority, they are persuasive, *see* Minn. Stat. § 480A.08, subd. 3(c) (2006) ("Unpublished opinions of the Court of Appeals are not precedential."), and we agree with the state that this case more closely mirrors the circumstances in *In re N.W.* In *In re N.W.*, the complainant was drinking heavily and "was, according to a witness, 'sick as hell' and could not do anything for herself." 2009 WL 2016000, at *1. The complainant laid down on a sleeping bag and drifted in and out of consciousness, only to find herself in a series of sexual assaults perpetrated by three individuals. *Id.* She objected to the first assailant, who yelled at her, and tried to get away, but then became scared and just laid still. *Id.* The complainant continued to maintain only partial lucidity throughout the series of assaults. *Id.* We affirmed the conviction for third-degree criminal sexual conduct, distinguishing it from *Blevins*, because the evidence was sufficient to show that

the complainant was "asleep or unconscious" while the defendant had intercourse with her and that the defendant had intercourse with her for at least some period of time before the complainant regained consciousness. *Id.* at *2, *3.

Here, complainant testified several times that she told her assailant to stop, called out for her boyfriend, and tried to physically resist. The nurse who examined complainant also testified that complainant reported that she told her assailant to stop. However, the record also reflects that complainant was drifting in and out of consciousness at the time. Complainant testified that she woke up to find a man removing her shorts and underwear, and that she told him to stop, but also that she lost consciousness again at some point. Additionally, complainant testified that "I couldn't move, I couldn't see, so I probably couldn't scream."

As the state points out, it was not required to prove complainant *was* physically helpless, only that she was physically helpless *or* mentally incapacitated.

> [A] jury cannot convict unless it unanimously finds that the government has proved each element of the offense; however the jury need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt.

State v. Ihle, 640 N.W.2d 910, 918 (Minn. 2002). Appellant's argument that, without a finding of physical helplessness, his conviction must be overturned is inconsistent with Minnesota law as mental incapacitation and physical helplessness are statutory alternatives as a means of committing a single act of criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(ii), and under Minn. Stat. § 609.344, subd. 1(d). Members of

the jury need not agree as to whether complainant was physically helpless or mentally incapacitated, so long as they unanimously concluded that the state proved beyond a reasonable doubt that complainant *was* physically helpless *or* mentally incapacitated and that appellant was aware or should have been aware of her condition. *See State v. Stempf*, 627 N.W.2d 352, 355 (Minn. App. 2001) (recognizing unanimity is not required as to alternative ways or means a crime can be committed).

The transcript and record reflect that the district court judge specifically instructed the jury on both mental incapacitation and physical helplessness when describing the element that appellant knew or had reason to know that complainant was mentally incapacitated or physically helpless, which the jury had to find in order to convict appellant of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(ii), and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d). Appellate courts do not retry the facts in a challenge to the sufficiency of the evidence. *State v. Bliss*, 457 N.W.2d 385, 391 (Minn. 1990). While complainant testified that she told her assailant to stop, she also testified that she drifted in and out of consciousness and had difficulty speaking and moving. K.K. testified that complainant appeared extremely intoxicated at the club and appellant himself observed complainant's condition as he carried her from the club. It was up to the jury to weigh the evidence and reconcile the conflicting testimony. The record reflects that the evidence was sufficient to support the jury's conclusion that complainant was physically helpless or mentally incapacitated such that appellant was aware or should have been aware of her condition. Therefore, we affirm appellant's convictions for first-degree criminal sexual conduct

under Minn. Stat. § 609.342, subd. 1(e)(ii) and third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d).

Affirmed.