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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0189**

State of Minnesota,
Respondent,

vs.

Autumn Blakey,
Appellant.

**Filed February 5, 2018
Affirmed
Larkin, Judge**

Chisago County District Court
File No. 13-CR-14-23

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

Janet Reiter, Chisago County Attorney, Beth A. Beaman, Jacob C. Fischmann, Assistant
County Attorneys, Center City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó,
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Considered and decided by Smith, Tracy M., Presiding Judge; Larkin, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the evidence at his trial was insufficient to sustain the jury's guilty verdict, that the district court abused its discretion by limiting the testimony of his expert witness, and that the prosecutor engaged in misconduct during closing argument. We affirm.

FACTS

Respondent State of Minnesota charged appellant Autumn Blakey with third-degree criminal sexual conduct, alleging that he sexually penetrated C.S. while C.S. was physically helpless. The case was tried to a jury. Prior to trial, Blakey moved the district court to allow a defense expert to testify regarding C.S.'s alcohol concentration at the time of the alleged offense. The district court denied the motion. Later, the district court reconsidered and ruled that the expert could testify for the limited purpose of establishing C.S.'s alcohol concentration at different times throughout the night in question, but not regarding the physiological effects of the alcohol.

At trial, C.S. testified that she has known Blakey since his uncle married her mother when she was a child. C.S. thinks of Blakey as an uncle. She testified that they spent time together while she was growing up, and the state introduced photographs of C.S. and Blakey attending a car show together when she was six years old. When C.S. was 17, she went on a one-week road trip with Blakey in the semi-trailer truck that he drove. When C.S. was 21, Blakey travelled to Las Vegas with C.S. and other family members. C.S. testified that she and Blakey did "[n]ormal family stuff." C.S. also testified that three or

four years before the trial, she lived with Blakey for two months when she needed a safe place to stay. C.S. testified that she had never engaged in consensual sexual activity with Blakey.

On the evening of November 23, 2013, C.S. went to a bar with Blakey and some of her friends. At trial, C.S. estimated that she consumed four drinks at the bar, as well as some shots, but she could not remember how many alcoholic beverages she consumed. She testified that she introduced Blakey as her uncle that night and that they stayed at the bar until 2:00 a.m. After the bar closed, she took a cab with Blakey back to his hotel. She accompanied him to the hotel because it offered a free breakfast and a pool, and because she was not safe to drive and did not have a car. C.S. felt ill, so Blakey called the cab driver who had driven them to the hotel and asked the driver to get them food from a fast-food restaurant. C.S. consumed the food, and Blakey rubbed her back until she fell asleep. C.S. testified she did not know what time she fell asleep.

When C.S. woke up, her pants were down at her ankles and Blakey's fingers were inside her vagina. She testified that she had not removed her pants and that she never gave Blakey permission to touch her in that manner. C.S. testified that when she woke up, Blakey tried "to tell [her] it was [her] idea." She testified that she felt "hurt and scared because he's family."

C.S. locked herself in the hotel room's bathroom, yelled, and refused to come out until law enforcement arrived. The responding officer took C.S. to an emergency room for a sexual-assault evaluation. Hospital staff cut off C.S.'s underwear, removed a tampon from her vagina, and swabbed her vagina for samples. Test results showed evidence of

semen in C.S.'s vagina, suggesting that Blakey had penetrated C.S.'s vagina with his penis. C.S. did not recall having intercourse with Blakey.

Officer Rebecca Steele is the officer who responded to the hotel. Officer Steele testified that C.S. reported that she fell asleep and that when she woke up, Blakey's fingers were inside her. Officer Steele took a statement from C.S., which was played for the jury. C.S. told Officer Steele:

[W]e came back here and I fell asleep. He was waking me up saying I should cuddle like this and was next to me and I fell asleep and I woke up to him (inaudible) his hand and I told him to step away or I would scream (inaudible) in self defense and I went into the bathroom and wouldn't unlock it until I had the proper authorities.

C.S. also told Officer Steele that when she woke up, she was on her back with her pants around her ankles and Blakey's fingers were inside her.

A hotel employee, S.T., testified that she was working at the hotel on the night of the incident. She testified that a man checked out of the hotel between 5:15 and 5:20 a.m. and asked her to go to his room and reassure the person there that she was the only one there. S.T. testified that she went to the room and encountered a woman who had locked herself in the bathroom. S.T. testified that she never saw the woman, but that the woman sounded like she had been crying. S.T. confirmed that someone had delivered food from a fast-food restaurant to the hotel and that two people came to the door to get food from a car.

Blakey testified that he went to the bar with C.S. and that when the bar closed, he and C.S. took a cab to a fast-food restaurant and waited in line at the drive-through. Then,

they went to the hotel, where they ate their food and purchased some drinks from the vending machines. Blakey testified that he and C.S. had consensual intercourse in their hotel room. Blakey further testified that, after the intercourse, they watched a movie, talked, and then got into an argument about C.S.'s friends. Blakey testified that the argument became so heated that C.S. locked herself in the bathroom and refused to come out. Blakey testified that he asked a person at the hotel's front desk to speak with C.S. and left for his home. Blakey denied that he put his fingers in C.S.'s vagina.

Blakey's expert witness testified that, assuming an average burn-off rate, C.S.'s alcohol concentration would have been about 0.07 grams per hundred milliliters at 5:00 a.m. He testified that at 4:00 a.m., C.S. would have an alcohol concentration of almost 0.09, and that at 3:00 a.m., she would have an alcohol concentration of 0.10.

The jury found Blakey guilty of third-degree criminal sexual conduct. The district court entered judgment of conviction and sentenced Blakey to serve a 48-month prison term. Blakey appeals.

D E C I S I O N

I.

Blakey contends that, “[a]s a matter of law, the evidence was insufficient to support the jury’s verdict that [he] knew or had reason to know that C.S. was ‘physically helpless.’” When considering a challenge to the sufficiency of the evidence to sustain a guilty verdict, an appellate court conducts a careful “review of the record to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict.” *Staunton v. State*, 784

N.W.2d 289, 297 (Minn. 2010) (quotation omitted). This court will not disturb the jury’s verdict if, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, the jury could reasonably conclude that the defendant was proven guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

The jury found Blakey guilty of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2012), which provides that a person is guilty of this offense if he engages in sexual penetration with another person and “knows or has reason to know that the [other person] is mentally impaired, mentally incapacitated, or physically helpless.” Sexual penetration includes “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body.” Minn. Stat. § 609.341, subd. 12(2) (2012). The state argued that C.S. was physically helpless. “Physically helpless” means that a person is: “(a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2012).

Blakey challenges the state’s proof regarding the requisite mental state. Because the state relied on circumstantial evidence to prove Blakey’s mental state, we evaluate the sufficiency of the evidence using the two-step circumstantial-evidence standard of review. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017) (“[A]s in most cases involving a state of mind, the State proved the element . . . through circumstantial evidence, which requires us to apply the circumstantial-evidence standard of review.”).

The first step requires us to determine the circumstances proved. *Id.* “In determining the circumstances proved, [appellate courts] disregard evidence that is inconsistent with the jury’s verdict.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). “[E]ven though verdicts based on circumstantial evidence may warrant stricter scrutiny, [appellate courts] still construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State’s witnesses and disbelieved the defense witnesses.” *State v. Tscheu*, 758 N.W.2d 849, 858 (Minn. 2008). The second step requires us to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving*, 891 N.W.2d at 643. If a reasonable inference other than guilt exists, then we will reverse the conviction. *Id.*

Blakey concedes that the following circumstances were proved:

CS ate and felt sick. She laid down, [he] rubbed her back, and she fell asleep. When she awakened, [he] was digitally penetrating her vagina.

. . . .

CS testified that she did not tell [him] to put his fingers in her vagina and she did not recall having any other type of sexual intercourse with [him].

These circumstances are consistent with guilt. Blakey contends that the circumstances proved also include that C.S. agreed to cuddle with him.

Assuming that these are the circumstances proved, we next determine whether they are consistent with a reasonable inference other than guilt. *Harris*, 895 N.W.2d at 600. Blakey argues that the circumstances do not exclude the rational hypothesis that he and C.S. engaged in consensual sexual activity: “It is possible from the circumstances proved

that C.S. consented by her words and actions[,] . . . that she does not remember that she consented, and that she fell asleep after having sex.”

“[P]ossibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *State v. Stein*, 776 N.W.2d 709, 719 (Minn. 2010) (quotation omitted). Appellate courts “will not overturn a conviction based on circumstantial evidence on the basis of mere conjecture.” *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). “[A] defendant is not relying on conjecture or speculation when the defendant . . . points to evidence in the record that is consistent with a rational theory other than guilt.” *State v. Al-Naseer*, 788 N.W.2d 469, 480 (Minn. 2010) (quotation omitted).

There is no evidence in the record to support Blakey’s hypothesis that C.S. consented to sexual intercourse, fell asleep, and did not remember consenting after she woke. Blakey’s testimony was the sole basis for his defense that C.S. consented to intercourse, and Blakey did not testify that C.S. fell asleep after having consensual sexual intercourse with him. Instead, he testified that he and C.S. had intercourse, watched a movie, and got into an argument. There was no mention of sleeping. In sum, Blakey’s hypothesis of innocence is inconsistent with C.S.’s version of events, as well as his own testimony at trial. Because there is no evidence to support Blakey’s alternative hypothesis of innocence, it is based on mere conjecture and does not support reversal.

Blakey’s hypothesis of innocence also fails because it does not negate the criminal liability that arises from Blakey’s digital penetration of C.S.’s vagina while she was asleep. Once again, C.S. testified that when she woke up, Blakey was digitally penetrating her

vagina. Blakey concedes that this is a circumstance proved, but he does not explain why this circumstance is not adequate to sustain his conviction of third-degree criminal sexual conduct. For example, he does not argue that he did not know C.S. was asleep when he digitally penetrated her vagina. In fact, at trial, he denied that he digitally penetrated C.S. Blakey's digital penetration of C.S.'s vagina while she slept is sufficient to sustain the jury's guilty verdict because it establishes that Blakey sexually penetrated a person who Blakey knew, or had reason to know, was physically helpless. See Minn. Stat. § 609.341, subd. 9 (“‘Physically helpless’ means that a person is (a) asleep or not conscious”); *Id.*, subd. 12(2) (Sexual penetration includes “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body”).

The flaw in Blakey's arguments regarding C.S.'s physical helplessness is that they focus on the theory that C.S. was physically helpless due to intoxication. Although the state argued that theory at trial, the prosecutor also argued that C.S.'s sleeping state alone satisfied the physically helpless requirement. In fact, the prosecutor told the jury “some of you might think that she passed out from drinking, some of you might think that she fell asleep, but even if you guys have different thoughts about why she was unconscious she would still be physically helpless.” Blakey's arguments that C.S. was not physically helpless due to intoxication and that she did not display signs of intoxication such that he knew or should have known C.S. was physically helpless are immaterial given the established fact that Blakey digitally penetrated C.S.'s vagina while she slept.

Also immaterial are Blakey's arguments that C.S. was not physically helpless because C.S. “fell asleep” rather than “passed out” and “was able to wake up—and was

therefore not passed out or unconscious.” The relevant statute does not require that a person be incapable of regaining consciousness to be physically helpless. It merely requires that the person be “asleep or not conscious” when the sexual penetration occurred. See Minn. Stat. § 609.341, subd. 9; Minn. Stat. § 609.344, subd. 1(d).

In sum, the circumstances proved establish that Blakey digitally penetrated C.S.’s vagina while she was asleep. Although Blakey asserts an alternative hypothesis of innocence, the record evidence does not support it, and it does not negate Blakey’s guilt based on C.S.’s sleeping state. Because the evidence was sufficient for the jury to reasonably conclude that Blakey was guilty of third-degree criminal sexual conduct, we do not disturb the verdict.

II.

Blakey contends that the district court abused its discretion by refusing to allow his expert to testify regarding the signs of intoxication that may be visible at different alcohol-concentration levels. Expert testimony is admissible if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Minn. R. Evid. 702. “The basic requirement of Rule 702 is the helpfulness requirement.” *State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982) (quotation omitted). In determining whether testimony is helpful, courts determine whether the testimony will “add precision or depth to the jury’s ability to reach conclusions.” *State v. Helterbride*, 301 N.W.2d 545, 547 (Minn. 1980).

“The admissibility of expert testimony lies within the sound discretion of the [district] court.” *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987). On appeal, a district court’s decision to admit expert testimony will not be reversed unless there has been an

abuse of discretion. *State v. Sandberg*, 406 N.W.2d 506, 511 (Minn. 1987). “[A]ny error in excluding [expert] testimony is subject to the harmless-error analysis.” *State v. Hakala*, 763 N.W.2d 346, 350 (Minn. App. 2009), *review granted* (Minn. June 16, 2009) *and appeal dismissed* (Minn. June 1, 2010).

Blakey argues that the proffered expert testimony would have helped the jury determine whether C.S. was physically helpless at the time of the offense. The district court held a hearing on Blakey’s motion to allow expert testimony regarding C.S.’s alcohol-concentration levels and the attendant physiological effects. At the pretrial hearing, the expert testified that based on C.S.’s test results, and assuming a standard burn-off rate, he estimated C.S.’s alcohol concentration to be 0.07 grams per hundred milliliters around 5:00 a.m. and 0.12 at 2:00 a.m. The expert also testified that he has studied the effects of various alcohol-concentrations levels. At the concentrations he calculated, a 23-year-old female would show some signs of intoxication, but nothing very profound. He testified that she might be more talkative and social, might exhibit slurring in her speech, and perhaps show some judgment problems. Finally, he testified that a normal, healthy individual would not black out in the ranges he calculated.

However, the expert also testified that the ranges he quoted were not based on C.S.’s individual characteristics. He further testified that he had never met C.S. and had no information regarding how she processed alcohol. He testified that he “just assumed that she was a normal, healthy individual” and that “she processed [alcohol] at a normal rate.” He never observed her while she was under the influence. He concluded, “I have no idea

how she would process [alcohol] . . . what symptoms she would exhibit at certain alcohol concentrations.”

The district court ruled that the expert could testify regarding C.S.’s alcohol concentration between 2:00 a.m. and 5:30 a.m. on the night in question, but not regarding any characteristics that she might have exhibited. The district court reasoned that the expert was not allowed “to testify as to how [C.S.] should have acted . . . because he doesn’t have information for that.”

In its initial ruling denying Blakey’s motion to allow expert testimony, the district court relied on *State v. Frank*, 364 N.W.2d 398 (Minn. 1985). In *Frank*, the supreme court stated, “Most jurors have some experience with the effects of excessive alcohol consumption and therefore, in an ordinary case, will not need expert assistance.” *Id.* at 400. “[E]xpert opinion testimony about the general effects of . . . intoxication is ordinarily inadmissible because most jurors have some experience with [this] condition[.]” *State v. Provost*, 490 N.W.2d 93, 103 (Minn. 1992); *see also State v. Greenleaf*, 591 N.W.2d 488, 504 (Minn. 1999) (concluding that expert testimony “in regard to the general effects of alcohol” would not have aided the jury).

Blakey attempts to distinguish this case by asserting that it “was not an ordinary case,” but he does not persuade us that this case is extraordinary. Because the district court’s decision finds support in caselaw, we do not discern an abuse of discretion. We nonetheless note that, because the verdict can be supported without any evidence of intoxication as explained in section I of this opinion, the district court’s limitation of the defense expert’s testimony was certainly harmless.

III.

Blakey contends that he should receive a new trial because the prosecutor engaged in misconduct during closing argument by arguing that Blakey—in contrast to C.S.—was not telling the truth and by impugning the defense expert. Because Blakey did not object to the alleged misconduct, we apply the modified plain-error analysis set forth in *State v. Ramey*. 721 N.W.2d 294, 302 (Minn. 2006). The burden is “on the nonobjecting defendant to demonstrate both that error occurred and that the error was plain.” *Id.* A plain error is one that “contravenes case law, a rule or a standard of conduct.” *Id.* The burden then shifts to the state to prove that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the jury’s verdict. *Id.* If a reviewing court concludes that any prong of the plain-error analysis is not satisfied, the court need not consider the other prongs. *State v. Brown*, 815 N.W.2d 609, 620 (Minn. 2012).

Witness Credibility

“The credibility of a witness is to be determined by the jury.” *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). “An advocate may indeed point to circumstances which cast doubt on a witness’ veracity or which corroborates his or her testimony, but [she] may not throw onto the scales of credibility the weight of [her] own personal opinion.” *Id.* “A prosecutor’s statements in closing argument become improper vouching when the prosecutor implies a guarantee of a witness’s truthfulness, refers to facts outside the record, or expresses a personal opinion as to a witness’s credibility.” *State v. Smith*, 825 N.W.2d 131, 139 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Mar. 19, 2013). But it is not improper for a prosecutor “to analyze the evidence and argue that particular

witnesses were or were not credible.” *State v. Wright*, 719 N.W.2d 910, 918-19 (Minn. 2006). To determine whether a prosecutor’s statement constituted improper vouching, this court considers the closing argument as a whole. *Id.* at 918.

Blakey argues that “[t]he prosecutor committed misconduct by giving her opinion on [his] credibility, by telling the jury that [he] lied, and by encouraging the jury to reject [his] defense of consent and find [him] guilty based on the prosecutor’s opinion that [he] lied.” Blakey cites the following portions of the prosecutor’s closing arguments as examples:

Now, both [C.S.] and the defendant came in here, they took an oath to tell you the truth, but only one of them did. And the person who told you the truth is [C.S.]. And you have to weigh the credibility of the witnesses to decide who is telling the truth. But the evidence supports [C.S.’s] version beyond a reasonable doubt.

. . . .

[C.S.], and the state’s witnesses, gave you the credible testimony in this case. They’re the ones that should be believed. The defendant’s testimony, in light of all the evidence and remaining testimony, establishes that he’s the one who was not truthful with you, that he’s the one who violated his oath to tell the truth.

In *State v. Swanson*, the supreme court held that the prosecutor’s statement that “[t]he state believes [a particular witness] is very believable” was “impermissible vouching *on its face* because the state directly endorsed the credibility of [that] witness.” 707 N.W.2d 645, 656 (Minn. 2006) (emphasis added). In *Ture v. State*, the supreme court concluded that it was improper for the prosecutor to use “the first-person pronoun ‘I’ during closing argument” when addressing witness credibility because a prosecutor “may not interject his

or her personal opinion so as to personally attach himself or herself to the cause which he or she represents.” 681 N.W.2d 9, 20 (Minn. 2004) (quotation omitted). The supreme court found “clearly improper” prosecutorial vouching where:

In the argument the prosecutor commented on the credibility of several of the state’s witnesses by characterizing various witnesses as being “honest,” “a woman of integrity,” “honest detectives,” and “honest police officers.” He extolled the police officers as “not the kind of officers who are going to get up here, take the stand, take the oath and tell you something if it isn’t true.” In addition, he characterized [the] defendant’s testimony as “[i]ncredible is the word for it I suggest to you that [the defendant] is not only wrong, but not exactly telling the truth on the stand.” [The d]efendant’s testimony was referred to as “a lot of nonsense” and as a “joke, joke.” He depicted [the] defendant as a “rapist and murderer” and as a “predator.”

State v. Ture, 353 N.W.2d at 516.

In contrast, this court determined that a prosecutor’s argument that a witness was very sincere and frank in his testimony did not rise to the level of inappropriate vouching because the statements were not a direct endorsement of the witness’s credibility. *Smith*, 825 N.W.2d at 139. Similarly, in *State v. Leutschaft*, this court held that it was permissible for a prosecutor to argue that a witness was honest on the stand and did her best to tell the jury what she saw. 759 N.W.2d 414, 425 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009). We reasoned:

[There was] no impropriety in the prosecutor’s arguments. He called the jury’s attention to [the witness’s] testimony and suggested that it was plausible and that she testified honestly. He did not interject personal opinion or intimate that he had any particular knowledge of her truthfulness. Rather, he

invited the jury to make its assessment on the basis of what it heard and saw in the courtroom.

Id.

Here, the prosecutor did not interject her personal opinion regarding the relative credibility of C.S. and Blakey. Nor did the prosecutor suggest that she had particular knowledge regarding C.S.'s truthfulness. Instead, the prosecutor argued that the jury should make a credibility determination based on the evidence presented at trial. This approach did not contravene caselaw. Thus, Blakey has not established that the prosecutor's witness-credibility arguments constituted error that was plain.

Impugning the Defense

Blakey argues that the "prosecutor impugned the defense expert by emphasizing that the expert testified for money." It is improper to disparage the defense in closing arguments. *State v. Griesse*, 565 N.W.2d 419, 427 (Minn. 1997). As is relevant here, it is inappropriate for a prosecutor to attack the character of a defendant's expert witness based on the expert's receipt of compensation for his testimony. *See State v. Bailey*, 677 N.W.2d 380, 404 (Minn. 2004) (concluding "that it was improper for the prosecutor to go beyond the testimony of the expert witness by making . . . references to the witness's character" based on the expert's receipt of compensation). Once again, because Blakey did not object at trial, we review for plain error.

We need not decide whether the challenged statements constituted error that was plain under the first two prongs of the plain-error test because, given the circumstances of this case, there is no reasonable likelihood that the challenged statements significantly affected the jury's verdict. *See Brown*, 815 N.W.2d at 620 (stating that a reviewing court

need not consider all parts of the plain-error test if any one part is not satisfied). As explained in section I of this opinion, because Blakey's guilt was established based on C.S.'s sleeping state—regardless of her level of intoxication—there is no reasonable likelihood that the prosecutor's alleged disparagement of the defense's intoxication expert significantly affected the verdict.

In conclusion, the evidence was sufficient to sustain the jury's guilty verdict, the district court did not abuse its discretion by limiting the testimony of Blakey's expert witness, and Blakey is not entitled to relief on his prosecutorial-misconduct claim.

Affirmed.