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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1631**

Anthony Strickland, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 9, 2018
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-12-17639

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and Rodenberg, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the postconviction court's denial of his petition for relief from his conviction of third-degree criminal sexual conduct, arguing that (1) there is insufficient

evidence to prove beyond a reasonable doubt that he engaged in sexual penetration with the alleged victim or that he knew or should have known that she was physically helpless and (2) the district court erred by permitting the prosecutor to impeach him with evidence of a prior unspecified felony conviction. We affirm.

FACTS

Following a medical appointment, T.S. began walking to a light-rail station to return home on October 1, 2005. On her way, T.S. met appellant Anthony Strickland, a stranger to her, and spent an hour with him at a nearby bar. Strickland accompanied her on the light rail so that he could continue spending time with her. Mid-route, Strickland and T.S. got off the light rail and stopped at a restaurant. After ordering, T.S. briefly left the table, leaving her beverage with Strickland. When she returned, Strickland encouraged her to drink it. When they left the restaurant, T.S. remembered walking away. But she could not walk without Strickland's support and was confused about their conversation. The next thing T.S. remembered was waking up sometime before 12:30 a.m., laying in bushes, partially clothed, as strangers around her asked her if she was okay. T.S. walked to a hospital to get help. Upon arriving, T.S. informed a staff member that she thought she had been raped.

A nurse at the hospital performed a sexual-assault examination. The nurse conducted a physical exam that included an oral, perineal, vaginal, and rectal swab of T.S. to check for bodily fluids and obtained a blood sample from T.S. to be tested for substances. Following the exam, two Minneapolis police officers spoke with T.S. and completed a

report. The officers forwarded the report to the appropriate units in the Minneapolis police department but did not further investigate the alleged rape.

T.S. heard nothing further for several months. Then, seven months later on April 24, 2006, T.S., while walking in downtown Minneapolis, was approached by a man in his vehicle. T.S. realized that this was the same man who had assaulted her in October, and she confronted him about it. She subsequently walked to the Minneapolis police station and informed the police that she had seen the man who raped her in October. A police officer filed a report with this information.

The Hennepin County Sheriff's crime lab did not test T.S.'s sexual-assault kit until June 23, 2009, because it lacked funding before then.¹ Testing revealed that T.S.'s perineal swab was positive for saliva and semen and her rectal swab was positive for semen. The DNA analyst uploaded the DNA sample to a database that periodically checks for DNA matches. In August 2011, an analyst notified the crime lab that the DNA profile from T.S.'s sexual-assault kit matched the DNA of Anthony Strickland. The police had obtained Strickland's DNA pursuant to a search warrant. The crime lab then tested the DNA sample and confirmed that the male DNA profile in T.S.'s sexual-assault kit matched Strickland's DNA.

The state charged Strickland with third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d) (2004), for the October 1, 2005 assault against T.S. Following

¹ T.S.'s blood and urine kit were not delivered to the BCA until May 23, 2012. The BCA did not test T.S.'s blood or urine sample for the presence of any substances because too much time had passed between the time that T.S. provided her sample and the time that the BCA received the sample.

a trial, a jury found Strickland guilty of third-degree criminal sexual conduct, and the district court sentenced him to 58 months in prison. Strickland petitioned for postconviction relief on the grounds that the evidence was insufficient to prove his guilt and that the district court failed to properly analyze whether he could be impeached with a prior felony conviction. The postconviction court denied his petition. This appeal follows.

DECISION

I.

Strickland argues that the postconviction court erred in determining that there was sufficient evidence to support his conviction. On appeal from a postconviction court's denial of relief, "we address questions of law de novo, review the postconviction court's factual findings for clear error, and evaluate the postconviction court's ultimate decision to deny relief for an abuse of discretion." *Lussier v. State*, 853 N.W.2d 149, 153 (Minn. 2014).

In reviewing a claim of insufficient evidence, we painstakingly review the record to determine whether the evidence, when viewed in the light most favorable to the verdict, is sufficient to allow the fact-finder to reach its verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). In so doing, we assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary," *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), particularly when resolution of the matter depends mainly on conflicting testimony, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). "We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a]

defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (alteration in original) (quotation omitted).

The jury found Strickland guilty of third-degree criminal sexual conduct pursuant to Minn. Stat. § 609.344, subd. 1(d). An individual is guilty under the statute if he engaged in sexual penetration with another person and he “[knew] or ha[d] reason to know that the complainant [was] mentally impaired, mentally incapacitated, or physically helpless.” Minn. Stat. § 609.344, subd. 1(d). A person is physically helpless if they are “asleep or not conscious,” “unable to withhold consent or to withdraw consent because of a physical condition,” or “unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2004). “‘Mentally incapacitated’ means that a 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.” *Id.*, subd. 7 (2004). “‘Sexual penetration’ means any of the following acts committed without the complainant’s consent . . . : sexual intercourse, cunnilingus, fellatio, or anal intercourse,” or “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body.” *Id.*, subd. 12 (2004).

Because the state relied on circumstantial evidence to prove its case, we apply the two-step circumstantial-evidence standard to review the sufficiency of the evidence. *See Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). “We review the sufficiency of the state’s circumstantial evidence de novo.” *State v. Sam*, 859 N.W.2d 825, 830 (Minn. App. 2015). First, we identify the circumstances proved, deferring to the jury’s acceptance of

the proof of these circumstances and rejecting evidence conflicting with the circumstances proved by the state. *State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013). “In determining the circumstances proved, we disregard evidence that is inconsistent with the jury’s verdict.” *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). In evaluating circumstantial evidence, we review the record as a whole and not as isolated facts. *Silvernail*, 831 N.W.2d at 599. The second step requires a determination of “whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt.” *Loving*, 891 N.W.2d at 643. We give no deference to the jury’s choice between reasonable inferences. *Id.* If the circumstances proved support a reasonable inference other than guilt, we will reverse the conviction. *Id.*

At trial, the state proved the following circumstances. T.S. testified that she had one drink with Strickland before she went to the restaurant and was not intoxicated before they ordered. T.S. and Strickland ordered food and beverages and sat down at a table. When T.S. left the table to get lids for their cups, she left her beverage unattended with Strickland. When she returned, Strickland encouraged T.S. to finish her beverage. T.S. testified that the parties left the restaurant in the daylight, and T.S. remembered needing Strickland’s assistance to walk and being in and out of consciousness. She testified that she never consented to having sex with Strickland. T.S. could not remember anything after that until she woke up sometime before 12:30 a.m. surrounded by strangers trying to help her gather her items. When she awoke, she was laying in bushes with her bra pushed above her breasts and her pants, which were covered in urine, pulled down below her buttocks. She walked to a hospital to get help.

T.S. testified that upon arriving at the hospital, she told a staff member that she thought she had been raped. A nurse from the hospital testified that she recorded T.S.'s account of the incident. T.S. informed the nurse that she could not remember what occurred between the time she left the restaurant and woke up in the bushes. The nurse testified that she performed a sexual-assault exam on T.S., which included swabbing T.S.'s oral, perineal, vaginal, and rectal areas. During the exam, the nurse observed a pinpoint tear in T.S.'s vaginal area. A DNA analyst testified that testing revealed that the rectal swab contained DNA from semen of an unidentified male and the perineal swab contained DNA from saliva and semen from an unidentified male. A DNA database later matched the DNA on the swabs to Strickland's DNA. The DNA analyst testified that a test comparing Strickland's DNA sample obtained from the police to the DNA on the rectal and perineal swabs matched Strickland's DNA to a probability that "would not be expected to occur more than once among unrelated individuals in the world's population."

A police officer testified that he took a report from T.S. following her sexual-assault exam at the hospital. The officer stated that T.S. informed him that she could not remember what happened after finishing her beverage, but that she woke up with strangers around her, and "she was kind of wobbling around and disoriented."

These proved circumstances are consistent with guilt. The semen on the rectal swab established penetration. And T.S.'s lack of memory, the sudden change in her coordination as she left the restaurant, and her experience waking up in the bushes, partially clothed, sometime before 12:30 a.m. demonstrated that she was physically helpless.

But Strickland argues that the circumstances proved support a rational hypothesis other than guilt. He first asserts that “he did ejaculate while in contact with [T.S.], but not while sexually penetrating [T.S.], and the semen later moved or shifted into [T.S.’s] rectum.” Strickland relies on the following evidence to support his argument: semen was found on T.S.’s perineal area, the nurse did not discover any injuries to T.S.’s rectal area during her physical examination, T.S. was unsure of whether penetration took place, and no witness testified that Strickland penetrated T.S. We are not persuaded. Penetration may be established by “any intrusion however slight into the . . . anal openings.” Minn. Stat. § 609.341, subd. 12(2). Because the DNA testing established that Strickland’s DNA matched the semen found on her rectal swab, the postconviction court determined Strickland’s hypothesis to be unreasonable.

Second, Strickland contends that the circumstances proved support the rational inference that he did not know that T.S. was physically helpless during the assault. Strickland argues that the state did not sufficiently prove that he was aware of T.S.’s mental state when the sexual contact occurred because T.S. did not appear impaired before they went to the restaurant, he was briefly made aware that she needed help walking when they left the restaurant, no evidence demonstrated exactly when the assault occurred, her blood and urine samples were not tested for substances, and she did not appear to be intoxicated during her sexual-assault exam.

In *State v. Berrios*, we determined that the circumstantial evidence sufficiently supported the jury’s determination that the victim was physically helpless because the defendant witnessed the victim take multiple shots of alcohol, vomit several times, lose

consciousness, and struggle to walk without the defendant's assistance. 788 N.W.2d 135, 143 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). Strickland argues that *Berrios* is distinguishable and that the circumstances proved here only establish that T.S. was unable to walk for a short period of time. We disagree.

The circumstances proved demonstrate that Strickland's sexual assault of T.S. occurred after they left the restaurant but before the time she awoke alone in the bushes, with no memory of what had occurred. T.S.'s inability to walk away from the restaurant without Strickland's help demonstrates that T.S. was "unable to withhold consent or to withdraw consent because of a physical condition" or "unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor." Minn. Stat. § 309.341, subd. 9. Assuming that the jury believed T.S., the jury would have concluded that T.S. lacked physical control as she left the restaurant and would have inferred that her condition deteriorated before she woke up.

Because the circumstances proved are consistent with Strickland's guilt and inconsistent with any rational hypothesis other than guilt, the evidence is sufficient to support Strickland's conviction of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d).

II.

Strickland challenges the postconviction court's determination that the district court did not err by allowing the state to present evidence of Strickland's prior felony conviction. Strickland argues that the prejudicial effect of the evidence of the prior felony outweighed its probative value and that its admission chilled his constitutional right to testify. Before

trial, Strickland moved to suppress evidence of his felony third-degree drug sale and requested that the district court prohibit the state from using it for impeachment purposes under Minn. R. Evid. 609. Because of the similarities between the drug-sale conviction and the facts here that implied that Strickland drugged T.S., the district court only allowed the prosecutor to refer to the previous conviction as an unspecified prior felony conviction.

Minn. R. Evid. 609(a) provides that a witness's credibility may be attacked with a prior conviction only if the crime "was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect" or the crime "involved dishonesty or false statement, regardless of the punishment." A reviewing court will not overturn a district court's determination of whether the probative value of a prior conviction outweighs its prejudicial effect absent an abuse of discretion. *State v. Graham*, 371 N.W.2d 204, 208-09 (Minn. 1985). When determining whether the probative value of a prior conviction outweighs its prejudicial effect, a district court applies the five-factor balancing test set forth in *State v. Jones*. 271 N.W.2d 534, 537-38 (Minn. 1978). The factors to be balanced are as follows:

(1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the similarity of the past crime with the charged crime (the greater the similarity, the greater the reason for not permitting use of the prior crime to impeach), (4) the importance of [the] defendant's testimony, and (5) the centrality of the credibility issue.

Id. A district court must demonstrate that it considered the *Jones* factors. *State v. Swanson*, 707 N.W.2d 645, 654-55 (Minn. 2006). But the district court may assign different weight

to each *Jones* factor and is given “broad discretion” in weighing the factors. *State v. Hochstein*, 623 N.W.2d 617, 625 (Minn. App. 2001).

Here, the district court did consider and weigh each *Jones* factor. As to the first factor, “the mere fact that a witness is a convicted felon holds impeachment value.” *State v. Hill*, 801 N.W.2d 646, 652 (Minn. 2011). The district court correctly concluded that all felonies have impeachment value in concluding that the first factor weighed in favor of admissibility.

The second factor, the date of the offense and subsequent history, is concerned with examining the defendant’s subsequent history to ensure that the prior offense has not lost any relevance by the passage of time. *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Minn. R. Evid. 609(b), which mandates that a prior conviction is not admissible if a period of more than ten years has elapsed since the date of that conviction unless its probative value substantially outweighs its prejudicial effect, also addresses the concern that the passage of time may cause the prior conviction to lose its relevance as it pertains to a defendant’s credibility. Strickland’s prior felony occurred six years before trial. The district court determined that this was a neutral factor because it was not “particularly old.”

The third *Jones* factor considers whether the prior conviction is similar to the charged crime because, if so, “there is a heightened danger that the jury will use the evidence not only for impeachment purposes, but also substantively.” *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). But the third *Jones* factor is irrelevant with respect to an unspecified felony conviction because there can be no prejudicial effect resulting from “the similarity of the past crime with the charged crime” if the jury does not know the

nature of the past crime. *See Jones*, 271 N.W.2d at 538. Here, the district court concluded that the third factor weighed against admissibility, reasoning that, although a sexual-assault charge and drug-sale conviction are different offenses, the prior conviction and sexual-assault charged were similar because the state's theory of the case—the victim's belief that she had been drugged—involved similar facts to the drug-sale conviction. Because the district court admitted the drug-sale conviction as an unspecified felony and because the jury did not know the nature of the past crime, Strickland was not prejudiced.

Under the fourth *Jones* factor, a district court may exclude a prior conviction if the admission of the conviction for impeachment will prevent the defendant from testifying and if it is more important that the jury hear the defendant's version of the case. *Bettin*, 295 N.W.2d at 546. Here, the district court concluded that this factor weighed against admitting evidence of the prior felony because Strickland's testimony was crucial to his case, and he had no other witnesses.

The fifth *Jones* factor favors admission “if the issue for the jury narrows to a choice between defendant's credibility and that of one other person.” *Id.* Strickland notified the district court that he was invoking the defense that T.S. consented to a sexual act. Because the credibility of both T.S. and Strickland was crucial in determining whether T.S. consented, the district court determined that this factor favored admission.

In balancing these factors, the district court determined that the prejudicial effect of disclosing the prior felony as a drug-sale conviction outweighed its probative value but concluded that the admission of the evidence would satisfy the rule 609(a)(1) balancing test if the state did not identify the felony. In reaching this conclusion, the district court

relied on *Hill*, in which the supreme court held that a district court “may still allow a party to impeach a witness with an unspecified felony conviction if the use of the unspecified conviction satisfies the balancing test of Rule 609(a)(1)” even if the prejudicial effect of disclosing the nature of the felony convictions outweighs its probative value. 801 N.W.2d at 652-53.

The postconviction court determined the district court did not abuse its discretion in admitting the conviction as an unspecified felony, reasoning that the district court “carefully minimized the impact of undue prejudice by allowing the State to impeach with an unspecified felony conviction.” Because the district court engaged in a thorough *Jones* analysis and admitted the drug-sale conviction as an unspecified felony conviction, we agree with the postconviction court’s conclusion that the district court did not abuse its discretion by allowing the state to use evidence of the unspecified felony conviction to impeach Strickland.

Strickland also argues that the district court chilled his constitutional right to testify by admitting his prior felony as impeachment evidence. The Fourteenth Amendment affords a criminal defendant “due process of law,” see U.S. Const. amend. XIV, § 1, which includes the right to explain his conduct to the jury. *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984). The supreme court has held that a district court’s evidentiary ruling may have a “chilling effect on the accused’s right to testify in his own defense,” particularly if the district court allows a broad inquiry into the facts underlying a prior conviction. *State v. Griesse*, 565 N.W.2d 419, 426 (Minn. 1997).

But a district court does not prohibit a defendant from testifying or violate his constitutional rights to testify simply because the defendant decided not to testify based on the evidence that would have been admitted had he done so. *See State v. Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998). Here, the district court did not permit the prosecutor to inquire about the facts underlying Strickland's conviction or to identify the felony as a drug-sale conviction. Strickland chose to take his attorney's advice not to testify at trial. Therefore, the district court did not violate Strickland's constitutional right to testify.

Finally, Strickland argues that, although the district court instructed the jury not to consider Strickland's failure to testify as evidence of guilt, the jury could not have understood the instruction. Minnesota caselaw does not support this theory. "Jurors are presumed to follow limiting instructions with respect to the proper use of evidence." *See State v. Ali*, 855 N.W.2d 235, 249-50 (Minn. 2014). We conclude that the postconviction court properly concluded that the district court did not abuse its discretion by allowing the state to introduce Strickland's unspecified felony as impeachment evidence and that this ruling did not chill his constitutional right to testify.

Affirmed.