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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0318**

State of Minnesota,
Respondent,

vs.

John Thomas Owen,
Appellant.

**Filed December 3, 2018
Affirmed in part, reversed in part, and remanded
Smith, John, Judge***

Blue Earth County District Court
File No. 07-CR-16-3607

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Considered and decided by Jesson, Presiding Judge; Bratvold, Judge; and Smith,
John, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm appellant's conviction of third-degree criminal sexual conduct because the record evidence is sufficient to sustain the conviction, the district court did not abuse its discretion by admitting evidence that appellant had completed the college required training on sexual consent, and the prosecutor did not commit misconduct. We also affirm appellant's sentence because the district court did not abuse its discretion by denying his motion for a downward durational departure. But we reverse appellant's convictions of fourth- and fifth-degree criminal sexual conduct, which are lesser included offenses, and remand for vacation of those sentences.

FACTS

Sixteen-year-old N.D. went to visit her sister A.D. at college. A.D. had to work, so N.D. spent the evening with two of A.D.'s friends. One of them gave N.D. two standard 20-ounce Gatorade bottles filled with two-thirds Gatorade and one-third vodka. She drank one in the dorm and the other "throughout the night" as they went to a party and then walked around an area of student housing.

N.D. became very intoxicated. She felt increasingly "heavy" and "dizzy" and experienced "black spots" or "blackout spots," where she does not remember anything at all. She could not walk on her own and kept closing her eyes and "tilting her head all over the place." Her companions expected her to vomit.

N.D. did not remember how she got back to her sister's dorm but remembers lying down on a futon in the room of one of her companions. Her sister put a blanket on her and

placed a garbage can near her head “in case she threw up.” Then her sister left, and she “passed out again.”

The next thing N.D. remembers is a male she did not know sitting on the futon next to her, followed by a blackout spot. And then he had his arm around her and was holding her up. They conversed, but she does not remember the conversation. He maneuvered her over so she was straddling him, then moved her hips back and forth and kissed her neck while she “droop[ed]” over his shoulder and laid her head against the back of the futon. N.D. perceived his actions “kind of like a dream,” as though “it wasn’t really happening to me.” Then she had another blackout spot. N.D. next remembers that she was lying down on the futon with him sitting over her and kissing her neck. She noticed a sudden “flood of light” as her sister opened the door to check on her, and the male stopped and “shot up.” N.D. was uncertain what was going on and then had another blackout spot; her sister observed that she was “passed out.” N.D. next remembers the male kissing her neck, “positioning” her legs, and getting on top of her. Then another blackout spot, followed by her discovering that he had removed her pants and was moving on top of her. When he went to remove his own pants, she said, “[N]o, no, no, I can’t.” He asked her why not, but she did not remember what followed because she had another blackout spot. She next remembers him whispering, “[W]elcome to college,” and putting his penis into her vagina. He “did two strokes” then stopped, and she had another blackout spot. The encounter lasted approximately 20 minutes.

Afterward, she remembers being in the bathroom with him. He handed her pants to her and told her to put them on, but she did not understand why. He led her back to the

futon, climbed into his lofted bed above, and told her they would “finish this next weekend” if she returned. She then “fully passed out.”

The next morning, N.D. discovered that the male was appellant John Owen, the roommate of one of her companions. At breakfast, she started crying and told her sister what happened, explaining that “everything was super fuzzy” but she remembered that she kept trying to push Owen off or say no but could not. N.D. reported the incident to police and went to the hospital for a sexual-assault examination. Owen gave a statement to police acknowledging that he had sex with N.D. even though he knew she was “too drunk” and had objected to sex, explaining that she thereafter grabbed him and initiated it.

Owen was charged with third-, fourth-, and fifth-degree criminal sexual conduct. After a jury trial, Owen was convicted of all three offenses. The district court denied Owen’s motion for a downward dispositional or durational departure and sentenced him to 48 months in prison.

D E C I S I O N

I. The record evidence is sufficient to sustain Owen’s convictions.

In reviewing a claim of insufficient evidence, we view “the evidence in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury to reasonably conclude that the defendant was guilty beyond a reasonable doubt of the offense of which he was convicted.” *State v. Hanson*, 800 N.W.2d 618, 621 (Minn. 2011) (quotations omitted). When reviewing a conviction based on circumstantial evidence, we apply a two-step analysis. *State v. Harris*, 895 N.W.2d 592, 598-601 (Minn. 2017). First, we identify the

circumstances proved “by resolving all questions of fact in favor of the jury’s verdict.” *Id.* at 600. In doing so, we are mindful that the jury, as fact-finder, is in the best position to determine witness credibility and may accept part and reject part of a witness’s testimony. *Id.* We also assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary” and defer to those credibility determinations. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). Second, we independently consider the “reasonable inferences that can be drawn from the circumstances proved.” *Harris*, 895 N.W.2d at 601. “To sustain the conviction, the circumstances proved, when viewed as a whole, must be consistent with a reasonable inference that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Id.* “But we will not overturn a guilty verdict on conjecture alone.” *State v. Hayes*, 831 N.W.2d 546, 553 (Minn. 2013).

To convict Owen of third-degree criminal sexual conduct,¹ the state was required to prove that he engaged in sexual penetration while he knew or had reason to know that N.D. was “physically helpless.” Minn. Stat. § 609.344, subd. 1(d) (2016). Owen disputes the sufficiency of the evidence establishing that (1) N.D. was physically helpless and (2) he knew or had reason to know of this condition. Because no direct evidence proves either element, we apply the circumstantial-evidence standard to each element in turn.

¹ Fourth-degree criminal sexual conduct is a lesser included offense, as discussed below, and Owen does not challenge his fifth-degree conviction. We therefore focus our analysis on the third-degree conviction.

Physically Helpless

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.” Minn. Stat. § 609.341, subd. 9 (2016). “‘Consent’ means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor.” *Id.*, subd. 4(a) (2016).

When viewed in the light most favorable to the conviction, the evidence of N.D.’s physical helplessness is as follows. Everyone around N.D., including Owen, perceived that she was extremely intoxicated. She was unable to move independently, keep her eyes open, or clearly perceive what was occurring, including whether she was awake or not. She cannot remember what was happening for periods of time. During one such “blackout” period, her sister observed her “passed out” on the futon next to Owen. Owen manipulated her body throughout the entire encounter—placing her on top of him, moving her hips, positioning her legs, and removing her pants. When he went to remove his own pants, she objected. She does not remember what happened afterward, but Owen continued his attentions. The next thing she knew, he was whispering in her ear and penetrating her.

Owen contends that these facts establish that N.D. was not physically helpless because she was able to verbally communicate her nonconsent, like the complainant in *State v. Blevins*, 757 N.W.2d 698 (Minn. App. 2008). We disagree. The complainant in *Blevins* was intoxicated but awake throughout the encounter and communicated

nonconsent, then consciously acquiesced in the sex act because she felt ill, uncomfortable, and afraid. 757 N.W.2d at 701. That is not the scenario before us.

This case is more akin to *State v. Berrios*, in which the complainant was “extremely intoxicated,” fell unconscious, awoke to discover the defendant removing her pants and told him “no,” but passed out again and awoke to find him on top of her with his penis inside her vagina and could not move her body. 788 N.W.2d 135, 142 (Minn. App. 2010), *review denied* (Minn. Nov. 16, 2010). N.D. was similarly in and out of consciousness, unable to move her own body, or remember what was happening to her. *See id.* (noting that the complainant’s memory gaps “are consistent with the testimony that [she] was severely intoxicated and experienced intermittent periods of unconsciousness”). N.D. was able to object once during the roughly 20-minute encounter, but she was consistently unable to withhold consent as Owen undressed her, manipulated her body, and penetrated her. Accordingly, we conclude that sufficient evidence supports the jury’s finding that N.D. was physically helpless.

Knew or Had Reason to Know

When viewed in the light most favorable to the conviction, the evidence that Owen knew or had reason to know of N.D.’s physical helplessness is as follows. He knew she was extremely intoxicated and that she was specifically “too drunk” to be having sex. N.D. was able to communicate with him at points during the encounter, including once objecting to sex, but he would have been aware that he was moving her body around throughout the encounter and that she lapsed into periods of unconsciousness. On this record, we conclude

that sufficient evidence supports the jury's finding that Owen knew or should have known of N.D.'s physical helplessness.

II. The district court did not abuse its discretion by admitting evidence that Owen received training on consent.

We review evidentiary rulings for an abuse of discretion. *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn. 2008). Appellant has the burden of demonstrating that the district court abused its discretion and that he was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

The district court admitted evidence, over Owen's objection, that Owen completed the college's required training on sexual consent. The training included information about "how alcohol impacts consent," potential risks, and statistics about alcohol use and impact. The training also included a true/false question about whether a person who is "asleep, drugged, or unconscious or blacking out" is capable of giving consent. The district court reasoned that the evidence is relevant to Owen's "knowledge about consent" and whether he "knew or had reason to know" N.D. was unable to consent.

Owen contends this evidence was irrelevant because consent is not an element of the charged offenses and his knowledge that a person cannot consent if she is asleep or unconscious "does not have anything to do with" whether he knew N.D. was actually asleep or unconscious. This argument is unavailing. All three of the charged offenses involve elements of whether N.D. consented or not, see Minn. Stat. § 609.3451, subd. 1(1) (2016), or whether she was able to consent or not and whether Owen was aware of that state, see Minn. Stat. §§ 609.341, subd. 9, .344, subd. 1(d), .345, subd. 1(d) (2016). Owen's

awareness that an extremely intoxicated person may not be able to consent to sex is relevant because it tends to make it more probable that these elements are satisfied. *See* Minn. R. Evid. 401. In fact, the district court’s concern in admitting the evidence was precisely that the issue of consent is so central to the case that it wanted to ensure the evidence of Owen’s training would not confuse the jury about the legal definition of consent.

Owen also argues that any probative value was outweighed by the potential for unfair prejudice or confusion. He contends the evidence, and the prosecutor’s argument on the evidence, misled the jury “into believing that the issue was whether Owen knew the definition of consent.” Because either consent or ability to consent (or not) was an element of each of the charged offenses, there was nothing misleading about presenting evidence and argument that Owen had been trained on a definition of consent that is not inconsistent with applicable law. The district court did not abuse its discretion by admitting the evidence.

III. The prosecutor did not commit misconduct.

We review unobjected-to claims of prosecutorial misconduct under a modified plain-error analysis. *State v. Peltier*, 874 N.W.2d 792, 803 (Minn. 2016). The defendant has the burden to demonstrate both that error occurred and that the error was plain. *Id.* If the defendant meets this burden, the state then must show that the misconduct did not affect the defendant’s substantial rights. *Id.*

The prosecutor is an officer of the court who must balance advocacy for the state’s position with an “obligation to achieve justice and fair adjudication.” *State v. Fields*, 730 N.W.2d 777, 782 (Minn. 2007); *see also State v. Graham*, 764 N.W.2d 340, 349 (Minn.

2009) (stating that “a prosecutor must be more than just an advocate for” the state). During closing argument, the state may “present all legitimate arguments on the evidence and all proper inferences that can be drawn from that evidence” but may not “misstate the evidence.” *State v. Munt*, 831 N.W.2d 569, 587 (Minn. 2013) (quotation omitted). Likewise, the prosecutor also may “reference the law” but should exercise caution not to misstate the law. *State v. Cao*, 788 N.W.2d 710, 716 (Minn. 2010). And the prosecutor “may argue as to the credibility of witnesses but may not throw his own opinion onto the scales of credibility.” *State v. McNeil*, 658 N.W.2d 228, 235 (Minn. App. 2003), *review denied* (Minn. June 25, 2003). When reviewing whether a prosecutor’s argument overstepped these lines, we consider the argument as a whole, rather than focusing on “particular phrases or remarks.” *State v. Jones*, 753 N.W.2d 677, 691 (Minn. 2008).

Owen first contends that the prosecutor misstated the evidence by stating that N.D. “was unconscious at the time” of the sexual act, and “there was no way for her to give any overt action or any words.” The prosecutor was addressing the charge of fifth-degree criminal sexual conduct based on Owen’s nonconsensual removal of clothing covering N.D.’s intimate parts. See Minn. Stat. § 609.3451, subd. 1. And the argument that N.D. was unconscious during this act, when she testified that it occurred during a “blackout spot,” simply posits that N.D.’s blackout spots were periods of unconsciousness. Such an argument is a reasonable inference from the evidence.

Owen also contends that the prosecutor misstated the law by telling the jury it could find N.D. was physically helpless if “she couldn’t move her body, didn’t know where she was, couldn’t open her eyes, she felt heavy, thought she was in a dream.” We disagree.

The prosecutor did not misstate the law but recited the details of N.D.’s condition and invited the jury to consider whether those details align with some part of the multifaceted concept of physical helplessness: “What you have to determine is that she was physically helpless. How you get there doesn’t matter.” And the jury repeatedly received an accurate legal definition of physical helplessness during the court’s oral and written instructions and throughout the prosecutor’s argument. The prosecutor did not commit misconduct in arguing that N.D.’s condition satisfied the physically helpless element.

Finally, Owen contends the prosecutor improperly appealed to the jury’s passions by evoking sympathy for N.D. and focusing on what she went through following the incident—telling her story to strangers, undergoing a sexual-assault exam, taking a Plan B pill, struggling emotionally in the year that followed, and then experiencing the trauma of testifying at trial. But the prosecutor recited these facts merely as a means of demonstrating N.D.’s credibility. The prosecutor asked the jury to consider why she would “make this up” and whether she has “something to gain,” then after discussing N.D.’s experience posited, “When you’re back there trying to decide whether [N.D.] is credible or not, think about what she’s gone through. Would she do that if she didn’t have to?” Overall, the prosecutor did not endorse N.D.’s credibility or appeal to the jury’s passions but recognized that the jury had to decide whether to believe Owen or N.D. and argued, based on properly admitted evidence, that N.D.’s experience supports finding her credible. *Cf. McNeil*, 658 N.W.2d at 235 (holding that argument about child victim’s loss of virginity and loss of childhood was “made to play on the sympathies of the jury and had nothing to do with the

facts of the case”). Such argument is not misconduct. Accordingly, Owen’s plain-error claim of prosecutorial misconduct fails.

IV. The district court did not abuse its discretion by denying Owen’s motion for a downward durational departure.

A district court “must pronounce a sentence of the applicable disposition and within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2016). Substantial and compelling circumstances for a durational departure are those that demonstrate the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). A district court’s decision whether to depart from the presumptive guidelines sentence is subject to an abuse-of-discretion standard of review. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). “Only in a rare case will a reviewing court reverse a district court’s imposition of the presumptive sentence.” *State v. Olson*, 765 N.W.2d 662, 664 (Minn. App. 2009).

Owen moved for a downward dispositional departure or, in the alternative, a downward durational departure. In support of a durational departure, Owen urged only (1) that his conduct was less serious than typically involved in the commission of the offense because he was not initially aware of N.D.’s level of intoxication and promptly stopped “once [he] realized his conduct was ‘wrong’” and (2) that he spent the remainder of the night treating N.D. “with particular care,” which he reasoned is the opposite of

particular cruelty. The district court determined that this is not the “rare” case warranting either downward departure.

Owen does not challenge the district court’s decision to sentence him to prison but argues that the district court abused its discretion by denying a downward durational departure because his conduct was less serious than the ordinary case and he expressed remorse. *See Solberg*, 882 N.W.2d at 625-26 (recognizing that a defendant’s remorse could justify a durational departure if it “relate[s] back” and remediates the conduct). But the district court considered and rejected these arguments. It noted the seriousness of Owen’s conduct, that he physically manipulated and took sexual advantage of a girl who “had an awful lot to drink.” It reasoned that Owen stopping promptly did not materially mitigate the seriousness of his conduct because “it was complete upon the act of penetration.” And it expressly rejected Owen’s claim of remorse, finding “a disappointing lack of empathy.” On this record, we conclude the district court did not abuse its discretion by denying Owen’s motion for a downward durational departure.

V. Owen’s conduct supports only one conviction.

Minnesota law prohibits a criminal defendant convicted of one offense from also being convicted of any included offenses. Minn. Stat. § 609.04, subd. 1 (2016). An included offense is “a crime necessarily proved if the crime charged were proved.” *Id.*, subd. 1(4). When a jury finds a defendant guilty of more than one offense from a single course of conduct, the district court should “adjudicate formally and impose sentence on one count only.” *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999). The warrant of commitment plainly indicates that the district court entered convictions on each of the three

guilty verdicts. The record indicates and the state does not dispute that all three charges against Owen were based on the same act. Accordingly, the district court should vacate the convictions for fourth- and fifth-degree criminal sexual conduct on remand.

Affirmed in part, reversed in part, and remanded.