STATE OF MINNESOTA

IN SUPREME COURT

A19-1281

Court of Appeals — Thissen, J.
Took no part, Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: March 24, 2021
Office of Appellate Courts

Francios Momolu Khalil,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Senior Assistant County Attorney, Linda M. Freyer, Assistant County Attorney, Megan Massie, Certified Student Attorney, Minneapolis, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant State Public Defender, Saint Paul, Minnesota, for appellant.

Anna Light, Assistant Dakota County Attorney, Hastings, Minnesota; and

Kelsey R. Kelley, Assistant Anoka County Attorney, Anoka, Minnesota, for amicus curiae Minnesota County Attorneys Association.

S Y L L A B U S

1. The legislative definition of "mentally incapacitated," as set forth in Minn. Stat. § 609.341, subd. 7 (2020), does not include a person who is voluntarily intoxicated by alcohol.

2. The district court's erroneous jury instructions were not harmless beyond a reasonable doubt.

Reversed and remanded.

O P I N I O N

THISSEN, Justice.

This case arises from an experience no person should ever have to endure. J.S. was intoxicated after drinking alcohol and taking a prescription narcotic. She went to a bar with a friend but was denied entry due to her intoxication. Appellant Francios Momolu Khalil approached J.S. outside of the bar and invited her to accompany him to a supposed party at a house. After arriving at the house, J.S. passed out and woke up to find Khalil penetrating her vagina with his penis. The question before us is whether Khalil's conduct is third-degree criminal sexual conduct: sexual penetration with another person when the actor knows or has reason to know that the complainant is "mentally incapacitated."

Our decision turns on the meaning of mentally incapacitated as defined by the Legislature in Minn. Stat. § 609.341, subd. 7 (2020). The statute provides:

> "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. Specifically, we are asked to determine whether the phrase "administered to that person without the person's agreement" applies to alcohol. *Id.* In other words, we must decide whether a person can be mentally incapacitated under the statute when the person voluntarily ingests alcohol, or whether the alcohol must be administered to the person without his or her agreement.

We hold that a person is mentally incapacitated under the definition adopted by the Legislature in section 609.341, subdivision 7, when that person is "under the influence of alcohol . . . administered to that person without the person's agreement."[1] Consequently, we reverse the decision of the court of appeals and remand to the district court for a new trial.

FACTS

The parties do not dispute the relevant facts. On the evening of May 13, 2017, J.S. consumed approximately five shots of vodka and one pill of a prescription narcotic. She

[1] We are mindful of and concerned with the fact that, as the Minnesota County Attorneys Association points out in its amicus brief, nearly half of all women in the United States have been the victim of sexual violence in their lifetime—including an estimated 10 million women who have been raped while under the influence of alcohol or drugs. With this level of sexual violence, legislatures across the country have enacted statutes aimed at prioritizing consent and protecting intoxicated victims of rape and sexual assault, regardless of how the victim became intoxicated. *See, e.g.*, Wash. Rev. Code § 9A.44.010 (defining "mental incapacity"—for the purpose of second-degree rape under Wash. Rev. Code § 9A.44.050—as a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause"). These statutory definitions protect intoxicated victims of rape regardless of how they became intoxicated. But today we undertake the task of interpreting the definition of "mentally incapacitated" that the Minnesota Legislature enacted in Minn. Stat. § 609.341, subd. 7 (2020).

then traveled to the Dinkytown neighborhood of Minneapolis with her friend S.L. Upon arriving, J.S. attempted to enter a local bar but was denied entry by the bouncer because she was intoxicated. Shortly thereafter, Khalil and two other men approached J.S. and S.L. outside the bar and invited them to a party. Khalil then drove the group to a house in North Minneapolis, arriving in the early morning hours of May 14, 2017. There was no party at the house.

S.L. testified that, after walking into the house, J.S. immediately laid down on the living room couch and soon fell asleep. J.S. testified that she "blacked out" due to her intoxication shortly after arriving at the house and did not clearly remember lying down on the couch. J.S. woke up some time later to find Khalil penetrating her vagina with his penis. She said, "No, I don't want to," to which he replied, "But you're so hot and you turn me on." J.S. then lost consciousness and woke up at some point between 7 and 8 a.m. with her shorts around her ankles. She retrieved S.L. from another room and the two called a Lyft and left the house. During the ride, J.S. told S.L. that she had been raped. Later that day, J.S. went to Regions Hospital in St. Paul to have a rape kit done.

On May 18, 2017, J.S. contacted the Minneapolis police department to report the incident. The police conducted an investigation and the State charged Khalil with one count of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant.[2] *See* Minn. Stat. § 609.344, subd. 1(d) (2020). The State

[2] The State also charged Khalil with three additional counts arising from the same alleged conduct: first-degree criminal sexual conduct involving personal injury and a mentally incapacitated or physically helpless complainant in violation of Minn. Stat.

chose not to charge Khalil with fifth-degree criminal sexual conduct which criminalizes nonconsensual sexual contact, a charge both the State and Khalil conceded would cover the conduct alleged in this case but which is a gross misdemeanor rather than a felony for a first offense. *See* Minn. Stat. § 609.3451 (2020).

At trial, the district court issued jury instructions, which stated in part:

> Mr. Khalil knew or had reason to know that [J.S.] was mentally incapacitated or physically helpless.
>
> A person is mentally incapacitated if she lacks the judgment to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic, or any other substance administered without her agreement.[3]

During deliberations, the jury requested clarification on the mental incapacitation element of criminal sexual conduct.[4] In the questions to the district court, the jury outlined

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§ 609.342, subd. 1(e)(ii) (2020); first-degree criminal sexual conduct involving physical injury and use of force or coercion in violation of Minn. Stat. § 609.342, subd. 1(e)(i); and third-degree criminal sexual conduct involving use of force or coercion in violation of Minn. Stat. § 609.344, subd. 1(c) (2020). At trial, the jury acquitted Khalil on these three additional counts; only the conviction for third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant is before us on appeal.

[3] This instruction does not align precisely with the definition of mentally incapacitated as set forth in Minn. Stat. § 609.341, subd. 7. Critically, this instruction (a written copy of which was available to the jury during its deliberations) omits the comma between "any other substance" and "administered" present in the statute. *Id.* This may explain, at least in part, the jury's confusion about the proper interpretation of the definition of mentally incapacitated.

[4] As the court of appeals noted, although the jury asked about the meaning of mentally incapacitated as it related to first-degree criminal sexual conduct involving personal injury and a mentally incapacitated or physically helpless complainant, its question about the proper interpretation of mentally incapacitated also applied to Khalil's charge of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant. *See State v. Khalil*, 948 N.W.2d 156, 163 n.1 (Minn. App. 2020); *see also*

two potential readings of the definition of mentally incapacitated. The first reading interpreted the definition as requiring J.S. to be under the "influence of alcohol [J.S.] administered herself or [the] influence of [a] narcotic J.S. administered herself or a thing administered [without] her agreement." The second reading required J.S. to be under the influence of "alcohol, narcotic, or another substance[,] none of which had been administered with her knowledge."

In other words, the jury sought to clarify whether it was sufficient that J.S. voluntarily consumed the alcohol or whether Khalil or another person had to have administered the alcohol to J.S. without her agreement for her to qualify as mentally incapacitated under Minn. Stat. § 609.341, subd. 7. Over Khalil's objection, the district court instructed the jury that the first reading of the statute was correct, stating: "[Y]ou can be mentally incapacitated following consumption of alcohol that one administers to one's self or narcotics that one administers to one's self or separately something else that's administered without someone's agreement." The jury then found Khalil guilty of third-degree criminal sexual conduct.

On appeal, Khalil challenged the validity of the jury instructions, arguing that the district court erred by instructing the jury on the definition of mentally incapacitated the way it did. *State v. Khalil*, 948 N.W.2d 156, 163 (Minn. App. 2020). In a divided opinion,

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Minn. Stat. § 609.341, subd. 1 (2020) (applying the definitions laid out in the statute to the five degrees of criminal sexual conduct). We agree.

the court of appeals rejected Khalil's argument and affirmed his conviction.[5] *Id.* at 170. We granted review.

ANALYSIS

The jury convicted Khalil of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(d), which states in relevant part:

> A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists: . . .
>
> (d) the actor *knows or has reason to know* that the complainant is mentally impaired, *mentally incapacitated*, or physically helpless[.]

(Emphasis added.) Consequently, to convict Khalil of third-degree criminal sexual conduct under section 609.344, subdivision 1(d), the State was required to prove that when Khalil sexually penetrated J.S., he knew or had reason to know that J.S. was in a particular state; namely, that J.S. was mentally incapacitated.

It is certainly true that a commonsense understanding of the term mentally incapacitated could include a person who cannot exercise judgment sufficiently to express consent due to intoxication resulting from the voluntary consumption of alcohol. But here, we do not look at the ordinary, commonsense understanding of mentally incapacitated because the Legislature expressly defined the term in the general definitions section of Minnesota's criminal sexual conduct statutes, Minn. Stat. §§ 609.341–.3451 (2020). *See U.S. Jaycees v. McClure*, 305 N.W.2d 764, 766 (Minn. 1981) ("The legislature defines a

[5] Khalil raised several other issues related to impeachment, discovery, and sentencing. Those arguments were rejected by the court of appeals and are not before us. *See Khalil*, 948 N.W.2d at 170.

term only because it intends in some measure to depart from the ordinary sense of that term. Thus, there is a presumption that we are not to substitute the literal, ordinary meaning of [a term] for the definition the legislature has provided."). For the purpose of criminal sexual conduct offenses, " '[m]entally 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." Minn. Stat. § 609.341, subd. 7.

The State does not claim that Khalil knew or had reason to know that J.S. was under the influence of alcohol administered to J.S. *without* her agreement. There is no evidence to support such a claim. On the other hand, Khalil does not dispute that there is sufficient evidence in the record that he knew or had reason to know that J.S. was under the influence of alcohol. Accordingly, our decision in this appeal turns on whether the *Legislature's* definition of mentally incapacitated includes a state of mental incapacitation caused by the consumption of alcohol, voluntary or not, or whether it is limited to circumstances where the state of mental incapacitation results from consumption of alcohol administered to the complainant involuntarily without her agreement.

The State urges us to read the definition of mentally incapacitated like the district court did when it instructed the jury in response to the jury's questions: mentally incapacitated means that a person under the influence of alcohol, however consumed, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration. In contrast, Khalil challenges the district court's interpretation of the Legislature's definition of mentally incapacitated and urges us to read the statute as follows: mentally incapacitated

means that a person under the influence of alcohol, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.

I.

The legal issue before us arises because of the district court's instruction to the jury on the meaning of mentally incapacitated. Although district courts enjoy "considerable latitude in selecting jury instructions," the instructions "must fairly and adequately explain the law of the case and not materially misstate the law." *State v. Peltier*, 874 N.W.2d 792, 797 (Minn. 2016).[6] The question of whether the district court materially misstated the law requires us to interpret the statutory definition of mentally incapacitated, which is a matter subject to de novo review. *Vill. Lofts at St. Anthony Falls Ass'n v. Hous. Partners III-Lofts, LLC*, 937 N.W.2d 430, 435 (Minn. 2020). The purpose of statutory interpretation is to "ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2020). Our deference to the intention of the Legislature is due not only to the section 645.16 mandate from the Legislature itself. It also reflects a structural understanding that legislators are the elected representatives of the people and that legislative bodies are

[6] The fact that Khalil challenges the district court's supplemental instructions issued in response to a question from the jury does not alter our analysis. *See, e.g.*, *State v. Spence*, 768 N.W.2d 104, 106–08 (Minn. 2009) (conducting routine statutory interpretation analysis based on the district court's supplemental jury instructions).

institutionally better positioned than courts to sort out conflicting interests and information surrounding complex public policy issues.[7]

[7] A good example of the unique institutional capacity of the Legislature (as compared with the judiciary) to sort out complex policy issues is the work currently underway to amend Minnesota's criminal sexual conduct statutes, including revisions to address the Legislature's concern about a potential gap concerning sexual penetration of, or sexual contact with, voluntarily intoxicated persons.

In 2019, bills were introduced in the Legislature to amend the definition of mentally incapacitated to include voluntarily intoxicated persons. *See* S.F. 1786, § 1, 91st Minn. Leg., 2019 Reg. Sess. (first engrossment) (amending the definition of mentally incapacitated to add new language after the phrase "administered to that person without the person's agreement" to include persons who are "significantly impaired by alcohol, a narcotic, anesthetic, or any other substance"); H.F. 480, § 3, 91st Minn. Leg., 2019 Reg. Sess. (as introduced) (amending the definition of mentally incapacitated to delete the phrase "administered to that person without the person's agreement"); *see also* S.F. 1786, § 2, 91st Minn. Leg., 2019 Reg. Sess. (as introduced) (making similar revisions to the definition of physically helpless in Minn. Stat. § 609.341, subd. 9).

The proposed changes to the definition of mentally incapacitated were not enacted, but the Legislature formed in session law a Criminal Sexual Conduct Statutory Reform Working Group. Act of May 24, 2019, 1st Spec. Sess., ch. 5, art. 4, § 21, 2019 Minn. Laws 547, 1001–02. The Legislature charged the Reform Working Group with reviewing, assessing, and making specific recommendations for amendments to Minnesota's criminal sexual conduct laws. *Id.* The Legislature expressly directed that the Reform Working Group include a wide variety of stakeholders. *Id.* at 1001. Eventually, a diverse group of 74 individuals served as members of the Reform Working Group. Criminal Sexual Conduct Statutory Reform Working Group, *Report to the Minnesota Legislature* at 38 (Jan. 2021) (App. 2). The Reform Working Group met on numerous occasions, held public hearings, and formed several subcommittees, including subcommittees on consent and capacity. *Id.* at 3.

In January 2021, as this case was pending before us, the Reform Working Group issued its Report to the Legislature that recommended amendments to Minnesota's criminal sexual conduct statutes to address voluntary intoxication. The Reform Working Group proposed either to (1) add a new subdivision (b) to the definition of mentally incapacitated in section 609.341, subdivision 7, providing "that a person is under the influence of an intoxicating substance to a degree that renders them incapable of consenting or incapable of appreciating, understanding, or controlling the person's conduct" or, alternatively, (2) create specific felony crimes of third-degree and fourth-degree criminal sexual conduct where

If the Legislature's intended meaning is clear from the text of the statute, we apply that meaning and not what we may wish the law was or what we think the law should be. *State v. Stay*, 935 N.W.2d 428, 430 (Minn. 2019) (noting that when interpreting a statute, we first determine whether the language of the statute is clear, and if it is, we follow the plain meaning); *Axelberg v. Comm'r of Pub. Safety*, 848 N.W.2d. 206, 212 (Minn. 2014); *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) (stating that when the text of a statute is clear "[w]e cannot rewrite a statute under the guise of statutory interpretation"). A text is unclear or ambiguous only when it is susceptible to multiple reasonable interpretations. *Vill. Lofts*, 937 N.W.2d at 435. We hold that the definition of "mentally incapacitated" in section 609.341, subd. 7, is susceptible to only one reasonable interpretation; namely, that alcohol causing a person to lack judgment to give a reasoned consent must be administered to the person without the person's agreement.

A.

We start with the text, structure, and punctuation of Minn. Stat. § 609.341, subd. 7. *See State v. Pakhnyuk*, 926 N.W.2d 914, 920–21 (Minn. 2019). Once again, the Legislature defined mentally incapacitated in Minn. Stat § 609.341, subd. 7 as follows:

> the actor has the intent (or purpose) to have sexual penetration/contact with the complainant while the actor knows (or has actual knowledge) that the complainant is under the influence of an intoxicating substance to a degree that renders them incapable of consenting or incapable of appraising or controlling the complainant's conduct.

Id. at 24, 33–34 (third-degree penalty where penetration is proven; fourth-degree penalty where sexual contact is proven); *see also id.* at 12–13 (discussing proposed changes). Legislation was introduced in the 2021 legislative session to enact proposed changes. H.F. 707, § 1, 92d Minn. Leg., 2021 Reg. Sess. (proposing to enact the first alternative described above); S.F. 1683, § 1, 92d Minn. Leg., 2021 Reg. Sess. (companion file).

> "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.

The text, structure, and punctuation of the Legislature's one-sentence definition of mentally incapacitated supports Khalil's interpretation of the statute; namely, that a person is mentally incapacitated only if under the influence of alcohol administered to the person without the person's agreement. The sentence is structured as an easily digestible series of similar nouns that describe intoxicating substances (alcohol, narcotic, anesthetic, or any other substance) followed by a qualifier ("administered to that person without the person's agreement") that, as we discuss below, sensibly applies to each noun. *See Stay*, 935 N.W.2d at 432 (concluding that a qualifier applied only to the closest antecedent phrase where the two preceding phrases were not parallel and "d[id] not form an easy, digestible list"). This textual structure is a classic example of the series qualifier rule of grammar, which states that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a . . . [qualifier] normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012).

Moreover, it takes little mental energy to process the individual nouns in the list present in the definition of mentally incapacitated, making it easy to apply the qualifier across them all. *See, e.g.*, *Lockhart v. United States*, ___ U.S. ___, 136 S. Ct. 958, 963–65 (2016) (noting that a qualifier generally applies to the closest antecedent clause "where it takes more than a little mental energy to process the individual entries in the list, making

it a heavy lift to carry the [qualifier] across them all," as opposed to a situation where the statutory language comprises a "single, integrated list").

It is also significant that the qualifier here ("administered to that person without the person's agreement") is set off from the series of similar nouns by a comma. "A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2007). Accordingly, the inclusion of a comma between the last in the series of intoxicating substances and "administered to that person without the person's agreement" supports Khalil's reading that the qualifier modifies all four of the substances in the preceding series: "alcohol, a narcotic, anesthetic, or any other substance." Minn. Stat. § 609.341, subd. 7.

Our precedent supports this interpretation of the statutory text. In *In re Butler*, we interpreted Minn. Stat. § 524.6–204(a) (2010), which provided:

> Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention, or there is a different disposition made by a valid will as herein provided, specifically referring to such account.

803 N.W.2d 393, 397 (Minn. 2011). We held that the qualifying phrase "specifically referring to such account" applied to both preceding phrases because, among other things, a comma separated the qualifier from both of the phrases. *Id.* at 397–98.

B.

As with any rule of grammar or syntactic canon, however, the series qualifier rule "can be defeated by other indicia of meaning, including competing canons." *Pakhnyuk*, 926 N.W.2d at 922. The State makes several arguments from the text of section 609.341, subdivision 7, and the broader structural context of Minnesota's criminal sexual conduct statutes, asserting that the qualifier "administered to that person without the person's agreement" should apply only to "any other substance" and not to the entire string of nouns ("alcohol, a narcotic, anesthetic, or any other substance") that precedes it. We conclude that the State's reading of the definition of mentally incapacitated is not supported by the statute's text.

1.

The State first urges us to apply the last antecedent rule, "which instructs that a limiting phrase . . . ordinarily modifies only the noun or phrase that it immediately follows . . . ." *Larson v. State*, 790 N.W.2d 700, 705 (Minn. 2010). We do not agree that this general grammatical presumption provides insight into the meaning of section 609.341, subdivision 7, which is made up of a very simple and straightforward list of parallel nouns followed by a qualifier offset from the list of nouns by a comma. No Minnesota case that we have found applies the last antecedent rule to interpret such a similarly structured statutory text. Further, as we discuss below, the qualifier "administered to that person without the person's agreement" makes sense when applied to each of the nouns in the list.

2.

The State also offers three arguments focused on words used in the text of section 609.341, subdivision 7, to support its interpretation that the phrase "administered to that person without the person's agreement" should not be read to apply to alcohol. We do not find these arguments convincing.

The State first asserts that Khalil's reading of the statute is incorrect because people normally do not speak of "administering" alcohol in everyday speech. It is not uncommon, however, for the word "administer" to be paired with the word "alcohol" in the context of criminal sexual conduct statutes. For instance, drafter commentary on proposed revisions to the Model Penal Code's sexual assault provisions describes alcohol as a substance that can be administered. *See* Model Penal Code § 213.3 (Am. L. Inst., Discussion Draft No. 2 2015) ("Although the actual frequency of such incidents is unknown, furtive administration of alcohol . . . occurs sufficiently often that a special provision is warranted."); *see also* Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 Ariz. L. Rev. 131, 145 (2002) (noting that "[a]lthough most alcohol-related cases concerned the rape of victims who were voluntarily intoxicated, some involved defendant administration of alcohol to the victim"); *State v. Anderson*, 94 N.W. 681, 682 (Minn. 1903) (observing in a parental rights case that the record showed that the father was "addicted to the use of intoxicating liquors, which he occasionally administered to his little girl").

Another significant flaw in this argument is that the State plucks the single word "administered" out of the context of the entire phrase "administered to that person without the person's agreement." Minn. Stat. § 609.341, subd. 7. The point of the qualifier here is

to distinguish one specific circumstance under which a person consumes something—when the thing consumed is given to the person without the person's knowledge or agreement—from all other circumstances. Even the State would not disagree with this reading of the phrase as it applies to "any other substance."[8] In view of that broader context, it would not be at all unusual to say that a person given alcohol surreptitiously (for example, when someone "spikes" a punch bowl at a party) was administered alcohol without the person's agreement.

The error in isolating the word "administered" from the rest of the qualifier is also demonstrated when one considers the other nouns in the series to which the qualifier applies. Once again, the State is arguing that the word administered cannot apply to alcohol because people do not commonly refer to alcohol as being administered. But the State employs that analysis to support its main argument that the qualifier "administered to that

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[8] Another example demonstrating that the pairing of alcohol and the word administered is not unusual is found in Minnesota's own statutory law. The concept of administering intoxicating substances, including alcohol, has been used in precisely this way in this exact context for most of the State's history. *See, e.g.*, Minn. Gen. Stat., Penal Code, tit. 10, ch. 2, § 235(4) (1889) (defining one form of rape as sexual penetration with a female "[w]hen her resistance is prevented by stupor or by weakness of mind, produced by an intoxicating narcotic or anaesthetic agent, administered by or with the privity of the defendant"); Minn. Gen. Stat. ch. 86, tit. 10, § 6191 (1891) (same); Minn. Rev. Laws ch. 98, § 4926 (1905) (same); Minn. Gen. Stat. ch. 98, § 8655 (1913) (same); Minn. Gen. Stat. ch. 98, § 10124 (1923) (same); Minn. Stat. § 617.01(4) (1941) (same). In *State v. Dombroski*, we interpreted these provisions to criminalize sexual penetration when the complainant is "under stupor from liquor or narcotics administered to her by or with the privity of" the defendant. 176 N.W. 985, 986 (Minn. 1920); *see also State v. Winger*, 282 N.W. 819, 820 (Minn. 1938) (quoting an indictment alleging that the defendant assaulted a female child where her resistance was "prevented by stupor and weakness of mind which had been then and there produced by intoxicating liquor administered by and with the privity of" the defendant).

person without the person's agreement" modifies only the final noun in the series: "any other substance." Minn. Stat. § 609.341, subd. 7. The State's position is that the qualifier also *does not* modify the terms "narcotic" or "anesthetic." But the State does not—and cannot credibly—argue that the word "administered" does not naturally fit with the words narcotic or (perhaps especially) anesthetic. Thus, the State's narrow focus on the purported linguistic ill fit between the words alcohol and administered does not logically support the ultimate conclusion that the State asks us to reach; namely, that "administered to that person without the person's agreement" applies only to "any other substance."

The State's second argument focuses on the other nouns included in the series set forth by the Legislature in section 609.341, subdivision 7. The State points out that if the phrase "administered to that person without the person's agreement" applied to all of the terms in the series, it would create gaps in the statute. For instance, if a person who consents to the administration of an anesthetic such as "laughing gas" when undergoing a medical procedure is sexually penetrated by a medical professional performing the procedure (and the anesthetic resulted in the person lacking the judgment to give a reasoned consent), the medical professional would likely face no criminal liability under the mental incapacitation provision. The State argues that such a result surely could not have been the intent of the Legislature.

The State's argument is not really textual in character. The State does not argue that the plain text itself makes no sense; in other words, that an anesthetic cannot be sensibly "administered to that person without the person's agreement." Minn. Stat. § 609.341, subd.

7. Rather, the State is arguing that the Legislature could not have intended what the words say.

We rejected a very similar argument in *State v. Carson*, where the defendant was convicted of third-degree driving while impaired (DWI) for operating a vehicle under the influence of a hazardous substance under Minn. Stat. § 169A.03, subd. 9 (2016). 902 N.W.2d 441, 442 (Minn. 2017). An analysis of the defendant's blood showed the presence of the chemical 1,1-difluoroethane (DFE). *Id.* at 442–43. The statute defined a hazardous substance as "any chemical or chemical compound that is *listed* as a hazardous substance in rules adopted under chapter 182." *Id*. at 444. We held that because DFE was not listed in the rule, it was not a hazardous substance for the purpose of the hazardous substance DWI offense. *Id.* at 445–46. We then stated:

> We acknowledge that based on our holding today, a driver dangerously intoxicated by DFE is not criminally liable under the plain language of the current DWI statutes. The dissent argues that the Legislature could not have intended this outcome. In other words, the dissent concludes that the Legislature could not have intended to criminalize the operation of a motor vehicle while the driver is knowingly under the influence of only those chemical compounds that are explicitly listed as hazardous substances under the [relevant] rules. But this public policy concern should be directed to the Legislature because we must read this state's laws as they are, not as some argue they should be.

Id. at 446 (citation omitted) (internal quotation marks omitted). So too here. If a gap in the statute exists with regard to anesthetics, filling in that gap is a job for the Legislature.

The State offers one more argument based on the language of section 609.341, subdivision 7. It asserts that the word "any" in the phrase "any other substance" breaks the link between the qualifier "administered to that person without the person's agreement"

and the nouns alcohol, narcotic, and anesthetic. The State asserts that the word "any" is a determiner in grammatical parlance and use of a determiner may limit the backwards reach of a qualifier from applying to earlier terms in a series. Scalia & Garner, *supra*, at 149. The State's argument, however, is weakened by the secondary source on which it relies. Scalia and Garner acknowledge that "the insertion of a determiner before the second item [in a list] tends to cut off the modifying phrase so that its backward reach is limited," but then immediately go on to note that the "effect is not entirely clear" before providing three examples, none of which use the determiner "any." *Id.*

More importantly, the State's explanation for why the qualifier "administered to that person without the person's agreement" is textually necessary to limit circumstances under which a person becomes mentally incapacitated by "any other substance" but not the other substances in the series is not compelling. The State claims that without limiting the words "any other substance," the definition of mentally incapacitated could criminalize sexual contact with a person under the influence of caffeine (an example the State offered at oral argument) or any other nonintoxicating substance. Alcohol, narcotics, and anesthetics, on the other hand, need no limitation because they are plainly intoxicating.

Yet at oral argument, the State conceded that the final phrase of the mentally incapacitated definition in section 609.341, subdivision 7—"lacks the judgment to give a reasoned consent to sexual contact or sexual penetration"—requires the State to prove that the influence of the consumed substance deprived the person consuming it of judgment to give a reasoned consent. Accordingly, "any other substance" is already limited by the final phrase in the definition to substances, the consumption of which can deprive the consuming

person of judgment to give a reasoned consent. The qualifier "administered to that person without the person's agreement" is not textually necessary to achieve that outcome. Moreover, the qualifier "administered to that person without the person's agreement" does not itself actually limit the words "any other substance" to intoxicating substances, the purpose that the State suggests for this qualifier. For example, if a person is served regular coffee instead of decaffeinated coffee without her knowledge, the person is administered a substance, but it is highly unlikely that caffeine is intoxicating such that it will exert any impact on complex judgment and reasoned decision-making.

Instead, we believe Khalil offers the more reasonable explanation for the inclusion of the word "any" in "any other substance" by arguing that the Legislature intended to capture all substances, the consumption of which could deprive a person of judgment to give a reasoned consent. Rather than naming each substance specifically (a list that could change over time as new intoxicating substances emerge), the Legislature used catch-all language. We generally recognize that statutes are commonly constructed to include specific items followed by a general catch-all term intended to capture the same kind or class of items as those specifically identified. *See State v. Sanschagrin*, 952 N.W.2d 620, 627 (Minn. 2020) (describing the *ejusdem generis* canon of construction).

Thus, the State's arguments about the nature of the word "administered," the scope of the qualifier "administered to that person without the person's agreement," the possible statutory gaps created by Khalil's interpretation of the statute, and the meaning of "any" in "any other substance" do not reasonably support its reading of the definition of mentally incapacitated.

3.

Finally, the State looks beyond the definition of mentally incapacitated in section 609.341, subdivision 7, to other parts of Minnesota's criminal sexual conduct statutes to support its position that the qualifier "administered to that person without the person's agreement" does not apply to the word "alcohol."

First, the State focuses on the mental-state requirement in Minn. Stat. § 609.344, subd. 1(d), the basis for Khalil's conviction here, which provides that the defendant commits third-degree criminal sexual conduct if he "knows or has reason to know" that the complainant is mentally incapacitated. *Id.* The State claims that, because the third-degree felony crime focuses on *what* the defendant knew or should have known about the complainant's condition, rather than on *how* (voluntarily or involuntarily) the complainant got into that condition, the "how" is irrelevant.[9]

[9] The State supports this argument by observing that "mentally incapacitated" is one of four states set forth in the definition of third-degree criminal sexual conduct, Minn. Stat. § 609.344, in which a complainant is legally unable to consent to sexual penetration. The other three states are when the complainant is (1) of various ages under the age of 18 (depending on the circumstances surrounding the sexual act); (2) "mentally impaired," meaning lacking judgment due to a developmental disability or psychiatric disorder, Minn. Stat. § 609.341, subd. 6 (2020); or (3) unable to communicate due to physical helplessness, Minn. Stat. § 609.341, subd. 9 (2020). *See* Minn. Stat. § 609.344, subd. 1(a)–(b), (d), (e)–(g). The argument runs that the Legislature imposed criminal liability for sexual penetration when the complainant falls into one of these three states despite the fact that none of these circumstances of age, mental disability, or physical helplessness are within the control of the defendant. Thus, the State reasons, because voluntary intoxication is similarly a state beyond the control of the defendant, sexual penetration of a person who cannot consent due to voluntary intoxication must also constitute third-degree criminal sexual conduct. Accordingly, by default, the term mentally incapacitated must include those persons who are voluntarily intoxicated.

The State, however, places the cart before the horse in making this argument. Indeed, the entire dispute in this case is about the "how": is the legislatively defined term mentally incapacitated limited to circumstances where the alcohol was administered to the complainant without the complainant's agreement or does it also include circumstances where the complainant voluntarily consumed alcohol?

If the proper interpretation of the text of section 609.341, subdivision 7, is limited to cases where alcohol is administered to the complainant without her agreement, then the state of the complainant that the defendant must have known or had reason to know under section 609.344, subdivision 1(d), is just that—the complainant was administered alcohol without her agreement and lacked the judgment to give a reasoned consent to sexual penetration. On the other hand, if the proper interpretation of the text of section 609.341, subdivision 7, covers cases where the complainant voluntarily consumed the alcohol, then the state of the complainant that the defendant must have known or had reason to know under section 609.344, subdivision 1(d), is that the complainant was under the influence of alcohol regardless of the circumstances under which it was consumed and lacked the

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The State's argument is flawed because it pays no attention to the actual language of section 609.341, subdivision 7. The assertion simply assumes that because age and the definitions of mental impairment and physically helpless have the characteristic of being states beyond the control of the defendant, mentally incapacitated must also be read to include *any* state of intoxication over which the defendant has no control. That is a logical leap too far. The argument also ignores that, unlike age, or the statutory definitions of physical helplessness and mental impairment, the definition of mentally incapacitated actually does include language signaling that the Legislature was concerned (at least in part) about circumstances where the complainant's state was within the control of the defendant: the qualifier "administered to that person without the person's agreement," which is at the heart of this dispute.

judgment to give a reasoned consent to sexual penetration. The mental state "knows or has reason to know" in the definition of third-degree criminal sexual conduct provides no information that tells us which of the two interpretations is correct since the mental-state element could be applied regardless of which interpretation is correct. Minn. Stat. § 609.344, subd. 1(d). The State simply *assumes* that a person may become mentally incapacitated (as defined by the Legislature in section 609.341, subdivision 7) by voluntarily consuming alcohol.

The State also more broadly argues that reading the definition of mentally incapacitated to mean that alcohol must be administered to the complainant without her consent is inconsistent with the overall context of the prohibition in Minnesota's criminal sexual conduct statutes on nonconsensual sex.[10] Underlying the State's argument is the insistence that, because a person may be unable to exercise the judgment necessary to consent due to the voluntary consumption of alcohol, sexual penetration with a complainant who cannot consent due to voluntary intoxication must be a felony (either first-degree or third-degree criminal sexual conduct). Both the State and Khalil agree that, under current law, such conduct would be fifth-degree criminal sexual conduct—a gross misdemeanor

[10] As a preliminary matter, the State's argument seems to rely not solely on the structure of the statute, but on consideration of the purpose of the statute and the policy issue to be remedied. Such considerations are proper if we determine that the statutory text is unclear. Minn. Stat. § 645.16 (2020). However, because we consider the text of a statutory provision within the broader statutory context when interpreting its meaning and scope and because the line between the whole statute canon, *see State v. Townsend*, 941 N.W.2d 108, 110 (Minn. 2020) ("Because the meaning of a phrase often depends on how it is being used in the context of the statute, we examine words and phrases in context."), and the inquiries into purpose and problem to be remedied can be fuzzy, we address the State's argument here.

for a first time offense. Minn. Stat. § 609.3451, subds. 1–2. Whether conduct like Khalil's *should* constitute a higher-level offense is not a question we have authority to answer. *See State v. Soto*, 378 N.W.2d 625, 630 (Minn. 1985) ("The enactment of criminal laws, the scope of those laws, and the sanctions for their violation, are solely within the legislative function and province.").

The State is certainly correct that Minnesota's criminal sexual conduct statutes prohibit nonconsensual sexual penetration and sexual contact, whereas consensual sexual acts are not criminalized. *See* Minn. Stat. §§ 609.341–.3451. But that general proposition does not compel the conclusion that the State asks us to reach; namely, that because Minnesota's criminal sexual conduct statutes prohibit nonconsensual sexual penetration and sexual contact, it follows that the Legislature's definition of mentally incapacitated must include voluntary intoxication.

Indeed, the State ignores the overall structure of Minnesota's criminal sexual conduct statutes. In structuring the law, the Legislature made the conscious policy choice that not all cases of nonconsensual sexual penetration and sexual contact would be treated the same by the criminal justice system. The Legislature has chosen to enact five distinct degrees of criminal sexual conduct: four felony-level crimes and one gross-misdemeanor crime (for first time offenses). Minn. Stat. §§ 609.342–.3451. And that is squarely within the power of the Legislature; it is not our place to question those choices. Within the limitations imposed by the federal and state constitutions, the Legislature has the power to define crimes and the punishment for crimes (including the terms for confinement and parole), and the judiciary interprets and carries out those legislative commands. *State v.*

Ali, 855 N.W.2d 235, 253–54 (Minn. 2014); *Schumann v. McGinn*, 240 N.W.2d 525, 537 (Minn. 1976).

One major differentiator among the five degrees of criminal sexual conduct is whether the actor engaged in sexual penetration (defined in Minn. Stat. § 609.341, subd. 12 (2020)) or in sexual contact (defined in Minn. Stat. § 609.341, subd. 11 (2020)). *Compare* Minn. Stat. §§ 609.342, .344 (2020) (defining separately first- and third-degree sexual conduct as sexual penetration accompanied by certain aggravating acts or with a complainant of a certain age), *with* Minn. Stat. §§ 609.343, .345 (2020) (defining separately second-degree and fourth-degree criminal sexual conduct as nonpenetrative sexual contact accompanied by similar aggravating acts or with a complainant of the same certain age).

The Legislature also provided that sexual penetration or sexual contact should be met with more serious opprobrium and punishment when accompanied by certain aggravating acts or circumstances. For instance, sexual penetration or sexual contact with a person under a certain young age leads to different punishment depending on the age difference between the actor and the complainant, the specific intent of the actor, and the relationship of the actor and the complainant.[11] Further, greater punishment is imposed for sexual penetration when the complainant reasonably fears imminent great bodily harm, when the actor is armed with a dangerous weapon, when the complainant suffers personal

[11] *See, e.g.*, Minn. Stat. §§ 609.342, subd. 1(a)–(b), (g)–(h); .343, subd. 1(a)–(b), (g)–(h); .344, subd. 1(a)–(b), (e)–(g); .345, subd. 1(a)–(b), (e)–(g); *see generally State v. Holloway*, 916 N.W.2d 338, 348–50 (Minn. 2019) (upholding such differences under the due process and equal protection clauses).

injury, and when the actor has a significant relationship with the complainant (for instance, a parent, stepparent, or other close relative).[12] Similarly, the Legislature imposed different punishments for nonconsensual sexual penetration or sexual contact with a person who is physically helpless (defined in Minn. Stat. § 609.341, subd. 9), mentally impaired (defined in Minn. Stat. § 609.341, subd. 6) or mentally incapacitated, depending on whether the complainant suffers physical injury as a result of the misconduct.[13]

In short, the State's argument that the Legislature must have intended felony classification for sexual penetration with a complainant who lacks the judgment to give a reasoned consent due to voluntary intoxication does not withstand scrutiny in light of the statutes' structural complexity (five degrees of crime) and the differentiated punishments imposed for various types of nonconsensual sexual penetration and sexual contact. More to the point, in light of the myriad choices that the Legislature made when structuring Minnesota's criminal sexual conduct statutes as to what constitutes a criminal sexual conduct crime and the proper punishment is for each criminalized act, the State's intuition that sexual contact with a voluntarily intoxicated person *must* be classified as a felony provides no definitive information that helps us answer the question before us.

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[12] *Compare* Minn. Stat. § 609.342, subd. 1(c)–(e), (g)–(h) (first-degree criminal sexual conduct for sexual penetration), *with* Minn. Stat. § 609.344 (third-degree criminal sexual conduct for sexual penetration); *compare* Minn. Stat. § 609.343, subd. 1 (c)–(e), (g)–(h) (second-degree criminal sexual conduct for sexual contact), *with* Minn. Stat. § 609.345 (fourth-degree criminal sexual conduct for sexual contact); *compare* Minn. Stat. §§ 609.342–.345, *with* Minn. Stat. § 609.3451 (fifth-degree nonconsensual sexual contact).

[13] *Compare* Minn. Stat. §§ 609.342, subd. 1(e), .343, subd. 1(e), *with* Minn. Stat. §§ 609.344, subd. 1(d), .345, subd. 1(d).

Indeed, the State's argument logically means that the Legislature should not have inserted the qualifier "administered to that person without the person's agreement" in the definition of mentally capacitated at all. Minn. Stat. § 609.341, subd. 7. Under the State's meta-structural argument, there should be no difference between a person intoxicated by alcohol and a person intoxicated by a substance other than alcohol, a narcotic, or anesthetic; but it is not our role to question whether the Legislature made the correct decision. Further, the structure of the criminal sexual conduct statutes, which provides differentiated punishment for specific aggravating circumstances, provides support for Khalil's interpretation of the statutory text. As outlined above, for decades the Legislature has recognized that the act of surreptitiously administering an intoxicating substance to a person such that the person was deprived of judgment to provide a reasoned consent is an aggravating circumstance meriting more severe punishment. *See supra* note 8.

C.

In summary, we read the Legislature's definition of "mentally incapacitated" to unambiguously mean that substances (including alcohol) which cause a person to lack judgment to give a reasoned consent must be administered to the person without the person's agreement. The State's contrary interpretation unreasonably strains and stretches the plain text of the statute. Accordingly, we conclude that section 609.341, subdivision 7, means that a person under the influence of alcohol is not mentally incapacitated unless the alcohol was administered to the person under its influence without that person's agreement.

Of course, we offer no judgment as to whether the Legislature's choice about the level of criminal liability and punishment that should be imposed on a person who sexually penetrates another person knowing (or negligently unaware) that the other person lacks the judgment to consent due to voluntary intoxication is appropriate. If the Legislature intended for the definition of mentally incapacitated to include voluntarily intoxicated persons, "it is the Legislature's prerogative to reexamine the . . . statute and amend it accordingly." *State v. Rick*, 835 N.W.2d 478, 486 (Minn. 2013), *abrogated on other grounds by State v. Thonesavanh*, 904 N.W.2d 432 (Minn. 2017). It has done so recently to address other perceived gaps in the criminal sexual conduct statutes. *See, e.g.*, Act of Aug. 1, 2019, 1st Spec. Sess., ch. 5, art. 4, § 5, 2019 Minn. Laws 947, 985–86 (amending Minn. Stat. § 609.342, subd. 1(h) following our decision in *State v. Ortega-Rodriguez*, 920 N.W.2d 642 (Minn. 2018)).

II.

Having concluded that the district court erred when instructing the jury on the proper meaning of Minn. Stat. § 609.341, subd. 7, we must now determine whether that error entitles Khalil to a new trial. "A district court's failure to correctly instruct the jury regarding an element of a charged offense requires a new trial, unless it can be established beyond a reasonable doubt that the error did not" significantly impact the verdict. *State v. Struzyk*, 869 N.W.2d 280, 290 (Minn. 2015); *see also State v. Guzman*, 892 N.W.2d 801, 816 (Minn. 2017) ("If we conclude that the alleged error was harmless, we need not decide whether the district court erred in giving the instruction in question.").

Here, the undisputed fact that neither party claims that Khalil administered anything to J.S. prior to or during the events in question (or knew or had reason to know that someone else administered a substance to J.S.) means that, but for the district court's instruction that Minn. Stat. § 609.341, subd. 7, includes voluntarily intoxicated persons who consumed alcohol, the jury may not have found Khalil guilty. More importantly, the jury requested clarification on the definition of mentally incapacitated and it is impossible to know whether the jury relied on the mental incapacitation or physical helplessness elements of Minn. Stat. § 609.344, subd. 1(d), in arriving at its verdict. If we cannot tell from the verdict whether the jury relied on erroneous instructions on one of two alternative elements required for a conviction, "we cannot conclude beyond a reasonable doubt that the improper instruction did not have a significant impact on the verdict." *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009), *overruled on other grounds by State v. Fleck*, 810 N.W.2d 303, 311–12 (Minn. 2012). That is the precise situation in this case. While the jury may have relied on a physical helplessness theory regardless of the district court's erroneous instruction as to the definition of mentally incapacitated, we do not know whether it did so. Thus, because we cannot conclude beyond a reasonable doubt that the district court's erroneous jury instructions were harmless, Khalil is entitled to a new trial.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court for a new trial.

Reversed and remanded.

CHUTICH, J., took no part in the consideration or decision of this case.