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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1792**

State of Minnesota,
Respondent,

vs.

William Lee Watson,
Appellant.

**Filed August 27, 2012
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Stevens County District Court
File No. 75-CR-10-140

Lori Swanson, Minnesota Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Aaron Jordan, Stevens County Attorney, Morris, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his convictions of third- and fourth-degree criminal sexual conduct, arguing that the evidence was insufficient to establish that the complainant was

physically helpless, an element of the crimes charged. Appellant also argues that fourth-degree criminal sexual conduct is a lesser-included offense of third-degree criminal sexual conduct, requiring vacation of the conviction of fourth-degree criminal sexual conduct. Because we conclude that the evidence was sufficient to support the finding that the complainant was helpless, we affirm appellant's conviction of third-degree criminal sexual conduct. But we reverse the conviction of fourth-degree criminal sexual conduct because it is a lesser-included offense of third-degree criminal sexual conduct, and we remand for vacation of that conviction.

FACTS

Appellant William Lee Watson, who was 46 years old at the time of the relevant conduct, met highly intoxicated 19-year-old B.E. at a party. B.E. and his friends were the last people to arrive at the party, and they drank a lot of alcohol to "catch up" with others at the party. Within a short period of time, B.E. drank at least eight shots of rum from a 1.75-liter bottle that he brought to the party, "shot-gunned" four or five beers, and drank four "Jag bombs," each consisting of a "good sized shot" of Jagermeister and an energy drink. B.E., who had been stumbling and slurring words, fell over in an attempt to swing at a punching bag. He then got into an altercation with the host. Watson asked B.E.'s friends to take him home, but they did not want to leave the party. Watson then took B.E. to Watson's home. At 2:54 a.m., Watson texted the host of the party: "Let me know when theyre heading for home-hes a mess."

The next morning, B.E. fled Watson's home without his clothes. He got some clothes from a neighboring house and returned to the site of the party where he told his

friends (who were still there) that he believed that he had been raped by Watson. B.E. said that he had vague memories of someone performing oral sex on him, of Watson being on top of him, and of Watson penetrating his anus with his fingers. Beginning at 10:26 a.m., Watson and B.E. engaged in an exchange of explicit text messages, initiated by Watson, in which B.E. expressed anger and Watson implied B.E.'s willing participation. Watson's first four messages were sent to a wrong number.

Watson told an investigating officer that "drunk would be an understatement" in describing B.E.'s condition at the party. Watson described B.E. as having trouble walking and talking. Watson initially denied that any sexual contact occurred and denied initiating any texts to B.E. Watson said he only texted B.E. to tell him that he would report B.E. to the police if B.E. persisted in sending threatening texts to Watson.

The officer confronted Watson with the actual series of text messages. The messages confirmed that Watson initiated the contact. Watson eventually admitted that sexual contact occurred and said that he had been trying to protect B.E. Watson claimed that B.E. had forced himself on Watson, placing his penis in Watson's mouth. Later Watson changed his statement about B.E. forcing himself on Watson and said that consensual sexual activity occurred for more than an hour. Watson said the activity was mutual but stated: "I don't think he knew I was even there at the time . . . he was talking to somebody else but it wasn't me." Watson reaffirmed that B.E. was not sober and told the officer, "He wouldn't be having sex with me if he was sober."

Watson was charged with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2010), sexual penetration with a physically

helpless victim, and one count of fourth-degree criminal sexual conduct in violation of Minn. Stat. § 609.345, subd. 1(d) (2010), sexual contact with a physically helpless victim. He waived his right to a jury trial, and the district court found him guilty of both charges. The district court entered convictions of both third- and fourth-degree criminal sexual conduct and sentenced Watson to 48 months in prison for third-degree criminal sexual conduct. This appeal followed.

D E C I S I O N

I. Sufficiency of evidence

Watson challenges the sufficiency of the evidence to support a finding that B.E. was physically helpless. This court “review[s] criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions.” *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). And we defer to the credibility determinations of the fact-finder. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002). In considering a claim of insufficient evidence, this court’s review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must 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). The reviewing court will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt,

could reasonably conclude that the defendant was guilty of the charged offense.

Bernhardt v. State, 684 N.W.2d 465, 476-77 (Minn. 2004).

“Physically helpless” is defined, for purposes of the crimes of third- and fourth-degree criminal sexual conduct, as when “a person is (a) asleep or not conscious, (b) unable to withhold consent or to withdraw consent because of a physical condition, or (c) unable to communicate nonconsent and the condition is known or reasonably should have been known to the actor.” Minn. Stat. § 609.341, subd. 9 (2010).

Watson concedes that the district court’s findings are consistent with B.E.’s testimony that he did not consent to any sexual activity with Watson, but he argues that “[t]he evidence also establishes that B.E. was not asleep, unconscious or unable to communicate nonconsent.” Watson argues that B.E.’s testimony “only establishes that he lacks memory of what occurred,” not that he was unconscious. But the statute does not require unconsciousness to establish helplessness. *See id.* (providing that being unable to withhold or withdraw consent because of a physical condition renders a person “physically helpless” for purposes of the statute).

Watson asserts that the district court found credible Watson’s testimony that B.E. would not let him insert his finger into B.E.’s anus, demonstrating B.E.’s ability to withhold consent and to communicate nonconsent. Watson relies on *State v. Blevins*, 757 N.W.2d 698, 701 (Minn. App. 2008), in which we held that, because a victim expressed that she did not consent to the sexual encounter, the evidence was insufficient to demonstrate that she was unable to withhold or withdraw her consent and therefore was

also insufficient to prove that the victim was physically helpless as defined by Minn. Stat. § 609.341, subd. 9(b).

But Watson's assertion that the district court found his testimony on this issue credible is without merit. The district court prefaced recitation of this portion of Watson's testimony and several other portions of Watson's testimony with phrases such as "defendant indicated" and "defendant testified." A mere recitation of a party's testimony does not constitute a finding of fact. *See Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (prefacing statements with phrases such as "petitioner claims" and "respondent asserts" are not true findings). And it is clear that the district court's recitation of Watson's statements and testimony is used to highlight the conflicts in Watson's various versions of the events as well as the conflict between Watson's testimony and B.E.'s testimony. After weighing the credibility of all of the witnesses, the district court concluded that B.E. was so intoxicated that he was unable to withhold consent or communicate nonconsent and that this level of intoxication was known to Watson. The district court's finding that B.E. was physically helpless, as that term is defined for purposes of third- and fourth-degree criminal sexual conduct, is supported by ample evidence in the record and is not clearly erroneous.

II. Sentencing

At sentencing, the district court entered convictions for both third- and fourth-degree criminal sexual conduct and sentenced Watson to 48 months in prison for the third-degree conviction. Watson correctly argues, and the state concedes, that fourth-degree criminal sexual conduct is a lesser-included crime, and "when the defendant is

convicted on more than one charge for the same act . . . the court [is] to adjudicate formally and impose sentence on only one count. The remaining conviction(s) should not be formally adjudicated at this time.” *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999) (quotation omitted); *see* Minn. Stat. § 609.04, subd. 1 (2010) (“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both. An included offense may be . . . [a] lesser degree of the same crime”). The district court erred in entering a conviction for fourth-degree criminal sexual conduct, and Watson is entitled to vacation of that conviction. *See Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984) (holding that where defendant was convicted of two counts of criminal sexual conduct, he was entitled to have one of the criminal-sexual-conduct convictions vacated because it is a lesser-included offense of criminal sexual conduct in the first degree). We reverse Watson’s conviction of fourth-degree criminal sexual conduct and remand to the district court for vacation of that conviction.

Affirmed in part, reversed in part, and remanded.