STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1474

In the Matter of the Welfare of: N. W., Child

Filed July 14, 2009
Affirmed
Bjorkman, Judge

Olmsted County District Court
File No. 55-JV-07-7995
Hennepin County District Court
File No. 27-JV-08-2762

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Mark A. Ostrem, Olmsted County Attorney, Karen A. Arthurs, Assistant County Attorney, 151 4th Street Southeast, Rochester, MN 55904 (for respondent state)

Considered and decided by Bjorkman, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

In this appeal from his delinquency adjudication, appellant argues that the evidence is insufficient to support the finding that he is guilty of third-degree criminal sexual conduct. We affirm.

FACTS

On December 31, 2006, 15-year-old K.A. attended a New Year's Eve party at a friend's house and became intoxicated after drinking heavily. When she arrived at another friend's house in the early hours of January 1, 2007, she was, according to a witness, "sick as hell" and could not do anything for herself. She required assistance walking and getting downstairs to the basement where she intended to sleep. K.A. laid down on a sleeping bag and drifted in and out of consciousness; she remembered "waking up at points and then having things done to [her]." She first woke up to discover A.E. having sexual intercourse with her. She objected and tried to crawl away; A.E. yelled at her and she became scared, so she laid still. After A.E. left her, K.A. vomited and lost consciousness. She woke up later to R.M. having sexual intercourse with her; she did not object because she was scared. She subsequently lost consciousness again. At some point thereafter, R.M. invited appellant N.W. to have sexual intercourse with K.A. K.A. woke up to a sexual encounter with appellant. K.A. never verbally consented to having sexual intercourse with appellant.

Appellant was charged with two counts of third-degree criminal sexual conduct and one count of fifth-degree criminal sexual conduct, violations of Minn. Stat. §§ 609.344, subd. 1(c), (d), .3451, subd. 1(1) (2006). At his trial, appellant claimed that K.A. gave nonverbal consent to sexual intercourse by unbuckling her jeans and helping appellant remove them, but the district court credited K.A.'s testimony that A.E. had removed her jeans and that they were not put on again until after her encounter with appellant. The district court found that "K.A. was intoxicated and essentially helpless"

when appellant had sexual intercourse with her. The district court further found that "[s]he was in a condition that should have been apparent and obvious to any reasonable person that rendered her physically helpless and impaired." On that basis, the district court found appellant guilty of one count of third-degree criminal sexual conduct and one count of fifth-degree criminal sexual conduct and adjudicated appellant delinquent. This appeal follows.

D E C I S I O N

In a delinquency adjudication, the state must prove beyond a reasonable doubt every element of the charged crime. *In re Welfare of S.M.J.*, 556 N.W.2d 4, 6 (Minn. App. 1996). When an appellant challenges a conviction based on insufficient evidence, "this court must ascertain whether given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged." *In re Welfare of J.G.B.*, 473 N.W.2d 342, 344-45 (Minn. App. 1991) (quotation omitted). We view the record and take any legitimate inferences that can be drawn from the record in the light most favorable to the adjudication. *In re Welfare of S.A.M.*, 570 N.W.2d 162, 167 (Minn. App. 1997).

"A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if . . . the actor knows or has reason to know that the complainant is . . . physically helpless." Minn. Stat. § 609.344, subd. 1(d). Appellant argues that his adjudication must be reversed because the evidence was insufficient to prove that K.A. was "physically helpless" within the meaning of the statute. A person is "physically helpless" when the "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 (2006). Appellant contends that K.A. was not physically helpless under any of these three definitions. We disagree.

Appellant first argues that K.A. was not physically helpless because she "was awake and conscious at the time appellant was having sexual intercourse with her." But K.A.'s testimony indicates that she drifted in and out of consciousness during the sexual encounter:

> PROSECUTOR: Is his—Where is [appellant's] penis the very moment you wake up?
> K.A.: It wasn't in me.
> PROSECUTOR: As you sit here today, do you recall [appellant's] penis ever being in you?
> K.A.: Yes.
> PROSECUTOR: At what point was that?
> K.A.: I woke up more than once and it was in me. I woke up numerous of times.
> PROSECUTOR: So the first time you woke up it wasn't but then at some point you do wake up—
> K.A.: Yes.
> PROSECUTOR: —and it is? Okay.
> K.A.: Mm-hmm.

Viewed in the light most favorable to the adjudication, K.A.'s testimony supports a finding that appellant engaged in sexual penetration with K.A. while she was asleep or unconscious.

Appellant also asserts that "K.A. was not unable to withhold consent" or "unable to communicate nonconsent" because she protested when A.E. previously

had intercourse with her. Appellant argues that this court's decision in *State v. Blevins*, 757 N.W.2d 698 (Minn. App. 2008), dictates such a determination. We disagree.

As in this case, the defendant in *Blevins* argued that his conviction of third-degree criminal sexual conduct should be reversed because the evidence did not support a finding that the complainant was physically helpless. 757 N.W.2d at 699. We agreed based on the record evidence that the complainant, though intoxicated, had "withheld her consent" and therefore "the evidence [was] insufficient to demonstrate that [the complainant] was unable to withhold or withdraw her consent." *Id.* at 701. But *Blevins* is distinguishable from this case in two critical ways.

First, we specifically noted in *Blevins* that the state did not present evidence of or claim that the complainant was asleep or unconscious at the time of the sexual encounter. *Id.* at 700. In contrast, as noted above, the evidence here reasonably establishes that K.A. was asleep or unconscious while appellant had intercourse with her. Thus, there is an independent basis for a finding of physical helplessness here that was not present in *Blevins*.

Second, *Blevins* involved explicitly nonconsensual sexual intercourse between one man and one woman. *Id.* at 699. The record here indicates a series of sexual encounters between three boys and a severely intoxicated girl. The fact that K.A. objected to A.E.'s sexual acts does not require a finding that she was able to withhold consent or to communicate nonconsent at the time appellant had intercourse with her. And we reject appellant's suggestion that K.A. admitted that she was able to

communicate nonconsent to him when she testified that "once [she] realize[d]" what was happening with appellant, she was scared from the previous encounters and "just laid there." Implicit in this very argument is the fact that appellant had intercourse with K.A. for some period of time before she regained consciousness. K.A.'s testimony, viewed in context, does not undermine the district court's determination that K.A.'s intermittent periods of unconsciousness and severe intoxication impeded her ability to understand what was happening to her and to respond by indicating or withholding consent.

Viewing the record as a whole in the light most favorable to the adjudication, we conclude that the evidence is sufficient to establish that appellant engaged in sexual penetration with K.A. while she was physically helpless within the meaning of the statute.

The state also was required to prove that appellant knew or had reason to know of K.A.'s condition. Minn. Stat. § 609.344, subd. 1(d). Although appellant does not specifically challenge the district court's finding on this point, such a challenge is implicit in his argument that K.A. was not "physically helpless." *See* Minn. Stat. § 609.341, subd. 9 (including actor's actual or reasonable knowledge of complainant's condition in definition of "physically helpless"). The district court based its finding of physical helplessness on K.A.'s severe intoxication, which it found to be readily apparent to those around her. K.A. and two other witnesses testified that K.A. was extremely intoxicated, sick, and unable to move about or do much of anything on her own. K.A. also testified that appellant was present when she entered the basement and that she drifted in and out

of consciousness during the three sexual encounters. Based on this other testimony, the district court expressly discredited appellant's testimony regarding K.A.'s apparent condition. *See In re Welfare of Child of T.D.*, 731 N.W.2d 548, 555 (Minn. App. 2007) (stating that we defer to the district court's credibility determinations), *review denied* (Minn. July 17, 2007). The evidence amply supports the district court's determination that K.A.'s state of severe intoxication, which rendered her physically helpless, was or should have been apparent to those around her, including appellant.

Affirmed.