IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID EUGENE CRESON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11539 Trial Court No. 3AN-12-7698 CR MEMORANDUM OPINION No. 6347 — June 1, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael Spaan, Judge.

Appearances: Nancy Driscoll Stroup, Attorney at Law, Palmer, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

David Eugene Creson appeals his conviction for second-degree sexual assault of an incapacitated woman.[1] He challenges the sufficiency of the evidence to

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

[1] AS 11.41.420(a)(3)(B).

support his conviction. He also argues that the sentencing judge erred by denying his request for referral to the three-judge sentencing panel after finding that Creson had no history of sexual offenses. We find the evidence was sufficient, and we also uphold the judge's denial of a referral to the three-judge sentencing panel.

Underlying facts

When a defendant challenges the sufficiency of the evidence to support a criminal conviction, we must view the evidence (and all reasonable inferences to be drawn from it) in the light most favorable to the jury's verdict.[2] We therefore present the evidence in Creson's case in that light.

T.A., age twenty-nine, consumed crystal methamphetamine during a four-day drug binge, sleeping little during that time. After she had Sunday brunch with a friend in a downtown Anchorage restaurant, she drove him to his home near Jewel Lake. Then, as she drove to her own home, she decided to buy gas and cigarettes.

She next remembered drifting into and out of consciousness on a bed in a stranger's apartment. She was naked from the waist down. Two men she did not know — both of them naked — each pinned her shoulders to the bed as the other had intercourse with her. She also recalled pornography playing on the television. One of the men, Creson, was Caucasian and had "shaggy hair." The other, Henderson, was African-American.

T.A. returned to full consciousness when Henderson sprayed her crotch with cold soda. She stood up, dressed herself, and demanded her purse so that she could leave. When T.A. looked inside her purse, she was missing her driver's license, social security card, cell phone, and a pill bottle of prescription Xanax.

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[2] *See Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

Creson donned his clothing and departed the apartment. T.A. left shortly thereafter; as she exited, she took with her an envelope addressed to Henderson to serve as evidence of his identity. She saw her car parked in front of the apartment; but rather than driving away, she ran down the street, borrowed a cell phone, and called the police.

Soon after, an officer discovered Creson passed out in a nearby backyard. The officer searched him and found T.A.'s driver's license, social security card, and pill bottle. Later, Creson called his sister from the jail on a monitored phone and told her that he and Henderson had found T.A. falling asleep in her car.

T.A. underwent a sexual assault response team (SART) exam. She was unsure whether either assailant had ejaculated, and the SART nurse found no visible semen. T.A. surmised that the men had used condoms because she had observed an unused condom package on the bedroom floor. (The police later found a packaged condom on the floor when they executed a search warrant at Henderson's apartment.) T.A. identified Creson with reasonable certainty in a photo lineup, and Henderson more definitively.

Creson testified at trial that, while he was visiting Henderson, he spotted T.A. parked in the lot below. When he tapped on her car window, she invited herself into the apartment. Creson testified that T.A. had a couple of shots of brandy (an allegation belied by T.A.'s negative blood-alcohol test) and that she then began dancing seductively. T.A. then accompanied Henderson to his upstairs bedroom.

Creson also testified that he later went upstairs to find the two watching pornography and smoking crack cocaine. After taking a hit of crack cocaine, T.A. disrobed and began masturbating. T.A. then stated that she was hot. But when handed a soda, she spilled it on herself. Agitated, she demanded her purse and left. Creson then departed, only to spot T.A.'s pills and credit card on the ground by her car door. He swallowed a Xanax and walked toward a liquor store before passing out.

The jury convicted Creson of second-degree sexual assault. Superior Court Judge Michael Spaan sentenced Creson to 9 years with 3 years suspended (6 years to serve) and 10 years' probation. This appeal followed.

Sufficiency of the evidence to support Creson's conviction

Evidence is legally sufficient to support a criminal conviction if the evidence and the reasonable inferences to be drawn from it, when viewed in the light most favorable to the jury's verdict, are sufficient to convince fair-minded jurors that the government has proved its allegations beyond a reasonable doubt.[3] When we rule on a claim of insufficient evidence, we do not re-weigh the evidence or assess witness credibility.[4]

Creson argues on appeal that the evidence was insufficient because the State offered no physical evidence of sexual assault, T.A.'s testimony at trial was impeached on several matters, and his conviction was inconsistent with Henderson's subsequent acquittal by a different jury. We find that the evidence was sufficient to support the conviction. The jury could reasonably find that Creson took opportunistic advantage of an incapacitated woman. And the later finding by a different jury that the State failed to prove its case against Henderson has no bearing on the validity of the jury's verdict in Creson's case.

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[3] *State v. McDonald*, 872 P.2d 627, 652-53 (Alaska App. 1994).

[4] *Morrell v. State*, 216 P.3d 574, 576 (Alaska App. 2009).

Creson's sentencing claim

As a first felony offender, Creson faced a presumptive sentencing range of 5 to 15 years.[5] Based on this Court's decision in *Collins v. State*, Creson asked the sentencing judge to refer his case to the three-judge sentencing panel, alleging that he had no history of unprosecuted sex offenses and that he had "normal" or "good" prospects for rehabilitation.[6] The judge denied this request.

Creson now argues that his case should be remanded for resentencing under the standard set forth in *Collins*. We conclude that such a remand is unnecessary. First, it is not clear what legal effect should be attributed to our decision in *Collins*, given the Alaska Legislature's subsequent repudiation of *Collins* and its explicit adoption of the *Collins* dissent.[7] Second, even if there are aspects of the *Collins* decision that continue to have legal force, the sentencing court could reasonably conclude that they do not warrant referral to the three-judge sentencing panel in Creson's case.

Here, the trial court found that Creson's rehabilitative prospects were "guarded at best," given his seventeen prior misdemeanors and his mature age (forty-five years old). Still, the judge imposed a sentence near the bottom of the 5- to 15-year presumptive range — 9 years with 3 years suspended (6 years to serve). Having independently reviewed the sentencing record, we conclude that the superior court's decision declining to refer the case to the three-judge sentencing panel was not clearly mistaken.[8]

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[5] AS 12.55.125(i)(3)(A).

[6] *See Collins v. State*, 287 P.3d 791, 797 (Alaska App. 2012).

[7] *See* AS 12.55.165(c), *as amended by* ch. 43, § 1, SLA 2013.

[8] *See Lepley v. State*, 807 P.2d 1095, 1099 n.1 (Alaska App. 1991).

Conclusion

We AFFIRM the judgment of the superior court.