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SLIP OPINION NO. 2026-OHIO-3934

THE STATE OF OHIO, APPELLANT, v. MCCLAIN, APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. McClain*, Slip Opinion No. 2026-Ohio-3934.]

Criminal law—Sufficiency of the evidence—R.C. 2907.02(A)(1)(c)—State presented sufficient evidence of all the elements of rape under R.C. 2907.02(A)(1)(c)—Defendant was not denied effective assistance of counsel—Court of appeals’ judgment reversed and cause remanded.

(No. 2025-0573—Submitted April 15, 2026—Decided October 8, 2026.)

APPEAL from the Court of Appeals for Cuyahoga County,
No. 113597, 2025-Ohio-962.

DETERS, J., authored the opinion of the court, which KENNEDY, C.J., and DEWINE, BRUNNER, HAWKINS, and SHANAHAN, JJ., joined. FISCHER, J., concurred in judgment only.

DETERS, J.

{¶ 1} When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must consider the evidence in a light most favorable to the State and determine whether the evidence, if believed, would convince an average person that each element of the crime had been met. The court does not consider whether the State met its burden to prove the defendant was guilty beyond a reasonable doubt.

{¶ 2} In this case, Robin McClain challenged the sufficiency of the evidence supporting his conviction for rape under R.C. 2907.02(A)(1)(c). For that offense, the State needed to present evidence that McClain had sexual conduct with the victim, that the victim's ability to resist or consent was substantially impaired, and that McClain knew or had reasonable cause to believe that the victim's ability to resist or consent was substantially impaired. The State presented evidence that the victim had no memory of what happened from the time she took a sip of her drink in a bar until she woke up injured in a parking lot. The State also presented evidence that McClain's DNA matched a sample taken from the victim's vagina and that the victim had not consented to sexual intercourse. When McClain appealed to the Eighth District Court of Appeals, that court concluded that the State had not proved beyond a reasonable doubt that McClain had known that the victim's ability to consent was substantially impaired. In doing so, the court held the State to a higher burden than is appropriate for a sufficiency review.

{¶ 3} After reviewing the evidence de novo, we conclude that the Eighth District was wrong. The State produced sufficient evidence of all the elements of rape under R.C. 2907.02(A)(1)(c). Further, we disagree with the Eighth District's conclusion that McClain's counsel were ineffective for failing to object to inadmissible testimony. We therefore reverse the judgment of the Eighth District and remand the case to that court for consideration of McClain's remaining assignment of error.

I. Background

A. McClain is convicted of substantial-impairment rape

{¶ 4} McClain was indicted on one count of forcible rape, R.C. 2907.02(A)(2), and one count of substantial-impairment rape, R.C. 2907.02(A)(1)(c). The charges related to an incident that occurred in 2010.

{¶ 5} Shortly after midnight on March 1, 2010, after closing two restaurants where she was a manager, S.G. went to a bar called the Third Place and ordered a pizza and a vodka tonic. According to S.G., shortly after she got her drink, a man approached her and “hit[] on [her] pretty aggressively” and she rebuffed him. A second man approached her from the other side.

{¶ 6} S.G. testified that she remembered ordering one drink but that she did not remember drinking it. Later, on cross-examination, she recalled having taken one sip of the drink. She also testified that she “[had] no idea” whether she ever got her pizza.

{¶ 7} The next thing S.G. remembered was “[b]eing woken up in a parking lot, beaten up, with [her] pants unzipped and clearly violated.” S.G. went on to explain that she had bruises on her face and arm, some blood on her lips, and a “soreness” in her vagina. According to S.G., the parking lot that she woke up in was “far from . . . where the bar was.” She testified that she had later recalled, in a flashback about that night, the “sensation of a back seat and being pushed out . . . onto the ground.” S.G. stated that the person who had awakened her in the parking lot had walked her home. Although S.G. testified at trial in 2022 that she had no idea who the person was who woke her or even whether the person was a man or a woman, her memory was refreshed on cross-examination with a 2020 recorded interview with a police investigator in which she stated she believed that the person was a barback or busboy.

{¶ 8} Later on the morning of the incident, after waking up in her apartment, S.G. called her friend Timothy Manco and told him what had happened, and he

suggested that she go to a hospital. Manco testified that S.G. had talked with him about having been at a bar where someone was bothering her and had hurt her. He said he believed she had been “taken advantage of,” and when he was asked to be specific, he said he assumed she had been sexually assaulted. Manco drove S.G. to the hospital, and S.G.’s aunt, Cathy Rhoades, met her there. Rhoades testified that she had received a call from S.G.’s mother saying that S.G. had been attacked and raped and was at a hospital.

{¶ 9} While S.G. was at the hospital, Lisa Watson, a sexual-assault nurse examiner (“SANE nurse”), examined S.G. Watson noted that S.G. had a cut on her lip, that her lip was swollen, that she had a bruise on her right hip, that her knees were red and bruised, that there was a bruise on her right elbow, and that there were no vaginal injuries. Watson testified that S.G. told her that she ““only want[ed] to know if something happened . . . sexually’ ” and that she ““[didn’t] want to go to court.’ ” S.G. testified that she did not have consensual sex with anyone the night of the incident.

{¶ 10} After leaving the hospital, S.G. tried to figure out what had happened. She went back to the Third Place and spoke with the bartender there. According to S.G.:

[The bartender] mentioned that [a similar] incident had happened with her. We shared a conversation about that. I asked her if there were any cameras that could corroborate where I was, who I left with. I asked if I got my pizza. I asked if I paid for it. She could not answer any of those. There was no video. She mentioned the owner was just in the process of putting them and installing them because there were a few other girls that had reported being roofied [i.e., having had a sedating or mind-altering drug secretly slipped into their food or drink without their knowledge] and I asked for the

owner to call me. I also called and left a message for him and never received a call back.

According to S.G., after her conversation with the bartender, she reached out to police officers but “never got a response” from them in 2010.

{¶ 11} The swabs that were taken as part of the SANE nurse’s examination were submitted to the Bureau of Criminal Investigation in 2010. The swabs taken from S.G.’s vaginal area revealed that sperm cells were present, so samples were collected from the swabs for DNA analysis.

{¶ 12} S.G. testified that she did not hear back from the police until 2020. The Cuyahoga County prosecutor’s cold-case unit had received a lead, through a commercial forensic-genealogist vendor, from which two possible suspects—McClain and his brother—were developed. Investigators surveilled both men, and eventually, a cigarette butt with McClain’s DNA was obtained. DNA from the cigarette butt matched the DNA that was in S.G.’s sexual-assault kit. A buccal swab from McClain confirmed the match. Investigators showed S.G. a photo array that included McClain’s photograph. S.G. selected a photograph, but it was not McClain’s.

{¶ 13} Investigators interviewed McClain, who denied having ever been in the Third Place. He also denied ever having had sex with S.G. or ever having seen her before.

{¶ 14} Mary Keller, who during her direct examination identified herself as McClain’s wife,¹ testified that in 2010, McClain was her best friend. She explained that in 2010, she, McClain, and others would often meet at a coffee shop called Common Grounds. The coffee shop shared the parking lot where S.G. woke up in March 2010. Keller described a typical night for the group, including McClain.

1. During cross-examination, Keller clarified that she was not legally married to McClain.

According to Keller, the group would meet at Common Grounds and then disperse to nearby bars. Keller testified that she drank with McClain often. After drinking, the group would return to Common Grounds to sober up. Keller recounted that on some of those nights, McClain would sometimes meet someone and have sexual relations with them. During his interview with investigators, McClain claimed that in 2010, he did not go to the bars around Common Grounds. Based on Keller’s testimony, that claim was a lie.

{¶ 15} At the conclusion of the trial, the jury found McClain not guilty of forcible rape but guilty of substantial-impairment rape. The trial court sentenced him accordingly.

B. McClain appeals to the Eighth District Court of Appeals

{¶ 16} McClain appealed to the Eighth District, arguing that there was not sufficient evidence to support his conviction, that his trial counsel had been ineffective because they had not objected to inadmissible testimony, and that the trial court had improperly allowed the introduction of victim-impact evidence. *See* 2025-Ohio-962, ¶ 19 (8th Dist.). In a two-to-one decision, the court of appeals concluded, “[T]he State has failed to meet its burden of proof on the element of McClain’s knowledge of the victim’s substantial impairment.” *Id.* at ¶ 52. The court also determined that counsel had been ineffective because they should have objected to S.G.’s testimony about what the bartender told her, Manco’s testimony that S.G. told him she had been “hurt, obviously, by somebody” and that he had assumed there had been a sexual assault, and Rhoades’s testimony that S.G.’s mother had told Rhoades that S.G. had been attacked and raped. *Id.* at ¶ 44-50. Given its resolution of McClain’s first two assignments of error, the court did not address McClain’s third assignment of error, which related to victim-impact evidence. *Id.* at ¶ 51. It vacated McClain’s conviction and remanded the case to the trial court. *Id.* at ¶ 52.

{¶ 17} We accepted the State’s appeal to consider whether there was sufficient evidence presented to support McClain’s conviction for substantial-impairment rape and whether the court of appeals wrongly determined that the testimony referred to in its decision was hearsay. *See* 2025-Ohio-2749.

II. There was sufficient evidence to convict McClain of substantial-impairment rape

{¶ 18} The jury found McClain guilty of substantial-impairment rape under R.C. 2907.02(A)(1)(c), which provides that “[n]o person shall engage in sexual conduct with another when . . . [t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition . . . and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition” In the Eighth District, McClain challenged the sufficiency of the State’s evidence.

{¶ 19} In sustaining McClain’s challenge to his conviction, the Eighth District explained that it was “hesitant to find that [S.G.’s testimony] was sufficient to prove beyond a reasonable doubt that [S.G.] was substantially impaired at the time of the sexual conduct.” (Emphasis deleted.) 2025-Ohio-962 at ¶ 25 (8th Dist.). And even after “assuming for the sake of argument” that the testimony was sufficient to demonstrate substantial impairment, the court concluded that the State failed “to prove beyond a reasonable doubt that McClain knew of her impairment at the time of the sexual conduct.” *Id.* The court of appeals employed the incorrect standard of review and, as we will discuss, arrived at the wrong result in its sufficiency review.

{¶ 20} During a sufficiency review, the reviewing court considers the evidence “in a light most favorable to the prosecution” “to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph

two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 1997-Ohio-355, ¶ 49, fn. 4. Because the question whether evidence is sufficient to support a verdict is a question of law, an appellate court reviews a challenge to the sufficiency of the evidence de novo. *State v. Dent*, 2020-Ohio-6670, ¶ 15.

{¶ 21} As indicated by its statements that the State “failed to prove [McClain’s knowledge of S.G.’s substantial impairment] beyond a reasonable doubt,” 2025-Ohio-962 at ¶ 25 (8th Dist.), and “failed to meet its burden of proof on the element of McClain’s knowledge of [S.G.’s] substantial impairment,” *id.* at ¶ 52, the Eighth District held the State to a higher burden than was warranted. While the oft-quoted *Jenks* standard refers to convincing the average person beyond a reasonable doubt, we have explained that a sufficiency review is a question of the burden of production, not persuasion, *see State v. Messenger*, 2022-Ohio-4562, ¶ 26; *see also State v. Thompkins*, 1997-Ohio-52, ¶ 34-36 (Cook, J., concurring). “In essence, sufficiency is a test of adequacy.” *Thompkins* at ¶ 23. We do not ask—as the Eighth District apparently did—whether the State produced evidence sufficient to persuade a jury beyond a reasonable doubt. Instead, the question is whether the State produced adequate evidence of each element.

{¶ 22} There are three elements that the State must prove to convict a person of substantial-impairment rape: (1) sexual conduct occurred, (2) the victim’s ability to resist or consent was substantially impaired because of a mental or physical condition, and (3) the offender knew or had reasonable cause to believe that the victim’s ability to resist or consent was substantially impaired. R.C. 2907.02(A)(1)(c). Because McClain’s DNA matched the sample taken from the sexual-assault kit, there is no question that there was sufficient evidence of the sexual-conduct element of the offense. We turn our attention, then, to whether the State produced adequate evidence of the remaining elements.

A. The State presented sufficient evidence that S.G. was substantially impaired

{¶ 23} The State needed to present evidence that, if believed, would convince the average mind that S.G.’s ability to resist or consent to sexual conduct with McClain was substantially impaired. “Substantially impaired” is not statutorily defined, so courts give it the meaning “generally understood in common usage.” *State v. Zeh*, 31 Ohio St.3d 99, 103 (1987). “Impaired” is defined as “being in an imperfect or weakened state or condition: such as diminished in function or ability.” *Merriam-Webster’s Collegiate Dictionary* (12th Ed. 2026). And “substantial” means “consisting of or relating to substance; not imaginary or illusory: real, true.” *Id.* So a person who is substantially impaired is truly or really diminished in function or ability. *See Zeh* at 103-104 (“substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim’s ability, either to appraise the nature of [her] conduct or to control [her] conduct”).

{¶ 24} S.G. testified that she could remember nothing from the time she took one sip of her vodka at the Third Place until she woke up in a parking lot and found herself bloodied with her pants unzipped and a “soreness” in her vagina. She testified that she was “clearly violated” that night. And according to S.G.’s testimony, on the night of the incident, she had not consented to having sex with anyone.

{¶ 25} McClain argues that there was “no evidence—other than S.G.’s account that she completely blacked out—that she was substantially impaired due to alcohol or any other chemical.” And he notes that no toxicology screen was performed that could have revealed whether S.G. had alcohol or drugs in her system. But such arguments go to the weight of the evidence presented by the State. Here, S.G.’s testimony by itself was sufficient to establish that from the time she took a sip of her drink at the Third Place until she woke up in the parking lot, her ability to appraise or control her conduct was diminished, *see Zeh* at 103-104.

Under a sufficiency review, we do not review whether that evidence proved beyond a reasonable doubt that she was substantially impaired. We conclude that the State presented sufficient evidence—when viewed in a light most favorable to the State—that S.G. was substantially impaired.

B. The State presented sufficient evidence that McClain knew or had reasonable cause to believe that S.G. was substantially impaired

{¶ 26} After noting its reservations about whether the State presented sufficient evidence of S.G.’s substantial impairment, the Eighth District turned its attention to whether McClain “knew of [S.G.’s] impairment at the time of the sexual conduct.” 2025-Ohio-962 at ¶ 25 (8th Dist.). It is notable that although the Eighth District quoted R.C. 2907.02(A)(1)(c), it did not engage with the statute’s phrase “or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired.” Thus, the court of appeals devoted its discussion to explaining its conclusion that “the State failed to prove [that McClain knew of S.G.’s impairment] beyond a reasonable doubt,” 2025-Ohio-962 at ¶ 25 (8th Dist.), and it did not consider whether he had “reasonable cause to believe” that S.G.’s ability to consent was substantially impaired.

{¶ 27} When considering whether there was sufficient evidence that McClain knew S.G. was substantially impaired, the Eighth District looked to its past cases. For instance, the court gleaned from its decisions in *State v. Jones*, 2015-Ohio-1818, ¶ 43 (8th Dist.), and *State v. Novak*, 2005-Ohio-563, ¶ 25 (8th Dist.), that “[k]nowledge of substantial impairment may be reasonably inferred from a combination of the complainant’s demeanor and other interactions with the complainant.” 2025-Ohio-962 at ¶ 26 (8th Dist.). And from *State v. Keller*, 2018-Ohio-4107, ¶ 31 (8th Dist.), and *State v. King*, 2002-Ohio-2313, ¶ 20 (8th Dist.), the court observed that it had “held that such things as an alleged victim falling, slurring speech, passing out, or vomiting could indicate [to observers of the conduct] that the alleged victim is substantially impaired.” 2025-Ohio-962 at ¶ 26

(8th Dist.). The court noted that “[t]he State failed to present evidence of any of the above-mentioned indicators of substantial impairment.” *Id.* at ¶ 27.

{¶ 28} True, testimony from one or more witnesses who stated that they had seen McClain interact with S.G. while at the bar and that S.G. had been behaving in a way that would indicate that she was substantially impaired would be adequate direct evidence of McClain’s knowledge of her impairment. But evidence need not be direct evidence to be sufficient. “In many circumstances, proving knowledge beyond a reasonable doubt can be difficult. . . . Therefore, the state can prove knowledge through either direct or circumstantial evidence.” *State v. Jordan*, 2023-Ohio-3800, ¶ 26 (plurality opinion), citing *Flores-Figueroa v. United States*, 556 U.S. 646, 655 (2009), and *McFadden v. United States*, 576 U.S. 186, 192 (2015), fn. 1. So, while the State may not have presented evidence of McClain’s knowledge akin to the type the Eighth District discussed in its opinion, *see* 2025-Ohio-962 at ¶ 26 (8th Dist.), it did present circumstantial evidence that McClain had reasonable cause to believe that S.G.’s ability to consent was substantially impaired.

{¶ 29} The State presented evidence that S.G.’s memory of the night had a gap from the time she took a sip of her drink at the Third Place until she woke in a parking lot some distance from the Third Place. The parking lot was shared by the coffee shop that Keller testified McClain had often spent time. S.G. testified that she did not consent to have sex with anyone that night and that she had had a flashback of being pushed out of the back seat of a car. As discussed above, S.G.’s testimony was sufficient to show her substantial impairment on the night in question. In addition, McClain’s DNA was found in a vaginal sample taken from S.G. the day of the incident. Thus, the State presented sufficient circumstantial evidence that, if believed, would establish that McClain had intercourse with S.G. while she was substantially impaired. And having had the opportunity to have intercourse with S.G., McClain was close enough to her for him to have cause to believe that her ability to consent was substantially impaired. Moreover, evidence

that McClain had lied to investigators—by saying that he had never seen S.G. before and that he did not go to the bars in the area around Common Grounds in 2010—could be considered to show consciousness of guilt. *See State v. Williams*, 2003-Ohio-4396, ¶ 54. A defendant’s consciousness of guilt may be considered in a challenge to the sufficiency of the evidence. *See, e.g., State v. Beasley*, 2018-Ohio-493, ¶ 220; *State v. Issa*, 2001-Ohio-1290, ¶ 78-80.

{¶ 30} Having reviewed the evidence de novo, we conclude that the State presented sufficient evidence of all the elements of rape under R.C. 2907.02(A)(1)(c).

III. McClain was not denied the effective assistance of counsel

{¶ 31} Despite having concluded that McClain’s conviction should be vacated and the case remanded to the trial court based on McClain’s insufficient-evidence claim, the Eighth District went on to determine McClain’s claim that he was denied the effective assistance of counsel because his trial counsel failed to object to inadmissible testimony. 2025-Ohio-962 at ¶ 20, 41-48 (8th Dist.). The court concluded that this claim also had merit. Because we conclude that the Eighth District incorrectly vacated McClain’s conviction on sufficiency grounds, we must also address that court’s ineffective-assistance determination.

{¶ 32} In his appeal to the Eighth District, McClain asserted that his trial counsel had been ineffective because they did not object to (1) S.G.’s testimony about her conversation with the bartender at the Third Place, (2) Manco’s testimony that S.G. had told him she had been hurt by somebody and that he had assumed a sexual assault had occurred, and (3) Rhoades’s testimony that S.G.’s mother had told Rhoades that S.G. had been attacked and raped. The Eighth District determined that the testimony was hearsay to which counsel should have objected and that the admission of the hearsay prejudiced McClain. *Id.* at ¶ 49-50.

{¶ 33} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel was deficient in some aspect of his

representation and (2) there is a reasonable probability that if not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With this guidance in mind, we consider McClain's assertions.

A. S.G.'s testimony about her conversation with the bartender

{¶ 34} After leaving the hospital, S.G. decided to “conduct [her] own investigation.” To that end, she spoke with the bartender at the Third Place. As noted above, she testified as follows regarding that conversation:

[The bartender] mentioned that [a similar] incident had happened with her. We shared a conversation about that. I asked her if there were any cameras that could corroborate where I was, who I left with. I asked if I got my pizza. I asked if I paid for it. She could not answer any of those. There was no video. She mentioned the owner was just in the process of putting them and installing them because there were a few other girls that had reported being roofied and I asked for the owner to call me. I also called and left a message for him and never received a call back.

(Emphasis added.) The State maintains that this testimony was akin to testimony by a police officer when explaining the steps taken during an investigation and notes that we have held that such testimony is not hearsay. *See State v. Ford*, 2019-Ohio-4539, ¶ 215. But here, the statements—specifically, the two statements italicized above—went beyond explaining steps taken by S.G. and repeated the bartender's suggestions that drugging of drinks had happened at the bar. Those statements were inadmissible hearsay.

{¶ 35} That the statements were inadmissible hearsay doesn't end our inquiry. We must now consider whether the outcome of McClain's trial would

have been different had his counsel objected. McClain argues that the testimony was prejudicial because “there was no toxicology testing to corroborate S.G.’s allegation that she [had] blacked out or the suggestion that she had necessarily been drugged.” But the main issues in the case were whether S.G. was substantially impaired and whether McClain knew or had reasonable cause to believe she was substantially impaired. As discussed above, the State’s evidence of substantial impairment was S.G.’s testimony that she had no recollection of what happened from the time she took a sip of her drink at the bar until she woke up. The State did not need to prove what caused the impairment. Also, the hearsay statements do not touch on McClain’s knowledge of the impairment. There was no allegation that McClain had drugged S.G. We conclude that defense counsel’s failure to object to the statements did not amount to a denial of the effective assistance of counsel.

B. Statements made during Manco’s and Rhoades’s testimonies

{¶ 36} McClain also argued that his counsel should have objected twice during Manco’s testimony and once during Rhoades’s. Manco testified, “[S.G.] just said, like, she wasn’t sure herself what had happened but she was hurt, obviously, by somebody,” and he said that he had assumed that a sexual assault had occurred. And Rhoades recalled that S.G.’s mother had told her that “[S.G.] had been attacked and . . . raped and was at Fairview Hospital.” In McClain’s view, admission of the hearsay statements and Manco’s statement speculating about what had happened was prejudicial because “the State attempted to [use it to] shore up the allegation that S.G. [had been] ‘raped’ or ‘sexually assault[ed]’ rather than having engaged in consensual sex.” S.G. herself testified that she had told her mother on the day of the incident that she thought she had been raped. Defense counsel had ample opportunity—and took the opportunity—to cross-examine S.G. about her recollection of the night in 2010. And leaving aside the testimony of Manco and Rhoades, the State presented evidence through S.G.’s testimony, the testimony of the SANE nurse, and the DNA evidence to show that S.G. had not

given her consent to sexual intercourse, that McClain had had sexual intercourse with S.G., and that he had had reasonable cause to believe that her ability to consent was substantially impaired. We cannot say that there is a reasonable probability that had the testimony of Manco and Rhoades been excluded, the result of the trial would have been different. Thus, we conclude that defense counsel's failure to object to the statements did not amount to a denial of the effective assistance of counsel.

IV. Conclusion

{¶ 37} We conclude that the State presented sufficient evidence for a reasonable jury to convict McClain of substantial-impairment rape and that McClain was not denied the effective assistance of counsel. We therefore reverse the judgment of the Eighth District Court of Appeals and remand the case to that court for consideration of McClain's third assignment of error.

Judgment reversed
and cause remanded.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, for appellant.

Cullen Sweeney, Cuyahoga County Public Defender, and Erika B. Cunliffe, Assistant Public Defender, for appellee.
