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COURT OF APPEALS OF THE STATE OF WASHINGTON
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NO. 69308-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANTHONY DIGEROLAMO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LORI K. SMITH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The State presented evidence that the victim went to sleep after a night of heavy drinking, woke up in the middle of the night with a male tongue in her vagina and then blacked out. A rape kit was performed the following morning and Digerolamo's DNA was found in the victim's underwear and perineal swabs. Did the State produce sufficient evidence that Digerolamo engaged in sexual intercourse with the victim at a time when she was incapable of consent due to mental incapacity or physical helplessness?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Joseph Digerolamo, was charged by information with one count of rape in the second degree. CP 1. The case proceeded to a jury trial on July 23, 2012, before the Honorable Lori K. Smith. 1 RP 3. After an eight day trial in which Digerolamo chose not to testify on his own behalf, the jury convicted him as charged. CP 167.

On August 31, 2012, Judge Smith sentenced Digerolamo to an indeterminate sentence of 90 months in prison, a standard range sentence. CP 56-66; 9 RP 623-624.

2. SUBSTANTIVE FACTS.

The defendant, Joseph Digerolamo, is married to Glennis Johnny. 3RP 126¹. The victim, S.B., is Johnny's niece who lives in British Columbia, Canada. 3RP 128; 5RP 274. S.B. and her six-year-old daughter visited Digerolamo and Johnny the weekend of May 31st, 2009, to celebrate her grandmother's 83rd birthday. 3RP 130; 5RP 294; 6RP 411-412. On the day S.B. arrived, Johnny was throwing another birthday party celebration at her home in Sea Tac, Washington. 3RP 124 – 133. At the end of the night, S.B., Johnny and some of Johnny's other nieces and nephews were drinking heavily and taking shots of alcohol. 3RP 134; 5RP 298-304. S.B. did not drink alcohol often and on that night she drank to the point of intoxication. 3RP 135; 5 RP 302- 304. Digerolamo was present the entire night but did not drink. 3RP 134.

¹ The Verbatim Report of Proceedings consists of nine volumes, referred to as follows: 1RP (7/23/2012), 2RP (7/24/2012), 3RP (7/25/2012), 4RP (7/23/2012), 5RP (7/30/2012), 6RP (7/31/2012), 7RP (8/1/2012), 8RP (8/2/2012), 9 RP (8/31/2012).

After the party was over, the only people remaining in the home were Digerolamo, Johnny, S.B., and S.B.'s daughter. 3RP 135. S.B. did not remember much of the night but remembered sliding into bed with her daughter and going to sleep and then rushing into the bathroom to vomit some time later. 5RP 304-305. Digerolamo checked on S.B. while she was in the bathroom vomiting. 5RP 305. The next thing S.B. remembered was waking up in the bed she shared with her daughter and feeling a male tongue inside her vagina. 5RP 305-308. She remembered trying to push the man's head away with her hands but then blacked out until the following morning when she woke. 5RP 305-308.

When S.B. woke up the following morning, she remembered what happened to her and began to cry. 5RP 309. Johnny came in to check on S.B., and S.B. conveyed to Johnny what had happened. 5RP 309. Johnny left S.B.'s room to talk to Digerolamo in the living room, where she noticed the window was open and the screen was bent. 3RP 143-144. Digerolamo called 911 to report a burglary had occurred. 3RP 167. When King County Deputy Trine Hansen responded to the scene, she believed she was responding to a report of a burglary. 6RP 426-428. Digerolamo was the first person Deputy Hansen contacted when she arrived at the residence. 6RP 426.

Digerolamo immediately identified himself as a law enforcement officer with 30 years in New York as a Detective. 6RP 426.

Digerolamo directed Deputy Hansen to the kitchen and pointed out a half broken bottle of Grey Goose that he had found on the counter which was not his. 6RP 427. Next, Digerolamo showed Deputy Hansen the living room and pointed to the east window where he thought that the burglar had entered. 6RP 427. It was at this time, Digerolamo told Deputy Hansen that his niece had been assaulted. 6RP 429. Deputy Hansen made contact with S.B. and got a preliminary statement of what happened. 6RP 432-433. Deputy Hansen then called her sergeant, due to the report of a sexual assault additional investigating officers arrived after. 6RP 433.

S.B. had a sexual assault examination at Harborview Medical Center and a rape kit was performed. 6RP 422. The rape kit was sent to the Washington State Patrol Crime Laboratory where they tested for DNA from the rape kit. 6RP 474-478. Digerolamo's DNA matched a DNA profile found in the form of amylase on the perineal swabs and S.B.'s underwear. 6RP 692 – 699.

C. **ARGUMENT**

**THE EVIDENCE WAS SUFFICIENT TO SUPPORT
DIGEROLAMO'S CONVICTION OF RAPE IN THE
SECOND DEGREE**

Digerolamo claims that the State's evidence was insufficient to support a guilty verdict for Rape in the Second Degree. Specifically, he argues that the evidence was insufficient to show that S.B. was incapable of consent due to being physically helpless or mentally incapacitated. But the State's evidence demonstrated that S.B. was passed out when Digerolamo assaulted her. His claim should be rejected.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted). A reviewing court must defer to the trier of fact on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence.

State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

To convict Digerolamo of rape in the second degree, the State had to prove beyond a reasonable doubt that the sexual intercourse he had with S.B. occurred while she was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050; CP 39. "Sexual intercourse" includes "any penetration of the vagina or anus however slight, by an object, including a body part, ...or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex." RCW 9A.44.010(1); CP 38. A person is "mentally incapacitated" if at the time of the intercourse she had a condition that prevented her 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 by some other cause. RCW 9A.44.010(4); CP 36. A person is "physically helpless" if she is "unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5); CP 36. One who is asleep is

physically helpless. State v. Puapuaga, 54 Wn. App. 857, 859-60, 776 P.2d 170 (1989). The Court has held that “mental incapacity” and physically helpless” are not alternative means of committing second degree rape. State v. Al-Hamdani, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001), *review denied*, 148 Wn.2d 1004 (2003).

- a. The State Presented Sufficient Evidence That S.B. Was Incapable of Consent Due to Her Mental Incapacitation.

Digerolamo claims that S.B.’s ability to recall certain details surrounding the incident showed her intoxication level was not to the point at which she could not understand the nature or consequences of the sexual act. App. Br. at 8, 9. But the State’s evidence demonstrated that S.B. could not remember a majority of the evening, after she ingested shots of alcohol throughout the evening, and was so intoxicated she vomited in the middle of the night and had very limited memory of what occurred. His claim should be rejected.

In Al-Hamdani, the victim indicated she had ten drinks during the evening, a high blood alcohol level, was stumbling, vomiting and passing in and out of consciousness prior to intercourse. Al-Hamdani, 109 Wn. App. at 609. The defendant in that case argued

that because the victim woke to find him on top of her and told him “no” and “don’t do that” when he asked her to engage in oral sex, she was not mentally incapacitated. This Court found that despite the victim’s testimony that she refused to engage in oral sex, she was incapable of meaningfully understanding the nature or consequences of sexual intercourse at the time it occurred. Id. at 610. This Court went on to quote the Washington Supreme Court decision in Ortega-Martinez, “It is important to distinguish between a person’s general ability to understand the nature and consequences of sexual intercourse and that person’s ability to understand the nature and consequences at a given time and in a given situation. The treatment of the two as identical contradicts the express language of the statute. RCW 9A.44.010(4) specifically notes ‘ [m]ental incapacity is that condition existing at the time of the offense...’” State v. Ortega-Martinez, 124 Wn. 2d 702, 716, 881 P.2d 231 (1994).

In this case, S.B. remembered a few details of the night such as sliding into bed with her daughter and vomiting sometime during the night. However, her testimony was clear that she was highly intoxicated and briefly woke up at some point with Digerolamo sexually assaulting her. As she tried to push him away, she went

completely blank until the next morning. The facts of this case regarding the level of S.B.'s intoxication parallels the facts of Al-Hamdani in which the victim was drinking a high volume of alcohol throughout the night, vomiting and could only remember a few details of the evening. Viewed in light most favorable to the State, there is sufficient evidence in the record from which the jury could conclude that S.B. was so intoxicated that she was unable to understand the nature or consequences of sexual intercourse at the time it occurred. Digerolamo's conviction should be affirmed.

b. The State Presented Sufficient Evidence That S.B. Was Incapable of Consent Due to Her Physical Helplessness.

There is also ample evidence in the record to support the jury's finding that S.B. was physically helpless when Digerolamo had sexual intercourse with her. Digerolamo nonetheless argues that the evidence is insufficient because S.B. was awake during some of the contact and resisted some of the contact. This argument misapplies prior case law and ignores that the State is entitled to all reasonable inferences to be drawn from the facts.

First, Digerolamo cites State v. Bucknell, 144 Wn. App. 524, 529-30, 183 P.3d 1078 (2008), for the proposition that “a person who is able to communicate orally, despite being bedridden and unable to move from her chest down due to symptoms of Lou Gehrig’s Disease has been held not to be physically helpless.” In Bucknell, the court examined the situation of a woman who was paralyzed from the chest down, but could “talk, answer questions and understand and perceive information.” Id. Based on those facts, the Bucknell court determined that the woman was not physically helpless because she had the capacity to be aware of the sexual intercourse and express her lack of consent orally, even if she could not physically repel the unwanted contact. Id.

Bucknell should not be applied to the current case. A victim who is awake, aware, and able to orally communicate is not comparable to a victim who is highly intoxicated and asleep when the sexual contact begins and only gradually awakens to find a man touching her vagina before passing out again due to intoxication. Prior to waking up and feeling his tongue in her vagina, S.B. was physically unable to communicate an unwillingness to an act. The jury was entitled to find, under these facts, that S.B. was physically helpless as she was asleep and unconscious when Digerolamo

initiated the sexual intercourse and although briefly awakened, passed out again rendering her unconscious again. Digerolamo's claims should be denied.

Digerolamo's argument that the evidence is insufficient to prove S.B. was physically helpless fails to give the State the benefit of all reasonable inferences that can be drawn from the facts. S.B. went to bed alongside her daughter. 5RP 304. She remembered waking up and vomiting in the middle of the night and then going back to bed. 5 RP 305-307. She woke up to a tongue already inside her vagina. Id. She had not awakened in bed prior to that point. Id. Any reasonable jury would infer from these facts that the sexual intercourse with Digerolamo began before S.B. awakened and before she was capable of being aware of it. The fact that she blacked out again after awaking is more evidence for a reasonable factfinder to conclude beyond a reasonable doubt that S.B. was physically helpless when Digerolamo had sexual intercourse with her.

D. CONCLUSION

For all the foregoing reasons, the defendant's conviction for rape in the second degree should be affirmed.

DATED this 6th day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

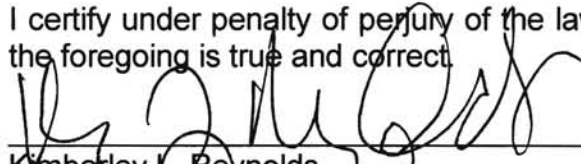
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOSEPH ANTHONY DIGEROLAMO, Cause No. 69308-5-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Kimberley L. Reynolds
Done in Seattle, Washington

8/6/2013
Date