

68061-7

68061-7

NO. 68061-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MOHAMAUD SULDAN MOHAMED,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZALEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In construing a statute, the court must give effect to the plain meaning of the law. The legislature has said that a person commits Indecent Liberties when he “knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another . . . [w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.” Applying ordinary rules of grammar, “knowingly” in the statute modifies “causes.” Should this Court reject Mohamed’s argument that an essential element of the crime of Indecent Liberties is the defendant’s knowledge that the victim lacks the capacity to consent?

2. 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 Mohamed removed most of his clothes, got into bed with the victim, and touched her vagina with his hand while she was sleeping. As she began to awaken, he put his fingers in her mouth and penetrated her vagina with his penis. Did the State produce sufficient evidence that Mohamed had sexual contact with the victim while she was physically helpless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 20, 2011, the State charged the defendant, Mohamaud Mohamed, with one count of Rape in the Third Degree. CP 1. The State later amended the charge to one count of Indecent Liberties under the “incapable of consent” prong. CP 7; 9/15/11RP 1-3.¹ The case proceeded to a jury trial on the Amended Information before the Honorable Steven Gonzalez. 9/15/11RP. After a several day trial in which Mohamed testified on his own behalf, the jury convicted him as charged. CP 61.

On December 9, 2011, Judge Gonzalez sentenced Mohamed to 18 months in prison, a standard range sentence. CP 65-75. This appeal timely followed. CP 76.

2. SUBSTANTIVE FACTS

On April 15, 2011, victim MM and her boyfriend, Nolan Milgate, attended a party at the home of Elizabeth Maunsell. 9/21/11RP 28-29, 31-33, 97. Mohamed also attended the party with a few friends; he was not previously known to Maunsell, Milgate, or MM. 9/21/11RP 30-31; 9/22/11RP 26, 72.. As the party ended, Milgate, MM, Maunsell, and Maunsell’s boyfriend, Jason Bergerson, remained at the home. 9/21/11RP

¹ The several volumes of the Verbatim Reports of Proceedings will hereinafter be referred to by date.

38; 9/22/11RP 111-12, 118-19. Mohamed, who was quite intoxicated, missed his ride home, and Maunsell allowed him to sleep on the living room couch. 9/21/11RP 34-35, 39-40, 47; 9/22/11RP 31-32, 75-76, 114, 116, 118-20. At about 2:30 a.m., Maunsell and Bergerson went upstairs to bed in the master bedroom. 9/21/11RP 38-40; 9/22/11RP 36, 77, 120. Milgate and MM went upstairs to bed in the guest bedroom shortly thereafter, leaving Mohamed downstairs on the couch. 9/21/11RP 40; 9/22/11RP 32, 76-77.

Shortly after going to bed, MM got up for a drink of water. As she walked down the hall towards the stairs, she noticed Mohamed upstairs in another bedroom lying on the bed, still fully dressed. 9/22/11RP 77-79, 95-96. She went downstairs for water, then returned to the guest bedroom and went to sleep next to Milgate on a narrow futon bed. 9/22/11RP 78-79; Ex. 12. Milgate was sleeping on the side of the bed nearest the door; MM was sleeping close to the wall. 9/22/11RP 33-34, 79; Ex. 12.

Several hours later, MM awoke to find Mohamed's fingers in her mouth and his other hand touching her vagina. 9/22/11RP 81-83, 105. Almost immediately, he penetrated her vagina with his penis. 9/22/11RP 81-83, 103, 105. MM, startled fully awake by this behavior, moved away, and Mohamed stopped. 9/22/11RP 83-84. MM immediately awakened Milgate, telling him she had been raped. 9/22/11RP 36, 83-84. MM was

crying and frantic. 9/22/11RP 36. Milgate observed Mohamed in the bed, wearing just his boxers. 9/22/11RP 37-38, 121. As MM ran down the hall to Maunsell and Bergerson's room for help, Milgate fought with Mohamed. 9/22/11RP 40-42, 84-85. A neighbor who saw Milgate and Mohamed fighting from his window called the police, as did Milgate. 9/22/11RP 6-7, 42. Bergerson waited with Mohamed for the police to arrive. 9/22/11RP 123. While they waited, Mohamed was crying and apologizing, saying "I'm sorry, I don't know what I was doing, and I can't believe that happened." 9/22/11RP 123.

The police arrived at about 6:00 a.m., within minutes of the 911 calls. 9/21/11RP 96; 9/22/11RP 9. Upon their arrival, they found MM shaking, disheveled, and distraught. 9/21/11RP 99, 114. She told them Mohamed had raped her. 9/21/11RP 99, 115. Mohamed was arrested, and he told the officers that he hadn't done anything. 9/21/11RP 106-07. The police took photographs, and they collected Mohamed's clothes. 9/21/11RP 74, 102. Later, forensic scientist Tara Roy of the Washington State Patrol Crime Laboratory tested the front interior panel of Mohamed's boxers. 9/21/11RP 85-86. She found biological material of mixed origin there, containing both semen and MM's DNA. 9/21/11RP 86-90. She never received a biological sample from Mohamed, so could not confirm the presence of Mohamed's DNA in the semen, but the DNA

also matched blood on the front left waistband of the boxers. 9/21/11RP 88-89, 94.

At trial, Mohamed testified that he never crawled into bed with MM. 9/26/11RP 41. He instead claimed that he had been flirting with MM all night, and that she put her hands down his pants. 9/26/11RP 34-36. He admitted on cross-examination that a few days after his arrest, on April 18, 2011, he twice called his sister from jail and denied that he had had sex with MM or had any type of sexual contact with her at all. 9/26/11RP 55; Ex. 56 at 5.² Between the two calls to his sister, Mohamed was interviewed by Seattle Police Department Detective Jeff Spong. Mohamed told Spong that he didn't have any sexual contact with anyone at the party. Ex. 57 at 25-26. He repeated that claim to his sister on May 4, 2011. Ex. 59 at 3-5. Then, after he received the DNA test results, Mohamed told his sister that MM had put her hands down his pants, and that's how her DNA got into his boxers. 9/21/11RP 90; Ex. 60. Mohamed never claimed to anyone – Bergerson, the officers at the scene,

² Exhibits 53 and 54, admitted into evidence, contain recordings of phone calls made by Mohamed from the jail, of in-car video and audio from Mohamed's arrest, and of an interview of Mohamed conducted by Detective Spong. Transcripts of some of these recordings were produced and provided to the jury while the recordings were played in order to assist the jury in understanding the recordings. The transcripts were marked, but not admitted into evidence. For ease of review, this brief cites to the transcripts; both the transcripts and the admitted recordings were designated and are available to this Court.

Detective Spong, his sister, or the jury – that he did not know that MM was asleep.

C. ARGUMENT

1. THE INFORMATION CORRECTLY INCLUDED ALL ELEMENTS OF THE OFFENSE OF INDECENT LIBERTIES.

Mohamed complains that the Information was deficient because it failed to allege the essential element of knowledge that the victim was incapable of consent, and that he was prejudiced by the omission. However, knowledge of a victim's incapacity to consent is not an essential element of the crime of Indecent Liberties. Moreover, if it is an element, Mohamed was not prejudiced by any inartful wording in the charging instrument. Mohamed's claim should be rejected.

- a. Knowledge Of A Victim's Lack Of Capacity To Consent Is Not An Essential Element Of The Crime Of Indecent Liberties.

The elements of a crime are defined by the legislature. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). Whether knowledge of the victim's lack of capacity is an element of the crime is a question of statutory construction. State v. Bradshaw, 152 Wn.2d 528, 535, 98 P.3d 1190 (2004). Statutory interpretation is reviewed de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The principles of statutory construction are well settled. The Supreme Court has provided a concise summary of the principles that should be applied to any issue of statutory construction:

In interpreting a statute, we do not construe a statute that is unambiguous. . . . If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd, or strained consequences. . . . The purpose of an enactment should prevail over express but inept wording. . . . The court must give effect to legislative intent determined “within the context of the entire statute.” . . . Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. . . . The meaning of a particular word in a statute “is not gleaned from the word alone, because our purpose is to ascertain legislative intent of the statute as a whole.”

Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (citations omitted).

The crime of Indecent Liberties is codified at RCW 9A.44.100.

That statute provides, in relevant part:

A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another: . . . (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless

RCW 9A.44.100(1) (emphasis added). The statute is unambiguous and needs no further construction. Although Mohamed claims that the word

“knowingly” modifies not just “causes” but also all of section (b), he is incorrect.

The word “knowingly” is an adverb. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1993). Correct grammatical usage of an adverb dictates that it be placed closest to the word it is intended to modify. THE CHICAGO MANUAL OF STYLE ¶ 5.155 (15th ed. 2003) (“To avoid miscues, the adverb should generally be placed as near as possible to the word it is intended to modify. . . . Placing the adverb with the word it modifies makes the meaning clear”). Here, the word “knowingly” immediately precedes the verb “causes,” indicating that “knowingly” modifies “causes,” not subsection (b). Moreover, the grammatically correct way to apply a knowledge requirement to the fact that the victim was incapacitated would be something like “with knowledge that the other person is incapable of consent” or “while knowing that the other person is incapable of consent.” Mohamed’s application of the word “knowingly” to subsection (b), by contrast, renders the statute unreadable: “knowingly . . . when the other person is incapable of consent.”

Mohamed cites to State v. Shipp, 93 Wn.2d 510, 519, 610 P.2d 1322 (1980), for the proposition that when an adverb precedes a colon, as “knowingly” does in RCW 9A.44.100(1), it applies to everything that comes after the colon. Specifically, the Shipp court said, “The word

‘knowingly’ precedes a colon and modifies everything which follows the colon.” Id. But a simple examination of the statute at issue in Shipp readily distinguishes it from the case at bar, and further demonstrates that the rule described above is in fact correct.

Shipp involved the construction of the Promoting Prostitution statute, which then read: “(1) A person is guilty of promoting prostitution in the first degree if he knowingly: . . . (b) Advances or profits from prostitution of a person less than eighteen years old.” Former RCW 9A.88.070, cited in Shipp, 93 Wn.2d at 518-19 (emphasis added). In that statute, “knowingly” was adjacent to subsection (b) because it immediately preceded the colon,³ and it could be read with subsection (b) in a grammatically correct way. Thus, in the Promoting Prostitution statute, “knowingly” unambiguously modified the subsections. By contrast, “knowingly” in the Indecent Liberties statute immediately precedes “causes”; the colon and subsections are nineteen words later.

Under the plain language of RCW 9A.44.100(1)(b), “knowingly” modifies “causes” and nothing else. No further construction is required or permitted. “If the plain language of the statute is unambiguous, then this court's inquiry is at an end. . . . The statute is to be enforced in accordance

³ Compare THE CHICAGO MANUAL OF STYLE ¶ 5.156, at 185-86 (“If the adverb qualifies an adjective, an adverb, a preposition, or a conjunction, it should immediately precede the word or phrase qualified” (emphasis added)).

with its plain meaning.” State v. Armendariz, 160 Wn.2d 106, 110-11, 156 P.3d 201 (2007) (citations omitted).

If, despite this plain and grammatical reading of the statute, this Court determines that the statute is subject to more than one reasonable interpretation, the Court must then discern the legislative intent. Several indicators demonstrate that the legislature did not intend to require the State to prove that a defendant have knowledge of a victim’s incapacity.

First, the Indecent Liberties statute is structurally similar to the statute defining Rape in the Second Degree, which does not require proof of a defendant’s knowledge of the victim’s lack of capacity to consent. Specifically, RCW 9A.44.050 defines Rape in the Second Degree as follows:

A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

- (a) By forcible compulsion;
- (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated

Despite having the same structure as the Indecent Liberties statute, Rape in the Second Degree has no mental element whatsoever. State v. Walden, 67 Wn. App. 891, 895, 841 P.2d 81 (1992).

It makes logical sense for the legislature not to include a mental element at all for the conduct of engaging in sexual intercourse (Rape in

the Second Degree) but to include the element of knowledge for the conduct of sexual contact (Indecent Liberties). A person “cannot accidentally or innocently induce another person to engage in sexual intercourse,” so there is no danger of criminalizing innocent conduct. Id. By contrast, mere contact that seems sexual to a victim could be accidental or innocent on the part of a defendant; requiring proof of knowledge avoids criminalizing nonculpable conduct.

The logic behind this disparity in the mens rea element, however, does not apply to the element of incapacity to consent. There can be no reason to require the State to prove the defendant’s knowledge of a victim’s lack of capacity to consent in an Indecent Liberties case, but not to require such proof in a case of Rape in the Second Degree.⁴

Second, the original statute defining Indecent Liberties had the same structure as the current statute, but also included a prong for sexual contact with children under the age of fourteen. Former RCW 9A.88.100, cited in State v. Miller, 30 Wn. App. 443, 446 n.4, 635 P.2d 160 (1981). In analyzing the elements of that crime for the purposes of determining whether Indecent Liberties against a child was a lesser included offense of

⁴ See also State v. Ortega-Martinez, 124 Wn.2d 702, 711, 881 P.2d 231 (1994) (recounting legislative history of Rape in the Second Degree and noting that the House Judiciary Committee rejected a version of the statute that included the element that the defendant knew of the victim’s incapacity to consent). This history also underscores the fact that the legislature was well aware of how to grammatically write a statute that includes such a knowledge requirement.

the former crime of Statutory Rape, the Miller court did not include the defendant's knowledge of the child's age. Miller, 30 Wn. App. at 445-46 & n.2.

Indeed, Washington crimes involving sexual conduct with a child victim have traditionally been strict liability crimes as to the age of the victim. See, e.g., State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996), disapproved of on other grounds by State v. Johnson, 173 Wn.2d 895, 270 P.3d 591 (2012); State v. Abbott, 45 Wn. App. 330, 332-35, 726 P.2d 988 (1986). There is no reason to think the legislature intended something different with RCW 9A.88.100, and thus with its recodification (and elimination of the prong relating to children under age 14) at RCW 9A.44.100.

Third, construing "knowingly" to apply to the subsections of RCW 9A.44.100 would render the statutory defense provided in RCW 9A.44.030(1) superfluous. That statute provides, in pertinent part:

In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

If RCW 9A.44.100(1)(b) is construed to mean that the State must prove beyond a reasonable doubt that a defendant knew that a victim lacked

capacity to consent in order to secure a conviction, then the statutory defense would become unnecessary. A defendant would be unable to prove that he reasonably believed a victim had the capacity to consent if the State had already proven beyond a reasonable doubt that the defendant in fact had such actual knowledge.

“[T]he rule of statutory construction that trumps every other rule [is] ‘the court should not construe statutory language so as to result in absurd or strained consequences.’” State v. Davis, 137 Wn.2d 957, 971, 977 P.2d 554 (1999). Construing RCW 9A.44.100(1)(b) to render the statutory defense of RCW 9A.44.030 superfluous would be absurd and plainly contrary to legislative intent.

Indeed, Division Two of this Court used this exact argument when it held that Statutory Rape is a strict liability offense with respect to the defendant’s knowledge of the age of the victim. In State v. Abbott, 45 Wn. App. 330, 726 P.2d 988, 990 (1986), the defendant pled guilty to one count of Statutory Rape in the First Degree, and later moved to withdraw his plea essentially on the same grounds urged by Mohamed – that he had never been advised of the mens rea of the crime. In rejecting Abbott’s contention that he had to know the age of his victim, the Court pointed to

the statutory defense in RCW 9A.44.030(2)⁵ as proof that the legislature did not intend that the State bear the burden of proving the defendant's knowledge.

The Abbott court made short work of the defendant's argument:

RCW 9A.44.030, which provides a statutory defense to the crime charged, expressly provides that, except under specified circumstances which must be proved by defendant under a preponderance of the evidence standard, "it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older." Thus, lack of knowledge of one of the three statutory elements of the crime, i.e., the victim's age, was expressly deemed not even a defense to the crime charged (except for limited circumstances not pertinent herein). It is patently frivolous to hold, by implication, that an element of the crime is that the accused must have knowledge that he is over the age of 13.

Abbott, 45 Wn. App. at 332-33 (footnote omitted). The Court further explained that it refused to "convert[] a defense burden into a prosecutorial burden." Id. at 333. For the same reasons, the existence of an affirmative defense – with the burden on the defendant to prove he reasonably believed that his victim had capacity to consent – establishes

⁵ RCW 9A.44.030(2) provides, in relevant part:

In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

that the legislature did not intend that a defendant's knowledge of lack of capacity be an essential element of the crime of Indecent Liberties.

Despite this evidence of the legislature's intent not to include knowledge of a victim's incapacity to consent as an element of the crime of Indecent Liberties, Mohamed claims that "the Court of Appeals has made clear" that a defendant must have such knowledge. Brief at 7 (citing State v. Lough, 70 Wn. App. 302, 853 P.2d 920 (1993)). Mohamed is correct that language in Lough reads: "In order to be guilty of indecent liberties . . . in violation of RCW 9A.44.100(1)(b), a defendant must knowingly cause 'sexual contact' and he must 'knowingly' cause such contact with a person who is 'physically helpless'." Id. at 325; see also id. at 326. This language, however, is dicta, and as such does not control the outcome of this case. Ass'n of Washington Bus. v. State of Washington, Dept. of Revenue, 155 Wn.2d 430, 442 n.11, 120 P.3d 46 (2005) (noting that, where statements are made in passing and are not directly related to the holding of a case, the language is not binding on the court).

It is clear that this language in Lough is dicta for several reasons. First, the issue before the Lough court was not the proper statutory construction of RCW 9A.44.100(1)(b), but rather the admissibility of common scheme or plan evidence under Evidence Rule 404(b). Second, there was little to no analysis in the opinion supporting the court's

statement that the State must prove the defendant's knowledge of the victim's incapacity. Third, the language is introduced by a paragraph that practically acknowledged that the language was dicta; the court wrote, "[W]e believe that, in order for our reasoning to be of any significant aid to these parties and to others who may review our decision for any purpose whatsoever, additional explanation is required." Lough, 70 Wn. App. at 324-25. Finally, the Supreme Court granted review in Lough, and issued what has become the seminal case on common scheme or plan evidence in this state. State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). In its opinion affirming the Court of Appeals, the Supreme Court made not even passing reference to – let alone expressed agreement with – the lower court's statement that knowledge of the victim's incapacity was an element of the crime.⁶

- b. If RCW 9A.44.100(1)(b) Includes The Element Of Knowledge That A Victim Lacked Capacity To Consent, Mohamed Was Not Prejudiced By The Inartful Language In The Charging Document.

If this Court holds that knowledge of the victim's lack of capacity to consent is in fact an element of the crime, Mohamed is still not entitled to relief. The State must allege all essential elements of a crime in the

⁶ Indeed, the Washington Pattern Jury Instructions – and even WPIC 49.02, the "to convict" instruction for Indecent Liberties – have been extensively revised since Lough, 70 Wn. App. 302, but no revision has implemented Lough's suggestion that knowledge of a victim's incapacity is an essential element of the crime. Compare WPIC 49.02 (1993) with WPIC 49.02 (2011).

Information, in order to give adequate notice to the accused of the crime that he must prepare to defend against. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). A challenge to the sufficiency of the charging instrument may be raised for the first time on appeal. Id. at 102. However, when the challenge is made after the verdict, a reviewing court must apply a two-step test: (1) Do the necessary elements appear in any form, or by fair construction can they be found, in the Information? If so, (2) can the defendant show that he was actually prejudiced by the vague or inartful language? Id. at 105-06.

Turning to the first step, the Information accused Mohamed of Indecent Liberties, specifically alleging that

MOHAMAUD SULDAN MOHAMED in King County, Washington, on or about April 16, 2011, did knowingly cause M.M. (DOB 12/2/90), who was not the spouse of the Defendant and who was incapable of consent by reason of being (a) mentally defective, (b) mentally incapacitated, and (c) physically helpless, to have sexual contact with the Defendant.

CP 7. As Mohamed correctly argues, an ordinary and grammatically correct reading of this sentence would suggest that “knowingly” does not modify “who was incapable of consent.” This is because the latter is a descriptive and nonrestrictive phrase, properly set off by commas. See THE CHICAGO MANUAL OF STYLE ¶ 6.31.

Accordingly, the Information could only be construed to apply “knowingly” to the element of lack of capacity by the same “liberal” and ungrammatical construction that would interpret the statutory language to include knowledge of incapacity as an element. If this Court is inclined to so stretch the plain language of RCW 9A.44.100(1)(b), it should similarly liberally construe the charging document to find that the element of knowledge of lack of capacity appears in some form.

If this Court determines that knowledge of the victim’s incapacity is an element and that element appears in any form in the Information, it must then turn to the question of whether Mohamed has suffered actual prejudice by the vague and inartful charging language. Kjorsvik, 117 Wn.2d at 105-06. The burden of showing prejudice lies with the defendant. State v. Goodman, 150 Wn. 2d 774, 789, 83 P.3d 410 (2004). Mohamed cannot meet this burden.

Mohamed first argues that he was prejudiced because he did not raise the statutory defense that he reasonably believed that MM was not sleeping and physically helpless. It is unclear how failure to raise an affirmative defense on which Mohamed would have borne the burden of proof is evidence that he was prejudiced by an inartful charging document. This is especially true in light of the fact that the uncontroverted evidence at trial was that MM was asleep next to her boyfriend – and had been for

several hours – before she awakened to find Mohamed almost naked in bed beside her. Moreover, in his multiple statements to Bergerson, arresting officers at the scene, his sister, and the investigating detective, Mohamed made several claims about what happened that night, ranging from denial of a sexual contact with anyone to a claim of sexual contact initiated by MM in a different room. Not once did Mohamed suggest either that MM was awake at the time of the criminal conduct, or that he thought she was. To have claimed for the first time at trial that he had touched and had intercourse with MM while she was in bed beside her sleeping boyfriend, and that he thought she was awake at the time, would merely have underscored for the jury the extent of his willingness to lie.

Mohamed also argues that he was prejudiced by the inartful charging document because it led his counsel to propose an incorrect “to convict” jury instruction, which the trial court then read to the jury. CP 43-44, 57-58. Even assuming that the jury instruction was erroneous, Mohamed was not prejudiced. A jury instruction that omits an essential element of the crime is subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Such error is harmless where it appears beyond a reasonable doubt that the error

complained of did not contribute to the verdict obtained, and the missing element is supported by uncontroverted evidence. Id.

Here, as discussed above, it was uncontroverted that MM had been sleeping for several hours next to her boyfriend at the time the criminal sexual contact began. Mohamed never denied to anyone that MM was asleep; he denied the relevant sexual contact. Mohamed cannot show actual prejudice.

Finally, if this Court construes RCW 9A.44.100(1)(b) as requiring that the State prove the defendant's knowledge of the victim's incapacity, and concludes either that the State failed to allege that element adequately or that Mohamed was prejudiced by the inartful language of the Information, the remedy is dismissal without prejudice to the State's ability to refile charges. State v. Vangerpen, 125 Wn.2d 782, 794-95, 888 P.2d 1177 (1995).

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MOHAMED'S INDECENT LIBERTIES CONVICTION.

Mohamed claims that the State's evidence was insufficient to support a guilty verdict for Indecent Liberties. Specifically, he argues that the evidence was insufficient to show that MM was incapable of consent due to being physically helpless. But the State's evidence demonstrated

that MM was asleep when Mohamed, at a minimum, put his hand between MM's legs and touched her vagina. 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).

To convict Mohamed of Indecent Liberties as charged in this case, the State had to prove beyond a reasonable doubt that the sexual contact he had with MM occurred while she was incapable of consent by reason of being physically helpless. RCW 9A.44.100(1)(b); CP 7, 57-58. "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2); CP 58. 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 58. One who is asleep is physically helpless. State v. Puapuaga, 54 Wn. App. 857, 859-60, 776 P.2d 170 (1989).

There is ample evidence in the record to support the jury's finding that MM was physically helpless when Mohamed had sexual contact with her. MM testified that she was in bed and asleep when she awoke to find Mohamed's hand in her mouth and him forcing his penis into her vagina. 9/22/11RP 81-83. She later clarified that she felt Mohamed touching her vagina, which started to wake her up. 9/22/11RP 105. In rapid succession, MM then felt him put his fingers into her mouth and his penis into her vagina. 9/22/11RP 81-82, 103, 105. She explained that she did not consent to any sexual contact with Mohamed, and could not have done so because she was asleep. 9/22/11RP 88. This evidence was more than adequate for a jury to conclude that MM was physically helpless – asleep – when Mohamed sexually touched her.

Mohamed nonetheless argues that the evidence is insufficient because MM was awake during the sexual contact – and in particular during the penetration – described above. This argument misapplies prior case law, strains the facts, and ignores that the State is entitled to all reasonable inferences to be drawn from the facts.

First, Mohamed cites State v. Bucknell, 144 Wn. App. 524, 529-30, 183 P.3d 1078 (2008), for the proposition that “the grogginess of

a recent, but past state of sleep does not establish lack of capacity to communicate non-consent.” Appellant’s Brief at 16. Bucknell says nothing of the kind. Instead, Bucknell examined the situation of a woman who was paralyzed from the chest down, but could “talk, answer questions and understand and perceive information.” Bucknell, 144 Wn. App. at 529-30. 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 contact and express her lack of consent orally, even if she could not physically repel the unwanted contact. Id.⁷

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 asleep when the sexual contact begins, and only gradually awakens to find a man touching her vagina, putting his hand in her mouth, and penetrating her with his penis. A jury should be entitled to find, under these facts, that MM was physically helpless as she was asleep when Mohamed initiated the sexual contact, and then gradually awakened as the contact progressed.

Second, Mohamed’s recitation of the facts is incomplete. For instance, he claims that MM testified that the “vaginal activity” occurred

⁷ In Bucknell, the charged crime was Rape in the Second Degree, rather than Indecent Liberties, but the same legal definitions were at issue. Id. at 528; compare RCW 9A.44.100(1)(b) (Indecent Liberties) with RCW 9A.44.050(1)(b) (Rape in the Second Degree).

after she was awake. However, MM testified that she felt the vaginal penetration immediately subsequent to her awakening, but she felt Mohamed touching her vagina as she awoke – indeed, that was what awakened her.⁸ 9/22/11RP 105 (“I was in bed, and somebody was touching my vagina. I thought it was Nolan. That’s when I started waking up.”). A conviction for Indecent Liberties does not require proof of penetration, only proof of sexual contact, which Mohamed’s touching of MM’s vagina plainly was.

Similarly, Mohamed characterizes MM as being awake during all of the events, relying on her affirmative answer to the question, “Okay, so during this entire episode, you were awake[?]” Appellant’s Brief at 18-19 (citing 9/22/11RP at 103). But before MM was asked this question, she had repeatedly said that she was “half asleep” or “half awake,” 9/22/11RP 103; she then testified that she was “awake” only when defense counsel told her to assume that “half asleep does not equal being asleep.” 9/22/11RP at 103. The evidence that Mohamed was touching MM’s vagina when she awakened, and that she was half asleep when he put his

⁸ Mohamed repeatedly uses words like “vaginal activity” as a substitute for “penetration” or “sexual intercourse.” See Appellant’s Brief at 17, 18, 19. This terminology is misleading, as it both minimizes Mohamed’s conduct and ignores that the vaginal touching began while MM was still completely asleep. This is well illustrated by examining Mohamed’s argument that because MM “stated that the vaginal activity only lasted for a few seconds,” she must have been aware of – awake – when it began. Appellant’s Brief at 17 (emphasis added). But MM testified that the penetration only lasted a few seconds. 9/22/11RP at 81-83. MM made no estimate of how long Mohamed had been touching her vagina.

fingers in her mouth and penetrated her with his penis, are independently adequate to support a conviction for Indecent Liberties.

Finally, Mohamed's argument that the evidence is insufficient to prove sexual contact while MM was physically helpless fails to give the State the benefit of all reasonable inferences that can be drawn from the facts. MM testified that she had gone to bed with her boyfriend Nolan; the last time she saw Mohamed, he had been fully clothed. 9/22/11RP 77-79, 95-96. She awakened to find Mohamed in bed beside her, touching her vagina. 9/22/11RP 82-83. He was wearing only boxer shorts. 9/22/11RP 37-38, 121. She had not awakened when Mohamed climbed into the bed. 9/22/11RP 99-100. Any reasonable jury would infer from these facts that the sexual contact with MM began before she awakened and was capable of being aware of it. Indeed, the fact that MM was able to successfully end the assault as soon as she was fully awake is further evidence that she was asleep and physically helpless when the sexual contact began. There was more than sufficient evidence for a reasonable factfinder to conclude beyond a reasonable doubt that MM was physically helpless when Mohamed had sexual contact with her.

D. CONCLUSION

For all of the foregoing reasons, the defendant's conviction for Indecent Liberties should be affirmed.

DATED this 16th day of September, 2012.

Respectfully submitted,

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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 Oliver R. Davis, 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. MOHAMED, Cause No. 68061-7-I, 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.

U Brame
Name
Done in Seattle, Washington

9/26/12
Date

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