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IN THE
COURT OF APPEALS OF INDIANA

Kristopher P. Gliva,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 7, 2021

Court of Appeals Case No. 21A-CR-332

Appeal from the LaPorte Circuit Court

The Honorable Thomas J. Alevizos, Judge

Trial Court Cause No. 46C01-1805-F6-527

Weissmann, Judge.

[1] Today we reject the State's request to broaden the unaware prong of the sexual battery statute to include unawareness that a touching *is going to occur* as opposed to unawareness that a touching *is actually occurring*. This holding comports with precedent interpreting the unaware prongs of the rape and criminal deviate conduct statutes.

[2] Gliva's conviction relies on an overly broad interpretation of the sexual battery statute. We therefore reverse and remand with instructions to enter a judgment for battery as a class B misdemeanor.

Facts

[3] The State alleged that Gliva touched C.U.'s bottom three times while she was shopping at a large retail store. C.U. felt and reacted to two of these three touchings. She first felt a quick pat on her buttocks in the soap aisle, "like someone had put a sticker on me." Tr. Vol. II, p. 57-58. She looked up to see a man, later identified as Gliva, walk past.

[4] C.U. initially assumed the pat was an accident and continued shopping. She was in the freezer aisle when she "felt that same feeling again on my butt." *Id.* She looked up to see Gliva. No longer believing the touches were a mistake, she told Gliva to stay away from her. In response, he briskly walked away.

[5] When she got home, C.U. told her husband, a police officer, about the incident. Investigation of the store footage documented the first pat C.U. felt as well as a possible third touching, which she did not report. Ex. 2, Clip 1 at 2:40, 1:30. The incident in the freezer aisle does not appear in the surveillance footage. As

to the unreported touch, the footage shows C.U. only from the waist up and is subject to different interpretations as to whether Gliva's hand connected with C.U.'s buttocks.

[6] Relying on evidence of all three touches, the State charged Gliva with one count of sexual battery, a Level 6 felony, alleging that C.U. had been "unaware that the touching is occurring." App. Vol. II, p. 22. The jury found Gliva guilty and Gliva now appeals.

Discussion and Decision

[7] Gliva does not argue that he never touched C.U.'s buttocks at all, only that the touchings did not constitute sexual battery because C.U. was aware she was being touched.[1] Gliva asks that we reverse and remand with instructions to enter a battery conviction instead. The State counters that the "unaware" language in the sexual battery statute encompasses any touching that the victim does not anticipate receiving. In the State's view, this includes Gliva's groping because C.U. did not know he was going to touch her before she felt his hand on her body. The meaning of "unaware" in the context of the sexual battery statute under which Gliva was charged is an issue of first impression.

[1] Gliva does not concede the third touching, which is unclear from the store footage.

I. Construing the "Unaware" Prong of the Sexual Battery Statute

[8] We construe penal statutes strictly against the State and ambiguities should be resolved in favor of the accused. *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005) (citations omitted). We do not, however, narrow a statute to exclude cases they would fairly cover. *Id.* We assume statutory language was used intentionally and that every word should be given effect and meaning. *Id.* "We seek to give a statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice. And statutes concerning the same subject matter must be read together to harmonize and give effect to each." *Id.*

[9] Indiana's sexual battery statute states:

> (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person:
>
> (1) touches another person when that person is:
>
> A. compelled to submit to the touching by force or the imminent threat of force; or
>
> B. so mentally disabled or deficient that consent to the touching cannot be given; or
>
> (2) touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring;
>
> commits sexual battery, a Level 6 felony.

Ind. Code § 35-42-4-8. Gliva was charged under part (a)(2), which we will call the "unaware prong." We will call part (a)(1)(A) the "force prong" and part (a)(1)(B) the "mentally deficient prong."

Statutory History

[10] The unaware prong was added to the sexual battery statute in 2012. 2012 Ind. Legis. Serv. P.L. 72-2012 (West). This amendment followed a series of appellate rulings limiting the prior statute's application. Led by our Supreme Court's observation that "not all touchings intended to arouse or satisfy sexual desires constitute sexual battery," our courts determined that the force prong does not apply to gropings similar to those alleged here. *Scott-Gordon v. State*, 579 N.E.2d 602, 604 (Ind. 1991) (finding evidence that defendant grabbed victim's buttocks from behind insufficient to support conviction under force prong), *trans. denied*; *Chatham v. State*, 845 N.E.2d 203 (Ind. Ct. App. 2006) (finding evidence that defendant grabbed victim's crotch from behind insufficient to support conviction under force prong).

[11] In 2011, we refused to apply the mentally deficient prong to sleeping victims. *Ball v. State*, 945 N.E.2d 252, 258 (Ind. Ct. App. 2011) (reversing sexual battery conviction and remanding with instructions to enter judgment for misdemeanor battery for defendant who kissed and licked victim's face while she was sleeping), *trans. denied*; *see also Perry v. State*, 962 N.E.2d 154, 159 (Ind. Ct. App. 2012) (reversing sexual battery conviction and remanding with instructions to enter conviction for misdemeanor battery for defendant who touched victim's

vagina while she was sleeping). In *Ball*, we noted that because the legislature had not included an unawareness provision in the statute as it had in other sex offense statutes, we would not construe "mentally disable or deficient" to include sleep. *Id.* A year after our decision in *Ball*, the legislature amended the sexual battery statute to include the "unaware" prong.[2]

Victim Must be "Unaware" of the Touching as it Occurs

[12] We have construed "unaware" in Indiana's rape statute[3] and the now-repealed criminal deviate conduct statute[4] as "not aware: lacking knowledge or acquaintance; Unconscious." *Glover v. State*, 760 N.E.2d 1120, 1124 (Ind. Ct. App. 2002) (citing *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984)). Both Gliva and the State adopt this definition in their briefs. Appellant's Br., pp 17-18; Appellee's Br., p 11; Appellant's Reply Br., pp 4-5. Because statutes concerning the same subject matter should be read together to "harmonize," we agree that the legislature intended the meaning of "unaware" to be consistent across these three statutes. *Merritt*, 829 N.E.2d at 475.

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[2] Interestingly, because the unaware prong is limited to touchings of "another person's genitals, pubic area, buttocks, or female breast," the incident in *Ball*, where the defendant kissed and licked the victim's face while she slept, is still not reached by any provision of the sexual battery statute. *Ball*, 945 N.E.2d at 258; Ind. Code § 35-42-4-8.

[3] "[A] person who knowingly or intentionally has sexual intercourse with another person or knowingly or intentionally causes another person to perform or submit to other sexual conduct . . . when . . . the other person is unaware that the sexual intercourse or other sexual conduct . . . is occurring . . . commits rape . . . ." Ind. Code § 35-42-4-1.

[4] "A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when . . . the other person is unaware that the conduct is occurring . . . commits criminal deviate conduct . . . ." Ind. Code § 35-42-4-2 (repealed 2014).

[13] Gliva and the State disagree on *when* a victim must be unaware to satisfy the statute. Gliva argues that the victim must be unaware of the touching as it is occurring. The State argues that the victim must merely be unaware that the touching is about to occur.[5] Gliva's interpretation would encompass sexual touchings of victims who are sleeping, passed out from alcohol use, or under the influence of drugs that impair their perception and engagement with reality, among others. *See infra* para. 14. The State's interpretation would transform significantly more behavior from Class B misdemeanor battery into Level 6 felony sexual battery, including all of those touchings *and* any touching the victim did not anticipate, including the groping convictions reversed by our Supreme Court in *Scott-Gordon* and *Chatham*. *Scott-Gordon*, 579 N.E.2d at 604; *Chatham*, 845 N.E.2d at 207-8.

[14] The plain language of the statute does not support the State's broad reading. The legislature chose to use present tense in stating sexual battery occurs when the victim "*is* unaware that the touching *is* occurring." Ind. Code § 35-42-4-8(a)(2) (emphasis added). The verb tense in this clause does not change, meaning contemporaneous unawareness and touching. To interpret this phrase to include touches the victim does not anticipate is unreasonable.

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[5] In dicta, this Court acknowledged a similar argument in *Ball*. 945 N.E.2d at 256. The defendant compared his case to that in *Chatham*, as the victims in both cases were "caught unaware." *Id*. However, because the defendants in *Ball* and *Chatham* were charged under different prongs of the statute, this Court found the comparison inapposite and did not comment on the idea further. *Id.*

[15] The legislature chose the same present tense language in the sexual battery statute as previously employed in the rape statute and the criminal deviate statute: "is unaware . . . is occurring." Ind. Code § 35-42-4-1; Ind. Code § 35-42-4-2 (repealed 2014). In cases applying those statutes, victims were found unaware when they were sleeping, halfway asleep, extremely intoxicated, and under the influence of Rohypnol. *Birari v. State*, 968 N.E.2d at 835 (Ind. Ct. App. 2012) (finding sleeping victim of attempted rape unaware where defendant undressed victim and rubbed his bare penis near victim's vagina before she awakened); *Nolan v. State*, 863 N.E.2d 398, 402 (Ind. Ct. App. 2007) (finding "halfway asleep" victim sufficiently unaware to satisfy criminal deviate conduct statute); *Filice v. State*, 886 N.E.2d 24, 33 (Ind. Ct. App. 2008) (finding victim in "Rohypnol-induced state of unawareness" during attempted rape), *trans. denied*; *Becker v. State*, 703 N.E.2d 696, 698 (Ind. Ct. App. 1998) (finding sleeping victim unaware when defendant inserted his finger in her vagina).

[16] Importantly, the victims in these rape and criminal deviate conduct cases became aware of the illegal acts after the crime had already been completed. In *Birari*, the victim awoke to find her pants removed and the defendant's erect penis rubbing against her vagina. 968 N.E.2d at 835-36. The crime of attempted rape was complete before she awakened, though the defendant's actions had not yet ceased. *Id.* at 836. In *Nolan*, the victim was "dreaming" and "halfway asleep" when the defendant touched her genitals with his mouth. 863 N.E.2d at 403. Though she became aware of what had happened later, the crime was complete while she was unaware. *Id. Becker* also follows this pattern. 703

N.E.2d at 697-98. The victim awoke to defendant's finger in her vagina, meaning the crime was complete and chargeable before she awoke, though the touching was still occurring. *Id.*

[17] Based on this precedent, we conclude the unaware prong of the sexual battery statute applies when the victim lacks knowledge or acquaintance of the touching or is unconscious of the touching *as the touching is occurring*. Unawareness that the touching is *going to occur* alone does not satisfy the provision.

II. Applying the Sexual Battery Statute

[18] Under our construction of the statute, which requires unawareness contemporaneous with the touching, we cannot say with confidence that the State met its burden of proving sexual battery beyond a reasonable doubt. Our standard of review in sufficiency of the evidence arguments is well settled. "We consider only the probative evidence and reasonable inferences supporting the verdict, without reweighing evidence or reassessing witness credibility. *Mi.D. v. State*, 57 N.E.3d 809, 811 (Ind. 2016). We will affirm "unless no reasonable factfinder could conclude the State proved [the defendant] guilty beyond a reasonable doubt." *Id.* "[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Id.* (quoting *Pickens v. State*, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

[19] C.U. testified that she felt two of the touchings, indicating that she was concurrently aware of them. Tr. Vol. II, p. 58-59. Neither of these touchings

can form the basis of a sexual battery conviction. Nevertheless, the State presented these two touchings and erroneously told the jury this evidence proved sexual battery. Though Gliva potentially touched C.U. a third time, we cannot say with certainty that the jury relied only on this act in finding Gliva guilty of sexual battery. We therefore are unconvinced that an inference may reasonably be drawn from the evidence to support the verdict. *See, e.g., Webb v. State*, 147 N.E.3d 378, 387 (Ind. Ct. App. 2020) (holding evidence insufficient where it was too vague and inconsistent to establish defendant as shooter in attempted robbery resulting in serious bodily injury).

[20] The evidence is sufficient, however, to support a conviction of misdemeanor battery. "A person who knowingly or intentionally . . . touches another person in a rude, insolent, or angry manner . . . commits battery, a Class B misdemeanor." Ind. Code § 35-42-2-1(c)(1). We therefore reverse and remand with instructions to enter judgment for battery as a class B misdemeanor.

[21] The judgment is reversed and remanded for further proceedings consistent with this opinion.

Mathias, J., and Tavitas, J., concur.