

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brandon Fisher,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

April 21, 2022

Court of Appeals Case No.
21A-CR-1795

Appeal from the Hamilton
Superior Court

The Honorable Jonathan M.
Brown, Judge

Trial Court Cause No.
29D02-1907-F3-5923

Bailey, Judge.

Case Summary

- [1] Brandon Fisher appeals his convictions for two counts of Rape, as Level 3 felonies.¹ He presents the issue of whether the convictions are supported by sufficient evidence. We reverse the conviction for Rape as alleged in Count 1 (sexual intercourse) and affirm the conviction for Rape as alleged in Count 3 (other sexual conduct). We remand with instructions to vacate the conviction and concurrent sentence for one count of Rape.

Facts and Procedural History

- [2] S.D. suffers from narcolepsy, a sleep disorder causing excessive daytime sleepiness. She takes a prescription stimulant during the day, which has as a side effect that she sometimes “crashes” at night, experiencing “exhaustion.” (Tr. Vol. II, pg. 36.)
- [3] In 2017, S.D. began a sexual relationship with Fisher. On one occasion, S.D. anticipated that she might fall asleep during intercourse and she told Fisher that he could continue engaging in intercourse if she fell asleep. On some other occasions, S.D. consented to Fisher recording some of their sexual activities.
- [4] In March of 2019, S.D. ended her relationship with Fisher. Thereafter, Fisher sent S.D. a series of text messages, a video, and multiple screenshots that

¹ Ind. Code § 35-42-4-1(a)(2).

caused S.D. to suspect that Fisher had posed S.D. and engaged her in various sexual activities when S.D. was not aware that the activity was occurring. Fisher claimed that he and S.D. had made “amazing porn that I always wanted to show you.” (Exhibits, pg. 20.) One text from Fisher advised S.D.: “And I don’t think you realize that you don’t always pass out. Often you black out. Difference is you are still active and responsive.” (*Id.* at 36.) Fisher “thanked” S.D. for the “extra night exercises.” (*Id.* at 38.)

[5] S.D. took her phone to the local prosecutor’s office and shared the communications from Fisher. On July 19, 2019, the State charged Fisher with three counts of Rape, alleging that S.D. had been “unaware” when Fisher performed sexual intercourse (Count 1), anal penetration (Count 2), and penetration by a sexual device (Count 3). *See* Ind. Code § 35-42-4-1(a)(2). A bench trial was conducted on June 29 and 30, 2021, at which the State submitted photographic evidence authenticated by S.D.’s testimony. The trial court found Fisher guilty of Counts 1 and 3 and acquitted him of Count 2. Fisher was given concurrent sentences of eight years, with four years suspended and four years to be served on work release. Fisher now appeals.

Discussion and Decision

[6] Fisher contends that insufficient evidence supports his convictions. In particular, he challenges the evidence of S.D.’s state of awareness. According to Fisher, S.D. simply speculated as to whether she was awake or asleep in the

subject photographs. He argues that, if S.D. was not asleep, she was not unaware that the activity depicted was taking place.

[7] “A person may be convicted of an offense only if his guilt is proved beyond a reasonable doubt.” I.C. § 35-41-4-1(a). Here, the State charged Fisher with violating Indiana Code Section 35-42-4-1(a)(2), which provides:

Except as provided in subsection (b), 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 (as defined in IC 35-31.5-2-221.5) when: ...

(2) the other person is unaware that the sexual intercourse or other sexual conduct (as defined in IC 35-31.5-2-221.5) is occurring[] commits rape, a Level 3 felony.

Indiana Code Section 35-31.5-2-221.5 defines “other sexual conduct” as “an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.”

[8] In reviewing for sufficient evidence, we neither reweigh evidence nor judge credibility of witnesses. *Bowles v. State*, 737 N.E.2d 1150, 1151-52 (Ind. 2000). Moreover, “[w]e view all evidence and reasonable inferences drawn therefrom in a light most favorable to the conviction.” *Walker v. State*, 998 N.E.2d 724, 726 (Ind. 2013). We affirm if there is substantial evidence of probative value from which a reasonable factfinder could find the defendant guilty beyond a reasonable doubt. *McElfresh v. State*, 51 N.E.3d 103, 107 (Ind. 2016).

Furthermore, it is well-established that the State can meet its burden through the uncorroborated testimony of a single witness. *Sallee v. State*, 51 N.E.3d 130, 135 (Ind. 2016). This is so “even when that witness is the victim.” *Bailey v. State*, 979 N.E.2d 133, 135 (Ind. 2012).

[9] At the outset, we observe that Fisher appears to conflate “asleep” with the statutory element of “unaware.” Indeed, much of the testimony elicited from S.D. focused upon whether she was awake or asleep at the time a particular photograph or videorecording was made. But in the prosecution of a sexual conduct crime, the term “unaware” includes, but is not limited to, unconsciousness. *Filice v. State*, 886 N.E.2d 24, 33-34 (Ind. Ct. App. 2008), *trans. denied*. “Unaware” has been understood to mean “not aware, lacking in knowledge or acquaintance, or unconscious.” *Nolan v. State*, 863 N.E.2d 398, 402 (Ind. Ct. App. 2007), *trans. denied*. Although sleep is understood to be a cause of unawareness, “our supreme court has suggested that a victim’s illness and intoxication may lead to her being sufficiently ‘unaware’ for the rape statute to apply, even if the victim never loses consciousness.” *Id.* (citing *Bryant v. State*, 644 N.E.2d 859, 860 n.1 (Ind. 1994)).

[10] During her testimony, S.D. examined each of the State’s photographic exhibits in turn. S.D. identified herself as the subject in the photographs and she testified to her belief or “feeling” that she had been asleep. (Tr. Vol. II, pg. 115.) The photographs did not focus upon facial features; thus, S.D. admittedly was unable to say if her eyes had been opened or closed in the photographs. During direct and cross-examination, S.D. was asked to explain any other

photographic details supporting her belief that she had been asleep. Ultimately, however, S.D. conceded that she was not able to definitively say whether she was awake or asleep in some of the photographs. According to Fisher, the State failed in its burden of proof as to each of his convictions because the photographs were not probative of S.D.'s state of awareness. However, this contention ignores the testimony that S.D. provided based upon her own recollection of her history of giving consent to sexual activities with Fisher. S.D. testified that she had given limited consent to sexual intercourse but never at any time consented to Fisher's use of a sexual device in the manner portrayed.

[11] S.D. testified that she had, on one occasion, told Fisher "he could finish [intercourse] if I had fallen asleep. One time." (*Id.* at 50.) She explained that she was in a state of post-surgery "exhaustion" and "couldn't take the fighting, and it was just easier if I could just get some sleep versus deal with the tantrum or a fight to escalate." (*Id.*) Upon the trial court's questioning, S.D. clarified that she had given Fisher permission to continue with intercourse if she fell asleep "one time" and one time only. (*Id.*) S.D. examined the photographs that depicted intercourse and explained reasons for her perception that she was sleeping. Ultimately, however, S.D. could not testify that the photographs depicted intercourse on an occasion other than the one in which she gave consent. Because the State did not establish beyond a reasonable doubt that Fisher caused S.D. to submit to intercourse when she was unaware that it was happening, Count 1 is unsupported by sufficient evidence.

[12] Count 3 involved an allegation of penetration by an object, specifically, a suction device intended for male enhancement. The State’s photographic evidence pertaining to that allegation, State’s Exhibit 1B, depicts a suction device cupped around a vulva and exerting sufficient force to extract vaginal secretions. S.D. testified: “I was not awake for that penis pump to go on like that.” (*Id.* at 116.)

[13] She explained the bases for her belief. She recognized the device and recalled that she had used it before, in a different manner and while she was in a different position. S.D. explained that the device had been purchased for Fisher and “he did not like the suction,” so he “wanted to try it on [S.D.]” (*Id.* at 79.) With the device in her own control, S.D. “would allow the suction to do just a little bit.” (*Id.*) S.D. denied that she had ever given Fisher consent to “attach the device to [her] in that way.” (*Id.* at 79.) Given her familiarity with the device, S.D. opined that the activity depicted in the photograph would have been “excruciatingly painful” and she reiterated: “I would never have allowed that to happen.” (*Id.* at 117.)

[14] Even if we agreed with Fisher that State’s Exhibit 1B is not independently probative of S.D.’s state of wakefulness, the factfinder heard S.D.’s testimony that she would never have submitted to the conduct during wakefulness. Moreover, Fisher’s own communications to S.D. indicated that she sometimes experienced what Fisher described as a “black out.” (Exhibits, pg. 36.) From this evidence, the factfinder could reasonably conclude that S.D. was “unaware” of the occurrence of the “other sexual conduct” alleged in Count 3.

Conclusion

- [15] The State presented sufficient evidence to support Fisher's conviction of Rape as alleged in Count 3. However, Fisher's conviction for Rape as alleged in Count 1 is not supported by sufficient evidence.
- [16] Affirmed in part; reversed in part; and remanded.

Najam, J., and Bradford, C.J., concur.