

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Olivier Dusabe,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

September 2, 2022

Court of Appeals Case No.  
21A-CR-2841

Appeal from the Marion Superior  
Court

The Honorable Hugh Patrick  
Murphy, Magistrate

Trial Court Cause No.  
49D27-1903-F3-12273

**Crone, Judge.**

## Case Summary

- [1] Olivier Dusabe appeals his conviction, following a jury trial, for level 3 felony attempted rape. He asserts that the State presented insufficient evidence to support his conviction. Finding the evidence sufficient, we affirm.

## Facts and Procedural History

- [2] K.D., a twenty-six-year-old female from Iowa, and a female named Jennifer from Ohio connected on Tinder and began communicating. They decided to meet in Indianapolis so K.D. rented an Airbnb in Indianapolis for a weekend in February 2019. K.D. and Jennifer arrived in Indianapolis on February 8, 2019. The women drank some wine and then took an Uber to downtown Indianapolis around 11:45 p.m.
- [3] Jennifer had an acquaintance, Dusabe, who lived in Indianapolis. Dusabe sent a text message to Jennifer indicating that he was at Tini's bar downtown, so Jennifer and K.D. went there and met up with Dusabe and his coworkers. While everyone was drinking and socializing, Jennifer and Dusabe asked K.D. what she wanted to drink. She asked for a "Crown and Pepsi." Tr. Vol. 2 at 150. Dusabe handed the drink to Jennifer, who then handed it to K.D. The group went upstairs to the dance floor, but K.D. began to feel uncomfortable, so she stood to the side and finished her drink. She then did two shots of alcohol with Jennifer and also drank a different drink that someone else had ordered for her. K.D. and Jennifer got in an Uber and returned to the Airbnb around 2:00 a.m. on February 9.

[4] At that point, K.D.'s memory became "foggy" and "patchy," and all she could remember about returning was entering the Airbnb and coming into the hallway. *Id.* at 157. Her next memory was waking up on the bed on her right side facing the wall, and the feeling of someone being "really close" to her back. *Id.* She felt "warmth and pressure" and "somebody's legs against [her] legs." *Id.* at 161. The leggings and underwear she had been wearing were pushed down below her knees. K.D. could feel "something between [her] legs by [her] vagina." *Id.* at 163. She felt this something touch the "outside" of her vagina. *Id.* She reached behind her and felt a "bald head." *Id.* at 158. She then heard Dusabe tell her to "just relax." *Id.* at 161. K.D. could feel that Dusabe was "trying to put something inside of [her]." *Id.* at 163. K.D. quickly jumped out of bed and went into the living room. Dusabe followed her out of the bedroom while "pulling up" his green boxer shorts. *Id.* at 165. The commotion awakened Jennifer, and she told Dusabe that he needed to leave. K.D. told Jennifer that she had been raped, and Jennifer called the police. After police arrived, K.D. went to the hospital.

[5] The State charged Dusabe with level 3 felony rape and level 4 felony burglary. A jury trial was held in September 2021. The first morning of trial, the court dismissed the burglary charge on the State's motion. At the close of the evidence, the State requested a final jury instruction on attempted rape, which the trial court gave over Dusabe's objection. The jury found Dusabe guilty of level 3 felony attempted rape. The trial court imposed a nine-year sentence,

with six years suspended. The court ordered Dusabe's executed time to be served in community corrections. This appeal ensued.

## Discussion and Decision

- [6] Dusabe challenges the sufficiency of the evidence supporting his conviction. In reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Buti v. State*, 185 N.E.3d 433, 436 (Ind. Ct. App. 2022). It is unnecessary for the evidence to overcome every reasonable hypothesis of innocence. *Id.* "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt." *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009).
- [7] To convict Dusabe of level 3 felony attempted rape, the State was required to prove that he knowingly or intentionally engaged in conduct that constituted a substantial step toward sexual intercourse with K.D. when she was unaware that the sexual intercourse was occurring. Ind. Code §§ 35-42-4-1(a)(2), 35-41-5-1. "Sexual intercourse" means an act that includes any penetration of the female sex organ by the male sex organ. Ind. Code § 35-31.5-2-302. Dusabe asserts that the State failed to prove that he possessed the requisite intent to commit rape and that he took a substantial step toward committing rape. We disagree.

[8] It is well established that a person’s intent “may be determined from their conduct and the natural consequences thereof” and that “intent may be inferred from circumstantial evidence.” *Birari v. State*, 968 N.E.2d 827, 835 (Ind. Ct. App. 2012), *trans. denied*. And “[a] substantial step is any overt act beyond mere preparation and in furtherance of the intent to commit the offense.” *Newville v. State*, 983 N.E.2d 602, 605 (Ind. Ct. App. 2013). K.D. testified that she awoke to Dusabe pressing his bare legs and lower body against her naked lower body from behind. Her leggings and underwear had been pushed down below her knees, and Dusabe had removed, or at least pulled down, his underwear. K.D. could feel Dusabe push a part of his body between her thighs, touching the outside of her vagina, as if he was “trying to put something inside of [her].” Tr. Vol. 2 at 163. He instructed her to “just relax” before she realized what was happening, and she jumped up and “freaked out.” *Id.* at 161, 164.

[9] Dusabe claims that this evidence was insufficient to prove both his intent to commit rape and that he took a substantial step in furtherance of committing rape because K.D. did not specifically identify his penis as the body part that touched the outside of her vagina, and thus there was insufficient evidence that he attempted to “penetrate K.D.’s vagina” with his penis. Appellant’s Br. at 11. Dusabe is mistaken that such specificity is required.

[10] In *Tatum v. State*, 485 N.E.2d 138 (Ind. Ct. App. 1985), *trans. denied*, we affirmed an attempted rape conviction based upon less evidence than was presented here. The evidence in *Tatum* revealed that the defendant went into a thirteen-year-old’s bedroom, sat on top of her, pushed her shoulders down, and

put his hand over her mouth, then ran out of the room with his pants down after the victim kicked him. *Id.* We observed:

The fact that a defendant may not attempt to, or is ultimately unsuccessful in, removing his victim's clothing, removing his own clothing, or removing his penis from his clothing does not lead to the conclusion that such defendant lacked the requisite intent or that he did not take a substantial step toward committing the offense of rape.

*Id.* at 139. Rather, it is sufficient if the trier of fact can “logically find beyond a reasonable doubt that the attacker intended to accomplish penetration [when the victim was unaware that sexual intercourse was occurring<sup>1</sup>] and that he took a substantial step toward accomplishment of that result.” *Id.*

[11] Here, Dusabe removed his own underwear, pressed his naked body against a sleeping woman's naked body, and pushed a body part between her thighs, touching her vagina. Dusabe's conduct and the natural consequences thereof support the jury's conclusion that he intended to accomplish penetration of K.D.'s vagina with his penis when she was unaware that sexual intercourse was occurring, and that he took a substantial step toward accomplishment of that result. Indeed, contrary to Dusabe's claim that “K.D.'s vague descriptions” of his actions were insufficient, *see* Appellant's Br. 11, her testimony was more

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<sup>1</sup> Unlike in this case where it was alleged that K.D. was unaware that sexual intercourse was occurring, the defendant in *Tatum* was charged and convicted of knowing or intentionally engaging in conduct that constituted a substantial step toward sexual intercourse with another person when the other person is compelled by force or imminent threat of force. *See* Ind. Code § 35-42-4-1(a)(1).

than enough to demonstrate that he “assumed a position consistent with a plan to accomplish penetration.” *Tatum*, 485 N.E.2d at 139. The State presented sufficient evidence that Dusabe committed attempted rape by acting with the required culpability and taking a substantial step toward completing rape. Accordingly, we affirm his conviction.

[12] Affirmed.

May, J., and Weissmann, J., concur.