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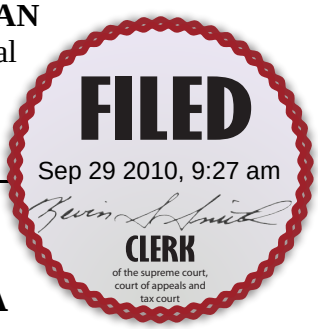


# IN THE COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| PHILLIP LAWTON, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 71A04-1004-CR-267 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William H. Albright, Senior Judge
Cause No. 71D02-0909-FB-106

**September 29, 2010**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**NAJAM, Judge**

## STATEMENT OF THE CASE

Phillip Lawton appeals his conviction for Rape, as a Class B felony, following a jury trial. Lawton presents a single issue for our review, namely, whether the State presented sufficient evidence to support his conviction.

We affirm.

## FACTS AND PROCEDURAL HISTORY

During the evening hours of September 12, 2009, and the early morning hours of September 13, R.G. and her live-in boyfriend, K.M., were hanging out with Lawton, who was their roommate at the time, and others. The group started out the evening at a church function and later went to two bars, and R.G., K.M., and Lawton each consumed significant amounts of alcohol. When the three went home, K.M. passed out on the living room floor, and R.G., intoxicated, went to sleep in her bedroom. At some point early in the morning, Lawton entered R.G.'s bedroom, removed her pants and underwear, and performed oral sex on her. R.G. was asleep, but she "vaguely remember[ed] him with his head down" by her vagina. Transcript at 219. After a minute or two, R.G. woke up to find Lawton having sexual intercourse with her. R.G. pushed Lawton off of her and said, "What the fuck do you think you're doing?" Id. at 223. Lawton stood up and screamed at R.G., "You told me I could, you told me I could!" Id. But R.G. had not given any consent to Lawton for either oral sex or vaginal intercourse.

The State charged Lawton with rape, as a Class B felony. At the conclusion of trial, a jury found Lawton guilty as charged. The trial court entered judgment and sentence accordingly. This appeal ensued.

## DISCUSSION AND DECISION

Lawton contends that the State did not present sufficient evidence to support his conviction. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove rape as charged, the State was required to show that Lawton knowingly had sexual intercourse with R.G. when R.G. was unaware that sexual intercourse with Lawton was occurring. See Ind. Code § 35-42-4-1. Lawton's sole contention on appeal is that the State did not prove beyond a reasonable doubt that R.G. was unaware that Lawton was having sexual intercourse with her. While "unaware" has not been defined by the legislature, we have held that "'[u]naware' is defined as 'not aware: lacking knowledge or acquaintance: UNCONSCIOUS.'" Becker v. State, 703 N.E.2d 696, 698 (Ind. Ct. App. 1998) (quoting Webster's 3d New Int'l Dictionary 2483 (1986 ed.)).

Circumstances in which we have found a victim to have been "unaware" include where the victim was asleep, as "a person is unconscious during sleep." Id. In addition, we found a female victim unaware when she had "lost consciousness due to inebriation." Glover v. State, 760 N.E.2d 1120, 1124 (Ind. Ct. App. 2002) (adopting the Becker definition of "unaware" to the corresponding provision of the rape statute, I.C. § 35-42-4-

1(a)(2)), trans. denied. And 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. See Bryant v. State, 644 N.E.2d 859, 860 n.1 (Ind. 1994).

Lawton contends that R.G. was not "unaware" under the statute because there was "no evidence that R.G. was slurring her words, staggering, falling asleep, or passing out." Brief of Appellant at 14. In addition, Lawton directs us to "credible evidence that demonstrated that R.G. was awake and aware at the time the intercourse occurred." Id. But the State presented evidence that R.G. was asleep and unable to consent to intercourse with Lawton. While R.G.'s testimony regarding when she woke up was somewhat equivocal, it was sufficient to support the jury's determination that R.G. was "unaware" at the time of the incident. In particular, R.G. testified on cross-examination as follows:

> Q: What I'm asking you, do you recall my asking you about what woke you up, and you said, "I felt his head down there."
>
> A: But that didn't really wake me up at that time. I was awake, but I wasn't awake. I wasn't aware of what was going on.
>
> Q: You weren't aware of what was going on?
>
> A: No.
>
> Q: Alright. But you did say to the question about what woke you up, you said, "His head was down there."
>
> A: No. It woke me up, but it didn't.
>
> * * *

> Q: . . . And then you said: "I didn't know if it was a dream or not, or if it was actually happening." But that's what woke you up, is that correct?
>
> A: Right, but it didn't totally wake me—

Transcript at 256-57.

The evidence in this case is similar to that in Nolan v. State, 863 N.E.2d 398, 403 (Ind. Ct. App. 2009), trans. denied, where the victim testified that she "was dreaming" and "halfway asleep" when Nolan entered the room and first engaged K.M. on her bed. The victim further described her mental state at that time with a rhetorical question: "You ever been in a dream state where you're half awake and half asleep[?]" Id. And the evidence showed that the victim gave no verbal or other consent to the defendant at any point, indicating a lack of awareness on her part as to the situation. See id. We held that the evidence was sufficient to prove that the victim was incapable of voluntarily giving the defendant her consent. See id.

Likewise, here, R.G.'s testimony indicates that she was either asleep or half-asleep and in a "dream-like" state when Lawton initiated oral sex and vaginal intercourse with her. R.G. testified that she was "drunk" when she went to bed that morning. Transcript at 218. The evidence shows that R.G. was incapable of giving her consent to intercourse. Lawton's contention that R.G. was awake and/or aware at the time of the rape amounts to a request that we reweigh the evidence, which we will not do. The State presented sufficient evidence to prove that R.G. was incapable of giving her consent and, therefore, that Lawton raped R.G.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.