IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOSEPH GEORGE SOLOMON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13589 Trial Court No. 4GA-15-00010 CR MEMORANDUM OPINION No. 7046 — February 22, 2023

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Benjamin Seekins, Judge.

Appearances: Susan Orlansky, Reeves Amodio LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge ALLARD.

In 2014, Joseph George Solomon sexually assaulted a highly intoxicated woman who was incapacitated when the assault began. A jury found Solomon guilty of two counts of first-degree sexual assault (forcible anal and vaginal penetration) and two counts of second-degree sexual assault (anal and vaginal penetration while the victim

was incapacitated).[1] At sentencing, the verdicts for second-degree sexual assault merged with the verdicts for first-degree sexual assault, resulting in one conviction for first-degree sexual assault for each type of penetration.

On appeal, Solomon argues that there was insufficient evidence presented at trial to support his conviction for first-degree sexual assault for forcible vaginal penetration of the victim. Specifically, Solomon argues that the evidence was insufficient to support a finding that the victim was aware of the vaginal penetration at the time it occurred. (Solomon concedes that there was sufficient evidence that the victim was aware of the anal penetration.)

Having carefully reviewed the record, we agree that, even viewing the evidence in the light most favorable to upholding the verdict, the evidence was insufficient to support the challenged conviction. We thus vacate Solomon's first-degree sexual assault conviction for forcible vaginal penetration, and we remand this matter to the superior court with instructions to enter a judgment of conviction for second-degree sexual assault for that count instead. Because this change affects the presumptive ranges that apply at sentencing, we also vacate Solomon's sentence and instruct the superior court to conduct a full resentencing hearing.[2]

Why we conclude that there was insufficient evidence to support Solomon's conviction for forcible vaginal penetration

To prove a defendant guilty of first-degree sexual assault under former AS 11.41.410(a)(1), the State was required to prove beyond a reasonable doubt that (1) the defendant engaged in sexual penetration with the victim "without consent," and

[1] Former AS 11.41.410(a)(1) (2014) and former AS 11.41.420(a)(3) (2014), respectively.

[2] We note that Solomon also challenges various aspects of his sentencing in this appeal. The parties agree that, because Solomon will be resentenced, these claims are moot.

(2) that the defendant acted in reckless disregard of the fact that the sexual penetration was "without consent."[3] Under former AS 11.41.470(8)(A), "without consent" meant that the victim "with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone."[4] Thus, a sexual assault under former AS 11.41.410(a)(1) occurs only if the victim is "coerced," which in turn requires that the victim is alert enough to perceive the defendant's use of force.

In contrast, to prove second-degree sexual assault under former AS 11.41.420(a)(3), the State was required to prove beyond a reasonable doubt that the defendant sexually penetrated the victim knowing that the victim was "incapacitated" or "unaware that a sexual act is being committed." "Incapacitated" in this context means "temporarily incapable of appraising the nature of one's own conduct or physically unable to express unwillingness to act."[5]

In the current case, Solomon does not contest that the evidence presented at trial was sufficient to support his conviction for the forcible anal penetration of the victim — *i.e.*, for that count of first-degree sexual assault. He also does not contest that

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[3] *See Reynolds v. State*, 664 P.2d 621, 625 (Alaska App. 1983).

[4] We note that the legislature has since changed the elements of first-degree sexual assault and the statutory definition of "without consent." Effective January 1, 2023, a person commits first-degree sexual assault under AS 11.41.410(a)(1)(A)(i) if "the offender engages in sexual penetration with another person . . . without consent of that person by . . . the use of force or the express or implied threat of force against any person or property." The term "without consent" is now defined as "under the totality of the circumstances surrounding the offense, there was not a freely given, reversible agreement specific to the conduct at issue; in this paragraph, 'freely given' means agreement to cooperate in the act was positively expressed by word or action." AS 11.41.470(10); *see also* AS 11.41.420(a)(5) ("An offender commits the crime of sexual assault in the second degree if . . . under circumstances not proscribed under AS 11.41.410, the offender engages in sexual penetration with another person without consent of that person.").

[5] AS 11.41.470(2).

the evidence presented at trial was sufficient to support a conviction for second-degree sexual assault for vaginally penetrating her when she was incapacitated. But he argues that there was insufficient evidence presented at trial to establish that the vaginal penetration of the victim was accomplished by "coercion" because, according to Solomon, the evidence failed to show that the victim was aware of the vaginal penetration at the time it occurred.

When we review a claim of insufficient evidence on appeal, we are required to view the evidence — and all reasonable inferences to be drawn from the evidence — in the light most favorable to upholding the jury's verdict.[6] We then ask whether, viewing the facts in that light, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7]

Because Solomon's sufficiency of the evidence argument hinges on the particularities of the sexual assault, we describe it in detail. Here, the victim, E.H., testified that she was "beyond" intoxicated on the night of the assault. She testified that she was drinking heavily at her friend's house when she fell asleep on her friend's couch. She woke up to being sexually assaulted by Solomon on her friend's bed. E.H. testified that, when she woke up, she was bent over the bed with Solomon behind her, penetrating her anus with his penis. She had no idea how she got to the bedroom; nor did she have any memory of any sexual activity prior to waking up. E.H. testified that she screamed for her friend. In response, Solomon hit E.H. in the back with his fist, causing bruises, and he covered her mouth with his hands. Solomon also told her that he was "cumming" — *i.e.*, ejaculating.

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[6] *Moore v. State*, 298 P.3d 209, 217 (Alaska App. 2013); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

[7] *Jackson*, 443 U.S. at 319.

On cross-examination, the defense attorney questioned E.H. about whether she ever felt Solomon's penis in her vagina. The following exchange then took place:

> *Defense attorney*: So are you certain that that is the first time you realized what was going on, he was penetrating you anally?
>
> *E.H.*: Yes.
>
> *Defense attorney*: Okay. Did you feel his penis in your vagina?
>
> *E.H.*: No, I did not.
>
> *Defense attorney*: Did you tell the troopers that you felt his penis in your vagina?
>
> *E.H.*: If I did, I — I — I can't say I did because I don't know. I just —
>
> *Defense attorney*: If you did?
>
> *E.H.*: — know that I was ripped up on the inside and that's what they told me at my examination.
>
> *Defense attorney*: If you said, I felt his penis in my vagina, were you telling the truth?
>
> *E.H.*: I — I — I don't recall saying that but I do know he was in me, sexually assaulting me.
>
> *Defense attorney*: Do you recall at any point during the sexual assault of having vaginal sex?
>
> *E.H.*: No, I can't say I did.

E.H. remained consistent throughout the trial that she woke up to Solomon anally penetrating her, and that she did not feel him vaginally penetrating her. E.H. suspected, however, that she had been vaginally penetrated because she experienced pain in both her anus and her vagina after the assault. The medical examination confirmed that she had been vaginally penetrated. E.H. had bruises to her vaginal area

and a laceration on the side of her vaginal wall.[8] Solomon's sperm was also found on swabs taken from both her vagina and her anus.[9]

E.H.'s testimony about Solomon anally penetrating her was corroborated by her friend, an eyewitness to part of the sexual assault. E.H.'s friend testified that she went looking for E.H. when she woke up. She looked in her bedroom and saw Solomon with E.H. bent over the bed; Solomon was holding E.H.'s mouth and penetrating E.H. from behind. When the friend asked what was going on, Solomon got up, pulled up his pants, pushed the friend against a door in the hallway, and ran past her. The friend testified that as Solomon pushed past her, he threw a bottle of alcohol and said "here's your payment."

E.H. was also interviewed at the hospital by state troopers and a forensic nurse. The forensic nurse testified that E.H. told the troopers that she fell asleep at her friend's house after drinking heavily and that she "woke up to someone penetrating her, a penis attempting to penetrate her anus, and that's what woke her up." This was consistent with E.H.'s trial testimony.

On appeal, the State points to another part of the forensic nurse's testimony that was inconsistent with E.H.'s trial testimony. Specifically, the nurse was asked whether she remembered E.H. telling the trooper that Solomon said "he was

[8] On cross-examination, the forensic nurse who conducted the medical examination testified that the injuries to the vagina were consistent with both nonconsensual and consensual sex.

[9] DNA testing established that the sperm belonged to Solomon by a reasonable degree of forensic certainty. The crime lab witness testified that the "deduced genetic profile" from the anal and vaginal swabs indicated that the chances the DNA came from someone other than Solomon was "1 in 11 quintillion for [the] Caucasian population, 1 in 2 quintillion for [the] African-American population, 1 in 76 trillion for [the] Athabaskan population, 1 in 734 trillion [for the] Inupiat population, and 1 in 1 quadrillion [for the] Yupik population."

[ejaculating] before he rolled her onto her stomach."[10] The nurse replied that she remembered having this "noted somewhere." She also testified that, although she believed her notes were "accurate," they were not "verbatim" because they were not in quotes. After reviewing her notes to refresh her recollection, the nurse testified that E.H. indicated that she was "laying on her back when he said he was [ejaculating]." The defense attorney asked if that position was "indicative of either vaginal or anal sex." The nurse testified that "it could be either."

E.H. was later recalled as a witness and questioned about her alleged statement to the trooper and the forensic nurse that she was lying on her back. E.H. testified that she had no memory of making such a statement. E.H. testified that she remembered Solomon saying that he was ejaculating, but she was adamant that Solomon was penetrating her from behind when he made this statement and that she was bent over the bed and lying on her stomach, not her back.

During closing argument, the defense attorney misrepresented the trial evidence involving E.H.'s prior statements. The attorney asserted that E.H. "remembered Joe [Solomon] say he was [ejaculating] and [she] felt his penis inside her vagina." But, contrary to the attorney's assertion, E.H. never testified that she felt Solomon's penis in her vagina. At trial, E.H. was consistent that she woke up to being anally penetrated and she did not feel the vaginal penetration while it was happening. It was the *forensic nurse* who testified that E.H. reported being on her back when Solomon said he was ejaculating and that he then "rolled [her] over to her stomach." But the nurse never testified that E.H. reported being vaginally penetrated in that position. To the contrary, the nurse testified that the position (on one's back) was "indicative of

[10] We note that only the forensic nurse testified to this alleged statement. The trooper who was present at the interview testified at trial but did not testify about any of E.H.'s statements. The recording of E.H.'s statements was also not played for the jury.

either vaginal or anal sex" and that E.H. reported being woken up by "a penis attempting to penetrate her anus."

On appeal, the State relies on the defense attorney's erroneous assertion that E.H. previously reported feeling Solomon's penis in her vagina as evidence supporting Solomon's conviction for first-degree sexual assault involving vaginal penetration. But statements made by an attorney during argument are not evidence.[11]

The State also points to Solomon's trial testimony as support for the challenged conviction. At trial, Solomon took the stand and testified that he had consensual vaginal sex with E.H. He also testified that she was awake during the sexual encounter and that she had propositioned him to have sex with her in exchange for a bottle of whiskey. On appeal, the State argues that the jury could have believed part of Solomon's testimony — *i.e.*, the jury could have believed that E.H. was awake during the entire sexual encounter — but disbelieved the other part — *i.e.*, the jury could have disbelieved Solomon's claim that E.H. consented to have sex. But the test for sufficiency is also one of rationality. That is, the question before this Court is whether, viewing all the facts in the light most favorable to upholding the jury's verdict, "any *rational* trier of fact" could conclude beyond a reasonable doubt that Solomon committed all elements of first-degree sexual assault.[12]

In order for the jury to accept Solomon's testimony that E.H. was awake during the vaginal penetration, it would have to reject most, if not all, of E.H.'s

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[11] *See* Alaska Criminal Pattern Jury Instruction 1.33 (2012) (explaining that lawyers argue the case to jurors at the end of trial but the arguments "are not evidence" and cannot be considered as evidence).

[12] *Jackson*, 443 U.S. at 319 (emphasis altered). We note that "any rational trier of fact" is also described in our case law as "a fair-minded juror exercising reasonable judgment" or "a reasonable juror." *See, e.g.*, *Moore v. State*, 298 P.3d 209, 217 (Alaska App. 2013); *Collins v. State*, 977 P.2d 741, 747 (Alaska App. 1999).

testimony, including the testimony the State relied on to prove beyond a reasonable doubt that the vaginal penetration was "coerced by the use of force."

Having reviewed the entire trial transcript, we conclude that, even viewing the evidence in the light most favorable to upholding the verdict, there was insufficient evidence presented at trial from which a rational trier of fact could find that the State had proved beyond a reasonable doubt that Solomon was guilty of first-degree sexual assault with regard to the vaginal penetration.

Conclusion

The conviction for first-degree sexual assault in Count I is REVERSED, and this case is remanded to the superior court to enter a conviction of record for second-degree sexual assault in Count III and to resentence Solomon.