IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 07/12/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 09-0893
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication
NEPHI JOSEPH KEMPER, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006159-001 DT

The Honorable John R. Ditsworth, Judge

VACATED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
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Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Glendale
By Louise Stark, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Nephi Joseph Kemper appeals his conviction for sexual assault, a class 2 felony in violation of Arizona Revised

Statutes ("A.R.S.") section 13-1406. In a simultaneously-filed Opinion, we conclude that a jury instruction given at the conclusion of Kemper's trial constituted fundamental error. In this memorandum decision, we consider whether Kemper has established prejudice arising from that error. Concluding that he has done so, we vacate his conviction and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

¶2 The victim and her boyfriend, David, were drinking with a group of people at a restaurant. The group included Kemper, whom the victim had known for approximately five years, but never had a physical relationship with, and a man named Tim. At closing time around 2:00 a.m., the victim and David decided to get a room at the Embassy Suites because they had consumed too much alcohol to drive. They invited others in the group to join them. Kemper and Tim accepted their invitation.

¶3 David rented a suite that had a living room with a pullout bed and a separate bedroom. When the victim retired to the bedroom, she closed the door. She slept next to David in her underwear. According to the victim, she awakened suddenly, initially believing David was trying to remove her underwear. She then realized Kemper was pulling on her underwear and saw that he had his head between her legs and his mouth on her genitals. She began hitting Kemper and screaming at him.

¶4 A week after the incident, the victim placed a confrontation call to Kemper. Kemper stated he knew the victim and David were asleep when he entered their room. He said that when he announced his plan to "crash" in the bed with them, the victim rolled over toward David. Kemper construed this as a sign he could join them. Kemper said he later awoke when the victim rolled toward him and "snuggled-up." According to Kemper, while the victim was "snuggled up," he began massaging her shoulders, whereupon the victim responded "a little more physically." He moved her onto her back and massaged her breasts. He then moved between her legs, touching her genitals digitally and orally. Kemper stated several times during the confrontation call that he did not initially realize that his sexual advances were unwanted.

¶5 Trial proceeded on one count of sexual assault. The jury returned a guilty verdict, and Kemper timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶6 Kemper was charged with violating A.R.S. § 13-1406(A), which states:

> A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact

> with any person without consent of such person.

¶7 In our companion Opinion, we hold that the following jury instruction was fundamentally erroneous because it failed to instruct jurors regarding the *mens rea* applicable to the "without consent" element of the crime:

> The crime of sexual assault requires proof that the defendant:
>
> 1. Intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; ***and***
>
> 2. Engaged in the act without the consent of the other person.

Although the State has conceded this instruction was erroneous, it contends that reversal is not required because Kemper has not established prejudice stemming from the improper instruction. We disagree.

¶8 Because Kemper did not object to the jury instruction below, he has the burden of demonstrating both fundamental error and ensuing prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Our Opinion concludes that the instruction was fundamentally erroneous. We thus turn to the question of prejudice.

¶9 The showing required to establish prejudice "differs from case to case." *Id.* at 568, ¶ 26, 115 P.3d at 608. A defendant "must show that a reasonable jury, applying the

appropriate standard of proof, could have reached a different result." *Id.* at 569, ¶ 27, 115 P.3d at 609.

¶10 Kemper's sole defense at trial was that he mistakenly believed the victim had consented to the sexual contact. The singular nature of his defense was highlighted in defense counsel's closing argument, where she told the jury:

> It's clear that Nephi never set out to assault this woman. Yes, he did have oral sex with her. Yes. But throughout he believed that she was giving consent and didn't realize until she started yelling and hitting him, the mistake that had been made.

¶11 The erroneous jury instruction was not tangentially related to Kemper's defense. Rather, it cut to the heart of his defense that he believed the sexual conduct was consensual. We also disagree with the State's contention that any reasonable juror, properly instructed on the "without consent" language contained in A.R.S. § 13-1401 (addressing victims incapable of consent due to, *inter alia,* alcohol or sleep), necessarily would have found Kemper guilty.

¶12 We recognize that the State presented substantial evidence of guilt. The victim has steadfastly maintained she was asleep and did not consent to sexual contact with Kemper. There is admittedly evidence from which a properly-instructed trier of fact *could* conclude the victim was incapable of consenting due to sleep or alcohol impairment. On the other

hand, although Kemper has conceded the victim was asleep when he entered the bedroom, he claimed she rolled toward him and "snuggled up," causing him to believe she had awakened and become a consensual participant in the sexual conduct.

¶13 The existence of prejudice becomes clear when we factor in the State's closing argument, which directly compounded the error in the jury instruction. *See State v. Valverde*, 220 Ariz. 582, 586, ¶ 16, 208 P.3d 233, 237 (2009) (in determining the impact of an erroneous instruction, the court may consider attorneys' statements to the jury). In her initial closing argument, the prosecutor told the jury that the only issue for it to decide was whether Kemper engaged in oral sexual conduct with the victim:

> Now the defendant wants you to believe that this is a big misunderstanding, that this is not a crime, that nothing really happened, just a misunderstanding. I thought one way, she thought another. But you know what? That's not what the law is and that is not what this question is. That is not what the question is.
>
> . . . .
>
> The only question that's left is, did the defendant put his mouth on [the victim's] genitals. That is the question. That's the only question. That is the question that you are left to answer.

Later, in rebuttal closing argument, the prosecutor repeated this theme, stating:

> This is the only question: Did the defendant purposefully put his mouth on [the victim's] genitals? That is the only question.
>
> . . . .
>
> Did the defendant purposefully put his mouth on [the victim's] genitals? It's the only question that's left.

¶14 Given the unique facts of this case, we conclude that, absent the erroneous jury instruction, as compounded by the State's closing argument, a reasonable jury could have reached a different verdict based on the evidence presented. Kemper has thus demonstrated the requisite prejudice.

CONCLUSION

¶15 For the reasons stated, we vacate Kemper's conviction and remand for a new trial.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge