

MEMORANDUM DECISION

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IN THE
Court of Appeals of Indiana

Daryl Dejaun Gardner,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

May 6, 2024

Court of Appeals Case No.
23A-CR-2312

Appeal from the St. Joseph Superior Court
The Honorable Stephanie Steele, Judge

Trial Court Cause No.
71D01-2112-F3-58

Memorandum Decision by Judge Riley
Judges Brown and Foley concur.

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Daryl Gardner (Gardner), appeals his conviction for rape, a Level 3 felony, Ind. Code § 35-42-4-1(a)(2).

[2] We affirm.

ISSUE

[3] Gardner presents this court with one issue, which we restate as: Whether the State proved beyond a reasonable doubt that he knowingly had sexual intercourse with his victim when she was unaware that the sexual intercourse was occurring.

FACTS AND PROCEDURAL HISTORY

[4] In September 2020, sixty-one-year-old T.J. was living with her son, Jeremiah, his wife, Nathalie, and their two children in a home in the 1800 block of North Wilbur Street in South Bend, Indiana. On September 14, 2020, T.J. left home before dinnertime and walked seven blocks to My Place, a bar on Portage Street. T.J. had two or three beers at My Place then went to another bar across the street where she had another beer. T.J. then returned to My Place, where she continued to consume beer. Shortly after 9:00 p.m., My Place surveillance recorded T.J. sitting at the bar, slouched over with her head cradled in her arms. Later, T.J. fell off her barstool and needed assistance getting up off the floor. Around this time, Gardner entered the bar and spoke to some friends. At

9:19 p.m., T.J. walked haltingly out of My Place towards her home. Gardner left My Place shortly thereafter, also on foot.

[5] Gardner encountered T.J. where she had fallen outside near his apartment building in the 1300 block of Kinyon Street. T.J. needed Gardner's assistance to stand and walk, and she was so intoxicated that she could not operate her cellphone. Gardner and T.J. went into Gardner's apartment, where T.J. fell onto the couch after coming out of the restroom. Gardner then had sexual intercourse with T.J. Afterwards, Gardner left T.J. on the steps of his building and walked to the home of his fiancée, who lived nearby.

[6] Nathalie, who had been tracking T.J.'s cellphone and texting with T.J. through the evening, noted that T.J. had been at My Place and an address on Kinyon Street. T.J.'s texts had become "incoherent" as the evening progressed. (Transcript p. 53). Around 10:00 p.m., Nathalie received another incoherent text from T.J. Jeremiah reached T.J. by cellphone, and T.J. indicated that she needed help. Jeremiah tracked T.J.'s cellphone to Gardner's apartment building, where T.J. was still sitting on the front steps. T.J. was disheveled and confused, and there were traces of feces on her jeans. Although Jeremiah had seen T.J. after she had consumed alcohol, he had never seen her in this condition, wherein "it was hard for her to know exactly what was going on." (Tr. p. 84). T.J. could not remember anything that had happened after she returned to My Place the second time. Her memory was "a blur" until she realized that she was sitting on the steps outside of the building. (Tr. p. 68). T.J. complained of pain in her genitals.

[7] Jeremiah had to assist T.J. to his car, at times partially carrying her. Jeremiah called 9-1-1. T.J. was transported to St. Joseph Regional Medical Center where she underwent a sexual assault examination. Approximately four hours after she had ceased consuming alcohol, T.J. had a BAC of .123. DNA not belonging to T.J. was found in swabs of her cervix and external genitalia. Six months later, Gardner was found to have been the source of that DNA.

[8] After the DNA match was made, Detective Brittany Bayles (Detective Bayles) interviewed Gardner. Initially, Gardner told the detective that he had simply gone home from My Place on September 14, 2020, without incident. After being shown T.J.'s photograph, Gardner denied recognizing her. When Detective Bayles suggested that Gardner had encountered T.J., he suddenly remembered T.J. as that "drunk lady." (Exh. 22 at 13:38). Gardner recounted that T.J. was "drunk as hell[,] " that she had fallen outside, and that he had to grab her arm to help her up. (Exh. 22 at 13:07). According to Gardner, T.J. could not walk, and she could not operate her cellphone. On a drunkenness scale of one to ten, Gardner characterized T.J. as being a "ten plus." (Exh. 22 at 12:10). Gardner maintained that he had helped T.J. use her cellphone but that he then left her alone. After Detective Bayles confronted Gardner with the fact that law enforcement already knew that more had occurred, Gardner admitted that T.J. had come into his apartment to use the restroom. Gardner told the detective that T.J. was so intoxicated that he had to help her pull up her pants after she had urinated. When Detective Bayles asked Gardner what else happened, he responded, "That's it! She was too drunk to do anything." (Exh.

22 at 8:55-9:00). Gardner then stated that T.J. had initiated sex with him and that they had sexual intercourse. Gardner acknowledged that after engaging in sexual intercourse with T.J., she still could not operate her cellphone and that he had to help her outside to the apartment building steps where he had left her.

[9] On December 7, 2021, the State filed an Information, charging Gardner with Level 3 felony rape. On July 31, 2023, the trial court convened Gardner's two-day jury trial. Detective Bayles testified that, given the manner in which alcohol metabolizes, T.J.'s BAC would have been higher than .123 immediately after she left My Place. Gardner's recorded police interview was admitted into evidence and was published to the jury.

[10] At the close of the evidence, the jury found Gardner guilty as charged. On August 1, 2023, the trial court held Gardner's sentencing hearing. The trial court sentenced Gardner to twelve years in the Department of Correction.

[11] Gardner now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

[12] Gardner contends that the State failed to establish that T.J. was unaware that sexual intercourse was occurring and that he knew that she was unaware. We review sufficiency of the evidence claims under a well-established standard of review, pursuant to which we neither reweigh the evidence nor judge the credibility of witnesses. *Owen v. State*, 210 N.E.3d 256, 264 (Ind. 2023). In conducting our review, we consider only the probative evidence and reasonable inferences that support the jury's verdict. *Id.* We will affirm the conviction

unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007).

[13] In order to convict Gardner of Level 3 felony rape as charged in the Information, the State was required to prove that Gardner knowingly had sexual intercourse with T.J. when she was unaware that sexual intercourse was occurring. I.C. § 35-42-4-1(a)(2). A person acts ‘knowingly’ if, when engaging in the conduct, he is “aware of a high probability that he is doing so.” I.C. § 35-41-2-2(b). For purposes of applying the rape statute, ‘unaware’ means “not aware: lacking knowledge or acquaintance; [u]nconscious.” *Glover v. State*, 760 N.E.2d 1120, 1124 (Ind. Ct. App. 2002), *trans. denied*. Although an unconscious person is ‘unaware’ for purposes of the rape statute, we have recognized that unconsciousness is not required to prove unawareness. *Filice v. State*, 886 N.E.2d 24, 33 (Ind. Ct. App. 2008), *trans. denied*; *see also Gliva v. State*, 178 N.E.3d 321, 325 (Ind. Ct. App. 2021) (observing that Indiana cases applying the rape and criminal deviate conduct statutes have found the requisite unawareness where victims “were sleeping, halfway asleep, extremely intoxicated, and under the influence of Rohypnol”). A victim may become ‘unaware’ due to extreme intoxication. *See Glover*, 760 N.E.2d at 1125 (finding sufficient evidence that victim was unaware due to alcohol intoxication); *Nolan v. State*, 863 N.E.2d 398, 402 (Ind. Ct. App. 2007) (observing that 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 where the victim never loses consciousness”), *trans. denied*.

[14] Due to the abundant evidence of T.J.’s extreme intoxication and impairment on September 14, 2020, we have little trouble concluding that the State established beyond a reasonable doubt that she was unaware that sexual intercourse was occurring. T.J. remembered consuming many beers throughout the evening and that at one point she suddenly “couldn’t stand on [her] own two feet[.]” (Tr. p. 97). Nathalie observed that T.J.’s texts had become incoherent throughout the evening. Just before T.J. left My Place, she slumped over the bar. T.J. then fell off her barstool and required assistance to get up. Thereafter, she encountered Gardner after having fallen on the way home. Gardner had to help her up, and, at that point, she could not operate her cellphone. According to Garner’s own statement, T.J. could not walk without assistance, she was “ten plus” intoxicated on a ten-point scale, she could not pull up her own pants, and she fell just before he had intercourse with her. (Exh. 22 at 12:10). After the rape, T.J. could not tell “what was going on[,]” and she could not remember the sexual intercourse. (Tr. p. 84).

[15] We conclude that this evidence was sufficient to prove that T.J. was ‘unaware’ within the meaning of the rape statute at the time the sexual intercourse was occurring. *See Filice*, 886 N.E.2d at 33 (finding sufficient evidence that the victim was unaware that sexual intercourse was occurring when she had been observed to be conscious but verbally unresponsive and not “quite present”, physically limp and hunched over, and had no recollection of the intercourse); *Glover*, 760 N.E.2d at 1125 (finding sufficient evidence that the victim was unaware, where she was so intoxicated that she could not stand without

assistance, she was mumbling, and she was making “no sense”). In addition, Gardner’s description to the police of T.J.’s extreme intoxication and impairment, his changing versions about what had happened, and his statement that “[s]he was too drunk to do anything” when asked if anything else had happened between T.J. and him established that Gardner was aware of a high probability that he was having sexual intercourse with T.J. while she was unaware. (Exh. 22 at 8:55-9:00).

[16] On appeal, Gardner draws our attention to evidence that a responding officer could not recall if T.J. smelled of alcohol, the nurse who conducted T.J.’s sexual assault exam did not note that T.J. was intoxicated, and that, by the time of the sexual assault examination, T.J.’s BAC was “a fairly low level of alcohol at .123 BAC.” (Appellant’s Br. p. 8). Gardner also contends that the evidence of T.J.’s unawareness is lacking because she managed to walk out of My Place by herself, she texted Nathalie around 10:00 p.m., and she responded to her cellphone when Jeremiah called her. However, Gardner’s arguments are unpersuasive, as they merely request that, contrary to our standard of review, we consider evidence that does not support the jury’s verdict and that we reweigh the evidence. *See Owen*, 210 N.E.3d at 264. In light of the substantial evidence establishing T.J.’s unawareness and Gardner’s knowing conduct, we do not disturb the jury’s verdict.

CONCLUSION

- [17] Based on the foregoing, we hold that the State proved beyond a reasonable doubt that Gardner knowingly had sexual intercourse with T.J. while she was unaware that the intercourse was occurring.
- [18] Affirmed.

Brown, J. and Foley, J. concur

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