

FILED: September 4, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JAYSON ANDREW TINDALL-MARTIN,
Defendant-Appellant.

Linn County Circuit Court
10122061, 11071269

A151559 (Control)
A151560

Thomas McHill, Judge.

Submitted on June 17, 2014.

Peter Gartlan, Chief Defender, and Marc D. Brown, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Sarah M. Villanueva, Assistant Attorney General, filed the brief for respondent.

Before DeVore, Presiding Judge, and Haselton, Chief Judge, and Garrett, Judge.

PER CURIAM

Affirmed.

1 PER CURIAM

2 Defendant was convicted of a multitude of sex crimes against five different
3 victims. In this consolidated appeal, he first assigns error to the trial court's denial of his
4 motion for a mistrial during *voir dire*. We reject that assignment without further
5 discussion. In his second and third assignments of error, he maintains that the trial court
6 erroneously denied his motions for a judgment of acquittal on one count of first-degree
7 sexual abuse and one count of first-degree unlawful sexual penetration. The issue that
8 defendant raises in his second and third assignments is whether a victim who is asleep
9 when the sexual abuse occurs is incapable of consent by reason of being "physically
10 helpless." See ORS 163.427(1)(a)(C) (sexual contact when the victim is incapable of
11 consent "by reason of being * * * physically helpless" is first-degree sexual abuse); ORS
12 163.411(1)(c) (penetration of "the vagina * * * with any object other than the penis or
13 mouth of the actor" is first-degree unlawful sexual penetration if the victim is "incapable
14 of consent by reason of * * * physical helplessness").

15 Defendant argues, as he did in the trial court, that merely being asleep does
16 not render the victim physically helpless. After the completion of briefing and oral
17 argument in this case, we decided *State v. Marker*, 263 Or App 669, 674, 329 P3d 781
18 (2014), which rejects the same argument that defendant now makes. Accordingly, we
19 affirm.

20 Affirmed.