

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 9, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2246-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KELLY D. SWAIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. MCALPINE, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. Kelly D. Swain appeals from a judgment of conviction of second-degree sexual assault, contrary to § 940.225(2)(d), STATS. Swain argues that there was insufficient evidence from which the jury could find that the complainant was "unconscious" when the sexual encounter took place. For the reasons set forth below, we affirm.

BACKGROUND

Kelly Swain rented a house in Wilton, Wisconsin, which he shared with Wesley Jankowski. Jankowski and Betty Carlson were romantically involved, and Carlson had recently moved in with Jankowski. Carlson slept either in Jankowski's room or on the sofa in the living room.

In the early morning hours of August 23, 1993, Carlson was asleep on the living room sofa, Jankowski was asleep in his bedroom, and Swain had been out drinking. When Swain returned, he approached Carlson on the sofa and fondled her.

Because the issue in this appeal is whether there was sufficient evidence from which a jury could conclude that Carlson was "unconscious" when Swain fondled her, we set forth Carlson's entire testimony on this subject in the accompanying footnote.¹

¹ Q. And then what happened?

A. [BY BETTY CARLSON] And around two a.m.--

Q. How do you know it was two a.m.?

A. I'm guessing. I have no idea.

Q. Okay. Go ahead. What happened?

A. I heard footsteps, and then I remember him touching me.

Q. Who -- Do you know who was touching you?

A. Not at that time, no.

Q. Where were you being touched?

A. Under the nightgown, my breast and my vagina.

Q. Did you have any clothing under that nightgown?

(..continued)

A. No.

Q. And what were you being touched by?

A. Hands.

Q. And did you give anyone permission to touch you in those -- you're [sic] vagina and your breasts?

A. No.

Q. And what did you do when you felt this touching?

A. I suddenly woke up, still in a daze.

Q. And was anything said to you then?

A. "Come with me."

Q. Did you know who was talking to you?

A. Not -- no.

Q. Why didn't you know who was talking to you then?

A. I just thought -- I just assumed it was Wesley.

Q. Well, were you awake enough to see anybody?

A. No.

Q. What did you tell the person who said that to you?

A. I said, "No".

Q. And what happened then?

A. He -- Then Kelly picked me up.

Q. Did you know it was Kelly then?

A. No, not at that time.

On cross examination, she further testified:

(..continued)

Q. And you have testified here that you were awakened by footsteps?

A. Yes.

Q. So you were not awoken [sic] by someone touching you?

A. I heard footsteps. Then after I heard footsteps, then he touched me.

Q. And you heard someone say, "Betty, come with me"?

A. Yes.

Q. You thought it was Wesley?

A. Yes, I did.

...

Q. You have also stated that you were awakened by the person saying, "Betty, come with me"?

...

A. I was -- I was awakened, yes, but I was still in a daze.

Q. You still thought the person was Wesley?

A. Yes, I did.

Q. And you told the person, "No"?

A. Yes.

Q. But you didn't open your eyes?

A. No, I did not.

Q. And the touching continued?

A. Yes.

Q. For ten minutes, according to you?

A. That's approximately, yes.

As stated in the transcript, Carlson testified that she heard footsteps, felt hands on her body, believed the hands belonged to Jankowski, and did not realize it was Swain until she had been carried away from the sofa. She also stated that she had awakened before being touched, was "still in a daze" and able to say "no," but did not open her eyes at that time.

ANALYSIS

The crime of second-degree sexual assault has four elements. First, the defendant must have had sexual contact with the victim; second, that contact must have been for the purpose of becoming sexually aroused or gratified; third, the victim must have been unconscious at the time of the sexual contact; and fourth, the defendant must have known the victim was unconscious. WIS J I—CRIMINAL 1215 (1994). In this appeal, defendant does not deny that he had sexual contact for the purpose of sexual gratification. Rather,

(..continued)

Q. And you still didn't open your eyes?

A. My eyes were then opened.

Q. Did you know who was touching you if your eyes were open?

A. No, not until we got into the kitchen.

Q. So, if your eyes were opened, how come you couldn't tell who was touching you?

A. Because I panicked.

Q. Why did you panic?

A. I was scared that something bad would happen.

Q. You thought it was your boyfriend touching you, right?

A. Yes. At one time, yes.

Q. Well, you didn't think it was Kelly until you got into the kitchen, correct?

A. Correct.

he challenges whether the victim was unconscious at the time of the sexual contact.²

Standard of Review

The parties do not directly address whether in their view, the victim's "unconsciousness" is a matter of fact or law. However, both parties appear to imply that the question presented is a mixed question of law and fact: both argue case law definitions of "conscious," as well as how to interpret the evidence presented. We agree that unconsciousness is a mixed question of law and fact. Cf. *State v. Disch* 129 Wis.2d 225, 234, 385 N.W.2d 140, 144 (1986) (interplay of facts and law discussed). See also *State v. Curtis*, 144 Wis.2d 691, 696, 424 N.W.2d 719, 721 (Ct. App. 1988) (court defines unconsciousness, jury finds facts as to whether victim was unconscious).

Where there is a mixed question of law and fact, the court must determine two matters: (1) what happened; and (2) whether those facts fulfill a particular legal issue. *State v. Gollon*, 115 Wis.2d 592, 600, 340 N.W.2d 912, 916 (Ct. App. 1983). The "underlying findings of what happened" will not be overturned unless clearly erroneous. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990); § 805.17(2), STATS. We review the question of law independently, without deference to the trial court. *Johnson*, 153 Wis.2d at 128, 449 N.W.2d at 848.

² As to the fourth element, defendant does not discuss whether he was aware of the victim's unconscious state. We understand him to argue that because the victim was not unconscious, he could not have known that she was unconscious.

Legal standard of "unconsciousness"

Defendant takes the position that "unconsciousness" means totally unconscious. He argues that because the victim admits having heard footsteps and having spoken and having felt hands on her body, she was not "unconscious." This narrow definition has been rejected in Wisconsin case law. Unconsciousness includes the loss of awareness resulting from sleep. *State v. Curtis*, 144 Wis.2d 691, 696-97, 424 N.W.2d 719, 721 (Ct. App. 1988). Thus, a person who has sex with one asleep commits an illegal act. *State v. Pittman*, 174 Wis.2d 255, 277, 496 N.W.2d 74, 83, cert. denied, 114 S. Ct. 137 (1993). However, sleep is not the only kind of unconsciousness. Rather, in the unconscious state, a person is "insensible, incapable of responding to sensory stimuli, or in a state lacking conscious awareness." *Disch*, 129 Wis.2d at 234-35, 140 N.W.2d at 144.

The trial judge in this case correctly instructed the jury as to the legal standard. The jurors were told that the term "unconscious" as used in this case "is a loss of awareness which *may* be caused by sleep." (Emphasis supplied.) This is a correct statement under *Curtis*, *Pittman* and *Disch*.

Whether the facts fulfill the legal standard

The jury determined by its guilty verdict that the victim was in a state of "unconsciousness." This is an "underlying finding of what happened," and we will not upset it unless clearly erroneous. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 848 (1990); § 805.17(2), STATS. To determine whether it is clearly erroneous, we must look to the facts and determine whether they fulfill the legal standard. *Disch*, 129 Wis.2d at 234, 140 N.W.2d at 144. ("Whether the facts fulfill a statutory standard is ... a determination of law....")

We conclude that the jury's verdict comports with the legal definition of unconsciousness. Specifically, because unconsciousness includes that state of "lacking conscious awareness," *Disch*, 129 Wis.2d at 234-35, 140 N.W.2d at 144, and because the victim testified that she was "in a daze" and did not know who was touching her, we conclude that a jury decision based on "unconsciousness" fulfills the legal standard. Stated otherwise, we uphold the

jury decision because it is based on facts which fulfill the legal definition of "unconsciousness."³

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

³ Because defendant has not chosen to argue the fourth factor, we need not consider whether the defendant knew of the victim's unconscious state at the time he fondled her.