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June 18, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1460-CR State of Wisconsin v. Gregory D. Basped (L.C. # 2012CF409)

Before Lundsten, Sherman and Kloppenburg, JJ.

Gregory Basped appeals a judgment convicting him, after a jury trial, of second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(cm) (2013-14),[1] and an order denying his postconviction motion. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Basped was charged with one count of second-degree sexual assault of an intoxicated person, C.H., as a party to a crime. *See* WIS. STAT. §§ 940.225(2)(cm), 939.05. The party to a crime modifier was later dismissed. The charge against Basped stemmed from allegations by C.H. that Basped, his brother Rogers, and his uncle Lester Green, sexually assaulted C.H. in her residence. Basped was found guilty after a jury trial. On appeal, he challenges his conviction and an order denying his postconviction motion for acquittal on the basis of sufficiency of the evidence.

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). To meet its burden of proof for second degree sexual assault of an intoxicated person, the State had to establish that: (1) Basped had sexual intercourse with C.H.; (2) C.H. was under the influence of an intoxicant at the time of intercourse; (3) C.H. was under the influence of an intoxicant to a degree which rendered her incapable of giving consent; (4) Basped had actual knowledge that C.H. was incapable of giving consent; and (5) Basped had the purpose to have sexual intercourse with C.H. while she was incapable of giving consent. *See* WIS JI—CRIMINAL 1212 (2014). The State asserts that the evidence was sufficient to prove each of these elements. We agree.

The first element of WIS. STAT. § 940.225(2)(cm) requires that the defendant had sexual intercourse with another person. Under WIS. STAT. § 940.225(5)(c), "sexual intercourse" is defined to include several types of acts, including but not limited to fellatio, vulvar penetration, and any intrusion of any part of a person's body into the genital or anal opening. According to

Basped's own trial testimony, he had penis-to-mouth and penis-to-vagina sexual intercourse with C.H. Thus, we are satisfied that the evidence was sufficient for the jury to find Basped guilty as to the first element of WIS. STAT. § 940.225(2)(cm).

We also are satisfied that the evidence at trial was sufficient for the jury to find that the State proved the second element, that C.H. was under the influence of an intoxicant at the time of sexual intercourse. *See* WIS JI—CRIMINAL 1212. C.H. testified that she had gone to a bar called Night Moves on July 14, 2014 around 12:30 a.m. She testified that she may have had a drink at home, then had a martini at another bar. C.H. testified that she saw three men at a table at Night Moves, one of whom she recognized was Green. Basped testified that he, Green, and Rogers were also at the bar that night. C.H. testified that one of the three men came up to her with a drink called "combat juice" and that within fifteen minutes after having a sip, she lost her memory. A bartender from Night Moves testified that he saw C.H. sitting at a table and she "appeared to be highly intoxicated." He testified that she was slumped over and bobbing her head. The bartender told C.H. that she had to leave.

Green testified that C.H. passed out in the bar and that she had been drinking a lot and staggering. He also testified that C.H. threw up when he took her outside. He said that he helped get C.H. a cab and that he and the cab driver had to help her out of the cab when they arrived at C.H.'s residence. It was undisputed at trial that Basped and Rogers went to C.H.'s residence after Green arrived there. C.H. testified that she faded into and out of alertness. At one point she woke up with her legs in the air, and a person was penetrating her vagina with his penis. She testified that she was retching and that someone was having intercourse with her, but that she was unable to respond and could not move.

As discussed above, Basped admitted at trial to having both oral and vaginal sex with C.H. after he arrived at her residence. No evidence was presented at trial that anyone other than Basped had vaginal intercourse with C.H. C.H. testified that the man whose penis was in her vagina was not Green. In light of all of the above, we are satisfied that, when viewed most favorably to the state and the conviction, the evidence was sufficient for the jury to find that C.H. was under the influence of an intoxicant at the time of sexual intercourse with Basped. *See* ***Zimmerman***, 266 Wis. 2d 1003, ¶24; WIS JI—CRIMINAL 1212.

As to the third and fourth elements of sexual assault of an intoxicated person, the State needed to prove that C.H. was under the influence of an intoxicant to the degree that she was "unconscious" or "physically unable to communicate unwillingness to an act," and that Basped had actual knowledge of that fact. WIS. STAT. § 940.225(4)(c); WIS JI—CRIMINAL 1212. Basped argues that the evidence at trial was insufficient to prove that C.H. was under the influence of an intoxicant to the extent that she was incapable of giving consent. He also argues that the evidence was insufficient to prove that he knew C.H. was incapable of giving consent. He acknowledges that there was evidence that C.H. acted impaired at Night Moves, but asserts that she was able to provide her home address to the cab driver, pay for the ride home, and prevent the alarm from sounding upon entry into her residence.

However, as the State points out in its brief, it was not required to prove that C.H. was incapable of giving consent when she was in the cab or when she arrived at her residence. The State needed only to prove that C.H. was under the influence of an intoxicant to the degree that she was incapable of consenting later when Basped had intercourse with her, and at that later time, he knew she was incapable of giving consent. We are satisfied that the evidence in the record is sufficient to support the jury's findings as to these elements.

C.H. testified that she recalled activating the security system at her residence before she went out, but did not remember deactivating it when she arrived home that night. Her first memory of being inside her residence was one of waking up to someone biting her breast. Someone's hand was also in her vagina. She was naked from the chest down, with her shirt and bra pulled up. She did not recall taking off her clothes or asking anyone to take them off. She realized there were three men in her house, and that one of them was Green. She testified that she then "passed out or went unconscious." Her next memory was of waking up with her legs in the air, and a person penetrating her vagina with his penis. She testified that she started to fight back and that she did not ask for sexual intercourse or consent to it. She also remembered two men putting their penises into her mouth without her consent. C.H. said that she could not speak well or articulate anything except moaning. She testified that at some point "whatever was in [her] system finally started to clear" and that she sat up and was able to get her bearings. She asked what time it was and one of the men told her it was 4:30 a.m. C.H. said she then got up and banged on the security system on the wall and yelled, "The cops are coming." The men then left.

During trial, Basped gave a different version of the events that occurred at C.H.'s residence. He testified that he asked C.H. to give him oral sex and that she proceeded to do so while she was sitting on the couch. He said that C.H. then grabbed his arm and took him to the bedroom, where she continued oral sex. According to Basped, "Minutes into the oral sex, she kind of just hopped on top of my penis." Basped also testified that C.H. had had a few drinks, but that he never saw her unconscious.

The jury heard both Basped and C.H.'s testimony about what occurred and, as implied by its guilty verdict, found C.H.'s version to be more credible. It is for the jury "to decide which

evidence is credible and which is not and how conflicts in the evidence are to be resolved." ***State v. Poellinger***, 153 Wis. 2d 493, 503, 451 N.W.2d 752 (1990). Basped fails to point to anything in C.H.'s testimony to persuade us that the testimony was incredible as a matter of law. *See* ***id.*** at 506-507. We are satisfied that the jury could have drawn the appropriate inferences from the trial testimony to find that C.H. was under the influence of an intoxicant to the degree that she was unconscious or physically unable to communicate unwillingness to act, and that Basped was aware of that fact. *See* WIS. STAT. § 940.225(4)(c); WIS JI—CRIMINAL 1212.

From the same trial testimony, the jury also could have drawn the inference that Basped had the purpose of having sexual intercourse with C.H. while she was incapable of giving consent, thus satisfying the fifth element under WIS. STAT. § 940.225(4)(c); WIS JI—CRIMINAL 1212. It is undisputed that Basped had sexual intercourse with C.H. There is nothing in the record to suggest that the intercourse was somehow not purposeful for Basped or that he did not intend that the intercourse happen while C.H. was incapable of consenting. To the contrary, his admission that he had intercourse with C.H., when combined with C.H.'s own testimony about her state of body and mind during the event, was sufficient for the jury to find Basped guilty of the fifth and final element of sexual assault of an intoxicated person, contrary to § 940.225(4)(c) and WIS JI—CRIMINAL 1212.

We turn next to Basped's argument that the circuit court should have granted his postconviction motion, which sought acquittal on the grounds that the evidence adduced at trial was insufficient to find Basped guilty. Having concluded that the evidence *was* sufficient for the jury to have found Basped guilty beyond a reasonable doubt, we further conclude that the circuit court properly denied his postconviction motion for acquittal.

As a final matter, we note that Basped brings to our attention the fact that the judgment of conviction contains a clerical error. The judgment references the party to a crime statute, WIS. STAT. § 939.05, even though the record unambiguously demonstrates that the party to a crime modifier was dismissed. Therefore, we modify the judgment to remove the party to a crime reference. All that remains is a mere defect in the judgment of conviction which may be corrected at any time at the direction of the circuit court, and no remand by this court is necessary. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶17, 51, 239 Wis. 2d 244, 618 N.W.2d 857.

IT IS ORDERED that the judgment is modified and, as modified, summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the order denying Gregory Basped's postconviction motion is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals