UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1100

September Term, 2014

ARRAHEEM DEDMON

v.

STATE OF MARYLAND

Krauser, C.J.,
Graeff,
Friedman,

JJ.

Opinion by Krauser, C.J.

Filed: July 23, 2015

Convicted, by a jury, in the Circuit Court for Wicomico County, of second-degree rape, third-degree and fourth-degree sexual offense, and second-degree assault, Arraheem Dedmon, appellant, contends that the evidence was not sufficient to sustain his convictions for those offenses. For the reasons that follow, we shall reverse Dedmon's convictions for third-degree and fourth-degree sexual offense and affirm his convictions for second-degree rape and assault.

FACTS AND PROCEEDINGS

Viewing the evidence in the light most favorable to the State, as we are required to do,[1] shows the following:

On August 30, 2013, the victim, Jazmine Maddox, and the appellant, Arraheem Dedmon, who were both students at Salisbury University, planned to attend a party with friends, and then, afterwards, to go to Dedmon's residence. But, before leaving for the party that evening, Maddox, Dedmon, and their friends, gathered in Maddox's dorm room to socialize at approximately 8:00 or 9:00 p.m. During that gathering, Maddox began drinking from a twelve-ounce water bottle in which she had mixed "clear liquor" and orange juice.[2] Then, at approximately 10:00 p.m., the group left the dorm and went to the party.

[1] *See, e.g., Smith v. State,* 415 Md. 174, 184 (2010) (explaining that, "on review of the sufficiency of the evidence to support a criminal conviction," we view "the evidence in the light most favorable to the prosecution").

[2] At trial, Maddox testified that she was not certain as to what type of liquor she had used in her drink but noted that it was clear. She "believe[d]" that she had used a twelve-ounce bottle, which she had filled "[a]bout a third" of the way with liquor.

At the party, Maddox drank more alcohol. Specifically, Maddox consumed the remainder of the drink she had in her water bottle, as well as two "shots" of clear liquor and "some of [Dedmon's] drink." Hours later, at approximately 1:00 a.m., Maddox, Dedmon, and their friends left the party. After going to a nearby Taco Bell restaurant, Maddox and Dedmon returned to Maddox's dorm room. Then, an intoxicated Maddox drove Dedmon back to Dedmon's residence, which was only a five-minute drive from Maddox's dorm. During the drive, Maddox's vision was blurred and her car "jumped [a] curb."

When they arrived at Dedmon's residence, Maddox, fearing that she would not be able to drive back to her dorm, decided to sleep there that night so that she could "sleep off . . . being drunk." When Maddox told Dedmon that she felt sick, and warned him that she was "not that kind of girl," and only wanted to "lay down and go to sleep," Dedmon responded "I know" and led Maddox upstairs to his room.[3] There, Maddox laid down, fully clothed, on the air mattress in Dedmon's room and fell asleep with Dedmon beside her and his arm around her waist.

The next morning, when Maddox awoke, she realized she was no longer wearing her shorts or underwear and that her tampon had been removed and placed in a nearby trash can. At that point, "frantic and concerned," Maddox woke up Dedmon and asked him why her

[3] At trial, Maddox noted that she told Dedmon "I'm not that kind of girl to think, you know, that we're going to do anything, I'm just going to lay down and go to sleep." She testified that she meant that she was "not the kind of girl that you are going to bring back to your place and sleep with on the first night[.]"

shorts and underwear had been taken off. Dedmon told Maddox that he had taken her shorts off because she complained of being hot and that her underwear and tampon must have come off with her shorts. He then tied up the trash bag in the trash can and moved the trash can out of Maddox's sight.

Although Maddox asked repeatedly about what had occurred the previous night, Dedmon insisted that "nothing . . . happened." Later, after Maddox left Dedmon's residence and returned to her dorm room, she sent Dedmon a text message in which she told him she was going to go to a clinic to "see if everything [was] all right and to get tested." At that point, Dedmon admitted that he and Maddox had had "sex for two minutes and then we blacked out and we stopped." Maddox responded; "That's rape, because I told you that I never wanted to have sex[.]" Maddox, thereafter, went to the hospital, where a nurse administered a rape kit, tested her for sexually transmitted diseases, took photographs, swab samples, and the tampon Maddox was using at the time she was examined. Maddox also gave statements to law enforcement and to the nurse who examined her.

Analysis of the noted tampon and swab samples, taken from Maddox's "anal perianal" and vaginal areas, indicated the presence of semen. DNA testing of the tampon showed the presence of a mixture of DNA consistent with the known DNA profiles of Maddox and Dedmon.[4]

[4]Because the DNA analysis of Maddox's tampon yielded, in his view, such (continued...)

Dedmon was charged with second-degree rape, third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. After a trial on the merits, Dedmon was convicted on all counts. The court imposed a sentence of ten years' imprisonment, all but one year and six months suspended, for Dedmon's second-degree rape conviction, and found that the remaining convictions merged for sentencing purposes.

DISCUSSION

Dedmon contends that his convictions were not supported by sufficient evidence. In addressing such a claim, we determine "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Martin v. State*, 218 Md. App. 1, 34 (2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). But, "[b]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citation omitted). We "'merely ascertain[] whether there is any relevant evidence, properly before the jury, legally sufficient to sustain a

[4](...continued)
conclusive evidence as to the presence of Dedmon's DNA, the forensic chemist, who performed that analysis, did not believe it was necessary to test the swab samples for DNA.

conviction.'" *Morgan v. State*, 134 Md. App. 113, 126 (2000) (quoting *State v. Devers*, 260 Md. 360, 371 (1971)).

A. Second-degree rape

Dedmon contends that the evidence was insufficient, under Md. Code Ann. (2012 Repl. Vol.) § 3-304 of the Criminal Law Article ("C.L."), to convict him of second-degree rape because the State failed to prove that the vaginal intercourse in question occurred while Maddox was mentally incapacitated or physically helpless and that Dedmon knew or should have known of Maddox's condition at that time.

Section 3-304 of the Criminal Law Article provides, in pertinent part:

> **§ 3-304. Rape in the second degree.**
>
> (a) *Prohibited*. – A person may not engage in vaginal intercourse with another:
>
> * * *
>
> (2) if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual[.]

The term "mentally incapacitated individual" is statutorily defined as "an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual's consent or awareness, is rendered substantially incapable of: (1) appraising the nature of the individual's conduct; or (2) resisting vaginal intercourse, a sexual act, or sexual contact." C.L. § 3-301(c). The term

"physically helpless individual" is defined as "an individual who: (1) is unconscious; or (2)(i) does not consent to vaginal intercourse, a sexual act, or sexual contact; and (ii) is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact." C.L. § 3-301(d).

The evidence showed that, on the night in question, Maddox was intoxicated, which Dedmon knew or reasonably should have known, as he observed Maddox consuming alcohol before and during the party they attended together, and as he was with Maddox when her intoxicated state so affected her driving that her car jumped a curb while she was driving the relatively short distance from her dorm to his residence. Moreover, upon arriving at Dedmon's residence, Maddox made clear to Dedmon that she felt ill, only wanted to go to sleep, and did not wish to have intercourse with him. Then, Maddox, fully-clothed, fell asleep in Dedmon's bed. When she woke up the following morning, she found that her shorts, underwear, and tampon had all been removed. When she asked Dedmon what had happened the night before, he explained that he had undressed her, but denied that the two had intercourse. Subsequently, however, Dedmon admitted to Maddox that he had had sexual intercourse with her on the night in question, a fact confirmed by DNA testing.

Given those facts, a rational trier of fact could have found, beyond a reasonable doubt, that the vaginal intercourse in question occurred while Maddox was either mentally incapacitated, due to her level of intoxication, or physically helpless, due to the fact that she was asleep, and that Dedmon knew, or reasonably should have known, of Maddox's state.

See Travis v. State, 218 Md. App. 410, 433 (2014) (holding that a sleeping victim is "unconscious" and, thus, "physically helpless" under C.L. § 3-301(d)). We, therefore, conclude that the evidence was sufficient to sustain Dedmon's second-degree rape conviction.

B. Third-degree and fourth-degree sexual offense

Next, Dedmon asserts that the evidence was insufficient to sustain his convictions for third-degree and fourth-degree sexual offense because the evidence did not establish that he engaged in prohibited "sexual contact" with Maddox.

While the third-degree sexual offense statute, C.L. § 3-307(a)(2), prohibits "sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual," the fourth-degree sexual offense statute, C.L. § 3-308(b)(1), prohibits "sexual contact with another without the consent of the other." "Sexual contact" is statutorily defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party." C.L. § 3-301(f)(1).

The Court of Appeals, in *Nalls v. State*, 437 Md. 674 (2014), addressed a sufficiency challenge similar to the one Dedmon raises here. In that case, the accused had been convicted of second-degree rape, third-degree sexual offense, and second-degree assault. *Id*.

at 681. The evidence adduced at trial showed that the victim was asleep in her bed when she was awakened by Nalls, who was at that moment having vaginal intercourse with her. *Id*. at 697. But, at the time of the incident in question, "sexual contact" was defined, by the then extant version of C.L. § 3-301, as:

> (f) *Sexual contact.* – (1) "Sexual contact" . . . means an intentional touching of the victim's or actor's genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party.
>
> (2) "Sexual contact" includes an act:
>
> (i) in which a part of an individual's body, except the penis, mouth, or tongue, penetrates, however slightly, into another individual's genital opening or anus; and
>
> (ii) that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party.

Id. at 695-96; Md. Code Ann. (2002), § 3-301(f)(1)-(2) of the Criminal Law Article.

Ultimately, the Court concluded that because the evidence only established a single act of vaginal intercourse, there was not sufficient evidence to sustain a conviction for third-degree sexual offense. In the words of the Court, "no rational trier of fact could find, beyond a reasonable doubt, that Nalls committed an act of sexual contact in addition to an act of vaginal penetration." *Nalls*, 437 Md. at 697; *see also Paige v. State*, 222 Md. App. 190, 208 (2015) (concluding that "[no] reasonable jury, having been correctly instructed in

accordance with the law, could have convicted an individual of both rape and a third-degree sexual offense based upon the same act.").[5]

Although the current definition of "sexual contact" does not include language which expressly excludes the act of penile penetration, this Court recently interpreted C.L. § 3-301(f) as referring specifically to the following sort of conduct:

> What is involved in sexual contact is purposeful tactile contact and tactile sensation, not incidental touching. It is the sexually-oriented act of groping, caressing, feeling or touching of the genital area or the anus or the breasts of the female victim. *It is something other than the necessarily involved contact that is merely incidental to the vaginal intercourse or the sexual act itself.*

Travis, 218 Md. App. at 465 (emphasis added).

Where, as here, the evidence speaks only to an act of vaginal intercourse and is silent as to any contact other than that which was incidental to that act, we are compelled to conclude that the evidence did not show "sexual contact" and, therefore, was not sufficient to sustain Dedmon's convictions for third-degree and fourth-degree sexual offense.

C. Second-degree assault

As for his conviction for second-degree assault, Dedmon insists that the evidence was insufficient to show that he intended to cause harmful or offensive contact against Maddox without her consent and without legal justification.

[5] As in *Nalls*, 437 Md. 674, the definition of "sexual contact" applicable in *Paige*, 222 Md. App. at 208-09, was that found in Md. Code Ann. (2002), § 3-301(f)(1)-(2) of the Criminal Law Article.

We first note that this claim was not preserved for appellate review. At trial, at the close of the State's case, defense counsel merely "submit[ted] on sufficiency of the evidence" in his motion for judgment of acquittal regarding the charge of second-degree assault. Because counsel failed to "state with particularity" the reasons why the evidence of second-degree assault was insufficient, that issue was waived. Md. Rule 4-324(a) (when a defendant moves for judgment of acquittal on one or more counts at the close of the evidence offered by the State, "[t]he defendant shall state with particularity all reasons why the motion should be granted."); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]"); *see also Brummel v. State*, 112 Md. App. 426, 428 (1996) (sufficiency challenge not preserved where motion for judgment of acquittal was made in the following manner, "[m]ake a motion for judgment of acquittal[,] [s]ubmit, Your Honor.").

In any event, Dedmon's sufficiency challenge as to second-degree assault is without merit. In defining the offense of second-degree assault, we have said:

> Second-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery. *See* [C.L. § 3-203(a)] ("A person may not commit an assault."); [C.L. § 3-201(b)] (defining "assault" to mean "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings"); *Nicolas v. State*, 426 Md. 385, 402-03 (2012). A battery is a touching that is either harmful, unlawful or offensive. *Marlin v. State*, 192 Md. App. 134, 166, *cert. denied*, 415 Md. 339 (2010). *See also Nicolas*, 426 Md. at 403 ("an assault of the battery variety is committed by causing offensive physical contact with another person.").

Quansah v. State, 207 Md. App. 636, 646-47 (2012) (internal parallel citation omitted).

> The elements of a second-degree assault, committed via battery, are:
>
> (1) that the defendant caused offensive physical contact with the victim; (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) that the contact was not consented to or legally justified.

Pryor v. State, 195 Md. App. 311, 335 (2010) (citation omitted).

In the instant case, the evidence adduced at trial, when viewed in the light most favorable to the State, showed that, while Maddox was asleep and intoxicated, Dedmon removed her shorts, underwear, and tampon, and proceeded to have intercourse with her. Given Maddox's state and the fact that she had, earlier, expressed to Dedmon that she did not wish to have intercourse with him, there was sufficient evidence that the removal of Maddox's clothes and tampon, by Dedmon, in order to facilitate the act of intercourse was intentional and offensive contact to which she did not consent. Accordingly, we hold that the evidence was sufficient to sustain Dedmon's conviction for second-degree assault.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED WITH RESPECT TO CONVICTIONS FOR SECOND-DEGREE RAPE AND SECOND-DEGREE ASSAULT, REVERSED WITH RESPECT TO CONVICTIONS FOR THIRD-DEGREE SEXUAL OFFENSE AND FOURTH-DEGREE SEXUAL OFFENSE. COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY WICOMICO COUNTY.