STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2014AP2432-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

JAMA I. JAMA,

Defendant-Respondent.

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR DANE COUNTY,
ELLEN K. BERZ, JUDGE

BRIEF FOR PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

Cases

Page

Page

Statutes

Page

Other Authorities

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ISSUES PRESENTED

1. Did the circuit court misconstrue both the sexual assault statute and the burglary statute to require proof, not just of lack of consent, but lack of consent by a person who was competent to give consent, thereby adding an element not

intended by the legislature to the crimes defined by those statutes?

The circuit court construed both statutes to require lack of consent by a person who was competent to give consent.

2. Did the circuit court err by ordering the entry of a judgment of not guilty of third-degree sexual assault, notwithstanding the jury's verdict convicting the defendant-respondent, Jama I. Jama, of that offense, by applying its erroneous view of the law to find the evidence insufficient to convict him?

The circuit court held that the evidence was insufficient to convict Jama of this offense.

3. If the evidence was sufficient to convict Jama of third-degree sexual assault, would this conviction and Jama's conviction of second-degree sexual assault be mutually exclusive?

The circuit court held that convictions of both second-degree sexual assault and third-degree sexual assault would be mutually exclusive.

4. Did the circuit court err by ordering the entry of judgments of not guilty of burglary with intent to commit a sexual assault and burglary with intent to steal, notwithstanding the jury's verdicts convicting Jama of those offenses, by applying its erroneous view of the law to find the evidence insufficient to convict him?

The circuit court held that the evidence was insufficient to convict Jama of these offenses.

5. If the evidence was sufficient to convict Jama of the two burglary charges, would these convictions and Jama's conviction of second-degree sexual assault be mutually exclusive?

The circuit court held that convictions of both second-degree sexual assault and burglary would be mutually exclusive.

ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. The opinion should not be published because this appeal involves only the application of settled law to the facts of this case.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an appeal by the state of an order of the Circuit Court for Dane County, Ellen K. Berz, Judge, directing the entry of judgments of not guilty on Counts 2, 3 and 4 of the Amended Information, charging Jama respectively with third-degree sexual assault, burglary with intent to commit the felony of sexual assault, and burglary with intent to steal, notwithstanding the verdicts of the jury finding Jama guilty of all three offenses.

PROCEDURAL STATUS OF THE CASE

Jama was charged in an Amended Information, dated December 20, 2013, with five crimes (25).[1] Count 1 charged Jama with second-degree sexual assault for having sexual intercourse with HH while she was under the influence of an intoxicant to the extent that she was incapable of giving consent (25:1). Count 2 charged Jama with third-degree sexual assault for having sexual intercourse with HH without her consent (25:1). Count 3 charged Jama with burglary for entering the residence of HH without her consent with the intent to commit the felony of sexual assault (25:2). Count 4 charged Jama with burglary for entering the residence of HH without her consent with the intent to steal (25:2). Count 5 charged Jama with misdemeanor theft for stealing moveable property from the residence of HH (25:2).

A four day jury trial was held from February 25 to 28, 2014 (88-93).

After the state presented its case in chief, Jama moved for directed verdicts on all five counts (92:70-71). The circuit court denied the motion with respect to each of these counts (92:80-83).

Following the close of all the evidence, the jury returned verdicts finding Jama guilty of all five counts charged (63; 93:110-11).

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[1] This document is numbered "24" in the record, but this is obviously an error since the index to the record lists the Amended Information as document 25, there already is a document 24, the state's supplemental witness list, in the record, and the next document following the Amended Information is numbered 26.

Jama orally moved for judgment notwithstanding the verdicts (93:112-13).

The court promptly denied the motion with respect to counts 1, 2 and 5, i.e., both counts of sexual assault and the count of theft (93:113). But with respect to counts 3 and 4, the two counts of burglary, the court held its decision in abeyance pending briefing by the parties (93:113-15).

After the briefs were submitted (64-68, 72, 74), the court again denied the motion with respect to counts 1 and 5, but changing its mind regarding the charge of third-degree sexual assault, granted the motion with respect to counts 2, 3 and 4 (76:16).

The state filed an appeal from the circuit court's written decision and order directing the entry of judgments of not guilty notwithstanding the verdicts with respect to counts 2, 3 and 4, third-degree sexual assault and burglary (78).

The two remaining counts of second-degree sexual assault and misdemeanor theft proceeded to sentencing and entry of a judgment of conviction (83; 95).

DECISION OF THE CIRCUIT COURT

The circuit court separately considered each of the charges of which Jama was found guilty by the jury to determine whether the evidence was sufficient to convict him of that offense.

1. Misdemeanor Theft

On the charge of misdemeanor theft, the circuit court found that the evidence was sufficient because the security camera in HH's apartment building showed Jama leaving with

a red bag belonging to the victim (76:4, A-Ap:104). The police found the red bag in Jama's home (76:4, A-Ap:104). Inside the bag was a remote control device that had been taken from the victim's apartment (76:4, A-Ap:104).

The court found that HH did not consent to the taking of her property because she testified she did not consent and because her apartment had been ransacked, indicating lack of consent (76:4, A-Ap:104).

2. Second-Degree Sexual Assault

The court also found the evidence sufficient to convict Jama of second-degree sexual assault (76:4-6, A-Ap:104-06).

The court found that the victim was unable to consent to sexual activity because she was too intoxicated, as vividly illustrated by the video of her entering her apartment building with Jama helping her walk (76:5, A-Ap:105).

3. Third-Degree Sexual Assault

Before determining whether the evidence was sufficient to convict Jama of third-degree sexual assault, the court considered whether the two verdicts convicting Jama of both second-degree and third-degree sexual assault were mutually exclusive, i.e., whether a finding of guilt on one charge necessarily excluded a finding of guilt on the other charge (76:6, A-Ap:106). Finding no law in Wisconsin, the court looked to other jurisdictions, primarily Illinois, for precedent (76:6-8, A-Ap:106-8).

To determine whether the guilty verdicts on the two sexual assault charges were mutually exclusive, the court engaged in a process of statutory construction to see whether the legislature intended the element of being "incapable of

giving consent" in the section defining second-degree sexual assault to be inherently inconsistent with the element of "without consent" in the section defining third-degree sexual assault (76:9, A-Ap:109).

Looking to Wis. Stat. § 940.225(4), which defines consent to mean an agreement by a person who is competent to give informed consent, the court construed third-degree sexual assault to have an additional element (76:9-10, A-Ap:109-10). Not only was it necessary to prove that the defendant had sexual intercourse with the victim and that the victim did not consent to have sex with the defendant, but the state also had to prove that the victim was competent to give consent (76:10, A-Ap:110). The court stated that the issue when a defendant was charged with third-degree sexual assault was "whether the competent person decided to consent" (76:10, A-Ap:110).

Having found that one of the elements of third-degree sexual assault is that the victim was competent to give consent, the court found that third-degree sexual assault was mutually inconsistent with second-degree sexual assault, which requires that the victim be incapable of consenting (76:10-11, A-Ap:110-11). The court determined that a victim could not be competent to give consent and at the same time be incapable of giving consent (76:11, A-Ap:111).

The court found the evidence insufficient to prove that Jama was guilty of third-degree sexual assault because it said that, although the evidence was sufficient to prove that Jama had sexual intercourse with HH, there was absolutely no valid evidence adduced at the trial to support a finding that HH did not consent to have sexual intercourse (76:11, A-Ap:111). Due to her intoxication at the time, HH was unable to clearly testify that she did not consent to have sex with Jama, but could say only that she had no memory of giving consent (76:11-12, A-Ap:111-12). The court held that because HH had no memory of

her encounter with Jama, the state was unable to prove that she did not give consent.

Since the court directed the entry of a judgment of not guilty on count 2, it found that there was no remaining issue with respect to whether a conviction of third-degree sexual assault and the conviction of second-degree sexual assault would be mutually exclusive (76:12, A-Ap:112).

4. Burglary With Intent To Commit A Sexual Assault

The court noted that an element of burglary is that the entry must be without the consent of the person in lawful possession of a dwelling (76:13, A-Ap:113). The court stated that the legislature did not provide any special definition of consent as used in the burglary statute (76:13, A-Ap:113).

Referencing the definition of consent in the sexual assault statute, the court found that the element of consent in the burglary statute was the decision of a competent person, a person with the ability to make an informed decision to give consent (76:13, A-Ap:113). So as it did with the sexual assault statute, the court construed the burglary statute to require an additional element, i.e., that the victim who did not consent to have her home burglarized must be shown to be competent to give consent (76:13, A-Ap:113).

The court stated that by convicting Jama of both second-degree sexual assault and burglary, the jury found that HH had two mutually exclusive mental states, i.e., the ability to consent necessary to convict Jama of burglary and the inability to consent necessary to convict him of second-degree sexual assault (76:14, A-Ap:114). The court found that convictions for both offenses would be mutually exclusive because that would require findings that HH was both competent and not competent to make an informed decision regarding consent.

In discussing the sufficiency of the evidence to convict Jama of burglary, the court found that there was enough evidence to show that Jama entered HH's apartment (76:14, A-Ap:114). However, the court said that there was nothing in Jama's words or actions at the time he entered HH's apartment to indicate that he intended to commit a sexual assault or any other crime (76:15, A-Ap:115).

The court further found that there was no evidence that HH did not consent to Jama's entry into her apartment (76:15, A-Ap:115). At most, she simply had no memory of giving consent (76:15, A-Ap:115). Moreover, there was evidence that the victim told the police she had given Jama consent to enter her apartment (76:15, A-Ap:115).

Thus, the court found that the evidence was insufficient to convict Jama of burglary with intent to commit a sexual assault and entered a judgment of not guilty on this count (76:15, A-Ap:115). This mooted any question with respect to the verdicts of second-degree sexual assault and burglary with intent to commit a sexual assault being mutually exclusive (76:15, A-Ap:115).

5. Burglary With Intent To Steal

For the same reasons the court found the evidence insufficient to convict Jama of burglary with intent to commit a sexual assault, it also found the evidence insufficient to convict him of burglary with intent to steal and entered a judgment of not guilty on this count (76:16, A-Ap:116). This also resolved any problem of mutual exclusivity (76:16, A-Ap:116).

FACTS RELEVANT TO ISSUES PRESENTED

HH was very intoxicated when she left a bar and started to walk home to her apartment on Gorham Street alone (88:181,

198, 204-05). A man HH did not know and had never seen before approached her and helped her walk home (88:205-07).

Although HH had no memory of the man helping her get into her apartment building and to her apartment door, a security camera in the lobby of HH's building recorded Jama helping HH enter the building and walk to the stairs leading to her second floor apartment (62:ex.41; 88:181, 207-08, 212).

HH could not remember unlocking the door to her apartment or going inside (88:215-16). Although HH could not remember at the time of the trial whether she gave anyone consent to enter her apartment, she previously told the police that she gave Jama consent to enter (89:17-18, 20, 34-35).

HH did recall being inside her apartment and getting hit on the back of her head (88:216). She did not give anyone permission to hit her (88:217).

HH was rendered unconscious either from the blow or the alcohol or both, and had no memory of anything that happened after being hit until she woke up later that day on the floor by the door to her apartment, naked from the waist down (88:216, 218, 222, 285).

HH had no memory of removing any of her clothing, of having sexual intercourse, or of giving anyone consent to have sexual intercourse with her (88:221, 228, 231, 278, 288; 89:23).

After waking up, HH found her clothing on the floor (88:223, 225). She also found a condom wrapper that had not been in her apartment before, and a cell phone that did not belong to her (88:222, 225, 240).

Her apartment had been ransacked, and several items including her own cell phone, a laptop computer, PlayStation,

Xbox, and various controllers were missing (88:228, 235, 241). HH did not give anyone consent to take these items or to enter her apartment for the purpose of stealing these items (88:232).

The security camera caught Jama coming down the stairs and leaving HH's apartment building with a red Bacardi bag that was taken from her apartment (62:exs.42-43; 88:213; 91:83-86). That bag as well as a stolen remote control and game controller were found in Jama's apartment (90:44, 46, 51). The stolen laptop computer and Xbox controllers were found in Jama's brother's car (89:105).

HH did a search of the cell phone she found in her apartment, and found a name associated with the person who owned the phone (88:248). That name was Jama (88:248). Jama's scarf was also found in HH's apartment (91:94).

The State Crime Laboratory found male DNA in the vaginal swab taken from HH, and sperm in the crotch area of HH's underpants (90:17-18). The DNA in the sperm belonged to Jama (90:14-15).

ARGUMENT

I. The circuit court misconstrued both the sexual assault statute and the burglary statute to require proof, not just of lack of consent, but lack of consent by a person who was competent to give consent, thereby adding an element not intended by the legislature to the crimes defined by those statutes.

The fundamental error made by the circuit court in this case was misconstruing both the sexual assault statute and the burglary statute to require proof, not just of lack of consent, but lack of consent by a person who was competent to give consent,

thereby adding an element not intended by the legislature to the crimes defined by those statutes.

A. The court erroneously added a nonexistent element to the crime of third-degree sexual assault.

Third-degree sexual assault is committed by having sexual intercourse with a person without that person's consent. Wis. Stat. § 940.225(3) (2013-14).

As written, this statute requires the state to prove only two things, that the defendant had sexual intercourse with a person and that this person did not consent to have sexual intercourse with the defendant. Wis. JI-Criminal 1218A (2002). There is no requirement that the person who does not consent must be competent to give consent.

Wisconsin Statute § 940.225(4) defines "consent," as used in the sexual assault statute, to mean "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."

But the fact that a person must be competent in order to give consent does not mean that a person must be competent in order to not give consent. *See Berg v. State*, 63 Wis. 2d 228, 238, 216 N.W.2d 521 (1974) (error to assume that converse of statement is necessarily true or intended).

This is clear from an additional provision of the definitional statute which states that a person who is unconscious is presumed to be incapable of consenting. Wis. Stat. § 940.225(4)(c).

The obvious meaning of this provision, when read together with the definition of consent, is that when a person is unconscious, and therefore incapable of consenting, there is presumptively no consent, as defined to require the words or acts of a person who is competent to consent. If there is no competence, one of the component parts of the definition that must all come together for there to be consent is missing. So if a person is not competent to consent, there cannot be any consent as that term is defined.

It would be nonsensical to interpret this provision to mean that when a person is incapable of consenting, so that there could not be any consent, the state could not prove that any unwanted sexual intercourse was without consent. *See Orion Flight Serv. v. Basler Flight Serv.*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130 (statute should be interpreted to avoid absurd or unreasonable results).

The principle that a person need not be competent to consent in order to not consent is also clear from case law interpreting and applying this statute.

In *State v. Grunke*, 2008 WI 82, 311 Wis. 2d 439, 752 N.W.2d 769, the defendants asserted the same contention as the circuit court in this case, i.e., that where a person cannot either provide or withhold consent, allowing a prosecution for having sexual intercourse with that person would clash with the requirement in § 940.225(3) that the intercourse occurred without the victim's consent. *Grunke*, 311 Wis. 2d 439, ¶ 24.

The supreme court stated that this contention was based on a mistaken interpretation of § 940.225(4) which would improperly require the state to prove that the victim actually withheld consent. *Grunke*, 311 Wis. 2d 439, ¶ 28.

But the element of "without consent" in § 940.225(3) requires no affirmative act such as withholding, or refusing, or deciding not to, consent. *Grunke*, 311 Wis. 2d 439, ¶ 28. Rather, there must simply be an absence of any such affirmative act. *Grunke*, 311 Wis. 2d 439, ¶ 28.

"'There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that submission involves consent.'" *State v. Herfel*, 49 Wis. 2d 513, 519, 182 N.W.2d 232 (1971).

If there is only submission, but no words or acts indicating a freely given agreement to have sexual intercourse, there is no consent. *See Grunke*, 311 Wis. 2d 439, ¶ 28; *State v. Long*, 2009 WI 36, ¶ 31, 317 Wis. 2d 92, 765 N.W.2d 557.

The supreme court expressly held that there was no statutory ambiguity or incompatibility between incapacity to consent and lack of consent, as required for a conviction of third-degree sexual assault. *Grunke*, 311 Wis. 2d 439, ¶ 25. To the contrary, the court confirmed the obvious when it stated that the element of "without consent" can be proven easily when the victim is not capable of consenting. *Grunke*, 311 Wis. 2d 439, ¶ 25.

"Common sense dictates that in the case of an unconscious person the unconscious state itself, without more, presumptively prevents giving informed consent." *State v. Sauceda*, 168 Wis. 2d 486, 498, 485 N.W.2d 1 (1992). Thus, it was recognized more than a century ago that "'where the *will* of the female does not concur with the act, or oppose it, and does not act at all, and where she has no power of consenting or dissenting [because of an intoxicated stupor], the act is said to be "against her will,"'" i.e., without her consent. *Quinn v. State*, 153 Wis. 573, 579, 142 N.W. 510 (1913).

Viewed another way, common sense dictates that a person does not have to be competent to do anything in order to do nothing.

B. The court erroneously added a nonexistent element to the crime of burglary.

The circuit court's error is even more pronounced with regard to burglary.

Burglary is committed by intentionally entering any building or dwelling without the consent of the person in lawful possession and with intent to steal or commit a felony. Wis. Stat. § 943.10(1m)(a) (2013-14).

The circuit court's analysis of the consent element in § 943.10(1m)(a) is fundamentally flawed right from the start because of its erroneous belief that there is no statutory definition of the term "without consent" as used in this statute when actually there is.

The words and phrases defined in Wis. Stat. § 939.22 (2013-14) have the meaning designated in that section wherever they are used throughout the criminal code unless a different definition is specifically provided. Wisconsin Statute § 939.22(48) defines "without consent" to mean "no consent in fact." This is the statutory definition that applies to the crime of burglary.

This general definition is significantly different from the specific definition in § 940.225(4), which is applicable only to sex crimes.

The definition of without consent in § 939.22(48) does not contain any reference to a person who is competent to give

informed consent, thereby eliminating the circuit court's main reason for misconstruing the meaning of without consent as that term is used in the sexual assault statute. There is absolutely nothing in the definition of without consent as used in the burglary statute which remotely suggests that competence to consent could possibly be an issue.

Although the definition states that something is without consent when consent is given for several enumerated reasons including defective mental condition, Wis. Stat. § 939.22(48)(c), this part of the definition applies only when there is actually a manifestation of consent, which is legally treated as inoperative because of the circumstances in which it is given. 5 Wisconsin Legislative Council, Judiciary Committee Report on the Criminal Code, comment to proposed § 339.22(48) at 18 (1953).

This comment makes clear that the "area where there has been neither consent in fact nor any manifestation of consent causes little difficulty. Where the victim has no knowledge of the thing done, he cannot be said to have consented to the doing of that thing." Judiciary Committee Report at 18. So when the victim is unaware of what is going on because she is unconscious, she does not consent in fact to anything that is happening, which is therefore without consent.

Furthermore, to construe this definition to require that the victim be competent to give consent would lead to unreasonable results. *See Orion*, 290 Wis. 2d 421, ¶ 16.

Suppose the occupants of a residence leave to go to a bar. When they arrive at the bar they are completely sober so that they are competent to give consent for another person to enter their house. If a person breaks into their house at this time with the intent to steal, he commits a burglary. But suppose the occupants spend some time drinking at the bar and become too intoxicated to be competent to consent. If the same person

simply waits to break into the same house with the same intent to steal, he would not commit a burglary.

There may be a problem where the victim consents to the entry of premises but the consent is limited to place and purpose. In that situation, the extent of the consent must be determined under the facts of the particular case. *State v. Karow*, 154 Wis. 2d 375, 383-84, 453 N.W.2d 181 (Ct. App. 1990).

But where the victim has no knowledge that the defendant has gone beyond the place and/or purpose for which consent was given, there is no consent in fact to this expanded intrusion.

Therefore, contrary to the circuit court's erroneous holding, competence of the victim to consent is not an element of either third-degree sexual assault or burglary, nor is proof of any such competence a condition precedent to conviction for either of these crimes.

II. The jury properly found Jama guilty of third-degree sexual assault.

A. The evidence was sufficient to prove that HH did not consent to have sexual intercourse with Jama.

The usual rules for assessing the sufficiency of the evidence apply when a circuit court overturns a verdict of the jury finding the defendant guilty and directs the entry of a judgment of not guilty. *State v. Helnik*, 47 Wis. 2d 720, 722-23, 177 N.W.2d 881 (1970).

Since sufficiency of the evidence is a question of law, *State v. Fleming*, 38 Wis. 2d 365, 368, 156 N.W.2d 485 (1968), review would be de novo. *See State v. Warbelton*, 2009 WI 6,

¶ 18, 315 Wis. 2d 253, 759 N.W.2d 557 (review of questions of law is de novo).

The test is not whether the reviewing court is convinced of the defendant's guilt, but whether the court can conclude that the trier of fact could reasonably be convinced beyond a reasonable doubt by the evidence it had a right to believe and accept as true. *State v. Perkins*, 2004 WI App 213, ¶ 14, 277 Wis. 2d 243, 689 N.W.2d 684; *State v. Poellinger*, 153 Wis. 2d 493, 503-04, 451 N.W.2d 752 (1990). Thus, the reviewing court must search the record for evidence that supports the finding, *State v. Schulpius*, 2006 WI App 263, ¶ 11, 298 Wis. 2d 155, 726 N.W.2d 706, viewing the evidence in the light most favorable to the finding. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504.

Here, the circuit court properly found that the evidence was sufficient to prove that Jama had sexual intercourse with HH. But the court was absolutely wrong to find that there was absolutely no evidence that HH did not consent to have sexual intercourse with Jama. This error inevitably stemmed from the court's mistaken belief that there had to be affirmative evidence that the victim withheld consent.

HH testified without contradiction that Jama hit her over the head as soon as she went into her apartment, and that she had no memory of anything that happened after that until she woke up later in the day (88:216).

Because HH was unconscious and therefore incapable of consenting when Jama had intercourse with her (88:278), the element of "without consent" was proven easily. *Grunke*, 311 Wis. 2d 439, ¶ 25. Contrary to the decision of the circuit court, the fact that HH had no memory of giving consent does not vitiate the jury's verdict; it proves beyond a reasonable doubt that HH did not consent because she could not consent.

No means no. But the absence of yes also means no.

B. The verdicts convicting Jama of second-degree and third-degree sexual assault were not mutually exclusive.

No Wisconsin appellate court has ever adopted the rule of mutual exclusivity advocated by the circuit court, *but see State v. Asfoor*, 75 Wis. 2d 411, 428, 249 N.W.2d 529 (1977) (noting that intent and negligence are mutually exclusive), and this court need not do so in this case because there is no question that the verdicts convicting Jama of second-degree and third-degree sexual assault were not mutually exclusive.

Being incapable of consent, as required for conviction of second-degree sexual assault, and not consenting, as required for conviction of third-degree sexual assault, are not conflicting but completely compatible since there is no consent when a victim is unable to consent. *Grunke*, 311 Wis. 2d 439, ¶ 25; *Sauceda*, 168 Wis. 2d at 498.

The circuit court erred by overturning the unanimous verdict finding Jama guilty beyond a reasonable doubt of third-degree sexual assault. The court's decision should be reversed, and the jury's verdict should be reinstated.

III. The jury properly found Jama guilty of burglary.

A. The evidence was sufficient to prove that Jama entered HH's apartment with intent to sexually assault and steal from her, and that she did not give him consent to enter her apartment for those purposes.

The circuit court properly found that the evidence was sufficient to prove that Jama entered HH's apartment. However, the court erred by finding that the evidence was insufficient to prove the other elements of burglary.

The court was wrong when it said there was no evidence of Jama's words or actions from which a jury could reasonably find that he intended to commit a sexual assault or a theft at the time he entered the apartment.

Facts can be established by reasonable inferences as well as direct evidence. *Perkins*, 277 Wis. 2d 243, ¶ 14; *Poellinger*, 153 Wis. 2d at 504.

It is the function of the trier of fact to draw these inferences. *Poellinger*, 153 Wis. 2d at 504. And in drawing them the trier of fact may use common knowledge and common sense. *State v. Messelt*, 185 Wis. 2d 254, 264, 518 N.W.2d 232 (1994); *Poellinger*, 153 Wis. 2d at 508. The trier of fact can choose among conflicting inferences that may be supported by the same evidence, and can adopt the inference that is consistent with guilt instead of innocence. *State v. Bodoh*, 226 Wis. 2d 718, 727-28, 595 N.W.2d 330 (1999); *Poellinger*, 153 Wis. 2d at 504.

Since drawing an inference is a finding of fact, the reviewing court must accept the inferences drawn by the fact finder even if other inferences could also be drawn from the evidentiary facts. *Poellinger*, 153 Wis. 2d at 504; *State v. Friday*,

147 Wis. 2d 359, 370, 434 N.W.2d 85 (1989). An inference may be rejected on appeal only if it is unreasonable as a matter of law. *See State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417; *Bodoh*, 226 Wis. 2d at 727-28; *Friday*, 147 Wis. 2d at 370-71.

The facts that Jama hit HH over the head, knocking her out, as soon as he entered the apartment, then had sexual intercourse with her right there by the door while she was unconscious (88:216, 218, 278), allowed the jury to reasonably infer that Jama formed the intent to sexually assault HH when he saw her walking in a vulnerable condition, and decided to help her get home so he could get into her apartment to effectuate his criminal intent.

The facts that Jama ransacked HH's apartment after sexually assaulting her, and left the building with a bag of loot he found to steal (88:228, 233, 235; 91:84), raises a reasonable inference that he similarly formed an intent to steal what he could from a vulnerable victim, who would be unable to stop him, before getting into her apartment.

The circuit court erred by rejecting inferences that could be drawn by the jury, which were completely reasonable under the undisputed evidence considered in the context of common knowledge and common sense.

The circuit court also erred by finding that the state failed to prove lack of consent because it ignored not only the law defining lack of consent as applicable to the crime of burglary, but also the law establishing that consent to enter premises may be limited to place and purpose.

Although HH may have given Jama consent to come into the entrance to her apartment for the purpose of helping her get inside, she did not consent to his entry for the purposes of

raping and robbing her. Since HH was knocked unconscious as soon as Jama entered the premises, HH could not have given him consent to enter for the purposes of stealing or committing a sexual assault.

Lacking consent to enter HH's apartment for those purposes, Jama committed a burglary when he intentionally entered the apartment without consent with intent to sexually assault and steal from HH. *See Karow*, 154 Wis. 2d at 383-84.

B. The verdicts convicting Jama of second-degree sexual assault and burglary were not mutually exclusive.

Being incapable of consent, as required for conviction of second-degree sexual assault, and not consenting, as required for conviction of burglary, are not conflicting but completely compatible since there is no consent when a victim is unable to consent. *Grunke*, 311 Wis. 2d 439, ¶ 25; *Sauceda*, 168 Wis. 2d at 498.

The only inconsistency here is the circuit court's findings that the state proved that HH, despite her unconsciousness, did not consent to the theft of her property, but did not prove that HH did not consent to Jama's entry into her apartment for the purpose of stealing that property (76:4, 15, A-Ap:104, 115).

The circuit court erred by overturning the unanimous verdicts finding Jama guilty beyond a reasonable doubt of burglary with intent to commit a sexual assault and burglary with intent to steal. The court's decision should be reversed, and the jury's verdicts should be reinstated.

CONCLUSION

HH did nothing to deserve what Jama criminally did to her. HH did nothing to justify acquitting Jama of the crimes he unequivocally committed against her. Her acts are no defense. Wis. Stat. § 939.14 (2013-14).

The correct law correctly applied to the evidence in this case establishes that the jury correctly found Jama guilty beyond a reasonable doubt of third-degree sexual assault, burglary with intent to commit a sexual assault and burglary with intent to steal. The circuit court erred when it applied law that does not exist to overturn those verdicts.

It is therefore respectfully submitted that the decision and order of the circuit court directing the entry of judgments of not guilty of the crimes of third-degree sexual assault, burglary with intent to commit a sexual assault and burglary with intent to steal notwithstanding the jury's verdicts of guilty should be reversed, and the verdicts finding Jama guilty of those crimes should be reinstated.

The case should be remanded to the circuit court for sentencing and the entry of judgments of conviction on the three remaining crimes of which Jama is guilty.

Dated: April 24, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,401 words.

Dated this 24th day of April, 2015.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of April, 2015.

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