

No. 1-13-2219

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 0484201
)	
ABRAHAM RAMOS,)	Honorable
)	Noreen V. Love,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Evidence at trial was insufficient to prove beyond a reasonable doubt that defendant committed criminal sexual assault, where the State failed to establish that he knew the victim was so intoxicated as to render her unable to willingly consent.

¶ 2 Following a joint bench trial with codefendant Luis Roldan,¹ who is not a party to this appeal, defendant Abraham Ramos was convicted of three counts of criminal sexual assault and

¹ Codefendant Luis Roldan's conviction for criminal sexual assault was reversed on appeal by this court in an opinion on September 14, 2015. See *People v. Roldan*, 2015 IL App

sentenced to consecutive 4-year terms for a total of 12 years of imprisonment. On appeal, the defendant argues that: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court applied an incorrect legal standard in determining that the alleged victim was unable to consent to the sexual acts; (3) the trial court violated his equal protection rights under the law by holding him to a higher standard of conduct than a similarly-situated woman; and (4) the trial court erred in sustaining two hearsay objections made by the State at trial. For the following reasons, we reverse the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 On March 6, 2011, the defendant was arrested and later charged with three counts of criminal sexual assault against J.T., on the basis that he knew the victim was unable to give knowing consent. See 720 ILCS 5/12-13(a)(2) (West 2010). On January 4, 2013, a joint bench trial² commenced during which several witnesses testified on behalf of the State and the defendant. The evidence adduced at trial shows that on the evening of March 6, 2011, Esperanza Castellanos (Esperanza), Yesenia Guerrero (Yesenia), and the victim, J.T., planned to go to a movie theater in Cicero to celebrate Yesenia's seventeenth birthday. When they could not decide which movie to see, they called the defendant, who arrived at the movie theater with his female cousin, Isamar Baez (Isamar). The group then drove to the home of the defendant's aunt in Cicero, where he lived at the time.

¶ 5 J.T. testified that when they were in the living room, the defendant asked whose birthday it was and then their ages. She told him she was 16 years old, Yesenia told him she had just

(1st) 131962.

² Because a joint bench trial was held for the defendant and codefendant Roldan, we reproduce the pertinent facts set forth in our September 14, 2015 opinion in resolving Roldan's appeal to the extent those facts were properly admitted in this case.

turned 17, and J.T. did not recall Esperanza answering that question. At that point, the defendant gave Yesenia a one-liter bottle of Smirnoff vodka that was one-third to one-half full and told her it was her birthday present. Yesenia started drinking straight out of the bottle, and J.T. also took a drink from it. J.T. testified that she had never consumed alcohol prior to that day. When Yesenia finished the bottle of vodka, the defendant produced an identical, but unopened, one-liter bottle of Smirnoff vodka for them to drink. Codefendant Roldan, whom J.T. had never met before, arrived at the home of the defendant's aunt with orange juice, which he, the defendant, J.T., Yesenia, and Esperanza mixed with the vodka and used to play a drinking game that involved playing cards which dictated the length of the drink to be taken. She testified that the defendant provided each person with a cup that was about 8 to 10 inches tall and filled with 1 to 2 inches of vodka. He prepared the first round of drinks, then each girl either refilled her own cup with the vodka and orange juice mixture, or he filled the cup for her. After playing the drinking game for about an hour, the group ran out of orange juice and decided to go to Walgreens to buy more. Each of the five participants had finished two to four cups of orange juice and vodka mixture at that point, with Yesenia drinking the most and J.T. a little less. J.T. further testified that Yesenia wanted to accompany the others to Walgreen, but they decided she was too drunk to come along and made her sleep on the couch in the living room. On the way to Walgreens, J.T. walked with codefendant Roldan, while Esperanza walked ahead of them with the defendant. J.T. testified that she was having trouble walking, and recalled that she and codefendant Roldan kissed inside the store. She also remembered arguing with the defendant outside the store, but her next recollection was hearing "a lot of loud noise" and sitting in a chair in the hospital the following morning where she had her blood drawn. She did not remember

returning to the home of the defendant's aunt, arriving at the hospital that night, or having sex with anyone.

¶ 6 Yesenia essentially testified to the same sequence of events as J.T., which brought them to the home of the defendant's aunt, where the defendant inquired into their ages, and they played a drinking game. She also testified that she and J.T. were best friends prior to the events of March 6, 2011, but were no longer friends. Yesenia testified that she had the most to drink that night, and J.T., in comparison, drank a little less than her, but more than the other three. When Esperanza and the defendant returned from the store, Yesenia woke up and realized that J.T. and codefendant Roldan were not with them. She attempted to call J.T. on her cell phone, but J.T. did not answer, so Yesenia called her friend, Jose, to help her look for J.T. When J.T. and codefendant Roldan eventually returned to the home of the defendant's aunt, Yesenia noticed that J.T. seemed fine and did not look like she was drunk. Jose then took Yesenia home, where her parents noticed that something was wrong. They contacted J.T.'s parents and, with Yesenia, returned to the home of the defendant's aunt. Upon arrival, Yesenia discovered J.T. lying on the bed in a boy's bedroom wearing boy's pants, which were not the pants she had been wearing earlier in the evening. When neither Yesenia nor J.T.'s mother could wake J.T., they called the police.

¶ 7 Police officer Walberto Galarza (Officer Galarza) arrived at the scene at about 11p.m. and observed a girl lying on a bed in one of the bedrooms. Officer Galarza attempted to rouse the girl by shaking her by the shoulders, but she did not wake up so he called the paramedics. They were able to rouse J.T., but as they led her to a wheelchair, she appeared to need help walking. Officer Galarza noted that J.T. was belligerent and swearing at her parents as she was

taken away by the paramedics. Officer Galarza noted in his police report that J.T. was shouting only at her parents and did not shout anything toward the defendant, whom he arrested.

¶ 8 Assistant State's Attorney Nicholas Kantas (ASA Kantas) testified that he spoke with the defendant at the police station and that their conversation was reduced to a typewritten statement signed by the defendant. At trial, ASA Kantas published the defendant's typewritten statement to the court, as follows: The defendant, who was 18 years old, stated that when J.T. returned to his aunt's home after the trip to Walgreens, she attempted to kiss him, but he told her "to stop because she had too much vodka." J.T. and Esperanza then went to the bathroom together, and the defendant went to check on them because they were taking a long time. He knocked on the bathroom door to make sure they were all right because they were "drunk." J.T. then came out of the bathroom and attempted to kiss him again. He took her to one of the empty bedrooms in the house, where they had sex for several minutes. He eventually opened the door to the bedroom because Esperanza had been knocking on it attempting to speak with J.T. The defendant left the bedroom for a few minutes, while Esperanza went into the bedroom to speak with J.T., who was lying on the bed wearing a pair of boy's pants that the defendant had given her. Shortly thereafter, J.T.'s parents arrived and he was arrested.

¶ 9 The parties then stipulated that, if called to testify, DNA analyst Angela Kaeshamer, would state that she received a condom retrieved by the police from the floor of codefendant Roldan's car. She discovered human male DNA on the condom and opined to a reasonable degree of scientific certainty that it belonged to codefendant Roldan, and not the defendant. She would also testify that the non-sperm fraction of the DNA collected represented a sample from which J.T. could not be excluded. The State then rested and the trial court denied the defendant's motion for a directed finding.

¶ 10 The defendant's cousin, Isamar, testified on behalf of the defense that she did not drink any alcohol that night and that she did not observe J.T. act drunk at any point throughout the night. After J.T. came back to the house from Walgreens, Isamar saw that J.T. was walking without assistance, that J.T. did not throw up, and that J.T. was having conversations with Esperanza. When Esperanza knocked on the locked bedroom door, Isamar could hear J.T. responding and talking to Esperanza back and forth through the door. Later, after the bedroom door was opened, Isamar heard Esperanza speaking with J.T. at the bedside. J.T. was responding to Esperanza's questions appropriately during the conversation. Isamar further testified that when J.T. was being led out of the bedroom by the paramedics, she shouted at the police to let the defendant go and yelled that "he didn't do anything." At that point, J.T.'s mother smacked J.T. and sat her back down.

¶ 11 Esperanza testified on behalf of the defense that during her encounters with J.T. throughout the night, J.T. did not seem drunk. She observed that J.T. was walking normally and did not need assistance walking, that she was responsive to questions, and that her speech was not slurred. Esperanza testified that during the walk back from Walgreens, she and the defendant lost sight of J.T. and codefendant Roldan and could not locate them. Esperanza called J.T. several times on her cell phone, but J.T. did not answer. She further testified that J.T. seemed fine when J.T. returned to the home of the defendant's aunt. The group stood outside the house, where J.T. then conversed with the defendant and they ended up "making out," which Esperanza described as kissing for longer than a minute. J.T. and Esperanza then went back inside the house to use the bathroom together. Inside the bathroom, the two girls conversed, during which J.T. had no trouble responding to Esperanza's questions, and they made a "silly" video with their phones to post on Facebook. Once they finished making the video, J.T. used the toilet. J.T. did

not fall over as she sat down on the toilet, nor did she need assistance getting off the toilet or walking out of the bathroom. Esperanza testified that J.T. exited the bathroom first, and that, by the time Esperanza exited, she could not find J.T. Esperanza then knocked on the closed bedroom door until the defendant opened it. The defendant then stepped out of the bedroom, and Esperanza tried to talk to J.T. who was still in the bedroom. J.T. did not tell her anything. Esperanza also stated that by that time J.T.'s parents kept calling J.T.'s cell phone. Esperanza asked J.T. what J.T. wanted her to tell her parents, but J.T. did not respond. A few minutes later, J.T.'s parents arrived at the house and called the police when they could not wake her. After the police arrived, the defendant was detained and handcuffed. As the paramedics escorted J.T. out of the bedroom, she was awake and yelled "let him go." When J.T. left the house, she was wearing loose jeans that did not appear to be her size, but Esperanza did not know whether J.T. put those pants on by herself.

¶ 12 The defendant testified on his own behalf that he was 18 years old at the time of the incident. That evening, he had been exchanging texts with Esperanza, who told him it was one of her friend's birthday and they wanted to celebrate. He had known Esperanza for several years. He and his cousin, Isamar, picked up Esperanza, Yesenia and J.T. from a local movie theater and went back to his aunt's house. The defendant had met J.T. before and knew they went to the same high school. He did not know Yesenia. The defendant then introduced the girls to his aunt, who was washing dishes in the kitchen. Thereafter, the girls asked what they were going to drink and he brought out a bottle of Smirnoff vodka that was only one-third full. He offered Yesenia a shot from the bottle and she suggested that they all take a shot, so they did. Codefendant Roldan then brought over orange juice and the group mixed it with the vodka. They played a drinking game on the floor of the living room. Isamar did not drink and did not

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participate in the drinking game, which lasted for about 45 minutes to an hour. The group also eventually drank a quarter of a second brand new bottle of vodka. The defendant had a total of about two to three cups of the cocktail mixture, while J.T. had about two cups of the mixture and Yesenia had about three cups. When the orange juice ran out, the group decided to walk to Walgreens to buy more. Yesenia was already drunk and "we already had taken her cup away and told her to calm down." Yesenia and Isamar stayed behind at the house while the defendant, codefendant Roldan, J.T. and Esperanza walked to the store about four blocks away. En route, the defendant and Esperanza were walking together, while J.T. was walking in front with codefendant Roldan. The defendant observed J.T. to be walking "perfectly fine." When they arrived at Walgreens, they decided not to buy anything and started to head back toward the house. On the way back to the house, J.T. was again walking in front with codefendant Roldan. The defendant and Esperanza then lost sight of them. As the defendant and Esperanza got back to the house, they tried looking for J.T. and codefendant Roldan. Esperanza called J.T.'s cell phone but J.T. did not answer. They stood outside the house and waited. About 15 minutes later, J.T. and codefendant Roldan reappeared and walked up to the front of the house. The defendant noticed that J.T. was walking "good" and was not stumbling at all. Codefendant Roldan then left to go home. J.T. then got close to the defendant and said, "oh you're really cute, *** I would have you and your boy." J.T. then tried to kiss the defendant, saying "I think you're cute." The defendant did not kiss her back at that time. J.T. then stated, "oh I want to f**k you, but you're – you're a love guy." J.T. then put her hand between his pants. In response, the defendant asked her what she was doing, told her that she was drunk, and moved her away. J.T. was insistent. Esperanza then suggested that she and J.T. go to the bathroom inside the house. As J.T. was going back inside the house with Esperanza, J.T. again stated to the defendant, "oh, I

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want to f**k you." Inside, Esperanza and J.T. went to the bathroom, while the defendant asked Isamar, "hey, this girl wants to do it. Where can I do it at?" Isamar told him she did not know. The defendant then sat in the living room while J.T. and Esperanza were inside the bathroom for about 15 to 20 minutes. The defendant then knocked on the bathroom door, which J.T. opened and exited. J.T. then tried to kiss the defendant again and then she and the defendant went into a bedroom about 3 to 4 feet away from the bathroom. Inside the bedroom, J.T. started to take her pants off, saying, "oh, I want you to f**k me." J.T. then pulled her pants down to her knees. The defendant then removed his own pants and removed J.T.'s pants the rest of the way. He noticed that he was not "getting hard," and suggested that J.T. put his penis in her mouth. She agreed and then put his penis in her mouth. During this time, J.T. was behaving normally and he could understand her clearly and she could understand what he was saying. The two then had sexual intercourse on the bed, during which J.T. remarked, "go faster, go harder." At no point was J.T. asleep or passed out. It appeared that she was a willing participant. During sex, J.T. was on top of the defendant for about five minutes. Simultaneously, Esperanza was knocking on the bedroom door, but neither J.T. nor the defendant answered her at first. After J.T. was on top of the defendant for about five minutes, the defendant asked if she was "okay with anal." After J.T. responded, they engaged in anal sex. During anal sex, the knocking continued at the door and the defendant told J.T., "let's finish this some other time, I'm opening the door." The defendant put his pants back on, saw what he thought was J.T.'s blue pants on the floor, gave her those pants, and she put them on. J.T. then went back to the bed. The defendant then opened the bedroom door, exited the room, and Esperanza went inside the bedroom and had a conversation with J.T. A few minutes later, J.T.'s parents arrived at the house, and later the police handcuffed him and the paramedics took J.T. to the hospital. At no time during the entire night did he ever

see J.T. vomit or pass out like Yesenia, nor did he see J.T. being physically held up by anybody. The defendant testified that he felt that J.T. understood what he was saying at all times.

¶ 13 In rebuttal, Detective John Savage (Detective Savage) testified on behalf of the State that at 1:50 a.m. on March 7, 2011, he had a conversation with Esperanza at the police station. During that conversation, Esperanza never told him that when the defendant was arrested J.T. stated "leave him alone, he didn't do anything wrong."

¶ 14 Following closing arguments, the trial court found the defendant guilty as charged.³ In finding the defendant guilty, the trial court stated that when people are drunk enough, they can sometimes go into a "blackout state," where they are unable to remember anything. The trial court noted that it did not know if a toxicology report was done, and the State would be unable to produce evidence it did not have. However, the court noted that J.T. was 16 years old and small in frame and had consumed a lot of alcohol in a short period of time and, later, neither the police nor her parents were able to wake her. The paramedics were eventually able to rouse her and she had to be carried to a wheelchair. The court stated that these circumstances indicated that J.T. was heavily intoxicated that night, and regardless of her actions toward the two defendants, she was unable to give knowing consent to sexual intercourse. The court found it significant that both defendants stated in their typewritten statements that they knew J.T. was drunk shortly before having sex with her, and concluded that that the defendant reasonably knew that J.T. was unable to give knowing consent because she was impaired and in a blackout state.

¶ 15 On June 21, 2013, the trial court denied the defendant's motion for a new trial and sentenced him to consecutive 4-year terms on each of the three counts of criminal sexual assault, for a total of 12 years of imprisonment.

³ Codefendant Roldan was also found guilty of criminal sexual assault.

¶ 16 On July 10, 2013, the defendant filed a timely notice of appeal. Accordingly, we have jurisdiction over this appeal.

¶ 17 ANALYSIS

¶ 18 We determine the following issues on appeal: (1) whether the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt; (2) whether the trial court applied an incorrect legal standard in determining that J.T. was unable to consent to the sexual acts; (3) whether the trial court improperly violated defendant's equal protection rights; and (4) whether the trial court erred in sustaining two hearsay objections made by the State at trial.

¶ 19 We first determine whether the evidence was sufficient to prove the defendant's guilt beyond a reasonable doubt.

¶ 20 The defendant argues that the evidence failed to show that J.T. was "highly intoxicated, unconscious, or asleep" such that she was unable to knowingly consent, or that he knew J.T. was unable to give knowing consent. He points out that the State did not present any evidence of J.T.'s blood alcohol level or any testimony from medical personnel and that there was no evidence that J.T. was incoherent or slurring her words, and that J.T. never vomited, never needed help standing or walking, and never lost consciousness prior to having sex with the defendant. To the contrary, he argues, the evidence showed that J.T. was able to stand and walk on her own, engage in coherent conversation, and record a video on her cell phone minutes before having sex with the defendant. Under these circumstances, he contends, the State failed to prove beyond a reasonable doubt that J.T. was so drunk that she was unable to give knowing consent and that he *knew* J.T. was unable to give knowing consent.

¶ 21 The State counters that it proved the defendant's guilt beyond a reasonable doubt, arguing that the evidence established that J.T. was highly intoxicated during the sex acts and unable to

give knowing consent where she was unconscious shortly after the sex acts and the defendant admitted in his statement to ASA Kantas and at trial that J.T. was drunk. As such, the State argues, the defendant knew or should have known that J.T. was unable to give knowing consent and the evidence established his guilt beyond a reasonable doubt.

¶ 22 As an initial matter, the defendant urges us to review this issue *de novo*, arguing that the evidence does not question the credibility of the witnesses, but instead questions whether the uncontested facts were sufficient to prove the elements of the crime charged. However, we decline to do so, as the record shows some differences in the witnesses' testimony and the trial court made its findings of fact after evaluating these discrepancies. Thus, the applicable standard of review is well-settled that the State must prove its case, "beyond a reasonable doubt."

¶ 23 Where defendant challenges the sufficiency of the evidence to sustain his conviction, the reviewing court must consider whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jordan*, 218 Ill. 2d 255, 269-70 (2006). This standard recognizes the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to give their testimony, to resolve any conflicts and inconsistencies in the evidence, and to draw reasonable inferences from such evidence. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the State, and will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011); *People v. Smith*, 185 Ill. 2d 532, 542 (1999). However, although great deference is given to the trial judges when they hear the evidence and observe the witnesses, "this deference does not require a mindless rubber-stamp on every bench trial guilty

verdict we address." *People v. Hernandez*, 312 Ill. 2d 1032, 1037 (2000). A judgment of conviction can be sustained only upon credible evidence that removes all reasonable doubt of guilt, and where the evidence of the prosecution is improbable, unconvincing or contrary to human experience, we will not hesitate to reverse that conviction. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). If this court "is of the opinion that the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and is not sufficient to create an abiding conviction that he is guilty of the crime charged, then the conviction must be reversed." *People v. Young*, 128 Ill. 2d 1, 48 (1989).

¶ 24 The Due Process Clause of the Fourteenth Amendment of the United States Constitution ensures that an accused defendant is not convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *People v. Carpenter*, 228 Ill. 2d 250, 254 (2008); see also *People v. Ehlert*, 211 Ill. 2d 192, 213 (2004) ("simply stated, the fact that a defendant [may be] guilty does not equate to guilty beyond a reasonable doubt").

¶ 25 In the case at bar, the defendant was charged with and convicted of three counts of criminal sexual assault. See 720 ILCS 5/12-13(a)(2) (West 2010).⁴ To sustain a conviction of criminal sexual assault, the State was required to prove beyond a reasonable doubt that the accused committed an act of sexual penetration and the accused knew that the victim was "unable to understand the nature of the act or was unable to give knowing consent." 720 ILCS 5/12-13(a)(2) (West 2010); see also 720 ILCS 5/11-1.20(a)(2) (West 2012). In this context, "consent" refers to the victim's "freely given agreement" to the act of sexual penetration. 720

⁴ Section 12-13 of the Criminal Code was later renumbered as section 11-1.20 by P.A. 96-1551, Art. 2, § 5, eff. July 1, 2011.

ILCS 5/11-1.70 (West 2012). A person acts knowingly, or acts with the knowledge of, "[t]he nature or attendant circumstances of his or her conduct, described by the statute defining the offense, when he or she is consciously aware that his or her conduct is of that nature or that those circumstances existed. Knowledge of a material fact includes awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5 (West 2010). "[T]he proper inquiry in a prosecution under section 12-13(a)(2) must be on the defendant's particular knowledge of a victim's ability to understand the act or give knowing consent and must be determined by examining the unique facts of each case." *People v. Lloyd*, 2013 IL 113510, ¶ 33; *People v. Whitten*, 269 Ill. App. 3d 1037, 1042 (1995) (The focus is on what the defendant knew or reasonably should have known regarding the victim's willingness or ability to give knowing consent). If a defendant has reason to believe that the victim is unable to give consent, he should abstain from engaging in any sexual contact with the victim. *Id.* at 1043. Knowledge may be proven by circumstantial evidence so long as the State presents sufficient evidence from which an inference of knowledge can be made. *Ortiz*, 196 Ill. 2d at 260.

¶ 26 The parties do not dispute that the element of sexual penetration was satisfied in the case at bar. Instead, the State's theory at trial was that the defendant knew that J.T.'s consumption of alcohol rendered her unable to consent to the sex acts. Viewing the evidence in a light most favorable to the State, we find that the evidence was insufficient to prove the defendant's guilt beyond a reasonable doubt. The evidence presented shows that the defendant and J.T. were among those who played a drinking game at his aunt's house, during which J.T. voluntarily consumed about two cups of a mixture of vodka and orange juice. Everyone, except Isamar, participated in the drinking game and drank alcohol. The group then walked to a nearby Walgreens. J.T. testified that she was having trouble walking, and although she recalled kissing

codefendant Roldan inside the store and arguing with the defendant outside of the store, she did not recall anything else until she was in the hospital the following morning. However, evidence was also presented that J.T. had no trouble at all walking at any point leading up to the sexual encounter with the defendant. In fact, according to several witnesses, J.T.'s speech, actions, and demeanor leading up to the sexual encounter with the defendant did not suggest that she was impaired. The State presented the testimony of J.T.'s best friend, Yesenia, who testified that when J.T. and codefendant Roldan returned to the house after going to Walgreens, J.T. seemed fine and did not look like she was drunk. Isamar also testified that after J.T. came back to the house from Walgreens, J.T. was walking without assistance, J.T. did not throw up, and J.T. was conversing with Esperanza. Esperanza, who was part of the group who walked to Walgreens, testified that throughout the night, J.T. did not seem drunk, was walking normally, did not need assistance walking, was responsive to Esperanza's questions, and did not have slurred speech. Although Esperanza lost sight of J.T. and codefendant Roldan during the return walk from Walgreens, Esperanza testified that J.T. seemed fine when J.T. eventually returned to the house with codefendant Roldan. Esperanza further testified that upon J.T.'s return to the house, J.T. conversed with the defendant and they ended up "making out." Thereafter, J.T. and Esperanza went to the bathroom together, where they engaged in conversation and made a "silly" video with their phones to post on Facebook, J.T. used the toilet without difficulty and J.T. did not need assistance. The defendant also testified that J.T. walked "perfectly fine" to Walgreens, that J.T. was walking "good" when she eventually returned to the house with codefendant Roldan, that she repeatedly expressed a desire to have sex with him, that she tried to kiss him and put her hands down his pants, that J.T. went to the bathroom with Esperanza, and that J.T. exited the bathroom on her own, began to kiss the defendant again, and the duo then went to a nearby

bedroom to have sex. The defendant also testified that, during the sexual encounter, J.T. was a willing participant who behaved normally and understood what he was saying and he understood her clearly. He testified that at no point during the entire night did he ever see J.T. vomit or pass out like Yesenia, nor did he see J.T. being physically assisted by anybody. We also observe that J.T. testified that her blood was drawn at the hospital; however, there was no further inquiry into whether the blood was used for a toxicology report or was drawn for another purpose. Notably, the State did not introduce any medical evidence of J.T.'s level of intoxication as a result of her consumption of alcohol. Also importantly, the State did not present any evidence regarding the physiology of alcohol consumption and how it may have been a factor in J.T. and defendant's behavior, although such evidence would have been crucial in this case. Based on the foregoing, the evidence was insufficient to support the determination that *at the time* of the defendant's sexual encounter with J.T., the defendant *knew* J.T. was unable to give knowing consent or that J.T. lacked the ability to give knowing consent. *Lloyd*, 2013 IL 113510, ¶ 44.

¶ 27 The trial court found that J.T. was in a "blackout" state and could not have consented to the sexual acts with the defendant. However, no evidence was introduced at trial that J.T. was blacked out *at the time* she had sex with the defendant. It appears that the trial court concluded that J.T. could not have consented to sex with the defendant based on her condition *subsequent* to her sexual encounter with the defendant, when her parents arrived and could not rouse her. However, for purposes of determining the validity of the trial court's conclusion, including the blackout theory, the critical point in time is *during* the sexual encounter between the defendant and J.T. The record contains no evidence of a "black out" or other behavior by J.T. *at the time of her sexual encounter with the defendant*, which suggests that the defendant should have known J.T. lacked the ability to give knowing consent. As noted, there was more evidence that J.T.

exhibited no outward signs in her speech, actions, or demeanor that could have indicated to anyone, including the defendant, that she was so impaired that she could not have given knowing consent at the time she had sex with the defendant in the bedroom. There was no evidence of the level of impairment that the State needed to establish to prove its case. Although J.T. had consumed alcohol that night, there was testimony from both State and defense witnesses that J.T. did not appear to be impaired to the point where it was obvious that she could not consent. Thus, the trial court, in issuing its ruling, may not assume, without sufficient evidence on the record (*People v. Davis*, 65 Ill. 2d 157, 161 (1976)), that J.T. was in a blackout state and therefore unable to give knowing consent. See also *United States v. Peters*, 277 F.3d 963, 967-68 (2002) (complainant's failure to remember how she got to the rear bedroom or her sexual encounter with the accused, coupled with her testimony that she would never consent to have sex with the accused, was insufficient to prove beyond a reasonable doubt that at the time of the act she was physically incapable of declining).

¶ 28 In arguing that the defendant knew or should have known that J.T. was so highly intoxicated that she was unable to consent to the sex acts, the State points to circumstantial evidence such as J.T.'s small frame and young age (16 years old), her consumption of the vodka and orange juice mixture, the defendant's role as the group's "bartender" during the drinking game, and his awareness that the alcohol affected Yesenia to the point that she could not stand or talk and affected Esperanza to the point where she vomited twice after returning from Walgreens. We find no reasonable inference can be drawn from this circumstantial evidence without more that J.T. was so intoxicated that she could not have consented to sex at the time she approached him. The State clearly could have, but chose not to, present any expert testimony regarding the effects of the alcohol on J.T. In fact, the State did not even bother to present a

toxicology report of any kind. Evidence that Yesenia and Esperanza, who showed outward signs of intoxication, undercuts the State's argument that the defendant should have likewise concluded that J.T., who did *not* exhibit any outward signs of intoxication, was so inebriated that she could not have knowingly consented to sex with the defendant. The evidence shows that Yesenia became so impaired during the drinking game that the group had to take her cup away and make her sleep on the couch, while Isamar stayed with her and the rest of the group headed to Walgreens. As acknowledged by the State, the defendant later told someone to take Yesenia home because of her physical condition. Though the State points to J.T.'s small frame and young age, it is unclear how the defendant, who had only known J.T. as someone who attended his high school, knew or should have known that the amount of alcohol J.T. consumed would have rendered her so intoxicated that she could not have willingly consented to sex, particularly since, by all witness accounts, J.T. did not appear to be impaired to the point where it was obvious that she could not consent.

¶ 29 The State further argues that the defendant's own words showed that he knew J.T. was extremely intoxicated, by pointing to the defendant's testimony that, while the group stood outside the house after returning from Walgreens, he initially declined J.T.'s repeated request to have sex with him because she was "drunk," and by relying on the defendant's typewritten statement to ASA Kantas in which he told J.T. to stop kissing him because she had "too much vodka." However, the State's argument that this shows the defendant knew J.T. was too impaired to consent is pure speculation. Although the defendant knew J.T. had consumed alcohol, there was no evidence to support the conclusion that he knew that rather than simply having relaxed inhibitions, she was completely unable to consent. See *People v. Lissade*, 403 Ill. App. 3d 609, 613 (2010) ("[t]he State must present sufficient evidence from which an inference of knowledge

can be made, and any inference must be based upon established facts and not pyramided on intervening inferences") (quoting *People v. Weiss*, 263 Ill. App. 3d 725, 731 (1994)). Therefore, without more, this is insufficient to meet the State's burden of showing beyond a reasonable doubt that the defendant knew that J.T. was incapable of giving knowing consent. *Lloyd*, 2013 IL 113510, ¶ 44; *Lissade*, 403 Ill. App. 3d at 613 (the State must prove the required mental state beyond a reasonable doubt).

¶ 30 Next, the State argues that the defendant's actions in taking "full advantage" of J.T.'s condition, in isolating her by taking her into the bedroom upon her exit from the bathroom, and in ignoring Esperanza's initial repeated knocking at the bedroom door, indicated that he was well aware that J.T. was too intoxicated to consent. We find no evidence in the record to support this characterization of what occurred. The evidence shows that minutes before entering the bedroom with the defendant, J.T. and Esperanza were in the bathroom together making a video for Facebook and J.T. did not have any trouble conversing with Esperanza and did not need assistance using the toilet. J.T. exited the bathroom on her own and, according to the defendant, she began to kiss him and they went to the bedroom. From the evidence in the record, at no point leading up to and during the sexual encounter with the defendant, did anyone witness or did J.T. ever show any signs that she was too intoxicated to consent to sex. There is no evidence presented that after J.T. emerged from the bathroom, J.T. was incoherent, unaware of what was going on, or that the defendant "took" her to the bedroom so he could "isolate" J.T. from Esperanza and presumably prevent Esperanza from protesting or stopping him. On the contrary, we find that the evidence is devoid of any indication that Esperanza ever expressed concern that the defendant was sexually assaulting J.T. or that Esperanza was protesting their activities in the bedroom. Instead, the evidence suggests that Esperanza was knocking on the bedroom door

because she needed to talk to J.T. since J.T.'s parents were calling J.T.'s cell phone and Esperanza wanted to know how to respond to J.T.'s parents. The State does not point to any evidence that Esperanza expressed concern about J.T.'s safety at that time. Thus, we reject the State's speculative arguments that the defendant's actions, as described by the State, showed that he knew J.T. was too intoxicated to knowingly consent to the sexual acts.

¶ 31 The State further argues that the fact that J.T. was found to be completely unconscious *after* the sexual encounter with the defendant, demonstrated J.T.'s inability to consent and the defendant's knowledge that she was unable to consent. Specifically, the State claims that because Esperanza's continued knocking on the bedroom door interrupted the defendant's anal sex with J.T., and Esperanza entered the room as soon as the defendant opened the door where she found J.T. asleep, a reasonable inference could be drawn that J.T. was asleep at the time of the sex acts with defendant.

¶ 32 We reject the State's argument. First, Esperanza did *not* testify that she found J.T. asleep or unconscious, as the State claims. Rather, her testimony shows that she tried to talk to J.T. in the bedroom, but that J.T. did not tell her anything. J.T. also did not respond to Esperanza's questions about what J.T. wanted Esperanza to tell J.T.'s parents. It was only after J.T.'s parents arrived at the house that J.T. could not be awakened. Second, we find the State's reliance on *People v. Fisher*, 281 Ill App. 3d 395 (1996), to be misplaced. In *Fisher*, the 15-year-old victim consumed a large amount of alcohol and ended up at a friend's relative's house, where she continued to drink beer. *Id.* at 397-98. At some point, the victim passed out on a kitchen bench, awoke to discover 33-year-old defendant having sexual intercourse with her, told him to stop (defendant did not), and passed out again. *Id.* at 398. A friend walked into the kitchen during the sexual act and saw the victim naked with her head "flopping backwards" off the end of the

bench and her eyes "rolling back in her head" while the defendant was naked on top of the victim. *Id.* at 399-400. The jury found the defendant guilty of criminal sexual assault, finding that the defendant knew or should have known that the victim in that case was incapable of giving knowing consent because she was unconscious before and during at least part of the sex act. *Id.* at 402-03. In upholding the defendant's conviction, the *Fisher* court found that the evidence was sufficient to show beyond a reasonable doubt that the defendant knew the victim could not have given consent where she had lost consciousness. *Id.* at 403. The *Fisher* court further noted that its holding should not be misconstrued so as to hold a defendant liable for criminal sexual assault where his "partner's inhibitions were merely relaxed through the consumption of alcohol." *Id.* at 403. In other words, the consumption of alcohol does not necessarily render a person unable to consent to sex. Unlike the victim in *Fisher*, here, there was no evidence whatsoever that J.T. was unconscious at any time *prior to* or *during* the sexual encounter with the defendant. As discussed, viewing the evidence in a light most favorable to the State, J.T.'s speech, actions and demeanor leading up to the sexual encounter with the defendant gave no indication that she was so impaired as to be unable to consent and the evidence was insufficient to show that the defendant, or anyone else at the party, knew or should have known that she lacked the ability to consent. Although the defendant knew that he and J.T. had consumed alcohol and were both under the influence of alcohol at the time of the sexual encounter, no evidence supports the conclusion that he knew that rather than simply having relaxed inhibitions, J.T. was completely unable to consent at the time they had sex. It is important to note that the relevant inquiry is what the defendant knew *at the time* they had sex and, thus, anything that occurred *after* the sexual encounter cannot show that he knew whether J.T. was able to consent at the time they engaged in sex. See *Whitten*, 269 Ill. App. 3d 1042-43

(a reviewing court should "consider all evidence ***, including the accused's perspective as to what he knew and when he knew it, in assessing the question of complainant's consent"); *Peters*, 277 F.3d at 968 (fact that the victim appeared unconscious and intoxicated when her family and police arrived did not establish what her condition was like during the time the sexual act occurred or whether the defendant knew that the victim was physically incapable of declining to participate in the sex act). Here, the trial court accepted J.T.'s testimony that she did not remember large portions of the night, including having sex with the defendant, and therefore, the court assumed that J.T. must have been too intoxicated to knowingly consent. However, regardless of what J.T. remembered, the burden remains upon the state to produce credible evidence, beyond a reasonable doubt, that the defendant knew or should have known of J.T.'s inability to give knowing consent *at the point in time* that the sexual encounter took place. Because the record is devoid of such evidence, the State failed to meet its burden of proving beyond a reasonable doubt, each and every element of the charged offense. Accordingly, we reverse the defendant's conviction for criminal sexual assault. In light of our holding, we need not address the defendant's remaining arguments on appeal.

¶ 33 Reversed.