IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRIAN FRANCIS WASKY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13976 Trial Court No. 3AN-19-03409 CR SUMMARY DISPOSITION No. 0345 — September 13, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Heather Stenson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Brian Francis Wasky was convicted, following a jury trial, of second-degree sexual assault after he sexually penetrated M.P., who was incapacitated, in the back of an Anchorage Safety Patrol van.[1] Wasky was sentenced to 8 years with 3 years suspended (5 years to serve), a sentence at the bottom of the presumptive range, and 10 years of probation. Wasky raises three issues on appeal.

[1] AS 11.41.420(a)(3).

First, Wasky argues that the evidence presented at trial was insufficient to support his conviction. When a defendant challenges the sufficiency of the evidence to support a criminal conviction, this Court views the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to upholding the jury's verdict.[2] The Court then assesses whether, viewing the evidence in that light, a reasonable factfinder could have concluded the State's case was proved beyond a reasonable doubt.[3]

Here, the evidence at trial included Wasky's confession that he anally penetrated M.P. (although he claimed that it was only slight penetration and that it was consensual). It also included the testimony of the two Anchorage Safety Patrol personnel who saw Wasky with his pants pulled down behind M.P., whose pants were also pulled down and who was incapacitated by alcohol and non-responsive. The witnesses also saw Wasky's erect penis when they pulled Wasky off M.P. and one of the witnesses testified that Wasky was "humping" M.P. Viewing this evidence in the light most favorable to upholding the verdict, we have little difficulty in concluding that the evidence presented at trial was sufficient to support Wasky's conviction for second-degree sexual assault (sexual penetration of a person who is incapacitated).

Wasky's second argument is that the trial court erred when it denied his motion for a new trial on the ground that the conviction was against the weight of the evidence. We find no merit to this claim. In denying the motion for a new trial, the trial court applied the correct legal standard, personally evaluated the evidence, and reasonably concluded that the guilty verdict was well-supported by the evidence.[4]

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[2] *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

[3] *Id.*

[4] *See Phornsavanh v. State*, 481 P.3d 1145, 1157-59 (Alaska App. 2021).

Wasky's last argument is that the trial court erred when it rejected the statutory mitigating factor under AS 12.55.155(d)(9) — that the defendant's conduct was "among the least serious conduct included in the definition of the offense." Wasky argues that this statutory mitigator applied to his case because he was heavily intoxicated himself and the penetration was minimal. But, as the State points out, the penetration was minimal because the Anchorage Safety Patrol personnel discovered Wasky sexually assaulting M.P. and they pulled Wasky away. Given these circumstances, we find no error in the trial court's rejection of the statutory mitigating factor.

The judgment of the superior court is AFFIRMED.