

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AUSTIN JOSEPH CAMPBELL, Petitioner

v.

STATE OF MISSOURI, Respondent

On Petition for Writ of Certiorari
to the Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Mr. Campbell was convicted of rape of a person who was “an incapacitated person because of a temporary physical condition in which K.K.¹ was unconscious.” K.K. testified that she was asleep after drinking heavily and awoke to find Mr. Campbell engaging in sexual intercourse. Mr. Campbell testified that he spoke with K.K. at the beginning of the encounter, and she invited him into bed and consented to his actions. In final argument the prosecutor told the jury, over objection, that “To find [Mr. Campbell] not guilty, you would really have to believe that K.K. made all of this up. . . .” Tr. p. 2475. The case therefore presents the following questions.

1. Is evidence that a complainant does not remember giving consent, and states that she awoke from sleep during the sexual encounter, legally sufficient to show that she was “an incapacitated person?”

2. Did the state’s argument misstate the burden of proof?

¹ As state court rules required, petitioner has redacted the name of the alleged victim and substituted her initials. During trial, the victim’s name was used.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Austin Joseph Campbell is the petitioner in this case and was represented in the Court below by Elizabeth Unger Carlyle.

The State of Missouri is the respondent in this case. It was represented in the court below by Assistant Missouri Attorney General Daniel N. McPherson.

Pursuant to Rule 29.6, petitioner states that no parties are corporations.

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Petitioner Austin Joseph Campbell prays that a writ of certiorari be granted to review the judgment of the Missouri Court of Appeals, Western District entered on February 11, 2020.

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District, affirming Mr. Campbell's conviction and sentence is printed at Appendix (hereinafter "App.") p. 1a. The decision is reported at 600 S.W.3d 780 (Mo. App. 2020).

JURISDICTION

The judgment of the Missouri Court of Appeals, Western District was entered on February 11, 2020, affirming Mr. Campbell's conviction and sentence. *See* App. p. 1a. A petition for rehearing or, in the alternative, transfer to the Missouri Supreme Court was denied in the Western District on March 31, 2020. App. p. 32a. An original application for transfer filed in the Missouri Supreme Court was denied on June 30, 2020. App. p. 33a. Pursuant to this Court's order of March

19, 2020, the petition for certiorari is due no later than November 27, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case stems from an incident in a dormitory room at the University of Missouri, Columbia. The complaining witness, K.K., who was then a freshman at the university, had an encounter with Austin Campbell, the petitioner, who was also a freshman.

Mr. Campbell was tried twice. The first trial ended in a hung jury. The evidence described below was presented at the second trial, which resulted in a conviction of rape and sentence of twenty years' imprisonment.

The state presented evidence that on the night of the incident giving rise to the charge, K.K. hosted a "gathering" in her room. Alcohol was served there. Mr. Campbell was briefly present during the

gathering. K.K. acknowledged, and others confirmed, that she had a large amount of alcohol that evening which affected her functioning.

Later in the evening, after Mr. Campbell left, the gathering moved next door to the room of two other students. There, K.K. fell asleep on one of their beds. Some time after that, she was assisted to return to her own room by Jacob Andrews. Mr. Andrews testified that she was “barely” able to walk on her own, he “just put her arm around my neck and kind of dragged her. Her legs would kind of move but not much.” Trial Tr. p. 1629. Mr. Andrews laid K.K. on her side on her bed, gave her a drink of water, and put the trash can by her bed in case she vomited. He asked her if she was okay, and she “mumbled something.” He then left. Tr. p. 1630. Mr. Andrews left the room door unlocked because a key was required to lock it from the outside, and he did not have K.K.’s key.

Some hours after K.K. was returned to her room, Mr. Campbell realized that he had lost his hat and water bottle. Mr. Campbell believed that he had left them in K.K.’s room. He went to the door of K.K.’s room to look for his belongings. According to his testimony, he knocked on the door, and K.K. invited him to enter. She was on the bed,

and lifted her head and asked him for water. He found a cup, and left the room (which had no sink) to get water for her. He rinsed and filled the cup at a water fountain, and returned to the room. A conversation occurred during which K.K. invited Mr. Campbell to get in bed with her. Their encounter proceeded from kissing, to Mr. Campbell's fondling K.K.'s breasts, to his reaching into her leggings to touch her vagina. Mr. Campbell testified that K.K. responded in the affirmative when asked for consent, and also indicated by body language and non-verbal sounds that she was enjoying the encounter. She began to remove her leggings. Mr. Campbell assisted her to complete that process, took off his own pants, and began to have sexual intercourse with K.K.. Suddenly, K.K. said "No" several times and pushed Mr. Campbell to the floor. He briefly lay on the floor stunned, then got up and left K.K.'s room.

K.K. testified that she did not remember leaving the other students' room. She had been told that Mr. Andrews brought her back to bed, but she had no recollection of that. The first thing she knew was that she awakened to Mr. Campbell on top of her having sex. She pushed him off.

During final argument, the state was permitted to argue over objection that in order to acquit Mr. Campbell, the jury was required to believe “that K.K. made all of this up.” Tr. pp. 2475-2476. The trial court overruled the defense objection and refused to instruct the jury to disregard.

REASONS FOR GRANTING THE WRIT

I. THE STATE’S EVIDENCE WAS LEGALLY INSUFFICIENT TO CONVICT MR. CAMPBELL.

The jury heard two accounts of what happened in Mr. Campbell’s room on the night of the incident which gave rise to the rape charge. Mr. Campbell testified that he engaged in sexual intercourse with K.K. with her express and implied consent. K.K. testified that she did not recall giving consent to Mr. Campbell because she was asleep when the intercourse began.

The jury was instructed that Mr. Campbell could be convicted of rape if he had sexual intercourse with K.K., he did so “while K.K. was an incapacitated person because of a temporary physical condition in which K.K. was unconscious,” and he did so “knowingly.” App. p. 34a.

The instruction further provided,

[T]he term “incapacitated” means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of such person's conduct, or unable to communicate unwillingness to an act.

Id.

K.K. did not testify to an inability to communicate with Mr. Campbell or to understand what is happening. She testified that she did not remember the beginning of the encounter, and attributed that fact to being asleep. This is simply not legally sufficient evidence that she was “incapacitated” at the beginning of the encounter.

The Missouri Court of Appeals correctly stated this Court’s constitutional standard as stated in *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979), whether there is sufficient evidence from which a reasonable juror could have found the defendant guilty beyond a reasonable doubt. *State v. Campbell*, 600 S.W.3d 780, 786 (Mo. App. 2020), App. p. 19a. The court further found that the evidence that “Victim awoke to find Campbell on top of her, kissing her, and sexually penetrating her” was sufficient to for the jury to find that she was “incapacitated” within the meaning of the jury instruction. *Id.* However, the court did not analyze the evidence beyond those conclusory statements.

This conclusion is inconsistent with the decisions of other states. As the Georgia Supreme Court found in *Scott v. State*, 844 S.E.2d 785, 789 (Ga. 2020), the mere *possibility* of rape is not sufficient to satisfy the *Jackson* standard. The evidence here clearly suggests an alternate scenario that is fully consistent with the testimony of both Mr.

Campbell and K.K.: That she consented to the intercourse, but because of her intoxication, did not remember doing so. Mr. Campbell therefore did not knowingly have sexual intercourse with an incapacitated person.

This case is also in conflict with *State v. Foster*, 2020 WL 1815150 (Oh. App. 2020). There, the court found that there was insufficient evidence that the defendant knew that the victim was “substantially impaired” despite evidence that she had been drinking earlier in the evening. As in this case, there was no evidence as to the victim’s being “incapacitated” or “unconscious” other than her own testimony. The court specifically recognized that a person who said that she was unaware of what happened could “walk, talk, and fully perform ordinary functions. . . .” *Id.* at *10. As here, there was no evidence in *Foster* that the defendant was aware of such facts as K.K.’s inability to

walk at the time she returned to her room, or the amount of alcohol she had consumed. While *Foster* did not involve evidence that the victim was asleep, there, as here, there was no instruction to the jury that “sleep” equates to “incapacitated” or “unconscious.” *Id* at *60. *See also State v. Huss*, 223 N.C. App. 480 (N.C. App. 2012) (fact that defendant was martial arts expert did not establish that the victim was “physically helpless.”)

While the conduct of Mr. Campbell was certainly not admirable in this situation, it did not warrant a rape conviction and twenty year sentence. And stretching the evidentiary requirements of convictions will only lead to over-criminalization of innocent conduct. This Court should grant review.

II. THE STATE’S ARGUMENT MISSTATED THE BURDEN OF PROOF

In *Berger v. United States*, 295 U.S. 78, 88 (1935), and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), this Court recognized its authority to consider whether a prosecutor’s final argument violates due process of law. The Court should exercise that authority here.

Under the Fifth Amendment to the United States Constitution, the prosecutor must prove each element of the offense charged beyond a reasonable doubt in order to obtain a conviction. *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979). Here, however, the prosecutor turned that requirement on its head when she told the jury, over defense objection, that in order to acquit Mr. Campbell, they were required to find that K.K. had lied.

The state court found that this was a simple comment on the victim's credibility in response to the defense argument that K.K.'s testimony did not accurately reflect what happened. App. pp. 27a-28a. But in fact, the defense was not required to prove that K.K. lied, either as a matter of law or as a matter of fact. It was up to the jury to decide whether her version or that of Mr. Campbell more accurately reflected the truth about the events of the night in question.

This case is similar to, and in conflict with, *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008). There, the prosecutor improperly vouched for the credibility of his witnesses, and reversal was required despite the lack of objection. *See also Judge v. State*, 529 S.W.2d 340, 345 (Tenn. Crim. App. 1976) (Reversed for improper argument because

“improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.”); *State v. Weiss*, 312 Wis. 2d 382, 752 N.W.2d 372 (Wis. App. 2008) (Reversed where prosecutor told jury that defendant had never denied committing the offense until he took the stand); *Com. v. Shelley*, 374 Mass. 466, 373 N.E. 951 (Mass. 1978) (Reversed where prosecutor urged jury to discount testimony of defense experts because they had been paid large fees).

This case was a close one; the first jury that heard the evidence could not reach a verdict. Under these circumstances, the attempt by the prosecutor to lesser her burden of proof cannot be countenanced, and review is required.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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