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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (JUNE 28, 2022)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK OSWALD,

Petitioner-Appellant,

v.

NICHOLAS MAUER, Summit County Adult Probation Officer; DAVE YOST, Ohio Attorney General,

Respondents-Appellees.

No. 21-4218

Before: BOGGS, Circuit Judge.

ORDER

Frank Oswald, an Ohio offender on community control, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Oswald applies for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b).

Following a 2017 bench trial, Oswald was found guilty of sexual battery, in violation of Ohio Revised Code § 2907.03(A)(3). His conviction derived from an incident after a family wedding, in which Oswald

shared a hotel room with the victim, who was his cousin's girlfriend. The victim and Oswald's cousin had a fight that night, leaving Oswald and the victim alone in the hotel room, where they fell asleep together while fully clothed. The victim later awoke to find Oswald having vaginal intercourse with her. Oswald stopped when the victim protested, and he was later arrested. *State v. Oswald*, No. 28633, 2018 WL 542358, at *1 (Ohio Ct. App. Jan. 24, 2018). The trial court sentenced Oswald to 24 months of imprisonment, to be followed by five years of post-release control. The Ohio Court of Appeals affirmed, *id.*, and the Ohio Supreme Court declined to grant review, *State v. Oswald*, 98 N.E.3d 296 (Ohio 2018) (table). The trial court later granted Oswald's motion for judicial release and placement on community control.

Oswald then filed a § 2254 petition, arguing that his constitutional right to due process was violated because the evidence was insufficient to show that he knew the victim was unaware that the sexual act was being committed. A magistrate judge recommended that the petition be denied, determining that the decision of the Ohio Court of Appeals to reject the claim on direct appeal was reasonable. Over Oswald's objections, the district court adopted the report and recommendation, denied the petition, and declined to issue a COA.

Oswald now applies to this court for a COA, again arguing that the evidence was insufficient to show that he had the necessary intent to commit a sexual battery. To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial is based on the merits, "[t]he petitioner must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Under the Antiterrorism and Effective Death Penalty Act of 1996, when presented with an application for a COA on a habeas petition filed under 28 U.S.C. § 2254 after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the state-court adjudication either (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Miller-El*, 537 U.S. at 336.

When evaluating the sufficiency of the evidence, a court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). On habeas review, then, the relevant inquiry involves two levels of deference: one to the jury's verdict under *Jackson*, and the second to the state court's decision

under § 2254(d). *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam).

Ohio Revised Code § 2907.03(A)(3) forbids sexual conduct when the perpetrator "knows that the other person submits because the other person is unaware that the act is being committed." "[K]nowledge is established if a person subjectively believes that there is a high probability of [a fact's] existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." Ohio Rev. Code § 2901.22(B).

The Ohio Court of Appeals determined that a reasonable trier of fact could have concluded that Oswald knew that the victim was submitting to his sexual acts because she was unaware of what was happening. Specifically, it found that there was a high probability that the victim was sleeping and that Oswald "failed to inquire or acted 'with a conscious purpose to avoid learning th[at] fact.'" *Oswald*, 2018 WL 542358, at *4 (quoting Ohio Rev. Code § 2901.22(B)). The Ohio Court of Appeals identified several pieces of evidence that supported this conclusion: (1) the victim's testimony that she fell asleep fully clothed, awoke to find her leggings and underwear pulled down, and did not consent or help Oswald pull down her clothing; (2) Oswald responded "I know" to a text from the victim that she "woke up to you having sex with me"; (3) Oswald admitted to the police that he pulled down the leggings, that the victim was passed out, and that he "forced" himself on her; and (4) Oswald remarked that he thought "maybe" the victim was awake and did not attempt to verify that fact. *Id.* at *3-4. The magistrate judge further noted that Oswald did not inform the police during his interview that he believed the victim was awake, that she initiated

the sex, or that she consented. Given the doubly deferential standard of review applied in habeas actions to sufficiency-of-the-evidence claims, reasonable jurists could not disagree with the district court's conclusion that the Ohio Court of Appeals reasonably determined that a rational juror could have found the element of intent based on this evidence.

Oswald has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

ORDER AND DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION (NOVEMBER 29, 2021)

2021 WL 5567299

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK OSWALD,

Petitioner,

v.

NICHOLAS MAUER, ET. AL.,

Respondents.

No. 5:19-cv-01191

Before: John R. ADAMS, U.S. District Judge.

ORDER AND DECISION

This matter appears before the Court on objections to the Report and Recommendation ("R&R") of the Magistrate Judge (Doc. 7) filed by Petitioner Frank Oswald. Upon due consideration, the Court overrules the objections and adopts the Report and recommended findings and conclusions of the Magistrate Judge and incorporates them herein. Therefore, it is ordered that

the petition is hereby DENIED, and this matter is hereby DISMISSED.

Where objections are made to a magistrate judge's R&R this Court must:

> must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

Oswald does not specifically delineate his objection to the R&R. Rather, he generally asserts that "both the Ninth District and the Magistrate improperly concluded that knowledge had been established under a purposeful avoidance theory despite the absence of proof that Petitioner believed there was a high probability that C.J. was unaware the sexual conduct was occurring such that knowledge could reasonably be imputed or inferred." (Doc. 7, p. 4). In other words, Oswald challenges the sufficiency of the evidence. Oswald then points to various facts cited in the R&R that he contends do not support the contention that the State proved he acted knowingly and that his conviction should be sustained.

In concluding that the state appellate court reasonably rejected Oswald's argument that there was insufficient evidence to support his conviction, the R&R set forth the facts established before the state court and analyzed these facts under the lens of the AEDPA. Notably, the R&R explained:

> The state appellate court reasonably concluded that sufficient evidence supported the trial court's findings as to each element of the charge at issue based on the above testimony from both the victim and Oswald, as well as Oswald's statements to police. While Oswald asserts there was insufficient evidence based on his testimony setting forth his version of events, it is not for this Court to weigh evidence or determine credibility. *See Jackson*, 443 U.S. at 317-19; *Coleman*, 566 U.S. at 651. While Oswald interprets evidence in a light most favorable to him, that is not the standard—the Court must view the evidence in a light most favorable to the prosecution. Jackson, 443 U.S. at 319.
>
> The state appellate court reasonably rejected Oswald's argument there was insufficient evidence to support his conviction, and there is no basis for this Court to conclude that the state court decision in this case involved an unreasonable determination of the facts or was contrary to, or involved an unreasonable application of, clearly established federal law.

(Doc. 6, p. 14-15).

Oswald does not identify error in the R&R but merely restates his prior arguments that the Magistrate Judge has already considered and properly rejected. "An 'objection' that does nothing more than state a disagreement with a Magistrate's suggested resolution or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F.Supp.2d 743, 747 (E.D. Mich. 2004). A general objection to the Magistrate's

report has the same effect as a failure to object. *Id*. Because Oswald merely repeated and restated previous arguments, and did not state any specific objection to the R&R, his objections are overruled.

Oswald's objections are hereby overruled. The R&R is hereby ADOPTED IN WHOLE, and Oswald's petition is hereby DENIED.

The Court certifies, pursuant to 28 U.S.C. § 1915 (A)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability.

This Order is entered pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION BY MAGISTRATE JUDGE JONATHAN D. GREENBERG (APRIL 29, 2021)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRCT OF OHIO
EASTERN DIVISION

FRANK OSWALD,

Petitioner,

v.

NICHOLAS MAUER, SUMMIT COUNTY ADULT PROBATION OFFICER, ET AL.,

Respondents.

Case No. 5:19-CV-01191-JRA

Before: John R. ADAMS, U.S. District Judge., Jonathan D. GREENBERG, Magistrate Judge.

REPORT AND RECOMMENDATION

JONATHAN D. GREENBERG
United States Magistrate Judge

This matter is before the magistrate judge pursuant to Local Rule 72.2. Before the Court is the Petition of Frank Oswald ("Oswald" or "Petitioner"), for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Oswald currently is on community

control with ten conditions. (Doc. No. 5-1, Ex. 15.)[1] For the following reasons, the undersigned recommends that the Petition be DENIED.

I. Summary of Facts

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by state courts are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012); *Montgomery v. Bobby*, 654 F.3d 668, 701 (6th Cir. 2011). The state appellate court summarized the facts underlying Oswald's conviction as follows:

> {¶ 2} One Saturday evening, Mr. Oswald and his cousin attended a wedding reception for a member of their family.
>
> Mr. Oswald's cousin came with his girlfriend, the victim in this matter, and she socialized with Mr. Oswald as the evening progressed. When the reception ended, Mr. Oswald, the victim, and her boyfriend (Mr. Oswald's cousin) drove together to a nearby hotel where several family members had rented rooms for the evening. They then spent the next few hours visiting with other cousins, drinking, and occasionally smoking marijuana.
>
> {¶ 3} Eventually, all of the cousins returned to their own rooms, save for Mr. Oswald, who

[1] Because Oswald filed his habeas petition during the pendency of his community control sanctions, "custody" is present to give this Court jurisdiction. *Kiriazis v. Polito*, No. 1:05cv2227, 2006 WL 1620217, at *1 (N. D. Ohio June 7, 2006).

> needed a place to sleep. The victim's boyfriend agreed that Mr. Oswald could stay in their room, but a fight between the victim and her boyfriend led to her and Mr. Oswald being alone together in the room. According to the victim, she and Mr. Oswald fell asleep in the hotel bed, fully dressed and with only their hands touching. She then awoke some time later to find him having vaginal intercourse with her. The victim immediately told Mr. Oswald to stop, and he complied. Several days later, she spoke with the police about the incident, and they arrested Mr. Oswald.
>
> {¶ 4} A grand jury indicted Mr. Oswald on one count of rape and two counts of sexual battery. The first sexual battery count alleged a violation of R.C. 2907.03(A)(2) while the second count alleged a violation of R.C. 2907.03(A)(3). Following a bench trial, the court found Mr. Oswald guilty of the latter sexual battery count and not guilty of his remaining counts. The court sentenced him to serve two years in prison and classified him as a tier III sexual offender.

State v. Oswald, 2018-Ohio-245, 2018 WL 542358, at *1 (Ohio Ct. App. Jan. 24, 2018).

II. Procedural History

A. Trial Court Proceedings

On May 16, 2016, the Summit County Grand Jury indicted Oswald on the following charges: one count of rape, in violation of O.R.C. § 2907.02(A)(2); one count of sexual battery, in violation of O.R.C.

§ 2907.03(A)(2); and one count of sexual battery in violation of O.R.C. § 2907.03(A)(3). (Doc. No. 5-1, Ex. 1.) Oswald entered pleas of not guilty to all charges. (Doc. No. 5-1, Ex. 2.)

Oswald waived his right to a jury trial. (Doc. No. 5-1, Ex. 3.) Oswald's bench trial began on February 28, 2017 and concluded on March 1, 2017. (Doc. No. 5-1, Ex. 4.) The trial court judge found Oswald guilty of one count of sexual battery in violation of O.R.C. § 2907.03(A)(3), and not guilty of rape and the other sexual battery count. (*Id.*)

On April 13, 2017, the state trial court held a sentencing hearing. (Doc. No. 5-1, Ex. 5.) The state trial court sentenced Oswald to a prison term of twenty-four months and a mandatory period of five years of post-release control. (*Id.*) The trial court also ordered Oswald to register as a Tier III Sex Offender. (*Id.*)

B. Direct Appeal

Oswald, through counsel, filed a timely notice of appeal to the Ninth District Court of Appeals. (Doc. No. 5-1, Ex. 6.) In his appellate brief, he raised the following assignments of error:

> I. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION UNDER R.C. § 2907.03(A)(3) IN VIOLATION OF OSWALD'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO STATE CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. OSWALD'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT IMPROPERLY PERMITTED TESTIMONY REGARDING OSWALD'S ALLEGED STATEMENT TO DETECTIVE DONATO, THEREBY DEPRIVING HIM OF HIS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

(Doc. No. 5-1, Ex. 7.) The State filed a brief in response. (Doc. No. 5-1, Ex. 8.)

On January 24, 2018, the state appellate court affirmed Oswald's conviction. (Doc. No. 5-1, Ex. 9.) *See also Oswald*, 2018-Ohio-245, 2018 WL 542358, at *7.

On March 12, 2018, Oswald, through counsel, filed a Notice of Appeal with the Supreme Court of Ohio. (Doc. No. 5-1, Ex. 10.) In his Memorandum in Support of Jurisdiction, Oswald raised the following Propositions of Law:

I. R.C. § 2901.22(B) does not impose an affirmative duty on defendants to inquire as to the existence of a pertinent fact absent evidence that the defendant subjectively believed that there was a high probability that said fact actually existed.

II. "Knowledge" is not established under R.C. § 2901.22(B) based upon evidence of the mere possibility that a pertinent fact or circumstances exist.

III. A conviction under R.C. § 2907.03(A)(3) cannot be sustained upon proof that the defendant had "constructive knowledge" of the accuser's

mental condition at the time of the alleged offense.

IV. A conviction under R.C. § 2907.03(A)(3) requires proof, beyond a reasonable doubt, that at the time of the alleged offense, the defendant knew that the accuser was only submitting because he or she was unaware that the sexual conduct was occurring.

(Doc. No. 5-1, Ex. 11.) The State filed a waiver of memorandum in response. (Doc. No. 5-1, Ex. 12.)

On May 23, 2018, the Supreme Court of Ohio declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4). (Doc. No. 5-1, Ex. 13.)

C. Judicial Release

On October 18, 2017, while his direct appeal was pending, Oswald, through counsel, filed a motion for judicial release. (Doc. No. 5-1, Ex. 14.) The trial court held a hearing on the motion on December 21, 2017. (Doc. No. 5-1, Ex. 15.) On January 4, 2018, the trial court granted Oswald's motion for judicial release and placed Oswald on community control for two years. (*Id.*)

On February 6, 2018, Oswald filed a motion to modify community control sanctions to allow him access to a computer for employment purposes. (Doc. No. 5-1, Ex. 16.) On March 20, 2018, the trial court granted the motion to modify community control sanctions. (Doc. No. 5-1, Ex. 17.)

D. Federal Habeas Petition

On May 23, 2019, Oswald, through counsel, filed a Petition for Writ of Habeas Corpus in this Court and asserted the following grounds for relief:

> GROUND ONE: The conviction is not supported by sufficient evidence in violation of Petitioner's constitutional right to due process of law under the United States Constitution[.]
>
> Supporting Facts: See Memorandum of Law, which is attached hereto and incorporated herein by express reference.

(Doc. No. 1.)

On June 28, 2019, Respondents filed the Return of Writ. (Doc. No. 5.) Oswald did not file a Traverse.

III. Review on the Merits

A. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997). The relevant provisions of AEDPA state:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined

by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1996).

Clearly established federal law is to be determined by the holdings (as opposed to the dicta) of the United States Supreme Court. *See Parker v. Matthews*, 567 U.S. 37, 132 S. Ct. 2148, 183 L.Ed.2d 32 (2012); *Renico v Lett*, 559 U.S. 766, 130 S. Ct. 1855, 1865-1866 (2010); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000); *Shimel v.Warren,* 838 F.3d 685, 695 (6th Cir. 2016); *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir. 2005). Indeed, the Supreme Court has indicated that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court." *Parker*, 567 U.S. at 48-49; *Howes v. Walker*, 567 U.S. 901, 132 S. Ct. 2741, 183 L.Ed.2d 612 (2012). *See also Lopez v. Smith*, ___ U.S. ___, 135 S. Ct. 1, 4, 190 L.Ed.2d 1 (2014) (per curiam) ("Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'" (quoting *Marshall v. Rodgers*, 569 U.S. 58, 133 S. Ct. 1446, 1450, 185 L.Ed.2d 540 (2013))).

A state court's decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has

on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. at 413. By contrast, a state court's decision involves an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. *See also Shimel*, 838 F.3d at 695. However, a federal district court may not find a state court's decision unreasonable "simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor,* 529 U.S. at 411. Rather, a federal district court must determine whether the state court's decision constituted an objectively unreasonable application of federal law. *Id.* at 410-12. "This standard generally requires that federal courts defer to state—court decisions." *Strickland v. Pitcher*, 162 Fed.Appx. 511, 516 (6th Cir. 2006) (citing *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

In *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that as long as "fairminded jurists could disagree on the correctness of the state court's decision," relief is precluded under the AEDPA. *Id*. at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not "treat[ ] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review," and that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id*. at 785. The Court noted that Section 2254(d) "reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems"

and does not function as a "substitute for ordinary error correction through appeal." *Id.* (internal quotation marks omitted). Therefore, a petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. This is a very high standard, which the Supreme Court readily acknowledged. *See id.* at 786 ("If this standard is difficult to meet, that is because it is meant to be.")

Oswald raises two arguments in support of his sole ground that his due process rights were violated when the state appellate court affirmed his conviction in the absence of sufficient evidence on each essential element of the offense. (Doc. No. 1-2 at 6-17.) First, Oswald argues there was no direct evidence of knowledge at the time the sexual conduct began that the victim only submitted to the conduct because she was asleep. (*Id.* at 10-13.) Second, Oswald asserts there was insufficient evidence to infer knowledge; he argues the state appellate court only relied on a "passing reference to Petitioner's use of the word 'maybe' in describing his belief that [the victim] was awake," a reference Oswald maintains was taken "entirely out of context," and which "does not support a finding that Petitioner acted despite being aware of a *high probability* that [the victim] was asleep or otherwise unconscious." (*Id.* at 13-17) (emphasis in original). Oswald maintains his statements "suggest that he was aware of the *possibility* that [the victim] was not awake." (*Id.* at 17.) Oswald asserts the trial court and the state appellate court "disregarded any evidence of [his] subjective belief' and found knowledge

could be established "solely upon a determination that the accuser was, in fact, unaware that the conduct was occurring." (*Id.* at 18.)

Oswald argues that in so doing, the trial court and the state appellate court transformed the statute into a "strict liability offense." (*Id.*)

Respondents argue the *Jackson* standard "does not mean, as Oswald's habeas petition in principal part argues, that Oswald's trial testimony must be given credence." (Doc. No. 5 at 13.) Respondents assert Oswald fails both levels of review for sufficiency of the evidence, and as a result his insufficiency of the evidence claim is meritless under the AEDPA. (*Id.* at 14-16.)

The record reflects Oswald raised a sufficiency of the evidence claim on direct appeal to both the state appellate court and the Supreme Court of Ohio. (Doc. No. 5-1, Ex. 7, 11.) The state appellate court considered this claim on the merits and rejected it as follows:

> {¶ 6} In his first assignment of error, Mr. Oswald argues that his sexual battery conviction is based on insufficient evidence. Specifically, he argues that there was no evidence he knew the victim was asleep when he began having vaginal intercourse with her. This Court disagrees.
>
> {¶ 7} Whether the evidence in a case is legally sufficient to sustain a conviction is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *Thompkins* at 386. Although the standard of review is de novo, the appellate court does not resolve evidentiary conflicts or assess the credibility of witnesses, because these functions belong to the trier of fact. *State v. Tucker*, 9th Dist. Medina No. 14CA0047-M, 2015-Ohio-3810, ¶ 7.

{¶ 8} "No person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." R.C. 2907.03(A)(3).

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge

> of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B). Whoever commits the foregoing offense is guilty of sexual battery. R.C. 2907.03(B).

{¶ 9} The victim testified that she resided in Columbus when these events transpired, but drove north for the weekend to attend a wedding with her boyfriend, who was Mr. Oswald's cousin. The victim had met Mr. Oswald once or twice before at family gatherings and sat at a table with him during the reception. After the reception, the victim, her boyfriend, and Mr. Oswald drove together to a nearby hotel where several members of the boyfriend's family had reserved rooms for the evening. The victim testified that she had consumed alcohol during the wedding and, on the drive to the hotel, took an Adderall to help her stay awake longer. Additionally, she gave Mr. Oswald an Adderall.

{¶ 10} Once at the hotel, the victim changed into a t-shirt, sweatshirt, and a pair of leggings. She and her boyfriend had reserved their own room that evening, but joined his cousins in another room after changing

clothes. Over the next few hours, the victim, her boyfriend, and his cousins continued to drink and went outside a few times to smoke marijuana. Eventually, the victim and her boyfriend returned to their room along with Mr. Oswald and another cousin. The cousin departed not long after, leaving Mr. Oswald with the couple. The victim testified that her boyfriend then agreed to let Mr. Oswald sleep on the floor in their room because he needed a place to stay. There was testimony that, at that point, it was about 4:00 a.m.

{¶ 11} Not long after Mr. Oswald lay down on the floor to sleep, the victim and her boyfriend began arguing. The victim indicated that their argument was more intense than usual because they were both intoxicated. The fight roused Mr. Oswald and also resulted in the boyfriend leaving the hotel without the victim. Greatly upset, the victim sobbed and talked to Mr. Oswald about her relationship with her boyfriend. She then went into the bathroom and took a Xanax before lying down in bed. The victim testified that she and Mr. Oswald ultimately fell asleep in the same bed, fully clothed, with only their hands touching.

{¶ 12} At some later point, the victim awoke and felt Mr. Oswald pressing against her from behind. Though she was confused, she quickly registered that her leggings and underwear had been pulled down and Mr. Oswald was having vaginal intercourse with her. She then said: "I didn't give you permission to

do this." According to the victim, Mr. Oswald stopped slowly and acted "really casual," as if he had not done anything wrong. She testified, however, that she never invited Mr. Oswald to have sex with her, never signaled that it was acceptable for him to do so, and never assisted him in pulling down her clothing.

{¶ 13} Although the victim made several attempts to contact her boyfriend, she was unsuccessful. She testified that she could not otherwise arrange a ride back to her car, so she had to accept a ride from Mr. Oswald. Once she got back to her car, she returned to Columbus without telling anyone what had happened. The victim described being confused, embarrassed, and unsure of what to do.

{¶ 14} Later that evening, the victim sent a text message to her boyfriend, indicating that she was extremely upset because she had "woke[n] up to [Mr. Oswald] having sex with [her]." Her boyfriend then called and, after they spoke, she agreed that he could report the incident to the police. Meanwhile, that same evening, the victim received a text message from Mr. Oswald, asking if she was doing alright. The victim did not initially respond to Mr. Oswald's message, but her boyfriend sent Mr. Oswald a text message, asking him, "How could you do that?" In response, Mr. Oswald indicated that he was "freaking out," described himself as having suicidal thoughts, and wrote: "Please tell

her I am so sorry and tell her once I realized what I was doing I stopped[.]"

{¶ 15} Over the course of the next two days, the victim went to the hospital for an exam and returned to the Twinsburg area to meet with Detective Brian Donato. While speaking with the detective, the victim responded to Mr. Oswald's text message. The following text message exchange then took place:

> [THE VICTIM]: I mean I trusted you in the room with me [ ] and I woke up to you having sex with me. I didn't give you permission. Or even lead you on. You were comforting me and told me everything was going to be ok with me and [my boyfriend].
>
> [MR. OSWALD]: I know[.] And this is killing me[.] [I've] never done anything like this before and I am disgusted with what happened[.] Once you said that I realized what I was doing and * * * stopped[.]

When the victim wrote, "You hurt me by raping me in my sleep," Mr. Oswald responded by asking if he could call her. He also repeatedly apologized and wrote that it "was never [his] intention to hurt [her] * * *."

{¶ 16} Detective Donato and another officer met with Mr. Oswald at his home the day after the victim's interview. The detective surreptitiously recorded the meeting, and the State played portions of the recording at trial. Mr. Oswald informed the officers that

he and the victim fell asleep together, but he then awoke, pulled her pants down, and "forced [himself] on her * * *." Mr. Oswald stated that the victim was making noises, so he thought "maybe" she was awake. When asked whether the victim had been "passed out when [he] started," however, Mr. Oswald responded, "yeah, * * * we were definitely both asleep." He also acknowledged that, while he was having sex with the victim, she attempted to turn and said, "I didn't give you permission to do this."

{¶ 17} Viewing the evidence in a light most favorable to the State, a rational trier of fact could have concluded that, at the time he had sex with the victim, Mr. Oswald knew she was submitting because she was unaware of what was happening. *See Jenks*, 61 Ohio St.3d 259 at paragraph two of the syllabus; R.C. 2907.03(A)(3). The victim specifically testified that she fell asleep next to Mr. Oswald fully clothed, but awoke to find her leggings and underwear pulled down and Mr. Oswald having sex with her. *See Summit v. Anderson*, 9th Dist. Summit No. 27886, 2016-Ohio-7275, ¶ 19. She testified that she never invited him to engage in intercourse with her or helped him pull down her clothing. Indeed, both she and Mr. Oswald agreed that, as he was having sex with her, she stated: "I didn't give you permission to do this."

{¶ 18} When text messaging with the victim, Mr. Oswald never attempted to deny forcing

> himself on her. In fact, when confronted with her message, "I woke up to you having sex with me * * *," Mr. Oswald responded: "I know[.] And this is killing me[.]" He also admitted to Detective Donato that he pulled down the victim's leggings, that she was "passed out" when he began, and that he "forced [himself]" on her. *See State v. Smetana*, 9th Dist. Lorain No. 12CA010252, 2013-Ohio-2376, ¶ 14. Although Mr. Oswald remarked at one point that he thought "maybe" the victim was awake, he made no attempt to verify that fact. A rational trier of fact, therefore, could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted "with a conscious purpose to avoid learning the fact." R.C. 2901.22(B). As such, this Court rejects his argument that his sexual battery conviction is based on insufficient evidence. Mr. Oswald's first assignment of error is overruled.

Oswald, 2018-Ohio-245, 2018 WL 542358, at **1-4.

The Due Process Clause of the Fourteenth Amendment requires that a criminal conviction be supported by proof beyond a reasonable doubt with respect to every fact necessary to constitute the offense charged. *In re Winship*, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The standard for determining if a conviction is supported by sufficient evidence is "whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). In making such a determination, a district court may not substitute its own determination of guilt or innocence for that of the factfinder, nor may it weigh the credibility of witnesses. *Id. See also Walker v. Engle*, 703 F.2d 959, 970 (6th Cir. 1983). Moreover, federal courts are required to give deference to factual determinations made in state court and "[a]ny conflicting inferences arising from the record . . . should be resolved in favor of the prosecution." *Heinish v. Tate*, 1993 WL 460782 at *3 (6th Cir. 1993) (citing *Walker*, 703 F.3d at 969-70.*) See also Wright v. West*, 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1992) (the deference owed to the trier of fact limits the nature of constitutional sufficiency review.)

Consistent with these principles, the Supreme Court has emphasized that habeas courts must review sufficiency of the evidence claims with "double deference:"

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, 'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.' *Cavazos v. Smith*, 565 U.S. 1, ___, 132 S. Ct. 2, 4, 181 L.Ed.2d 311 (2011) *(per curiam*). And second, on habeas

> review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, ___, 130 S. Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Coleman v. Johnson, 566 U.S. 650, 132 S. Ct. 2060, 2062, 182 L.Ed.2d 978 (2012). Under this standard, "we cannot rely simply upon our own personal conceptions of what evidentiary showings would be sufficient to convince us of the petitioner's guilt," nor can "[w]e . . . inquire whether any rational trier of fact would conclude that petitioner . . . is guilty of the offenses with which he is charged." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). Rather, a habeas court must confine its review to determining whether the state court "was unreasonable in its conclusion that a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." *Id.* (emphasis in original) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 129 S. Ct. 1411, 1420, 173 L.Ed.2d 251 (2009)).

Upon careful review of the trial transcript, the Court finds the state appellate court reasonably determined Oswald's conviction was supported by sufficient evidence. In resolving this claim, the state appellate court accurately summarized the evidence of record and correctly identified the applicable law. As noted in the state appellate court opinion, the victim testified she and Oswald fell asleep while she was fully clothed with only maybe their hands touching, but

she later awoke to find her leggings and underwear pulled down and Oswald having sex with her. (Doc. No. 5-2 at PageID# 462, 464-66.) The victim further testified she never invited Oswald to have sex with her or helped pull down her clothing. (*Id.* at PageID# 508, 522.) Both the victim and Oswald stated that the victim said, "I didn't give you permission to do this." (Doc. No. 5-2 at PageID# 467; Doc No. 5-4 at PageID# 743.) Oswald admitted to detectives that he "forced himself' on the victim.[2] (Doc. No. 5-4 at PageID# 701.)

Furthermore, on cross-examination, Oswald admitted the following:

- He never told the police during his interview that the victim was pressing her butt against his penis. (Doc. No. 5-4 at PageID# 697-98.)
- He never told the police during his interview that the victim initiated sex with him. (*Id.* at PageID# 698.)
- He never told the police during his interview that he believed the victim was awake. (*Id.*)
- His interview with the police would have been the time to tell them that the sex was consensual. (*Id.* at PageID# 700.) He never told the police during his interview that the sex was consensual. (*Id.*)

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[2] Contrary to Oswald's assertion (Doc. No. 1-2 at 12-13), the fact that the state trial court found that Oswald did not use the term "force" in a way sufficient to meet the statutory requirement for rape does not mean the trial court was foreclosed from considering Oswald's statement as evidence sufficient to support a conviction for sexual battery. (*See* Doc. No. 5-4 at PageID# 741.)

- He used the word "forced" in his interview with the police to describe his behavior. (*Id.* at PageID# 701.)
- He told police he had never had "unconsensual sex with anyone before." (*Id.* at PageID# 702.)
- He never disagreed with or corrected the victim's version of events in the text messages they exchanged after the fact. (*Id.* at PagelD# 706-07.)

The state appellate court also found that Oswald acknowledged the victim "maybe" was asleep, he made no effort to confirm she was awake. *Oswald*, 2018-Ohio-245, 2018 WL 542358, at *3. While Oswald asserts the state trial court took his statement "entirely out of context" and "fail[ed] to mention the particular facts and circumstances—as testified to by Petitioner—that supported his belief that [the victim] was awake (*e.g.* [the victim] was pressing her body against him and making noises)" (Doc. No. 1-2 at 1617), he fails to provide the context for the statement and overlooks the fact that the trial court was not required to credit Oswald's testimony. Based on the above and applying the "double deference" required under the AEDPA, the Court is unable to say the state appellate court's decision "was so insupportable as to fall below the threshold of bare rationality." *Coleman*, 566 U.S. at 656.

The state appellate court reasonably concluded that sufficient evidence supported the trial court's findings as to each element of the charge at issue[3]

[3] Under O.R.C. § 2907.03(A)(3), a person commits sexual battery when a person engages in sexual conduct with another, not the spouse of the offender, when the offender knows that the other

based on the above testimony from both the victim and Oswald, as well as Oswald's statements to police. While Oswald asserts there was insufficient evidence based on his testimony setting forth his version of events, it is not for this Court to weigh evidence or determine credibility. *See Jackson*, 443 U.S. at 317-19; *Coleman*, 566 U.S. at 651. While Oswald interprets evidence in a light most favorable to him, that is not the standard—the Court must view the evidence in a light most favorable to the prosecution. *Jackson*, 443 U.S. at 319.

The state appellate court reasonably rejected Oswald's argument there was insufficient evidence to support his conviction, and there is no basis for this Court to conclude that the state court decision in this case involved an unreasonable determination of the facts or was contrary to, or involved an unreasonable application of, clearly established federal law. Accordingly, it is recommended the Court find Oswald's sole ground for relief lacks merit.

IV. Conclusion

For all the reasons set forth above, it is recommended that the Petition be DENIED.

/s/ Jonathan D. Greenberg
United States Magistrate Judge

Date: April 29, 2021

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person submits because the other person is unaware that the act is being committed.

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See United States v. Walters,* 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn,* 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

ORDER OF THE SUPREME COURT OF OHIO (MAY 23, 2018)

SUPREME COURT OF OHIO

STATE OF OHIO,

v.

FRANK OSWALD,

2018-0388

Summit App. No. 28633, 2018–Ohio–245

CASE ANNOUNCEMENTS

APPEALS NOT ACCEPTED FOR REVIEW

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, NINTH DISTRICT, SUMMIT COUNTY (JANUARY 24, 2018)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT,
STATE OF OHIO, COUNTY OF SUMMIT

STATE OF OHIO,

Appellee,

v.

FRANK OSWALD,

Appellant.

C.A. No. 28633

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio
Case No. CR-2016-04-1302

Before: CALLAHAN, Judge,
HENSAL, P.J., TEODOSIO, J.

CALLAHAN, Judge.

{¶1} Defendant-Appellant, Frank Oswald, appeals from his conviction in the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} One Saturday evening, Mr. Oswald and his cousin attended a wedding reception for a member of their family. Mr. Oswald's cousin came with his girlfriend, the victim in this matter, and she socialized with Mr. Oswald as the evening progressed. When the reception ended, Mr. Oswald, the victim, and her boyfriend (Mr. Oswald's cousin) drove together to a nearby hotel where several family members had rented rooms for the evening. They then spent the next few hours visiting with other cousins, drinking, and occasionally smoking marijuana.

{¶3} Eventually, all of the cousins returned to their own rooms, save for Mr. Oswald, who needed a place to sleep. The victim's boyfriend agreed that Mr. Oswald could stay in their room, but a fight between the victim and her boyfriend led to her and Mr. Oswald being alone together in the room. According to the victim, she and Mr. Oswald fell asleep in the hotel bed, fully dressed and with only their hands touching. She then awoke some time later to find him having vaginal intercourse with her. The victim immediately told Mr. Oswald to stop, and he complied. Several days later, she spoke with the police about the incident, and they arrested Mr. Oswald.

{¶4} A grand jury indicted Mr. Oswald on one count of rape and two counts of sexual battery. The first sexual battery count alleged a violation of R.C. 2907.03(A)(2) while the second count alleged a violation of R.C. 2907.03(A)(3). Following a bench trial, the court found Mr. Oswald guilty of the latter sexual battery count and not guilty of his remaining counts. The court sentenced him to serve two years in prison and classified him as a tier III sexual offender.

{¶5} Mr. Oswald now appeals from his conviction and raises three assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR NO. 1

> THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION UNDER R.C. § 2907.03(A)(3) IN VIOLATION OF [MR.] OSWALD'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO STATE CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶6} In his first assignment of error, Mr. Oswald argues that his sexual battery conviction is based on insufficient evidence. Specifically, he argues that there was no evidence he knew the victim was asleep when he began having vaginal intercourse with her. This Court disagrees.

{¶7} Whether the evidence in a case is legally sufficient to sustain a conviction is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is

> whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy." *Thompkins* at 386. Although the standard of review is de novo, the appellate court does not resolve evidentiary conflicts or assess the credibility of witnesses, because these functions belong to the trier of fact. *State v. Tucker*, 9th Dist. Medina No. 14CA0047-M, 2015-Ohio-3810, ¶ 7.

{¶8} "No person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." R.C. 2907.03(A)(3).

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B). Whoever commits the foregoing offense is guilty of sexual battery. R.C. 2907.03(B).

{¶9} The victim testified that she resided in Columbus when these events transpired, but drove north for the weekend to attend a wedding with her boyfriend, who was Mr. Oswald's cousin. The victim had met Mr. Oswald once or twice before at family gatherings and sat at a table with him during the reception. After the reception, the victim, her boyfriend, and Mr. Oswald drove together to a nearby hotel where several members of the boyfriend's family had reserved rooms for the evening. The victim testified that she had consumed alcohol during the wedding and, on the drive to the hotel, took an Adderall to help her stay awake longer. Additionally, she gave Mr. Oswald an Adderall.

{¶10} Once at the hotel, the victim changed into a t-shirt, sweatshirt, and a pair of leggings. She and her boyfriend had reserved their own room that evening, but joined his cousins in another room after changing clothes. Over the next few hours, the victim, her boyfriend, and his cousins continued to drink and went outside a few times to smoke marijuana. Eventually, the victim and her boyfriend returned to their room along with Mr. Oswald and another cousin. The cousin departed not long after, leaving Mr. Oswald with the couple. The victim testified that her boyfriend then agreed to let Mr. Oswald sleep on the floor in their room because he needed a place to stay. There was testimony that, at that point, it was about 4:00 a.m.

{¶11} Not long after Mr. Oswald lay down on the floor to sleep, the victim and her boyfriend began arguing. The victim indicated that their argument was more intense than usual because they were both intoxicated. The fight roused Mr. Oswald and also

resulted in the boyfriend leaving the hotel without the victim. Greatly upset, the victim sobbed and talked to Mr. Oswald about her relationship with her boyfriend. She then went into the bathroom and took a Xanax before lying down in bed. The victim testified that she and Mr. Oswald ultimately fell asleep in the same bed, fully clothed, with only their hands touching.

{¶12} At some later point, the victim awoke and felt Mr. Oswald pressing against her from behind. Though she was confused, she quickly registered that her leggings and underwear had been pulled down and Mr. Oswald was having vaginal intercourse with her. She then said: "I didn't give you permission to do this." According to the victim, Mr. Oswald stopped slowly and acted "really casual," as if he had not done anything wrong. She testified, however, that she never invited Mr. Oswald to have sex with her, never signaled that it was acceptable for him to do so, and never assisted him in pulling down her clothing.

{¶13} Although the victim made several attempts to contact her boyfriend, she was unsuccessful. She testified that she could not otherwise arrange a ride back to her car, so she had to accept a ride from Mr. Oswald. Once she got back to her car, she returned to Columbus without telling anyone what had happened. The victim described being confused, embarrassed, and unsure of what to do.

{¶14} Later that evening, the victim sent a text message to her boyfriend, indicating that she was extremely upset because she had "woke[n] up to [Mr. Oswald] having sex with [her]." Her boyfriend then called and, after they spoke, she agreed that he could report the incident to the police. Meanwhile, that same evening, the victim received a text message from Mr.

Oswald, asking if she was doing alright. The victim did not initially respond to Mr. Oswald's message, but her boyfriend sent Mr. Oswald a text message, asking him, "How could you do that?" In response, Mr. Oswald indicated that he was "freaking out," described himself as having suicidal thoughts, and wrote: "Please tell her I am so sorry and tell her once I realized what I was doing I stopped[.]"

{¶15} Over the course of the next two days, the victim went to the hospital for an exam and returned to the Twinsburg area to meet with Detective Brian Donato. While speaking with the detective, the victim responded to Mr. Oswald's text message. The following text message exchange then took place:

> [THE VICTIM]: I mean I trusted you in the room with me [ ] and I woke up to you having sex with me. I didn't give you permission. Or even lead you on. You were comforting me and told me everything was going to be ok with me and [my boyfriend].
>
> [MR. OSWALD]: I know[.] And this is killing me[.] [I've] never done anything like this before and I am disgusted with what happened[.] Once you said that I realized what I was doing and * * * stopped[.]

When the victim wrote, "You hurt me by raping me in my sleep," Mr. Oswald responded by asking if he could call her. He also repeatedly apologized and wrote that it "was never [his] intention to hurt [her] * * *."

{¶16} Detective Donato and another officer met with Mr. Oswald at his home the day after the victim's interview. The detective surreptitiously recorded the

meeting, and the State played portions of the recording at trial. Mr. Oswald informed the officers that he and the victim fell asleep together, but he then awoke, pulled her pants down, and "forced [himself] on her * * *." Mr. Oswald stated that the victim was making noises, so he thought "maybe" she was awake. When asked whether the victim had been "passed out when [he] started," however, Mr. Oswald responded, "yeah, * * * we were definitely both asleep." He also acknowledged that, while he was having sex with the victim, she attempted to turn and said, "I didn't give you permission to do this."

{¶17} Viewing the evidence in a light most favorable to the State, a rational trier of fact could have concluded that, at the time he had sex with the victim, Mr. Oswald knew she was submitting because she was unaware of what was happening. *See Jenks*, 61 Ohio St.3d 259 at paragraph two of the syllabus; R.C. 2907.03(A)(3). The victim specifically testified that she fell asleep next to Mr. Oswald fully clothed, but awoke to find her leggings and underwear pulled down and Mr. Oswald having sex with her. *See Summit v. Anderson*, 9th Dist. Summit No. 27886, 2016-Ohio-7275, ¶ 19. She testified that she never invited him to engage in intercourse with her or helped him pull down her clothing. Indeed, both she and Mr. Oswald agreed that, as he was having sex with her, she stated: "I didn't give you permission to do this."

{¶18} When text messaging with the victim, Mr. Oswald never attempted to deny forcing himself on her. In fact, when confronted with her message, "I woke up to you having sex with me * * *," Mr. Oswald responded: "I know[.] And this is killing me[.]" He also admitted to Detective Donato that he pulled down

the victim's leggings, that she was "passed out" when he began, and that he "forced [himself]" on her. *See State v. Smetana*, 9th Dist. Lorain No. 12CA010252, 2013-Ohio-2376, ¶ 14. Although Mr. Oswald remarked at one point that he thought "maybe" the victim was awake, he made no attempt to verify that fact. A rational trier of fact, therefore, could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted "with a conscious purpose to avoid learning the fact." R.C. 2901.22(B). As such, this Court rejects his argument that his sexual battery conviction is based on insufficient evidence. Mr. Oswald's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

> [MR.] OSWALD'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} In his second assignment of error, Mr. Oswald argues that his conviction is against the manifest weight of the evidence. This Court disagrees.

{¶20} When a defendant argues that his conviction is against the weight of the evidence, this court must review all of the evidence before the trial court.

> In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a mani-

> fest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Otten, 33 Ohio App.3d 339, 340 (9th Dist.1986). "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact[-]finder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340.

{¶21} At trial, Mr. Oswald testified in his own defense. Consistent with the victim's testimony, he described how a night of drinking and smoking marijuana led to him falling asleep on the floor of the victim's hotel room. Much like the victim, he testified that he awoke when the victim and her boyfriend began fighting and the boyfriend left the hotel. At that point, the victim was crying and invited Mr. Oswald to sit on the bed with her. He indicated that they spoke for some time before nodding off. It was his testimony that they fell asleep "holding hands and in the spooning position."

{¶22} According to Mr. Oswald, he woke up because the victim "was pressing her butt against [his] penis" and was making "moaning noises." Though neither of them spoke and he could not see the victim's face, he testified that the victim continued to move against him for approximately thirty seconds before he began to pull down her leggings and underwear. Mr. Oswald testified that the victim's leggings were "skin tight," but she assisted his efforts by

"wiggl[ing] her body to help [him] pull them down." As the victim continued to move her body against Mr. Oswald, he pulled down her underwear and began having vaginal intercourse with her. Mr. Oswald testified that, based on the victim's movements and the noises she was making, he believed she was awake and inviting him to have sex with her. He estimated that he had sex with the victim for approximately ten seconds before she told him to stop and he complied.

{¶ 23} Mr. Oswald indicated that he repeatedly expressed remorse for his actions, not because he forced himself on the victim, but because he disrespected her relationship with his cousin by having sex with her. He testified that, before he drove the victim back to her car that morning, she said everything was fine and simply requested that he not tell her boyfriend what had happened. According to Mr. Oswald, the victim acted normally during their entire car ride, talking and laughing with him. He testified that, until he received her text messages a few days later, he believed that the two had engaged in consensual sex. He indicated that he was nervous when he spoke to the police and that some of his statements had been taken out of context. According to Mr. Oswald, when he said he forced himself on the victim, he only meant that he used some force to remove her clothing and "[m]athematically" used some force to put his penis inside her.

{¶ 24} Mr. Oswald argues that his conviction is against the manifest weight of the evidence because the evidence tended to show that he and the victim engaged in consensual sex that the victim later regretted. He notes that the victim's leggings were skin tight, such that he could not have removed them

without her assistance. He further notes that the victim's actions were inconsistent with a sexual battery given that she remained with him after they had sex, later asked him to drive her home, and never sought assistance from any of the other wedding guests whom she knew to be staying in the same hotel. According to Mr. Oswald, his first indication that the victim did not wish to have sex came when she told him to stop and he immediately complied. He asserts that, at the time the sexual activity was occurring, he did not know that the victim was asleep or otherwise unconscious.

{¶ 25} Having carefully reviewed the entire record, this Court cannot conclude that the trier of fact lost its way when it found Mr. Oswald guilty of sexual battery. The victim clearly testified that she was not awake when Mr. Oswald began having sex with her. Although Mr. Oswald claimed that she suggestively moved against him and helped him pull down her leggings, he made no mention of her alleged movements or assistance when speaking with the police. Instead, he acknowledged to the officers that he awoke, pulled down her leggings, and "forced [himself] on her * * *." He also conceded that the victim was "passed out when [he] started." Mr. Oswald made no attempt to deny the victim's accusations when she sent him text messages, alleging that he had sex with her in her sleep and raped her. Though the victim accepted a ride from Mr. Oswald that morning and kept quiet about the incident until much later that evening, she explained that she did so because she was confused, embarrassed, and unable to secure another ride to her car. Faced with two competing versions of the events, the trial court was "in the best position to

determine the credibility of witnesses and evaluate their testimony accordingly." *State v. Johnson*, 9th Dist. Summit No. 25161, 2010-Ohio-3296, ¶ 15. "A verdict is not against the manifest weight of the evidence because the finder of fact chose to believe the State's witnesses rather than the defendant's version of the events." *State v. Martinez*, 9th Dist. Wayne No. 12CA0054, 2013-Ohio-3189, ¶ 16. Because Mr. Oswald has not shown that this is the exceptional case where the evidence weighs heavily against his conviction, this Court rejects his manifest weight argument. His second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL COURT IMPROPERLY PERMITTED TESTIMONY REGARDING [MR.] OSWALD'S ALLEGED STATEMENT TO DETECTIVE DONATO, THEREBY DEPRIVING HIM OF HIS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶26} In his third assignment of error, Mr. Oswald argues that the trial court erred when it allowed the State to question him about certain, unrecorded statements he allegedly made to Detective Donato. For the following reasons, this Court rejects his argument.

{¶27} The decision to admit or exclude evidence lies in the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180 (1987). "Absent an issue of law, this Court, therefore, reviews the trial court's decision regarding evidentiary matters under an abuse of discretion standard of review." *State v. Aguirre*, 9th Dist. Lorain No. 13CA010418, 2015-Ohio-922, ¶ 6. An abuse of discretion indicates that the court's

attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶28} When cross-examining Mr. Oswald, the prosecutor asked him about statements he allegedly made to Detective Donato while in transit to the police station. The following exchange took place:

> [PROSECUTOR]: [D]uring those questions with the detectives in the car ride, * * * you admit that you have viewed pornography—you tell them "I've viewed pornography involving incest and sex with sleeping people"; right?
>
> [MR. OSWALD]: That's not true.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled. Go ahead.
>
> [MR. OSWALD]: That's not true.
>
> [PROSECUTOR]: And you also stated to the police officers that you've done searches on the internet related to sleeping porn and porn involving family?
>
> [MR. OSWALD]: That's not true, either.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Okay. So, what the detectives wrote in there is something they made up?
>
> [DEFENSE COUNSEL]: Objection. It's not in evidence.

> [PROSECUTOR]: I'm asking if he believes that they just made that up, that they're lying.
>
> [MR. OSWALD]: They were—
>
> THE COURT: Wait, wait, wait. The report is not in evidence.
>
> [PROSECUTOR]: Correct.
>
> THE COURT: Right. So, if—okay, so you're denying * * * that you said that?
>
> [MR. OSWALD]: Correct.

Defense counsel then once again objected on the basis that the prosecutor never asked Detective Donato about the statements during his direct examination, and the detective's report was inadmissible.

{¶29} Mr. Oswald argues that the unrecorded statements contained in Detective Donato's report were highly inflammatory because they implied "some sort of deviant sexual and/or pornographic interest [that] would undoubtedly prejudice [the] trier of fact * * *." He argues that the court erred when it allowed the State to question him about the statements because the report was not in evidence, and he never had the opportunity to cross-examine the detective about the alleged statements.

{¶30} Even assuming that the trial court erred by allowing the State to ask Mr. Oswald about the statements contained in Detective Donato's report, this Court cannot conclude that the foregoing exchange affected his substantial rights. *See* Crim.R. 52(A) (errors that do not affect substantial rights "shall be disregarded"). First, the State introduced other evidence

that was at least partially corroborative of the unrecorded statements contained in the report. During its case-in-chief, the State played a recording of Mr. Oswald at the police station having a telephone conversation with his mother. While on the phone, Mr. Oswald told his mother how he and the police discussed the victim having been asleep when he had sex with her and the possibility that this "could be a fetish or something." Mr. Oswald then stated: "they were saying, like, when did this start, and I was thinking like, it's kinda like . . . this is kinda true, like I might have a problem." Accordingly, quite apart from his exchange with the prosecutor, the trial court heard Mr. Oswald acknowledge the possibility that he harbored an interest in having sex with a sleeping individual. Mr. Oswald has made no attempt to explain how the State's line of questioning prejudiced him in light of his statements on the recording. *See* App.R. 16(A)(7).

{¶31} Second, because this was a bench trial, this Court presumes that the trial court considered "only the relevant, material, and competent evidence in arriving at a decision." *State v. Diaz*, 9th Dist. Lorain No. 02CA008069, 2003-Ohio-1132, ¶ 39. Regardless of whether Mr. Oswald ever viewed certain types of pornography, the issue before the trial court was whether, when he engaged in sexual conduct with the victim, he knew that she was submitting because she was unaware it was occurring. *See* R.C. 2907 .03(A)(3). To that end, the court heard a significant amount of circumstantial evidence tending to show that Mr. Oswald did, in fact, know that the victim was either asleep or otherwise unconscious. Notably, in orally announcing the guilty verdict, the court set

forth the evidence upon which it relied and never referenced Mr. Oswald's unrecorded statements. Mr. Oswald has not shown that, but for the State's line of questioning about the unrecorded statements, the court would not have convicted him. *See* Crim.R. 52(A). Accordingly, his third assignment of error is overruled.

III.

{¶32} Mr. Oswald's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Lynne S. Callahan
For the Court

HENSAL, P. J.
TEODOSIO, J.

CONCUR.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FILED UNDER 28 U.S.C. § 2254 (MAY 23, 2019)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FRANK OSWALD,

Petitioner-Appellee,

v.

NICHOLAS MAUER, ET AL.,

Respondent-Appellant.

Case No. 5:19-cv-01191

Now comes the Petitioner, Frank Oswald, by and through undersigned counsel, Friedman & Nemecek, L.L.C., and hereby respectfully submits the instant Memorandum of Law in support of his Petition filed under 28 U.S.C. § 2254.

{ Tables Omitted }

MEMORANDUM IN SUPPORT

I. Jurisdiction

A. Relief Is Appropriate Under 28 U.S.C. § 2254

1. Petitioner Is "in Custody"

28 U.S.C. § 2254 provides that any prisoner who is being held in custody pursuant a State court judgment that violates the United States Constitution, United States Supreme Court precedent, a federal law, or a United States Treaty may petition the district court for relief from said judgment. 28 U.S.C. § 2254(a). Petitioner is presently serving a term of supervision through the Summit County Adult Probation Department. As a result, he is subject to significant restraints on his liberty that are not shared by the public generally, including restrictions on his residency, ability to travel and/or freedom of association. *See Ex. 1.* Courts have previously found that these types of restrictions are sufficient to satisfy the "in custody" requirement set forth in 28 U.S.C. § 2254(a). *See, e.g., Jones v. Cunningham*, 371 U.S. 236, 238-242 (1963); *Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973); *United States v. Sandles*, 469 F.3d 508, 517-518 (6th Cir. 2006) (individuals subject to post-release control satisfy the "in custody" requirement); *Kusay v. United States*, 62 F.3d 192, 193 (7th Cir. 1995).

Likewise, as a result of his conviction, Petitioner has been classified as a Tier III sex offender under Ohio law. This classification imposes additional restrictions and obligations on Petitioner's freedoms

and liberties that are not shared by other citizens. The Third Circuit Court of Appeals recently determined that the restraints attendant to sex offender registration laws are sufficient to satisfy the "in custody" component of 28 U.S.C. § 2254(a). *See Piasecki v. Court of Common Pleas, Bucks County, PA*, No. 16-4175 (3rd Cir. 2019).

2. Petition is Timely

This Petition is timely. Specifically, 28 U.S.C. § 2244(d) provides a one (1) year statute of limitations running from "the date on which the judgment of conviction becomes final by the conclusion of direct review . . . " 28 U.S.C. § 2244(d)(1)(A). The Ohio Supreme Court declined to accept jurisdiction in this case on May 23, 2018. As such, the instant Petition is submitted within the requisite time limitations.

3. Remedy Exhaustion

Furthermore, Petitioner exhausted all remedies available to him in the State courts prior to filing this Petition. 28 U.S.C. § 2254(b) requires a petitioner seeking federal habeas corpus relief to first exhaust any and all remedies available to him in State court. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999) (holding that "exhaustion" is satisfied by seeking review of the claim in the highest state court with jurisdiction to consider the claim). In Ohio, this includes filing a direct and/or delayed appeal with the proper appellate district court as well as petitioning for review in the Ohio Supreme Court. *See generally Mackey v. Koloski*, 413 F.2d 1019 (6th Cir. 1969); *Allen v. Perini*, 424 F.2d 134, 140 (6th Cir. 1970). Petitioner in the instant matter timely appealed the State court judgment to

the Ninth District Court of Appeals and subsequently requested that the Ohio Supreme Court accept the case for further review. Thus, Petitioner has properly exhausted all State court remedies as of the date of this Petition.

II. Background: Procedural and Factual History

In April of 2016, Petitioner attended a family wedding in Twinsburg, Ohio. Also in attendance were his cousin, B.W., and B.W.'s girlfriend, C.J. Petitioner and C.J. were together for most of the wedding and continued to spend time together at the hotel after the reception concluded. By the end of the evening, C.J., Petitioner and B.W. were all in the same hotel room preparing to go to sleep. Shortly after Petitioner fell asleep, C.J. and B.W. began arguing. B.W. eventually left the room and proceeded to drive home. Before leaving the hotel, however, B.W. informed Petitioner that he could sleep in the bed with C.J.

C.J. was extremely distraught after the fight. Petitioner comforted C.J. and attempted to calm her down. *See Ex. 2A*, tr. p. 46. They eventually fell asleep in the bed, holding hands and facing the same direction. Due to their relative positioning in the bed and the conditions of the hotel room (*e.g.* lights turned off; shades drawn; etc.), Petitioner was unable to *see* C.J.'s face. *See Ex. 3A*, tr. p. 242.

At some point thereafter, Petitioner awoke and felt C.J. pressing her body against him and making what he perceived to be amorous noises. *Id*. at p. 240-241. Although he could not see her face, Petitioner believed that C.J. was awake and fully aware of what was occurring. Petitioner eventually began engaging in sexual intercourse with C.J. *Id*. at p. 246. Shortly

after the conduct commenced, C.J. turned to face Petitioner and told him that he did not have her permission. *Id*. at p. 247. By all accounts, the sexual activity immediately stopped at that point in time. *See Ex. 2*, tr. p. 53; *see also Ex. 3A*, tr. p. 247.

Petitioner and C.J. then discussed what had occurred. C.J. expressed confusion as to the entire situation, including the fact that she was dating Petitioner's cousin, B.W. *See Ex. 2A*, tr. p. 60-61. C.J. never accused Petitioner of knowing that she was asleep prior to or during the sexual intercourse. And, although he expressed remorse for the entire incident, Petitioner never indicated that he knew or believed that C.J. was asleep when the sexual conduct commenced. C.J. stated that they should pretend that the incident never happened and directed Petitioner not to mention it to anyone else. *Id*.

Petitioner gave C.J. a ride to B.W.'s house later that morning. *See Ex. 3*, tr. p. 254. Upon arriving at the residence, C.J. exited the vehicle and the two parted ways without further issue. In the days that followed, C.J. informed B.W. and law enforcement officials that she was asleep when the sexual intercourse began. She sent accusatory text messages to Petitioner reiterating that the conduct had occurred without her consent. *See Ex. 4*. Petitioner apologized to C.J. and indicated that he never intended to hurt her. Petitioner did not dispute C.J.'s claim that she was asleep when the conduct began; rather, he informed law enforcement officers that, at the time of the incident, he believed that she was awake.

The Summit County Grand Jury returned a three (3) count in Indictment against Petitioner alleging the following offenses, to wit: one (1) count of Rape in

violation of R.C. § 2907.02(A)(2); one (1) count of Sexual Battery in violation of R.C. § 2907.03(A)(2); and one (1) count of Sexual Battery in violation of R.C. § 2907.03(A)(3). The matter eventually proceeded to a bench trial. At the conclusion of their respective cases, the trial court found Petitioner guilty of Sexual Battery in violation of R.C. § 2907.03(A)(3). Petitioner was sentenced to a term of 2 years' incarceration and determined to be a Tier III sex offender.

On appeal, Petitioner argued, *inter alia*, that the State failed to present sufficient evidence that he knew C.J. was asleep *at the time the sexual conduct occurred*. In affirming the conviction, the Ninth District held that "[a]lthough [Petitioner] . . . thought . . . the victim was awake, he made no attempt to verify that fact." *State v. Oswald*, 18 C.A. 28633, ¶ 18 (Ohio App. 9th Dist. 2018).[1] According to the court, a rational trier of fact "could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted 'with a conscious purpose to avoid learning the fact.'" *Id*.

Thereafter, Petitioner filed a Notice of Appeal and a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court declined to accept jurisdiction in this matter on May 23, 2018.

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1 A copy of the Opinion is attached hereto as Exhibit 5 and incorporated herein by express reference.

III. Issues and Supporting Argument Together with Points and Authorities of Law

A. Petitioner's Right to Due Process of Law was Violated When his Conviction was Affirmed Despite the Absence of Sufficient Evidence on Each Essential Element of the Offense

The United States Constitution ensures that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—that is, evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of each and every element of the offense. *See, e.g., In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Fiore v. White*, 531 U.S. 225, 228-229 (2001); *see also* U.S. Const. amend. XIV. While a State has the sole authority to determine the particular elements of a criminal offense, once those elements have been adopted, the United States Constitution mandates that the State prove each of them beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364 (noting that in order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt). Thus, an allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See, e.g., Jackson*, 443 U.S. 307; *In re Winship*, 397 U.S. 358; *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990).

In *Jackson*, *supra*, the Supreme Court set forth the governing standard to identify violations of the

due process rights implicated by challenges to the sufficiency of the evidence: a reviewing court must determine, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). Because *Jackson* requires an element-by-element evaluation of the sufficiency of the evidence adduced at trial, a clear understanding of a crime's elements is essential for the proper application of that standard.

In the matter *sub judice*, Petitioner was convicted of Sexual Battery in violation of R.C. § 2907.03(A)(3), which expressly provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when . . . [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." *See* R.C. § 2907.03 (A)(3). Thus, in order to sustain a conviction for said offense, the record must establish that the State proved, beyond a reasonable doubt, that: (1) Petitioner engaged in sexual conduct with C.J.; (2) C.J. only submitted to the conduct because she unaware that the act was being committed; and (3) Petitioner knew that C.J.'s submission to the conduct was due to the fact that she was unaware it was occurring.

Knowledge can be established either through direct or circumstantial evidence. As to the latter, R.C. § 2901.22(B) provides, in pertinent part, that "[a] person has knowledge of circumstances when the person is aware that such circumstances *probably exist*." Moreover, "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes

that there is a *high probability* of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." R.C. § 2901.22(B). (Emphasis added).

In determining whether the defendant knew that the victim was unable to consent for purposes of R.C. § 2907.03(A)(3), the proper focus is on the defendant's awareness at the time of the alleged sexual conduct. *See, e.g., State v. Doss*, 2008-Ohio-449, ¶ 23 (Ohio App. 8th Dist. 2008) (considering defendant's knowledge of victim's mental condition at the time sexual conduct occurred); *State v. Freeman*, 2011-Ohio-2663, ¶ 23 (Ohio App. 8th Dist. 2011)("[t]he totality of facts and circumstances in existence *at the moment where resistance or consent is established* are all relevant in assessing the offender's knowledge of the victim's impairment) (emphasis added); *State v. Theodus*, 2012-Ohio-2064, ¶ 8 (Ohio App. 8th Dist. 2012); *State v. Antoline*, 2003-Ohio-1130, ¶ 52 (Ohio App. 9th Dist. 2003). (Emphasis added). Accordingly, evidence that the defendant became aware that the victim was substantially impaired at some point after the sexual conduct is insufficient to sustain a conviction under R.C. § 2907.03(A)(3). *See, e.g., State v. Noernberg*, 2012-Ohio-2062 (Ohio App. 8th Dist. 2012) (fact that victim vomited while performing oral sex on defendant insufficient to establish knowledge because it occurred after the sexual conduct had already commenced).

Generally, courts have relied upon a defendant's personal observations of an alleged victim's conduct in order to determine whether he or she had knowledge of—or reasonable cause to believe that—the individual was substantially impaired. *See, e.g., State v. Robinson*, 2003 WL 22298243, ¶ 16-17 (Ohio App. 9th Dist. 2003);

State v. Harmath, 2007-Ohio-2993, ¶ 18-19 (Ohio App. 3rd Dist. 2007)(defendant observed the victim consume thirteen vodka drinks in a short period of time; the victim fell out of the car and fell several times in the defendant's presence; the defendant helped the victim back to his apartment; the victim testified that she was "very intoxicated" on the night in question; and the victim vomited on two separate occasions while at the defendant's residence); *State v. Sipes*, 2008-Ohio-6627 (Ohio App. 5th Dist. 2008) (victim consumed in excess of 11 mixed drinks, was slurring her speech and stumbling, vomited numerous times throughout the evening including during intercourse, and whom the defendant described as being a "twelve" out of a possible ten on a scale measuring her impairment); *State v. Eberth*, 2008-Ohio-6596 (Ohio App. 7th Dist. 2008)(victim consumed a substantial amount of alcohol and cocaine with the defendant and was digitally penetrated by the defendant while she was passed out from intoxication).

1. No Direct Evidence of Knowledge

Here, Petitioner and C.J. were the only parties present when the sexual conduct occurred. Petitioner did not necessarily dispute that C.J. was, in fact, asleep at the time the sexual conduct occurred. Rather, he maintained that he reasonably believed that she was awake at the moment the sexual conduct commenced. The undisputed facts and circumstances surrounding the incident—as attested to by the victim—invariably supported Petitioner's (albeit mistaken) belief: C.J. invited Petitioner to lay in bed with her, cuddle and hold hands prior to both parties falling asleep; Petitioner was behind C.J. in a "spooning" position

throughout the course of the sexual activity[2]; and at the time the sexual activity commenced, all of the lights in the room were off, the shades were drawn, and Petitioner was unable to *see* C.J.'s face or discern whether her eyes were open or closed. *See Ex. 2B*, tr. p. 93-94.

C.J. never testified that Petitioner knew she was asleep at the time the sexual activity commenced. Likewise, none of the actions that precipitated the sexual conduct would have provided Petitioner with any indication that C.J. was asleep. Throughout the course of this incident, Petitioner and C.J. were in the same positions in the bed as when they had initially fallen asleep—lying down, facing the same direction in an unlit hotel room. Moreover, Petitioner ceased all sexual activity immediately after C.J. voiced an objection, which, by all accounts, was the first indication that she did not consent to the sexual conduct. *See Ex. 2A*, tr. p. 53. As such, even assuming that C.J. was asleep when the sexual intercourse began, there was no evidence presented from which any trier-of-fact could reasonably infer that Petitioner was aware—or should have been aware—of such a fact.

Despite the foregoing circumstances, the Ninth District concluded that there was sufficient direct evidence of Petitioner's knowledge to sustain the conviction. For instance, the court noted that in response to C.J.'s text message that "I woke up to you having sex with me," Petitioner stated "I know[.] And this is killing me[.]" *Oswald*, 18 C.A. 28633 at ¶ 18; *see also Ex. 4*. The court also referenced Petitioner's

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[2] *See Ex. 3A*, tr. p. 241-242.

failure to rebut C.J.'s contention that she did not consent to sexual intercourse. *Id*.

It is important to note that Petitioner never disputed that C.J. told him she was asleep at some point *after the act occurred* or that he immediately ceased the activity upon learning that she did not consent. However, merely establishing that C.J. was actually asleep when the sexual conduct began does not ultimately resolve the issue of whether Petitioner is guilty of Sexual Battery. To the contrary, the State was required to prove, beyond a reasonable doubt, that Petitioner knew, *at the time the sexual conduct commenced*, that C.J. was only submitting because she was unaware that the sexual conduct was occurring. Thus, Petitioner's after-the-fact acknowledgement that C.J. was asleep when the sexual conduct began is insufficient, in and of itself, to sustain a conviction under R.C. § 2907.03(A)(3).

The Ninth District also relied upon Petitioner's alleged admission that C.J. was "passed out" when the sexual conduct first occurred. *Oswald*, 18 C.A. 28633 at ¶ 18. However, the recording of that conversation establishes that in response to the officers' questioning if C.J. was "passed out when you started," Petitioner stated "[y]eah . . . we were definitely both asleep" before the sexual conduct occurred, meaning that there was no discussion or agreement to engage in sexual activity prior to the point in time when it occurred. Petitioner's statement does not in any way negate his earlier contention that he genuinely believed she was awake when the sexual conduct began or the particular circumstances that supported his belief.

Finally, the Ninth District made several references to the fact that Petitioner told officers that he "forced"

himself on C.J. At trial, however, Petitioner explained that he never intended to convey the same meaning that the law applies to the word "force" when he used it in his interview with law enforcement. The trial court accepted Petitioner's assertion and expressly rejected the inference made by the Ninth District: "[t]he evidence . . . shows that *he did not mean that word in a legal sense of 2901.01(A)(1) . . . it wasn't meant to mean violence, compulsion or physical restraint*." *See Ex. 6*, tr. p. 321. (Emphasis added). Irrespective of the court's reasoning, force is not an element of R.C. § 2907.03(A)(3) and, as such, Petitioner's statement has no bearing on the determination of whether the evidence is sufficient to sustain his conviction.

Even viewing the evidence in a light most favorable to the State, the only conclusion that can be drawn from the record in this case is that C.J. was asleep at the time the sexual conduct began. Petitioner's text message response and his statements to law enforcement simply confirm his post-incident awareness of C.J.'s claim. *See Ex. 4*. The above-referenced evidence does not, however, constitute an admission that he knew or was otherwise aware—*at the time the sexual conduct commenced*—that C.J. only submitted to the conduct because she was asleep.

2. Insufficient Evidence to Infer Knowledge

Even in the absence of direct evidence that the defendant had knowledge of a particular fact, the statute provides that such knowledge can be established "if a person subjectively believes that there is a *high probability* of its existence and fails to make inquiry

or acts with a conscious purpose to avoid learning the fact." R.C. § 2901.22(B). (Emphasis added).

The express language utilized in R.C. § 2901.22(B) expresses a clear legislative intent to distinguish between the mere possibility that a particular fact or circumstance exists and the probability that it does. A "possibility" is defined as "an event that may or may not happen." *Black's Law Dictionary* (8th Ed.2004) 1203. On the other hand, the term "probability" is defined as "[a] condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it." *Black's Law Dictionary* (6th Ed.1990) 1201; *see also McDermitt v. Tweel*, 151 Ohio App.3d 763, 773 (Ohio App. 10th Dist. 2003) ("probability" means "more likely than not" or a "greater than fifty percent chance"). Importantly, evidence tending to establish that a particular fact or circumstance is "possible" is insufficient to establish that a defendant acted with the requisite intent (*i.e.* knowingly). *State v. Hover*, 2005-Ohio-5897, ¶ 29-31 (Ohio App. 12th Dist. 2005) (trial court committed plain error by improperly instructing the jury that a defendant acts "knowingly" when there existed at the time in the mind of the defendant an awareness of the *possibility*, as opposed to probability, of a certain fact).

In affirming the conviction in this case, the Ninth District held that "[a]lthough [Petitioner] . . . thought . . . the victim was awake, he made no attempt to verify that fact." *State v. Oswald*, 18 C.A. 28633, ¶ 18 (Ohio App. 9th Dist. 2018). According to the court, a rational trier of fact "could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but

failed to inquire or acted 'with a conscious purpose to avoid learning the fact.'" *Id*.

As the express language of R.C. § 2901.22(B) clearly provides, however, the State cannot prove a defendant's knowledge of a particular fact under a purposeful avoidance theory unless the record demonstrates that the defendant believed there was a high probability that said fact actually existed. Here, there is nothing in the record to establish that Petitioner believed there was a "high probability" that C.J. was asleep such that his failure to further inquire into the subject would support the conclusion that he acted with a "conscious purpose to avoid learning the fact." To the contrary, Petitioner adamantly maintained that he believed C.J. was awake at the time the sexual activity commenced—a fact acknowledged by the Ninth District's notation that Petitioner "thought . . . the victim was awake" at the time the sexual conduct commenced. *Id*. at ¶ 18.

Furthermore, the facts and circumstances surrounding the incident, which were established largely through uncontroverted testimony, would not have reasonably caused Petitioner to believe that there was a high probability that C.J. was awake. Again, C.J. consented to Petitioner lying next to her, cuddling and holding hands prior to falling asleep. Both C.J. and Petitioner confirmed that they were unable to see each other's faces when the sexual activity began, and all conduct immediately ceased when C.J. stated that Petitioner did not have her "permission," which, by all accounts, was the first indication that Petitioner would have received that C.J. was either unaware of the sexual conduct or, at the very least, did not consent to the same. Thus, this

case is clearly distinguishable from other prosecutions involving Sexual Battery where the circumstantial evidence alone supported a finding that the defendant had knowledge that the victim was unaware of the sexual conduct. *See, e.g., State v. Macht*, 1999 WL 387058 (Ohio App. 1st Dist. 1999) (evidence that the defendant was on top of the victim and able to see that she was asleep during the sexual intercourse); *State v. Green*, 2002-Ohio-3949 (Ohio App. 5th Dist. 2002) (the defendant physically carried the sleeping victim to a different location prior to engaging in sexual activity with her).

The only argument the Ninth District offered to support its "knowledge by purposeful avoidance" theory was a passing reference to Petitioner's use of the word "maybe" in describing his belief that C.J. was awake. *Oswald*, 18 C.A. 28633 at ¶ 18. However, it should be noted that this excerpted portion of Petitioner's statement is taken entirely out of context and fails to mention the particular facts and circumstances—as testified to by Petitioner—that supported his belief that C.J. was awake (*e.g.* C.J. was pressing her body against him and making noises). *See Ex. 3A*. Contextual issues aside, the word "maybe" does not in any way qualify the degree of Petitioner's conviction that C.J. was, in fact, awake. Even if it suggests some uncertainty, it certainly does not support a finding that Petitioner acted despite being aware of a *high probability* that C.J. was asleep or otherwise unconscious.

At best, Petitioner's statements suggest that he was aware of the *possibility* that C.J. was not awake. Whether his belief was, in fact, accurate is not *ipso facto* determinative of the ultimate issue. Likewise,

acknowledging the possibility that his belief (*i.e.* that C.J. was awake) might have been incorrect does not provide justification for inferring knowledge under a theory of purposeful avoidance. Neither the express language of the statute nor precedent case law supports such a proposition. In any event, it is inapposite to conclude that the absence of absolute certainty in one's subjective belief somehow equates to a high probability that the inverse conclusion—here, that C.J. was asleep—is actually true.

IV. Conclusion and Requested Relief

The foundation of the criminal justice system is the assurance that no defendant will be deprived of their right to life or liberty without due process of law, which necessitates that all convictions be sustained by proof of every essential element of an offense beyond a reasonable doubt. There is a compelling societal interest in safeguarding the protections afforded to all citizens by the United States Constitution.

Both the trial court and the Ninth District disregarded any evidence of Petitioner's subjective belief and instead determined that knowledge could be established based solely upon a determination that the accuser was, in fact, unaware that the conduct was occurring. This rationale contravenes the express statutory language defining "knowingly" and effectively transformed R.C. § 2907.03(A)(3) into a strict liability offense. What's more, this rationale seemingly imposes a duty on defendants to obtain affirmative consent before engaging in sexual activity regardless of the circumstances. While such a proposition might be preferable or even ideal, it is not the law in Ohio.

Whether C.J. was actually asleep at the time the sexual conduct occurred is immaterial to the determination of whether Petitioner had the requisite intent to commit Sexual Battery. Thus, irrespective of any flawed reasoning underlying the courts' decisions, the fact remains that there was insufficient evidence presented to sustain Petitioner's conviction in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. *See, e.g., Jackson*, 443 U.S. at 319; *State v. Jenks*, 61 Ohio St.3d 259 (Ohio 1991); U.S. Const. amend. XIV. Absent relief from this Honorable Court, Petitioner will continue to suffer irreparable harm as a result of his unlawful and unconstitutional conviction. Accordingly, Petitioner respectfully requests that this Honorable Court vacate his conviction forthwith.

Respectfully submitted,

/s/ Eric C. Nemecek
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PETITIONER'S OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION (MAY 12, 2021)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

FRANK OSWALD,

Petitioner-Appellee,

v.

NICHOLAS MAUER, ET. AL.,

Respondent-Appellant.

No. 5:19-cv-01191

Before: John R. ADAMS, U.S. District Judge.,
Jonathan D. GREENBERG, Magistrate Judge.

Now comes Petitioner, Frank Oswald, by and through undersigned counsel, Friedman & Nemecek, L.L.C., and hereby respectfully submits the instant Objections to Magistrate Greenberg's Report and Recommendation, which was filed on April 29, 2021. (Doc. No. 6, Report and Recommendation; PageID #747 761). Based upon arguments set forth *infra* as well as those contained in the original Petition (Doc. No. 1, Habeas Petition; PageID #1-229), counsel respectfully submits that Petitioner is entitled to the relief requested, *to wit*: vacating his conviction forth-

with. Reasons in support of the instant request are set forth more fully in the Brief in Support, which is attached hereto and incorporated herein by express reference.

Respectfully submitted,

/s/ Eric C Nemecek
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LOCAL RULE 7.1 CERTIFICATE

I hereby certify that the attached Brief in Support does not exceed twenty (20) pages, which complies with the page limit requirements set forth in Local Rule 7.1(f).

/s/ Eric C. Nemecek
ERIC C. NEMECEK
Counsel for Petitioner

BRIEF IN SUPPORT

I. Issue(s) Raised in Petition

Petitioner maintains that the State failed to present sufficient evidence that he acted with the requisite mental state of "knowingly" to sustain his conviction for Sexual Battery in violation of R.C. § 2907.03(A)(3). Specifically, Petitioner submits that the State failed to prove, beyond a reasonable doubt, that he knew, at the time the sexual conduct occurred, that C.J. was unable to consent because she was unaware that it was occurring. Petitioner further contends that both the Ninth District and the Magistrate improperly concluded that knowledge had been established under a purposeful avoidance theory despite the absence of proof that Petitioner believed there was a high probability that C.J. was unaware the sexual conduct was occurring such that knowledge could reasonably be imputed or inferred.

II. Applicable Standards and Statutes

The Sexual Battery statute provides that "[n]o person shall engage in sexual conduct with another, not the spouse of the offender, when . . . [t]he offender knows that the other person submits because the other person is unaware that the act is being committed." *See* R.C. § 2907.03(A)(3). Knowledge can be established either through direct or circumstantial evidence. As to the latter, R.C. § 2901.22(B) provides, in pertinent part, that "[a] person has knowledge of circumstances when the person is aware that such circumstances *probably exist*." Moreover, "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person

subjectively believes that there is a *high probability* of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." R.C. § 2901.22(B). (Emphasis added).

In deciding whether the defendant had knowledge of the accuser's inability to consent, the proper focus is on the defendant's awareness at the time the sexual conduct occurred. *See, e.g., State v. Doss*, 2008-Ohio-449, ¶ 23 (Ohio App. 8th Dist. 2008)(considering defendant's knowledge of victim's mental condition at the time sexual conduct occurred); *State v. Freeman*, 2011-Ohio-2663, ¶ 23 (Ohio App. 8th Dist. 2011)("[t]he totality of facts and circumstances in existence *at the moment where resistance or consent is established* are all relevant in assessing the offender's knowledge of the victim's impairment) (emphasis added); *State v. Theodus*, 2012-Ohio-2064, ¶ 8 (Ohio App. 8th Dist. 2012); *State v. Antoline*, 2003 Ohio-1130, ¶ 52 (Ohio App. 9th Dist. 2003); *State v. Noernberg*, 2012-Ohio-2062 (Ohio App. 8th Dist. 2012)(fact that victim vomited while performing oral sex on defendant *insufficient to establish knowledge because it occurred after the sexual conduct had already commenced*) (emphasis added).

III. Argument in Support of Objections

A. Specific Evidence Referenced and/or Relied upon by Magistrate

As set forth below and discussed more fully *infra*, the Magistrate's Report references portions of the trial record that purportedly support the Ninth District's determination that Petitioner knew C.J. was unable to consent to the sexual conduct. The

undersigned respectfully submits that none of these facts—either in isolation or taken together—supports the contention that the State proved that Petitioner acted knowingly such that the conviction should be sustained.

> *(1) Both C.J. and Petitioner agreed that C.J. stated "I didn't give you permission to do this" shortly after the sexual conduct commenced.* (Doc. No. 6, Report and Recommendation; PageID #759).

Petitioner acknowledges that C.J. made the above-referenced statement after the sexual conduct had commenced. Furthermore, both parties testified that the sexual conduct immediately ceased at the time C.J. made said statement. (Tr. p. 53; 247). As discussed more fully *infra*, however, this admission is insufficient to prove that Petitioner had the requisite degree of knowledge such that his conviction can be sustained. Rather, it merely establishes that Petitioner was aware that C.J. did not consent to the sexual conduct *at the time the statement was made.*

The same is true even if the statement was sufficient to alert Petitioner that C.J. had been asleep when the sexual conduct was initiated. The statutory language and precedent case law provide that in determining whether a defendant knew that a victim was unable to consent, the focus must be limited to the facts and circumstances in existence at the time the sexual conduct occurred. Thus, at most, the testimony proves that Petitioner knew that C.J. did not consent to the sexual conduct once the statement was made. It does not, however, provide any insight into what Petitioner knew or should have known at the time the sexual conduct commenced.

(2) Petitioner admitted to detectives that he "forced himself" on C.J. (Doc. No. 6, Report and Recommendation; PageID #759).

At trial, Petitioner explained that he never intended to convey the same meaning that the law applies to the word "force" when he used it in his interview with law enforcement. The trial court accepted Petitioner's assertion and expressly rejected the inference made by the Ninth District and cited within the Magistrate's Report: "[t]he evidence . . . shows that *he did not mean that word in a legal sense of 2901.01(A)(1) . . . it wasn't meant to mean violence, compulsion or physical restraint*." *See Ex. 6*, tr. p. 321. (Emphasis added).

Although acknowledging the trial court's determination of Petitioner's intent in making said statement, the Magistrate's Report nevertheless suggests that "the fact that the state trial court found that Oswald did not use the term 'force' in a way sufficient to meet the statutory requirement for rape does not mean the trial court was foreclosed from considering Oswald's statement as evidence sufficient to support a conviction for sexual battery." (Doc. No. 6, Report and Recommendation; PageID #759, fn. 2). While that may be true, the record clearly establishes that the trial court did not perceive Petitioner's statement as evidencing his knowledge or awareness that C.J. was unable to consent. To the contrary, the court's explanation confirms that Petitioner's use of the word had no legal significance, thereby rendering it effectively irrelevant to the issue of whether he possessed the necessary degree of knowledge such that his conviction could be sustained.

(3) Petitioner never told the police during his interview that C.J. was pressing her butt against his penis. (Doc. No. 6, Report and Recommendation; PageID #759).

(4) Petitioner never told the police during his interview that C.J. initiated the sexual conduct. (Doc. No. 6, Report and Recommendation; PageID #759).

(5) Petitioner never told the police during his interview that he believed C.J. was awake. (Doc. No. 6, Report and Recommendation; PageID #759).

(6) Petitioner acknowledged that he should have disclosed pertinent details during his interview with law enforcement, including the fact that he believed the sexual conduct was consensual. (Doc. No. 6, Report and Recommendation; PageID #759).

While, as Petitioner acknowledged, it may have been more prudent to advise the officers of the foregoing facts during the interrogation, it is important to note that Petitioner was under no obligation to make said disclosures. What's more, Petitioner testified that law enforcement officers never asked him whether the conduct was consensual at any point during the interview—a fact which was not disputed by any other witnesses or evidence introduced at trial. (Doc. No. 5-4, Trial Transcript; PageID #712). Although Petitioner's failure to make said disclosures may have affected the trial court's assessment of the weight or credibility to accord his testimony, the fact that such disclosures were not made during the interrogation is of no significance to the issue of whether the State

presented sufficient evidence to prove that he had the requisite mental state when the conduct occurred.

> *(7) Petitioner told the police that he had never had "unconsensual sex with anyone before."* (Doc. No. 6, Report and Recommendation; PageID #759).

At trial, Petitioner was questioned regarding the statement that he had "never done this before." Petitioner explained that he was not intending to convey that this was the first instance where he engaged in nonconsensual sexual conduct such that his statement could be deemed a tacit admission of guilt. Rather, he was simply attempting to convey that he had not previously slept with someone who was dating one of his family members:

> Defense: In those texts you say to her, "Tell her I'm sorry. I never did this before . . . "
>
> * * * *
>
> Why did you choose those words, that I never did it before?
>
> Oswald: Because I've never had sex with my cousin's girlfriend before, or any cousin's girlfriend.
>
> Defense: Was it that you had never had nonconsensual sex before?
>
> Oswald: No.

(Doc. No. 5-4, Trial Transcript; Page ID #682-683). Petitioner also confirmed that prior to C.J.'s advisement to the contrary, he genuinely believed that the sexual conduct was consensual. (*Id*. at PageID #676).

> *8.) Petitioner failed to disagree with or correct C.J.'s version of events in the text messages that they exchanged after the alleged incident had occurred.* (Doc. No. 6, Report and Recommendation; PageID #760).

The Magistrate's assertion is contradicted by the text messages that were introduced at trial. Specifically, the time-stamped messages establish that C.J. first accused Petitioner of "raping [her] in [her] sleep" at 5:24 p.m. After C.J. rejected Petitioner's request to discuss the matter over the phone, Petitioner sent C.J. the following message:

> [i]t was never my intention to hurt you, I was comforting you and we fell asleep, I woke up and I was shocked just like you and we stopped. We were both upset but after and in the morning my main concern was if you were okay.

(Doc. No. 1-8, Text Messages; PageID #208). It is evident that Petitioner did not agree with C.J.'s claim that he knowingly engaged in sexual conduct with her while she was asleep. Instead, he clearly conveyed his recollection of the events that transpired—namely, that he was comforting C.J., then fell asleep, and then engaged in sexual conduct. Importantly, these statements were also in line with Petitioner's testimony at trial.

> *(9) Petitioner acknowledged to officers during the interview that C.J. "maybe" was asleep and that he took no effort to confirm that she was awake.* (Doc. No. 6, Report and Recommendation; PageID #760).

Petitioner's acknowledgment that C.J. "maybe" was asleep is insufficient to impute knowledge in this case under a theory of purposeful avoidance. First, the statement is not an admission that Petitioner knew C.J. was asleep at the time the conduct occurred. Thus, it does not constitute direct evidence of knowledge under R.C. § 2901.22.

Likewise, the statement cannot serve as a basis to conclude that such knowledge should be imputed or inferred under the particular facts and circumstances of this case. As discussed more fully *infra*, the statutory language makes clear that the State cannot prove a defendant's knowledge of a particular fact under a purposeful avoidance theory unless the record demonstrates that the defendant believed there was *a high probability* that said fact actually existed. Here, Petitioner's use of the term "maybe" does not support a finding that he acted despite being aware of a *high probability* that C.J. was asleep or otherwise unconscious.

B. Legal Analysis and Argument

1. No direct evidence of "knowledge"

C.J. never testified that Petitioner knew she was asleep at the time the sexual activity commenced. Likewise, none of the actions that precipitated the sexual conduct would have provided Petitioner with any indication that C.J. was asleep or that the conduct was nonconsensual.[1] Throughout the course

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[1] As to the latter point, the evidence established that C.J. and Petitioner were hanging out and acting flirtatious towards each other throughout the evening. C.J. and her boyfriend invited Petitioner to stay in their hotel room. When her boyfriend left

of this incident, Petitioner and C.J. were in the same positions in the bed as when they had initially fallen asleep—lying down, facing the same direction in an unlit hotel room. Moreover, Petitioner ceased all sexual activity immediately after C.J. voiced an objection, which, by all accounts, was the first indication that she did not consent to the sexual conduct. (Doc. No. 5-2, Trial Transcript; PageID #467). Thus, even assuming that C.J. was asleep when the sexual intercourse began, there was no evidence presented from which any trier-of-fact could reasonably conclude that Petitioner was aware—or should have been aware—of such a fact.

Both the Ninth District's Opinion and the Magistrate's Report rely on a text message exchange between Petitioner and C.J. as well as Petitioner's failure to rebut C.J.'s claim that she did not consent to sexual intercourse to conclude that the State presented sufficient evidence that Petitioner knew C.J. was unaware the sexual conduct was occurring. (Doc. No. 5-1, Ex. 9, Ninth District Opinion; PageID #325-339); *see also State v. Oswald*, *2018-Ohio-245,* ¶ 18 (Ohio App. 9th Dist. 2018). Importantly, however, these conversations did not transpire until *after* the sexual conduct had already occurred. And, as set forth in the Memorandum of Law, merely establishing that C.J. was actually asleep when the sexual conduct began does not ultimately resolve the issue of whether Petitioner is guilty of Sexual Battery; rather, the State was required to prove, beyond a reasonable

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the hotel after an argument, he instructed Petitioner to sleep in bed with C.J. Petitioner consoled C.J. after the argument with her boyfriend, which including laying the same bed and holding each other until they fell asleep.

doubt, that Petitioner knew, *at the time the sexual conduct commenced*, that C.J. was only submitting because she was unaware that the sexual conduct was occurring. *See, e.g., Doss*, 2008-Ohio-449 at ¶ 23; *Freeman*, 2011-Ohio-2663 at ¶ 23; *Theodus*, 2012-Ohio-2064 at ¶ 8; *Antoline*, 2003-Ohio-1130 at ¶ 52; *State v. Noernberg*, 2012-Ohio-2062 (Ohio App. 8th Dist. 2012) (fact that victim vomited while performing oral sex on defendant *insufficient to establish knowledge because it occurred after the sexual conduct had already commenced*) (emphasis added).

Likewise, the Magistrate's reliance on Petitioner's statement that he "forced" himself on C.J. is also insufficient to establish that Petitioner knew C.J. was asleep or otherwise unable to consent to the sexual conduct at the time it occurred. As explained *supra*, the Magistrate's contention that the trial court could have considered Petitioner's use of the term as evidence of sexual battery is belied by the trial court's own statements prior to announcing its verdict—namely, that the court did not ascribe any legal significance to Petitioner's use of the term "force."

2. Improper to infer or impute knowledge

As aforementioned, there was no direct evidence presented to establish that Petitioner knew that C.J. was asleep when the sexual conduct occurred: C.J. never testified that Petitioner was aware she was asleep, nor would he have been able to confirm as much given the attendant circumstances (*e.g.*, positioning of C.J. and Petitioner in the bed; dark room; early morning; etc.) Moreover, it is undisputed that Petitioner ceased all sexual activity immediately after C.J. voiced an objection, which, by all accounts, was

the first indication that she did not consent to the sexual conduct. (Doc. No. 5-2, Trial Transcript; PageID #467). Thus, Petitioner's conviction can only be sustained if the evidence permits an inference or imputation of knowledge under the theory of purposeful avoidance.

In order for the trier of fact to properly impute knowledge under a purposeful avoidance theory, the evidence must clearly establish that the "person subjectively believes that there is a *high probability* of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." R.C. § 2901.22(B). (Emphasis added). The statutory language evinces the legislature's intent to distinguish between the mere possibility that a particular fact or circumstance exists and the probability that it does. Thus, evidence tending to establish that a particular fact or circumstance is "possible" is insufficient to establish that a defendant acted with the requisite intent (*i.e.,* knowingly).

In recommending that the instant Petition be denied, the Magistrate primarily relies on statements that Petitioner made—or failed to make—to law enforcement officers and/or in a text message conversation with C.J. For instance, the Report notes that Petitioner told detectives that he "forced himself" on C.J.[2] and acknowledged that she "maybe" was asleep at the time the sexual conduct commenced. (Doc. #6, Report and Recommendation; PageID #759-760). According to the Magistrate, these facts support the

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[2] As discussed *supra*, the trial court concluded that Petitioner's use of the word "force" was not intended to serve as an admission that he engaged in non-consensual sexual conduct with C.J.

Ninth District's conclusion that "[a]lthough [Petitioner] . . . thought . . . the victim was awake, he made no attempt to verify that fact." (Doc. No. 6, Report and Recommendation; PageID #760); *see also Oswald*, 2018-Ohio-245 at ¶ 18.

The undersigned respectfully submits that Petitioner's acknowledgment that C.J. "maybe" was asleep is insufficient to impute knowledge in this case under a theory of purposeful avoidance. The statutory language makes clear that the State cannot prove a defendant's knowledge of a particular fact under a purposeful avoidance theory unless the record demonstrates that the defendant believed there was *a high probability* that said fact actually existed. *See* R.C. § 2901.22(B); *see also State v. Hover*, 2005-Ohio-5897, ¶ 29-31 (Ohio App. 12th Dist. 2005) (trial court committed plain error by improperly instructing the jury that a defendant acts "knowingly" when there existed at the time in the mind of the defendant an awareness of the *possibility*, as opposed to probability, of a certain fact). Here, Petitioner's use of the term "maybe" does not in any way qualify the degree of his conviction that C.J. was, in fact, awake. Even if it suggests some uncertainty, it certainly does not support a finding that Petitioner acted despite being aware of a *high probability* that C.J. was asleep or otherwise unconscious.

There is nothing in the record to establish that Petitioner believed there was a "high probability" that C.J. was asleep such that his failure to further inquire into the subject would support the conclusion that he acted with a "conscious purpose to avoid learning the fact." At best, Petitioner's statements suggest that he was aware of the *possibility* that C.J.

was not awake. Whether his belief was, in fact, accurate is not *ipso facto* determinative of the ultimate issue. Likewise, acknowledging the possibility that his belief (*i.e.,* that C.J. was awake) might have been incorrect does not provide justification for inferring knowledge under a theory of purposeful avoidance. Neither the express language of the statute nor precedent case law supports such a proposition.

CONCLUSION

The evidence failed to establish that Petitioner knew, at the time the sexual conduct occurred, that C.J. was asleep or otherwise unaware that it was occurring. Furthermore, the particular facts and circumstances of this case preclude the trier of fact from imputing such knowledge under a purposeful avoidance theory. Despite the absence of any evidence on an essential element of the offense, the Magistrate's Report recommends that the instant Petition be denied.

Apart from violating Petitioner's constitutional rights, adopting the Magistrate's Report would set a dangerous precedent by effectively transforming R.C. § 2907.03 into a strict liability offense that makes the defendant's mental state immaterial as long as the evidence establishes that the accuser was, in fact, unaware that the conduct was occurring. This reasoning not only contravenes the express statutory language defining "knowingly," but also imposes a duty on defendants to obtain affirmative consent before engaging in sexual activity regardless of the circumstances. While such a proposition might be preferable or even ideal, it is not the law in Ohio.

Based upon the foregoing, the undersigned respectfully requests that this Honorable Court reject

the Magistrate's Report and Recommendation and instead conclude that Petitioner is entitled to the relief herein requested, *to wit*: vacating his conviction forthwith.[3]

WHEREFORE, the Petitioner, Frank Oswald, hereby respectfully submits his Objections to the Magistrate's Report and Recommendation (Doc. No. 6, Report and Recommendation; PageID #747-761), and requests that this Honorable Court grant the relief herein requested pursuant to 28 U.S.C. § 2254.

Respectfully submitted,

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[3] Should this Honorable Court adopt the Magistrate's Report and Recommendation, the undersigned respectfully requests that the Court issue a Certificate of Appealability under 28 U.S.C. § 2253(c) to permit Petitioner to present the arguments heretofore discussed to the Sixth Circuit Court of Appeals. In the alternative, counsel requests that the Court allow the parties to submit arguments on whether a Certificate of Appealability should be issued as provided in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. §§ 2254 or 2255.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection was filed by CM/ECF this 12th day of May 2021, which will send a notification of such filing electronically to the following: William H. Lamb, Assistant Attorney General, Criminal Justice Section at 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202.

/s/ Eric C. Nemecek
ERIC C. NEMECEK
Counsel for Petitioner

APPLICATION FOR CERTIFICATE OF APPEALABILITY IN CASE NO. 5:19-CV-01191 (JANUARY 4, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK OSWALD,

Petitioner,

v.

NICHOLAS MAUER, ET. AL.,

Respondents.

No. 21-4218

Now comes Petitioner, Frank Oswald, by and through undersigned counsel, Friedman & Nemecek, L.L.C., and pursuant to 28 U.S.C. § 2253, hereby respectfully applies for a Certificate of Appealability. Based upon arguments set forth *infra* as well as those contained in the original 28 U.S.C. § 2254 Petition (Doc. No. 1: Habeas Petition; PageID #1-229), counsel respectfully submits that Petitioner is entitled to the relief requested, to wit: vacating his conviction forthwith. Reasons in support of the instant request are set forth more fully in the Memorandum in Support, which is attached hereto and incorporated herein by express reference.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Relevant Facts and Procedural History

In April of 2016, Petitioner, Frank Oswald ("Oswald"), attended a family wedding in Twinsburg, Ohio. Also in attendance were his cousin, B.W., and B.W.'s girlfriend, C.J. Oswald and C.J. were together for most of the wedding and continued to spend time together at the hotel after the reception concluded. By the end of the evening, C.J., Oswald, and B.W. were all in the same hotel room preparing to go to sleep. Shortly after Oswald fell asleep, C.J. and B.W. began arguing. B.W. eventually left the room and proceeded to drive home. Before leaving the hotel, however, B.W. informed Oswald that he could sleep in the bed with C.J.

Oswald comforted C.J. and attempted to calm her down. (Doc. No. 1-4: Tr. pt. 1; PageID #74). They eventually fell asleep in the bed, holding hands and facing the same direction. Due to their relative positioning in the bed and the conditions of the hotel room (*e.g.* lights turned off; shades drawn; etc.), Oswald was unable to *see* C.J.'s face. (Doc. No. 1-6: Tr. pt. 3; PageID #154). At some point thereafter, Oswald awoke and felt C.J. pressing her body against him and making what he perceived to be amorous noises. (*Id.* at PageID #152-153). Although he could not see her face, Oswald believed that C.J. was awake and fully aware of what was occurring. Oswald eventually began engaging in sexual intercourse with C.J. (*Id.* at PageID #158). Shortly after the conduct commenced, C.J. turned to face Oswald and told him that he did not have her permission. (*Id.* at PageID #159). By all accounts, the

sexual activity immediately stopped at that point in time. (*Id.*).

Oswald and C.J. then discussed what had occurred. Importantly, C.J. never accused Oswald of knowing that she was asleep prior to or during the sexual intercourse. And, although he expressed remorse for the entire incident, Oswald never indicated that he knew or believed that C.J. was asleep when the sexual conduct commenced. C.J. stated that they should pretend that the incident never happened and directed Oswald not to mention it to anyone else. (*Id.*). Oswald then proceeded to drive C.J. to B.W.'s house, where the two eventually parted ways without issue.

In the days that followed, C.J. informed B.W. and law enforcement officials that she was asleep when the sexual intercourse began. She sent accusatory text messages to Oswald reiterating that the conduct had occurred without her consent. Although Oswald did not dispute C.J.'s claim that she was asleep when the conduct began, he maintained that, at the time of the incident, he believed that she was awake.

The Summit County Grand Jury returned a three (3) count Indictment against Oswald alleging the following offenses, *to wit*: one (1) count of Rape in violation of R.C. § 2907.02(A)(2); one (1) count of Sexual Battery in violation of R.C. § 2907.03(A)(2); and one (1) count of Sexual Battery in violation of R.C. § 2907.03(A)(3). The matter eventually proceeded to a bench trial. At the conclusion of their respective cases, the trial court found Oswald guilty of Sexual Battery in violation of R.C. § 2907.03(A)(3). Oswald was sentenced to a term of 2 years' incarceration and determined to be a Tier III sex offender.

On direct appeal, Oswald argued, *inter alia*, that the State failed to present sufficient evidence that he knew C.J. was asleep *at the time the sexual conduct occurred*. Oswald maintained that there was no direct evidence presented to establish his knowledge of C.J.'s condition. To the contrary, the undisputed testimony concerning the incident—as attested to by the victim—invariably supported his (albeit mistaken) belief that C.J. was awake and consented to the sexual conduct. Similarly, Oswald noted that knowledge could not be inferred under the circumstances of this case, particularly in light of the fact that there was nothing to suggest that he believed there was a high probability that C.J. was asleep at the time the sexual conduct commenced.

The Ninth District disregarded the forgoing arguments and instead affirmed the conviction. In support of its decision, the Ninth District expressly held that "[a]lthough [Oswald] . . . thought . . . the victim was awake, he made no attempt to verify that fact." *State v. Oswald*, 18 C.A. 28633, ¶ 18 (Ohio App. 9th Dist. 2018). According to the court, a rational trier of fact "could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted 'with a conscious purpose to avoid learning the fact.'" *Id.*

Thereafter, Oswald filed a Notice of Appeal and a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court declined to accept jurisdiction in this matter on May 23, 2018. On May 23, 2019, Oswald filed a 28 U.S.C. § 2254 Petition with the United States District Court for the Northern District of Ohio raising the same argument—namely, that his conviction was not supported by

sufficient evidence in violation of his Fifth and Fourteenth Amendment right to due process of law. The matter was assigned to the Honorable Judge John Adams, who referred the case to Magistrate Judge Jonathan D. Greenberg.

After the issues were fully briefed, Magistrate Greenberg issued his Report and Recommendation, which concluded that Oswald's Petition should be denied. (Doc. No. 6: Report and Recommendation; PageID #1). Oswald submitted timely objections and further requested that the Court issue a certificate of appealability in the event that the Magistrate's recommendation was adopted. (Doc. No. 7: Petitioner's Objections; PageID #18). On November 29, 2021, Judge Adams filed an Opinion adopting the Magistrate's Report and Recommendation and summarily denying Oswald's request for a certificate of appealability. (Doc. No. 8: Order and Decision; PageID #3).

For the reasons discussed more fully *infra*, Oswald asks this Court to issue a certificate of appealability to address the due process violation claim. A certificate of appealability may issue if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

II. Law and Argument

A. Authority to Issue a Certificate of Appealability

Oswald invokes this Honorable Court's authority under Rule 22 of the Federal Rules of Appellate Procedure, which vests the Court with jurisdiction to issue a certificate of appealability after the district court has declined to issue the same. *See* Fed. R. App. P. 22(b)(1). The Sixth Circuit has previously recognized that both district and circuit judges, as well as the circuit justice, may issue a certificate of appealability. *See*, *e.g.*, *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997).

B. A Certificate of Appealability Is Warranted in This Case

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas proceeding in which the detention complained of arises out of process issued by a state court. *See* 28 U.S.C. § 2253(c)(1)(A); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A certificate of appealability may issue only if the applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). Under this standard, a petitioner "need not show that he should prevail on the merits," *Barefoot*, 463 U.S. at 893 n.4; rather, he need only to show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 336, *quoting Slack*, 529 U.S. at

484. A certificate should issue if the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct" in any procedural ruling. *See Slack*, 529 U.S. at 478.

In resolving this issue, the court must conduct an overview of the claims in the habeas petition, generally assesses their merits, and determine whether the resolution was debatable among jurists of reason or wrong. *Id.* An applicant must show more than an absence of frivolity or the existence of mere good faith; however, it is not necessary to establish that the appeal will succeed. *See Miller-El*, 537 U.S. at 338. As the United States Supreme Court has explained, "the issuance of a certificate of probable cause (the predecessor to a certificate of appealability) generally should indicate that an appeal is not legally frivolous," whereas "a court of appeal should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous." *Barefoot*, 463 U.S. at 894.

In the matter *sub judice*, it is clear that Oswald's Fifth Amendment claim is not "legally frivolous." To the contrary, the issues raised in the petition concern the most basic and fundamental constitutional rights upon which this country was founded. The bedrock of the criminal justice system is the assurance that no defendant will be deprived of his right to life or liberty without due process of law, which necessitates that all convictions be sustained by proof of every essential element of an offense beyond a reasonable

doubt. *See*, *e.g.*, *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Fiore v. White*, 531 U.S. 225, 228-229 (2001); *see also* U.S. Const. amend. XIV. There is a compelling societal interest in safeguarding the protections afforded to all citizens by the United States Constitution.

The question at this stage of the proceedings is whether "reasonable jurists" could deem the issues related to the sufficiency of the evidence "debatable," and "deserv[ing] encouragement to proceed further." *Slack*, 529 U.S. at 484. The undersigned submits the answer to this question is undoubtedly "yes." Accordingly, counsel respectfully requests that this Honorable Court issue a certificate of appealability and afford Oswald an opportunity to fully present his constitutional claims.

Both the trial court and the Ninth District disregarded any evidence of Oswald's subjective belief and instead determined that knowledge could be established based solely upon a determination that the accuser was, in fact, unaware that the conduct was occurring. This rationale contravenes the express statutory language defining "knowingly" and effectively transformed R.C. § 2907.03(A)(3) into a strict liability offense. What's more, it seemingly imposes a duty on defendants to obtain affirmative consent before engaging in sexual activity regardless of the circumstances. While such a proposition might be preferable or even ideal, it is not the law in Ohio.

Whether C.J. was actually asleep at the time the sexual conduct occurred is immaterial to the determination of whether Oswald had the requisite intent to commit Sexual Battery. Thus, irrespective of any flawed reasoning underlying the courts' decisions, the

fact remains that there was insufficient evidence presented to sustain Oswald's conviction in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. *See*, *e.g.*, *Jackson*, 443 U.S. at 319; *State v. Jenks*, 61 Ohio St.3d 259 (Ohio 1991); U.S. Const. amend. XIV. Absent relief from this Honorable Court, Oswald will continue to suffer irreparable harm as a result of his unlawful and unconstitutional conviction. Accordingly, Petitioner respectfully requests that this Honorable Court grant the certificate of appealability.

WHEREFORE, the Petitioner, Frank Oswald, pursuant to 28 U.S.C. § 2253, hereby respectfully applies for a Certificate of Appealability and requests that this Honorable Court grant the relief herein requested.

Respectfully submitted,

/s/ Eric C Nemecek
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Certificate of Appealability was filed by CM/ECF this 4th day of January 2022, which will send a notification of such filing electronically to the following: William H. Lamb, Assistant Attorney General, Criminal Justice Section at 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio, 45202.

/s/ Eric C. Nemecek
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