[Cite as *State v. Foster*, 2020-Ohio-1379.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 108340
v.	:	
KURT FOSTER,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: April 6, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-626464-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristin M. Karkutt, Assistant Prosecuting Attorney, *for appellee.*

Henderson, Mokhtari & Weatherly, and Justin M. Weatherly, *for appellant.*

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Defendant-appellant, Kurt Foster, was indicted for two counts of substantial impairment rape pursuant to R.C. 2907.02(A)(1)(c). A mistrial was declared in his first trial when the jury was unable to reach a unanimous verdict.

He was found guilty of both counts of rape in the instant trial, and the trial court imposed a six-year prison term for his offenses. On appeal, Foster presents the following nine assignments of error for our review:

> I. [R.C.] 2901.21(E) is unconstitutional as it violated [Appellant's] right to due process by prohibiting the jury from considering the "totality of the circumstances" and fully complying with jury instructions.
>
> II. The trial court erred to the prejudice of the Appellant in instructing the jury to consider H.C.'s ability to drive when determining if her ability to resist or consent was substantially impaired.
>
> III. The trial court erred to the prejudice of the Appellant in admitting the state's reverse extrapolation evidence.
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> IV. The trial court erred in not admitting the dose-response curve chart offered during Dr. Belloto's testimony.
>
> V. The trial court erred in prohibiting defense counsel from impeaching H.C. with her prior inconsistent statement.
>
> VI. The Appellant was deprived of his right to a fair trial due to the trial court's display of judicial bias.
>
> VII. The trial court erred in not allowing the jury to view Detective Moctezuma's body camera footage in its entirety.
>
> VIII. [Appellant's] rape convictions are not supported by sufficient evidence.
>
> IX. Appellant's convictions for rape in violation of [R.C.] 2907.02(A)(1)(c) are against the manifest weight of the evidence.

{¶ 2} After a careful review of the record and pertinent case law, we find merit to Foster's eighth assignment of error and reverse his rape convictions. Pursuant to the rape statute, R.C. 2907.02(A)(1)(c), the state must produce evidence to prove not only that the alleged victim was substantially impaired but

also that the defendant knew or should have known of the substantial impairment. Reviewing the evidence in a light most favorable to the state, we are unable to conclude that the state produced sufficient evidence from which a jury could conclude beyond a reasonable doubt that Foster knew or should have known of the alleged victim's substantial impairment.

I. The Trial

{¶ 3} For purposes of this appeal and our disposition of Foster's eighth assignment of error, the following relevant evidence and testimony was presented.

A. Witnesses for the State

{¶ 4} At trial, the state's key witnesses included the alleged victim, H.C.; two friends who were with her during the evening of December 29, 2017; Foster's friend Nicholas Reschke, who was with Foster that evening; and the state's expert, Szabolcs Sofalvi.

1. H.C.'s Friends — Michaella Pietro and Shannon Rodak

{¶ 5} Pietro testified that she went to Marble Room with H.C. for "happy hour" around 5 p.m. on December 29, 2017. She estimated that they had four or five drinks there, including wine, martinis, and champagne. They next went to Barrio, where they continued drinking. After Barrio, they went to Dive Bar to meet with another friend, Rodak, and to watch the Ohio State football game. They continued to drink there. Around 10:30 p.m., Pietro left to meet other friends, and H.C. stayed at Dive Bar. Pietro testified that they were both "really drunk" at this point. (Tr. 1322.)

{¶ 6} Rodak testified that H.C. arrived at Dive Bar around 8:30 p.m. Rodak said when she left the bar around midnight, H.C. "[s]eemed just like a normal — just seemed like [H.]." "She wasn't falling all over the place or slurring her words or anything." (Tr. 1303, 1309.) Rodak described herself as "being tipsy and intoxicated" at that time and described H.C. as "probably the same level as me." (Tr. 1304.)

2. Nicholas Reschke

{¶ 7} Reschke, a friend and employee of Foster's, testified for the state. On December 29, 2017, he and Foster went to downtown Cleveland for dinner and drinks, and they booked a room at the Residence Inn to stay overnight. They started their evening at the downtown casino and then went to Tilted Kilt for dinner. After dinner, they went to Thirsty Parrot and later Corner Alley to drink. After a stop back at their hotel room, they went to Barley House. They ended the evening at Dive Bar and stayed there until near its closing time, around 2 or 2:30 a.m. When they exited the bar, they saw a taxi outside. A few security officers standing nearby told them not to get in the taxi, but its driver told the officers it was okay for Reschke and Foster to get in.

{¶ 8} Once inside the taxi, Reschke saw a woman in the front passenger seat. The woman, later identified as H.C., appeared to be crying and upset about something. While the taxi driver and H.C. conversed, Reschke asked the driver if there were places still open near downtown. The driver drove them to Christie's Cabaret, a strip club. Reschke and Foster paid the cab fare and exited the taxi but

returned to it quickly when they found out that Christie's was closed. The taxi driver then drove them to their hotel. Reschke and Foster exited the taxi, only to find out the driver had taken them to the wrong hotel, and they returned to the taxi.

{¶ 9} Reschke testified that while H.C. initially appeared to be angry and upset, her mood seemed to improve after some exchange of small talk and jokes between them. When the taxi finally arrived at the Residence Inn, H.C. asked if Reschke and Foster had champagne in their room. Reschke said they did not have champagne, but they had some beer. When asked by the prosecutor, "[d]id you invite her to come up to the room and have some Coors Light?" Reschke answered, "I had put the offer out there that we had Coors Light and just kind of left it at that" and "I guess she took that as an offer, by [my] saying I have Coors Light." (Tr. 1364, 1366.) When asked to describe his observation of H.C. during the taxi ride, Reschke testified that "[s]he seemed fine. I mean, other than when we first got in the cab, other than seeming angry, [she] seemed okay." (Tr. 1365.) Surveillance video was played for the jury showing the men and H.C. walking from the taxi and into the hotel.

{¶ 10} Reschke stated that they all went up to the hotel room. He described the hotel room as consisting of a bedroom with two beds and a bath, separated by a door from a living room area, which had a kitchenette and a couch. Once the three of them got inside the hotel room — around 3 a.m. in Reschke' s estimate — Reschke offered H.C. a Coors Light and she took a few sips. According to Reschke,

H.C. did not have any difficulty taking her coat off or sitting down. He stated she was not stumbling or falling, and there was no indication she was intoxicated. He drank a beer and then went to go to bed. While he was getting ready to sleep in the bedroom, Foster came in to take a blanket off the bed to give to H.C. At that point, Reschke "guess[ed] * * * [H.C.] had decided that she was going to stay the night." (Tr. 1368.) Reschke felt a bit uneasy about a stranger staying overnight in their room, unsure if the stranger would do any damage to the room.

{¶ 11} Reschke fell asleep soon after Foster took the blanket. He woke up in the morning from the noise of snow-plowing trucks. Foster woke up too. Reschke went to the living area and found H.C. still sleeping on the couch, with a blanket over her. He woke her up and told her that they all had to leave soon. According to Reschke, she responded "okay." (Tr. 1374.) He then went back to the bedroom to gather his belongings. H.C. fell back to sleep, and he had to wake her up a second time. This time when she woke, H.C., asked him where her friends were; he told her that she came to the hotel by herself. (Tr. 1389.) After that, H.C. left the hotel room. He stated that she did not appear disheveled, hungover, or confused.

{¶ 12} Reschke and Foster left the hotel room soon after H.C. left. While they were waiting for the valet to bring their vehicle, they saw police officers in the lobby, but Reschke did not learn of H.C.'s accusation against Foster until a detective asked to talk to him sometime later. Foster finally told Reschke that he

and H.C. engaged in consensual sexual activity after Reschke received a subpoena to appear in court.

{¶ 13} When asked to describe whether H.C. appeared intoxicated, Reschke testified that "I'm assuming she was [drinking], being out that [late] at night. But she didn't seem like she wasn't able to — she seemed like she was able to carry a conversation and seemed okay." (Tr. 1390.) He stated that while they were in the taxi, she was following the conversation with no slurring of speech. He also testified that when they entered the hotel lobby, H.C. did not seem unsteady on her feet and required no assistance with walking. On cross-examination, Reschke stated that neither he nor Foster invited her to their hotel room, and that H.C. gave no indication that she was highly intoxicated. Additionally, he stated that H.C. inquired about whether they had alcohol in their room; he did not offer.

3. H.C.

{¶ 14} H.C. testified that on the night of December 29, 2017, she went with Pietro and another friend "Nikki" to Marble Room where she consumed a vodka martini, another vodka drink, and a few glasses of champagne. After two and a half hours there, they went to Barrio. While there, she consumed a beer and a shot, and ate some chips, salsa, and a taco. They stayed at Barrio until 8:30 p.m. and then took an Uber to Dive Bar to watch the Ohio State football game. While at Dive Bar, she consumed four to six shots of liquor drinks.

{¶ 15} H.C. said that sometime between 10:30 p.m. and 11:30 p.m., her friends Rodak, Pietro, and "Nikki" left to go to another bar. She did not go with

them and planned to take a taxi or Uber home. She described herself as "drunk" at that time. (Tr. 1077.) The battery of her cellphone died around 11:30 p.m. or 12:00 a.m. preventing her from calling an Uber to take her home. She vaguely remembered being outside Dive Bar and being in a yellow cab but did not remember what happened after that.

{¶ 16} Although unable to recall any events after being in the cab, H.C. remembered a brief moment in the middle of the night. The trial transcript reflects the following testimony:

> Q. * * * What's your next — what's your next memory after getting into the yellow cab?
>
> A. And then my next memory is in — I — sorry. My next memory is it's the middle of the night, it's dark, and this older man is on top of me and having sex with me.

(Tr. 1080.)

{¶ 17} H.C. stated that when she woke up in the morning, she discovered she was covered with a blanket, but her pants and underpants were all the way down and pulled over her over-the-knee boots. She saw a younger guy standing over her telling her that she needed to leave. She gathered her stuff, left the hotel room after "kind of realizing what's going on," (tr. 1082) and went to the front desk to report that she had been assaulted in the hotel room.

{¶ 18} During H.C.'s testimony, the prosecutor showed two videos, one showing H.C., Foster, and Reschke walking from the taxi to the hotel door through the snow-covered curb and the other one showing them entering the hotel lobby. H.C. acknowledged that the videos showed that she walked out of the taxi and into

the hotel on her own, but she described herself as looking like "a drunken mess." (Tr. 1138.)

{¶ 19} During cross-examination, H.C. agreed that what she experienced was a "blackout." The transcript contains the following testimony:

> Q. I guess the one thing I really want to make clear here is in your words you don't remember anything from the cab — being in the cab, to waking up with someone on top of you; is that right?
>
> A. That's right.
>
> Q. The whole period is what you're considering a black out [sic] period; is that correct?
>
> A. Yeah. Yeah.
>
> Q. That whole period from when you got into that cab car — do you remember the cab driver at all?
>
> A. No.
>
> Q. Okay. Do you remember talking to the cab driver at all?
>
> A. No.
>
> * * *
>
> Q. — you have zero memory, right?
>
> A. Correct.

(Tr. 1111-1112.) Despite having no memory beyond being in the taxi until the middle of the night, H.C. unequivocally denied that she propositioned, initiated, or consented to sexual conduct with Foster.[1]

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[1] At the first trial, which ended in a hung jury, H.C. was asked if she engaged in any consensual sexual activity with anyone. She answered, "No, not that I remember." (Tr. 295, 297.) Under cross-examination, when defense counsel asked her "if there's a possibility that you don't remember consenting," she answered "sure." (Tr. 297.)

4. The State's Expert

{¶ 20} Szabolcs Sofalvi, a quality assurance officer and forensic scientist with the Cuyahoga County Medical Examiner's Office, testified as the state's expert regarding how he used the reverse extrapolation method to estimate H.C.'s blood alcohol content level at the time of the sexual conduct. He testified that after consuming alcohol, one's blood alcohol content level would reach peak concentration after 30 or 40 minutes if alcohol was consumed on an empty stomach. After the peak level, ethanol would be eliminated from the body at a constant rate — the median rate being 0.015 grams per deciliter per hour. H.C.'s blood was drawn around 4:15 p.m. the day after the alleged rape, with a result of 0.025 grams, plus or minus 0.02. Sofalvi testified that assuming her peak of concentration was either at 2:15 a.m. (14 hours before the blood draw) or 3:15 a.m. (13 hours before the blood draw), to a reasonable degree of scientific certainty, H.C.'s blood alcohol level was estimated to be 0.235 at 2:15 a.m., 0.220 at 3:15 a.m., and 0.205 at 4:15 a.m.

Because of the seemingly different responses given during this trial, defense counsel attempted to impeach her pursuant to Evid.R. 613, which allows a witness to be impeached by a prior inconsistent statement. The trial court, however, would not allow defense counsel to impeach H.C. At the sidebar, the trial court expressed its displeasure that defense counsel did not provide the court with a transcript of the pertinent portion of the prior trial relating to the attempted impeachment. Following the sidebar, defense counsel further attempted to impeach H.C. with her prior inconsistent statement. The trial court sustained the state's objection on relevancy. The trial court further scolded defense counsel in the presence of the jury: "Learn how to impeach or sit down." (Tr. 1128.) Under the sixth assignment of error, Foster argues the trial court's scolding of defense counsel on this occasion and on other occasions throughout the trial court reflected a display of judicial bias, which deprived him of a fair trial. Under the fifth assignment of error, Foster contends the trial court erred in prohibiting defense counsel from impeaching H.C. with her prior inconsistent statement pursuant to Evid.R. 613.

{¶ 21} The state also elicited testimony from Sofalvi that in Ohio, the legal driving limit is 0.08 grams per deciliter. Under the third assignment of error, Foster alleges that the state's reverse extrapolation evidence relied on many assumed variables (such as the time H.C. stopped drinking, her accurate elimination rate, an accurate time when her alcohol consumption peaked, and information as to whether her elimination rate remained constant). He argues that because specific information and measurements would have been necessary in order to produce accurate results, the state's reverse extrapolation evidence should not have been admitted.

B. Witnesses for the Defense

{¶ 22} Testifying for the defense was its expert, Dr. Robert Belloto; Foster; and his wife.

1. Dr. Robert Belloto

{¶ 23} In response to the testimony of the state's expert, who estimated H.C.'s blood alcohol level at the time of the incident based on the reverse extrapolation method, the defense introduced its own expert, Dr. Belloto. He specialized in clinical pharmacology, a specialization involving modeling the time course of a drug and its toxicological effect.

{¶ 24} Dr. Belloto testified first regarding the effect of alcohol on memory and explained that a blackout was not the same as being unconscious. He testified that during a blackout, the short-term memory is not transferred to the long-time memory due to the effect of alcohol and, as a result, there is a loss of memory for

events that occur during a blackout. Dr. Belloto also questioned the accuracy of the reverse extrapolation method because he said multiple variables would be necessary for an accurate determination.

{¶ 25} During Dr. Belloto's testimony, defense counsel attempted to introduce a "dose-response" curve chart to show that a person's blood-alcohol content level is not indicative of intoxication or the appearance of intoxication. The "dose-response" curve chart was part of Dr. Belloto's expert report, which was timely provided to the state before trial. During his testimony, as he explained the methodology of "pharmacodynamics modeling" and the data shown in the curve chart, the trial court, without an objection from the state, sua sponte called for a sidebar regarding the chart. Although defense counsel explained the "dose-response" curve chart was commonly known and used in the practice of pharmacology and therefore admissible as a learned treatise, the trial court precluded Dr. Belloto from providing any testimony regarding the chart. Under the fourth assignment of error, Foster contends that the "dose-response" curve chart and the related information has been published in multiple textbooks, scientific research journals, and articles, and therefore, Dr. Belloto should have been permitted to testify regarding the chart under Evid.R. 803(18), which governs the standard for admitting materials and statements relied on by an expert as a learned treatise.

2. Foster

{¶ 26} Foster testified that on December 29, 2017, he and Reschke went to downtown Cleveland to celebrate the holidays, as they have done in the past. They checked into Residence Inn around 4:30 p.m., and after drinking some beers they had brought with them, they went to the Jack Casino and walked around. They ate dinner at Tilted Kilt and later went to Corner Alley, where he had one beer. After stopping back at their hotel room, they went to Thirsty Parrot briefly, and then returned to the casino and gambled for a while. Around 10:00 p.m. they went to Barley House and left there sometime between 11:00 p.m. and midnight. They ended the evening at Dive Bar, where he had two more beers. Foster estimated he had six to eight Coors Light beers throughout the night and estimated his level of intoxication at six to seven on a scale of one to ten. He and Reschke stayed at Dive Bar until it closed around 2:00 a.m.

{¶ 27} After leaving the bar, they walked across the street to a taxi, which was a minivan. There was a passenger in the front seat already. A security officer told them they could not get in, but the taxi driver told the security officer that "they [were] fine." (Tr. 1634.) Once inside the taxi, Foster saw an unknown female — H.C. — in the front passenger seat talking to the driver. According to Foster, she appeared to be upset and crying about something, but her speech seemed normal. Foster corroborated Reschke's testimony about attempting to go to Christie's Cabaret, and subsequently being taken to the wrong hotel.

{¶ 28} Foster testified that on the way to Residence Inn, H.C. mentioned she would like some champagne to drink. According to Foster, Reschke told her

that they did not drink champagne, but they had Coors Light in the hotel room and offered to H.C. that she could sleep on their hotel couch. When the taxi stopped at their hotel, H.C. exited the taxi first, and was able to walk inside the hotel door without any difficulties. The surveillance video was again shown to the jury.

{¶ 29} Foster stated that once they got to the hotel room, he and Reschke gave H.C. a beer and chatted with her about the Cleveland weather. H.C. had a few sips of the beer and, according to Foster, talked normally as she participated in the conversation. Foster admitted that she appeared to have been drinking but said she did not appear to be highly intoxicated to him. After 20 to 30 minutes and when Reschke decided to go to bed, Foster realized for the first time that H.C. was planning to spend the night there, as she appeared to try to get comfortable on the couch and also tried to take off her boots.

{¶ 30} Foster testified that while it was odd that a stranger would spend the night in his hotel room, he went into the bedroom to grab a blanket off his bed for her. When he returned, she was still struggling with the zipper in her knee-high boots and asked him to help her with unzipping them. He tried to help but had no success either because the zipper was opening beneath the pull. Foster testified that while he was in front of her on one knee trying to unzip her boots, H.C. started to rub her leg on his shoulder and said, "let's have some fun." (Tr. 1613.) He said "no, I'm a married man." (Tr. 1614.) He stated that H.C. responded, "I don't care," then proceeded to pull her pants and underwear down to the top of her boots and asked him to kiss her "down there." (Tr. at *id*.) He did it for a few minutes but

stopped because his knee was hurting. When he stood up, she grabbed his penis on the outside of his pants. Foster testified that he could not resist the temptation and proceeded to pull his pants down and had intercourse with her. However, the sexual interaction lasted only for a short time because he could not perform. He put his pants back on and told her he was going to bed.

{¶ 31} Foster went to bed and fell asleep. He woke up to the sound of a truck that was plowing snow in a parking lot outside the hotel. He realized he and Reschke had snowplow jobs to do themselves and needed to leave quickly. Foster used the bathroom while Reschke went to wake H.C. Foster stated that he waited in the bathroom because he did not "want to see her for what had happened." (Tr. 1639-1640.) After H.C. left, the men also left the hotel room.

{¶ 32} As they were waiting in the lobby for the valet to bring their car up, they saw Cleveland police officers enter into the building. He testified that he was not nervous when he saw the police officers because he had done nothing wrong. Two weeks later, a detective came to his house while he was at work. His wife reached him by phone, and he learned for the first time that he was involved in a criminal investigation. He contacted the detective for an interview. He admitted he lied to the detective during that first interview, claiming there was no sexual conduct between him and H.C. He testified that he lied to cover up a bad decision he made, and also because he did not want his wife to know he had cheated on her. After the interview, he decided to tell his wife what had happened. In a second

interview with the detective, he admitted that he engaged in consensual sexual conduct with H.C.

3. Defendant's Wife

{¶ 33} Foster's wife testified on his behalf. She testified she and Foster had been married for 12 years and he was a good father to their two boys. She was very surprised when a detective came to their residence informing her that her husband was under investigation for rape. She stated that Foster initially denied that any sexual conduct had occurred but, after his initial interview with the detective, he admitted that he had had cheated on her but said he did not commit a rape. She was very upset but believed her husband and urged him to tell the detective the truth.

{¶ 34} On cross-examination by the state, the following exchange occurred:

> Q. [Your husband is] [n]ot someone who would take advantage of somebody?
>
> A. Correct.
>
> Q. Why it is then, Mrs. Foster, that when Detective Moctezuma knocked on your door and told you what he was there for, your first response was "[t]ake him away"?
>
> A. I didn't say take him away.

(Tr. 1673.) When Mrs. Foster denied saying "take him away," the state played for the jury a portion of the video from the body-camera worn by Detective Moctezuma, which showed that Mrs. Foster did utter the words "[t]ake him away" at one point. Under the seventh assignment of error, Foster argues that Mrs. Foster's "[t]ake him away" comment was shown in the video out of context, and

the trial court erred in not allowing the jury to view Detective Moctezuma's body-camera footage in its entirety.[2]

C. Jury Instructions

{¶ 35} The trial court instructed the jury on substantial impairment as follows:

> Substantially impaired means a present reduction, diminution, or decrease in the victim's ability either to appraise the nature of her conduct or to control her conduct.
>
> Now, in determining whether a person is substantially impaired you may consider whether the person is able to perform normal motor functions including standing, walking, and their ability to drive. You may consider whether they were capable of engaging in normal speech activities, and/or whether their problem[-]solving skills were diminished.

(Tr. 1691.) The state did not request any instruction that sleeping could constitute substantial impairment.

{¶ 36} Defense counsel objected to the reference to a person's ability to drive in the instruction for substantial impairment, arguing that assessing substantial impairment by one's ability to drive improperly conflated one's blood alcohol level exceeding the legal limit of 0.08 for driving purposes and being substantially impaired.[3] The trial court overruled the objection. Under the second

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[2] We note that the transcript does not reflect that defense counsel had proffered the body-cam video at trial. On appeal, Foster moved this court to supplement the record with the body-cam video in its entirety. This court allowed Foster to supplement the record as there was no opposition by the state.

[3] Moreover, we note that the trial court's instruction deviated from the standard jury instruction on "substantial impairment" by including the "ability to drive" language.

assignment of error, Foster argues the jury instruction was improper because the alleged victim's legal ability to operate a vehicle or whether her blood alcohol level was in excess of the legal driving limit should not have been considered in determining whether the victim was substantially impaired for consent purposes.

D. The Verdict and Sentence

{¶ 37} The jury found Foster guilty of both counts of rape as charged under R.C. 2907.02(A)(1)(c) (Count 1 for vaginal intercourse and Count 2 for cunnilingus). The trial court imposed a six-year prison term on Count 1 and a three-year prison term on Count 2, to be served concurrently. The court also imposed five years of postrelease control and a $10,000 fine. Foster now appeals.

II. The Appeal

{¶ 38} On appeal, Foster raises nine assignments of error.

A. Sufficiency of the Evidence

{¶ 39} In his eighth assignment of error, Foster contends that the evidence is insufficient to support his convictions for rape. We agree.

{¶ 40} When assessing a sufficiency-of-the-evidence challenge, a reviewing court must "examine [all] 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after

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See Ohio Jury Instructions, CR Section 507.02(A)(1) (Rev. Jan. 22, 2011). As we explain later, "substantial impairment" is not synonymous with "intoxication."

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." *Id*. A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). While a manifest-weight challenge questions whether the state has met its burden of persuasion, the test for sufficiency of the evidence requires a determination whether the state has met its burden of production at trial. *Id*. at 390.

1. Substantial Impairment

{¶ 41} Pursuant to R.C. 2907.02(A)(1)(c), a rape occurs when the other person's "ability to resist or consent is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition." In this case, the question is whether the state produced sufficient evidence regarding the element of substantial impairment.

{¶ 42} The term "substantially impaired" is not statutorily defined, and therefore, the term must be given the meaning "generally understood in common usage." *State v. Zeh*, 31 Ohio St.3d 99, 103, 509 N.E.2d 414 (1987). The state can show substantial impairment by offering evidence "demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the

nature of [her] conduct or to control [her] conduct." *Id*. at 103-104. This court has found that voluntary intoxication is a mental or physical condition that could cause substantial impairment. *State v. Jones*, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, ¶ 43, citing *State v. Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, ¶ 13. However, as this court has noted, the statute "was not intended to criminalize sexual conduct as the result of an alcohol or drug-induced state of lowered inhibitions." *State v. Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-2663, ¶ 16.

{¶ 43} In this case, H.C. testified to her consumption of a large quantity of alcohol in the hours leading to the sexual conduct. Additionally, she stated that she was in a "blackout" state following the night of drinking. The state's expert, employing the reverse extrapolation method, estimated that her level of blood alcohol content level at the time of the sexual conduct was around 0.235 or 0.220, significantly exceeding the legal driving level of 0.08.

{¶ 44} However, under the case law, substantial impairment contemplated in the rape statute is not synonymous with intoxication. "When reviewing substantial impairment due to voluntary intoxication, there can be a fine, fuzzy, and subjective line between intoxication and impairment. Every alcohol consumption does not lead to a substantial impairment." *Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, at ¶ 18. *See also State v. Hansing*, 2019-Ohio-739, 132 N.E.3d 252, ¶ 14 (9th Dist.) (not every instance of intoxication equates with

substantial impairment) and *State v. Jenkins*, 2d Dist. Greene No. 2015-CA-6, 2015-Ohio-5167, ¶ 27.

{¶ 45} Moreover, "substantial impairment does not have to be proven by expert medical testimony; rather, it can be shown to exist by the testimony of people who have interacted with the victim." *State v. Brady*, 8th Dist. Cuyahoga No. 87854, 2007-Ohio-1453, at ¶ 78; s*ee also State v. Jones*, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, ¶ 43. The victim's own testimony is also sufficient to prove substantial impairment. *Hansing* at ¶ 13, citing *State v. Dasen*, 9th Dist. Summit No. 28172, 2017-Ohio-5556, ¶ 19.

{¶ 46} In this case, while intoxication does not equate with substantial impairment, when viewed in a light most favorable to the state, the evidence showed that H.C. consumed a large volume of alcohol prior to the sexual incident; her blood alcohol content level around the time of the incident was estimated by the state's expert to far exceed 0.08, the legal driving level; and she was in an alcohol-induced blackout and unable to recall the events of the evening after she got into a taxi, other than a brief moment of an "older man" engaging in sexual conduct with her. (Tr. 1080.) While this evidence is sufficient to establish H.C.'s intoxication and may have even be sufficient to show she was substantially impaired at the time of the sexual conduct, the law also requires the state to produce legally sufficient evidence to show that Foster knew or had cause to believe H.C. was substantially impaired.

{¶ 47} Not all persons who engage in sexual conduct with a voluntarily intoxicated person are culpable of rape under R.C. 2907.02(A)(1)(c). *In re King*, 8th Dist. Cuyahoga Nos. 79755 and 79830, 2002-Ohio-2313, ¶ 20. And "the waters become even murkier when reviewing whether a defendant knew, or should have known, that someone was impaired rather than merely intoxicated." *Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, at ¶ 18. A person's conduct becomes criminal only when engaging in sexual conduct with an intoxicated victim when that person *knows or has reasonable cause to believe* that the victim's ability to resist or consent is substantially impaired because of her intoxication. *State v. Noernberg*, 8th Dist. Cuyahoga No. 97126, 2012-Ohio- 2062, ¶ 11; *State v. Rivera*, 8th Dist. Cuyahoga No. 97091, 2012-Ohio-2060, ¶ 22; and *State v. Martin*, 12th Dist. Brown No. CA99-09-026, 2000 Ohio App. LEXIS 3649, 2000 WL 1145465 (Aug. 12, 2000). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶ 48} Whether an offender knew or had reasonable cause to believe the victim was impaired may be reasonably inferred from a combination of the victim's demeanor and others' interactions with the victim. *Jones*, 8th Dist. Cuyahoga No. 101311, 2015-Ohio-1818, at ¶ 43, citing *State v. Novak*, 11th Dist. Lake No. 2003-L-077, 2005-Ohio-563, ¶ 25. Evidence that should have alerted an offender to whether a victim was substantially impaired may include evidence that the victim

was stumbling, falling, slurring speech, passing out, or vomiting. *King* at ¶ 20; *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, ¶ 50 (2d Dist.).

{¶ 49} In this case, the state presented testimony from several individuals who interacted with H.C. in the hours leading to the sexual conduct, but none testified to indications that H.C. was substantially impaired, such as stumbling, falling, or slurred speech. H.C.'s friend Pietro spent the evening with her and last saw her around 10:30 p.m. Her testimony only showed that H.C. was intoxicated; she described both of them as "really drunk" at that time. (Tr. 1322.) H.C.'s friend Rodak was with her at Dive Bar until midnight. Rodak similarly testified to H.C.'s intoxication, describing herself as "tipsy and intoxicated" and H.C. as "probably at the same level as [me]" when the two parted. (Tr. 1304.) As to H.C.'s demeanor, Rodak stated that H.C. "[s]eemed just like a normal — just seemed like [H.]" and that "[s]he wasn't falling all over the place or slurring her words or anything." (Tr. 1303, 1309.)

{¶ 50} Additionally, when Reschke was asked to describe his observations of H.C. during the taxi ride, he testified that she "seemed fine" and that other than appearing upset when he first saw her in the taxi's front seat, she "seemed okay." (Tr. 1365.) Reschke was the last person to observe H.C.'s demeanor before she and Foster engaged in sexual conduct, yet there was no testimony from him that H.C. showed any signs of substantial impairment. In fact, the jury was able to observe H.C.'s demeanor and abilities when they viewed the surveillance videos taken from

outside and inside the hotel. H.C. herself acknowledged that as depicted in those videos, she walked from the taxi to the hotel lobby on her own.

{¶ 51} H.C. described herself as in a "blackout." In *Doss,* 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, this court addressed the question of whether a defendant knew or had cause to know that an alleged victim was substantially impaired where the alleged victim was intoxicated to the point of not remembering the sexual conduct with the defendant. This court reversed the rape conviction for insufficient evidence, reasoning that the alleged victim's testimony that she did not remember anything about the incident was not evidence that she did not consent to the sexual encounter, or that the defendant knew she may have been substantially impaired. *Id.* at ¶ 21. This court noted that a person experiencing an alcohol-induced blackout may walk, talk, and fully perform ordinary functions without others being able to tell that he or she was "blacked out." *Id.* at ¶ 18, citing Westen, Peter, *Egelhoff Again*, 36 Am.Crim.L.Rev. 1203, 1231 (1999).[4]

{¶ 52} This court in *Noernberg*, 8th Dist. Cuyahoga No. 97126, 2012-Ohio-2062, also reversed the defendant's rape conviction for insufficient evidence. This court reasoned that while the defendant knew the alleged victim had consumed

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[4] The dissent in *Doss* found the record to have contained sufficient evidence to show that the defendant knew or had reasonable cause to believe that the victim was substantially impaired, pointing to testimony by witnesses that the victim was so intoxicated that the bartender stopped serving her alcohol, that she was "slumping," "not sitting up straight," and "[n]ot really aware," and that she "displayed signs of being too intoxicated to perform ordinary functions." *Doss* at ¶ 30 (Sweeney, J., dissenting). As we explain later, such testimony was absent in the present case.

alcohol and drugs, there was no evidence of any particular aspects of her behavior that should have alerted the defendant to her substantial impairment, such as stumbling, falling, slurred speech, passing out, or vomiting. *Id.* at ¶ 27. This court contrasted that case with cases where the defendant had observed indications of the victim's substantial impairment, citing as examples *State v. Harmath*, 3d Dist. Seneca No. 13-06-20, 2007-Ohio-2993, ¶ 14 (defendant was aware the victim had consumed a large amount of alcohol; had seen the victim stumbling, falling down, and vomiting twice before passing out), *State v. Eberth*, 7th Dist. Mahoning No. 07-MA-196, 2008-Ohio-6596 (defendant knew or should have known of the victim's substantial impairment because he carried the unconscious victim from the bar and was aware she had passed out after ingesting a large amount of alcohol and cocaine), and *State v. Williams*, 9th Dist. Lorain No. 02CA008112, 2003-Ohio-4639 (defendant's awareness that victim passed out after ingesting a substantial amount of alcohol was evidence that he knew or should have known the victim was substantially impaired). *Noernberg* at ¶ 28. *See also State v. Keller*, 8th Dist. Cuyahoga No. 106196, 2018-Ohio-4107 (defendant was present during the entire evening when the victim consumed alcohol and smoked marijuana; saw her fall off a railing at one of the bars; drove her to their friend's house following a night of bar-hopping knowing she could not drive her vehicle due to her intoxication; and knew she consumed additional alcohol and drugs).

{¶ 53} "The proof must be of reasonable cause to believe the victim is substantially impaired — not just intoxicated or 'under the influence' — beyond a

reasonable doubt." *Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, 927 N.E.2d 632, at ¶ 24 (2d Dist.). The Second District emphasized in *Hatten* that the question was not whether the victim was intoxicated but whether she was substantially impaired and whether the defendant had reasonable cause to believe that she was substantially impaired. *Id*. at ¶ 36. The *Hatten* court, as in *Noernberg*, pointed to the absence of evidence presented by the state demonstrating the defendant knew of the alleged victim's alcohol consumption prior to coming to the defendant's home or the victim showing any particular behaviors that should have alerted the defendant to her substantial impairment.

{¶ 54} The issue in this case is when one should know another individual is so intoxicated that they are substantially impaired and cannot consent. Here and similar to *Noernberg*, there was no testimony from the state's witnesses showing that H.C. exhibited any signs of substantial impairment, or that Foster was aware that she had consumed a large quantity of alcohol prior to their encounter. As in *Noernberg* and *Hatten*, the state's witnesses offered no testimony regarding any particular aspects of H.C.'s behavior, such as stumbling, falling, slurred speech, passing out, or vomiting, that should have alerted Foster to her substantial impairment.

{¶ 55} This case contrasts with cases where the defendant supplied alcohol that led to a victim's impairment, had knowledge of the alcohol consumed by the victim that led to her impairment, or set into motion a situation where the victim ended up with the defendant, all the while knowing the victim was

impaired. *See, e.g., State v. Gardner*, 8th Dist. Cuyahoga No. 107573, 2019-Ohio-1780 (defendant asked the victim, a co-worker in a restaurant, to join him for drinks, and the rape incident occurred afterwards); *Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-2663 (the defendant set into motion a scenario where a 15-year-old victim ended up in the defendant's van where he supplied potent drugs to her); *King*, 8th Dist. Cuyahoga Nos. 79830 and 79755, 2002-Ohio-2313 (the minor victim was served a substantial amount of alcohol by the defendant).

{¶ 56} In this case, there was no testimony that Foster was aware of H.C.'s consumption of a large quantity of alcohol, and none of the state's witnesses who interacted with her prior to the sexual incident testified that she showed specific signs or indications of substantial impairment such that Foster knew or should have known that her ability to consent to sexual conduct was substantially impaired. While the state points out that Foster should have known H.C. was substantially impaired because (1) he saw her upset in a taxi by herself after 2:00 a.m. when the bar closed; (2) she voluntarily went to a stranger's hotel room; and (3) Foster testified that H.C. had trouble unzipping her boot, we note that being upset when leaving a bar at its closing time and voluntarily joining others at a hotel is not an indication of substantial impairment.

{¶ 57} As for H.C.'s trouble unzipping her boot as testified to by Foster, Foster testified that he too had trouble unzipping the boot because the zipper was jammed. While whether an offender knew or had reasonable cause to believe a victim was impaired may be reasonably inferred from a combination of her

demeanor and other's interactions with the victim, *Novak*, without any other testimony from those who had interacted with H.C. to show that Foster knew or should have known she was substantially impaired and could not consent because of her substantial impairment, we are unable to conclude the state established all the statutorily required elements of rape in this case.

{¶ 58} While we recognize the sensitivity of the matter, we are compelled to follow the case law precedents regarding the required element of knowledge of substantial impairment in the rape statute and to apply the proper standard of review regarding a claim of insufficient evidence. Considered in a light most favorable to the state, the evidence presented by the state in this case was not legally sufficient for a trier of fact to conclude beyond a reasonable doubt that Foster was aware or had cause to believe that H.C. was substantially impaired.

{¶ 59} The state alternatively claims on appeal that H.C.'s testimony showed she was asleep when Foster engaged in sexual conduct with her and therefore, he knew or should have known her ability to consent was substantially impaired because she was asleep. The state is correct that sleep constitutes a condition that substantially impairs a person from consenting to sexual conduct. *State v. McCall*, 8th Dist. Cuyahoga No. 104479, 2017-Ohio-296, ¶ 6. It must be noted, however, that the state's theory of the case did not hinge on H.C. being asleep. [5] Moreover, the state did not request a jury instruction that sleeping

[5] Our review of the transcript reflects that at the closing argument, the state pointed to the following as evidence that H.C. was substantially impaired: she consumed a large quantity of alcohol; she lost her credit card at some point in the evening; she had

constitutes substantial impairment. *Compare State v. Palmer-Tesema*, 8th Dist. Cuyahoga No. 107972, 2020-Ohio-907 (the state requested both a voluntary intoxication and sleep instruction for the purposes of proving substantial impairment).

{¶ 60} Considering the merits of the state's argument, the testimony at trial does not support the state's argument on appeal. Our review of the transcript reflects that H.C. never testified that she had fallen asleep before the sexual conduct occurred. Her exact testimony was: "my next memory [after getting into the yellow taxi] is * * * it's the middle of the night, it's dark, and this older man is on top of me and having sex with me." (Tr. 1080.) She never testified that she had gone to bed, fell asleep, or passed out, and woke up from her sleep to find defendant having sex with her. And there was no testimony from Reschke that H.C. had gone to bed or fallen asleep prior to him going into the bedroom area of the hotel room. Notably, H.C. described herself as being in a "blackout," rather than sleeping, when the sexual conduct occurred. (*See, e.g.*, tr. 1111-1112.) Consequently, this case is distinguishable from cases like *Keller, supra*, where

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no recollection of the events after 11:30 p.m.; and her blood alcohol content level was at 0.025 at 5 p.m. the next day. Regarding evidence showing Foster knew or had reasonable cause to believe H.C. was substantially impaired, the state pointed to evidence such as H.C.'s being alone outside a bar at 2:30 a.m., initially appearing to be upset but then joking with strangers in the taxi; being uncertain how she was going to get home; and seemingly unsteady walking from the taxi to the hotel lobby. At its final closing argument, the state, for the first time, alleged that H.C. "passed out" on the couch, although H.C. described herself as in a blackout. (Tr. 1732.)

there was testimony showing the victim had gone to bed and the victim being asleep was deemed substantial impairment.

{¶ 61} Accordingly, the state's argument on appeal that H.C. was substantially impaired due to sleep, or that Foster should have known that H.C. was substantially impaired due to sleep is without merit

2. Lesser Included — Sexual Battery

{¶ 62} During trial, the state requested, and the jury was instructed on sexual battery as the lesser-included offense to rape. Having found the evidence insufficient to support Forster's rape convictions, we now turn to whether the evidence is sufficient to support the lesser-included offenses of sexual battery.

{¶ 63} The jury was instructed on two subsections of sexual battery:

> Now, sexual battery is as follows: The defendant, Kurt Foster, is charged in count 1 and Count 2 with a lesser[-]included charge of sexual battery. Before you can find the defendant guilty of sexual battery, a lesser[-]included charge, as charged in Count 1 and Count 2, you must find beyond a reasonable doubt that on or about the 30th day of December, 2017, in Cuyahoga County, Ohio, the defendant did engage in sexual conduct with another, in this case [H.C.], and the defendant knew that the person's ability to appraise the nature of or control her own conduct was substantially impaired, or significantly weakened, or the defendant knew that the other person submitted because she was unaware that the act was being committed.

(Tr. 1695-1696.)

{¶ 64} This instruction mimics the language in R.C. 2907.03(A)(2) and (3), which provides:

> (A) No person shall engage in sexual conduct with another, * * * when any of the following apply:
>
> * * *
>
> (2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.
>
> (3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

For each of these subsections, the state would have been required to prove that Foster had knowledge that H.C. was either substantially impaired or unaware.

{¶ 65} As previously discussed, the state presented insufficient evidence to prove that Foster knew that H.C. was substantially impaired. Accordingly, insufficient evidence was presented to prove that Foster committed the lesser-included act of sexual battery pursuant to R.C. 2907.03(A)(2).

{¶ 66} Additionally, we find that insufficient evidence was presented to prove that Foster knew that H.C. was unaware that the act was being committed. In cases involving victim unawareness, typically the victim is either asleep or unconscious. *See, e.g., State v. Antoline*, 9th Dist. Lorain No. 02CA008100, 2003-Ohio-1130, ¶ 55. In this case, no testimony was presented that H.C. fell asleep or passed out prior to the sexual conduct. H.C. testified that the last memory she had was vaguely remembering being outside Dive Bar and being in a yellow cab. She later testified that her next memory was in the middle of the night of someone having sex with her. Although this memory is sufficient to prove that sexual conduct occurred, it is insufficient prove that Foster had knowledge of H.C.'s unawareness of the sexual conduct. And as previously discussed, our review of the record reveals that the state did not attempt to prove substantial impairment by virtue of H.C. being asleep or unconscious. Therefore, insufficient evidence was also presented to prove that Foster committed the lesser-included act of sexual battery pursuant to R.C. 2907.03(A)(3).

{¶ 67} Accordingly, Foster's eighth assignment of error is sustained. Our resolution of the claim of insufficient evidence disposes of the appeal. The remaining assignments of error are rendered moot. App.R. 12(A)(1)(c).

{¶ 68} Judgment is reversed, and the case is remanded to the trial court to order Foster discharged.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;
MICHELLE J. SHEEHAN, J., DISSENTS

MICHELLE J. SHEEHAN, J., DISSENTING:

{¶ 69} I respectfully dissent. Based on the evidence presented by the state, a trier of fact could have reasonably concluded, based on the totality of the circumstances, that Foster knew or should have known H.C. was substantially impaired and could not consent to sex. *Thompkins*, 78 Ohio St.3d 380 at 383, 678 N.E.2d 541 (evidence was sufficient when the trier of fact could have reasonably concluded that an element was met based on the totality of the circumstances).

While I would hold sufficient evidence existed to support the jury verdict, I would remand this matter for a new trial based upon the improper jury instruction and the trial court's prohibition of defense counsel's cross-examination of H.C.

Sufficiency of Evidence

{¶ 70} When viewed in a light most favorable to the prosecution, the evidence presented is sufficient to establish both essential elements of rape defined in R.C. 2907.02(A)(1)(c) — that H.C. was substantially impaired and Foster knew or should have known her ability to consent was substantially impaired.

{¶ 71} H.C. testified she consumed between 10 to 20 drinks in a short period of time while consuming minimum food. Testimony was provided by H.C. herself that she consumed so much alcohol she "blacked out" and was unable to remember what occurred after midnight that evening. H.C. repeatedly testified she could not have consented because she was highly intoxicated that night. The state's expert further estimated her blood alcohol level to be 0.235 at 3:15 a.m. "It is sufficient for the state to establish substantial impairment by establishing a reduction or decrease in the victim's ability to act or think." *Freeman*, 8th Dist. Cuyahoga No. 95511, 2011-Ohio-2663, at ¶15, citing *Zeh*, 31 Ohio St.3d at 103-104, 509 N.E.2d 414. This court has held that "[v]oluntary intoxication or impairment is included in the terms 'mental or physical condition' as used in R.C. 2907.02(A)(1)(c)." *Id*. Not "every case requires proof of an unconscious, vomiting, staggering, or slurring victim. Those are just factors to consider in determining whether the victim is substantially impaired by a physical condition." *Freeman* at ¶ 19. Rather,

voluntary intoxication to the extent of an alcohol-induced blackout should constitute sufficient evidence that H.C. was not only intoxicated but also that she was substantially impaired. *See id*. at ¶ 17 (substantial impairment falls somewhere in a continuum between impairment and unconsciousness and it is easier to establish substantial impairment when a young, inexperienced person is involved; in this case a fifteen-year-old ingesting three "puffs" of marijuana was sufficient evidence of substantial impairment); *In re King*, 8th Dist. Cuyahoga Nos. 79830 and 79755, 2002-Ohio-2313 (victim substantially impaired after six to eight triple shots of hard liquor and a blood alcohol concentration of .25 when admitted to the hospital).

{¶ 72} The closer question in this case is whether Foster knew or should have known H.C.'s ability to consent was substantially impaired. This court has held that evidence establishing that the offender knew or should have known of the victim's substantial impairment is "based on the totality of the circumstances surrounding the interaction between the offender and the victim." *Freeman* at ¶ 19. To establish a defendant's knowledge, or lack therefore, we are to analyze "all the facts and circumstances in existence at the time of the event." *Id*. at ¶ 21; *see also Thompkins,* 78 Ohio St.3d at 383, 678 N.E.2d 541 (evidence was sufficient when the trier of fact could have reasonably concluded that an element was met based on the totality of the circumstances).

{¶ 73} Reviewing all the facts and circumstances in existence at the time of the incident, I would find the state's evidence sufficient for a rational trier of fact to

conclude that Foster knew or should have known H.C.'s ability to consent was substantially impaired. Foster, age 45, first saw H.C., significantly younger, in a taxicab outside a bar around 2:00 a.m. as the bar was closing. She was crying and upset, but her mood dramatically changed during the short cab ride. During the cab ride with two men she just met, she repeatedly asked for champagne. Foster himself testified that he knew she had been drinking; she just didn't appear to be "highly intoxicated" to him. (Tr. 1405.)

{¶ 74} Det. Moctezuma testified regarding the two videos depicting H.C. and the men walking from the taxi to the hotel door and then walking inside the hotel lobby. Based upon over 20 years of experience dealing with intoxicated individuals, Det. Moctezuma testified the video of H.C. walking through the hotel lobby reflects an intoxicated individual based upon how she was walking and her head down the entire time. (Tr. 1482-1483.) H.C., when viewing the videos at trial, testified the videos reflect that she looked like "an absolute mess, a drunken mess." (Tr. 1138.) She also confirmed that while she appeared to walk from the taxi into the hotel without assistance, Foster appeared to have "veered" her back into the right direction when walking through the lobby. (Tr. 1138.)

{¶ 75} In addition, when Foster asked to meet with Det. Moctezuma the second time so he could tell the truth about what occurred that evening, Foster admitted that he knew "she definitely had been drinking." (Video interview, exhibit No. 27). In the same interview, he also conceded that he thought it was

peculiar that a young lady would go to his hotel and sleep on his hotel room couch. The interview was videotaped and repeatedly played for the jury.

{¶ 76} After construing all reasonable inferences in favor of the state, any reasonable trier of fact could find that the state presented evidence to prove that Foster knew or should have known H.C.'s ability to consent to sexual conduct was substantially impaired. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983) (the test for sufficiency requires "viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution").

{¶ 77} I recognize that the courts have not interpreted R.C. 2907.02(A)(1)(c) to criminalize sexual conduct as the result of alcohol-induced lowered inhibitions. *Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, at ¶ 15, citing *Martin*, 12th Dist. Brown No. CA99-09-026, 2000 Ohio App. LEXIS 3649 (Aug. 14, 2000). I also acknowledge that not all who engage in sexual conduct with a voluntarily intoxicated person are culpable of rape defined in that statute. *In re King*, 8th Dist. Cuyahoga Nos. 79830 and 79755, 2002-Ohio-2313, at ¶ 20. The courts, however, have also acknowledged that when we assess the evidence for R.C. 2907.02(A)(1)(c) rape, "there can be a fine, fuzzy, and subjective line between intoxication and impairment," *Doss* at ¶ 18, and "the waters become even murkier when reviewing whether a defendant knew, or should have known, that someone was impaired rather than merely intoxicated." *Id.* In an admittedly "murky" case such as this case, I believe the jury, not the court, is in the best position to evaluate

the evidence presented by the state and it should be permitted to determine the defendant's guilt or innocence based on its evaluation. As the Supreme Court and this court acknowledged, the standard of review for sufficiency of the evidence "is a highly deferential standard of review because 'it is the responsibility of the [trier of fact] — not the court — to decide what conclusions should be drawn from evidence admitted at trial.'" *State v. Davis*, 8th Dist. Cuyahoga No. 102726, 2016-Ohio-694, ¶ 3, citing *Cavazos v. Smith*, 565 U.S. 1, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011).

{¶ 78} For these reasons, I respectfully dissent from the majority's determination that insufficient evidence existed to support Foster's guilt.

{¶ 79} Although I find the state's evidence sufficient to support Foster's conviction of rape, I would reverse this matter for a new trial based upon Foster's second and fifth assignments of error, which cumulatively deprived Foster of a fair trial. The second assignment of error concerns the jury instruction given by the trial court on substantial impairment. The fifth assignment of error concerns the attempted impeachment of H.C. by defense counsel.

Jury Instruction on Substantial Impairment

{¶ 80} Regarding the trial court's jury instruction on the definition of "substantial impairment," the record reflects that, in the first trial, the trial court instructed the jury as follows: "[s]ubstantially impaired means a present reduction, diminution or decrease in the victim's ability either to appraise the nature of her conduct or to control her conduct." This instruction was based on Ohio Jury Instruction (2 507 OJI CR 507.05 (2018)), which, in turn, is based on the

definition of substantial impairment set forth in *Zeh*, 31 Ohio St.3d 99, 509 N.E.2d 414.

{¶ 81} At the instant trial, however, the trial court on its own decided to add extraneous language instructing the jury that it may consider whether the person is able to perform normal motor functions including standing, walking, and driving.[6] (Tr. 1510.) Defense counsel objected to the reference to the ability to drive in the instruction (tr. 1685), but the trial court overruled the objection and instructed the jury as follows:

> Substantially impaired means a present reduction, diminution, or decrease in the victim's ability either to appraise the nature of her conduct or to control her conduct.
>
> Now, in determining whether a person is substantially impaired you may consider whether the person is able to perform normal motor functions including standing, walking, and their ability to drive. You may consider whether they were capable of engaging in normal speech activities, and/or whether their problem[-]solving skills were diminished.

{¶ 82} "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give

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[6] Page 1,463 of the transcript reflects the trial court commented to the parties that "I find the definition of substantially impaired to be less than adequate in OJI." Page 1,510 of the transcript further reflects the following statement by the trial court:

> Counsel, I find the OJI instruction on substantial impairment lacking in guidance for a jury. And as a result I've prepared the additional instruction that states: In determining whether a person is substantially impaired you may consider whether a person is able to perform normal motor functions including standing, walking, and their ability to drive. You may consider whether they were capable of engaging in normal speech activities and whether their problem[-] solving skills were diminished.

a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims*, 8th Dist. Cuyahoga No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

{¶ 83} There is no case law authority to allow the jury to consider the victim's inability to drive as an indication of substantial impairment for purposes of R.C. 2907.02(A)(1)(c). Furthermore, the instruction under the circumstances of this case is highly prejudicial to Foster. Specifically, the state's expert estimated H.C.'s blood alcohol content to be between 0.235 and 0.205 at different times of the evening. Although the legal driving limit would be immaterial in this case because H.C. did not drive a vehicle that evening, the state elicited direct testimony from its expert that the legal driving limit was a blood alcohol content of .08. The instruction given by the trial court therefore allowed the jury to improperly conflate excessive blood alcohol level for driving purposes and indication of substantial impairment for the rape statute. The trial court abused its discretion in instructing the jury to consider H.C.'s ability to drive when determining whether H.C.'s ability to consent was substantially impaired.

Impeachment

{¶ 84} Regarding defense counsel's attempted impeachment of H.C., the record reflects that, in the first trial, H.C. testified that she did not remember the incident and she acknowledged that because she did not have any memory of the incident, it was possible that she consented to the sexual conduct or initiated the

sexual conduct, stating that "[a]nything is possible." The transcript of the first trial reflects her testimony on cross-examination as follows:

> Q. You were just asked if you engaged in any consensual sexual activity. Correct?
>
> A. Yes.
>
> Q. Your answer was not that I remember, correct?
>
> A. Yes.
>
> Q So it's possible but may just not remember?
>
> A. I wasn't in a position to grant consent. And I don't remember anything.
>
> Q. Your answer was not that I remember. So there's a possibility that you don't remember consenting.
>
> A. Sure.

(Tr. 296-297.)

> Q. Ms. [C.], you are unable to detail for us how the intercourse was initiated, right?
>
> A. Yes.
>
> Q. It could have been initiated by you, right?
>
> A. I don't remember.
>
> Q. Well, if you say you don't remember, then there's a possibility that it could have been initiated by you. Correct?
>
> A. It could have been but I — I don't think it was. And I don't remember.

(Tr. 323.)

Q. Okay. * * * [D]o you remember telling Kurt that you wanted to have some fun?

A. No.

Q. It's possible you said that?

A. Anything it's possible. I mean I don't know — I don't remember saying that.

(Tr. 326.)

{¶ 85} While H.C. acknowledged at the first trial that she could not rule out the possibility that she initiated the sexual conduct due to her lack of memory of the incident, her testimony was different at the instant trial. She was steadfast that she did not consent and did not initiate any sexual conduct. On direct examination, she testified as follows:

Q. Did you consent to [the] sexual activity with this older individual?

A. No.

Q. Did you proposition this person or come on to him in any way or initiate any sexual activity?

A. No.

(Tr. 1080.)

Q. Do you believe that you were in any condition to consent to any sexual activity that night?

A. No.

* * *

Q. Did you consent to any sexual activity that night?

A. No.

Q. Did you proposition anyone that evening?

A. No.

Q. Did you proposition this person over here, at the defense table?

A. No.

(Tr. 1103-1104.)

{¶ 86} Because her testimony showed a lack of wavering that was reflected in her prior testimony, the defense counsel attempted to impeach her with her prior trial testimony. The following exchanged occurred at H.C.'s cross-examination:

Q. You were [just] asked if you consented, right?

A. Yes.

Q. You definitely said no. Correct?

A. Correct.

Q. Just now. Right?
(Witness nodding head.)

* * *

Q. You were asked if you propositioned Kurt?

A. Yes.

Q. You definitely said no, correct?

A. Yes.

Q. You were asked if you pulled your pants down, right?

A. Right.

Q. You definitely said no?

A. Yes.

Q. You were asked if you initiated sexual contact, you definitely said no. Correct?

A. Yes.

Q. Like I said, you and I have met before, right?

A. Unfortunately, yes.

Q. We've had conversations before?

A. Yes.

Q. Okay. And in previous conversations on each one of those issues did you consent, did you proposition, did you initiate, and did you pull your pants down yourself, your answer was: It's possible. Correct?

[PROSECUTOR]: Objection.

[THE COURT]: Counsel, can you approach?

[THE WITNESS]: That's a lie. Sorry.

(Tr. 1112-1114.)

{¶ 87} After a sidebar off the record, defense counsel's attempt to impeach H.C. continued. H.C. was asked if she had testified in a previous court proceeding. (Tr. 1115.) At this point, the court ordered a recess so that defense counsel could provide the court with a transcript of H.C.'s prior testimony. The court expressed

its dismay that counsel had not provided the transcript to the court prior to the impeachment, and it reprimanded counsel. (Tr. 1117-1120.)

{¶ 88} Defense counsel then provided the court with the transcript but, when counsel resumed his attempt to impeach H.C., the court called for a side bar on the record regarding the impeachment. The trial court would not allow the impeachment, reasoning that consent was not an issue in this case. The defense counsel made the following argument as to why the impeachment should be allowed under Evid.R. 613(B), which permits extrinsic evidence of a prior statement if the subject matter of the statement is relevant:

> [DEFENSE COUNSEL]: * * * [The prior testimony] goes to whether or not he had reasonable cause to believe that she was impaired. So it is absolutely material to that issue.
>
> * * *
>
> Because if she is initiating sexual contact with him, if she is pulling her pants down and inviting him to engage in sexual contact, and she's doing it in a focused manner, in a way that there's no uncertain terms, which is what his testimony is, and that goes to his credibility [in testifying] that she did not exhibit any signs of impairment that gave him reasonable cause to believe that she was substantially impaired.

(Tr. 1124-1125.)

{¶ 89} Evid.R. 613(B) allows introduction of extrinsic evidence of a prior statement after proper foundation is laid through examination of the witness in which (1) the witness is presented with the former statement, (2) the witness is asked whether he or she made the statement, (3) the witness is given an opportunity to admit, deny, or explain the statement, and (4) the opposing party is

given an opportunity to interrogate the witness on the inconsistent statement. *State v. Ferguson*, 10th Dist. Franklin No. 12AP-1003, 2013-Ohio-4798, ¶ 15. After a foundation is laid, the prior statement is admissible if the subject matter of the statement is "a fact that is of consequence to the determination of the action other than the credibility of a witness." Evid.R. 613(B)(2)(a).[7]

{¶ 90} The trial court's admission or exclusion of evidence under Evid.R. 613(B) is reviewed for an abuse of discretion. *State v. Kemp*, 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167. The trial court here abused its discretion in not allowing the defense counsel to impeach H.C. pursuant to Evid.R. 613(B). The trial court was correct that the central issue in this case was not consent, but rather whether Foster knew or should have known H.C.'s ability to consent was substantially impaired. However, an impeachment of H.C. pursuant to Evid.R. 613(B) should have been permitted because H.C.'s prior statement that it was possible she may have consented or initiated the sexual conduct is relevant ("of

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[7] Evid.R. 613(B) states, in relevant part:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> > (a) A fact that is of consequence to the determination of the action other than the credibility of a witness[.]

consequence to the determination of the action") to that central issue. Her previous testimony acknowledging the possibility of her initiating sexual conduct with Foster was being used by the defense to show that Foster did not have reasonable cause to believe that her ability to consent was substantially impaired. The trial court here abused its discretion in not permitting the defense counsel to impeach H.C. with her prior trial testimony.

{¶ 91} The "cumulative error" doctrine states that "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the numerous instances of the trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Although Foster claims several other reversable errors, I find the cumulative effect of the errors regarding the jury instruction and the defense counsel's inability to impeach H.C. sufficiently prejudicial and deprived Foster a fair trial. Therefore, although I find the state presented sufficient evidence to support Foster's rape offense, I would reverse his conviction and remand the matter for a new trial.