

BOISE, THURSDAY, JANUARY 11, 2024, AT 1:30 P.M.

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 49517

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
v.)
)
MICHAEL LESLIE OLSEN,)
)
Defendant-Appellant.)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. James S. Cawthon, District Judge.

Erik R. Lehtinen, Interim State Appellate Public Defender; Brian R. Dickson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Raúl R. Labrador, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

Michael Leslie Olsen appeals his conviction for forcible penetration with a foreign object, Idaho Code § 18-6604, and asserts the district court erred by denying his motion for acquittal under Idaho Criminal Rule 29. The charge arose after Olsen and the victim engaged in an evening of heavy drinking. The victim was heavily intoxicated and lost consciousness due to that intoxication at various times. During one of those times, the victim awoke and realized Olsen was forcibly penetrating her. Olsen was charged with forcible penetration under two different theories: a use-of-force theory and an intoxication of the victim theory. After the State rested, Olsen moved for a judgment of acquittal pursuant to I.C.R. 29, asserting the State had failed to present sufficient evidence under either theory. The district court denied the motion, and Olsen appealed from his judgment of conviction.

On appeal, Olsen argues the district court erred in denying his I.C.R. 29 motion because the State failed to prove either theory beyond a reasonable doubt. Specifically, Olsen asserts that because the victim was unconscious at the time of the act, the State could not show the victim's will was overborne or that intoxication prevented her resistance. Olsen asserts the State could have, but did not, charge him under a different statutory subsection that applies when the victim is unconscious at the time of the act. However, he argues that theory is mutually exclusive of all other statutory subsections and cannot be used to bolster any other theory of guilt, including intoxication. Finally, Olsen argues the district court improperly instructed the jury on the use-of-force theory because there was insufficient evidence of force. The State argues the district court

did not err because there was sufficient evidence from which a rational factfinder could convict Olsen under either theory because the victim was conscious and heavily intoxicated during the penetration.