For Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IRVIN O. FLORES, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	)	**S. Ct. Crim. No. 2017-0070** Re: Super. Ct. Crim. No. 168/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise M. Francois

Argued: May 8, 2018
Filed: March 28, 2019

Cite as: 2019 VI 12

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

¶ 1 Irvin Ocasio Flores ("Flores") appeals from the Superior Court's August 10, 2017 judgment and commitment for his convictions of first degree rape as an act of domestic violence,

in violation of 14 V.I.C. § 1701(a)(4) and 16 V.I.C. § 91(b)(6), and unlawful sexual conduct in the first degree as an act of domestic violence, in violation of 14 V.I.C § 1708(a)(6) and 16 V.I.C. § 91(b)(6).[1] Flores alleges that the trial court erred when it failed to grant his Rule 29 motion for judgment of acquittal. For the reasons discussed below, we vacate Flores' convictions and reverse the Superior Court's July 18, 2017 order denying Flores' renewed motion for judgment of acquittal.

I. BACKGROUND

¶ 2 On May 5, 2014, the People filed a two-count information against Flores, charging him with first-degree rape as an act of domestic violence in violation of 14 V.I.C. § 1701(a)(2) and 16 V.I.C. §91(b)(6), and first-degree unlawful sexual contact as an act of domestic violence in violation of 14 V.I.C. § 1708(6) and 16 V.I.C. § 91(b)(5). On June 13, 2017, the first day of trial, the People filed a motion to amend the information against Flores to change the charging statute, charging him instead with first-degree rape as an act of domestic violence, in violation of 14 V.I.C. § 1701(a)(4) and 16 V.I.C. § 91(b)(6), and first degree unlawful sexual contact as an act of domestic violence, in violation of 14 V.I.C. § 1708(a)(6) and 16 V.I.C. § 91(b)(6).[2] (J.A. 20-24). The court granted the motion to amend the information. The Superior Court conducted a jury trial

[1] Domestic violence encompasses rape when the victim and the perpetrator are related by marriage. *See* 16 V.I.C. § 91(b)(6); 16 V.I.C. § 91(c). J.A. testified that she had married Melvin Ocasio Flores, the brother of Irvin Ocasio Flores. In his testimony, Irvin Flores also acknowledged the relationship between parties. Therefore, J.A. would be properly considered a victim of domestic violence if the People proved she was raped.

[2] We note that both the June 30, 2017 amended information and the May 5, 2014 original information, as well as the August 9, 2017 judgment and commitment all cite to §§ 1701(2) and 1701(4), as opposed to §§ 1701(a)(2) and 1701(a)(4), and to § 1708(6) instead of §1708(a)(6). In 2013, 14 V.I.C. § 1701 and 14 V.I.C § 1708 were amended to include the existing numbered paragraphs within the statutes' new subsection "(a)." Act 7517, § 1(c)(3). Therefore, throughout this opinion, we refer to the statutes pursuant to their proper lettering and numbering scheme.

on the amended information from June 13-16, 2017, and on June 16, 2017, the jury found Flores guilty on all counts. (J.A. 135-798, 821-825.) The following events, as disclosed from the trial evidence, gave rise to Flores' convictions.

¶ 3 On March 7, 2013, Flores and his brother Melvin Ocasio Flores (hereinafter "Melvin") were fixing Melvin's jeep at the garage where Melvin worked. (J.A. 215). After they finished around 8:30-9:00pm, they drove to the house Melvin shared with his wife, J.A., his newborn baby, and another couple. (J.A. 216.) There, Flores and Melvin proceeded to drink beer outside by the parked jeep. (J.A. 216, 379-80.)

¶ 4 Around 10:00 p.m., J.A. returned home with her and Melvin's three-month-old baby, who she had been showing to some friends. (J.A. 216, 379.) J.A. went upstairs, and Flores and Melvin continued to drink beer outside. (J.A. 216.) Eventually, Melvin joined his wife upstairs, but he told Flores that if he wanted to continue hanging out, he could take the keys to the jeep and some money, which Flores accepted. (J.A. 216-217.) According to Flores, he proceeded to take the jeep and the money to a bar called "Double Play." (J.A. 530.)

¶ 5 J.A. was asleep when Melvin came inside. (J.A. 383.) The couple rented a room where they slept with their baby, who had a crib beside their bed. (J.A. 383.) Melvin went to sleep, laying on the outside end of the bed adjacent to the crib, while his wife slept at the end against the wall. (J.A. 383.) Around 2:00am, J.A. and Melvin awoke to feed the baby. (J.A. 217-18, 384.) Around 2:30am, the couple went back to sleep in the same positions. (J.A. 218-19, 385-86.) Melvin arose, however, when he realized that Flores had taken all of his keys, including the keys to the house and bedroom. (J.A. 218.) Melvin went to the kitchen, made a sandwich, and sat on the sofa to wait for Flores to return. (J.A. 218-19.) Melvin fell asleep on the sofa, sandwich in hand. (J.A. 218-19.)

¶ 6 When J.A. fell back to sleep after feeding the baby, her husband was in bed next to her. (J.A. 384.) She stirred when she felt a hand touch her back. (J.A. 384.) Believing that it was Melvin, J.A. told him, "leave me alone because my [birth control] injection is wearing off." (J.A. 386.) The hand stopped for a bit but began to touch her again. (J.A. 386-87.) This time, J.A. stated "do what you have to do because I have to rest." (J.A. 387.) By "do what you have to do," J.A. meant "to have relations." (J.A. 387.) J.A. rolled onto her back and the person got on top of her and proceeded to penetrate her. (J.A. 388.) As J.A. touched the man's genitals, chest, and head and noticed his scent, she realized that this person was not her husband. (J.A. 388-89.) With this realization, J.A. stated "you are not Melvin." (J.A. 389.) Hearing this, the man proceeded to hold J.A. tighter, go faster, and ejaculate inside her. (J.A. 389-90.) Only then was J.A. able to go turn on the light and discover that the man was Flores, who proceeded to run out of the room. (J.A. 390.)

¶ 7 J.A. wrapped a towel around herself and left the bedroom. (J.A. 390.) She observed her husband asleep on the sofa holding his sandwich, and Flores on the sofa pretending to be asleep. (J.A. 223, 390.) Melvin awoke to his wife screaming, "look at what your brother did," and "look, look at what he is doing." (J.A. 221, 391.) J.A. wiped her vagina and said, "look at what he did to me," and "look at what your brother did." (J.A. 221.) Flores got up from the couch and said, "I did it, and so, what are you going to do?" (J.A. 394.) Melvin noticed that Flores' zipper was down. (J.A. 222.) Furious, Melvin went to the kitchen to get a knife, but J.A. stopped him, reminding him of their baby. (J.A. 227.) While J.A. was calming Melvin, Flores left the premises. (J.A. 227.)

¶ 8 J.A. and Melvin went to the police station, and later the hospital. (J.A. 227, 394.) At the police station, police took DNA samples from J.A.'s vagina and other areas. (J.A. 394-95.) Virgin Islands Police Sergeant Sofia Rashid testified that when she observed J.A. at the hospital, "she was crying; she was shaking; she was upset," and "she was just frantic; and she kept crying about what

happened." (J.A. 350.) At trial, FBI Special Agent Shane Hoffman testified that the DNA analysis revealed that the semen taken from J.A.'s vagina belonged to Flores. (J.A. 443.)

¶ 9 After receiving his convictions, Flores made an oral renewed motion for judgment of acquittal, which the Superior Court denied in a written order entered July 18, 2017. (J.A. 825.) On August 1, 2017, the Superior Court sentenced Flores to ten years' incarceration for count one and ten years' incarceration for count two. (J.A. 18-19). Because count two arose from the same act as count one, the Superior Court stayed the sentence for count two and merged it with count one, imposing a total of ten years' incarceration.[3] The Superior Court memorialized the sentences in a written judgment and commitment entered on August 10, 2017. On August 14, 2017, Flores filed a timely notice of appeal with this Court. (J.A. 15-16); V.I. R. APP. P. 5(a)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 10 This Court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because the Superior Court's August 10, 2017 judgment and commitment was a final order, this Court has jurisdiction over this appeal. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013).

¶ 11 This Court exercises *de novo* review of the Superior Court's application of law, and reviews factual findings for clear error. *St. Thomas—St. John Bd. of Elections v. Daniel*, 49 V.I. 322, 329

[3] In light of *Titre v. People*, __ V.I. __, 2019 WL 338989, at *6 (V.I. Jan. 24, 2019), the proper procedure where 14 V.I.C. § 104 is implicated would be to vacate the conviction of the lesser included offense. If this Court were to affirm Flores' convictions, we would remand with instruction to do so. *Id*.

(V.I. 2007). We review Superior Court denials of post-verdict motions for judgment of acquittal *de novo*. *People v. Thompson*, 57 V.I. 342, 349 (V.I. 2012). We also exercise *de novo* review over sufficiency of the evidence challenges. *Francis v. People*, 63 V.I. 724, 733 (V.I. 2015). When reviewing sufficiency of the evidence challenges, this Court must determine whether the People proved each element of every crime charged beyond a reasonable doubt. *Milligan v. People*, __ V.I. __, 2018 WL 4350120, at *3 (V.I. Sept. 11, 2018). The sufficiency of the evidence standard requires that this Court consider the evidence "in the light most favorable to the government." *Gilbert v. People*, 52 V.I. 350, 354 (V.I. 2009); *Milligan*, 2018 WL 4350120, at *3. Finally, "[t]his Court 'exercise[s] plenary review of questions of statutory construction.'" *Smith v. Henley*, 67 V.I. 965, 970 (V.I. 2017) (quoting *V.I. Public Servs. Comm'n v. V.I. WAPA*, 49 V.I. 478, 483 (V.I. 2008)).

B. Sufficiency of the Evidence

¶ 12 Flores alleges that the People failed to present sufficient evidence to prove the necessary elements of 14 V.I.C. § 1701(a)(4) rape in the first degree and 14 V.I.C. §1708(a)(6) unlawful sexual conduct in the first degree. This Court's "review of sufficiency of the evidence challenges is narrow; we must affirm a conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Milligan*, 2018 WL 4350120, at *3 (quoting *George v. People*, 59 V.I. 368, 384 (V.I. 2013)); see also *Charles v. People*, 60 V.I. 823, 831 (V.I. 2014) ("An appellant who challenges the sufficiency of the evidence bears a very heavy burden.") (citation and internal quotation marks omitted). This Court may only set aside a jury's findings "if no rational trier of fact would have agreed with the jury based on the trial record." *People v. Clarke*, 55 V.I. 473, 477 (V.I. 2011). Therefore, "we review [Flores'] sufficiency of the evidence challenge with great deference to the jury." *Milligan*, 2018 WL 4350120, at *3.

i. 14 V.I.C. § 1701(a)(4): Rape in the First Degree

¶ 13 Flores contends that the People failed to elicit facts at trial establishing that J.A.'s resistance was prevented by her being in a state of "stupor," as required by 14 V.I.C. § 1701(a)(4). Section 1701(a)(4) states the following:

> (a) Whoever perpetrates an act of sexual intercourse or sodomy with a person . . . (4) when the person's resistance is prevented by stupor or weakness of mind produced by an intoxicating, narcotic or anesthetic agent, or when the person is known by the defendant to be in such a state of stupor or weakness of mind from any cause . . . is guilty of rape in the first degree[.]

14 V.I.C. § 1701(a)(4).

¶ 14 At issue is the meaning of the word "stupor." When interpreting a statute, we look first to the plain meaning of its language and attempt to construe it in a way that would not "result in injustice or absurd consequences." *Brady v. Gov't of the V.I.*, 57 V.I. 433, 442–43 (V.I. 2012) (quoting *Farrell v. People*, 54 V.I. 600, 610 (V.I. 2011)). "If the language is ambiguous, we will proceed to examine the legislative history of the statute and its purpose to ascertain [what] interpretation [best accords with] the [L]egislature's intent." *Sonson v. People*, 59 V.I. 590, 598 (V.I. 2013) (citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n.3 (2010)). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, no further inquiry is needed." *In re L.O.F.*, 62 V.I. 655, 661 (V.I. 2015) (quoting *In re Reynolds*, 60 V.I. at 334) (internal quotation marks omitted); *Smith*, 67 V.I. at 972.

¶ 15 Title 1, section 42 of the Virgin Islands Code states that "[w]ords and phrases shall be read with[in] their context and shall be construed according to the common and approved usage of the English language." Although section 1701(a)(4) does not define the word "stupor," the word's plain meaning is "a physical or mental condition characterized by great diminution or suspension of sense or feeling," and specifically, "a chiefly mental condition marked by absence of

spontaneous movement, greatly diminished responsiveness to stimulation, and usually impaired consciousness." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2270 (1993); *see also In re Richardson's Will*, 202 N.W. 114, 117 (Iowa 1925) ("Stupor is defined as great diminution or suspension of sensibility, and may mean either physical or mental insensibility."). Notably, this is precisely the definition the trial court relied on in rejecting Flores's motion for judgment of acquittal for first-degree rape. Reading § 1701(a)(4) in its entirety, the victim's dulled sensibility must be so great as to prevent the victim from being able to resist sexual intercourse.

¶ 16 Courts interpreting similar statutes have required that such convictions be supported by evidence tending to show the victim's state of mind at time of the incident. *See State v. Green*, 248 So.3d 360, 374 (La. Ct. App. 2017) (holding that the evidence—primarily that the victim was too intoxicated to drive—was sufficient to prove the victim was incapable of resisting because of a stupor induced by intoxication); *State v. Fruge*, 34 So.3d 422, 430–32 (La. Ct. App. 2010) (explaining that the record supported a finding that victim had consumed alcohol during the night in question and was asleep when the defendant began to rape her, that the record was supported by testimony from the victim detailing her alcohol consumption, and concluding that under these circumstances the defendant was aware of the victim's inability to consent); *State v. Porter*, 639 So.2d 1137, 1143 (La. 1994) (concluding that there was sufficient evidence to sustain the conviction when the record indicated alcohol consumption by the victim and the victim's alcohol-influenced state of mind); *see also People v. Sposito*, 140 A.D.3d 1308, 1312 (N.Y. App. Div. 2016) (expert testimony that the blood alcohol content of the victim would have placed her in a "stupor stage" supported the finding of sufficient evidence to sustain the defendant's conviction of rape in the first-degree); *Baldridge v. State*, 74 S.W. 916, 918-19 (Tex. Crim. App. 1903)

(concluding that there was insufficient evidence to sustain the defendant's conviction because there was no testimony or any other evidence indicating that the victim was in a stupor state of mind).

¶ 17 Here, Flores argues that J.A.'s statement, "do what you have to do because I have to rest," coupled with the fact that she freely moved her arms to touch him once they began "having relations," is evidence that J.A. was not in a stupor when she consented to sex. The People counter that the trial evidence provided a sufficient basis for the jury to conclude that J.A. was in a sleep-induced stupor when she complied with Flores' sexual advances. Specifically, the People point to evidence that J.A. had been sleeping when Flores began touching her back, and evidence that J.A. was sleep deprived from having been up feeding the baby to demonstrate that J.A. was not fully awake when Flores made advances towards her. While we do not doubt that this evidence supports the inference that J.A. was tired at the time of the incident, we are unable to conclude that such evidence is sufficient to demonstrate the victim's state of mind as required by § 1701(a)(4): that J.A.'s sensibility was so greatly dulled as to prevent her from being able to resist sexual intercourse.

¶ 18 Moreover, while the People questioned J.A. about the *sequence* of events, it failed to develop any testimony as to J.A.'s *state of mind* when she consented. The relevance of this deficiency cannot be understated, considering that inherent in the definition of stupor is a greatly altered or diminished state of mind. During the People's case in chief, J.A. gave the following testimony on direct examination:

> Q: And after you fell back to sleep, what's the next thing that you remember?
> A: That someone was touching me.
> Q: And where was that person touching you at?
> A: I was laying down on my side and they were touching me from

> the back.
>
> . . . .
>
> Q: And whenever that person was touching you in the back, what happened next?
> A: Because I thought it was my husband, I told him to leave me alone, because of the injections you know? Because the injection was already expiring.

(J.A. 385–386). The testimony on direct examination continued:

> Q: Where were they touching you at whenever they touched you again?
> A: In the same spot.
> Q: And what happened?
> A: So, then I told him, because I thought it was my husband, to do whatever it is he has to do because I wanted to rest.
> Q: Whenever you say do what you have to do, what are you referring to?
> A: To have relations with me, because it was my husband, so that I could rest.
>
> . . . .
>
> Q: And after you said do whatever you want, what happened next?
> A: I turned over and I was on my back face up, face up.
> Q: And where was that person at in relation to you, if you know?
> A: On top.
> Q: And what happened whenever that person was on top?
> A: He penetrated my part.

(J.A. 387–388).

¶ 19 Courts have recognized that a person who is asleep is in a state of physical helplessness and therefore unable to consent to any sexual touching or action that takes place while that person is unconscious. *See State v. Marker*, 329 P.3d 781, 784 (Or. Ct. App. 2014) (finding that a sexual abuse in the first-degree statute requiring that "[t]he victim is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless" includes the condition of being asleep); *People v. Manning*, 81 A.D.3d 1181, 1182 (N.Y. App. Div. 2011) (finding sufficient evidence that victim was physically helpless where victim testified that she had been sleeping and was awakened by defendant's hands moving up her thigh area, and as she was waking up,

defendant was "playing with her vagina"); *see also People v. Morales*, 212 Cal. Rptr. 3d 920, 925-26 (Cal. Ct. App. 2013) ("[T]he concept of unconsciousness is related to the issue of consent."). In this case, however, although the testimony the People elicited from J.A. demonstrates that she was asleep when Flores began touching her back, it also shows that the touching awakened J.A. and that she was alert enough to explain to him why she did not want to have sex before she ultimately acquiesced. This Court concludes that this level of responsiveness and reasoning is incompatible with the common accepted definition of stupor; a greatly dulled or completely suspended sense of sensibility.

¶ 20 However, even if we were to conclude that the People introduced enough evidence to show that J.A.'s dulled sensibility was so great as to prevent her from being able to resist sexual intercourse, which we do not, there is still insufficient evidence to show, beyond a reasonable doubt, that Flores had knowledge of J.A.'s dulled state of mind. Because the alleged stupor in this case was not induced by an intoxicating, narcotic or anesthetic agent, the People were required to prove that J.A. was known by Flores to be in such state of stupor. *See* 14 V.I.C. § 1701(a)(4) (providing that rape in the first degree results from "an act of sexual intercourse or sodomy with a person. . . when the person is *known by the defendant* to be in such state of stupor or weakness of mind from any cause") (emphasis added). In its denial of Flores's motion for a judgment of acquittal, the trial court did not consider whether Flores had knowledge of J.A.'s state of mind at the time of the incident. (J.A. 823–824). In its appellate brief, the People again did not point to any evidence in the record of Flores's knowledge of the victim's state of mind. Nevertheless, we examine the entire record to determine if any evidence was introduced at trial sufficient to sustain the conviction. *See Cascen*, 60 V.I. at 409 ("[W]hen an appellate court reviews the sufficiency of

the evidence, it must consider all the evidence the jury had before it, including any evidence that is later determined to be inadmissible." (quoting *Ambrose v. People*, 56 V.I. 99, 107 (V.I.2012))).

¶ 21 The People introduced evidence showing that Flores knew that J.A. had recently had a baby and that J.A. "wanted to rest" at the time of the incident, and therefore the record clearly supports an inference that Flores knew that J.A. was tired. However, there is nothing in the record to reasonably support the further inference that Flores knew that J.A. was so tired—suffering from such greatly dulled sensibility—as to be prevented from resisting his sexual advances. In fact, J.A. testified that she initially did resist Flores's advances, telling him to "leave [her] alone, because of the [birth control] injections," explaining that the "injection was already expiring." (J.A. 386.) Thus, even when viewed in the light most favorable to the People, there is insufficient evidence to reasonably support the inference that Flores knew that J.A. was not only tired, but in such a state of greatly dulled sensibility as to be unable to resist his advances.[4] Without additional evidence directly bearing on Flores's state of mind, any such inference fails to rise above the level of speculation, conjecture, or attenuated inference, and is therefore insufficient to satisfy the element of knowledge as required by statute. *See Milligan*, 2018 WL 4350120, at *6 (cautioning that "a verdict cannot rest on the mere suspicion, speculation, or conjecture, or an overly attenuated piling

[4] We do not doubt that Flores knew that J.A. thought she was speaking to her husband and that, under the cover of darkness, he took advantage of that fact. Section 1701(a)(4) is satisfied by a showing that the victim "is known by the defendant to be in such a state of stupor or weakness of mind from *any cause*" (emphasis added). Reading the statute in context, however, we are not convinced that section 1701(a)(4) contemplates that the victim's mistaken identification of the person she consented to having sexual relations with evidences that she was in such a state of stupor or weakness of mind that she was unable to consent to the act of sex itself. And because the People failed to elicit evidence that Flores knew that J.A. was under the influence of an "intoxicating, narcotic or anesthetic agent," or even that he knew that she was in a state of stupor, we must find that the evidence was insufficient to satisfy the requisite elements of section 1701(a)(4).

of inference on inference") (internal quotation marks omitted). Accordingly, we conclude that the Superior Court erred by denying Flores's motion for judgment of acquittal as to Count I.[5]

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[5] Importantly, we note that J.A.'s testimony demonstrates grounds from which the jury could conclude that J.A. rescinded her consent when she exclaimed "you are not Melvin." (J.A. 389.) While this Court has not specifically spoken to the idea that consent is rescindable, several courts agree that rape occurs when a defendant compels sexual intercourse after the victim revokes her original consent. *See, e.g.*, *In Re John Z.*, 60 P.3d 83, 184 (Cal. 2003) ("Withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual intercourse."); *State v. Robinson*, 496 A.2d 1067, 1071 (Me. 1985) ("The dramatic change from the role of a voluntary participant to that of a victim compelled involuntarily to submit to sexual intercourse is a distinct one."); *Acquaintance Rape and Degrees of Consent: "No" Means "No," but What Does "Yes" Mean?*, 117 HARV. L. REV. 2341, 2358 (2004) (hereinafter *Acquaintance Rape*) ("Seven state courts—in Alaska, California . . . Connecticut, Kansas, Maine, Minnesota, and South Dakota—have explicitly held that a woman can withdraw consent after penetration.").

Logically, consent is rescindable any time the conditions under which the consent was given have changed. *See Acquaintance Rape*, *supra*, at 2360 ("The revocation of consent after penetration creates a mechanism through which sexual intercourse can be conditioned on terms established prior to the actual act."). J.A.'s testimony reveals that once she exclaimed "you are not Melvin," Flores held her tighter, went faster, and finished before letting her go. (J.A. 389-90.) Such testimony could evidence that Flores forcibly overcame J.A.'s resistance once she audibly withdrew consent, and falls within title 14, section 1701(a)(2) of the Virgin Islands Code. 14 V.I.C. § 1701(a)(2) ("(a) Whoever perpetrates an act of sexual intercourse or sodomy with a person . . . (2) when the person's resistance is forcibly overcome; . . . is guilty of rape in the first degree[.]").

The People originally charged Flores with violating section 1701(a)(2) in the initial charging information. However, the People elected to abandon the use of force element and replace section 1701(a)(2) with the stupor or weakness of mind element of section 1701(a)(4) in the amended information and, having changed its theory of prosecution, signaled to Flores that he need not mount a use of force defense. Despite the fact that the testimony the People elicited from J.A. at trial ultimately revealed that Flores used force to finish the act after J.A. revoked her consent, the Superior Court never instructed the jury to weigh that factor since it is not an element of section 1701(a)(4). Accordingly, to apply section 1701(a)(2) retroactively on appeal is not only not within this Court's powers, but it would violate Flores' due process right to notice of the specific charge against him. *See Bibbee v. Scott*, No. 98-6445,1999 WL 1079597, at *3-4 (10th Cir. 1999) (unpublished) ("It is a basic principle of procedural due process 'that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.'") (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)); *Rogers v. Gibson*, 173 F.3d 1278, 1287 (10th Cir. 1999) (explaining that a variance between the evidence adduced at trial and the facts alleged in an information is reversible error "if the defendant is prejudiced in his defense because he cannot anticipate from the [information] what evidence will be presented against him") (internal quotation marks and citation omitted).

ii. 14 V.I.C. § 1708(a)(6): Unlawful Sexual Contact in the First Degree

¶ 22 In Count II of the Amended Information, the People charged that on or about May 7, 2013, Flores "engaged in sexual contact with a person not his spouse, J.A., to wit: he had sexual contact with J.A. knowing her mental incapacity [sic] was compromised, in violation of 14 V.I.C. § 1708(a)(6)." (J.A. 20–21). Flores alleges that the People failed to present sufficient evidence to prove the necessary elements of 14 V.I.C. § 1708(a)(6) unlawful sexual contact in the first degree. Section 1708(a)(6) states the following:

> (a) A person who engages in sexual contact with a person . . . (6) when the other person is unconscious or physically helpless, or that person's mental defect or incapacity is known to the perpetrator is guilty of unlawful sexual contact[.]

14 V.I.C. 1708(a)(6).

¶ 23 The Legislature defined "sexual contact" as "any touching of another person with the genitals or any touching of the genitals, anus, groin, inner thighs, buttocks, lips or breasts of another person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." 14 V.I.C. § 1699(d); *see also Francis v. People*, 63 V.I. 724, 737 (V.I. 2015). Although not defined by the Legislature in the statute, the plain meaning of "unconscious" is (a) "not knowing or perceiving: not aware" and (b) "free from self-awareness." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 2486 (1993). This is also the exact definition the trial court relied on in rejecting Flores's motion for judgment of acquittal.

¶ 24 Flores contends that because he only touched J.A.'s back while she was asleep, and because a person's back is not included in the definition of an intimate or inherently sexual area, he did not engage in unlawful sexual contact. We agree. And while Flores' subsequent act of sexual intercourse may itself be sufficient to sustain Flores' conviction under section 1708(a)(6), because the People failed to introduce sufficient evidence to support the inference that J.A. was

unconscious at the time of the sexual contact act, we conclude that there was insufficient evidence to convict Flores of first-degree unlawful sexual contact. Although the jury may reasonably have inferred that J.A. was tired, J.A.'s testimony also demonstrates that she was sufficiently alert and aware such that she understood the nature and intent of Flores's repeated touches, and was able to verbally acquiesce to his persistent advances. Thus, on the basis of J.A.'s testimony, the jury could not reasonably infer that she was unconscious during the act of intercourse and the resulting sexual contact as required within the meaning of section 1708(a)(6). Moreover, even if we were to conclude that the People introduced enough evidence to show that J.A.'s mental capacity was compromised—for the same reasons already discussed above in relation to the knowledge requirement of Count I—the People failed to introduce sufficient evidence to support the inference that Flores knew J.A.'s mental capacity was compromised. Accordingly, we conclude that the People failed introduce evidence that, when viewed in the light most favorable to the People, was sufficient to convict Flores for first-degree sexual contact, and consequently that the Superior Court erred in denying Flores's motion for judgment of acquittal as to Count II. *Milligan*, 2018 WL 4350120, at *3; *Clarke*, 55 V.I. at 477.

C. Rape by Fraud

¶ 25 The People contend that Flores is guilty under § 1701(a)(1) generally, despite not being charged under this subsection,[6] because his fraudulent misrepresentation of himself as J.A.'s husband should invalidate J.A.'s consent. Flores contends that the Virgin Islands rape statute does not criminalize rape by fraud because the common law, which the Virgin Islands rape statute

[6] For the same due process concerns explained in footnote 4, *supra*, even if we agreed with the People's argument, we could not retroactively apply section 1701(a)(1) because the People never charged Flores under that subsection.

follows, does not criminalize this action. Generally, in the absence of a statute, where a woman is effectively capable of consenting and does consent to sexual intercourse, the perpetrator is not guilty of rape even though consent was obtained through fraud. *See* 75 C.J.S. *Rape* § 27. Historically, under the common law definition of rape, the sexual intercourse must have been achieved forcibly. Indeed, Flores relies on two nineteenth-century cases to support his contention that J.A.'s failure to resist intercourse under the mistaken belief that Flores was her husband does not supply the requisite force for the crime of rape. *Mills v. United States*, 144 U.S. 644, 649 (1897) (explaining that when a woman is of sound body and mind, is not overcome by threats, and there is no evidence of resistance, the act of sexual intercourse is consensual); *Lewis v. State*, 30 Ala. 54, 56 (Ala. 1857) (finding that sexual intercourse with consent does not constitute rape, even though the woman's consent was procured by a fraudulent impersonation of her husband). Generally, states without a statute criminalizing rape by fraud have found no crime under common law rape where sex was procured by fraud in the inducement. *See* B.K. Carpenter, *Rape by Fraud or Impersonation*, 91 A.L.R.2d 591 §§ 4-5 (1963).

¶ 26 A number of states have enacted statutes extending the traditional definition of rape to include sexual intercourse achieved by fraud. *See* Cal. Penal Code § 261(a)(4)(c) (providing that rape results "[w]here a person is at the time unconscious of the nature of the act, and this is known to the accused" and that "unconscious of the nature of the act" as used in the statute means "incapable of resisting because the victim meets any one of the following condition: . . . [she w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact"); Tenn. Code § 39-13-503(a)(4) ("Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances . . . [t]he sexual penetration is accomplished by fraud."); Ariz. Rev. Stat. § 13–611

(repealed 1978) (providing that rape results "[w]here the female submits under a belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense or concealment practiced by the accused with intent to induce such belief").

¶ 27 Unfortunately, under the circumstances of this case, and in absence of a similar rape by fraud statute in the Virgin Islands, this Court has no choice but to reverse Flores's conviction for first-degree rape. This Court's conclusion should not be interpreted as condoning the behavior exhibited in this case. While we are cognizant of this gap in our Territory's rape statutes, it is within the domain of the Legislature, not this Court, to create law.[7]

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[7] We note that this case highlights the relevance of a wider and unresolved debate about what constitutes consent. The first-degree rape statute implicated in this case focuses on the ways a victim's consent to the *act* of sex may be absent or invalidated, and how lack of a victim's consent may be forcibly overcome. However, this traditional understanding of rape promotes the precarious position that consent is general; the identity of whoever accepts that consent is irrelevant because the *act* was consented to. In reality, consent is specific; it is an act rooted in an agreement between two (or more) people, and the identity of those sexual partners is an essential element defining the act itself. Indeed, when imagining J.A.'s perspective in the present case, we are empathetic to the likelihood that for J.A., sex with her husband and sex with Flores are two distinct acts, only one of which she consented to. Under a more comprehensive and realistic understanding of consent, most would agree that Flores never had J.A.'s consent because she consented to the separate act of having sex *with her husband*.

The Court of Appeals of California has addressed this issue comprehensively, analyzing the difference between fraud in the inducement and fraud in fact within the context of rape. *People v. Morales*, 150 Cal.Rptr.3d 920, 926 (Cal. Ct. App. 2013) ([T]he question whether one who impersonates another in order to accomplish sexual intercourse commits fraud in the fact or fraud in the inducement is one that has vexed courts for more than a hundred years."). The *Morales* Court noted that where a defendant has made "misrepresentations to the victim in order to get her consent for a particular act, and then proceeds to carry out that very act[,] . . . courts have historically been reluctant to impose criminal liability on the defendant since the victim consented to the particular act performed, albeit under false pretenses." *Id*. at 591. This is the crux of Flores' argument. *Morales* goes on to explain, however, that "other cases [have] conclude[d] that fraudulent impersonation constitutes fraud in fact and vitiates consent." *Id*. at 592. This is because, "[a]s one judge explained in an 1884 case arising in Ireland, in which the court affirmed a conviction of rape involving a defendant who impersonated the victim's husband, 'an act done under the bona fide belief that it is another act different in its essence is not in law the act of the party. . . . The person by whom the act was to be performed was part of its essence.'" *Id*. (quoting *Rape by Fraud*, 91 A.L.R.2d at p. 601 (quoting *Reg. v. Dee* (Ir. 1884) 15 Cox CC 579)). Yet,

III. CONCLUSION

¶ 28 For the reasons discussed above, we conclude that the evidence introduced at trial was insufficient to support Flores's convictions for first-degree rape and first-degree unlawful sexual contact. Therefore, we vacate Flores's convictions for first-degree rape and first-degree unlawful sexual contact, reverse the Superior Court's order entered July 18, 2017, and instruct the Superior Court to enter a judgment of acquittal in accordance with this opinion.

Dated this 28th day of March 2019.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

because this debate remains unresolved, and because the Virgin Islands does not yet have a rape-by-fraud statute, we have no choice but to reverse Flores' convictions.