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Criminal Law - Rape - Unconscious Victim

Melissa A. Struzzi

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CRIMINAL LAW — RAPE — UNCONSCIOUS VICTIM — The Supreme Court of Pennsylvania held that a victim is “unconscious” under 18 Pa. Cons. Stat. section 3121(3) even if the victim can remember some details of the rape.

Commonwealth v. Erney, 698 A.2d 56 (Pa. 1997).

On a December evening in 1991, fifteen-year-old J.R. went with her friend Timothy Beck (“Beck”), to the home of the appellant, Roland Erney (“Erney”).¹ Another friend of Erney’s, Duane Weiser (“Weiser”), was also present when J.R. and Beck arrived.² During their visit, Erney gave J.R. and Beck alcohol and marijuana.³ Erney aggressively encouraged J.R. to smoke the marijuana by pressuring her to take repeated “hits” from the cigarette and she soon became highly intoxicated.⁴ Beck stated that J.R. was “incoherent, ‘not paying attention to anything that was going on around her,’ and like ‘a vegetable.’”⁵ It was at this point, as J.R. was lying on the floor in this “incoherent” state, that the bedroom light was turned off, and both Erney and Duane Weiser began fondling J.R.⁶ Although Beck informed Erney of J.R.’s age, Erney tore down J.R.’s pants and had sexual intercourse with her.⁷ At trial, J.R. testified

1. *Commonwealth v. Erney*, 698 A.2d 56 (Pa. 1997). Roland Erney was thirty-three years old at the time of the incident and lived with his mother at her home on Bethlehem Pike in Sellersville, Bucks County, Pennsylvania. Brief for Appellee at 4, *Commonwealth v. Erney*, 698 A.2d 56 (Pa. 1997) No. 45 E.D. 1996; *Erney*, 698 A.2d at 58.

2. *Erney*, 698 A.2d at 58. Erney’s mother was asleep in her bedroom during the incident. *Id.*

3. *Id.* J.R. stated that they went to Erney’s home because they wanted to get “high” and drunk. Brief for Appellee at 4. J.R. testified that she smoked approximately three or four bowls of marijuana and drank some type of alcoholic beverage. *Id.* J.R. stated that at this time she felt “messed up.” *Id.* Beck, J.R., Erney, and Weiser then went up to Erney’s bedroom where they continued to smoke marijuana. *Id.*

4. *Id.* Several times Erney refused to allow J.R. to “pass the joint,” making her consume consecutive doses of marijuana. *Id.* J.R. testified at trial that she felt even “more messed up” afterwards and that she could not move. Brief for Appellee at 5.

5. *Id.* J.R. was so intoxicated by the marijuana and alcohol that she could not move or speak. *Id.*

6. *Commonwealth v. Erney*, No. 5440, 1992 (C.P. Bucks County Criminal Division) (Order denying post-trial motions). J.R. testified that both men touched her breasts and digitally penetrated her. Brief for Appellee at 5. J.R. described feeling as though she couldn’t get up or move. *Id.* She said that she told both men to stop, but they ignored her requests. *Id.*

7. *Erney*, 698 A.2d at 58. Erney assaulted J.R. while Beck was still present in the room. *Id.* Beck testified that he told Erney that J.R. was only fifteen years old, to which Erney replied that J.R. reminded him of his fifteen-year-old daughter. *Id.* Beck never physically

that she attempted several times to tell Erney to stop in her loudest voice.⁸ According to Beck, J.R. only mumbled unintelligibly and was unable to answer when he tried to question her to see if she was "okay."⁹ J.R. testified that she had no idea how long the assault lasted or why the assault stopped.¹⁰ J.R. could not remember getting dressed or leaving Erney's home.¹¹

The next day, J.R. was unsure whether the assault actually happened, but she confirmed the events with Beck.¹² J.R. also spoke with Erney on the telephone — he told J.R. that "she had gotten what she deserved."¹³ J.R. reported the assault to the police in August 1992.¹⁴ When the police questioned Erney, he initially admitted that J.R. had been in his home and that they smoked marijuana, but later denied that J.R. was ever there.¹⁵

The Pennridge Regional Police Department arrested and charged Erney with the rape of an unconscious victim,¹⁶ aggravated indecent assault,¹⁷ and corruption of minors.¹⁸ On March 9, 1993, a

tried to intervene in the assault, but was able to stop Erney's attack on J.R. through repeated pleas and threats of calling the police and waking Erney's mother. *Id.* J.R. testified that her pants were ripped during the assault and that she was aware that Erney got on top of her, penetrated her, and moved around. Appellee's Brief at 5.

8. *Id.*

9. *Id.* Beck questioned J.R. during the assault to try to determine if she was alright. *Id.*

10. *Id.* J.R. testified that Erney simply stopped the assault. *Id.* In reality, Beck threatened to wake Erney's mother, who was asleep in another bedroom, and call the police. *Id.* Erney still did not cease until Beck started to leave the room to call for help. *Id.*

11. *Id.* J.R. was unable to walk down the stairs in Erney's home, so she slid down them and rested before being able to leave with Beck. *Id.*

12. *Erney*, 698 A.2d at 58.

13. *Id.* Erney later called J.R.'s mother and told her that J.R. got "what she deserved because women are evil and [they] all get what [they] deserve." *Id.*

14. Brief for Appellee at 6.

15. *Erney*, 698 A.2d at 58. Erney claimed no females other than family had been to his house in over two years. *Id.*

16. 18 PA. CONS. STAT. ANN. section 3121(3) provides, in part: "a person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant . . . who is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring." *Id.*

17. 18 PA. CONS. STAT. ANN. section 3125 provides, in part:

[E]xcept as provided in [§] 3121 (relating to rape), 3122.1 (relating to statutory sexual assault), 3123 (relating to involuntary deviate sexual intercourse) and 3124.1 (relating to sexual assault), a person who engages in penetration, however slight, of the genitals or anus of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic, or law enforcement procedures commits aggravated indecent assault, a felony of the second degree, if . . . the complainant is unconscious or the person knows that the complainant is unaware that penetration is occurring; . . .

Id.

jury in Bucks County convicted Erney on all three counts.¹⁹ Erney filed post-trial motions alleging that the court violated his rights under the Sixth and Fourteenth amendments to the United States Constitution by quashing his subpoena of records maintained by the Network of Victim Assistance ("NOVA").²⁰ He further claimed that the evidence was insufficient to sustain the verdict under 18 Pa. Cons. Stat. section 3121(3).²¹ The court denied his motions on August 31, 1993 and sentenced Erney on January 13, 1995²² to a mandatory term of five to ten years in prison.²³ Erney appealed his conviction to the Superior Court of Pennsylvania.²⁴ No longer denying he had sex with J.R., Erney contended that because his victim could remember parts of the assault in detail, she was conscious and was, therefore, not an "unconscious victim" under 18 Pa. Cons. Stat. section 3121(3).²⁵ Under this interpretation, Erney argued there was insufficient evidence to support his conviction under 18 Pa. Cons. Stat. section 3121(3).²⁶ The superior court affirmed the conviction, finding that the testimony that J.R. was "messed up," "stoned," and "out of it" was sufficient to establish the victim's unconscious state within the meaning intended by the legislature and the Webster's New World Dictionary's definition of "unconscious."²⁷ The Supreme Court of Pennsylvania granted

18. *Erney*, 698 A.2d at 56. 18 Pa. Cons. Stat. Ann. section 6301 provides: "whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age . . ." may be charged with corruption of a minor. *Id.* Erney was charged on October 2, 1992 by Officer Donald C. Fresh of the Pennridge Regional Police Department. Brief for Appellee at 3. Erney's preliminary hearing was held on October 19, 1992 before District Justice C. Robert Roth. *Id.*

19. *Erney*, 698 A.2d at 56. The convictions were for the sexual assault of a teenage girl who was so intoxicated she could not consent and was unaware of parts of the assault. *Id.* The jury found Erney not guilty of rape by forcible compulsion, 18 Pa. Cons. Stat. section 3121(1). Brief for Appellee at 3. The trial commenced on March 8, 1993 before the Honorable Edward G. Biester, Jr. *Id.*

20. Brief for Appellee at 3.

21. *Id.*

22. *Id.* Erney's sentencing was scheduled for October 1, 1993 but Erney, who had a history of mental illness, was found to be incompetent. *Id.* He was deemed competent again on January 13, 1995 and consequently sentenced. *Id.*

23. *Id.* See also Sentences for Offenses Against Infant Persons, 42 PA. CONS. STAT. ANN. § 9718; mandatory sentencing guidelines relating to the rape of person under 16 years old. *Id.*

24. *Erney*, 698 A.2d at 56.

25. *Id.* J.R. was able to remember that Erney touched her vagina and penetrated her with his penis. *Id.*

26. *Id.*

27. *Id.*; Brief for Appellant at 9; Commonwealth v. Erney, 698 A.2d 56 (Pa. 1997) (No. 45 E.D.).

allocator.²⁸

The sole issue before the supreme court was whether a victim is "unconscious" within the meaning of 18 Pa. Cons. Stat. section 3121(3) when the victim is able to remember, in detail, some parts of the assault, but is too intoxicated to communicate "no" to her attacker, even though she believed she did so loudly.²⁹ The court held that a victim who is intermittently unconscious throughout the assault is so impaired physically and mentally that she is incapable of giving consent and, therefore, intercourse with such a victim is rape.³⁰ In considering the sufficiency of the evidence claim, the court relied upon the standard of review articulated in *Commonwealth v. Bracey* and found that there was sufficient evidence for the jury to find that the victim was unconscious during parts of the sexual assault.³¹

In rejecting Erney's claim that the victim was not unconscious because she could recollect some of the events that occurred during the assault, the court relied upon the common and approved usage of the term "unconscious."³² The court defined "unconscious" as lacking knowledge or awareness of one's own sensations or external events; not being in a normal waking state.³³ When the assault began, the victim, J.R., showed no signs of awareness of external events and was unaware that she was not communicating "no" to her attacker.³⁴ J.R. was only able to remember portions of the assault and had no knowledge of when or why the assault

28. *Id.* "Allocatur" is a term used to denote that a writ or order was accepted for review. BLACK'S LAW DICTIONARY 49 (6th ed. 1990).

29. *Erney*, 698 A.2d at 58. The victim's mistaken belief that she communicated "no" to her attacker is relevant to the issue of her impaired mental condition and her awareness of the events taking place around her. *Id.* at 59. J.R.'s lack of awareness contradicts Erney's argument that J.R. was conscious and aware of the assault and, therefore, not an "unconscious victim." *Id.* at 58.

30. *Id.* at 59. The court concluded that if a mentally and physically impaired victim lacks the capacity to consent, her submission to intercourse is involuntary. *Id.* The court found this constitutes "rape of an unconscious victim." *Id.* J.R. was so physically impaired that she had to be held up during the assault. Brief for Appellee at 13.

31. *Erney*, 698 A.2d at 58. The standard established by the court in *Commonwealth v. Bracey*, A.2d 1062 (Pa.1995), is that the court must "view the evidence most favorable to the Commonwealth as verdict winner and accept as true all evidence and reasonable inferences arising therefrom upon which, if believed, the jury could have based their verdict." *Id.*

32. *Erney*, 698 A.2d at 58, 59.

33. *Id.* The court relied upon *Webster's New World Dictionary* (2d College ed.) and *Webster's New Collegiate Dictionary* (9th ed.). *Id.* "Unconscious" is defined as "not endowed with consciousness" and "consciousness" is defined as "the awareness of one's own feelings, what is happening around one . . ." *Id.* "Consciousness" is further defined as "aware; cognizant . . . [;] able to feel and think; in the normal waking state. . . ." *Id.*

34. *Id.* at 58.

stopped.³⁵ Both Beck and Weiser testified at trial that the victim was just lying on the floor “out of it” and “spaced out,” not perceiving any of the events that were going on around her.³⁶ The court found that this was ample evidence that J.R. was not in a normal waking state during the assault and was, therefore, “unconscious” under 18 Pa. Cons. Stat. section 3121(3).³⁷

The court further denied Erney’s contention that 18 Pa. Cons. Stat. section 3121(3) only protects individuals who are completely unconscious throughout the assault.³⁸ Rather, the court determined that because of J.R.’s impaired mental and physical condition, she could not have voluntarily consented to intercourse with Erney.³⁹ J.R. was unable to respond to Beck’s inquiries as to whether she wanted to have sex with Erney and was not even able to move.⁴⁰ The court reasoned that allowing Erney to escape punishment because his victim was conscious during part of the assault would be inconsistent with the intent of the legislature to punish sexual intercourse with one who is unable, physically or mentally, to consent.⁴¹ The court affirmed the order of the superior court, upholding Erney’s conviction for rape under 18 Pa. Cons. Stat. section 3121(3).

Justice Nigro wrote a dissenting opinion stating that there was insufficient evidence that the victim in this case was “unconscious.”⁴² Justice Nigro stated that the victim’s ability to recall details of the assault and her awareness that the assault stopped showed that she was in fact conscious, and therefore, not an “unconscious victim.”⁴³ He further noted that one’s inability to consent because of intoxication does not support a conviction for rape under 18 Pa. Cons. Stat. section 3121.⁴⁴ Justice Nigro

35. *Id.*

36. Brief for Appellee at 13, 14. Weiser was a witness for the defense. *Id.* at 14. He testified that J.R. was unaware of Erney’s search for a condom and his talk of having sex with her. *Id.* Weiser stated that both he and Beck tried to get Erney to stop by saying “no,” but that J.R. “didn’t even say a word.” *Id.*

37. *Erney*, 694 A.2d at 59.

38. *Id.* “In considering the legislative intent, we are mindful that the ‘essence of the criminal act of rape is involuntary submission to sexual intercourse.’” *Id.*

39. *Id.*

40. *Id.* Brief for Appellee at 13.

41. *Id.* at 31.

42. *Erney*, 698 A.2d at 59 (Nigro, J., dissenting). Justice Zappala joined Justice Nigro in dissent. *Id.*

43. *Id.* Even though the victim was unaware of the “nature of the assault . . . she was cognizant that the assault stopped.” *Id.*

44. *Id.* at 60.

differentiated between "one who is inebriated and one who is unconscious" and urged the legislature to enact a means to convict in situations involving the rape of an intoxicated victim.⁴⁵

"Rape" in England was defined by Chief Justice Matthew Hale of the King's Bench as "the carnal knowledge of any woman above the age of ten years against her will."⁴⁶ Under English law, a rape victim, like the victims of other crimes, was required to "raise a hue" and cry out to warn the rest of the community.⁴⁷ The woman was then expected to initiate legal action by bringing her bleeding body to authorities and exhibiting her torn clothing.⁴⁸ In 1275, Parliament enacted the Statute of Westminster to allow the Crown to bring charges against the offenders if the woman failed to press charges within forty days.⁴⁹ Until 1840, the punishment for rape in England was death.⁵⁰

American common law borrowed the English definition of rape, defining it as "unlawful carnal knowledge of a woman, forcibly and against her will."⁵¹ Rape was not defined by statute in Pennsylvania until passage of the Criminal Code of 1860, which specifically embodied the common law definition.⁵² Prior Pennsylvania statutes only listed rape as a felony and adopted the English statutory definition of rape that provided, "if a man from henceforth do ravish a woman married, maid, or other, where she did not consent, neither before nor after, he shall have judgement of life and member."⁵³

45. *Id.* Justice Nigro did not doubt that an intoxicated victim could be raped, only that an intoxicated victim who was only partially unaware of the events surrounding her and otherwise awake and cognizant, was not sufficiently "unconscious" to support a rape conviction under section 3121(3). *Id.*

46. KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 70 (1996).

47. *Id.*

48. JENNIFER TEMKIN, RAPE AND THE CRIMINAL JUSTICE SYSTEM 177 (1995).

49. *Id.*

50. BURGESS-JACKSON, *supra* note 45, at 70. "[T]he Statute of Westminster mitigated this to two years imprisonment and a fine at the King's pleasure," but this statute only was valid for ten years, after which rape was again considered a capital offense. *Id.*

51. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 531 (2d ed. 1995). The common law definition was taken from 2 SHARSWOOD'S BLACKSTONE'S COMMENTARY 209. *Id.*

52. *Commonwealth v. Stephens*, 17 A.2d 919, 920 (Pa. 1941). Act of March 31, 1860 Pub. L. No. 382 § 91, as amended by the Act of May 19, 1887 Pub. L. No. 128 § 1, 18 Pa. Cons. Stat. Ann. § 2261. *Id.*

53. *Stephens*, 17 A.2d at 920. The English statute in force was 13 Ed. I, STAT. WESTM. 2, c. 34 (1285). *Id.* The court in *Stephens* discussed that the "against her will" requirement in the Code of 1860 was synonymous with the "without her consent" provision under the Statute of Westminster. *Id.*

Although a provision for an "unconscious victim"⁵⁴ was not included in the rape statute until 18 Pa. Cons. Stat. Ann. section 3121 was enacted in 1972, the courts had already been active in protecting a victim who is unable to give consent because of unconsciousness.⁵⁵ In 1875, the Supreme Court of Pennsylvania decided *Stevick v. Commonwealth*,⁵⁶ the case of a thirteen-year-old girl who was raped by a stranger who passed her on the road.⁵⁷ In determining whether a thirteen-year-old girl was capable of consenting, the court stated that intercourse with a woman who was "insensible or unconscious, from whatever cause, is rape."⁵⁸

Commonwealth v. Stephens,⁵⁹ decided in 1941, involved the rape of a woman who was insane.⁶⁰ The court, finding that an insane woman is incapable of giving consent, stated that "intercourse is against a woman's will when, from any cause, she is not in a position to exercise any judgement about the matter."⁶¹ Therefore, the court upheld the appellant's conviction for rape, stating that sex with a woman who is "mentally unconscious from the use of drugs or other causes . . . is generally held to be rape."⁶² The court based its decision on several English cases⁶³ which relaxed the rule that force was necessary to prove rape, and determined that "where the

54. The Model Penal Code, drafted in 1955 by the American Law Institute and published in 1962, contained a provision regarding an unconscious female. BURGESS-JACKSON, *supra* note 45, at 72.

55. 1972, Dec. 6, Pub. L. 1482, No. 334, § 1, effective June 6, 1973. Prior laws in section 721 of Penal Code of 1939 (18 P.S. § 4721), as amended by Act No. 1, Special Session No. 3, of 1966, approved May 12, 1966 defined "statutory rape" as carnal knowledge of a "woman child" under the age of sixteen years. 18 PA. CONS. STAT. ANN. § 3121.

56. 78 Pa. 460, 462 (1875).

57. *Stevick*, 78 Pa. at 462. The girl, Clara, was walking home from her aunt's home when the appellant approached her, offered her fifty cents to "take liberties with her," and when she refused, threw her to the ground and threatened to shoot her if she resisted. *Id.* Appellant was interrupted in his assault before penetration could occur by another man who was passing by on the road. *Id.* The appellant ran and hid in a nearby graveyard. *Id.*

58. *Id.* The court decided that Clara did not give her consent and any attempt to cry out or struggle on her part was stifled by the appellant with threats that he would shoot her. *Id.*

59. *Stephens*, 17 A.2d at 919.

60. *Id.* The appellant in this case was aware of the girl's insanity because her father had told him "that girl crazy" and there was medical testimony that any adult could recognize that the woman was insane and incapable of giving consent. *Id.*

61. *Id.*

62. *Id.* at 920, 921. The court held that the applicable rule is "carnal knowledge of a woman who is incapable through unsoundness of mind, whether temporary or permanent, of giving rational legal consent is against her will, and is rape where the actor knows of such incompetency." *Id.* at 921.

63. *Reg. v. Camplin*, 1 Cox C.C. 220; *Reg. v. Dee*, 15 Cox C.C. 579; *Reg. v. Fletcher*, 8 Cox C.C. 134.

female was an idiot, or had been rendered insensible by the use of drugs or intoxicating drinks, . . . the law implied force."⁶⁴

After the enactment of 18 Pa. Cons. Stat. section 3121 in 1972, the courts began exploring the issue of what constitutes an "unconscious" victim within the meaning of the statute.⁶⁵ In 1992, *Commonwealth v. Price*⁶⁶ addressed the issue of whether a person who was asleep when intercourse occurred fit within the definition of "unconscious victim."⁶⁷ The superior court held that sexual intercourse with a person who was asleep was sufficient to support a finding that defendant committed rape of an unconscious person under 18 Pa. Cons. Stat. section 3121(3).⁶⁸ In *Price*, the victim, J.L., had been out drinking and dancing with her attacker, Price.⁶⁹ When Price drove J.L. home, he told her he was too intoxicated to drive and J.L. invited him to sleep on her sofa.⁷⁰ J.L. made herself a snack, went to her bedroom, and soon fell asleep.⁷¹ J.L. awoke not long afterward to find Price lying on top of her and having intercourse with her.⁷² J.L. screamed and pushed Price away.⁷³ The court found that because J.L. was asleep when the intercourse occurred she was, therefore, "unconscious" within the meaning of section 3121(3).⁷⁴

Price was the first case to interpret the meaning of

64. Reg. v. Dee, *supra* note 54.

65. 18 PA. CONS. STAT. section 3121(3) enacted in 1972 provided that "a person commits a felony of the first degree when he or she engages in sexual intercourse with another person not his spouse . . . who is unconscious. . . ." *Id.*

66. 616 A.2d 681 (1992).

67. *Id.* The victim in this case also had consumed alcohol, but was asleep when the assault took place. *Id.*

68. *Price*, 616 A.2d at 683. The court distinguished this case from an earlier case, *Commonwealth v. Titus*, 556 A.2d 425 (Pa. Super. Ct. 1989) in which the intoxicated defendant climbed into bed with his thirteen-year-old daughter and had sex with her. *Id.* The court found it compelling that in *Titus*, the girl was asleep when the defendant got in bed, but she was awake when the actual penetration occurred. *Id.* Also important to the court was that, in *Price*, the victim resisted as soon as she awoke, but, in *Titus*, the victim did not resist until after intercourse had occurred. *Id.*

69. *Id.* at 682.

70. *Id.* It was approximately 4:00 a.m. when they returned to J.L.'s home and even though Price had driven them there, he protested until J.L. agreed to let him stay on her couch. *Id.* J.L. pointed out the sofa as soon as they were inside. *Id.*

71. *Id.* J.L. ate her snack in her room and telephoned a friend before falling asleep. *Id.*

72. *Id.*

73. *Price*, 616 A.2d at 681. J.L. eventually managed to kick Price out of her apartment and reported the assault to police the next morning. *Id.*

74. *Id.* at 684. The court reasoned that a person who is asleep is unaware of her surroundings and unable to protect herself against personal intrusion. *Id.* The court relied upon the definition of unconscious provided in Webster's New Collegiate Dictionary (9th ed.). *Id.*

“unconscious” under section 3121(3), relying upon the dictionary definition of “unconscious” and the intent of the legislature in reaching its conclusion that subsection 3 was “enacted to proscribe intercourse with persons unable to consent because of their physical condition.”⁷⁵ The interpretation of “unconscious” made by the *Price* court was subsequently upheld in *Commonwealth v. Widmer*.⁷⁶ *Widmer* also involved a sleeping victim who awoke to find her attacker on top of her engaging in sexual intercourse.⁷⁷ The court affirmed the conviction under section 3121(3), relying on *Price* for the rule that a sleeping victim who awakens to find a defendant having sex with her is “unconscious” within the meaning of section 3121(3).⁷⁸

The Pennsylvania legislature amended section 3121(3) in 1995 to its current form. This section provides: “A person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant . . . who is unconscious or where the person knows the complainant is unaware that the sexual intercourse is occurring. . . .”⁷⁹

Although the decision in *Commonwealth v. Erney* demonstrates the court’s increasing concern for protecting the rape victim, one may nevertheless question whether the court has gone too far. As Justice Nigro pointed out in his dissent, the victim was clearly conscious in this case.⁸⁰ According to the definition relied upon by the *Erney* majority, “consciousness” is “awareness of one’s own

75. *Id.* The court paralleled this holding with its holding in *Commonwealth v. Carter*, 418 A.2d 537 (Pa. Super. Ct. 1980), in which it found that the legislative purpose behind the enactment of subsection (d) of the rape statute dealing with rape of a mentally deficient person was to protect persons unable to consent to sexual intercourse. *Price*, 616 A.2d at 684.

76. 667 A.2d 215 (Pa. Super. Ct. 1995), *rev. on other grounds*, 689 A.2d 211 (Pa. 1997).

77. *Widmer*, 667 A.2d at 219. *Widmer* had been drinking with the victim’s boyfriend. *Id.* They returned to the boyfriend’s house, where the victim was asleep in an upstairs bedroom. *Id.* The victim’s boyfriend went looking for *Widmer* who, while supposedly using the bathroom, was having sex with the victim. *Id.* The boyfriend testified that the victim was beating *Widmer* on the chest in an attempt to get him to cease his assault. *Id.* The boyfriend chased *Widmer* out of the house with a handgun. *Id.*

78. *Widmer*, 667 A.2d at 215.

79. 18 PA. CONS. STAT. ANN. § 3121. In addition, the 1995 amendment rewrote subsection 4 to provide: “Where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance.” *Id.* The amendment also added subsections 5 and 6, which provide “Who suffers from a mental disability which renders the complainant incapable of consent” and “Who is less than 13 years of age,” respectively. *Id.*

80. *Commonwealth v. Erney*, 698 A.2d 56, 59 (Pa. 1997) (Nigro, J., dissenting).

feelings, what is happening around one.”⁸¹ The victim, J.R., knew that she was being assaulted because she testified that she thought she cried out “no.”⁸² If the courts allow an exception for a person who is highly intoxicated from marijuana and beer, but still “conscious” within the dictionary definition,⁸³ will they next consider a person who has consumed three or four beers “unconscious” or “not in the normal waking state?”⁸⁴

In addition, this decision may be susceptible to a constitutional challenge. The court seems to be shifting the burden of proving the victim’s consciousness to the defendant. The courts have been given considerable latitude in construing what constitutes an “unconscious victim.” If the Supreme Court of Pennsylvania continues to consider an intoxicated, but awake, victim as “unconscious,” the court is forcing the defendant to prove the victim’s awareness of what was occurring and capacity to voice her objection to the defendant’s advances.

The situation presented in *Erney* is likely to arise again. The court’s decision adds confusion to the already difficult task of protecting an intoxicated victim. Justice Nigro is correct in his assertion that the legislature needs to address the issue of the victim who voluntarily begins drinking, but is either coerced to imbibe unsafe amounts of the intoxicant(s) or is simply too young to exercise proper judgement and subsequently is taken advantage of by an adult.⁸⁵ The court’s decision in *Erney* offers more protection to the victim, but further obfuscates the meaning of “unaware,” “not in the normal waking state,” and “unconscious” within the language of 18 Pa. Cons. Stat. section 3121(3) for both defendants and prosecutors.

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81. *Erney*, 698 A.2d at 59 (Nigro, J., dissenting).

82. *Id.* at 58.

83. *Id.* at 59.

84. *Id.* It is possible to argue that a person after only one beer is no longer in the “normal waking state.” *Id.*

85. *Id.* at 60. Section 3121(4) provides: “a person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant . . . where the person has substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance. 18 PA. CONS. STAT. ANN. § 3121(4) (1995).