

Appellant-Defendant Timothy Scott Hanna appeals following his convictions for Class B felony Criminal Deviate Conduct¹ and two counts of Class C misdemeanor Furnishing Alcohol to a Minor.² On appeal, Hanna challenges the sufficiency of the evidence to sustain his convictions. We affirm.

FACTS AND PROCEDURAL HISTORY

On June 16, 2008, D.R., a seventeen-year-old, received permission from her mother to sleep over at the home of her seventeen-year-old friend, C.H. Before watching a movie, D.R. and C.H. planned to go to the grocery store to buy snacks. Hanna, C.H.'s uncle who lived with C.H. and her grandparents in the home, asked to go with them to buy liquor. On the way to the grocery store, Hanna participated in a conversation with the girls about the kind of liquor they liked to drink. After the girls purchased their snacks and Hanna bought a bottle of liquor, they returned home and all watched a movie with C.H.'s grandparents. After C.H.'s grandparents went to sleep, C.H. and D.R. went swimming in the backyard. Hanna stayed up with the girls. He offered C.H. and D.R. some of the liquor he had purchased earlier at the store. C.H. and D.R. drank the liquor mixed with Coca-Cola. C.H. became sick, so the girls went to C.H.'s bedroom to sleep. Because C.H. had become ill, D.R. decided to sleep on blankets on the floor, next to C.H.'s bed. D.R. borrowed C.H.'s portable music player, and fell asleep sometime after midnight with headphones in her ears, listening to music.

¹ Ind. Code § 35-42-4-2(a)(2)(2007).

² Ind. Code § 7.1-5-7-8(a)(2007).

Unbeknownst to D.R. and C.H., Hanna entered C.H.'s bedroom while the girls were asleep. Hanna lay down behind D.R. on the floor and pulled down his pants. Hanna put his hand under D.R.'s clothing and inserted one or more fingers into D.R.'s vagina. D.R. recalled that at that moment, "I wasn't fully awake yet. I wasn't really even sure what exactly was going on." Tr. p. 113. She removed her headphones, moved away from Hanna, and told him to stop. Hanna pulled on her leg and said, "I can't help it, you're so f***ing beautiful." Tr. p. 113. Hearing Hanna's voice, C.H. awoke. Hanna left the room. D.R. told C.H. about Hanna's actions. Soon after, C.H. and D.R. returned to D.R.'s house and told her mother about the incident. The police were called.

On June 17, 2008, the State charged Hanna with Class B felony criminal deviate conduct, Class D felony criminal battery, and two counts of Class C misdemeanor furnishing alcohol to a minor. On July 10, 2010, the case proceeded to jury trial. The jury found Hanna guilty of criminal deviate conduct and two counts of furnishing alcohol to a minor. A sentencing hearing was held on August 17, 2010. The trial court sentenced Hanna to fifteen years of incarceration for criminal deviate conduct, with five years suspended to probation. The trial court also sentenced Hanna to sixty days of incarceration for both counts of furnishing alcohol to a minor, both sentences to run concurrently with the sentence for criminal deviate conduct.

DISCUSSION AND DECISION

Whether the State Produced Sufficient Evidence to Sustain Hanna's Convictions

Hanna contends that there was insufficient evidence to sustain his convictions for criminal deviate conduct and furnishing alcohol to minors. “When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses.” *Spurlock v. State*, 675 N.E.2d 312, 314 (Ind. 1996). We consider evidence most favorable to the verdict and look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* The conviction will be affirmed if the record supports it with substantial evidence of probative value from which a trier of fact could reasonably infer guilt beyond a reasonable doubt. *Bryant v. State*, 644 N.E.2d 860, 860 (Ind. 1994).

A. Criminal Deviate Conduct

According to Indiana Code section 35-42-4-2(a)(2), a person may be convicted of criminal deviate conduct when it is proved that he knowingly or intentionally penetrated a victim while the victim was unaware that the conduct was occurring. Hanna contends that the State failed to sufficiently prove that D.R. was “unaware” of the penetration.

The focus in addressing whether a victim was “unaware” involves looking to the facts to determine whether the victim was capable of voluntarily giving consent to the actor’s conduct. *Nolan v. State*, 863 N.E.2d 398, 403 (Ind. Ct. App. 2007), *trans. denied*. While lack of consent is not a per se element of “unawareness,” it is relevant to the victim’s “unawareness.” *Id.* Evidence that the defendant engaged in intercourse or criminal deviate conduct when the victim’s awareness was impaired is sufficient to prove that the defendant employed compulsion. *See Bryant*, 644 N.E.2d at 860. Compulsion

distinguishes sexual intercourse and deviate conduct from rape or criminal deviate conduct. *Nolan*, 863 N.E.2d at 403.

Hanna's argument is essentially that D.R. is required to have been completely unconscious in order to be found "unaware" under the criminal deviate conduct statute. This court, however, has already considered and rejected this argument. In *Nolan*, we concluded that there was sufficient evidence to find that the victim was "unaware" where the victim was "halfway asleep," also described as just awaking from sleep, when the act occurred. *Id.* Similarly, in *Filice v. State*, 886 N.E.2d 24, 33 (Ind. Ct. App. 2007), we held that the victim was "unaware" when the evidence showed that she "wasn't quite present" and was "non-lucid" during the criminal conduct. It is clear that unconsciousness is not a requirement to be "unaware" under Ind. Code § 35-42-4-2(a). *Id.* at 36.

The evidence sufficiently supports the jury's finding that D.R. was unaware of Hanna's act of criminal deviate conduct, even though D.R. might not have been fully asleep. D.R. testified that while D.R. was still asleep, Hanna pulled down his pants and lay down behind her. D.R. further testifies that she pulled her headphones out of her ears, and then "moved onto [her] back and scooted back because [she] felt his finger go inside [her]." Tr. p. 113. Finally, D.R. testified that at the time of the incident "[she] wasn't fully awake yet. [She] wasn't even sure what exactly was going on." Tr. p. 113. As in *Nolan* and *Filice*, we conclude that this evidence was sufficient to prove that D.R. was "unaware" of Hanna's criminal deviate conduct with her.

B. Furnishing Alcohol to Minors

Hanna also contends that there is insufficient evidence to sustain his two convictions for furnishing alcohol to a minor. To be convicted under Indiana Code section 7.1-5-7-8(a), the State must prove that the defendant “recklessly, knowingly, or intentionally ... provide[d] or furnish[ed] an alcoholic beverage to a minor.” The facts support the jury’s findings that Hanna provided alcohol to both D.R. and C.H. According to C.H.’s testimony, after Hanna, D.R., and C.H. returned home from buying snacks and liquor, Hanna offered D.R. and C.H. liquor from the bottle. Hanna gave C.H. liquor from the bottle. Hanna gave D.R. liquor from the same bottle. The evidence was sufficient to establish that Hanna furnished liquor to C.H and D.R.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.