

Voluntary Intoxication Not Grounds for Lack of Consent in Minnesota

In May 2017, after drinking five shots of vodka at a Minneapolis, MN, bar with a female friend and taking a prescription pill, a visibly intoxicated 20-year-old woman was turned away by the bouncer at another bar in the Dinkytown neighborhood. Francios Momolu Khalil, 24, and his friend noticed the women outside and approached them to invite the two to a party at a house in northern Minneapolis.

The woman remained awake long enough to find that there was no party at the apartment where Khalil had taken her and her friend. She then blacked out. When she woke up, she found she was lying on a couch with Khalil engaging in nonconsensual sex with her (previously) unconscious body. She told him she did not want to have sex, and he allegedly replied, “But you’re so hot and you turn me on.” She again lost consciousness.

She awoke up in the morning with her shorts around her ankles. The two women called for a Lyft. The victim went to a hospital to have a rape kit done later that day. She reported the case to Minneapolis police four days later. (Marisa Iati, *A Minnesota Man Can’t Be Charged With Felony Rape Because the Woman Chose to Drink Beforehand*, *Court Rules*, Washington Post, Mar. 26, 2021, available at www.WashingtonPost.com/national-security/2021/03/26/Minnesota-Rape-Alcohol.)

Coincidence of Alcohol Use and Sexual Assaults

According to the Sex Offender Management Assessment and Planning Initiative (SOMAPI), by SMART, Office of Justice Programs (2017) (available at <https://smart.ojp.gov/somapi/chapter-1-incidence-and-prevalence-sexual-offending>), there is a robust link between substance use (alcohol; drugs) and sexual victimization.

- Mohler-Kuo and colleagues (2004) surveyed nearly 24,000 women between 1997 and 2001 in the College Alcohol Study and found that 4.7% had been raped. Of that group, 72% were intoxicated at the time the incident occurred. (M. Mohler-Kuo, G. Dowdall, M. Koss, and W. Henry, *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65(1) *J. of Studies on Alcohol* 37 (2004).)

- Among 300 female college students, Lawyer and colleagues (2010) found that 29.6% of the survey respondents reported a drug-related sexual assault, and of those, 84.6% were preceded by the victim’s voluntary intoxication or incapacitation (via drugs or alcohol). By contrast, 15.4% of those assaults were preceded by involuntary incapacitation. The majority of drug-related assaults (96.1%) involved alcohol consumption prior to assault. (See S. Lawyer, H. Resnick, V. Bakanic, T. Burkett, and D. Kilpatrick, *Forcible, Drug-Facilitated and Incapacitated Rape and Sexual Assault Among Undergraduate Women*, 58(5) *J. of Am. Coll. Health* 453 (2010).)

Drug-Facilitated, Incapacitated, and Forcible Rape (DAFR) study, by Kilpatrick et al. (2007), surveyed a national sample of 5,000 adult women (3,000 in general public and 2,000 attending college) and found that an estimated 20 million women had been victims of rape at some point in their lifetimes at the time of the survey. This amounts to approximately 18% of women in the United States. The study also found that only 16% of survey participants who self-reported rape victimization indicated they had reported the crime to law enforcement. Among the 84% who did not report to law enforcement, the victims of drug-facilitated or incapacitated sexual assault were significantly less likely to make a report to the police

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Moreover, sex crimes have been shown to be more likely to occur when alcohol is consumed by the offender. Alcohol and drug consumption are common reasons for lowered inhibitions. (See David Finkelhor, *Child Sexual Abuse: New Theory and Research* (1984).) “The overcoming of internal inhibitions (e.g., personal sense of morals, values, ethics; fear of being caught) [may occur] due to poor impulse control, the use of alcohol or drugs, engaging in excuses and justifications, or impaired mental ability.” (SOMAPI, *supra*, at 40.) According to research on the factors influencing sexual abuse, when certain situational factors are present, individuals who are already prone to sexual offending behavior become more likely to engage in that behavior; alcohol or drugs contribute to this dynamic, as does limited intellectual functioning, home stress, or the loss of a relationship or job. (Finkelhor, *supra*.) Although the factors do not cause the sex offending, they increase its likelihood in some individuals. (SOMAPI, *supra*, at 46.)

Drug-facilitated, Incapacitated, and Forcible Rape. A national study, the

than were victims of forcible rape. (See D. Kilpatrick, H. Resnick, K. Ruggiero, L. Conoscenti, & J. McCauley, *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, Research Report, Office of Justice Programs, NIJ (2007).)

Incapacitated Undercounted in Prior UCR. As an historical point, until 2012, the Unified Crime Reports (UCR) used a definition of rape that excluded categories of sexual assault even though they might have met the jurisdictional standards for rape and were reported to police. These categories included sexual assaults that were:

- Facilitated with drugs and/or alcohol;
- Against an unconscious victim; and
- Against a victim with a disability that precluded the individual from legally being able to give consent. (*Id.* at 3.)

Nonconsensual Sex Leads to Conviction

Khalil was later convicted of third-degree criminal sexual conduct, i.e., “sexual

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penetration with another person when the actor knows or has reason to know that the complainant is ‘mentally incapacitated.’” The Minnesota Supreme Court overturned his conviction in a 6-0 opinion. (*State v. Khalil*, A19-1281, Minn. Sup. Ct. (Mar. 24, 2021).)

State Law Excludes Voluntary Intoxication. Under Minnesota law, voluntary intoxication cannot form the basis of lack of consent. (*See* Minn. Stat. § 609.341, subd. 7 (2020).) In Minnesota, rape of a person so intoxicated she cannot give consent demands a second failure of consent—that is, lack of consent to the consumption of the intoxicating substances. This second “consent” requirement is not present for other types of sexual assault. In other words, mental incapacity to give consent due to intoxication is limited to instances when the individual was forced to ingest incapacitating substances, had her drink or food spiked with drugs, or was given drugs or alcohol in some other way without her knowledge. Even if it could be proved that Khalil was an offender who preyed on people in a vulnerable condition, the facts of the case would not meet the law’s standards.

In the case against Khalil, the victim consumed the vodka and pill that caused her to black out before she met him, and they were thus not “administered to that person without the person’s agreement.” Because she chose to ingest the substances, the sexual encounter that followed did not meet the standard for sexual assault under the statute, which provides:

“Mentally incapacitated” means that a person under the influence of alcohol, a narcotic, anesthetic, or any other

substance, administered to that person without the person’s agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration. (Minn. Stat. § 609.341, subd. 7 (2020).) (*Khalil*, A19-1281, Minn. Sup. Ct. (Mar. 24, 2021) at 8.)

State Supreme Court Bound to Overturn Conviction

Although the state supreme court’s opinion began, “This case arises from an experience no person should ever have to endure,” the court did not uphold the rape conviction, which had been upheld by an

incapacity”—for the purpose of second-degree rape under Wash. Rev. Code § 9A.44.050—as a “condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause”). These statutory definitions protect intoxicated victims of rape regardless of how they became intoxicated. But today we undertake the task of interpreting the definition of “mentally incapacitated” that the

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appeals court. The court granted him the right to a new trial at which Khalil could be charged with fifth-degree criminal sexual conduct, a gross misdemeanor under current Minnesota law.

The state supreme court stated, “If the legislature’s intended meaning is clear from the text of the statute, we apply that meaning and not what we may wish the law was or what we think the law should be.” The court added, in *dicta*, that other states do protect women in the victim’s positions:

[L]egislatures across the country have enacted statutes aimed at prioritizing consent and protecting intoxicated victims of rape and sexual assault, regardless of how the victim became intoxicated. *See, e.g.*, Wash. Rev. Code § 9A.44.010 (defining “mental

Minnesota Legislature enacted in Minn. Stat. § 609.341, subd. 7 (2020). (A19-1281, at 3, n.1.)

Updated Law Would Still Present High Bar at Trial

A proposed bill that would include voluntary intoxication within the meaning of nonconsent for the purposes of rape in Minnesota was presented to and tabled by legislators in 2019. A later bipartisan bill that would update current law was issued in the Minnesota House of Representatives. Under the proposed changes in the law, the state would still have to explore the defendant’s knowledge of the victim’s state of mind in order to prove that the defendant knew or should have known that the victim was intoxicated to a degree that made her incapable of giving consent. ■



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