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CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff-Appellee

v.

ANTOLOK ANTOLOK,
Defendant-Appellant.

Supreme Court No. 2018-011

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT,* and SEEBORG,** Associate Justices

PER CURIAM:

I. INTRODUCTION

Following a High Court bench trial, defendant-appellant Antolok Antolok ("Antolok") was convicted of the second-degree sexual assault of Tilber Hesa ("Tilber"), a mentally-disabled 19-year-old woman, in violation of 31 MIRC § 213.2(1)(b). He was subsequently sentenced to a term of ten years' imprisonment, with two years suspended and eight to be served at Majuro Jail. On appeal, Antolok argues the evidence admitted at trial is insufficient to sustain his conviction.[1] We agree. Because the Republic failed to introduce evidence sufficient to show "sexual penetration"—an essential element of second-degree sexual assault—Antolok's conviction for that crime is reversed. The High Court is directed to enter judgment for the lesser-included offense of third-degree sexual assault, and to resentence Antolok accordingly.

* The Honorable J. Michael Seabright, Chief U.S. District Judge, District of Hawaii, sitting by designation of the Cabinet.

** The Honorable Richard Seeborg, U.S. District Judge, Northern District of California, sitting by designation of the Cabinet.

[1] Although Antolok's briefing raised additional concerns over prosecutorial misconduct, Appellant's Opening Br. at 2, counsel explicitly abandoned that ground for appeal at oral argument.

II. BACKGROUND

A. The Republic's Charges Against Antolok

In November 2017, Tilber and her mother, Laila Hesa, filed a complaint with the Republic of the Marshall Islands police alleging that on September 24, 2017, Antolok forced Tilber into an abandoned house, where he threatened and sexually assaulted her. The Republic then brought this case, and in September 2018, Antolok stood trial for three felony offenses (sexual assault in the first, second, and third degrees) and three misdemeanor offenses (sexual assault in the fourth degree, assault, and indecent exposure).[2]

Two of those offenses, as defined by the RMI Criminal Code, bear particularly on this appeal. Under § 213.2(1)(b), a person is guilty of second-degree sexual assault if "[t]he person knowingly subjects to sexual *penetration* another person who is mentally defective, mentally incapacitated, or physically helpless . . . ." 31 MIRC § 213.2(1)(b) (emphasis added). By contrast, under § 213.3(1)(d), a person is guilty of third-degree sexual assault if "[t]he person recklessly subjects to sexual *contact* another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor . . . ." 31 MIRC § 213.3(1)(d) (emphasis added).

B. Evidence Adduced at Trial

Having waived his right to a jury, Antolok was tried before the High Court across four days in September 2018. Over that period, each side sought to prove its own version of events on Sunday, September 24, 2017: whereas the Government contended Antolok had dragged Tilber into an abandoned house in Utridrikan Village, where he threatened and raped her, sometime between 10:00 AM and noon, Antolok—while admitting to being in that specific

[2] In the lead-up to trial, the Republic, relying on information gleaned from Tilber during one of her interviews with a state psychologist, also accused Antolok of having sexually assaulted Tilber prior to September 24, 2017. Antolok consequently was charged twice for each of these six crimes. After the Republic rested its case-in-chief, Antolok, pursuant to Rule 29(a) of the RMI Rules of Criminal Procedure, successfully moved for judgment of acquittal as to all counts relating to his alleged pre-September 24, 2017 conduct.

house—insisted he had spent the entire morning, and early afternoon, fast asleep following a night of severe intoxication.

These efforts produced, in pertinent part, the following testimonial evidence: from Tilber's mother, a statement that she had caught Antolok throwing rocks at Tilber's window, in an apparent effort to wake Tilber up, around 7:00 AM, as well as a concession that she did not take Tilber for medical testing at any point after the alleged crime; from Tilber, the assertion that at around 11:00 AM, Antolok led her from beside the road into the abandoned house, where he forced her to disrobe, showed her his penis, and made "kiss marks" on her body with "his mouth"; from Tilber's neighbor, an account of seeing Tilber inside the abandoned house, and exhorting her to "get out," sometime before noon; from Tilber's sister, a description of photographing "kiss marks" on Tilber's neck and breasts in the early afternoon;[3] from another of Tilber's sisters—who was sent, that evening, to fetch Antolok from his residence—Antolok's supposed remark that there was no "reason of being mad about" the morning's events, because Tilber "had already lost her virginity"; and from Antolok himself, a narrative placing him at the alleged crime scene during the alleged crime (by his telling, he entered the abandoned house at 10:00 AM, and slept there until "1 or 2"), offered alongside little else in the way of a concrete alibi. Neither side took issue with the fact of Tilber's intellectual disability. As a state psychiatrist explained on the trial's opening day, her brain has not developed beyond the stage one might expect of a four-year-old.

C. The High Court's Verdict

Following closing arguments, the High Court rendered a four-pronged verdict. First, citing a lack of evidence around Antolok's use of "strong compulsion," the trial judge found Antolok innocent of the form of first-degree sexual assault requiring that element. *See* 31 MIRC § 213.1(1)(a). Second, finding "beyond a reasonable doubt that the defendant knowingly subjected Tilber to sexual penetration and that she is a person who is mentally defected," the trial

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[3] After some dispute as to their reliability, these photographs were admitted into evidence.

judge observed that, pursuant to the Criminal Code, Antolok could be convicted of either first-degree or second-degree sexual assault. *Compare* 31 MIRC § 213.1(1)(d) (penalizing "knowing[] . . . sexual penetration [of] another person who is mentally defective"), *with* 31 MIRC § 213.2(1)(b) (penalizing "knowing[] . . . sexual penetration [of] another person who is mentally defective, mentally incapacitated, or physically helpless"). Third, invoking the principle that a person who "can be found guilty under two separate statutes for doing exactly the same thing [is] . . . entitled to be convicted only under the lesser offense," the trial judge held Antolok guilty of sexually assaulting a "mentally defective" person in the second, but not first, degree. Finally, the High Court determined that all remaining offenses for which Antolok stood charged—third-degree sexual assault, fourth-degree sexual assault, assault, and indecent exposure—were "lesser included offenses" of second-degree sexual assault, and therefore could not, as a constitutional matter, furnish a basis for any additional conviction.

III. LEGAL STANDARD

Antolok challenges the sufficiency of the evidence that led to his conviction. Under well-settled precedent, a conviction "is supported by the sufficiency of the evidence when 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *RMI v. Kijiner,* 3 MILR 122, 124 (2010) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original)). In this setting, the Court "may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal"; rather, our appellate inquiry must proceed strictly upon evidence construed "in a manner favoring the prosecution." *Id.* (quoting *United States v. Nevils,* 598 F.3d 1158, 1164-67 (9th Cir. 2010)). "Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and determine whether the evidence at trial, including any evidence of innocence, could allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *Nevils*, 598 F.3d at 1164-65 (emphasis in original)).

IV. <u>DISCUSSION</u>

A. Second-Degree Sexual Assault

Antolok stands convicted of violating § 213.2(1)(b), which proscribes "knowingly subject[ing] to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless." 31 MIRC § 213.2(1)(b). Given the uncontested fact of Tilber's intellectual disability, the validity of Antolok's conviction therefore is a function of whether, based on the evidence at trial, "*any* rational trier of fact could have found . . . beyond a reasonable doubt" that Antolok "knowingly subject[ted] [Tilber] to sexual penetration . . . ." *Kijiner,* 3 MILR at 124 (quoting *Jackson,* 443 U.S. at 319 (emphasis in original)); 31 MIRC § 213.2(1)(b). This standard tilts strongly in the prosecution's favor: "the evidence and all reasonable inferences which may be drawn from it" are to be "viewed in the light most favorable to the government," and "any conflicts in the evidence are to be resolved in favor of the jury's verdict." *United States v. Kaplan,* 836 F.3d 1199, 1212 (9th Cir. 2016) (internal quotation marks and citations omitted). Reviewed de novo, and even approaching the issue from a maximally prosecution-friendly perspective, the Republic's case does not clear this hurdle.

With the question of "knowing . . . sexual penetration" in the foreground, a candid review of the evidence bears out this conclusion. Certain facts from Antolok's trial are beyond dispute—there is, to reiterate, no disagreement that Antolok was physically present in the abandoned house at the time of the alleged crime, or that Tilber is severely intellectually disabled. Beyond that, however, the Republic's proof distills down to the following: much to suggest a non-consensual sexual *act* took place between Antolok and Tilber, but nearly nothing tending to indicate the occurrence of sexual *penetration.* On appeal, this silence is deafening. No witness, for instance, claimed to have seen Antolok engaged in the act of penetration (this includes Tilber, whose inability to relate "what [Antolok] d[id] with his penis" necessitated a break in the trial, the question never to be revisited); no witness claimed to have seen Tilber unclothed, or evincing other indicia of sexual penetration; and as defense counsel managed to extract from Tilber's mother, nobody took Tilber for medical testing, thereby depriving the fact-

finder of any scientific evidence that might have established sexual penetration on the morning of September 24, 2017.

Against this backdrop, Antolok's § 213.2(1)(b) conviction, like the judicial finding that "[Antolok] subjected Tilber to sexual penetration" upon which it rests, cannot be sustained. In neglecting an essential element of the convicted crime, the record on appeal is plainly deficient. To overcome this deficiency and uphold the verdict, one would have to extrapolate—from little more than Tilber's statements that Antolok "showed his penis" and made "kiss marks," photographs of those "kiss marks," and Antolok's alleged comment regarding Tilber's virginity—an instance of sexual penetration, proven beyond a reasonable doubt. Such extrapolation would trade not in the drawing of "reasonable [evidentiary] inferences," but rather the conjuring of material facts. *See Kaplan,* 836 F.3d at 1212. We decline to engage in it here.[4]

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[4] The trial transcript reflects one possible explanation for the High Court's contrary course of action. During her testimony, Tilber struggled to respond verbally to questioning, instead answering frequently through physical gestures. At certain points, the High Court made appropriate efforts to detail these gestures for the record. *See, e.g.* Trial Tr. at 27 (observing, from the bench, that one of Tilber's non-verbal responses "refers . . . [to] the chest area"). At other points, however, it is clear the trial judge failed to perfect the record. Indeed, once Tilber left the stand, he stated:

> During Tilber's testimony, there were times she nodded and showed her answer[], or as the Marshallese do, with their eyebrows, and those small answers were not verbal, but *we know the answers.* And even though she kept on looking at the clerk and signaling to him, the clerk showed the signal to the lawyers and the judges. And for the record, there were times Tilber didn't answer or show her answer to the lawyers.

Id. at 31 (emphasis added). It may be the case, therefore, that the trial judge discerned evidence within Tilber's testimony that both escaped the record and factored into his eventual sexual penetration finding. Even so, this Court simply cannot rely on a lower court's unadorned claim to "know[ing] the answers" in discharging its duty of appellate review. In order to ensure that trial testimony is reliable and reviewable on appeal, the trial court should inform witnesses to answer out loud, with words. Or, in the case that a witness is truly unable to respond verbally, the court should ensure that each non-verbal response is properly entered into the record.

Because no "rational trier of fact" could have ascertained the existence of a fact the Republic apparently did not concern itself with—let alone succeed in—establishing, Antolok's conviction is reversed for insufficient evidence. *Kijiner,* 3 MILR at 124 (internal quotation marks and citation omitted).

B. Third-Degree Sexual Assault

That we overturn Antolok's conviction for second-degree sexual assault does not mean Antolok is entitled to acquittal on all charges. The question of what becomes of a lesser-included offense when a defendant's conviction for a greater offense is overturned is a matter of first impression before the Court. In such circumstances, the RMI Constitution provides that the Court may look to court decisions of the United States as well as generally accepted common law principles for guidance. RMI Const., Art. I, § 3(1); *see also In the Matter of P.L. No. 1995-118*, 2 MILR 105, 109 (1997). "[A]ppellate courts . . . have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that only affect the greater offense." *Rutledge v. United States,* 517 U.S. 292, 306 (1996) (citations omitted) (further acknowledging that the United States Supreme Court "has noted the use of such a practice with approval."). Although different courts employ different standards for when this action is warranted, two common criteria emerge from U.S. caselaw. First, and most obviously, the lesser offense must be a true "lesser-included offense—a 'subset' of the greater one," and the "the element as to which sufficient evidence was missing with respect to the greater offense must not be a requisite element of the lesser offense as well." *U.S. v. Begay,* 567 F.3d 540, 551 (9th Cir. 2009) (citation omitted), *rev'd en banc on other grounds,* 673 F.3d 1038 (9th Cir. 2011); *see also United States v. Brisbane,* 367 F.3d 910, 914-15 (D.C. Cir. 2004). Second, the fact-finder at trial, whether it be a jury or judge, must demonstrably have been aware of the opportunity to return a guilty verdict on the lesser-included offense, such that the greater offense conviction can be understood reliably to encompass the lesser-included offense elements. *See United States v. Davila-Lopez,* 107 F.3d 878 at *1 (9th Cir. 1997) (unpublished op.); s*ee also United States v. Franklin,* 728 F.2d 994, 1000 (8th Cir.

1994) (articulating, upon review of a bench trial, the appellate court's general need to limit its exercise of this power to what "the district court necessarily found"). Replacing Antolok's second-degree sexual assault conviction with a third-degree sexual assault conviction, both criteria are satisfied here.

Broken down to its component parts, § 213.3(1)(d) provides that a person is guilty of sexual assault in the third degree if that person (i) "recklessly engages in sexual contact"; (ii) "with another person"; (iii) "who is mentally defective, mentally incapacitated, or physically helpless . . . ." 31 MIRC § 213.3(1)(d). While the second and third of these § 213.3(1)(d) elements are shared by § 213.2(1)(b), the latter offense differs from the former in that it targets "knowingly subject[ing]" intellectually disabled persons "to sexual penetration." Because this difference tasks the Republic with proving, for § 213.2(1)(b) purposes, all the elements of § 213.3(1)(d) and then some—namely, a higher degree of scienter and a more specific form of "sexual contact"—§ 213.3(1)(d) third-degree sexual assault is "a 'subset' of" its second-degree counterpart. *Begay,* 567 F.3d at 551; *see also* United States Model Penal Code § 2.02(5) ("[w]hen recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly"). Nor would the defective aspect of Antolok's conviction carry over to that "subset" offense: third-degree sexual assault forgoes "sexual penetration" for "sexual contact," of which there is ample evidence in Tilber's testimony alone. As for the second criterion, the High Court unmistakably was aware of the availability of the lesser-included third-degree sexual assault option.[5] It therefore is appropriate for this Court to direct the High Court to enter judgment of third-degree sexual assault against Antolok on remand, and the High Court is so directed.

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[5] Helpfully, within moments of rendering his verdict, the trial judge said so. *See* Trial Tr. at 131-32 ("counts 5, 7, 9, and 11 . . . are lesser-included offenses of charge number 3").

V. CONCLUSION

Based on the foregoing, the High Court's conviction of Antolok Antolok is REVERSED, and his sentence is VACATED. On remand, the High Court shall enter judgment of conviction under 31 MIRC § 213.3(1)(d), and resentence defendant-appellant promptly thereafter.

Dated: November 18, 2020

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: November 18, 2020

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: November 18, 2020

/s/ Richard Seeborg
Richard Seeborg
Associate Justice