Case No. 24-CF-7

District of Columbia
Court of Appeals

EDUARDO MALDONADO,

Appellant,

v.

UNITED STATES,

Appellee.

On Appeal from the Superior Court of the District of Columbia
Criminal Division
Case No. 2023-CF1-002066, The Honorable Judith Smith

APPELLANT EDUARDO MALDONADO'S OPENING BRIEF

James W. Kraus (DC Bar No. 471945)
KRAUS JENKINS PLLC
650 Massachusetts Avenue, NW
Suite 600
Washington, DC 20001
(202) 888-7681
jkraus@krausjenkins.com

Counsel for Appellant Eduardo Maldonado

LIST OF INTERESTED PARTIES

The following is a list of all non-governmental parties, intervenors, amici curiae, and their counsel in the trial court and in this appellate proceeding:

Eduardo Maldonado (Appellant)

James W. Kraus, Esq. (Appellate Counsel for Eduardo Maldonado)

Julie Swaney, Esq. (Trial Counsel for Eduardo Maldonado)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

At its most fundamental level, criminal law distinguishes between *actus reas* and *mens rea*, requiring the establishment of both before assigning guilt and assessing punishment. With this distinction, the law acknowledges that it is possible for an individual to suffer harm that was innocently inflicted. Such is the case here.

The Complainant in this matter had a sexual encounter that fell below her subjective comfort level, undoubtedly causing her harm. Without diminishing the Complainant's experience, however, it can also be—and is—true that Appellant Eduardo Maldonado had no intention of harming the Complainant and, after an evening of light drinking, dancing, and heavy petting, reasonably believed that the Complainant willingly participated in their sexual conduct at every stage. The trial court lacked sufficient evidence to find otherwise.

JURISDICTIONAL STATEMENT

This is timely appeal from a final judgment of the Superior Court of the District of Columbia, Criminal Division.

STATEMENT OF ISSUES

1. Whether there was sufficient evidence from which the trial court could find that Mr. Maldonado knew or should have known that he did not have the Complainant's consent to engage in oral sex.
2. Whether there was sufficient evidence from which the trial court could find that Mr. Maldonado knew or should have known that he did not have the Complainant's consent to engage in sexual intercourse via vaginal penetration.

STATEMENT OF THE CASE

On December 12, 2023, the Superior Court of the District of Columbia found Appellant Eduardo Maldonado guilty of two counts of misdemeanor sexual abuse following a bench trial. (R. 120, Sentence of the Court p. 1). Based on this finding, the court sentenced Mr. Maldonado to two consecutive terms of 180 days' incarceration, which the court suspended pending 2 years of supervised probation. (*Id.*) This appeal challenges the sufficiency of the evidence underlying the court's judgment.

On the evening of September 16, 2022, Mr. Maldonado and the Complainant, A.R., met at a nightclub and had what A.R. described as a "fabulous" night that included dancing, grinding, kissing, and sensual touching. (Trial Tr. (10/31/2023) 57:17–64:5.)

As the evening of September 16 turned into the wee hours of September 17, Mr. Maldonado and A.R. decided to leave the club. On their way out, A.R. encountered one of the club's bouncers who described the Complainant as certainly "drunk," but not so intoxicated that she was unable to navigate the club's steep, narrow stairs, which were a challenge "even if you're sober." (Trial Tr. (10/24/2023) 57:20–58:10, 66:15).

Once outside, both A.R. and Mr. Maldonado testified that they began looking for transportation home. (Trial Tr. (10/31/2023) 78:21–24; Trial Tr. (11/1/2023) 30:23–25). However, according to Mr. Maldonado, and undisputed by the Complainant, neither could find a car within a reasonable wait time due to the high demand for car services and street closures in the area. (Trial Tr. (11/1/2023) 30:23–31:4). To increase their chances of finding an Uber or Lyft, Mr. Maldonado testified that he encouraged A.R. to walk

away from the club toward a more vehicle-accessible street. (Trial Tr. (11/1/2023) 48:25–49:6).

Along their walk, Mr. Maldonado and the Complainant stopped at a church, where A.R. leaned back on the side of the steps and used her phone to search for a rideshare and to text her mom and others. (Trial Tr. (10/31/2023) 10:1–10, 79:24–80:1). Although Mr. Maldonado and the Complainant disagree about whether there was a discussion regarding oral sex at this time (*compare* Trial Tr. (10/31/2023) 12:19–25, *with* Trial Tr. (11/1/2023) 29:22–30:1), both agreed that Mr. Maldonado briefly performed oral sex on the Complainant while they waited on the steps. (Trial Tr. (10/31/2023) 11:14–13:15; Trial Tr. (11/1/2023) 29:16–30:5). According to both the Complainant and Mr. Maldonado, the interaction stopped not because the Complainant did not consent to the contact, but because they were in public. (Trial Tr. (10/31/2023) 13:1–13:9; Trial Tr. (11/1/2023) 30:1–20). Both Mr. Maldonado and the Complainant agreed that she did not instruct Mr. Maldonado to stop the contact, nor did the Complainant express any displeasure with Mr. Maldonado's contact. (*Id.*) Instead, after Mr.

Maldonado stopped performing oral sex, they walked away from the steps and went to a more secluded location, with the Complainant voluntarily joining Mr. Maldonado. (Trial Tr. (10/31/2023) 13:12–14:7; Trial Tr. (11/1/2023) 31:5–16).

According to surveillance footage, the pair walked behind a wall, to a more secluded location, at approximately 00:14 on September 17. (Trial Tr. 87:18–88:1). At this point in time, A.R. testified that her memory of the night fades, even admitting that her memory regarding the timing of the experience was entirely different from what the video footage depicted. (Trial Tr. (10/31/2023) 94:6–8, 100:15–18, 129:12–21). In the Complainant's memory, she and Mr. Maldonado began having sex immediately after they entered the secluded area. (Trial Tr. (10/31/2023) 99:2–7). According to Mr. Maldonado, however, he and A.R. first began kissing, and then increased their level of intimacy through sexual touching and oral sex. (Trial Tr. (11/1/2023) 32:3–25).

At 00:30, fifteen minutes after the pair entered the secluded area, A.R. initiated a recording of the encounter, which required her to complete a

series of steps on her phone. (Trial Tr. (10/30/2023) 98:13–101:10). The video, which is primarily audio due to the angle of the phone and the time of night, provides just under three minutes of the encounter and reflects moaning that the Complainant identified as her voice. (Government's Exhibit 13; Trial Tr. (10/30/2023) 35:25–1). After a period of moaning, Mr. Maldonado expressly asked for the Complainant's permission to engage in sexual acts, to which the Complainant responded that she was not sober. (Government's Exhibit 13). The Complainant continued moaning, at which point Mr. Maldonado asked for a clear "yes or no" answer as to whether she was comfortable and wanted him to continue. (*Id.*) At this point, the Complainant said, for the first time, "No." (*Id.*) In immediate response, Mr. Maldonado stopped what he was doing, and stated, "I didn't know." He then lay down beside the Complainant, where they continued kissing and talking. The Complainant then stopped her video recording. (*Id.*)

Approximately ten minutes later, A.R. initiated a second video recording. (*See* Government's Exhibit 14; *see also* Trial Tr. (10/31/2023) 103:14–19). This process required A.R. to, again, complete a series of steps

on her phone. As with the first video, the second video is primarily audio; however, a woman's leg is visible on the right-hand side of the screen. (*See generally* Government's Exhibit 14). Despite A.R. being shown this video during trial, she did not testify to what the video depicted, nor did she testify to what occurred in the ten minutes between the two videos. *(See generally* Trial Tr. (10/31/2023) 37:10–53:9). Mr. Maldonado, on the other hand, did provide testimony about this time period, truthfully explaining that he could not definitively say whether they were engaged in sex, but he believed he was just massaging and kissing her legs at this point. (Trial Tr. (11/1/2023) 56:21–57:2, 65:9–16). The video then depicts Mr. Maldonado talking with the Complainant about their night, acknowledging that they had sex at some point in the evening, and that he was happy to have met her. (*See* Government's Exhibit 14).

Shortly after the Complainant ends the second recording, surveillance footage shows A.R. leaving the secluded area. (*See* Government's Exhibit 17 at 00:46:58–00:47:09). A.R. testified that she was able to get up and leave on her own. (Trial Tr. (10/31/2023) 104:17–20). Upon leaving the secluded area,

the Complainant encountered a couple of individuals, one of whom testified at trial. According to the witness, the Complainant stated that a male individual, who the witness did not identify at the time of trial, raped her. (Trial Tr. (10/23/2023) 31:13–16). He then testified that the unidentified male individual, who was still with A.R., denied the allegations, at which point the witness told the man to leave. (Trial Tr. (10/23/2023) 32:9–11).

In his testimony Mr. Maldonado, explained that when the intercourse began, he understood that A.R. "was okay with sex" between them and that, throughout their encounter, they "were always gauging each other's temperature" on what acts were permissible, as demonstrated on the videos taken by the Complainant. (Trial Tr. (11/1/2023) 58:9–21, 63:2–6). Mr. Maldonado also explained that after he and the Complainant left the secluded area, he was "shocked by the behavior of the guys" he and A.R. encountered on the street. (Trial. Tr. 11/1/2023) 41:2–7). Although he felt as though he had not done anything to warrant an "aggressive response" from the men, Mr. Maldonado decided to simply leave as they requested,

particularly because one of the men was larger than Mr. Maldonado, and he did not want to risk being injured. (Trial Tr. (11/1/2023) 41:7–13).

At the close of trial, the court issued its ruling, finding Mr. Maldonado guilty on two of the four counts brought against him: Count I for misdemeanor sexual abuse by vaginal penetration and Count II for misdemeanor sexual abuse by cunnilingus. The court determined that the Government had not met its burden on Counts III and IV, additional counts of sexual abuse, because it did not provide a clear timeline of when these allegedly improper acts occurred, leaving an open question regarding consent. (Trial Tr. (12/12/2023) 29:13–31:8).

With respect to Count I, the court placed particular emphasis on the recordings taken on the Complainant's phone. (*See generally* Trial Tr. (12/12/2023) 11:11–14:20, 23:1–27:7). The court recognized that Mr. Maldonado repeatedly asked for A.R.'s consent and clarity on what sexual acts were permissible, and that Mr. Maldonado stopped when the Complainant told him to stop. (Trail Tr. (12/12/2023) 24:13–19). Despite Mr. Maldonado's efforts to ensure he had the Complainant's approval for his

actions, the court determined that "having to ask [for clarity] means that it was not clear" and that even though it "may not have been as clear that she *wasn't* consenting . . . he should have known." (Trial Tr. (12/12/2023) 26:15–27:7) (emphasis added). Therefore, the court found Mr. Maldonado guilty of Count I. (Trial Tr. (12/12/2023) 27:11–22).

As for Count II, which pertains to Mr. Maldonado performing oral sex on the church steps, the court began by acknowledging that the evidence was "slightly less clear." (Trial Tr. (12/12/2023) 28:5–10). However, the court determined that the Government met its burden because "[t]here is no testimony from the defendant that he even asked. He just initiated." (Trial Tr. (12/12/2023) 28:16–17). And because of this "lack of any conversation," despite acknowledging that "there had been some sexual discussion," the court determined that Mr. Maldonado should have known that A.R. "was not consenting" to the sexual contact. (Trial Tr. (12/12/2023) 29:3–8).

At sentencing, the court imposed two consecutive terms of 180 days' confinement; however, the court suspended the sentence, placing Mr. Maldonado on a two-year period of probation, drug and alcohol testing and

treatment if needed, and a sexual offender evaluation and treatment, if recommended. (Trial Tr. (12/12/2023) 42:13–22).

Mr. Maldonado now appeals from the court's final order of judgment and sentence.

SUMMARY OF ARGUMENT

Mr. Maldonado took every reasonable step to check in with the Complainant throughout their interactions, and when she withdrew her consent, he stopped. In other words, Mr. Maldonado did exactly what he was supposed to do to respect his sexual partner and her boundaries. Instead of recognizing Mr. Maldonado's efforts to ensure he and the Complainant were always on the same page, the trial court imposed two contradictory rulings that place Mr. Maldonado in a guilty position no matter his actions.

On the one hand, the trial court found Mr. Maldonado guilty of Count I because he *did* ask for consent and clarity regarding A.R.'s desire to continue a sexual encounter, stating that "having to ask [for clarity] means that it was not clear." On the other hand, the trial court found Mr. Maldonado guilty of Count II because he did *not* ask A.R. whether he could

perform oral sex "right there, right then," even though the pair were contemporaneously engaged in "some sexual discussion" and touching. (Trial Tr. (12/12/2023) 29:3–8). These two opposing rulings, which leave a confounding question of how consent can be ascertained, demonstrate the evidentiary weaknesses of this case and the lack of proof, beyond a reasonable doubt, that Mr. Maldonado committed sexual abuse.

ARGUMENT

Mr. Maldonado does not deny that the Complainant was harmed by their sexual encounter, and, in fact, he expressed remorse for this at trial. (Trial Tr. (12/12/2023) 39:1–8). But the Complainant's subjective harm alone does not mean a crime occurred. To the contrary, the Government was required to show that Mr. Maldonado knew or had reason to know that he did not have the Complainant's permission for their sexual contact. *See* D.C. Code § 22-3006. The Government failed to meet its burden, demonstrated by the court's contradictory ruling. As such, Mr. Maldonado's conviction should be vacated on both Counts I and II.

Although deferential, this Court's review of the sufficiency of the evidence "is not toothless." *Augustin v. United States*, 240 A.3d 816, 824 (D.C. 2020) (internal quotation omitted). This Court has "an obligation to take seriously the requirement that the evidence in a criminal prosecution must be strong enough that a factfinder behaving rationally *really could* find it persuasive beyond a reasonable doubt." *Id.* (internal quotation omitted) (emphasis added) (cleaned up). Therefore, each element must be supported by relevant record evidence, though the fact of relevant evidence "does not automatically make it sufficient to support a criminal conviction." *Id.* (internal quotation omitted). Deferring to the trial judge's assessment of witness credibility and drawing all reasonable inferences in favor of the verdict, a trial judge's factual findings may be reversed where they are plainly wrong or without evidence to support them." *Id.* Such is the case here.

Addressing the allegations against Mr. Maldonado in chronological order, this brief first challenges the sufficiency of the evidence concerning Count II before turning to the evidentiary shortcomings of Count I.

I. The trial court lacked sufficient evidence to find Mr. Maldonado guilty of sexual abuse by oral sex beyond a reasonable doubt.

The trial court found Mr. Maldonado guilty of sexual abuse because there was no evidence that Mr. Maldonado and the Complainant discussed Mr. Maldonado performing oral sex at that moment, on the steps of the church, before he did so. This, however, is not the standard. The Government was required to demonstrate that Mr. Maldonado engaged in oral sex with the Complainant, despite knowing or having reason to know that he did not have her permission based on her statements *or* actions. The evidence does not support such a finding.

As detailed above, Mr. Maldonado and A.R. stopped on the church steps to continue their search for a ride home. While there, the pair engaged in sexual discussions specifically related to oral sex, and, in turn, Mr. Maldonado briefly performed oral sex on A.R. The Complainant did not tell Mr. Maldonado to stop or even that the contact was unwanted. To the contrary, she testified that she did not register the contact at first (suggesting it was not yet occurring), and that when she did notice what was happening, she simply moved, and the act stopped. Both A.R. and Mr. Maldonado

testified that the act came to an end because they were in public—not because the act was generally unwanted. (Trial Tr. (10/31/2023) 13:1–13:9; Trial Tr. (11/1/2023) 30:1–20). Tellingly, the Complainant was actively communicating with others via text message at the time the oral sex occurred, but she did not indicate she was unsafe or had been violated. (*See* Trial Tr. (10/31/2023) 11:16–19). In fact, after the contact ended, A.R. voluntarily left with Mr. Maldonado and continued to a separate, secluded location. (Trial Tr. (10/31/2023) 13:12–14:7; Trial Tr. (11/1/2023) 31:5–16).

These facts do not support a finding that Mr. Maldonado engaged in sexual contact knowing, or with reason to know, that he did not have A.R.'s permission. The Complainant was engaged in conversation with Mr. Maldonado at the time, she was coherently texting multiple other individuals, she was aware of her surroundings (such as the presence of other people), and, according to her testimony, she had the capacity to stop the sexual encounter by moving, standing up, and eventually walking to another location with Mr. Maldonado. The record further reflects that in the moments leading up to this encounter, A.R. and the Complainant were

flirting, touching, kissing, and even discussing oral sex, building on a conversation and touching that had occurred earlier at the club. *Contra Harkins v. United States*, 810 A.2d 895, 901 (D.C. 2002) (finding sufficient evidence of knowledge where victim recoiled from defendant's touch, exclaimed, "No, you can't do that," in response to defendant's touch, and repeatedly moved away from defendant); *Olafisoye v. United States*, 857 A.2d 1078, 1086 (D.C. 2004) (finding sufficient evidence of knowledge where defendant continued to touch victim's breasts after victim instructed defendant to stop); *Hughes v. United States*, 150 A.3d 289, 306–07 (D.C. 2016) (finding sufficient evidence where defendant's touching caused physical injury to victim and victim instructed defendant not to hit her on the buttocks again).

Despite this record evidence, the court found that Mr. Maldonado should have known he did not have A.R.'s consent because there was not a discussion wherein Mr. Maldonado expressly stated he was going to perform oral sex "right there, right then" prior to doing so. But a requirement that there be a discussion of the specific sexual contact prior to

occurrence is not the standard for consent. As defined by D.C. Code § 22-3001(4), consent can come in the form of "words" or "actions" that "indicat[e] a freely given agreement to the sexual act or contact in question." The Government had the burden of demonstrating that, despite A.R.'s overt actions of touching and kissing Mr. Maldonado and their sexually charged conversations, Mr. Maldonado should have known he did not have her consent. The trial court's own holding demonstrates that the Government did not satisfy this burden.

Most tellingly, the trial court itself acknowledged that the evidence of sexual abuse is "less clear" with respect to Count II. To satisfy the standard of "proof beyond a reasonable doubt," the court was required "to reach a subjective state of near certitude of the guilty of the accused." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This standard requires more than proof that guilt is "highly probable." *(Darius) Smith v. United States*, 709 A.2d 78, 82 (D.C. 1998) (en banc). An essential component of due process, proof beyond a reasonable doubt demands acquittal where there is "the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to

hesitate to act in the graver and more important matters of life." *Rivas v. United States*, 783 A.2d 125, 133 (D.C. 2001) (quoting *Smith*, 709 A.2d at 82). This is exactly the type of doubt the court expressed when it acknowledged that the evidence of guilt was "less clear" with respect to Count II, and it is exactly the doubt that is demanded by the evidence in the record.

Because the Government did not prove, and the trial court did not find, that Mr. Maldonado knew or should have known that he did not have A.R.'s consent for oral sex beyond a reasonable doubt, this Court must reverse Mr. Maldonado's conviction of guilt with respect to Count II.

II. The trial court lacked sufficient evidence to find Mr. Maldonado guilty of sexual abuse by vaginal penetration beyond a reasonable doubt.

Although the court was less equivocal in its finding with respect to Count I than Count II, the evidence still failed to support a finding of guilt beyond a reasonable doubt.

As noted, the court relied primarily on the videos that A.R. recorded on her phone, which fail to capture the first fifteen minutes that Mr. Maldonado and A.R. were in the secluded area and at least ten essential

minutes after A.R. said "no" and Mr. Maldonado immediately stopped the sexual activity. In summarizing the video and audio that is available, the court expressly acknowledged that Mr. Maldonado repeatedly asked for A.R.'s consent and that he requested clarity about whether she enjoyed certain acts and wanted them to continue. The court then acknowledge that when A.R. made clear she did not want the sexual encounter to continue, Mr. Maldonado stopped. However, to undermine Mr. Maldonado immediately respecting A.R.'s wishes, the court reasoned that "having to ask [for clarity] means that it was not clear."

The court then determined that the unwanted sexual act was depicted in the second video, more than ten minutes after the initial video ended. Specifically, the court noted that the Complainant's "feet and legs are clearly up in the air," which the court "believe[d] was additional penetration at that point between the defendant's penis and the complainant's vagina in sexual intercourse." (Trial Tr. (12/12/2023) 14:11–20). Because the court found that this intercourse occurred after A.R. "indicated she was not sober," it

concluded Mr. Maldonado should have known that he did not have consent for the actions.

As an initial matter, the court's statement that asking for clarity means consent is not clear, suggesting culpability, is an exceptionally dangerous finding unsupported by the law. Finding an individual guilty of sexual abuse *because* he asked for consent and checked in with his sexual partner throughout the encounter runs in direct conflict with the societal call for affirmative consent. Should this "don't ask, don't tell" holding stand, individuals will be discouraged from checking in with their sexual partners, increasing the risk of unintentional sexual discomfort and shame.

Second, the court's findings that (1) sexual intercourse occurred in the second video; and (2) that intercourse must have been without consent are riddled with reasonable doubt.

With respect to the conclusion that sexual intercourse was depicted in the second video based on the barely visible placement of the individuals' bodies, the Government did not offer any evidence to support the court's finding. For instance, A.R. did not testify to what occurred in this portion of

the video. Mr. Maldonado, on the other hand, testified that he believed he was massaging the Complainant's legs at this time. This uncontroverted testimony is equally supported by the video evidence as is any conclusion of penetration. Therefore, without more, the court could not conclude, beyond a reasonable doubt, that sexual intercourse was occurring. *See Smith*, 709 A.2d at 82.

But even if the video does show sexual intercourse, there was not sufficient evidence from which the court could conclude, beyond a reasonable doubt, that Mr. Maldonado knew he did not have A.R.'s consent. The only evidence to which the court points to support its conclusion is that ten minutes prior, the Complainant stated she was not sober. But a lack of sobriety is not synonymous with incapability. *Cardozo v. United States*, 255 A.3d 979, 985 (D.C. 2021), *vacated in part on other grounds, Cardozo v. United States*, ___ A.3d ___, 2024 WL 2338633 (D.C. 2024) (en banc).

In *Cardozo*, this Court explored the meaning of "incapable" for purposes of sexual consent. *Id.* Reviewing the ordinary meaning of "incapable" and extra-jurisdictional precedent, the Court observed that

"incapable" generally refers to a lack of power, capacity, or fitness, and often refers to a permanent or long-term disability. *Id.* The Court then observed that, in other jurisdictions, short-term impairment by drugs or alcohol *can* satisfy the standard for incapability, but this Court in no way concluded that inebriation can, much less necessarily does, equal incapability under D.C. law. *Id.* In fact, the Court determined that it was not necessary to determine whether incapability can arise from temporary circumstances at all because, under the facts of the case, the victim was clearly capable of giving consent. *Id.* In reaching this conclusion, this Court emphasized that the victim was "capable of appraising the nature of [the defendant's] conduct, declining participation in the sexual contact, and communicating unwillingness to engage in that contact." *Id.*

So, too, here. As the record reflects, A.R. was aware of her surroundings, she consciously decided to initiate a recording on her phone, she had sufficient capacity to complete the multiple steps necessary to begin a recording, she had the capacity to articulate her condition to Mr. Maldonado ("not sober"), and she had the ability to choose whether to

participate in sexual activity and to articulate her desires to Mr. Maldonado, as reflected in the first video. Based on these facts, A.R.'s previous statement that she was "not sober" does not support the conclusion that Mr. Maldonado knew or should have known she was incapable of consenting to sexual activity.

Further highlighting the insufficiency of the evidence regarding Count I, the Government failed to offer any evidence as to what occurred in the intervening ten minutes between the first video, when A.R. stated she was not sober, and the second video. Without any evidence regarding the communications or actions that occurred between A.R. and Mr. Maldonado—which was the Government's burden to provide—it is impossible to determine what happened prior to the second video being filmed, any consent that may have been provided, or any overt actions or statements A.R. may have made to lead Mr. Maldonado to reasonably believe he had A.R.'s consent. *Swinton v. United States*, 902 A.2d 772, 776 n.6 (D.C. 2006) ("[G]aps in the evidence . . . are not to be filled by conjectures, guesses or assumptions."); *Washington v. United States*, 965 A.2d 35, 44 n. 29

(D.C. 2009) (emphasizing that a "gap [in evidence] alone can be enough to sustain a reasonable doubt").

In *Hector v. United States*, this Court held that where a defendant's testimony was not "implausible, incredible, nor inherently inconsistent, and the government provided no other evidence of guilt that may have corroborated an inference [regarding *mens rea*]," the court cannot "fill the gap left by the government[]" to find the defendant guilty. 883 A.2d 129, 134 (D.C. 2005). Yet that is exactly what occurred here. Despite the Government's failure to provide evidence regarding what occurred in the ten minutes without video recording, the court made a negative inference against Mr. Maldonado's testimony to fill in the missing pieces and conclude that he did not have A.R.'s permission for sexual activity. This reasoning cannot support a guilty verdict.

Because the Government failed to offer any evidence about what occurred in the intervening ten minutes between the two videos, it is simply impossible to conclude, beyond a reasonable doubt, that Mr. Maldonado engaged in sexual intercourse with A.R. when he should have known he did

not have her consent to do so. Therefore, Mr. Maldonado's conviction must be vacated with respect to Count I.

CONCLUSION

For the foregoing reasons, Mr. Maldonado respectfully requests that this Court vacate the trial court's judgment and sentence.

Respectfully submitted:

By: */s/ James W. Kraus*

James W. Kraus (DC Bar No. 471945)
KRAUS JENKINS PLLC
650 Massachusetts Avenue, NW
Suite 600
Washington, DC 20001
(202) 888-7681
jkraus@krausjenkins.com

Counsel for Appellant Eduardo Maldonado

Date: June 18, 2024

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of foregoing Opening Brief has sent via this Court's e-filing system to:

Chrisellen Kolb, Esquire
Chief, Appellate Division
United States Attorney's Office
601 D Street, NW
Washington, DC 20530-0034
Chrisellen.R.Kolb@usdoj.gov

By: /s/ James W. Kraus
JAMES W. KRAUS, ESQUIRE
KRAUS JENKINS PLLC
Counsel for Appellant Eduardo Maldonado

Date: June 18, 2024