BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-7

EDUARDO MALDONADO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
AMANDA SWANSON
* DYLAN M. ALUISE
D.C. Bar # 90018755
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Dylan.Aluise@usdoj.gov
(202) 252-6829

Cr. No. 2023-CF1-2066

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

ISSUES PRESENTED

I. Whether there was sufficient evidence to prove misdemeanor sex abuse (MSA) when the defendant exposed the victim's genitalia on public steps next to a busy pedestrian sidewalk and put his mouth on her vulva without ever seeking or obtaining her permission to perform that public sex act.

II. Whether there was sufficient evidence to prove MSA when the defendant had sexual intercourse with the heavily intoxicated victim after she told him "no" and that she was "not sober" in response to his attempts to initiate sex, when the defendant had been drinking with the victim that evening, had to support her while she struggled to walk, lied about his relationship with the victim when confronted by a security guard at the bar, and fled after the victim reported the rape to a Good Samaritan.

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 24-CF-7

EDUARDO MALDONADO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 11, 2023, appellant Eduardo Maldonado was charged by information with four counts of misdemeanor sexual abuse (MSA), in violation of D.C. Code § 22–3006 (Record on Appeal (R.) 67 (PDF) (Information)). Following a bench trial before the Honorable Judith A. Smith, the trial court convicted Maldonado of two counts of MSA and acquitted him of the other two counts (12/12/23 Transcript (Tr.) 31). On December 12, 2023, Judge Smith sentenced Maldonado to consecutive

terms of 180 days in prison and suspended that sentence in favor of two years of supervised probation (*id.* at 42; R. 123 (PDF) (Judgment & Commitment Order)). On January 3, 2024, Maldonado filed a timely notice of appeal (R. 124 (PDF) (Notice of Appeal)).

The Trial

The Government's Evidence

Shortly after midnight on September 17, 2022, Maldonado performed cunnilingus on A.R. on a public staircase near Rhode Island Avenue NW and Dupont Circle without seeking or obtaining her consent (10/23/23 Tr. 39, 10/31/23 Tr. 9–14; see Government's Exhibit (Exh.) 3).[1] A few minutes later, Maldonado led the heavily intoxicated A.R. to a garden around the corner and had intercourse with her after she told him "no" and that she was "not sober" (10/31/23 Tr. 14–21, 34–48; Exhs. 12–18).

A.R., a 21-year-old woman, began that evening drinking before meeting up with some friends at the Dupont Circle bar Decades (10/23/23 Tr. 39–40, 10/31/23 Tr. 57). While at the bar, she met Maldonado, a

[1] The government's exhibits were transmitted by the trial court and incorporated into the record on March 25, 2024.

stranger (10/23/23 Tr. 40–44). Maldonado and A.R. drank, talked, kissed, and danced (*id.* at 43–47; see, e.g., Exh. 1 at 11:33:00–11:43:40).[2] A.R. became increasingly intoxicated as the night progressed.[3] Maldonado assisted her to the bathroom where a Decades security guard eventually found her in the fetal position on the floor next to the toilet (10/24/23 Tr. 53–58; see Exh. 1 at 11:47:09–11:51:22). A.R. then struggled to navigate the stairs as she left the bar with Maldonado (10/24/23 Tr. 57–60; see 10/23/23 Tr. 54–56; Exh. 2). Indeed, recognizing that A.R. was "definitely drunk" and "not sober," the same security guard felt compelled to check on A.R.'s well-being and ensure she was safe (10/24/23 Tr. 59–60, 65, 67, 70–71; see 10/23/23 Tr. 54).[4] Based on A.R.'s level of intoxication at that point, the guard testified that she would not have permitted A.R. to reenter the bar (10/24/23 Tr. 59–60, 65, 67, 70–71).

---

[2] While dancing, Maldonado forced A.R.'s hand down his pants (10/23/23 Tr. 45). A.R. removed her hand and continued dancing with him (*id.*).

[3] Because of how much A.R. had to drink, she explained that there are portions of that evening that she is unable to recall (see 10/31/23 Tr. 17, 89).

[4] The guard asked Maldonado if he knew A.R., and Maldonado falsely assured the guard that he had known A.R. for five months (10/23/23 Tr. 60).

After exiting the bar, A.R. attempted to order a rideshare car to take her home using an application on her phone; she had no intention of going home with Maldonado (10/23/23 Tr. 53, 57–58; 10/31/23 Tr. 123–24).[5] By now, A.R. was so intoxicated that she could not enter her address into the rideshare application, which prompted Maldonado to offer to assist her with typing on her phone (10/23/23 Tr. 57–58). Maldonado then "dragged" A.R. away from the bar and to a nearby staircase leading up from the sidewalk on Rhode Island Avenue to wait for a rideshare (10/23/23 Tr. 59–62; 10/31/23 Tr. 9–11). A.R. lay down on the steps while attempting to operate her phone (10/31/23 Tr. 9–11). Without asking for or obtaining A.R.'s permission, Maldonado put his mouth on A.R.'s vulva as she lay on the steps (10/31/23 Tr. 11–14). In her inebriated state, A.R. did not initially feel what Maldonado was doing but immediately got up

[5] While at the bar, A.R. texted a friend that Maldonado was trying to bring her home (10/31/23 Tr. 70). She texted another friend asking to "save" her and to "remove [her] from the situation" (*id.* at 124–25). A.R. never agreed to go home with Maldonado or to have him come over to her house (*id.* at 123–24).

to stop him once she realized what was happening because it was "in public" and "awkward" (*id.* at 13).[6]

Maldonado led A.R. away from the steps to a small garden nearby that was partially shielded from the sidewalk by a wall (12/31/23 Tr. 13–15; see Exhs. 5–6). A.R. was unable to walk straight and relied on Maldonado's assistance to move (see Exh. 3 at 12:12:37–12:13:14). A.R. collapsed on the ground next to Maldonado once they arrived at the garden area around 12:15 a.m. (10/31/23 Tr. 15, 18–20; see Exh. 12 at 00:14:40–00:14:50). Maldonado saw A.R. on the ground and began "humping" her (10/31/23 Tr. at 15–16). He then engaged A.R. in intercourse, cunnilingus, and fellatio after she told him not to do so and explained that she was not sober (*id.* at 15–17, 34–39; see Exhs. 13, 14).

Although A.R. eventually "blacked out" from intoxication in the garden area, out of "instinct," she recorded on her phone portions of the roughly 30 minutes that she and Maldonado spent in that area (10/31/23 Tr. 17–18, 34–39, 88–89, 95). In a recording from 12:30 a.m., A.R. pleaded

---

[6] As shown in surveillance footage, several pedestrians walked by those steps on the sidewalk just feet from where Maldonado and A.R. were located (see generally Exh. 3 at 12:08:00–12:12:37; see also 10/31/24 Tr. 13).

with Maldonado several times, "please, I'm not sober" (Exh. 13 at counter 0:00–0:17; see 10/31/23 Tr. 34–36, 98–99). Maldonado acknowledged the pleas but kept escalating the sexual encounter (Exh. 13 at counter 0:06–0:32). A.R. moaned "no" when Maldonado asked if he could "do that, please" (*id.* at counter 0:32–1:38). Maldonado then asked if A.R. "like[d] it" and if "that" was "OK" (*id.* at counter 1:38–2:05). A.R. cried, "ow, f**k" and firmly told Maldonado, "no" (*id.*). After A.R. told him, "no," and that she was "not sober," Maldonado nevertheless initiated various sex acts with A.R., including multiple instances of intercourse (10/31/23 Tr. 34–39).

A second recording from about 10 minutes later captured Maldonado again having intercourse with A.R. (Exh. 14; 10/31/23 Tr. 36–39, 101–02). That video depicts Maldonado rhythmically moving on top of A.R. with her leg over his shoulder as A.R. painfully groans (see generally Exh. 14). During that video, Maldonado asked A.R. if she "like[d his] d**k," assured her not to "worry" because he was "not going to finish inside of [her]," asserted that she "know[s she] like[d] this s**t," and told her that he was "glad [they] had sex" and was "very happy about that" and does not want her to "forget that" (*id.* at counter 0:15–1:10).

Less than five minutes after that video, A.R. ran away from the garden area followed by Maldonado (10/31/23 Tr. 43–49; see Exh. 18 at 00:48:24–00:48:35). She stumbled and fell on the sidewalk outside the garden, which captured the attention of two men in the area (10/31/23 Tr. at 48–49; 10/23/23 Tr. 26–27). By this time, A.R. was visibly "very drunk" such that she could "barely walk," was unable to stand up on her own, and "couldn't really . . . speak" (10/23/23 Tr. 27). She managed to tell the men that Maldonado had just raped her (10/23/23 Tr. 31; 10/31/23 Tr. 49). The men confronted Maldonado, who claimed that he and A.R. were "just making out"; Maldonado then fled the scene (10/23/23 Tr. 31–32; 10/31/23 Tr. 49–50).

Police officers and an ambulance took A.R. to the hospital for treatment and a forensic sexual assault examination (10/31/23 Tr. 50, 89).[7] An investigation by Metropolitan Police Department Detective Stephanie Garner tracked down Maldonado based on surveillance

[7] On police body-worn camera footage from approximately 45 minutes after the sexual assault, A.R. is unable to walk on her own and is barely able to speak coherently (Exh. 19 at 01:30:14–01:30:49).

footage from the Decades bar and credit-card information obtained from the bar (10/24/23 Tr. 20–32).

The Defense Evidence

Maldonado confirmed that he met A.R. at Decades and that they drank, flirted, and danced together (11/1/23 Tr. 21–24).[8] He claimed that A.R. told him that she was good at performing fellatio and that they left the bar planning to go home together (*id.* at 24–25). He confirmed that A.R. struggled a bit to get down the stairs but claimed to believe that was due to her high heels (*id.* at 26, 44).[9]

Maldonado explained that he led A.R. to the steps leading up from the Rhode Island Avenue sidewalk so that she could order a rideshare and they could plan on how to spend the night together at one of their homes or a hotel (11/1/23 Tr. 27–29). He claimed that, while they were on the staircase, he told A.R. that he was also good at oral sex and would

---

[8] According to Maldonado, it was A.R. who stuck her hand down his pants on the dancefloor (11/1/23 Tr. 22). Maldonado also denied seeing A.R. drink a lot at the bar (*id.* at 44).

[9] Maldonado acknowledged that he spoke with a security guard about A.R. as they went down the stairs but denied that he ever told the guard that he had known A.R. for five months (11/1/23 Tr. 26, 45).

"show" her, which made A.R. "giggle[]" (*id.* at 29–30). Without any attempt to obtain A.R.'s permission to perform cunnilingus on her in public, Maldonado admitted that he proceeded to put his mouth on A.R.'s vulva while she lay on the steps (*id.*). According to Maldonado, he felt it would be a "hassle" to wait a few minutes longer to take a rideshare home with A.R. before initiating sexual relations (*id.* at 47). Maldonado claimed that he stopped performing cunnilingus on A.R. because they were only a few feet from the busy sidewalk, and it would be "indecent" to do something "sexual" in "public" (*id.* at 30).

Maldonado led A.R. away from the steps to a nearby garden behind a wall (11/1/23 Tr. 31). Just after arriving, he saw A.R. on the ground and thought to himself, "okay" (*id.* at 32). He got on the ground and started kissing her, licking her breasts, inserting his fingers into her vagina, and "gauging" her reactions to his sexual advances (*id.* at 32–34). He claimed that A.R. voluntarily began performing fellatio on him, that she was "enjoying" the experience, and that she was directing his sexual acts (*id.* at 33–34, 49–50).

Maldonado admitted that he had intercourse with A.R. and that it "shocked" her (11/1/23 Tr. 34). According to Maldonado, he removed his

penis from A.R.'s vagina when she told him that she did not want to have sex and that she was not sober (*id.* at 34–35). He explained that he believed A.R. was trying to communicate that she was "okay with sex" but was instead "uncertain" about "long, procrastinated sex" because it "could lead to pregnancy," which was why he assured her they were not going to conceive a child (*id.* at 58; *see id.* at 32–33). He characterized A.R. as becoming increasingly "frigid" toward him as he attempted to "gauge" her willingness to engage in further sexual acts in the garden (*id.* at 35, 54–55, 63–64). Maldonado variably testified that he did not have sex with A.R. again but also that he was "not sure" if he had sex again after she told him no and that she was not sober (*id.* at 38, 54–57).[10]

Maldonado acknowledged that two men on the sidewalk confronted him after speaking to A.R. just after she exited the garden area; hed claimed that he left because the men got aggressive with him (11/1/23 Tr. 39–41). According to Maldonado, A.R. had never told him that anything was wrong (*id.* at 40).

---

[10] Maldonado attempted to explain that his rhythmic movements with A.R.'s foot slung over his shoulder in Exhibit 14 was a "massage," although he was unable to identify what type of massage that could be (*id.* at 57–58).

The Trial Court's Findings of Fact and Verdict

In finding Maldonado guilty of two counts of MSA, the trial court concluded that Maldonado knew or should have known that he did not have A.R.'s permission to (1) put his mouth on A.R.'s vulva while she was reclined on the public staircase (12/1/23 Tr. 7, 28–29), and (2) insert his penis into A.R.'s vagina on multiple occasions in the garden area after she told him not to do so and stated that she was not sober (*id.* at 8–14, 27–31).[11] In making the latter determination, the trial court explained that it carefully reviewed Exhibits 13 and 14 and expressly found that Maldonado had sexual intercourse with A.R. in both videos (*id.* at 12–14).

As to Maldonado's mens rea generally, the trial court determined that any flirtations or kissing at the bar did not furnish "blanket consent" for Maldonado's "subsequent sexual acts" (12/12/23 Tr. 24–25). For the

---

[11] In reaching its verdict, the trial court credited the testimony of the government's witnesses (12/12/23 Tr. 16–21), noting that (1) it placed no weight on the bar security guard's opinion testimony on the effects of alcohol (*id.* at 17–18), and (2) it credited A.R.'s testimony despite her self-admitted lack of memory of portions of the evening (*id.* at 18–21). The court observed that the testimony of other witnesses as well as surveillance footage corroborated A.R.'s account of events (*id.* at 20–21). By contrast, the trial court found portions of Maldonado's testimony "inconsistent," including his claimed lack of awareness of how A.R. ended up on the ground of the garden (*id.* at 23).

cunnilingus on the stairs, the court found that Maldonado never asked A.R. if he could perform cunnilingus on her in public and instead just initiated that sexual act (*id.* at 6–7, 28–29). Recognizing that the legal definition of consent requires words or overt action freely given to signify agreement to a specific sexual act, the trial court determined that Maldonado should have known from the lack of any discussion with A.R. about performing cunnilingus in public that he did not have her permission through words or overt actions to perform that specific sex act in that setting (*id.* at 27, 29–31). And the court noted that its finding was corroborated by A.R. immediately terminating the oral sex once she realized it was happening (*id.* at 28–29).

For the sexual intercourse in the garden, the trial court found that by telling Maldonado, "no," and advising that she was "not sober," A.R. conveyed to Maldonado her "clear lack of consent" to sexual intercourse (12/12/23 Tr. 26; see *id.* at 30). The court determined that, after A.R. made her lack of consent "clear," Maldonado nevertheless proceeded to insert his penis into her vagina on at least two separate occasions (*id.* at 26; see *id.* at 8–14, 30). The court observed that there was no testimony or evidence that A.R. ever changed her mind and consented (*id.* at 26–

27). Moreover, A.R. explicitly told Maldonado that she was not sober, and her level of intoxication should have been obvious to Maldonado from their time drinking together, his actions helping her walk, and her collapsing in the garden right next to him (*id.* at 21–25; 30–31). Maldonado's observations of A.R.'s "frigid[ity]" during the sexual encounter also contributed to his knowledge that she did not consent (*id.* at 26). Accordingly, the trial court found that Maldonado knew or should have known he did not have A.R.'s permission to insert his penis into her vagina (*id.* at 22–28).[12]

SUMMARY OF ARGUMENT

The evidence was sufficient to convict Maldonado on both counts of MSA. *First*, the trial court correctly applied the law governing consent, which requires words or overt actions manifesting a person's freely given agreement to the specific sexual act in question, to determine that

[12] The trial court acquitted Maldonado of the charged non-consensual cunnilingus and fellatio in the garden, finding that the government had not proven beyond a reasonable doubt that those acts occurred after A.R. gave a "clear . . . indication of no consent" as depicted in Exhibit 13 (12/12/23 Tr. 29–30; see *id.* at 26).

Maldonado knew or should have known that he did not have A.R.'s consent to have oral sex in public. As the trial court recognized, Maldonado never sought or received A.R.'s permission to expose her genitalia and put his mouth on her vulva while she was reclining on public steps just feet from pedestrians on a busy sidewalk. Because Maldonado nevertheless initiated cunnilingus, the trial court appropriately found that he knew or should have known that he did not have A.R.'s permission to perform that public sex act.

Second, the trial court did not clearly err in finding that Maldonado had intercourse with A.R. after she told him, "no," and that she was "not sober." The trial court carefully reviewed video evidence capturing two separate instances in which Maldonado had sex with A.R. and credited A.R.'s testimony that Maldonado performed various sex acts on her after she withheld her consent. Indeed, because A.R. made her lack of consent clear by telling Maldonado, "no," and that she was "not sober," the trial court correctly found that he knew or should have known he did not have A.R.'s permission to initiate sexual intercourse. A.R.'s lack of consent was further established by the fact that she had "blacked out" in the garden before the intercourse occurred and remained severely intoxicated later

when police arrived. Furthermore, Maldonado's own conduct evidenced his knowledge of A.R.'s vulnerable state: he falsely claimed to have had an on-going relationship with A.R. when confronted by the security guard and he fled after A.R. promptly reported the rape to a concerned citizen.

ARGUMENT

There Was Sufficient Evidence to Support Maldonado's MSA Convictions for Initiating Oral and Vaginal Sex Without A.R.'s Permission.

A. Standard of Review and Applicable Legal Principles

This Court reviews challenges to the sufficiency of the evidence de novo. *Hughes v. United States*, 150 A.3d 289, 305 (D.C. 2016). It will not reverse a conviction if "*any* rational trier of fact could have found the essential elements charged beyond a reasonable doubt." *Bassil v. United States*, 147 A.3d 303, 307 (D.C. 2016) (cleaned up) (emphasis in original). Thus, it is appellant's "heavy burden" to show that there was "no evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." *Dorsey v. United States*, 154 A.3d 106, 112 (D.C. 2017) (citation omitted). In assessing the evidence, the Court views the record "in the light most favorable to the government, drawing all reasonable

inferences in [its] favor, and giving deference to the [fact-finder]'s right to determine credibility and weight." *Bruce v. United States*, 305 A.3d 381, 392 (D.C. 2023) (cleaned up).

Following a bench trial, the Court reviews a trial court's factual findings for clear error. *District of Columbia v. Bongam*, 271 A.3d 1154, 1162 (D.C. 2022); *see* D.C. Code § 17–305(a). When there are "two permissible views of the evidence," the trial judge's "choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 573–74 (1985) (cleaned up). That is so even when its "findings do not rest on credibility determinations, but are based instead on . . . documentary evidence or inferences from other facts." *Id.* (cleaned up). If the trial court's factual findings are "plausible" based on the record, then this Court "may not reverse" them even if it "would have weighed the evidence differently." *Id.* (cleaned up).

To establish MSA based on a sexual act, the government must prove: (1) the defendant committed a sexual act, and (2) knew or should have known that he did not have the complainant's permission to initiate that act. *Mungo v. United States*, 772 A.2d 240, 244–45 (D.C. 2005); *see* D.C. Code § 22–3006(a). Sexual acts include "penetration, however slight,

of the . . . vulva of another by a penis," and "[c]ontact between . . . the mouth and the vulva." D.C. Code §§ 22–3001(8)(A), (B). Although the statute does not define "permission," this Court has recognized that it is synonymous with "consent." *Davis v. United States*, 873 A.2d 1101, 1104 (D.C. 2005). Consent is defined as "words or overt actions indicating a freely given agreement to the sexual act or contact in question." D.C. Code § 22–3001(4).

B. Maldonado Knew or Should Have Known That He Did Not Have A.R.'s Permission When He Initiated Cunnilingus in Public Without Seeking or Obtaining Her Consent.

The trial court correctly determined that the government established beyond a reasonable doubt that Maldonado knew or should have known that he did not have A.R.'s permission to perform cunnilingus on her in public (12/12/23 Tr. 28–29). As the court observed, Maldonado never sought or received A.R.'s permission before initiating that public sex act (12/12/23 Tr. 7, 28–29; see 10/31/23 Tr. 12; 11/1/23 Tr. 29–30). Recognizing that consent turns on words or overt actions manifesting an agreement to the specific sexual act in question, the court correctly determined that Maldonado knew or should have known that

he did not have A.R.'s permission to perform oral sex on her on the public steps (12/12/23 Tr. 28–31).[13]

Maldonado argues (Br. 16–17) that it is unnecessary to obtain a person's consent for a "specific sexual contact prior to [its] occurrence," and claims that he did not know he lacked A.R.'s permission because of their earlier flirtations and discussions of going home or to a hotel to have sex. The Court should reject this contention. As the trial court correctly observed, consent turns on whether a person uses "words or overt actions indicating a freely given agreement to the sexual act or contact *in question*." D.C. Code § 22–3001(4) (emphasis added). Thus, the trial court appropriately rejected Maldonado's claim here that earlier flirtations, kissing, and discussions about going home or to a hotel to have sex provided blanket authority from A.R. to engage in sexual acts anywhere at any time, let alone provide specific permission to perform cunnilingus

[13] Maldonado argues (Br. 15) that A.R. had the capacity to stop the sexual encounter by moving or standing up. That is of no consequence. The relevant inquiry for MSA is whether Maldonado knew or should have known that he did not have A.R.'s permission to initiate oral sex while they were in public. *See* D.C. Code § 22–3006(a). That A.R. had the capability of terminating the sexual encounter after it started has no bearing on whether Maldonado knew or should have known that he had A.R.'s permission ex ante to initiate that public sex act.

on the public steps (see 12/12/23 Tr. 25, 27–29).[14] *See, e.g.*, *Hailstock v. United States*, 85 A.3d 1277, 1279–82 (D.C. 2014) (finding evidence sufficient to support mens rea for MSA when defendant intended to have sexual contact with victim without first obtaining her consent to that specific act).

Maldonado further claims (Br. 17-18) that the trial court convicted him of MSA in connection with the public act of oral sex based upon a standard less than beyond a reasonable doubt. Although Judge Smith characterized the evidence related to Maldonado's non-consensual public cunnilingus as "slightly less clear" than A.R.'s expression of a "clear lack of consent" when she explicitly told Maldonado "no" and "I'm not sober" before he initiated intercourse, Judge Smith expressly found that the "government has met its burden" to prove MSA as to the public act of oral

[14] Indeed, it defies reason to assume that A.R. would have risked arrest to have sex with Maldonado in such a public place when she could have waited just a few minutes for a car to take them home. *See* D.C. Code § 22–1312 (engaging in public sex acts and exposing one's genitals in public are crimes punishable by up to 90 days in prison); *see also Torney v. United States*, 300 A.3d 760, 782–83 (D.C. 2023) (reasoning that, in the absence of affirmative evidence of consent, it is "common sense" that "an individual would not choose to have anal sex" with a stranger in a yard when "she could have done so just steps away, inside her house").

sex (12/12/23 Tr. 26, 28, 30; see also *id.* at 27 (reciting burden and elements for MSA)). Trial judges are presumed to know the law and thus understand that the government must prove each element of an offense beyond a reasonable doubt to convict a criminal defendant. *Saidi v. United States*, 110 A.3d 606, 613 (D.C. 2015). That is exactly what the trial court did here.

C. Maldonado Knew or Should Have Known That A.R. Did Not Consent to Sex When He Had Intercourse With Her After She Told Him "No" and "I'm Not Sober."

The trial court also correctly found beyond a reasonable doubt that Maldonado knew or should have known he did not have A.R.'s permission to have sexual intercourse after she signaled a "clear lack of consent" by telling him, "no," and that she was "not sober" (12/12/23 Tr. 12–14, 26, 30).

First, contrary to Maldonado's claim (Br. 20–21), the trial court did not clearly err in finding that Maldonado was having sexual intercourse with A.R. in Exhibit 14 (12/12/23 Tr. 13–14). The trial court reached that reasonable conclusion based on observing A.R.'s "feet and legs . . . up in the air," Maldonado "moving" on top of her between her legs, A.R.'s

repeatedly yelping "ow," and Maldonado making statements such as, "[d]o you like my d**k," and, "I'm not going to finish inside of you" (12/12/23 Tr. 13–14; see Exh. 14). A.R. also testified that Maldonado had sex with her after she told him that she was not sober in Exhibit 13 (10/31/23 Tr. 36; see *id.* at 38). And Maldonado conceded that he was "not sure" if he was having sex with A.R. in Exhibit 14 (11/1/23 Tr. 38, 57). The court's factual finding that Maldonado had sexual intercourse with A.R. in Exhibit 14 was a "plausible" and "permissible view" of the evidence and its reasonable inferences, and thus should not be reversed on appeal. *See Anderson*, 470 U.S. at 573–74.

Maldonado also claims (Br. 23–25) that the trial court erred by assuming that A.R. did not consent to sex in the 10-minute period between when she said, "no," and "I'm not sober" in Exhibit 13 and when Maldonado had sexual intercourse with her again in Exhibit 14. There was no error. To start, there was no evidence—from Maldonado's testimony or otherwise—that A.R. reversed her earlier position and freely consented to sexual intercourse with Maldonado in that short window. On the contrary, A.R. testified explicitly that Maldonado had sex with her after she told him no and that she was not sober in Exhibit 13

(10/31/23 Tr. 34–39). Moreover, it defies common sense to conclude that A.R. entered the garden unable to walk or stand without assistance (see Exh. 3 at 12:12:37–12:13:14; Exh. 12 at 00:14:40–00:14:50), miraculously regained sobriety and voluntarily consented to sex during that 10-minute period after telling Maldonado that she was not sober, and then resumed such an extreme state of intoxication minutes later when she was barely able to walk or speak (see 10/23/23 Tr. 27). The trial court's finding (12/12/23 Tr. 26–27) that A.R. did not voluntarily consent to sex in the garden was thus amply supported by the evidence and reasonable inferences therefrom. *See Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) (distinguishing between the "vast range of reasonable inferences" finders of fact may draw from the evidence and unmoored "speculation" and "conjecture") (citation omitted); *see also Olafisoye v. United States*, 857 A.2d 1078, 1087 (D.C. 2004) (finding evidence of MSA sufficient when defendant touched victim's breasts days after she told him to stop doing so).[15]

[15] Even if the trial court's factual findings regarding Exhibit 14 were plainly erroneous, there is still sufficient evidence to sustain Maldonado's conviction for MSA based on unconsented vaginal intercourse. The trial court found that Maldonado had sexual intercourse with A.R. in Exhibit
(continued . . .)

Second, the evidence supported the trial court's conclusion beyond a reasonable doubt that Maldonado knew or should have known that he did not have A.R.'s permission when he had sexual intercourse with her after she expressed a "clear lack of consent" by telling him "no" and that she was "not sober" as he escalated the sexual encounter (12/12/23 Tr. 12–14, 23, 26–28, 30; see 10/31/23 Tr. 34–39; 11/1/23 Tr. 34–35, 38, 57; Exhs. 13, 14).

As an initial matter, there is only one reasonable way to interpret the response "I'm not sober" in the context of asking whether a partner consents to a sexual act after a night out drinking: that the partner cannot—and does not—voluntarily consent to that act.[16] *See, e.g.*,

---

13 after she told him that she was "not sober," which indicated to Maldonado her "clear lack of consent" (12/12/23 Tr. 12–13, 26, 30; see also 10/31/23 Tr. 34–39; Exh. 13).

[16] Beyond A.R. explicitly telling Maldonado that she was not sober, the trial court also correctly observed that A.R.'s level of intoxication and cognitive impairment would have been obvious to Maldonado (12/12/23 Tr. 21–25, 30–31). Prior to having sex with her, Maldonado witnessed A.R. having such extreme difficulty typing on her phone that he offered to help her with that simple task (10/23/23 Tr. 58); he had to support her as she struggled to maintain balance and walk straight (see Exh. 3 at 12:12:37–12:13:14); and he was right next to her as she collapsed to the ground in the garden (10/31/23 Tr. 15, 18–20; 11/1/23 Tr. 32, 49; see Exh. 12 at 00:14:40–00:14:50).

Augustin v. United States, 240 A.3d 816, 820 (D.C. 2020) (noting that the District's sexual-abuse statute prohibits "the commission of a sexual act . . . without the victim's consent . . . by taking advantage of the victim's . . . impairment") (cleaned up); *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (observing that sexual abuse "might involve proof of the victim's intoxication" as evidence of non-consent) (citation omitted).[17] The trial court's conclusion that A.R.'s intoxication provided a "clear" signal to Maldonado that A.R. did not consent to sex reflects that common-sense conclusion (12/12/23 Tr. 12–14, 26–27, 30).

And beyond her intoxication, there is no clearer way for a person to express that he or she does not consent to a sexual act than by saying "no," as A.R. did here. *See, e.g.*, *Hughes v. United States*, 150 A.3d at 305–

[17] Maldonado incorrectly asserts (Br. 25–26) that *Cardozo v. United States* supports his claims. 255 A.3d 979 (D.C. 2021), *vacated in part*, 268 A.3d 862 (D.C. 2022), *and on reh'g en banc*, 315 A.3d 658 (D.C. 2024). *Cardozo* is inapposite. That case, involving fourth-degree sexual abuse, concerned whether a victim had the capacity to apprise and decline a sexual contact when her assailant snuck up on her from behind and grabbed her breasts and buttocks. 255 A.3d at 981, 983–87. While the Court reasoned that surprise did not vitiate the victim's capacity in those respects, it explicitly recognized that "temporary circumstances" such as "being . . . under the influence of . . . alcohol, can constitute 'incapab[ility]' for purposes of the sexual-abuse statute." *Id.* at 985 (collecting cases).

07 (finding evidence sufficient for MSA conviction after defendant hit victim in the buttocks after she told him not to do so anymore); *Olafisoye*, 857 A.2d at 1087 (sustaining MSA conviction for defendant touching victim's breasts after she told him to stop); *Outlaw v. United States*, 854 A.2d 169, 170 (D.C. 2004) (affirming MSA conviction because defendant had sexual intercourse with victim after she told him "no").[18]

A.R.'s lack of consent and Maldonado's intent to exploit A.R.'s intoxication to engage in sexual conduct were also corroborated by other

[18] The Court should reject Maldonado's argument (Br. 20) that affirmance would endorse a "don't ask, don't tell" policy discouraging sexual partners from seeking consent. As an initial matter, the trial court's verdict rested on its finding that A.R. explicitly told Maldonado, "no," and that she was "not sober" when he attempted to initiate sexual contact with her (12/12/23 Tr. 12–14, 26–27, 30). That Maldonado persisted in badgering her for consent after she expressed her "clear lack of consent" (12/12/23 Tr. 12–13, 26, 30) is beside the point. What matters is that Maldonado never obtained A.R.'s consent, ignored her express wishes, and had intercourse with her anyway. There will be no chilling effect on sexual partners seeking consent in affirming a conviction after consent was sought and expressly rejected. Moreover, contrary to Maldonado's reading of the law, consent to a sexual act must be secured through "words or overt actions indicating a freely given agreement to the sexual act or contact in question." D.C. Code § 22–3001(4); *see, e.g.*, *Hailstock*, 85 A.3d at 1279–83. Thus, the law already prohibits the so-called "don't ask, don't tell" theory in which sexual acts and contact are initiated without seeking consent that Maldonado fears might come from affirmance.

evidence from the record. For example, when a security guard at Decades checked on A.R. as she drunkenly exited the bar, Maldonado lied to the guard about how long he had known A.R. (10/23/23 Tr. 60). There was presumably no reason for Maldonado to lie other than to ensure that the guard would not derail his plan to remain with a visibly intoxicated A.R. Likewise, as soon as she exited the garden, A.R. immediately reported to concerned citizens that Maldonado had raped her, which supports that he had just engaged in non-consensual sex with A.R. *See Battle v. United States*, 630 A.2d 211, 217 (D.C. 1993). And, of course, Maldonado's immediate reactions to A.R.'s report of rape were to (1) claim—directly contrary to the evidence—that they had only "ma[de] out," and (2) then promptly flee the scene (10/23/23 Tr. 32; 10/31/23 Tr. 49–50); such conduct betrays Maldonado's consciousness of guilt. *See, e.g.*, *Mills v. United States*, 599 A.2d 775, 783 (D.C. 1991) (false exculpatory statements); *Wilson v. United States*, 528 A.2d 876, 878 n.3 (D.C. 1987) (flight).

In light of this evidence, the trial court correctly concluded that Maldonado beyond a reasonable doubt knew or should have known that A.R. did not consent to sexual intercourse (12/12/23 Tr. 12–14, 26–27, 30).

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
AMANDA SWANSON
Assistant United States Attorneys

/s/
DYLAN M. ALUISE
D.C. Bar # 90018755
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
Dylan.Aluise@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, James W. Kraus, Esq., on this 17th day of September, 2024.

/s/
DYLAN M. ALUISE
Assistant United States Attorney