



# OLR RESEARCH REPORT

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## SUMMARY OF STATE V. FOURTIN

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You asked for a summary of *State v. Fourtin* (307 Conn. 186), a recent state Supreme Court case involving the alleged sexual assault of a woman with severe disabilities.

### SUMMARY

In this case, a woman with severe disabilities alleged that she had been sexually assaulted by her mother's boyfriend. After a jury trial, the boyfriend was convicted of attempt to commit sexual assault in the second degree and sexual assault in the fourth degree, under statutory provisions which require the state to prove that the victim was physically helpless during the assault. The Appellate Court reversed the decision. In a 4-3 opinion, a majority of the state Supreme Court agreed with the Appellate Court that there had been insufficient evidence at trial to show that the victim was physically helpless within the statutory definition of that term. The dissent countered that the evidence was sufficient to sustain the guilty verdict.

The majority opinion turned on two central issues: (1) the court's interpretation of the term "physically helpless" (which has a more narrow meaning under the statute than the common meaning of the term) and (2) its determination that the state's theory on appeal differed from the theory it presented to the jury at trial.

## **FACTS AND PROCEDURAL HISTORY**

The following facts are drawn from the majority opinion. The 25-year old victim lived with her mother. The defendant, who was the mother's boyfriend, lived nearby. The victim suffers from significant disabilities, including cerebral palsy, intellectual disability, and hydrocephalus (buildup of fluid inside the skull leading to brain swelling). The victim cannot walk and requires assistance in performing daily living activities. She is nonverbal, but several witnesses testified that she communicates in various ways, such as by gesturing, vocalizing, and using a communication board. As explained below, there was divergent testimony on the extent of the victim's ability to communicate.

In February 2006, the victim used gestures and a communication board to communicate to two staff members at her adult day care program that her mother's boyfriend had sexually assaulted her. The victim later received a medical examination, the results of which were consistent with her accusations.

After a jury trial, the defendant (Richard Fournin) was convicted of attempt to commit sexual assault in the second degree (CGS §§ [53a-71\(a\)\(3\)](#) and [53a-49\(a\)\(2\)](#)) and sexual assault in the fourth degree (now CGS § [53a-73a\(a\)\(1\)\(D\)](#)). Under these statutory subsections, sexual assault in the second degree is defined as sexual intercourse with another person who is physically helpless. Sexual assault in the fourth degree is defined as intentionally subjecting a physically helpless person to sexual contact. For these purposes, the law defines "physically helpless" as someone who "is unconscious or for any other reason is physically unable to communicate unwillingness to an act" (CGS § [53a-65\(6\)](#)).

At trial, several witnesses were asked about the victim's ability to communicate. Three physicians who had examined the plaintiff (one following the alleged assault) all testified that they were unable to communicate with the victim during the examinations. However, most witnesses testified that the victim could communicate. For example, three staff members from the victim's adult day care program or group home (including the two who initially learned about the alleged assault) testified that the victim was able to communicate in various ways. One person testified that the victim could communicate with him by the shrill of her voice, the communication board, or writing "little messages or little notes" on a computer.

The victim's mother testified that the victim was able to express her emotions and had no problem communicating when she did or did not want to do something. The mother also testified that the victim did not like the mother's ex-husband, would frown when he was present, and tried to hurt him physically.

The defense also called several witnesses who testified that the victim expressed herself using gestures, kicking, biting, or screaming. These witnesses included a home health aide and the victim's grandmother.

At two points during the trial, the defendant moved for judgment of acquittal on the ground that the state had failed to offer sufficient evidence that the victim was physically helpless at the time of the alleged assault. The court denied these motions. After the jury found the defendant guilty, he appealed, arguing that the jury could not have reasonably found that the state introduced sufficient evidence to prove that the victim was physically helpless within the meaning of the statute.

The Appellate Court agreed with the defendant. The state then appealed to the Supreme Court. In a 4-3 decision, the Supreme Court upheld the Appellate Court's ruling.

## **ISSUE**

The issue before the Supreme Court was whether the Appellate Court had improperly substituted its judgment for that of the jury when it determined that the state did not sustain its burden of proof that the victim was "physically helpless" under CGS § [53a-65\(6\)](#).

## **ANALYSIS AND HOLDING**

### ***Overview***

On appeal to the Supreme Court, the state argued that there was sufficient evidence to sustain the verdict, because the jury was not required to accept the testimony of witnesses regarding the victim's ability to express her unwillingness to act (through biting, kicking, or other nonverbal means). The defendant argued that the Appellate Court properly overturned the verdict due to insufficient evidence, and that the state's theories on appeal were not aligned with how the state presented its theory of the facts at trial. A majority of the Supreme Court agreed with the defendant. Justice Palmer wrote the majority opinion, which was joined by Chief Justice Rogers and Justices McLachlan and Zarella.

## ***Standard of Review***

In cases concerning claims of evidentiary insufficiency, the court must construe the evidence in the light most favorable to sustaining the verdict. It must determine:

whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical (*Fourtin*, 307 Conn. at 197-98) (quoting *State v. Ovechka*, 292 Conn. 533, 540-41, 975 (2009)).

The court also noted that before it could determine whether the state had presented sufficient evidence that the victim was “physically helpless,” it had to interpret the meaning of that term. The court exercises plenary review over matters of statutory interpretation. (In other words, it need not accord any deference to the lower court’s interpretation of the statute.)

## ***Statutory Interpretation of “Physically Helpless” Under CGS § 53a-65(6)***

The court acknowledged that “no one would dispute that the victim is physically helpless in the ordinary sense of that term” (*Fourtin*, 307 Conn. at 198). However, it emphasized that under the statutory definition of physically helpless in CGS § [53a-65\(6\)](#), as understood by relevant case law, “even total physical incapacity does not, by itself, render an individual physically helpless” (307 Conn. at 198).

The court relied on a prior case (*State v. Hufford*, 205 Conn. 386 (1987)) for the proposition that physical helplessness in this context applies only to someone who, “at the time of the alleged act, was unconscious or for some other reason physically unable to communicate lack of consent to the act” (*Fourtin*, 307 Conn. at 200). In *Hufford*, the victim alleged that she was sexually assaulted by an emergency medical technician while she was restrained on a stretcher in an ambulance. In that case, the court rejected the argument that the victim was physically helpless, because the victim was able to repeatedly tell the defendant to stop touching her.

In *Fourtin*, the court noted that it had never before been presented with a case addressing how the term “physically helpless” applies to a severely disabled person who may be able to communicate nonverbally.

The court noted that criminal law treatises and cases from other jurisdictions with similar definitions of “physically helpless” suggest that the term was intended primarily to address people who are unconscious, asleep, or otherwise temporarily unable to communicate (due to drugs or alcohol, for example), rather than someone who is disabled. The court cited several cases from New York, noting that while New York cases are not binding on Connecticut courts, they may be helpful, as the drafters of Connecticut’s penal code relied heavily on the New York penal code.

According to the court, in the few factually similar cases from other states with similar definitions of “physically helpless,” the sexual assault charges were dismissed or the conviction overturned in all cases but one. For example, the court discussed a New York Court of Appeals case involving a sexual assault victim with severe disabilities who was unable to speak, but who could make guttural noises and was capable of making and understanding a few signs (*People v. Huurre*, 84 N.Y.2d 930 (1994)). Her caregivers testified that she was able to communicate when she did or did not want something. The Court of Appeals upheld the lower court’s conclusion that a person’s mental disability would not necessarily preclude a finding that the person was physically helpless, but that in the case, the evidence was legally insufficient to establish that the victim was physically unable to communicate the unwillingness to act.

The *Fourtin* court agreed that a person’s physical or intellectual disabilities do not preclude a finding that the person is physically helpless within the meaning of CGS § [53a-65\(6\)](#). Thus, the key inquiry is whether, at the time of the alleged assault, the victim was physically able to convey an unwillingness to act.

### ***Sufficiency of the Evidence***

The state argued that the evidence of the victim’s physical helplessness was sufficient, because the jury was not required to accept the testimony that the victim could express her unwillingness to an act through biting, kicking, scratching, screeching, groaning, or gesturing. The state further argued that even if the jury accepted this testimony, the jury could have concluded that these actions were not a form of communication, but were “merely emblematic of her multiple disabilities . . . or a reflection of her attitude toward [her mother], or merely part of [the victim’s] startle reflex, or a sign of generalized anger, frustration or even mischievousness” (*Fourtin*, 307 Conn. at 208).

However, the court did not allow the state to pursue these theories on appeal, as it had not done so at trial. According to the court, during the trial, the state had not challenged the testimony about the victim's methods of communicating displeasure (e.g., by biting or kicking), nor had the state contended that these behaviors were something other than communication. Instead, the state's theory at trial had been that the victim was physically helpless, despite her ability to communicate nonverbally, in view of her limited cognitive abilities, inability to speak, and dependence on others. The court cited cases supporting the proposition that due process and other constitutional concerns prohibit the prosecution from pursuing a theory of guilt on appeal that it did not pursue during the trial.

The court then concluded that the evidence adduced at trial was insufficient to show that the victim was physically helpless, when examined in the context of the state's theory of guilt at trial. The court noted that the state "presented ample evidence to demonstrate that the victim communicated with many individuals by various means" and "presented no evidence or argument to call into question the testimony concerning the victim's nonverbal methods of communication" (*Fourtin*, 307 Conn. at 211). The court found that the testimony from physicians that the victim was unable to communicate was "not probative of whether the victim was unable to physically communicate *to the defendant* that his alleged sexual advances were unwelcome" (*Id.*) (emphasis in original).

### ***Dicta Concerning State's Choice of Statute***

In dicta, the court noted that "this appears to be a case in which the state ultimately proceeded against the defendant under the wrong statute" (*Fourtin*, 307 Conn. at 210 n.20). The state had initially also charged the defendant with different subsections of the sexual assault statutes, prohibiting sexual intercourse or contact with someone who is "mentally defective." The court noted that "because the evidence established that the victim's cognitive abilities are significantly limited, the state could well have prosecuted the defendant under those provisions" (307 Conn. at 211 n.20).

### **DISSENTING OPINION**

Justice Norcott dissented, joined by Justices Eveleigh and Harper. The dissent concluded that the jury reasonably could have found that the victim was physically helpless within the statutory definition.

The dissent agreed with the majority that, pursuant to *Hufford* and cases from other states, “even the most significant physical disability does not *by itself* render an individual physically helpless” for purposes of CGS § [53a-65\(6\)](#) and thus “the analytical key remains the disabled victim’s physical ability to communicate consent or the lack thereof” (307 Conn. at 218) (emphasis in original). But unlike the majority, the dissent agreed with the state’s position that there was legally sufficient evidence at trial to support the conclusion that the victim’s disabilities left her physically helpless within the meaning of the statute.

The dissent noted that the victim’s ability to communicate was significantly and severely restricted, as shown by testimony on the considerable time and energy it took for the victim to use her communication board. The dissent highlighted additional testimony that supported the limited nature of the victim’s ability to communicate her unwillingness to engage in sex, such as the victim’s lack of sex education, through which testimony the jury “reasonably could have inferred that the victim had significant difficulty understanding and responding to questions about sex” (307 Conn. at 221). The dissent also discussed the physicians' testimony that the victim was unable to communicate during gynecological examinations.

The dissent also disagreed with the majority’s reliance on *People v. Huurre* (the New York case). Among other things, the dissent viewed *Huurre* as (1) wrongly decided and (2) only superficially similar to the present case. For example, in contrast to the present case, there was evidence in *Huurre* that the victim was able to communicate nonverbally during her medical examinations, by attempting to physically resist the examinations.

The dissent also disagreed with the majority’s conclusion that some of the state’s factual arguments on appeal were not presented at trial and thus could not be raised on appeal. The dissent viewed the victim’s physical helplessness as “not a significant factual matter tried to the jury” but rather an issue the defendant pursued “primarily as a question of law to be determined by the trial court in his motion for a judgment of acquittal and postjudgment motions, and the state responded accordingly” (307 Conn. at 227-28).

The dissent concluded that the state's factual arguments on appeal were consistent with "its argument before the trial court in response to the defendant's motions, namely, that the victim's ability to communicate consent at the time of the assault was a credibility based question of fact" (307 Conn. at 228). According to the dissent, the primary factual issue addressed during closing arguments was not the victim's helplessness but whether the defendant had committed the sexual acts.

In summary, the dissent concluded that given all the evidence presented, a jury reasonably could have determined that the victim was physically helpless. The dissent noted its agreement with the majority's dicta indicating that the state should have prosecuted this case under the "mentally defective" prong of the sexual assault statutes. The dissent also "urge[d] the legislature to determine whether the current definition of physically helpless provides adequate protection for persons with physical disabilities from sexually assaultive conduct" (307 Conn. at 230 n.22).

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