NO. 29021-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

REX GREGORY,

Defendant/Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES ii

STATUTES ii

RULES AND REGULATIONS ii

ASSIGNMENTS OF ERROR 1

ISSUES RELATING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 7

CONCLUSION 15

APPENDIX "A"

TABLE OF AUTHORITIES

CASES

State v. Austin, 59 Wn. App. 186, 796 P. 2d 746 (1990)..... .11

State v. Bashaw, 169 Wn. 2d 133(2010).....1,7, 15

State v. Carlyle, 84 Wn. App. 33, 925 P. 2d 635 (1996).....9

State v. Goldberg, 149 Wn. 2d 888, 72 P. 3d 1083 (2003)..... 15

State v. Green, 94 Wn. 2d 216, 616 P. 2d 628 (1980).....13, 14

State v. Saunders, 153 Wn. App. 209, 220 (2009).....9

STATUTES

RCW9A.40.010(1) 12

RCW9A.40.010(1)(b)..... 13

RCW9A.40.010(2)..... 12

RCW9A.40.030(1)..... 11

RULES AND REGULATIONS

CrR3.3.....1, 11

CrR3.3(a)(1).....7

CrR3.3(b).....7

CrR3.3(b)(1).....8

CrR3.3(b)(5)..... 8

CrR3.3(c)(2).....8

CrR3.3(c)(2)(iii).....7, 9, 10, 11

CrR3.3(d)(2).....10, 11

CrR3.3(d)(3).....10, 11

CrR3.3(f)(2).....11

CrR3.3(h)..... ..11

CrR4.1(b)..... 9

ER404(b).....2

ASSIGNMENTS OF ERROR

1. The State violated Rex Gregory's time-for-trial rights under CrR3.3.

2. There is insufficient evidence to establish, beyond a reasonable doubt, each and every element of the offense of second degree kidnapping as charged in Count 5 of the Second Amended Information. (CP 69)

3. Instruction 30, relating to the special verdict for sexual motivation, is an erroneous instruction and the special verdict should be reversed and dismissed. (CP 120; Appendix "A")

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State fail to bring Mr. Gregory to trial within the parameters of CrR 3.3 following a mistrial under Asotin County Cause No. 09 1 00150 4? (CP 305)

2. Did the State present sufficient evidence of each and every element of the offense of second degree kidnapping as charged in Count 5 of the Second Amended Information?

3. Does the special verdict instruction comply with the requirements established in *State v. Bashaw,* 169 Wn. 2d 133(2010)?

STATEMENT OF CASE

Mr. Gregory was born on September 14, 1973. He married JoDee Gregory on April 9, 2005. Mr. Gregory's stepdaughter S.A.O was born on June 25, 1998. (177-6 RP 689, l. 22; RP 689, l. 23 to RP 690, l. 1; RP 690, l. 4; ll. 6-9). [1]

S.H. was born on September 6, 1995. She is Mr. Gregory's next door neighbor. (177-6 RP 473, ll. 3-4; RP 474, ll. 4-23).

09 1 00150-4

An Information was filed on September 23, 2009 charging Mr. Gregory with second degree kidnapping. It included a sexual motivation enhancement. The alleged incident involved S.H. and occurred on September 22, 2009. (CP 188)

Mr. Gregory remained in custody pursuant to a bond order entered on September 24, 2009. (CP 190;177-6 RP 19, ll. 6-8)

A child hearsay hearing was conducted on November 17, 2009. The hearing addressed the State's ER 404(b) motion to admit other misconduct evidence involving S.A.O. (150-4 RP 99, l. 25 to RP 100, l. 2; RP 100, ll. 9-23; RP 101, ll. 1-9; CP 193; CP 196).

The trial court determined that S.A.O. was a competent witness and that her statements were admissible. (150-4 RP 238, l. 24 to RP 245, l. 23).

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[1] 177-6 and 150-4 refer to the respective transcripts from the two (2) trials.

Mr. Gregory's trial under cause No. 09 1 00150 4 ended in a mistrial on December 7, 2009. The mistrial occurred due to a "hung jury." Findings of Fact, Conclusions of Law and an Order Declaring Mistrial were entered on December 14, 2009. (150-4 RP 1022, ll. 3-23; CP 305).

Prior to Mr. Gregory's trial under cause No. 150-4 the State filed an Information under cause No. 177-6. That Information charged 3 counts of first degree child molestation. (CP 1). The trial court previously denied the State's motion to amend the information in cause No. 150-4. (150-4 RP 60; l. 11 to RP 61, l. 4; RP 62, ll. 10-21; RP 69, ll. 19-22; RP 70, ll. 2-9).

The State filed a Motion to Consolidate cause No. 150-4 and No. 177-6 on December 31, 2009. (CP 18).

A hearing on the Motion to Consolidate was held on January 11, 2010. The Prosecuting Attorney discussed dismissing cause No. 150-4 and refiling it as Count 5 of an Amended Information in cause No. 177-6. Defense counsel agreed that cause No. 150-4 could be dismissed without prejudice. (177-6 RP 26, ll. 8-12; RP 55, ll. 3-8; RP 56, ll. 22-23).

The trial court discussed trial dates with the attorneys following the consolidation hearing. An arraignment was scheduled for February 22, 2010 on the Amended Information. (CP 31; 177-6 RP 59, l. 12 to RP 61, l. 10; RP 62, ll. 9-18).

The trial court entered an order of dismissal without prejudice in cause No. 150-4 on February 22, 2010. (CP 308)

The State filed the Amended Information on February 22, 2010. It set forth 4 counts of child molestation first degree and 1 count of second degree kidnapping with sexual motivation (Count 5).

A Second Amended Information was filed on March 4, 2010. It added a count of second degree child rape, or in the alternative, third degree child rape (Count 6). (CP 69).

S.H. testified that she had sex with Mr. Gregory. She stated that he put his penis in her vagina. It occurred in Mr. Gregory's van. It was not the first time she had sex with him. (177-6 RP 477, l. 20; RP 479, ll. 20-22; RP 40, ll. 5-10; ll. 22-24; RP 47, ll. 2-23; RP 488, ll. 6-7).

S.H. got into the van voluntarily. She described Mr. Gregory putting his hands on her breasts. She stated that he was not holding her arms as she had previously testified. (177-6 RP 490, ll. 207, RP 487, ll. 2-5; RP 503, ll. 22-25; RP 504, l. 16 to RP 505, l. 2)

S.H. told Katelin Mechling and Jordan Hamilton that she was having sex with an older man. She admitted that she only told them about it because she wanted to "fit in." (177-6 RP 528, ll. 2-16; RP 1029, l. 19; RP 1030, ll. 3-8; ll. 10-12; RP 1041, ll. 3-12; RP 1044, ll. 3-4).

Ms. Mechling testified that S.H. told her that sex with Mr. Gregory occurred prior to S.H.'s birthday on September 6, 2009. (177-6 RP 1033, ll. 5-7; RP 1034, ll. 17-20)

S.H. claimed that Mr. Gregory told her that he had purchased condoms. However, he never used condoms when they were having sex.

Condoms were later discovered in Mr. Gregory's dresser drawer by his wife. (177-6 RP 532, ll. 5-13; RP 696, ll. 1-15; RP 697, ll. 11-16)

Jake Grayson, S.H.'s eleven year old brother, saw Mr. Gregory and his sister in the back of the van. He described Mr. Gregory's hands holding her hands on the floor in the back of the van. (177-6 RP 538, ll. 22-23; RP 541, ll. 1-18; RP 547, ll. 9-10)

S.H. bit Mr. Gregory's hand when she saw her brother looking at them in the back of the van. (177-6 RP 488, ll. 15-23).

Steve Payton, a neighbor of Mr. Gregory, saw S.H. out walking her dog at approximately 6:35 a.m. He later saw that the back portion of Mr. Gregory's van was open. He heard voices whispering inside the van. (177-6 RP 682, ll. 11-14; RP 683, ll. 11-15; RP 684, ll. 10-12; ll. 20-23; RP 685, l. 1; ll. 6-10).

No evidence was introduced of any physical examination of S.H.

09 1 00177-6

S.A.O. testified that Mr. Gregory began inappropriately touching her when she was seven years old. The first time occurred in her bedroom at night. She claimed that Mr. Gregory used a numbing gel on her vagina and had a massager. She later found her underwear on the floor. (177-6 RP 766, ll. 22-23; RP 767, ll. 2-7; RP 767, l. 15 to RP 768, l. 6).

S.A.O. described another incident that occurred under a bridge while she and Mr. Gregory were hiking. He allegedly had her touch his penis after he exposed it to her. (177-6 RP 769, ll. 3-10).

A further incident involved Mr. Gregory and S.A.O. on a couch. She was sitting on his lap. They were covered with a blanket. Mr. Gregory was supposedly rubbing her vagina. (177-6 RP 775, ll. 10-15; RP 819, ll. 3-12; RP 821, ll. 8-10).

Finally, S.A.O. told of a final event occurring on January 23, 2009. Mr. Gregory allegedly grabbed her breast and tried to reach up under her nightgown while her mother was in the shower. (177-6 RP 703, ll. 2-9; RP 703, l. 21 to RP 704, l. 2; RP 777, l. 25 to RP 778, l. 15; RP 779, ll. 12-17).

A video interview of S.A.O. by Officer Coe of the Clarkston Police Department was played for the jury during trial. S.A.O. did not reveal anything about Mr. Gregory having her touch his penis. She indicated that he only showed his penis to her. (177-6 RP 920, ll. 19-20; RP 932, ll. 17-19; RP 933, ll. 6-7; RP 944, l. 24 to RP 945, l. 11; RP 947, ll. 5-8; ll. 19-23; RP 950, ll. 13-14; RP 1000, ll. 1-9).

At the end of the State's case defense counsel moved to dismiss Count 6 based upon insufficient evidence of sexual intercourse. The motion was denied. (177-6 RP 1010, ll. 23-25; RP 1014, l. 5 to RP 1015, l. 7).

Defense counsel did not object to the special verdict instruction. (177-6 RP 1105, ll. 1-3).

A jury found Mr. Gregory guilty of 4 counts of first degree child molestation, 1 count of second degree child rape, and 1 count of second degree kidnapping with sexual motivation. (CP 123; CP 126).

Judgment and Sentence was entered on May 5, 2010. It included the 24 month sexual motivation enhancement. Mr. Gregory filed his Notice of Appeal the same date. (CP 157; CP 170).

SUMMARY OF ARGUMENT

The trial court failed to reschedule Mr. Gregory's trial within the time provisions of CrR3.3(c)(2)(iii) and CrR3.3(b) following entry of the mistrial order.

The State failed to establish, beyond a reasonable doubt, each and every element of the offense of second degree kidnapping.

Instruction 30, the special verdict instruction, misstates the unanimity burden of proof contrary to *State v. Bashaw, supra.*

ARGUMENT

A.TIME FOR TRIAL

CrR3.3(a)(1) states:

> It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

Mr. Gregory contends that the trial court failed to live up to its responsibility under CrR3.3(a)(1). In particular, following the mistrial under cause No. 150-4, neither the trial court nor the State complied with the provisions of CrR3.3(c)(2)(iii).

CrR3.3(c)(2) provides, in part:

> On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. ...
> ...
> (iii) *New Trial.* The entry of an order granting a mistrial... . The new commencement date shall be the date the order is entered.

The trial court entered its mistrial order on December 14, 2009. Mr. Gregory remained in custody. Thus, CrR3.3(b)(1) is the applicable time for trial rule. It states:

> A defendant who is detained in jail shall be brought to trial within the longer of
>
> (i) 60 days after the commencement date specified in this rule, or
> (ii) The time specified under subsection (b)(5).

CrR3.3(b)(5) is not applicable. It pertains to excluded periods. A mistrial is not an excluded period.

Mr. Gregory's new commencement date following the mistrial was December 14, 2009. Sixty (60) days from that date is February 12, 2010.

The State filed a Motion to Consolidate cause No. 150-4 with No. 177-6. The Amended Information, following consolidation, was not filed until February 22, 2010. Mr. Gregory was arraigned the same date. A total of 70 days had elapsed at the time of his arraignment.

Mr. Gregory concedes that the arraignment on the Amended Information was timely as to Counts 1-4. It was not timely as to Count 5.

Application of the time-for-trial rule is reviewed de novo. *See: State v. Carlyle,* 84 Wn. App. 33, 35-36, 925 P. 2d 635 (1996).

> ...[U]nder CrR3.3, **once the 60** or the 90 **day time for trial expires** without a stated lawful basis for the further continuance, the rule requires dismissal and **the trial court loses authority to try the case.** ... The rule's importance is underscored by the responsibility it places on the trial court itself to ensure that the defendant receives a timely trial and its requirement that criminal trials take precedence over civil trials. ...

State v. Saunders, 153 Wn. App. 209, 220 (2009). (Emphasis supplied.)

Mr. Gregory asserts that the State's dilatory action in filing the Amended Information and arraigning him on it violates the time-for-trial rule. The language of CrR3.3(c)(2)(iii) is unambiguous. The new commencement date was December 14, 2009. The last day for Mr. Gregory to be tried was February 12, 2010.

The trial court had no jurisdiction to try Mr. Gregory on Count 5 of the Second Amended Information.

Mr. Gregory maintains that CrR4.1(b) has no application to his case. The rule provides, in part:

> A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of arraignment. ... A party who fails to object as required shall lose the right to object... .

Mr. Gregory was held in custody under both cause No. 150-4 and No. 177-6. The Information in cause No. 150-4 was originally filed on September 23, 2009. The Information in cause No. 177-6 was filed November 23, 2009.

Mr. Gregory does not contend there is a time-for-trial violation under No. 177-6 as originally filed. Defense counsel moved to strike the trial date and continue the trial in cause No. 177-6 on January 4, 2010. (177-6 RP 18, ll. 10-15).

The State attempted to bypass the explicit provisions of CrR3.3(c)(2)(iii) by consolidating the two cases. This cannot be countenanced.

CrR3.3(d)(2) states, in part:

> When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2)..., the court shall set a new date for trial which is within the time limits prescribed... .

The trial court did not reset Mr. Gregory's trial date in accord with CrR3.3(d)(2). No trial date was set until arraignment occurred on February 22, 2010.

CrR3.3(d)(3) provides, in part:

> A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days ... move that the court set a trial within

> those time limits. ... A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

Mr. Gregory calls attention to *State v. Austin,* 59 Wn. App. 186, 796 P. 2d 746 (1990). Even though the *Austin* case predates the amendments to CrR3.3, Mr. Gregory takes the position that it is still good law insofar as interpreting CrR3.3(c)(2)(iii) and CrR3.3(d)(2), (3).

The *Austin* Court ruled at 200:

> We hold that CrR3.3(f)(2) [Now CrR3.3(d)(3)] which allows 10 days for any party objecting to the resetting of a trial date to move for a new trial date, does not apply to a trial setting procedure which occurs fewer than 10 days before the expiration of the speedy trial period.

In Mr. Gregory's case the resetting of the trial date occurred after the expiration of the time-for-trial period following the mistrial.

Mr. Gregory's conviction under Count 5 of the Second Amended Information should be reversed and dismissed in accord with the provisions of CrR3.3(h).

B. INSUFFICIENT EVIDENCE

In the event the Court does not reverse and dismiss Mr. Gregory's conviction under Count 5, he than argues that the State did not establish each and every element of the offense of second degree kidnapping.

RCW 9A.40.030(1) states:

> A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

RCW 9A.40.010(2) defines the word "abduct" as meaning

> ...to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.

The State presented no evidence to support subparagraph (b) of RCW 9A.40.010(2).

The State argued that the back of the van constituted a place where S.H. was not likely to be found. The evidence is to the contrary.

The van was parked in a carport with the rear door open. S.H.'s brother clearly saw Mr. Gregory and S.H. in the back of the van. Mr. Payton could hear voices through the open door.

Moreover, a serious question exists concerning whether or not S.H. was restrained. RCW 9A.40.010(1) defines the word "restrain" as meaning

> ...to restrict a person's movements without consent and without legal authority in a manner **which interferes substantially** with his liberty.

(Emphasis supplied.)

Mr. Gregory acknowledges that S.H. could not voluntarily consent to enter the back of the van. *See:* RCW 9A.40.010(1)(b).

The record is inconclusive that S.H.'s liberty was interfered with to a substantial degree.

S.H. clearly stated that Mr. Gregory never grabbed her and pushed her into the van. He had his hands on her breasts. He was not holding her arms on the floor of the van. He was having sex with her. (177-6 RP 508, ll. 10-24).

The test concerning sufficiency of the evidence is set forth in *State v. Green,* 94 Wn. 2d 216, 221, 616 P. 2d 628 (1980):

> "...[T]he relevant question is whether, 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." Jackson v. Virginia,* 443 U.S. 307, 319, 61 L.Ed. 2d 590, 99 S.Ct. 2781 (1979).

The facts in *Green* indicate that the victim was placed in the exterior loading area of an apartment complex. A description of that area follows:

> ...[I]t had no outside doors, was visible from the children's play area and a tire swing located only about 30 feet away, and could be viewed from the rear windows of another apartment only about 40 feet distant. In short, the exterior loading area was plainly visible from the outside. Additionally, the apartment's first floor rear exit, or fire door, opened into one end of the exterior loading area only a few feet from where [a witness] observed [the defendant] and the victim. Further, the place...was near the bottom of the back stairway which leads to all of the upstairs apartments. This stairway was used in common by the occupants and visitors to

> the apartments. Finally, at best, a total of only 2 to 3 minutes elapsed from the time the victim first screamed to the time [the witness] reached the exterior loading area and actually saw [the victim] in [the defendant's] arms.
>
> Considering the unusually short time involved, the minimal distance the victim was moved (estimated variously, by the prosecuting attorney, as from 20 to 50 feet), the location of the participants when found, the clear visibility of that location from the outside as well as the total lack of any evidence of actual isolation from open public areas, there is no substantial evidence of restraint by means of secreting the victim in a place where she was not likely to be found.

State v. Green, supra, 226.

The back door of the van was open. It was parked in a carport clearly visible from nearby housing units. S.H.'s brother saw Mr. Gregory and S.H. in the back of the van.

S.H. was not abducted by Mr. Gregory.

C.SPECIAL VERDICT INSTRUCTION

In the event that the Court does not dismiss Count 5 for failure of the State to prove each and every element of the offense beyond a reasonable doubt, then Mr. Gregory asserts that the special verdict finding must be reversed and dismissed.

The special verdict instruction given by the trial court is erroneous. It does not comply with the language required by *State v. Goldberg,* 149 Wn. 2d 888, 72 P. 3d 1083 (2003) and *State v. Bashaw, supra.*

The special verdict instruction directs the jury to either unanimously find that sexual motivation occurred, or alternatively, unanimously find that sexual motivation did not occur.

As the *Bashaw* Court noted at 146:

> The rule from *Goldberg*...is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

The *Bashaw* Court went on to explain at 147:

> Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty, *see Goldberg, 149 Wn. 2d at 893,* it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

CONCLUSION

Mr. Gregory's conviction for second degree kidnapping with sexual motivation should be reversed and dismissed because either there (1) was a violation of the time-for-trial rules and/or there (2) was insufficient evidence of abduction and/or restraint.

Alternatively, the special verdict instruction is erroneous and the sexual motivation enhancement must be reversed and dismissed.

DATED this 8th day of December, 2010.

Respectfully submitted,

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APPENDIX "A"

INSTRUCTION NO. 30

You will also be given special verdict forms for the crime Kidnapping in the Second Degree as charged in Count 5. If you find the Defendant not guilty of this crime, do not use the special verdict form. If you find the Defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".