

89542-2

Court of appeals case

NO. 43506-3-II

Supreme court of the state of Washington

COULD NOT BE RECORDED
RECORDED
DEC 18 11:11
STATE OF WASHINGTON
BY

STATE OF WASHINGTON,

Respondent,

VS.

Wylie Dean Rhodes

petitioner.

13 DEC 26 4 8:15
BY RONALD R. INFERS
STATE OF WASHINGTON

Petition FOR Review

Wylie Dean Rhodes doc# 35527
I-A-16

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RCW 9A.04.100 proof Beyond a reasonable doubt. every person charged with the commission of a crime is presumed innocent until proven guilty; no person may be convicted of a crime unless each element of a crime is proved by competent evidence beyond a reasonable doubt.

1
RCW 9A.44.100 indecent liberties the six ways are (A) By forcible compulsion (B) when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless (C) when the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who: (i) has supervisory authority over the victim and of (ii) was providing transportation within the course of employment, to the victim at the time of the offence, (D) when the perpetrator is a health care provider, the victim is a client or patient and the sexual contact occurs during, treatment, consultation interview or examination. It is affirmative defense that the defendant must prove by preponderance of the evidence that the sexual contact was consensual. (E) when the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim (F) when the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim who has a significant relationship with the victim or was providing transportation within the course of his or her employment to the victim at the time of the offence.

section A. Identity of petitioner

Wylie Dean Rhodes asks this court to accept review of the decision designated in part B of this motion.

section B. Decision

petitioner seeks review of the entire decision of the court of appeals affirming petitioner's conviction and sentence entered in the superior court of Washington for CLARK county. A copy of the court of appeals decision is attached to this motion.

section C. Issues presented for review

This court should review these issues (1) The jury only returned a guilty verdict on Indecent Liberties, NOT on Indecent Liberties with forcible compulsion. (2) The state did not provide any findings that there was forcible compulsion (3) The evidence the state did provide

was insufficient to support a conviction of Indecent Liberties with forcible compulsion (4) The case laws, the commissioner for the court of appeals used to affirm the judgement and sentence are no longer "good law".

Section D. Statement of the case.

All the issues presented in this petition are factual and needed for the argument section below.

Section E. Argument why review should be accepted.

This court should accept this case because the state denied due process. when they sentenced on the offence of indecent liberties with forcible compulsion. when the jury only returned a guilty verdict on INDECENT liberties. INDECENT liberties is a class B felony unless by forcible compulsion. RCW 9A.44.100 (see page marked RCW'S) They violated US amendment 14 section 1 and Washington amendments artical 1 section 3 & 21. personal rights. No person shall be deprived of life, liberty, or property with-out due process.

section E. continued

As in State v. Byrd (72 Wn. app. 774) (1994) Defendant was convicted of second degree assault while armed with a deadly weapon. The court of appeals held that (1) Jury instructions improperly omitted requirement that defendant must have intended to cause apprehension and fear of Bodily harm (2) instructional deficiency denied defendant a fair trial and (3) instructional error could be raised for first time on appeal.

Also the state did not provide any findings of forcible compulsion. There was no ripped articles of clothing, no cuts, bruises, as that's damaging to the state's case. RCW 10.96.005 Findings of evidence did not support conviction. The state failed to prove the element of the crime charged.

As well the state provided insufficient evidence to support forcible compulsion. Just like State v. Weisberg (65 Wn. app. 721, 725, 829 P.2d 252) (1992) where defendant was convicted of second degree rape and he appealed, the court of appeals held that (1) state produced insufficient evidence of forcible compulsion (2) Denial of Defendants

Section E, continued

Motion for psychiatric examination of Victim was not an abuse of discretion and (3) there was sufficient evidence to support conviction of lesser offence. (4) there was insufficient evidence to sustain conviction of forcible compulsion.

As well victims hear-say testimony against defendants testimony is not enough evidence to uphold conviction. RCW 9A.04.100 states every person charged with a crime is presumed innocent until proven guilty. No person shall be convicted of a crime unless each element of a crime is proved by competent evidence beyond a reasonable doubt.

It's really damaging to the states case when they declared mistrial on counts 3 & 4. If jury could not return a guilty verdict on a assault 4 which is any unwanted touching. how can they find forcible compulsion.

finally, how can the commissioner use case laws that are no longer "good law" to affirm conviction that just goes against justice,

section E continued

State V. Nass

Defendant was convicted of unlawful sale of a narcotic drug, and from the judgement of the superior court, Pierce County. The defendant appealed, the supreme court held, (1) That facts that the sale of a narcotic drug was made to a minor and that defendant knew of buyer's minority must be alleged and proven beyond a reasonable doubt before increased penalty can be imposed and since there was no findings of that the court erred in imposing increased sentence.

Just like the case at Bar. Jury did not return a finding of forcible compulsion, for them to give a life sentence with zero felony points would be an incredible increased sentence from thirteen to twenty months for indecent liberties. Almost like in State V. Williams-Walker (167 Wn.2d 889, 225 P.3d 913) (2010)

section F.

CONCLUSION

For the reasons set out in this motion, this court should accept review of this case and reverse petitioners conviction.

Dated this day of December, 2013

Respectfully submitted

Wylie Dean Rhodes

Wylie Dean Rhodes

9A.44.100(1)(a) through (f) (2007).¹ The State, however, only charged indecent liberties by forcible compulsion. Former RCW 9A.44.100(a).

The case was tried. The jury instruction for the indecent liberties charge stated:

To convict the defendant of the crime of Indecent Liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 24, 2011, the defendant knowingly caused Stephanie Stocker to have sexual contact with the defendant,
- (2) That this sexual contact occurred by forcible compulsion;
- (3) That the defendant was not the spouse of Stephanie Stocker at the time of the sexual contact; and
- (4) That any of these acts occurred in the State of Washington.

¹ The six ways are:

- (a) By forcible compulsion;
- (b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;
- (c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:
 - (i) Has supervisory authority over the victim; or
 - (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;
- (d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual contact occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual contact with the knowledge that the sexual contact was not for the purpose of treatment;
- (e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or
- (f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:
 - (i) Has a significant relationship with the victim; or
 - (ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

Former RCW 9A.44.100(a) through (f).

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 78 (emphasis added).

The jury verdict form provided: "We, the jury, find the above-named defendant [fill in blank] of the crime of **INDECENT LIBERTIES**." CP at 98 (emphasis theirs). The jury returned a conviction on this count by writing "guilty" in the appropriate space on this jury form. CP at 98. The jury found Rhodes not guilty of burglary and the court declared a mistrial on the remaining counts. The jury also found, in a special verdict, that Rhodes and the victim were members of the same family or household. The trial court polled the jury and accepted the guilty verdict. The trial court sentenced Rhodes to life in prison with a minimum mandatory time to serve of 55 months, and community custody for life.² Rhodes appeals.

ANALYSIS

Rhodes argues that due process required the jury to find that he committed the crime of indecent liberties by forcible compulsion and because the jury's verdict form

² Indecent liberties by forcible compulsion is a class A felony. Former RCW 9A.44.100(2)(b). If committed by any other means, it is a class B felony. Former RCW 9A.44.100(2)(a).

lacked the phrase "by forcible compulsion," his conviction must be overturned.³ He relies on *Apprendi* and its progeny, which require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); see also *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); see generally *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 215, 186 L. Ed. 2d 314 (2013) (holding that facts that increase a mandatory minimum sentence must be found by the jury). Rhodes analogizes his verdict to the verdicts challenged in *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010). In *Williams-Walker*, our Supreme Court reaffirmed that

Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

167 Wn.2d at 896 (quoting *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)). *Williams-Walker* consequently held that the trial court could not impose a five-year sentencing enhancement for use of a firearm in a case in which a jury returned a "deadly weapon" verdict, supporting only a two-year enhancement. 167 Wn.2d at 897-98. Rhodes contends that because the crime of indecent liberties by forcible

³ Rhodes does not appear to have challenged the verdict form in the trial court. Because he raises a constitutional challenge to his conviction, this court will review the alleged error for the first time on appeal. RAP 2.5(a)(3).

compulsion carries a greater sentence than indecent liberties by any other of the alternative means, *Williams-Walker* required the verdict form to set out not only that that he committed the crime of indecent liberties, but that he committed the crime of indecent liberties "by forcible compulsion."

Rhodes's argument fails. Here, the State charged Rhodes solely with indecent liberties by forcible compulsion and not by any other means. *Cf. State v. Tang*, 77 Wn. App. 644, 650, 893 P.2d 646 (1995) ("Where a defendant is charged with alternate means which have different seriousness levels and is convicted by general verdict, a special interrogatory is required to ensure that the defendant will be sentenced using the proper standard range."), *review denied*, 127 Wn.2d 1017 (1995). The trial court correctly instructed the jury on the elements of this crime, which included "[t]hat this sexual contact occurred by forcible compulsion." CP at 78; *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988) (if a statutory subsection sets out multiple ways to commit a crime, the "manner of committing a crime is an element"). And, unlike in *Tang*, the trial court did not submit any other means of committing indecent liberties to the jury.⁴

Rhodes argues that because the remaining means of committing the crimes are less serious, he was subject to a "greater punishment." The means of forcible compulsion, however, did not "aggravate[]" the offense charged or "cause[]" the

⁴ Indeed, it would have been error for the State urge a conviction for indecent liberties by an uncharged means. *Bray*, 52 Wn. App. at 34 ("When the information charges only one of the alternatives, however, it is error to instruct the jury that they may consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial.").

defendant to be subject to a greater punishment than would otherwise be imposed"; it was part and parcel of the sole indecent liberties offense charged. *Williams-Walker*, 167 Wn.2d at 896 (quoting *Frazier*, 81 Wn.2d at 633). Rhodes was either guilty of indecent liberties by forcible compulsion or he was not guilty of indecent liberties by forcible compulsion. This jury found him guilty.

This court next briefly considers whether the missing language in the verdict form requires reversal of the conviction even absent violation of the rule set out in *Apprendi* and *Williams-Walker*. An incomplete or ambiguous verdict form will not void a verdict "if its meaning can be ascertained by reference to the indictment or information." *State v. Vaughan*, 163 Wash. 681, 684, 1 P.2d 888 (1931). And

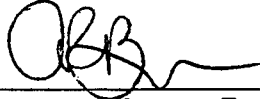
Because inartificial expressions and words are sometimes employed in framing a verdict, the first object in the construction of a verdict is to learn the intent of the jury, and when this can be ascertained, such effect should be given to the verdict In the interpretation of an ambiguous verdict, the court may make use of anything in the proceedings that serves to show with certainty what the jury intended, and for this purpose, reference may be had, for example, to the pleadings, the evidence, the admissions of the parties, the instructions, or the forms of verdict submitted.

State v. Lane, 37 Wn.2d 145, 152, 222 P.2d 394 (1950) (quoting 53 AM. JUR. 716, § 1036) (verdict that defendant was "guilty of the crimes as charged in count I and count II of the information, instead of referring to the amended information" was not void). Here, the information alleged the means of forcible compulsion and the jury instructions also included the element. Even assuming the verdict form was defective, the jury's intent can be ascertained. Accordingly, it is hereby

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ORDERED that the court-initiated motion on the merits to affirm is granted and Rhodes's conviction is affirmed. RAP 18.14.

DATED this 29th day of August, 2013.



Aurora R. Bearse
Court Commissioner

cc: John A. Hays
Anne M. Cruser
Hon. Robert Lewis