44906-4-II

IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

RESPONDENT

VS

ROBERT E. JAMES

APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR GRAYS HARBOR

APPEALANT STATEMENT OF ADDITIONAL GROUNDS (SAG)

ADDITIONAL GROUNDS I

THE TRIAL COURT'S INSTRUCTION ON CONSENT AS AN AFFIRMATIVE DEFENSE GIVEN IN CONJUNCTION WITH THE INSTRUCTION ON SECOND DEGREE RAPE AS A LESSER INCLUDED OFFENSE VIOLATED DUE PROCESS BY IMPROPERLY SHIFTING THE BURDEN OF PROOF TO ME TO DISPROVE AN ELEMENT OF SECOND DEGREE RAPE.

"Constitutional error may be raised for the first time on appeal (RAP 2.5 (a)). This is particularly true of error affecting fundamental aspects of Due Process, such as the presumption of innocence and the right to have the state prove every element of the charges beyond a reasonable doubt" STATE VS JOHNSON, 100 Wn.2d. 607, 614, (1983), overruled on other grounds in STATE VS BERGEREN, 105 Wn.2d 1, (1985). A jury instruction which improperly shifts the burden of proof to the defendant violates due process and is a Constitutional question which may be raised for the first time on appeal, STATE VS McCULLUM, 98 Wn.2d 484, 488, (1983). The jury instructions given in my case raise a constitutional claim which this court must address.

The due process clause of the fourteenth amendment to the United States Constitution requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. SANDSTROM VS MONTANA, 442 U.S. 510, 520, 99 S.CT. 2450, 2457, 61 L.ED .2d 39, 48 (1979); In re WINSHIP, 397

U.S. 358, 364, 90 S.CT. 1068. 1072, 25 L.ed.2d 368, 375 (1970). Here, the instruction on consent relieved the state of its burden of proving the elements of incapicity to consent by reason of being physically helpless or mentally incapicitated in the lesser included offense of second degree rape, and shifted the burden of proving consent to me.

I was charged with First Degree Rape, pursuant to RCW 9A.44.040(1)(c).Over my objections the court gave instruction nine (9) on the lesser included offense of second degree rape which included the elements of the victim being incapable of consent by reason of being physically helpless, or mentally incapicited. (RP 123 (a)7-24) The court also gave an instruction on the affirmative defense of consent, I never raised a consent defense.

In STATE VS CAMARA, 113 Wn.2d 631, (1989). The Supreme Court recognized consent as a valid defense to a charge of rape. In that case, the defendant was convicted of second degree rape under RCW 9A.44.050 (1)(a), the "forcible compulsion" alternative. Separate instructions were given that defined the terms forcible compulsion and consent for the jury. The defendant argued that consent negates the elements of forcible compulsion and therefore the state had the burden of proving the absence of consent beyond a reasonable doubt. The court rejected this argument and held the burden of proving consent could constitutionally be placed upon the defendant.

In CAMARA, the court did not address the situation in which the incapacity to consent or the lack of consent is an element of the offense charged. Nevertheless, the Court of Appeal in STATE VS LOUGH, 70 Wn.App. 302, 326, (1993), affirmed at 125 WN.2d. 847, (1995),approved placing the burden upon the defendant to prove consent in an indecent liberties case when the allegation was that the victim was incapable of consent by reason of being physically helpless. The court did note, however, that a defendant's consent defense is legally and logically superfluous when the state's sole theory is that the victim was legally incapable of giving consent, LOUGH, 70 Wn.App. 329

Camara and Lough are distinguishable from my case. Here, unlike in Camasra, incapicity to consent or mental incapicitation is an element of the lesser included offense of second degree rape that was submitted to the jury. Unlike Camara and Lough, I did not raise a defense of consent during trial and therefore there were no facts before the jury upon which they could consider the issue of consent, much less determine whether the state had met its burden of proving every element of second degree rape beyond a reasonable doubt. The state's theory of the case was that I engaged in "sexual intercourse with [the victim] by forcible compulsion where [I] inflict[ed] serious physical injury." RCW 9A.44.040(1)(c).

Instruction 9 (nine) allowed the jury to consider

the element of incapicity to consent or mental incapicition without any facts relating to the issue of consent which, coupled with the instruction on consent, "erronerously indicated to the jurors that [I] had some burden of persuasion to carry, which, if not met, would preclude [the juror's] ability to aquit [me] of [the] lesser criminal act." McCULLUM 98 Wn.2d 497. This relieved the state of its burden of proving every element of the lessser offense, and unconstitutionally shifted the burden of proving consent to me. Id.

The trial court committed prejucicial error by submitting both instruction to the jury. "Since the error infringed upon a constutitional right . . , the error is presumed prejudicial, and the state has the burden of proving the error was harmless." McCULLUM Supra at 497

Neither, the consent instruction was misleading. "A reasonable juror could have mistakenly concluded that [I] had not met [my] 'burden of proof' to establish a 'reasonable doubt,' and thus convicted [me] of [second degree rape]." Id at 498. "Since the instruction in [my case] could well have affected the final outcome of the case, the error cannot be deemed harmless beyond a reasonable doubt. ID. My conviction must be reversed and my case remanded for a new trial.

ADDITIONAL GROUNDS II

I contend that the trial Court erred in instructing the jury on the lesser degree offense of rape in the second degree. There were no allegations or testimony from the victim or myself that only the elements of the lesser offense were committed. All evidence and testimony presented at trial concerned the first degree rape offense resulting in the serious physical injuries, which was the aggravating factor elevating the offense to rape in the first degree.

RCW 10.61.006; 010:. The factual prong of the WORKMAN, test for determining whether a lesser included offense instruction is warranted is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence support a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater.

Courts should give lesser degree offense instruction only when there is evidence that defendant committed only the lesser degree offense. STATE VS PETTUS, (1998) 89 Wn.App 688, review denied, 136 Wn.2d 1010, under all relevant statutes and cases, there is a requirement that there exist some substantial evidence
indicating that only the lesser degree offense has been

committed, to the exclusion of the greater, before the givin of a lesser degree instruction is warranted. That is obviously not the situation in my case. It is unconstested that S.C. suffered serious bodily injury as a result of the assault upon her. The only point of contention at trial was whether I was the person who assaulted S.C. and caused her injuries. S.C. never claimed that she was forced to engage in sexual intercourse other then the assault which resulted in her injuries.

A case which bears directly on mine is STATE VS BROWN, 127 Wn.2d. 749 (1995). which concerns a decision by the Washington Supreme Court in which a defendant, charged with rape in the first degree, is improperly convicted of the lesser degree of rape in the second degree. The victim, T.C. testified that Brown and other forced her to have sexual intercourse and that he held a gun to her head at one point. Brown denied raping her. Based on this testimony, Brown argues that neither [127 Wn.2d 755] party presented evidence that would support the conclusion that he raped T.G. but did not threaten to use a deadly weapon.

The Court of Appeals concluded that there was affirmative evidence that Brown committed only second degree rape because there was evidence which tended to impeach T.G.'s claim that a gun was used. Brown, however, wisely asserts that

the court of Appeal's ruling contradicts this courts precedent. In FOWLER, we held that "affirmative evidence" requires something more than the possibility that the jury could disbelieve some of the state's evidence, FOWLER: see also STATE VS SPEECE,SUPRA.

The State, nevertheless, contends that it did produce affirmative evidence, and focuses on the fact that the gun was not originally used to force T.G. to submit to sexual intercourse.

However, under the statute, RCW 9A.44.040., the use or threathen use of a deadly weapon during the assault constituted the rape is an aggravating factor elevating this crime to first degree rape. The plain langugage of the statute supports no other conclusion (emphasis in original). We (Supreme Court) think its unlikely that the state would argue under subsection (c) that if an assault inflicts serious physical injury of his victim only after completing sexual intercourse, he is guilty of only second degeree rape.

Based on the foregoing, we conclud that the state has failed to satisfy the factual prong of WORKMAN. As a result, it was error to instruct the jury on the lesser included offense of second degree rape.

Our reversal here is not based on the insufficiency of the evidence to support a charge of second degree rape, b

but the improperiety of allowing the jury to consider that charge as a lesser included offense of first degree rape. Accordingly, we reverse and remand for a new trial on second degree rape.

The Supreme Court, in the case above, used an clearly prescient analogy in describing its decision to reverse the conviction of the defendant in STATE VS BROWN, which is "We think it unlikely that the state would argue under subsection (c) that if an assailant inflicts serious physical injury only after completing sexual intercourse, he is guilty of only second degree rape."

The statement above exactly describe the argument used by the state to justify the giving of the lesser degree instruction to the jury in my case. The aggravating factors elevating the offense to the charge of rape in the first degree in my case was the serious physical injuries inflicted on S.C. during her assault.

While the aggravating factors elevateing the offense to first degree rape differ in the two cases, it is my contention that the anology used by the court describes exactly the unlikely argument the state utilizes to justify the giving of the lesser degree instructions of rape in the second degree which resulted in my conviction. Namely, the state seems to be arguing that

I am guilty of only second degree rape, despite the injuries suffered by S.C. and the fact there was no evidence presented committe only the lesser offense had been committed. Using the Supreme court reasoning, Courts the plain language of the statute supports no other conclusion, which is the infliction of serious physical injury during the assault constituting the rape is an aggravating factor elevating the crime to first degree rape.

Accordingly, I contend that my conviction should be reversed based on the decision reached in STATE VS BROWN. Namely that the court erred in giving the jury improper instructions of rape in the second degree.

Further advancing this arguement, the following cases and articles of the Washington Constitution support my contention that the giving of the lesser degree instruction to the jury by the court was an improper comment on the evidence, giving the impression to the jury that the court considered there to be sufficient evidence of my guilt, and that it was for the jury to decide the required element and severity of the crime committed. Specifically, the giving of the improper jury instructions allowed the jury to consider alternative among

s

no evidence or te

means to commit the crime alleged, where no evidence or testimony concerning those alternative means were never produced, by the state or myself, during the trial.

Article IV, Section 16 of the Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been established as a matter of law.

A jury instruction is not an impermissible comment on the evidence when sufficient evidence support it and the instruction is an accurate statement of the law. State vs Johnson

While the State did produce evidence and argument contenting that S.C. had consumed a certain amount of alcohol and as a result was physically helpless and unable to consent to sexual intercourse, this was presented to support the chain of events which led to S.C.s' eventual assault, which resulted in the injuries elevating the offense to rape in the first degree. mony

I am obviously not a trained legal professional, and not certain if the decisions and cases cited here are the final, guiding principals in the areas of law in question, especially as I have been denied access to the clerk papers, which contain the actual jury instructions and any discussion regarding them.

Nevertheless, I content that the facts of my case, and the decisions reached in the cases cited, warrant reversal of my improper conviction of the lesser degree offense of rape in the second degree.

ADDITIONAL GROUNDS III

I was denied effective assistence of counsel. This resulted in an improper conviction on the lesser degree of rape in the second degree. This lack of effective assistance was manifest in several area, which I will list and address below.

A

Defense counsel failed to make a motion to suppress the initial identification based on impermisibly suggestive photo montage.

After informing officers that the person who had assaulted her was named Louis Pluff (RP 3-26-13, pg 103, 104) who was 6'4, and who had grown up with her brother, the victim, S.C., was then shown a photo montage (exhibit #18) prepared by Det. Snodgrass, who testified (RP 3-27-13, pg 11) that he used black and white photos to insure my photo did not stand out in any way. I contend that the reverse is true, and that the photo of me was used, and the fact that all photos were black and white, resulted in a photo montage in which I stood out considerably. In the photo montage, I am wearing a white and blue flannel, button-up work shirt, and all others in the photo montage are wearing black and grey T-shirt. I mentioned

this to my defense counsel soon after viewing discovery, which was many months prior to trial, and he assured me that he would make a motion to suppress the photo identification of me. If defense counsel had made a motion to suppress, the court would have been able to examine the photo to determe if the montago was impemissibly suggestive.

S.C.'s initial conflicting identification, her mental confusion when viewing the photos, and the fact that an impesimisible suggestive photo montage was used, would have provided the doubt required to create a reasonable probility that the motion to suppress would have been granted.

B

Defense counsel was ineffective for failing to make a motion requesting a psychiatric examination of S.C..

C

Defense Counsel was ineffective for failing to include psychiatric experts to testify regarding the effect of S.C. mental disability on her ability to accurateely recall and recount events.

S.C. testified that she, "is on disability because I've got the mind of a 12 year-old (RP 3-26-13, pg 20), and in her statement to emergency room nurse Mirian Thompson (RP 3-27-13, PG 66-70), S.C. told the nurse that she had three

different personalities, and described their characteristics. While it is not known if S.C. has been diagnosed as suffering from D.I.D. (Disassociativee identy disorder), more commenly known as Multiple personality, she clearly has some level of mental disability, as evidence by the fact that she has been deemed eligible for disability benefits by the state.

"An adult witness is incompetent to testify if he or she is of "unsound mind", or appears incapable of recieving and relating accurate impressions. of the facts about which they are examined." STATE VS JOHNSTON 143 Wn.App 1 (2007). S.C. clearly had trouble remembering events accurately, as evidenced by conflicting identification, and general mental confusion. Combined with her self professed psychiatric condition and state determination of disability, I believe a motion for a psychiatric examination could have been granted.

In STATE VS DEMOS 94 Wn.2d 733 (1980), the washington Supreme Court ruled that, "The vast majority holds that the trial court does have discretion to order a psychiatric examination of the complainting witness where a compelling reason is shown. We align ourselves with the majority. This appears to be the rule adopted by our court of Appeals". STATE VS BRAXTON 20 Wn.App. 489, 492 (1978).

There is a reasonable probability that such an examination, if requested, would have been granted. This would have allowed for an opportunity to investigate the basis of S.C.s disability status, and the effect of that on her memory. The failure of defense counsel to request a competensy hearing was clearly an ommission which denied me the oppotunity to present the jury with evidence of S.C. mental disability and the effect it may have had on her ability to accurately recall and recount events. McFARLAND, 127 Wn.2d at 337 n.4, "This Court will not find ineffective assistence of counsel for the failure to request a competency hearing unless . . . can make a showing that the trial court would have likely found . . .incompetent as a witness. Otherwise . . . has failed to demonstrate prejudice."

For the reason and arguments presented above. I also contend that defense counsel provided ineffective asssistence of counsel by failing to request a defense expert to testify as to S.C.'S mental condition and the effect it may have had on her ability to accurately recall and recount events. MATER OF PERSONAL RESTRRAINT OF LORD(1994), "at trial court level, appointment of experts is part of defendants constitutional right to assistence of counsel."

D.

D.

Defense Counsel was ineffective for failing to present a cohesive defense, and failing to effectively cross examine witness.

Defense counsel failed to present a cohesive defense by failing to effectively cross examine the witnesses. Defense did not question any witnesses on the presence of other possible suspects in or near the motel room in question before S.C. was found.

My defense to the charge against me was that I am not the person who committed the assault, and that S.C. was talking with a transient as I left, who I then believe continued drinking with S.C. and eventually, with others, committed the assault upon her. Defense counseel never attempted to establish the existence of the person by questioning any witness regarding him. Further, while cross examining S.C. (RP3-26-13 pg 19-21), defense counsel never asked her if I was the person who assaulted her. Her earlier statement to the prosecutor that she didn't remember anything after accepting a ride until waking up in the motel room (RP 3-26-13. Pg 7-8) is a clear implication that she did not know who raped her, and a simple question by defense counsel would have made clear to juries that S.C. did not know who had assulted her, and that considering her lack of memory, my theory of events was possible, and could have been sustained by further questioning of S.C. and other witness. If this line of question would have been pursued,

I contend that the jury would have been presented with additional reasonable doubt as to whetther I had been the one to commit the assault upon S.C.

An anser of "I don't know", to the question of "was Mr. James the one who assaulted you" would have been a clear indiction of reasonable doubt, and combined with her earlier insist[illegible] that the person who assalted her was named louis Pluff, and was 6'-3 or 6'-4, would have provided more than [illegible] doubt to require an accquital.

[illegible] ineffective for failing to confirm results of washington state Parol lab DNA results.

After recieveing the Crime Labortory report from the Washington State Patrol. Defense counsel met with me at the Gray Harbor County Jail in Montesano. Washington to discuss the results of the DNA test. These concerned the results of tests comparing my DNA to evidence recieved from the crime scene, as well as DNA evidence collected during S.C.'S medical examination.

Defense counsel informed me that he had just recieved the DNA results, and that it was a "home run". when I asked what that meant, he told me that the results confimed that the only DNA of mine recovered during S.C.'S medical examination

came from sample taken from her neck, which was consistent with my testimony that we had been "making out". Defense counsel told me that there was also DNA found elsewhere on S.C.'S body from "another unidentified male." (defense trial Brief, pg 2, line 14, 15).

The relevant paragraph from the crime labatory report (pg 2) is the last one in the section marked CONCLUSIONS/INTERPRETATIONS, and reads "The deduced male profile obtained from the "Rt neck" sample was entered into and searched against the Washington State Patrol Combined DNA index system (CODIS) database and no matches to a forensic unknown were found."

After reading the lab report, I told defense counsel that the pagagraph he was refering to was somewhat vague, and asked him if he was sure that is what the paragraph in question meant. He assured me that it was, and told me that as a result "the case is all but over". While very happy to be told this I was still in doubt that he was correct in his interpretation of the lab results, and asked him to contact the washington state patrol labatory to confirm these results. Defense [illegible] would, and that I could

CASE #: 44906-4-II

Dear Clerk of Court, COA Div. II March 25, 2014

Please add these final 3 pages to my Statement of Additional Grounds, mailed yesterday, March 24, 2014.

They were accidently left out when I was preparing the various copies for mailing to you, the prosecutor, and my appelate attorney.

Respectfully,

Robert E. James

Robert E. James

c.c.
Lise Ellner, Appelate Attorney
Katherine Lee Svoboda, Grays Harbor Co. Prosecutor

now "rest easy".

Over the next several months, on the few occasions that I was able to talk with defense counsel, I asked him if he had confirmed the DNA results with the labaratory yet. On each occasion he told me that he had not, but would do so soon. This continued until the day of trial.

Defense counsel never confirmed the DNA results, and on the second day of the trial, while questioning Marion Clark, the forensic scientist from the Washington State Patrol Laboratory on the results of the DNA test (RP3-27-13, pg 83-84) Defense counsel raised the question of DNA from an unidentifiable male for the first time. He is then corrected and informed of the correct interpretation, which is that my sample did not match any "unknown" in the state database.

I contend that defense counsel failed to conduct the required investigation to confirm the results of the DNA tests, and as a result did not provide me the correct information which would have enabled me to accurately guage the strengthes and weakness of my case. Defense Counsels incorrect interpretation of test results allowed counsel to operate under the mistaked impression that evidence existed that would prove my innocence conclusively, and therefore he failed to present a cohesive defense, by conducting a more thorough investigation of the facts, and a more aggressive cross examination of witnesses.

This basic investigation failure to confirm lab results is a clear and prejudicial example of ineffective assistence of counsel, which could have been prevented by simply placing a phone call to confirm the results of DNA testing.

Accordingly, I contend that my conviction should be reversed for the reasons set forth above.

ADDITIONAL GROUNDS IV

The cumulative effect of the many errors committed during my trial, by defense counsel and he court, denied me a fair trial.

While several of the issues addressed in this statement of additional grounds and the direct appeal are of Constitutional magnitude and warrant reversal of my conviction individually, I contend that the cumulative effect of these errors are more than sufficient to sustain a reversal and, if not a dissimissal due to insufficient evidence, a remand for a new trial on the charge of rape in the second degree.

The Washington Supreme Court in STATE VS WEBER 159 W.2d 252, 279 (2006),stated that "under cumutive error doctrine, reversal of a defendants' conviction may be warranted if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered

harmless"

Based on this decision, I contend that the many errors committed by the court and defense counsel in my case combined to effectively deny me a fair trial and believe a reversal of my conviction is warranted.

SUBMITTED ON THIS 23 DAY OF March, 2014

Respectfully

Robert E. Jame

Robert E. Jame,