FILED
June 15, 2015
Court of Appeals
Division III
State of Washington

No. 32220-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUIS A. DUENAS BARRETO, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by giving instruction 15:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence mans that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

B. The State's evidence was insufficient to support the conviction for attempted second degree rape.

Issues Pertaining to Assignments of Error

A. Did the court err by giving instruction 15 because it relieved the State of its burden of proving the element of forcible compulsion for second degree rape and improperly put the burden on Mr. Barreto? (Assignment of Error 1).

B. Was the State's evidence insufficient to support the conviction for attempted second degree rape? (Assignment of

Error 2).

II. STATEMENT OF THE CASE

Luis A. Duenas Barreto was charged by second amended information with count I: second degree rape by forcible compulsion and count II: attempted second degree rape by forcing his way into the victim's apartment and trying to force himself upon her. (CP 120). The case proceeded to jury trial.

Nancy Ariaz testified that in the first week of November 2012, Mr. Barreto came to her house. (12/6/13 RP 114, 117). When he grabbed and kissed her, she hit him. (*Id*. at 114). Ms. Ariaz asked him to leave, but he grabbed her again from behind, kissed her, threw her on the bed, pinned her hands together with his one hand, took her pants and underwear off with the other, and raped her. (*Id*. at 115). Mr. Barreto opened her legs forcefully and penetrated her vagina with his penis as she resisted. (*Id*. at 115-16). Because he threatened her with hanging and she was afraid, Ms. Ariaz did not call police. (*Id*. at 118). She did, however, tell her friend, Veronica Zelaya, about it two or three days later. (*Id*.).

Ms. Ariaz testified that about a week or two after this incident, Mr. Barreto came back:

> He was at my house. He grabbed me by force again. He threw me on the living room. I screamed really loud and he left me alone. (12/6/13 RP 127).

She did not invite him in that day. (*Id*.).

The judge instructed the jury on the defense of consent. Instruction 15 stated:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty. (CP 90).

And consent was Mr. Barreto's defense to the charge of second degree rape. (*See* 12/9/13 RP 239-44).

The jury found Mr. Barreto guilty of second degree rape and attempted second degree rape as charged. (CP 70, 71). Under RCW 9.94A.507, he was sentenced to a minimum term of 120 months and a maximum term of life for the second degree rape and a minimum term of 102 months and a maximum term of life for the attempted second degree rape, to run concurrently. (CP 28, 35).

This appeal follows. (CP 6).

III. ARGUMENT

A. The court erred by giving instruction 15 because it relieved the State of its burden of proving the element of forcible compulsion for second degree rape and improperly put the burden on Mr. Barreto.

While this appeal was pending, the Supreme Court decided *State v. W. R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). Mr. Barreto is entitled to the benefits of *W.R*. *State v. McCormick*, 152 Wn. App. 536, 539, 216 P.3d 475 (2009), *review denied*, 172 Wn. 2d 1007 (2011) (new principle of law retroactive to cases not yet final).

Here, the State did not have to prove lack of consent as part of its proof of the element of forcible compulsion. Rather, the court's instruction 15 put the burden of proving the defense on Mr. Barreto. The trial court thus violated his due process rights by putting the burden on him to prove consent, which negates the element of forcible compulsion. (*See also* Instruction 8 defining second degree rape, CP 83; Instruction 9, to-convict for second degree rape, CP 84; Instruction 14 defining forcible compulsion, CP 89; Instruction 15 defining consent, CP 90). In *W.R.*, 181 Wn.2d at

770-71, the Supreme Court stated:

> When a defense necessarily negates an element of the crime charged, the State may not shift the burden of proving that defense onto the defendant. To hold otherwise unconstitutionally relieves the State of its burden of proving every element of the crime beyond a reasonable doubt. We hold consent necessarily negates forcible compulsion. We overrule *Camara* and *Gregory* to the extent they hold the defendant bears the burden of proving consent by a preponderance of the evidence.

The remedy is remand for a new trial with the proper allocation of the burden of proof. *Id*. at 770.

Under the holding in *W.R.*, Mr. Barreto must therefore be granted a new trial on the second degree rape conviction.

B. The State's evidence was insufficient to support the conviction for attempted second degree rape.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628

(1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Instruction 10 stated:

> A person commits the crime of attempted Rape in the Second Degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime. (CP 85).

Instruction 12 defined substantial step:

> A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. (CP 87).

Instruction 11 stated in relevant part:

> To convict the defendant of the crime of attempted Rape in the Second Degree as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between November 10 to November 30th 2012, the defendant did an act that was a substantial step toward the commission of Rape in the commission of Rape in the Second Degree;

(2) That the act was done with the intent to commit Rape in the Second Degree; and

(3) That the act occurred in the State of Washington. (CP 86).

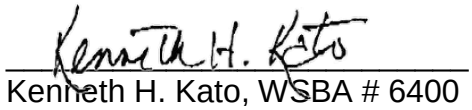
The only evidence in the record on the attempted second degree rape is the testimony of Ms. Ariaz that she was grabbed by force and thrown on the living room by Mr. Barreto. (12/6/13 RP 127). But there is nothing in the record showing that he intended to commit, and took a substantial step toward committing, second degree rape. Although he may have been guilty of simple assault, that was not the charge. No evidence supports the conviction for attempted second degree rape as the State failed to prove beyond a reasonable doubt the essential elements of intent and a substantial step. *In re Winship*, *supra*. Indeed, the jury necessarily resorted to guess, speculation, and conjecture to find facts to convict since the State produced none. This, it cannot do. *Hutton*, *supra*. The conviction for attempted second degree rape must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Barreto respectfully urges this court to reverse his conviction for second

degree rape and remand for new trial and reverse his conviction for attempted second degree rape and dismiss the charge.

DATED this 15th day of June, 2015.



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CERTIFICATE OF SERVICE

I certify that on June 15, 2015, I served the brief of appellant by first class mail, postage prepaid, on Luis A. Duenas Barreto, # 370878, PO Box 769, Connell, WA 99326; and by email, as agreed by counsel, on Brian Hultgren at airacheta@co.franklin.wa.us.