NO. 97795-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEREJE YAKAYO KEBEDE, AKA, DEREJE ASRAT DEGFU,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT AND CROSS-PETITIONER

The State of Washington is the Respondent and cross-petitioner in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is the unpublished opinion in State v. Dereje Kebede, No. 77445-0-I, entered on September 23, 2019. Uber driver Kebede was convicted of attempted second degree rape of J.A., an inebriated passenger who entered his car after celebrating her twenty-second birthday at a nightclub. Kebede's conviction and sentence were affirmed by the Court of Appeals.

Kebede made numerous claims in his direct appeal and statement of additional grounds for review. In addressing Kebede's claim of instructional error, the Court of Appeals held that the Washington Pattern Jury Instructions-Criminal ("WPICs") for attempted rape in the second degree are ambiguous, but that any error was harmless beyond a reasonable doubt due to the overwhelming evidence that Kebede intended to have intercourse with a person who was unable to consent because she was mentally incapacitated.

C. ISSUES PRESENTED FOR REVIEW

In summary, the State joins the Petitioner in asking this Court to accept review of the Court of Appeals' conclusion that the WPIC jury instructions for the crime of attempted rape in the second degree are ambiguous. The Court of Appeals reached this conclusion by determining that the State must prove a higher level of specific intent than required by this Court. This determination also led the Court of Appeals to hold that the statutory affirmative defense for second degree rape does not apply to the attempted crime.

The State renews its argument that the jury instructions are an accurate statement of the law. The State's analysis in its briefing in the Court of Appeals was incorrect and has been corrected here to align with this Court's precedent on the mental state necessary for attempted rape. The Court of Appeals' conclusion is contrary to decisions from this Court and creates an issue of substantial public interest because it is now unclear how the jury should be instructed for attempted second degree rape. Although the decision at issue is unpublished, courts, especially trial courts, are likely to rely on its analysis. The State asks this Court to deny review as to all other issues raised in the Petition for Review, including the finding of harmless error, because they do not meet the requirements of RAP 13.4.

1. Whether the Court of Appeals' holding that the specific intent element of attempted rape in the second degree requires a finding that the defendant believed the victim was incapacitated led it to erroneously conclude that the relevant WPIC jury instructions are ambiguous.

2. Whether the Court of Appeals correctly concluded that no prosecutorial misconduct occurred where the unobjected-to argument, when taken in proper context, was a correct statement of the law and any misstatement could have been remedied by a curative instruction.

3. Whether the Court of Appeals correctly held that the trial court properly exercised its discretion in excluding highly prejudicial DNA evidence of low probative value that did not impact Kebede's right to present a defense.

D. STATEMENT OF THE CASE[1]

J.A. went out with friends to a Capitol Hill nightclub to celebrate her birthday. RP 1162, 1166, 1175. After several drinks on an empty stomach, she blacked out. RP 1185-89. As a result, J.A. could not remember any of the night's events after blacking out. Id. At some point, she lost her phone and was kicked out of the nightclub. RP 585, 667, 1211.

[1] A more detailed description of the facts is provided in the State's briefing before the Court of Appeals. Br. of Respondent at 2-13.

Kebede was an Uber driver. Shortly after signing off the Uber application, Kebede picked J.A. up in his Toyota Prius near the nightclub. RP 590, 1202. Kebede drove J.A. away from her home. RP 1448, 1540.

The next morning, J.A. awoke to find herself in a "nasty motel room" with no idea where she was. RP 1192-93. Kebede, whom she did not know, was in bed next to her, with an opened box of condoms on the nightstand. RP 1193, 1195. J.A. was dizzy and still intoxicated. RP 1193-96. Her pants had been removed, but she was still wearing her bra and socks, items that J.A. explained she would have removed for consensual intercourse. RP 1197-98. Kebede told J.A. that they had sex and that he had used "protection." RP 1020. When pressed for details on what had happened the night before, Kebede gave multiple contradictory accounts and claimed they had met in a bar and that he was not an Uber driver. RP 1028, 1202-03, 1206.

After Kebede dropped J.A. off at a friend's house, a Seattle police officer saw J.A. on the ground, writhing and screaming with the realization that she had been raped. RP 390-98, 675, 1216-17. After speaking with the officer, J.A. decided to go to the hospital for a sexual assault exam. RP 407, 678, 998-99. J.A. had vaginal injuries that were consistent with sexual assault and other injuries to her body and scalp. RP 1030-40, 1047, 1089, 1091. Kebede's DNA was located outside J.A.'s

vagina. RP 1129-32. Urinalysis confirmed that J.A. had still been legally intoxicated after she awoke that morning. RP 911, 914, 1014, 1221.

Kebede later provided a statement to police. RP 467-68. Kebede admitted that he wanted to have sex with J.A., whose name he did not know. Ex. 44. Kebede gave contradictory statements about J.A.'s intoxication. Id. Kebede also offered conflicting explanations about what had happened in the motel room while J.A. was blacked out, claiming that he was unable to maintain an erection for intercourse. Id.

At trial, J.A. testified that she never would have had consensual sex with Kebede, an Uber driver twice her age whom she had just met. RP 1218, 1237, 1316. Kebede testified at trial. RP 1445. Kebede's testimony was inconsistent with itself and with his prior statement. RP 1451-59, 1484, 1512, 1581. Kebede claimed that J.A. initiated sexual contact. RP 1460. Kebede initially testified that J.A. knew what she was doing throughout their interaction and did not appear drunk, but later admitted he knew that she was too drunk to drive. RP 1444, 1494, 1497.

The jury convicted Kebede as charged of attempted rape in the second degree. CP 55. At the sentencing hearing, the trial judge commented that Kebede's testimony was "extremely damaging to his case." RP 1740.

E. ARGUMENT

1. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DETERMINATION THAT THE PATTERN JURY INSTRUCTIONS ARE AMBIGUOUS.

RAP 13.4(b) permits review by this Court where a decision of the Court of Appeals is in conflict with a decision of the Supreme Court, a decision of the Court of Appeals, or raises an issue of substantial public interest that should be decided by the Supreme Court. All three criteria are met here.

The analysis of the decision below is inconsistent with established precedent from this Court and the Court of Appeals and makes it unclear how trial courts should instruct juries about the crime of attempted rape in the second degree. This uncertainty threatens to affect other attempt crimes. Accordingly, the erroneous decision raises an issue of substantial public interest.[2]

[2] The Court of Appeals' determination that any instructional error here was harmless beyond a reasonable doubt was wholly correct. However, for the reasons explained herein, the Court of Appeals should not have had to reach harmless error analysis on this issue.

a. Attempted Second Degree Rape Does Not Require The State To Establish That The Defendant Believed The Victim Was Incapacitated Where The State Proves The Victim Was Actually Incapacitated.

The Court of Appeals erroneously held that the State must always prove that the defendant believed his intended victim was incapacitated in order to establish that he intended to have intercourse with a person who was incapable of consent due to mental incapacitation. This holding is in conflict with State v. Johnson, 173 Wn.2d 895, 270 P.3d 591 (2012). In Johnson, this Court held, in the context of attempted promotion of commercial sexual abuse of a minor, that the State may prove the defendant's intent *either* by proving that the defendant's intended victim was *in fact* a minor, *or* by showing that the defendant *believed* that a fictitious victim was a minor. 173 Wn.2d at 908. By holding, in the context of attempted second degree rape, that the State must *always* prove the defendant believed that his intended victim was incapacitated, the Court of Appeals improperly elevated one *method* of proving intent to necessary *element* of attempted rape. Because this holding creates uncertainty about the elements of attempt crimes, it presents an issue of substantial public interest.[3]

[3] The State bears some responsibility in the Court of Appeals' erroneous conclusion. In that court, when addressing the instructional issue, the State argued that the pattern instructions were correct and necessarily required the jury to find that Kebede intended to

The intent required for a crime of attempt is the intent to accomplish the criminal result of the base crime. Id. at 899. A person is guilty of rape in the second degree when the person engages in sexual intercourse with another person when the victim is incapable of consent by reason of being mentally incapacitated. RCW 9A.44.050(1)(b). The criminal result of the crime is sexual intercourse with a person who is incapacitated. For the crime of *attempted* rape in the second degree, "the defendant must intend to have intercourse with a victim incapable of consent." State v. Weaville, 162 Wn. App. 801, 816, 256 P.3d 426 (2011) (citing In re Pers. Restraint of Hubert, 138 Wn. App. 924, 931-32, 158 P.3d 1282 (2007)).

As this Court explained in Johnson, the element of intent can be established in more than one manner depending on how the crime was committed. Johnson was convicted of attempted promotion of commercial sexual abuse of a minor based on his interaction with two adult undercover police officers posing as minors. Johnson, 173 Wn.2d at 896. Because there were no actual minors involved, the State could not prove Johnson's

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have intercourse with a mentally incapacitated victim. Br. of Respondent at 20-24. Later when addressing Kebede's claim of ineffective assistance of counsel, the State incorrectly agreed that proving intent required that the defendant had knowledge of the victim's incapacitation. Br. of Respondent at 30. Upon further examination, the State recognizes its concession was in error and offers the correct analysis herein. Appellate courts are not bound by an erroneous concession of law. State v. Knighten, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988).

criminal intent simply by showing the age of his intended victims. Id. at 909. Thus, the only way to establish Johnson's intent to promote the commercial sexual abuse of minors was through showing that he believed that the undercover officers were minors even though they were not. Id. This Court described the necessary intent for the crime of attempted rape of a child:

> [I]t is clear that the age of the victim of child rape – either the child victim's actual age or the defendant's belief in a fictitious victim's age – is material to proving the specific intent element of attempted child rape.

Johnson, 173 Wn.2d at 908.

Like commercial sexual abuse of a minor, it is the status of the victim that makes sexual intercourse with an incapacitated person a crime. Applying Johnson's reasoning to the crime of attempted second degree rape, the State can prove the element of intent by proving *either* that the intended victim was actually incapacitated, or that the defendant *believed* that the intended victim had that status. Whether one or both manners for establishing intent is available depends on the underlying facts of the crime.

In this case, J.A. was an actual victim, not an undercover officer posing as an incapacitated person. Therefore, the State could prove Kebede's intent to have intercourse with an incapacitated victim either by

proving that J.A. was actually incapacitated or that Kebede believed she was. But by holding that the State must always prove what the defendant believed about the victim's status, the Court of Appeals' decision takes one manner for establishing the underlying intent for attempted rape in the second degree and makes it mandatory in all cases, regardless of the underlying facts. This one-size-fits-all approach conflicts with Johnson and holds the State to a higher burden than required by the statute and established caselaw.

Because the Court of Appeals' ruling below conflicts with this Court's holding in Johnson and presents an issue of substantial public concern, this Court should accept review to clarify the elements of attempted second degree rape.

b. Based On Its Incorrect Conclusion Regarding Specific Intent, The Court of Appeals Erroneously Determined That The Pattern Jury Instructions For Attempted Second Degree Rape Are Ambiguous.

Based on its conclusion that the State must always prove the defendant's belief in the victim's incapacitation, the Court of Appeals held that the pattern jury instructions for attempted second degree rape are ambiguous. Specifically, the Court of Appeals found that the ambiguity derived from the separation of two correct instructions: the "to convict" instruction containing the element of intent and the definition of the base

crime of second degree rape. This holding is contrary to Johnson, as described supra, and is also contrary to this Court's holdings in State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003), and State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990).

The trial court accepted the State's proposal to instruct the jury using the standard Washington Pattern Jury Instructions-Criminal (WPICs). RP 1379. The court provided the following relevant instructions:

Instruction No.13

> To convict the defendant of the crime of Attempted Rape in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That between the dates of March 28, 2015 and March 29, 2015, the defendant did an act that was a substantial step toward 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.
>
> 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.

Instruction No. 7

> A person commits the crime of rape in the second degree when he engages in sexual intercourse with another person when the other person is incapable of consent by reason of being mentally incapacitated.

Instruction No. 6

A person commits the crime of attempted rape in the second degree when, with intent to commit that crime, he does any act that is a substantial step toward the commission of that crime.

Instruction No. 8

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Instruction No. 9

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

WPICs 100.02, 41.01, 100.01; CP 43, 36-39.

An attempt crime contains only two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime. DeRyke, 149 Wn.2d at 910. The "to convict" instruction for an attempt crime need not provide all of the elements of the crime attempted; the trial court may convey that information in a separate definitional instruction. Id. at 910-11. Reviewing courts must read jury instructions in their entirety and in a commonsense manner. Bowerman, 115 Wn.2d at 809.

The Court of Appeals found the above instructions ambiguous because they did not make it clear that the State needed to establish Kebede's belief in J.A.'s incapacitation. But as argued above, the State did

not need to prove Kebede's belief if it could prove that J.A. was in fact incapacitated. Accordingly, any ambiguity as to such a burden inures to the defendant's benefit and is therefore not prejudicial to his defense.

The Court of Appeals' analysis, that ambiguity in the jury instructions was created by "the separation of the definition of second degree rape from the intent element," is contrary to DeRyke and Bowerman. Slip Op. at 9. The Court of Appeals' confusion is understandable given its erroneous conclusion regarding what is necessary to prove intent. However, if there is any ambiguity in the instructions, it cannot be attributed to the separation of an attempt crime's "to convict" instruction from the definitional instruction of the base crime. Such a finding would run directly contrary to DeRyke, which expressly approves of the separation of the "to convict" instruction for an attempt crime from all of the elements of the crime attempted. 149 Wn.2d at 910-11. Such analysis also conflicts with this Court's holding in Bowerman that all jury instructions be read together and in a commonsense manner. 115 Wn.2d at 809.

The Court of Appeals' analysis on this issue has implications beyond the crime of attempted second degree rape. The court's flawed reasoning could impact other crimes of attempt, notably including sex crimes involving children. In that context, the degree of the crime depends

specifically on whether a child is above or below a certain age threshold and a certain number of months younger than the defendant. The Court of Appeals' decision in this case would require the State to prove the defendant's belief in the child's exact age, while the criminal result of the crime is simply sexual contact or intercourse with a person who is a child. See Johnson, 173 Wn.2d at 907.

Thus, the Court of Appeals' decision would substantially increase the State's burden and conflicts with existing case law. This Court should grant review to clarify the necessary intent for attempted second degree rape and to reestablish the correct jury instructions for crimes of attempt. Review is warranted under RAP 13.4.

c. Based On Its Incorrect Conclusion Regarding Specific Intent, The Court of Appeals Erroneously Determined That The Reasonable Belief Affirmative Defense Did Not Apply To The Crime Of Attempted Second Degree Rape.

The Court of Appeals incorrectly held that the reasonable belief affirmative defense instruction does not apply to attempted rape in the second degree as a result of its erroneous conclusion that the State must always prove the defendant's belief in the victim's incapacitation for

attempted second degree rape.[4] This holding is contrary to the Court of Appeals' decision in Hubert, 138 Wn. App. at 931-32.

As relevant here, RCW 9A.44.030(1) provides that it is an affirmative defense to the charge of rape in the second degree that at the time of the act the defendant reasonably believed that the victim was not mentally incapacitated. The defendant has the burden to prove this defense by a preponderance of the evidence. Id.

In Hubert, the Court of Appeals found that it was ineffective assistance of counsel for a defense attorney, who was not aware of the defense, to fail to offer the affirmative defense instruction for attempted rape in the second degree when it was the only available defense. Although addressed in the context of an ineffective assistance of counsel claim, the Hubert court concluded that the reasonable belief affirmative defense is available for the crime of attempted rape in the second degree.

In this case, the Court of Appeals erroneously determined that "the affirmative defense is not necessary for the crime of attempted second degree rape because the State must prove that the defendant intended to have intercourse with an incapacitated person, which necessitates a finding that the defendant believed the victim was incapacitated." Slip Op. at 14-

[4] Again, the State assumes some responsibility for the Court of Appeals' incorrect conclusion.

15. The Court's conclusion is a direct result of its incorrect holding that the State must establish the defendant's belief that the victim was incapacitated, in conflict with Johnson. The Court of Appeals' determination here directly conflicts with its own prior ruling in Hubert and makes it unclear whether the statutory affirmative defense is available for attempted second degree rape, creating an issue of substantial public interest that warrants review by this Court.

2. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' CORRECT CONCLUSION THAT NO PROSECUTORIAL MISCONDUCT OCCURRED.

Kebede seeks review of the Court of Appeals' conclusion that the prosecutor's unobjected-to closing argument was not a misstatement of the law and that any error could have been cured by an instruction to the jury. Review should be denied because this issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b). The facts relevant to this issue are set forth in the State's briefing before the Court of Appeals. Br. of Respondent at 34-40.

The Court of Appeals properly concluded that, when taken in context, the prosecutor's argument was a correct statement of law. Misstating the law is prosecutorial misconduct. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). A reviewing court must evaluate allegedly

improper statements in the context of the entire case, including the argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Here, the Court of Appeals properly applied Thorgerson by examining the prosecutor's statements in context and determined that they were not improper and that any misstatement could have been cured by a curative instruction.

The Court of Appeals' determination on this issue does not conflict with a decision of this Court, does not conflict with another decision of the Court of Appeals, does not present a significant constitutional question, and is not an issue of substantial public interest. This issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b). For this reason, review should not be granted on this issue.

3. THIS COURT SHOULD DENY REVIEW OF WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING IRRELEVANT AND CONFUSING DNA EVIDENCE.

Kebede seeks review of the Court of Appeals' conclusion that the trial court properly denied the admission of highly prejudicial DNA evidence of low probative value that did not impact Kebede's right to present a defense. Review should be denied because this issue does not

meet the standards governing acceptance of review set forth in RAP 13.4(b).

Put very briefly, Kebede denied having intercourse with J.A. and argued that J.A.'s vaginal and other injuries could have been caused by another individual.[5] RP 151. The trial court allowed DNA evidence from a perineal swab of the victim to be admitted that contained both Kebede's DNA and DNA from an unknown male. RP 246-47. The admission of that evidence allowed Kebede to make his desired argument. RP 1661. The trial court excluded mixed profile DNA evidence obtained from J.A.'s clothing that originated from at least four unknown males and from which no additional information could be obtained. RP 246-47. The trial court found that the excluded evidence was minimally relevant, highly prejudicial, and did not impede Kebede's ability to argue his sought theory. Id. Following a detailed analysis of the issue, the Court of Appeals correctly upheld the trial court's determination. Slip Op. at 21-25.

Evidence that is not relevant, is not admissible. ER 402. Even evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" ER 403. The right to put on evidence in one's defense does not extend to evidence

[5] A more complete recitation of the facts relevant to this issue is set forth in the State's briefing before the Court of Appeals. Br. of Respondent at 40-49.

that is only minimally relevant. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Kebede's claim that the Court of Appeals' ruling implicates "the proper bounds of the Rape Shield Statute, RCW 9A.44.020, when considering relevant defense evidence," fails. Petition for Review at 1. Because the Court of Appeals' determination that the evidence at issue is "highly prejudicial," "of low probative value," and "irrelevant to Kebede's [defense] theory," the evidence was inadmissible without regard to the Rape Shield Statute. Slip Op. at 25.

Kebede's claim that the Court of Appeals' ruling is in conflict with Jones, 168 Wn.2d 713 and State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983), is baseless. Both cases clearly articulate that evidence, either of a victim's past sexual behavior or in support of a defense theory, must be relevant to be admissible. Jones, 168 Wn.2d at 713; Hudlow, 99 Wn.2d at 16-17. The Court of Appeals' determination here, that it was proper to exclude evidence that was of low probative value and did not impact Kebede's defense, wholly conforms with those cases.

The Court of Appeals' ruling on this issue is consistent with caselaw from this Court and does not implicate the bounds of the Rape Shield Statute. This issue does not meet the standards governing

acceptance of review set forth in RAP 13.4(b). For this reason, review should not be granted on this issue.

F. CONCLUSION

In the interest of justice, the State joins the Petitioner in asking this Court to accept review to clarify the correct jury instructions for attempted rape in the second degree. The State respectfully asks that all other issues raised in the Petition for Review be denied review.

DATED this 21st day of November, 2019.

Respectfully submitted,

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