NO. 30294-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CODY KLOEPPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Carrie Runge, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE IN REPLY

Several factual assertions in the State's brief are incomplete.

The State points out that D.W. indicated during her 911 call that the rapist looked like one of the The Villas maintenance staff. Brief of Respondent, at 3. This is true. The State fails to mention, however, that D.W. also told the 911 operator – during this same call – that she did not know who the individual was and did not think she had ever met or seen him before. CP 174, 176. Critically, at the time of this call, D.W. already knew Cody Kloepper by name. RP 165.

The State also maintains, "D.W. came to doubt her identification of Mr. Goering because of the lack of DNA connection between him and the physical evidence. (RP 158). Based on this, the police reviewed the defendant as a suspect. (RP 526)." Brief of Respondent, at 5. Actually, D.W. came to doubt her identification of Goehring because Detective Shepherd told her, definitively, that Kloepper's DNA was found inside her apartment

on a piece of evidence. CP 104; exhibit A.[1] For that same reason, police again treated Kloepper as a suspect. RP 526-527.

Finally, the State asserts as established fact that the rapist opened D.W.'s door with a key. As support, the State indicates, "D.W., a single female living alone, always locked her door. (RP 124)." Brief of Respondent, at 6. The State fails to acknowledge D.W.'s concession at trial that she sometimes forgot to lock the door. RP 160-161. The State also relies on D.W.'s statement, during the 911 call, that she always locked her door and "just checked it." Brief of Respondent, at 3 (citing CP 174). Again, she conceded at trial that the door was not, in fact, always locked. And her claim she "just checked it" may simply refer to the fact D.W. locked the door *after* the rapist left and had just confirmed that fact. See CP 175 (during 911 call, D.W. confirms she locked door after rape, stating, "ya it's locked now."). Whether the door was actually locked prior to the rape was disputed at trial.

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[1] The State has produced a transcript of exhibit A. Detective Shepherd's statements concerning Kloepper's DNA can be found at pages 3, 4, 6, and 8.

B. ARGUMENT IN REPLY

1. D.W.'S IDENTIFICATION OF KLOEPPER AS THE RAPIST WAS IRREPARABLY TAINTED.

As with the assertions addressed above, the State's summary of the evidence on this issue is incomplete. Quoting only Detective Shepherd's first mention of the DNA testing – "the DNA matched Cody Kloepper" – the State points out that this was a correct statement of the forensic evidence. Brief of Respondent, at 12, 14. But Shepherd did not stop there. He also said, "there was DNA and it came back to Cody," "Cody's DNA is on a piece of evidence," and "we have Cody's DNA inside there now." VRP of Exh. A, at 4, 6, 9. These assertions exceed the science. See RP 617 (incorrect to say Kloepper's DNA on the evidence). They also improperly encouraged D.W. to conclude Kloepper was the rapist by directing "undue attention to one particular individual." State v. Eacret, 94 Wn. App. 282, 283, 971 P.2d 109 (1999).

Citing one portion of D.W.'s trial testimony, the State also argues the overstated and misleading DNA claims "did not affect her identification of the defendant." Brief of respondent, at 15. The quoted exchange, however, indicates nothing of the sort. D.W. was quite clear that the DNA assertions changed her identification

to Kloepper. See RP 396 (when asked if anything specific changed her mind to think Kloepper was the rapist, D.W. responded, "the DNA thing.").

According to the State, "the defendant agrees that the police properly updated the victim on the status of the case, and that they shared the DNA result with her (App. brief at 17-18)." Brief of Respondent, at 13. This is not precisely accurate. Police are indeed free to update a victim on the status of a case, including DNA results. But doing so puts any subsequent identification (in court or out) at risk, particularly where the victim had not previously identified the defendant. And where, as here, the "update" also overstates the significance of the evidence, it is certainly impermissibly suggestive.

By inflating the DNA evidence to indicate definitively that Kloepper's DNA was found on evidence in D.W.'s apartment, and repeatedly including Kloepper's image in the photos shown to D.W.,[2] law enforcement's actions were impermissibly suggestive. Therefore, finding of fact 15 is incorrect.

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[2] In its brief, the State does not address this additional circumstance tainting the in-court identification.

Moreover, based on the Manson[3] factors, there was a substantial likelihood of irreparable misidentification. The State argues these factors favor a finding that D.W.'s in-court identification of Kloepper was reliable. Brief of Respondent, at 16. But the State cannot dispute that, prior to the misleading DNA assertions, D.W.'s description of the rapist matched Goehring, she confidently identified Goehring, and she confidently excluded Kloepper. See Brief of Appellant, at 18-19. Kloepper has established the corrupting effect of the DNA claims tainted any later identification.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ACT ONCE JURORS LEARNED KLOEPPER HAD A CRIMINAL HISTORY.

Citing State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009), and State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000), the State argues defense counsel may not have requested a curative instruction regarding the reference to I-Leads as an intentional and legitimate tactic. Brief of Respondent, at 17-18.

In both Yarbrough and Barragan, however, the trial court expressly offered to give an instruction and defense counsel then

[3] Manson v. Braithwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

declined to ask for one. Yarbrough, 151 Wn. App. at 90; Barragan, 102 Wn. App. at 762. Thus, there could be no doubt the absence of an instruction was tactical and therefore defeated any claim of deficient performance. The same cannot be said in Kloepper's case, where there was no offer from the court to cure the problem with an instruction.

The State also points out that Detective Shepherd indicated most, but not all, data in I-Leads is from police contacts and that it includes contacts short of criminal conviction. Brief of Respondent, at 19. Conviction or not, Shepherd clearly informed jurors that most of the information contained in the database was contact or booking information, "[i]f somebody is booked into jail, their photos are in that," and, importantly, Kloepper's photo was in the database. RP 549, 551. This informed jurors that Kloepper had been booked for something in the past.

The State also argues this evidence was harmless because the evidence against Kloepper was "overwhelming." Brief of Respondent, at 18. It was not. As discussed in the opening brief, D.W. had confidently identified someone else as the rapist, had confidently excluded Kloepper, and the DNA statistical evidence was far less compelling than in most cases. Kloepper has

demonstrated prejudice, i.e., a reasonable probability counsel's mistake affected the trial outcome.

3. THE TRIAL COURT ERRED WHEN IT IMPOSED CONSECUTIVE SENTENCES FOR ASSAULT AND RAPE.

The sentencing court was under the misimpression that State v. Brown, 100 Wn. App. 104, 995 P.2d 1278 (2000), aff'd in part, rev'd in part, 147 Wn.2d 330, 58 P.3d 889 (2002), compelled a finding that the convictions for rape and assault involved different intents. RP (9/23/11) 8-9. In fact, however, Brown did not even argue his offenses involved the same overall intent and they clearly did not. Brief of Appellant, at 31-32.

The State argues that the intruder's continuous and sequential acts of overpowering and then raping D.W. did not involve an overall intent to rape because the intruder did not intend to rape D.W. until D.W. suggested rape. Brief of Respondent, at 26-28. Yet, the State's theory at trial was that, having been rejected at his intended sexual encounter with Salvador Contreras, Kloepper was still intent on having sex that night and specifically targeted D.W. See RP 692-693, 739 (D.W. specifically targeted and at a time when she would be home alone); RP 700-701, 749 (Kloepper out looking for sex); RP 743 (with Contreras and again

before entering D.W.'s apartment, Kloepper took shirt off; "maybe the defendant just likes to take off his shirt before he has sex").

The individual who raped D.W. intended to rape her when he assaulted her. This is true not only for the reasons identified by *the State* during its closing arguments, it is true based on the other evidence. The rapist stopped physically beating D.W. as soon as she stopped resisting. And there was no more beating after the rape, either. The rapist simply left. The sentencing court erred when it found, based on Brown, that the assault and rape were separate and distinct crimes. The sentences should be concurrent rather than consecutive.

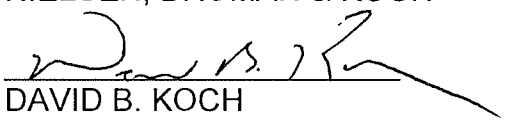
C. CONCLUSION

For the reasons discussed in Kloepper's opening brief and above, this Court should reverse and remand for a new trial. Minimally, this Court should remand for imposition of concurrent sentences on the assault and rape convictions.

DATED this 30th day of April, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30th day of April, 2013, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 30th day of April, 2013.

X Patrick Mayovsky