

69308-5

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No. 69308-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANTHONY DIGEROLAMO,

Appellant.

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

The Honorable Lori K. Smith

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 4

S.B. WAS NOT PHYSICALLY HELPLESS OR
MENTALLY INCAPACITATED, THUS THE STATE
FAILED TO PROVE MR. DIGEROLAMO WAS
GUILTY OF RAPE 4

1. The State bears the burden of proving each of the essential
elements of the charged offense beyond a reasonable doubt. 4

2. The State failed to prove that S.B. was incapable of consent
because she was mentally incapacitated or physically
helpless..... 5

a. S.B. was not physically helpless..... 6

b. Neither was S.B. mentally incapacitated at the time of
the event..... 7

3. Mr. Digerolamo is entitled to reversal of his conviction with
instructions to dismiss..... 9

E. CONCLUSION 10

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV 4

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 4

Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)..... 9

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 4

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)..... 4

WASHINGTON CASES

State v. Al-Hamdani, 109 Wn.App. 599, 36 P.3d 1103 (2001), *review denied*, 148 Wn.2d 1004 (2003) 5, 6

State v. Bucknell, 144 Wn.App. 524, 183 P.3d 1078 (2008)..... 6, 7

State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1996)..... 9

State v. Ortega-Martinez, 1124 Wn.2d 702, 881 P.2d 231 (1994)..... 7, 8

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)..... 5

State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992)..... 6

STATUTES

RCW 9A.44.010 5, 7

RCW 9A.44.030 7

RCW 9A.44.050 5, 6

A. ASSIGNMENT OF ERROR

The State failed to prove beyond a reasonable doubt S.B. was incapable of consent due to mental incapacity or physical helplessness.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove every element of the offense beyond a reasonable doubt. Based upon the subsection of the rape statute charged, the State was required to prove S.B. was incapable of consenting because she was physically helpless or mentally incapacitated. S.B. was conscious prior to, and during the incident and was able to describe the room in which the incident occurred, and the fact the person had hair on their head and stubble on their chin. She also was able to swat at the person to go away, and able to turn away from the person, thus showing an understanding of the act of sexual intercourse and of being physically capable of responding. Is Mr. Digerolamo entitled to reversal of his conviction as the State failed to prove an essential element of the offense beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Joseph Digerolamo lived in the city of SeaTac with his wife of 10 years, Glennis Johnny. RP 125-26. Ms. Johnny had a large extended family which included S.B., her niece, who lived in Victoria, British Columbia. RP 128, 274-77. In late May early June 2009, S.B. came to SeaTac to celebrate her grandmother's 83rd birthday. RP 293. Although S.B. usually stayed with her other aunt, Crystal, when she visited the Puget Sound area, on this occasion she was staying with Ms. Johnny and Mr. Digerolamo. RP 295.

The birthday party was the following day and lasted until approximately 6:00 p.m., when people began leaving. RP 295-96. Around 8:00 p.m., Ms. Johnny, S.B., and a few others began conversing and drinking straight shots of Crown Royal Whiskey. RP 299.

S.B. left the group after the second bottle of whiskey was opened after the first one had been emptied. RP 301-05. S.B. remembered getting into bed, falling asleep, then rushing to the bathroom to vomit. RP 305. S.B. remembered Mr. Digerolamo coming into the bathroom to check on S.B. and helping her clean up.

RP 305. S.B. remembered lying in bed in the dark, then feeling a person's tongue "around inside [her] vagina." RP 305.

I remember turning with my hands to try to get him off, but after that it's a complete blank. That's all I remember is just my hand just trying to get the head away, and that's all I remember until I woke up the next morning.

RP 305.

After vomiting, S.B. remembered a number of details. When she returned to her room, she remembered turning out the lights and closing the door. RP 306. She remembered lying in bed in the total darkness. RP 306.

Just when I was trying to push the head that the person – had head on their – hair on their head, and I just remember – I just woke up and I was like frozen, like I couldn't move. Just like, you know, supposed to somewhere supposed to be safe (inaudible) wake up and there's (inaudible) have their tongue in your vagina. The last thing I remember is trying to push (inaudible) and that was it, that's all I remember. I just felt (inaudible) hair on the person's head and (inaudible) but not that (inaudible) like facial hair too, like a little roughness, like the tongue was going around, I could feel it in between my legs, kind of that – that's all I remember after that is after I pushed that was the last thing I remember, is trying to get him away from down there.

RP 308.

S.B. awoke the next morning and stated she realized what had happened during the night. RP 309. S.B. disclosed to Ms. Johnny that

someone had entered her room that night and had engaged in a sexual act. RP 309. Ms. Johnny contacted the police. RP 310-11.

The State charged Mr. Digerolamo with one count of rape in the second degree. CP 1. Following a jury trial Mr. Digerolamo was convicted as charged. CP 48. He appeals. CP 67.

D. ARGUMENT

S.B. WAS NOT PHYSICALLY HELPLESS OR MENTALLY INCAPACITATED, THUS THE STATE FAILED TO PROVE MR. DIGEROLAMO WAS GUILTY OF RAPE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of

evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State failed to prove that S.B. was incapable of consent because she was mentally incapacitated or physically helpless. S.B.'s testimony established she was neither physically helpless nor mentally incapacitated, thus the State failed to prove all of the elements of second degree rape. Mr. Digerolamo is entitled to reversal of his conviction.

“A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.” RCW 9A.44.050(1)(b).¹ Physically helpless refers to “a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.” RCW 9A.44.010(5). Mentally incapacitated refers to a “condition existing at the time of the offense which prevents a person from understanding the

¹ This Court has held that “mental incapacity” and “physically helpless” are not alternative means of committing second degree rape. *State v. Al-Hamdani*, 109 Wn.App. 599, 607, 36 P.3d 1103 (2001), *review denied*, 148 Wn.2d 1004 (2003).

nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.” RCW 9A.44.010(4). Mental incapacity and physical helplessness are elements of rape that must be proven beyond a reasonable doubt. *State v. Strauss*, 119 Wn.2d 401, 410-11, 832 P.2d 78 (1992).

a. S.B. was not physically helpless. A person who is able to communicate orally, despite being bedridden and unable to move from her chest down due to symptoms of ALS (“amyotrophic lateral sclerosis” or “Lou Gehrig’s Disease”), has been held not to be “physically helpless” as contemplated in RCW 9A.44.050(1)(b). *State v. Bucknell*, 144 Wn.App. 524, 530, 183 P.3d 1078 (2008).

Further, the facts here do not rise to the level of those found sufficient to support a conviction for second degree rape based upon physical helplessness. In *Al-Hamdani*, the victim had a blood alcohol level estimated between .1375 and .21, was stumbling, vomiting, and passing in and out of consciousness prior to intercourse. 109 Wn.App. at 609. This Court described the victim as “debilitatingly intoxicated.” *Id.* Here, S.B., although arguably intoxicated, was not observed stumbling and she was able to remember a great amount of detail about

that night, including pushing the person away. S.B. was able to describe how she felt the tongue in and around her vagina and her ability to push the person away. RP 308.

“Physically helpless” is defined as the state of being unconscious or *physically* unable to communicate an unwillingness to an act. RCW 9A.44.030(5). S.B.’s testimony establishes that she was not unconscious and was able to communicate her wishes by pushing the person away and turning away. RP 305. The evidence clearly established S.B. was not physically helpless.

b. Neither was S.B. mentally incapacitated at the time of the event. “Mental incapacity” is an inability to understand the nature and consequences of sexual intercourse. RCW 9A.44.010(4).

A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.

State v. Ortega-Martinez, 1124 Wn.2d 702, 711, 881 P.2d 231 (1994)
(emphasis added).

S.B.’s testimony establishes she had a meaningful understanding of the nature and consequences of the sexual act. S.B. was able to describe in detail precisely what was happening and to respond

accordingly. S.B. was not unconscious, was able to detail what she was doing prior to the incident, and could describe in detail the circumstances surrounding the incident, including the lack of any lighting in the room, the hair on the person's head and stubble on their face, and her attempts at pushing the person away.

In assessing whether the State has met its burden of showing that a victim had a condition which prevented him or her from understanding the nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation.

Id., 124 Wn.2d at 714.

S.B.'s ability to recall the incident in great detail and to understand just what was happening, differs markedly from *Ortega-Martinez*, where the victim had an IQ of 40, had an eating disorder which prevented her from knowing when to stop eating, could not live independently, and was unable to resist the instructions from others. *Ortega-Martinez*, 124 Wn.2d at 705. Here, S.B. was able to not only describe the incident and the circumstances surrounding it, but also her

appropriate response. S.B. may have had too much alcohol to drink that night, but she was not mentally incapacitated. The State failed to prove beyond a reasonable doubt that she was.

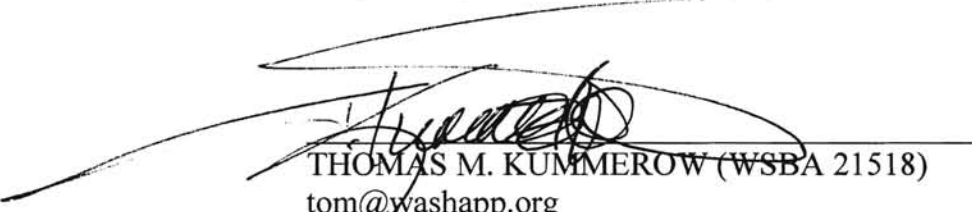
3. Mr. Digerolamo is entitled to reversal of his conviction with instructions to dismiss. Since there was insufficient evidence to support the conviction for second degree rape, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Digerolamo requests this Court reverse his conviction with instructions to dismiss.

DATED this 9th day of May 2013.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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Respondent,)	
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JOSEPH DIGEROLAMO,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF MAY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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