69601-7

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NO. 69601-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HAMPTON,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The trial court erred in instructing the jury on the offense of rape in the third degree.

The State charged Mr. Hampton with second degree rape. CP 83. It alleged that Mr. Hampton engaged in sexual intercourse with his son's girlfriend, A.B., when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. Id. At trial, A.B. testified that she fell asleep in Mr. Hampton's home and woke up to his body over hers. 9/6/12 RP 66. As she was waking up, she realized that Mr. Hampton had one finger inside of her vagina. 9/6/12 RP 67. A.B. described being in shock, and being able to say "no" and "stop" only after the penetration. 9/6/12 RP 70.

Mr. Hampton testified this did not happen. 9/7/12 RP 220. He testified A.B. approached him, touched his left hip, and moved her hand inward on his body. Id. A.B. was upset because he stopped her and scolded her for her actions. Id.

At the close of evidence, the trial court granted the State's motion for a jury instruction on rape in the third degree over Mr. Hampton's objection. 9/7/12 RP 252. The jury found Mr. Hampton

not guilty of second degree rape, and guilty of third degree rape. CP 60, 61.

a. Because A.B. consistently testified she was incapable of expressing her unwillingness to engage in sexual intercourse at the time of penetration, the trial court erred in instructing the jury on third degree rape.

A third degree rape instruction is not permitted when the jury would have to disbelieve both the defendant's testimony and the alleged victim's testimony in order to convict the defendant of rape in the third degree. State v. Wright, 152 Wn.App. 64, 72, 214 P.3d 968 (2009) (citing State v. Charles, 126 Wn.2d 353, 356, 894 P.2d 558 (1995)). The State attempts to distinguish this case from Wright and Charles by claiming that here the jury was not faced with "a clear cut either-or choice." Resp. Br. at 14. It argues the jury could have concluded, based on A.B.'s testimony, that A.B. was "too groggy to be able to communicate her non-consent" or that A.B. "was not that groggy, and was capable of consenting or not consenting." Resp. Br. at 14.

However, third degree rape requires that the victim did not consent and that such lack of consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a). A.B. testified she did not express a lack of consent until after penetration. 9/6/12 RP 68,

70 (A.B. testified there was nothing said before penetration, and that at the point she said no or stop, penetration had already occurred). If, as the State asserts, A.B.'s testimony allowed the jury to find A.B. "was not that groggy, and was capable of consenting or not consenting" the only evidence it presented was that A.B. did not express a lack of consent prior to engaging in sexual intercourse. See 9/6/12 RP 68-71, 117-19, 123-24. This is not a basis for third degree rape. RCW 9A.44.060(1)(a).

While A.B. presented limited testimony that the intercourse did not end instantly upon her saying "no," the fact that some evidence could be consistent with third degree rape is not sufficient for an instruction. Wright, 152 Wn.App. at 73-74. Here, A.B. was clear that when she felt Mr. Hampton's fingers inside her body, she was just waking up, and that she was only able to say "no" and "stop" after becoming fully conscious. 9/6/12 RP 68, 70. Because A.B.'s testimony consistently reflected penetration occurred when A.B. was incapable of consent, the court erred in instructing the jury on third degree rape. See Wright, 152 Wn.App. at 74.

b. Retrial on third degree rape is not permitted.

Mr. Hampton's conviction must be reversed, and his case remanded for dismissal. He cannot be retried for second degree rape because the jury found Mr. Hampton not guilty of second degree rape. CP 61; see Wright, 152, Wn. App. at 74 (double jeopardy did not bar retrial only because jury was unable to reach a verdict on charge of second degree rape).

The State argues that "should this Court conclude the jury should not have been instructed on third degree rape, the remedy is to remand for retrial on third degree rape." Resp. Br. at 16. It contends that State v. Wright, 152 Wn.App. 64, 214 P.3d 968 (2009), is "not on point here, because, while the jury explicitly acquitted the defendant of second degree rape, it also found the defendant guilty of third degree rape." Resp. Br. at 15. The State's argument is misleading because in Wright, just like in this case, the jury convicted the defendant of third degree rape. Wright, 152 Wn.App. at 70.

The State draws a distinction between instructional error and insufficiency of the evidence, and places this case in the former category. Resp. Br. at 15-16. It relies on the Supreme Court case, State v. Wright, 165 Wn.2d 783, 303 P.3d 1027 (2009), to argue that because

Mr. Hampton's challenge on appeal is "based on instructional error" rather than insufficient evidence, he may be retried on third degree rape. Resp. Br. at 15-16. This argument is without merit.

The Supreme Court's reasoning in Wright has no applicability here. In Wright, the defendants were charged under the statutory alternatives of intentional murder and felony murder based on assault. 165 Wn.2d at 788. At trial, they were convicted of felony murder based on assault after the jury was instructed only on that alternative. Id. The Supreme Court later held that second degree felony murder predicated on assault is a "nonexistent crime" and the defendants' convictions were vacated. Id. at 793. The court reasoned, in part, that the defendants could be tried under the alternative means of intentional murder because the convictions were vacated as a result of trial error rather than insufficient evidence. Id. at 796.

Here, the court erred in permitting the State's request for an instruction on third degree rape because there was insufficient evidence of this crime. The law is clear that when examining whether an instruction on an inferior degree offense is permissible, the Court must determine whether sufficient evidence supported an inference that only the inferior crime was committed. See Wright, 152 Wn.App. at 71;

State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); State v. Ieremia, 78 Wn. App. 746, 755, 899 P.2d 16 (1995); see also Op. Br. at 8-10. In Wright, the Court of Appeals found "the trial court erred by giving the third degree instruction because neither [the alleged victim's] testimony nor the defendants' evidence supported an unforced, nonconsensual rape." 152 Wn.App. at 72.

Because there was not sufficient evidence for the jury to find that only third degree rape had been committed, the court erred in instructing the jury on this crime, and Mr. Hampton's conviction must be reversed and remanded for dismissal.

2. Mr. Hampton was unreasonably denied his constitutional right to his counsel of his choice at trial.

Mr. Hampton hired private counsel, Anna Goykhman, to replace his court appointed attorney. 8/31/12 RP 3. At the trial call, Ms. Goykhman appeared in court and filed a motion to substitute and continue the trial date, explaining that she needed additional time to adequately prepare the case because she had just recently been retained. 8/31/12 RP 2; CP 93. Although the court initially agreed to allow the substitution of counsel, the motion to substitute was conditioned on the trial court's granting of the motion to continue, as Ms. Goykhman did

not feel that she could effectively represent Mr. Hampton otherwise. 8/31/12 RP 2-3.

Both appointed counsel, Donald Wackerman, and retained counsel, Ms. Goykhman, explained to the court that Mr. Hampton was not satisfied with his relationship with Mr. Wackerman. 8/31/12 RP 3-4. The trial court denied the motion to continue, finding that it was "not really being given much reason other than apparently some source decided to provide the funds today when it was still a serious case." 8/31/12 RP 8.

a. Because Mr. Hampton retained private counsel, *State v. Price* controls.

The State argues the Court should rely on the factors outlined in In re Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001) to find that the trial court properly denied Mr. Hampton his counsel of choice. Resp. Br. at 17. It points to the fact that State v. Price, 126 Wn.App. 617, 109 P.3d 27 (2005) relied on State v. Roth, 75 Wn.App. 808, 881 P.2d 268 (1994), which predated Stenson. This argument is misguided, however, because Stenson involved appointed counsel, whereas Roth and Price involved the retention of private counsel. Stenson, 142 Wn.2d at 726; Price, 629-30; Roth, 75 Wn.App. at 823.

Counsel of choice is not afforded to all defendants, but the Sixth Amendment grants "the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)) (emphasis added). Mr. Hampton was seeking a continuance to allow his private counsel of choice represent him at trial. He was not requesting that the court appoint new counsel. Thus, Roth and Price control, not Stetson.

The State contends that even if the Court applies the Price factors, it should rely on State v. Early, 70 Wn.App. 452, 853 P.2d 964 (1993), to find the trial court did not abuse its discretion. Resp. Br. at 23. However, Early predates both Roth and Price, and contrary to the State's claim, did not involve the same circumstances present here.

In Early, the court had granted at least two, and possibly three, continuances prior to the defendant's request for a continuance to allow his recently retained counsel to prepare. 70 Wn.App. at 458 n.7 The State expressed concern that a fourth continuance would not maintain the status quo for both parties because the State's relationship with one of the witnesses was "tenuous." Id. at 458. In this case, there had been

only one prior continuance, which was agreed to by both parties. Supp CP __ (Criminal Minute Entry, 7/13/12, sub no. 15). Even the judge noted there were a lot of cases that were older than Mr. Hampton's. 8/31/12 RP 8. In addition, while the State expressed concern that the defendant's son (and A.B.'s ex-boyfriend) was trying to talk A.B. out of testifying, the State summed up its argument with the statement that "nobody is really going to have a whole lot of complaint about... whatever you decide." 8/31/12 RP 6, 7. The State's concern in Early was not present here.

As discussed in Mr. Hampton's opening brief, the trial court failed to identify the correct constitutional right at issue and applied the wrong balancing test. Because it used the wrong legal standard, it abused its discretion. See State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

b. *United States v. Gonzalez-Lopez* precludes a harmless error analysis.

Price outlined four factors to be considered when determining whether the trial court abused its discretion in denying a motion to continue which seeks "to preserve the right to counsel." 126 Wn.App. at 632. The fourth factor, whether the denial of the motion is likely to

result in identifiable prejudice to the defendant's case of a material or substantial nature, is no longer valid under Gonzalez-Lopez. Price, 126 Wn.App. at 632; Gonzalez-Lopez, 548 U.S. at 148 (holding that "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation").

The State contends that Gonzalez-Lopez did not invalidate this fourth factor because it is only an "erroneous denial of right to counsel that constitutes a structural error not subject to harmless error analysis." Resp. Br. at 24 (emphasis original). In other words, the State argues that the defendant must show prejudice under Price, but once he has done so, he is relieved of his burden to show prejudice under Gonzalez-Lopez. This analysis defies logic. Gonzalez-Lopez, which was decided after this Court's decision in Price, holds that a defendant cannot be required to establish prejudice in order to show that his Sixth Amendment right to counsel of choice was violated.

Gonzalez-Lopez clearly articulates this finding in its discussion comparing the right to effective representation with the right to counsel of choice. 548 U.S. at 146-147. Counsel cannot be "ineffective" unless it is reasonably likely his mistakes have harmed the defense, so a

violation of the Sixth Amendment right to effective representation is not complete until the defendant is prejudiced. Id. at 147 (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In contrast, deprivation of the right to counsel of one's choice is complete when "the defendant is erroneously prevented from being represented by a lawyer he wants, regardless of the quality of the representation he received." Id. at 148. Gonzalez-Lopez held that "[t]o argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." Id.

When a defendant is erroneously deprived of his right to counsel of choice, as Mr. Hampton was here, it is structural error. Id. at 150. Mr. Hampton's conviction must be reversed and his case remanded for a new trial.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Hampton respectfully asks this Court to reverse his conviction and remand for dismissal, or in the alternative, a new trial.

DATED this 17th day of January 2014.

Respectfully submitted,

KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, MATTHEW HAMPTON, Appellant.	)))))))))	NO. 69601-7-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X]	MARY KATHLEEN WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	MATTHEW HAMPTON C/O DENISE HAMPTON 1116 121ST PL SE EVERETT, WA 98208	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF JANUARY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711