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JUN 27 2019

Washington State
Supreme Court

No. 97281-8

SUPREME COURT OF THE STATE OF WASHINGTON

Onelio Cardona-Hernandez
Petitioner,

v.

State of Washington
Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

Onelio Cardona-Hernandez

DOC# 394963, Unit H2B
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

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Table of Cases

A. IDENTITY OF PETITIONER

Onelio Cardona-Hernandez, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of appeals in case:

It stated: Because Cardona-Hernandez voluntarily spoke at his sentencing, the sentence falls within the standard range, and the challenges to conditions of community custody fail. And Cardona cannot show prejudice in his prosecutorial misconduct claim.
a copy of that decision is attached to this motion as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

To justify review, a COA decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another COA, (b)(2), present a significant question of law under a constitution, (b)(3), or involve an issue of substantial public interest, (b)(4).

(1) As a condition of community custody, the trial court ordered the petitioner to notify the supervising community corrections officer and sexual deviancy treatment provider of any dating relationship CP 275 (condition 5) This condition is unconstitutionally vague?

(2) The trial court ordered that the petitioner "not possess, use, access or view any sexually explicit material as defined by R.C.W. 9-68-130 or erotic materials as defined by R.C.W. 9-68-050 or any material depicting any person engaged in sexually explicit conduct as defined by R.C.W. 9-68A.011(4) unless given prior approval by your sexual deviancy provider." CP 276 (Condition 11) and (Condition 10)

(3) Prosecutorial Misconduct

During closing arguments the prosecutor committed misconduct which deprived Mr. Cardona of a fair trial

See Appendix B

D. STATEMENT OF THE CASE

The Statement of the case can be found in the Court of Appeals file T6074-2-1 on pages 2-6

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

This Court should accept review under RAP 13.4(b) because the case highlights a conflict between Divisions of the Court of Appeals and also ruled in this current Court.

This court should grant review under RAP 13.4(b) because the case represents a conflict between divisions of the Court of Appeals. As to the "dating relationship" condition, Division one in Morris reached a different result than did Division Three in State v. Dickerson, 184 Wn. App. 1014 (2016), which reversed the trial court's finding of a similar condition.

Cont on Appendix C

F. CONCLUSION

Mr. Carlos Hernandez respectfully ask this court
to accept review of his case and remand back to
the trial court with instructions.

Respectfully submitted this 27 day of June, 2019.



Print name:

DOC # 394963

Stafford Creek Correction Center, Unit: ____
191 Constantine Way
Aberdeen, Washington 98520

Appendix ~~K~~ A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ONELIO CARDONA-HERNANDEZ,

Appellant.

No. 76074-2-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 1, 2019

LEACH, J. — Onelio Cardona-Hernandez appeals the high-end standard range sentence and conditions of community custody the trial court imposed after his conviction for second degree rape.¹ He claims that the sentence was a “penalty” that violates his Fifth Amendment right against self-incrimination.² Because Cardona-Hernandez voluntarily spoke at his sentencing, the sentence falls within the standard range, and the challenges to conditions of community custody fail, we affirm the trial court.

BACKGROUND

The trial court convicted Cardona-Hernandez of rape in the second degree and two counts of burglary in the first degree with sexual motivation. Cardona-

¹ The Supreme Court of Washington directed this court to reconsider its April 16, 2018, opinion in light of State v. Hai Minh Nguyen, 191 Wn.2d 681, 425 P.3d 847 (2018). After reconsideration, this court withdraws its April 16, 2018, opinion and replaces it with this opinion.

² U.S. CONST. amend. V.

Hernandez also pleaded guilty to a reduced charge of criminal trespass in the first degree with sexual motivation.

At sentencing, Cardona-Hernandez faced a standard range for the rape conviction of 146 to 194 months. For the two counts of burglary, he faced a standard range of 57 to 75 months. The State recommended the high end of the standard range for the rape conviction. At the sentencing hearing, the trial court told Cardona-Hernandez that he had the right of allocution but that he also had the "absolute right to say nothing." Cardona-Hernandez chose to speak. He explained that he refused to plead guilty and take a plea offer because he was innocent.

After Cardona-Hernandez's statement, the trial court imposed the high-end term, 194 months, for the second degree rape. The trial court considered a number of factors before deciding to impose the high-end term. These included (1) the defense's argument of lack of relative force, (2) the nature of the crime, including exploiting his employer for the purpose of victimizing, (3) the nature of the crime scene (located in the University District which is a place of freedom and innocence where the defendant undoubtedly observed vulnerability), (4) the vulnerability of the victim given her infirmity, and (5) "the defendant's apparent lack of remorse and choice here rather than to apologize, to use this as an opportunity to cross-examine one of his rape victims."

The trial court sentenced Cardona-Hernandez to 66 months on the two counts of burglary, concurrent with his sentence for the rape count. The trial court also imposed lifetime community custody after Cardona-Hernandez's release.

Cardona-Hernandez appeals.

ANALYSIS

Standard Range Sentence

Cardona-Hernandez challenges the standard sentence range for the rape conviction. Under the Sentencing Reform Act of 1981 (SRA),³ a criminal defendant generally may not appeal the imposition of the standard sentence range.⁴ But a defendant may appeal a standard range sentence when a sentencing court does not comply with procedural requirements of the SRA or constitutional requirements.⁵

Cardona-Hernandez contends that the trial court violated his Fifth Amendment right against self-incrimination by considering his “remorseless” allocution when imposing the high end of the standard range sentence. The Fifth Amendment prevents a person from being “compelled in any criminal case to be a witness against himself.”⁶ A defendant may assert the right against self-incrimination in any proceeding, “civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”⁷ This includes a sentencing hearing.⁸

³ Ch. 9.94 RCW.

⁴ RCW 9.94A.585(1).

⁵ State v. Osman, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006).

⁶ U.S. CONST. amend. V; see McKune v. Lile, 536 U.S. 24, 35, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002).

⁷ Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973).

⁸ See Mitchell v. United States, 526 U.S. 314, 325-27, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

But no one compelled Cardona-Hernandez to speak. The trial court told Cardona-Hernandez that he had the right to allocution and the right to remain silent. The judge's advice eliminates any claim of any compulsion to self-incrimination.⁹ Cardona-Hernandez chose to speak after the court told him he could remain silent. By choosing to speak, he waived his Fifth Amendment right.

"Trial courts may not use a defendant's silence or continued denial of guilt as a basis for justifying an exceptional sentence."¹⁰ Here, the parties concede that no Washington case law directly addresses the issue of whether a court can consider a denial of guilt when imposing a standard range sentence. Cardona-Hernandez relies on a Montana decision, State v. Shreves.¹¹ There, the defendant maintained his innocence throughout the trial and chose to remain silent during sentencing.¹² The trial court imposed the 100-year sentence recommended by the State.¹³ The trial court imposed this sentence in large part due to the defendant's lack of remorse and equated the defendant's silence to a lack of remorse.¹⁴ The Montana Supreme Court held that the trial court "improperly penalized Shreves for maintaining his innocence pursuant to his constitutional right to remain silent."¹⁵ But the court also made clear that a trial court can consider a defendant's lack of

⁹ United States v. Washington, 431 U.S. 181, 188, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977) (stating when a respondent was explicitly advised of the right to remain silent, "This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist.").

¹⁰ State v. Garibay, 67 Wn. App. 773, 782, 841 P.2d 49 (1992).

¹¹ 2002 MT 333, 313 Mont. 252, 60 P.3d 991.

¹² Shreves, 2002 MT 333, ¶ 6.

¹³ Shreves, 2002 MT 333, ¶ 3.

¹⁴ Shreves, 2002 MT 333, ¶ 20.

¹⁵ Shreves, 2002 MT 333, ¶ 20.

remorse during pretrial, at trial, or posttrial as a sentencing factor.¹⁶ But the court prohibited a sentencing court from drawing “a negative inference of lack of remorse from the defendant’s silence at sentencing where he has maintained, throughout the proceedings, that he did not commit the offense of which he stands convicted.”¹⁷

We distinguish Shreves. Cardona-Hernandez did not remain silent at sentencing. So the trial court did not penalize him by drawing an impermissible inference from his silence. Cardona-Hernandez cites no authority for the proposition that the trial court must ignore the content of his allocution statement when imposing sentence. Once Cardona-Hernandez chose to speak, the Fifth Amendment did not require that the trial court ignore what he had to say.

For an additional reason to affirm, the State relies on United States v. Klotz,¹⁸ where the Seventh Circuit Court of Appeals established that a sentence within the federal sentencing guidelines is not presumed to be a penalty. The defendant in Klotz wanted the court to set the lower limit as the benchmark and to find a higher sentence within the range as a penalty.¹⁹ The “range itself is the apt starting point, and choices within the range cannot readily be assigned particular causes.”²⁰ The court stated it was proper to impose a sentence which was near the upper limit of the guidelines range, based in part on the refusal of the defendant

¹⁶ Shreves, 2002 MT 333, ¶ 21.

¹⁷ Shreves, 2002 MT 333, ¶ 22.

¹⁸ 943 F.2d 707, 710-11 (7th Cir. 1991).

¹⁹ Klotz, 943 F.2d at 710.

²⁰ Klotz, 943 F.2d at 710.

to assist authorities in investigations, and did not penalize the defendant for exercising his constitutional right to remain silent.²¹ Because we conclude that no Fifth Amendment violation occurred, we do not address the State's argument.

Community Custody Conditions

Cardona-Hernandez challenges three conditions of community custody. He claims that the trial court exceeded its statutory authority by imposing one condition that is not crime related and two that are unconstitutionally vague. This Court reviews the trial court's statutory authority to impose community custody conditions de novo.²²

(1) Crime Related

Cardona-Hernandez contends that condition 10 should be stricken because the condition is unrelated to the offense of his conviction.²³ Condition 10 states, "Do not enter sex-related businesses, including: X-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material." A trial court has the authority to impose "crime-related prohibitions" as a condition of community custody.²⁴ The SRA defines crime-related prohibition as "an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted."²⁵

²¹ Klotz, 943 F.2d at 710-11.

²² State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014).

²³ Cardona-Hernandez did not challenge the community conditions below, but defendants may challenge erroneous sentences for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

²⁴ RCW 9.94A.703(3)(f).

²⁵ RCW 9.94A.030(10).

“‘Directly related’ includes conditions that are ‘reasonably related’ to the crime.”²⁶

“This court reviews the factual bases for crime-related conditions under a ‘substantial evidence’ standard.”²⁷ “Community custody conditions are ‘usually upheld if reasonably crime related.’”²⁸

Our Supreme Court recently considered the validity of a similar condition imposed on a defendant convicted of two counts of rape in the second degree and found the condition sufficiently crime related even though the record included nothing suggesting that the defendant met her victim in a “sex-related business” or that her presence in this type of business played any role in her crimes.²⁹ The court found that the condition related to the defendant’s “inability to control her urges and impulsivities . . .” and that she would “struggle to rehabilitate from her sexual deviance so long as she frequents ‘sex-related businesses.’”³⁰ It found that the trial court did not abuse its discretion by imposing the challenged restriction. Because we cannot distinguish this case, we similarly conclude that the trial court did not exceed its authority by imposing condition 10.

(2) Vagueness

Cardona-Hernandez contends that condition 5, regarding dating relationships, and condition 11, regarding sexually explicit material and conduct,

²⁶ State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015) (citing State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014)).

²⁷ Irwin, 191 Wn. App. at 656.

²⁸ State v. Norris, 1 Wn. App. 2d 87, 97, 404 P.3d 83 (2017) (quoting State v. Warren, 165 Wn. 2d 17, 32, 195 P.3d 940 (2008)), rev’d on other grounds, State v. Hai Minh Nguyen, 191 Wn.2d 681, 687, 425 P.3d 847 (2018).

²⁹ Hai Minh Nguyen, 191 Wn.2d at 687.

³⁰ Hai Minh Nguyen, 191 Wn.2d at 687.

are unconstitutionally vague. Under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, citizens have the right to fair warning of proscribed conduct.³¹ A community custody condition is unconstitutionally vague if it (1) does not define the prohibited conduct with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards to protect against arbitrary enforcement.³² A community custody condition is unconstitutionally vague if it does not meet either of these requirements.³³

The court considers the context of the term to determine whether the term is unconstitutionally vague.³⁴ When a statute does not define a term, the court may consider the plain and ordinary meaning from a standard dictionary.³⁵ A community custody condition is sufficiently definite “[i]f ‘persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement.’”³⁶

Cardona-Hernandez contends condition 5, which requires him to inform the CCO and sexual deviancy treatment provider of “any dating relationship,” is unconstitutionally vague. Condition 5 states, “Inform the supervising CCO and

³¹ Bahl, 164 Wn.2d at 752 (citing City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)).

³² Bahl, 164 Wn.2d at 752-53 (quoting Douglass, 115 Wn.2d at 178).

³³ Bahl, 164 Wn.2d at 752-53.

³⁴ Bahl, 164 Wn.2d at 754 (citing Douglass, 115 Wn.2d at 180).

³⁵ Bahl, 164 Wn.2d at 754 (citing State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)).

³⁶ Bahl, 164 Wn.2d at 754 (second alteration in original) (quoting Douglass, 115 Wn.2d at 179).

sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.”

Cardona-Hernandez contends that this condition does not give adequate notice of how to avoid a sanction and does not prevent arbitrary enforcement. Cardona-Hernandez cites a federal case, United States v. Reeves,³⁷ as support for his argument. But recently, in Norris, this court held that the term “dating relationship” is easily distinguishable from the condition reviewed in Reeves.³⁸ This court concluded that “[t]he requirement to report a ‘dating relationship’ does not contain highly subjective qualifiers like ‘significant’ and ‘romantic.’”³⁹ Therefore, the condition in Norris was “neither unconstitutionally vague nor subject to arbitrary enforcement.”⁴⁰ Our decision in Norris controls. Condition 5 is not unconstitutionally vague.

Cardona-Hernandez also contends that condition 11 is unconstitutionally vague. Condition 11 states, “Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.”

³⁷ 591 F.3d 77 (2d Cir. 2010).

³⁸ Norris, 1 Wn. App. 2d at 94-95.

³⁹ Norris, 1 Wn. App. 2d at 95.

⁴⁰ Norris, 1 Wn. App. 2d at 95.

Cardona-Hernandez notes that this condition implicates materials protected by the First Amendment. When a community custody condition involves material having First Amendment protection, a vague condition can have a chilling effect on the exercise of First Amendment rights.⁴¹ Any restriction on protected materials that a defendant may access or possess must be clear and “must be reasonably necessary to accomplish essential state needs and public order.”⁴² “Thus, conditions may be imposed that restrict free speech rights if reasonably necessary, but they must be sensitively imposed.”⁴³

Cardona-Hernandez relies on State v. Bahl,⁴⁴ where our Supreme Court found a condition restricting access to pornography unconstitutionally vague. Cardona-Hernandez correctly notes that this condition did not define pornography or reference the term in another statute.⁴⁵ But the same court found lawful a condition prohibiting the defendant from frequenting establishments whose primary business pertains to sexually explicit or erotic material.⁴⁶

Because this condition did not define “sexually explicit” or “erotic,” the court looked to dictionary definitions and statutory definitions to help it assess whether the conditions was impermissibly vague.⁴⁷ The court did not decide whether the definition alone would provide sufficient notice to overcome a vagueness

⁴¹ Bahl, 164 Wn.2d at 753.

⁴² Bahl, 164 Wn.2d at 757-58.

⁴³ Bahl, 164 Wn.2d at 757.

⁴⁴ 164 Wn.2d 739, 743, 193 P.3d 678 (2008).

⁴⁵ Bahl, 164 Wn.2d at 743.

⁴⁶ Bahl, 164 Wn.2d at 759.

⁴⁷ Bahl, 164 Wn.2d at 759.

challenge.⁴⁸ But the court stated that the available definition “bolsters our conclusion that ‘sexually explicit,’ in the context used, is not unconstitutionally vague.”⁴⁹ Similarly, the statutory definitions referred to in condition 11 support the conclusion that “sexually explicit material,” “erotic material,” and “sexually explicit conduct” are not unconstitutionally vague.⁵⁰

Unlike the condition upheld in Bahl, condition 11 incorporates statutory definitions. With these definitions, an ordinary person would understand the conduct proscribed. Also, the condition contains explicit standards for its application. Thus, we conclude condition 11 is not unconstitutionally vague.

NEW JUDGE REQUEST

Cardona-Hernandez also requests assignment to a new judge for resentencing. A party may seek reassignment for the first time on appeal where the judge will exercise discretion on remand regarding the very issue that triggered the appeal.⁵¹ But this remedy is limited, and reassignment is not generally available because the appellate opinion may offer sufficient guidance to effectively limit trial court discretion on remand.⁵² Because we conclude that the trial court did not err in sentencing Cardona-Hernandez and remand for the limited purpose of striking one community custody condition, we deny Cardona-Hernandez’s request.

⁴⁸ Bahl, 164 Wn.2d at 760.

⁴⁹ Bahl, 164 Wn.2d at 760.

⁵⁰ See Soundgarden v. Eikenberry, 123 Wn.2d 750, 758-59, 871 P.2d 1050 (1994) (finding the term “erotic” under RCW 9.68.050 not unconstitutionally vague).

⁵¹ State v. Solis-Diaz, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017).

⁵² Solis-Diaz, 187 Wn.2d at 539-40.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Cardona-Hernandez raises several additional grounds for review. None of his claims have merit.

Jury Instructions

Cardona-Hernandez challenges three of the court's instructions to the jury. We review challenged jury instructions de novo.⁵³

Consent

First, Cardona-Hernandez challenges the court's instruction that "[c]onsent 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." He claims that this instruction improperly shifted the burden of proof. The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a crime beyond a reasonable doubt.⁵⁴ Instructing the jury in a manner that relieves the State of this burden is reversible error.⁵⁵ Our Supreme Court has held that consent negates the element of forcible compulsion of second degree rape.⁵⁶ Thus, a court violates a defendant's due process rights when it requires the defendant to prove consent by a preponderance of evidence.⁵⁷ But, here, the instructions did not improperly shift the burden of proof. The case that Cardona-Hernandez relies on, State v. W.R.,⁵⁸ involves the former version of

⁵³ State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

⁵⁴ State v. W.R., 181 Wn.2d 757, 762, 336 P.3d 1134 (2014).

⁵⁵ Pirtle, 127 Wn. 2d at 656.

⁵⁶ W.R., 181 Wn.2d at 763.

⁵⁷ W.R., 181 Wn.2d at 762-63.

⁵⁸ 181 Wn.2d 757, 336 P.3d 1134 (2014).

WPIC 18.25,⁵⁹ which did shift the burden. But, unlike in W.R., the court's instructions here did not place the burden of showing lack of consent on the defendant. The court instructed the jury that the State had the burden to show that the victim was incapable of consent by reason of being physically helpless. The court properly instructed the jury that the State had to prove each element of rape in the second degree beyond a reasonable doubt.

Knowingly Entered

Cardona-Hernandez also challenges the trial court's elements instruction for residential burglary. He specifically contends that the court erred by omitting an element that he "knowingly entered" a dwelling. Failure to instruct the jury on every element of a crime is reversible error because such an error relieves the State of its burden to prove every element beyond a reasonable doubt.⁶⁰ "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."⁶¹ Here, the trial court gave the statutory elements of the offense for burglary in the first degree.⁶² Knowing entry is not an element of burglary in the first degree.⁶³ The court's instruction was proper.

Comment on the Evidence

Next, Cardona-Hernandez challenges this limiting instruction:

⁵⁹ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.25, at 288 (3d ed. 2008).

⁶⁰ State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

⁶¹ RCW 9A.52.025(1).

⁶² RCW 9A.52.025(1).

⁶³ RCW 9A.52.025.

Certain evidence has been admitted in this case for only a limited purpose. This evidence relates to uncharged, alleged victims [E.R., C.H., E.S., and K.S.]. This evidence may be considered by you only for the purposes of knowledge, opportunity, and considering whether the defendant's alleged conduct is part of a common scheme or plan for each count. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Cardona-Hernandez contends that this instruction is an improper comment on the evidence. Under article IV, section 16 of the Washington Constitution, judges may not comment to the jury on matters of fact or convey to the jury his or her opinion about the testimony.⁶⁴ Here, the court's instruction does not assume any facts have been established by the evidence. It merely limits the jury's use of some evidence. We reject Cardona-Hernandez's contention.

Hearsay

Next, Cardona-Hernandez contends that the court improperly admitted a hearsay statement in K.L.'s deposition testimony. Cardona-Hernandez does not identify the challenged statement in the record. We are not obligated to search the record in support of his claim.⁶⁵

Sufficiency of Evidence

Cardona-Hernandez contends that the evidence was insufficient to convict him of count 4, first degree burglary with sexual motivation, for his conduct with respect to K.L. We review challenges to the sufficiency of the evidence de novo.⁶⁶

⁶⁴ State v. Dewey, 93 Wn. App. 50, 58-59, 966 P.2d 414 (1998).

⁶⁵ RAP 10.10(c).

⁶⁶ State v. Merritt, 200 Wn. App. 398, 408, 402 P.3d 862 (2017), aff'd, ___ Wn.2d ___, 434 P.3d 1016 (2019).

When reviewing the sufficiency of evidence, we view the evidence in the light most favorable to the State and ask whether any rational finder of fact could have found guilt beyond a reasonable doubt.⁶⁷ To convict Cardona-Hernandez of burglary in the first degree, the State must prove that he acted with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building and, while in the building or in immediate flight therefrom, he was armed with a deadly weapon or assaulted any person.⁶⁸

Cardona-Hernandez first contends that the identification by K.L. is insufficient to show he was the person who assaulted her; although she picked him from a montage, she was unable to identify him for certain in the courtroom. The Seattle Police Department had K.L. identify the person who assaulted her out of a montage of six photographs. K.L. picked out Cardona-Hernandez. She later stated that she did not recognize the defendant in the courtroom but believed that was due to the length of time since the incident. Notwithstanding K.L.'s later uncertainty, the trier of fact could reasonably find that K.L.'s initial identification was sufficient to prove that Cardona-Hernandez assaulted K.L.⁶⁹

Cardona-Hernandez also contends that he did not assault any person. The court instructed the jury that "[a]n assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is

⁶⁷ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

⁶⁸ RCW 9A.52.020.

⁶⁹ Cardona-Hernandez also points out that there is no DNA evidence to link him to count 4. But evidence of K.L.'s identification is sufficient to link him to the crime.

done to the person.” Here, K.L. testified that the next thing she remembered after falling asleep was someone spooning her from behind, kissing her neck, and groping her breast. She later identified Cardona-Hernandez as that person. Thus, the record contains sufficient evidence that he assaulted K.L.

Prosecutorial Misconduct

Cardona-Hernandez contends that prosecutorial misconduct during closing arguments deprived him of a fair trial. To establish prosecutorial misconduct, Cardona-Hernandez must show the prosecutor’s comments were “both improper and prejudicial in the context of the entire record and the circumstances at trial.”⁷⁰ Cardona-Hernandez has the burden to prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.”⁷¹ We review allegations of prosecutorial misconduct under an abuse of discretion standard.⁷²

Cardona-Hernandez contends that a comment made by the State during closing arguments bolstered the witnesses’ credibility and mischaracterized the role of the jury. The prosecution stated,

With respect to [K.L.] and [C.R.], I suspect the primary issue will be identity. Was it the defendant who came into [C.R.]’s house? Was it the defendant who was spooning [K.L.] and kissing her neck? I suggest to you that even if all you had was the testimony of [S.M.] and [C.R.] and [K.L.], the DNA results, and the montage picks of [C.R.] and [K.L.], that would be more than sufficient evidence for you to find the defendant guilty as charged in counts three and four.

⁷⁰ State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

⁷¹ Magers, 164 Wn.2d at 191 (alteration in original) (quoting Pirtle, 127 Wn.2d at 672).

⁷² Thorgerson, 172 Wn.2d at 460.

will
The defense objected. The court overruled the objection but reminded the jurors “that the lawyer’s arguments are not themselves evidence and that the law is defined by the court in its instruction to the jury.” Assuming the court improperly overruled this objection, Cardona-Hernandez cannot show prejudice. The court followed this sole incident of claimed misconduct with a curative comment. There is not a substantial likelihood that the comment affected the jury’s verdict.

Motion to Suppress and Sever

Finally, Cardona-Hernandez contends that the trial court abused its discretion because it did not grant the motion to suppress and the motion to sever. But defendants must, at the least, inform the court of the nature of the claimed error.⁷³ Because Cardona-Hernandez does not, we do not consider this claim.

CONCLUSION

We affirm Cardona-Hernandez’s sentence.

WE CONCUR:

Mann, ACS

Seach, J.

Dwyer, J.

⁷³ RAP 10.10(c).

Appendix ~~0~~ B

- 4.) The trial court violated the Appellant's constitutional rights when it gave the Jury the Consent instruction, which shifted the burden.
- 5.) The trial court Erred when it gave the Jury Instruction No. 23, which imputed an element of "knowingly entered".
- 6.) The trial court erred when it gave an impermissible Jury instruction, which commented on the evidence thereby prejudicing the Appellant.
- 7.) Speculation and hearsay evidence.
- 8.) Insufficiency of evidence on Count 4 for 1st Degree Burglary with Sexual Motivation enhancement.
- 9.) Review the motion to Suppress and Motion to Sever De novo.

Appendix c

Moreover, both issues was heard by this court in consolidated cases State v. Norris, and State v. Nguyen, consolidated under case Number 94083-6. So this court should accept review of the challenges to the conditions of ~~community~~ community custody. And it is clear that a COA decision is in conflict with a Supreme Court decision, and another COA. And it is and Abuse of discretion by the trial court and the Court of Appeals to impose these restrictions in Mrs Cardona-Hernandez case.

A. Assignments of Error

- 4) The trial court violated the Appellant's constitutional rights when it gave the jury the Consent instruction, which shifted the burden of proof.
- 5) The trial court erred when it gave Jury Instruction No. 23, which imputed an element of "knowingly entered."
- 6) The trial court erred when it gave an impermissible jury instruction, which commented on the evidence thereby prejudicing the Appellant.
- 7) Speculation and Hearsay Evidence.
- 8) Insufficiency of Evidence on Count 4 for 1st Degree Burglary with a Sexual Motivation enhancement.
- 6) Improper argument in Closing Arguments rendered Prosecutorial Misconduct. The trial judge abused his discretion when he did not give the jury a limiting instruction on the comment or evidence.
- 9) Review the motion to suppress and motion to sever de novo.

B. Statement of the Case

See Appellant's opening brief at pages 2-6.

C. Argument

Ground 4: The trial court violated the Appellant's constitutional rights when it gave the jury the Consent instruction, which shifted the burden of proof.

Ground 5: The trial court erred when it gave Jury Instruction No. 23, which imputed an element of "knowingly

entered."

Ground 6: The trial court erred when it gave an impermissible jury instruction, which commented on the evidence thereby prejudicing the Appellant. See Jury Instruction No. 5, and VRP Vol. V, 850-57, Oct. 5, 2016.

As they pertain to grounds 1, 2, and 3, Articles 4 and 16 of the Washington State Constitution prohibits a judge from conveying to the jury his personal attitudes towards the merits of the case. A proposed instruction may violate this provision if it constitutes an impermissible comment on the evidence. State v. Eaker, 113 Wn.App 111, 53 P.3d 37 (2002)(The courts instruction resolved a disputed fact that should have been left to the jury and constituted comment on evidence requiring reversal). Likewise, in Mr. Cardona-Hernandez's case, in Jury Instruction No. 5 the judge should not have made any comments to influence the jury in their verdict, which prejudiced Mr. Cardona-Hernandez. See Jury Instruction No. 5 in Appendix A and VRP Vol. V, 850-57, Oct. 5, 2016.

The Courts review a challenged jury instruction de novo, evaluating it in the context of the instruction as a whole. State v. Pirtle, 127 Wash.2d 628, 904 P.2d 245 (1995). Also, it is reversible error to instruct the jury in a manner that would relieve the State of this burden.

Jury instructions are improper if they do not permit

the defendant to argue his theories of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. State v. Vander-Houwen, 163 Wash.2d 25, 29, 1767 P.3d 93 (2008). The use of improper instruction in a criminal case is presumed to be prejudicial. State v. Campbell, 163 Wash.App 394, 260 P.3d 235 (2011). Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Pirtle (supra) at 656.

To satisfy the constitutional demands of a fair trial, jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defender to present his theory of the case. State v. Mills, 154 Wash.2d 1, 7, 109 P.3d 415 (2005). Washington reviewing courts must reverse if a trial court's erroneous instruction prejudiced the complaining party. State v. Aguirre, 168 Wash.2d 350, 364, 229 P.3d 669 (2010).

The purpose of the constitutional prohibition is to prevent the jury from being influenced by knowledge conveyed to it by the trial judge, through words or actions, as to his personal opinion regarding the credibility, weight, or sufficiency of some evidence introduced at trial. It is clear the instruction made

comment on the evidence, so the judge gave personal attitudes towards the merits of the case. See State v. Dewey, 93 Wn.App 50, 966 P.2d 414 (1998). In addition, an instruction which cautions the jury to be slow in disbelieving any witness is a comment on the evidence which must be evaluated in terms of the overall instructions to determine if it had a prejudicial effect.

Also, on Ground 2, the trial court erred when it gave Jury Instruction No. 23, which imputed an element of "knowingly entered." VRP, Vol. V, 849, Oct. 5, 2016. Due process requires that a jury be instructed as to each element of a crime charged. Thus, where the court undertook to state the elements of a crime in a single "formula" instruction, it is error to omit one of the elements. It is clear that the jury was misled. See State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)(failure to instruct on an element of an offense is automatic reversible error, as the error relieves the state of its burden of proving every essential element beyond a reasonable doubt). Also, failure to give an instruction beneficial to the defendant is presumed to be prejudicial. State v. Hicks, 102 Wn.2d 182, 683 P.2d 186 (1984)(The use of an improper instruction in a criminal case is presumed to be prejudicial). The presumption of prejudice arising from an erroneous instruction in a criminal prosecution is

not overcome unless the court determines that it did not affect the jury's consideration of the charge.

And on Ground 1, the trial court violated the Appellant's Constitutional rights when it gave the jury the Consent instruction, which shifted the burden of proof. It's clear the Appellant's trial attorney, Mr. Andrews, had said,

"...and Your Honor, I don't know if we need to make the record, but we do object to the consent instruction. Nonetheless, the WPIC committee and the case law have expressed some concern that defense shares that consent instruction can shift the burden and I don't believe that it is a term that needs definition for the jury in this case."

VRP, Vol. V, 846, Oct. 5, 2015. Also see Jury Instruction No. 9 in Appendix A.

An instruction which operates to shift to the the defendant the burden of proving a critical fact in issue is constitutionally impermissible. See State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996) and State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). The trial court committed reversible error because it violated due process under U.S. Const. Amend. 14 to assign the defendant the burden of proving consent as a defense to a charge of rape under Revised Code of Washington (RCW) §9A.44.050(1)(A), by "forcible compulsion," as defined under RCW 9A.44.016(6). Once a defendant asserts a Consent defense and provides sufficient evidence to support that defense, the State

bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion. Therefore, under W.R. (supra), shifting a burden to a defendant to prove consent by a preponderance of the evidence is prohibited.

Mr. Cardona-Hernandez contends the trial court violated his due process rights when it allocated to him the burden of proving consent, which he maintains negates the element of forcible compulsion. Likewise, in this case under W.R. (supra), the court had held that consent negates the element of forcible compulsion. And so, once a defendant asserts a Consent defense and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion. 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.

The Washington State Supreme Court said that "consent necessarily negates forcible compulsion." W.R. (supra).

The due process clause of the Fourteenth Amendment guarantees, "No State shall... deprive any person of life, liberty, or property, without due process of Law." U.S.

Const. Amend. 14 §1. The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove "beyond a reasonable doubt... every fact necessary to constitute the crime with which a defendant is charged." In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A corollary rule is that the State cannot require the defendant to disprove any fact that constitutes the crime charged. That was what was done in this case with Mr. Cardona-Hernandez on all the counts the jury heard on the Consent instruction.

Ground 7: Speculation, Hearsay Evidence

It is clear in Ms. Lucia's deposition that it was a hearsay statement made, to which the Appellant did object. VRP 1020, Vol. VI, Sept. 28, 2016; ER 801(c). The reviewing court must review it under the Abuse of Discretion Standard. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014); State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Ground 8: Insufficiency of Evidence (on Count 4, 1st Degree Burglary with Sexual Motivation enhancement)

It's clear under State v. Budik, 173 Wn.2d 727, 272

P.3d 816 (2012), when there is not enough evidence to support the conviction, as in Count 4, and where an appellant is challenging the sufficiency of the State's evidence, that the Appellate Court assumes the truth of the State's evidence, even where the Appellant provides conflicting evidence. In a challenge to the sufficiency of evidence supporting a criminal conviction, the question is whether, viewing the evidence in the light most favorable to the State, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

It is clear in this case as it is in Budik and Engel. The Court should drop the 1st Degree Burglary with Sexual Motivation, or at least take off 2 years, because there is not enough evidence for the Appellant to be convicted on Count 4. Kayla Lucia picked Cardona-Hernandez from a photo montage, which was compiled after another witness provided Cardona-Hernandez's name based on Lucia's police sketch. 4 RP 645-47; 6 RP 1002. But during a preservation deposition played for the jury, Lucia was unable to identify Mr. Cardona-Hernandez. Also, there is no D.N.A. to link Count 4, 1st Degree Burglary with Sexual Motivation, to Mr. Cardona-Hernandez. The State does not meet their burden to prove Count 4.

Under RCW 9A.52.020, a person is guilty of burglary in

the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight there from, the actor or another participant in the crime (A) is armed with a deadly weapon, or (B) assaults any person.

In this case, there is not enough evidence to convict Mr. Cardona-Hernandez because he was not armed with a weapon and he did not assault anyone. It is clear that Ms. Lucia was unable to identify Mr. Cardona-Hernandez. It's clear she had the wrong person. So far as the elements for 1st Degree Burglary with Sexual Motivation are concerned, the State did not prove that it was Mr. Cardona-Hernandez that committed the alleged crime. Therefore, the Court must dismiss that count or drop it to a lesser degree, and dismiss the sexual motivation aggravator and take off 2 years.

Ground 3: Prosecutorial Misconduct and Abuse of Discretion

Improper argument in closing arguments rendered prosecutorial misconduct. The trial court abused its discretion when the judge didn't give the jury a limiting or curative instruction when the defense attorney objected.

In the closing arguments, the prosecutor said:

"...with respect to Kayla and Clara, I suspect the primary issue will be identity. Was it the

defendant who came into Clara's house? Was it the defendant who was spooning Kayla and kissing her neck? I suggest to you that even if all you had was testimony of Sam and Clara and Kayla, the D.N.A. results, and montage picks of Clara and Kayla, that would be more than sufficient evidence for you to find the defendant guilty as charged in counts three and four.

Mr. Andrews: Objection, your honor, improper argument.

The Court: Overruled. However, the jurors are reminded that the lawyer's arguments are not themselves evidence and that the law is defined by the court in its instruction to the jury."

VRP 897, Vol. V, Oct. 5, 2016.

Once an appellant establishes that a prosecutor's comments are improper, the court must determine whether the appellant was prejudiced under one of the two standards of review. The Appellant did object at trial, so the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Anderson, 153 Wn.App 417, 431, 220 P.3d 1273 (2009); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Thorgerson, 172 Wn.2d at 455. Likewise, in this case the statement was improper and flagrant, and also violated due process of law. The reviewing court must focus on whether the prosecutor's misconduct was flagrant or ill-intentioned and more, or whether the resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a defendant from

having a fair trial?" Slatery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932).

The prosecutor's remarks in the closing arguments bolstered the witnesses' credibility, making the statements improper because they mischaracterized the role of the jury. The remarks suggest that the jury's role is to solve the case. The prosecutor's arguments were improper. The jury's job is not to determine the truth of what happened; a jury, therefore, does not "speak the truth" or "declare the truth." Anderson (supra). Rather, a jury's job is to determine whether the state has proved the charged offenses beyond a reasonable doubt. Winship (supra), 397 U.S. at 364. It is clear in this case that the prosecutor's argument bolstered the witnesses' credibility. See State v. Jones, 144 Wn.App 284, 183 P.3d 307 (2008); VRP 897, Vol. V, Oct. 5, 2016. As it was in Jones, the same was done here in this case.

It's clear in this case that the Appellant did object at trial, and the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. A prosecutor's remarks are not per se incurable simply because they touch on a defendant's constitutional rights. Because the prosecutor mischaracterized the trial as a search for the truth and undermined the presumption of innocence, the court must

apply the standard of review. State v. Emery, 174 Wn.2d 741, 576, 278 P.3d 653 (2012); State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The prejudice was established and there is a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

However, in the absence of a limiting or curative instruction, the jury is permitted to consider the evidence for any purpose, including it's truth. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 359 (1903). The court's refusal to give the Appellant's requested instruction allowed the jury to give unlimited consideration to the evidence, and the Appellant did object to the argument.

Also, this Court can review the argument under Abuse of Discretion. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

So, the Court must review the prosecutor's misconduct, the improper remarks in the context of the total argument, the issue in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Furthermore, a prosecutor's expressions of personal opinion about the Appellant's guilt or the witnesses credibility are improper. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). Prejudicial error occurred, because it is

clear and unmistakable that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion, and vouching or bolstering the witnesses' credibility. So, the Appellant did adequately satisfy the review standard, and his case was indeed prejudiced.

Ground 9: Review the Motion to Suppress and the Motion to Sever

Review the Motion to Suppress, CP 58, and the motion to sever, CP 68, under the de novo standard. The judge abused his discretion in not granting them. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

Conclusion

When constitutional errors call into question the objectivity of those charged with bringing a defendant to judgement, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. It is clear that the Consent instruction, Jury Instruction No. 5, Jury Instruction No. 23, and the improper arguments in closing, all satisfy the prejudice prong of the review standard, in that the Appellant's right to a fair trial was compromised. If it wasn't for these errors the result of the trial would have been different. The State should not have shifted the burden of proof in the Consent

instruction, and the trial court should not have imputed an element of "knowingly," or made comments on the evidence in Jury Instruction No. 5. It is clear that the prosecutor made an improper argument in the closing argument, which was objected to by Defendant's counsel, but the judge did not give the jury limiting or curative instructions for the improper argument to the jury. Once the jury heard that argument, the jury was tainted, and the judge did not instruct them properly. Those arguments of the prosecutor resulted in prejudice. In the absence of a limiting instruction the jury was permitted to consider the evidence for any purpose, including its truth.

Additionally, there is the speculation with the hearsay evidence. Once the jury heard the evidence, the jury was tainted. On Count 4, there was not enough evidence to convict Mr. Cardona-Hernandez of 1st Degree Burglary with a Sexual Motivation enhancement.

Further, the Defendant/Appellant requests this Court review the Motion to Suppress and the Motion to Sever, CP 58, 68, 64, under the de novo standard.

In light of the above, the Defendant/Appellant requests this Court reverse and remand for a new trial, or further relevant facts for an evidentiary hearing, or a Dismissal of Count 4, and to resentence him only on counts 1, 2, and 5. Because there was no DNA and the victim did

not identify Mr. Cardona-Hernandez, there was insufficient evidence
to convict on count 4.

Mig Cardona - Hernandez # 394983/H2B-119C
Ford Creek Corrections Center

Constantine way
Deen, W.A. 98520



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Susan L. Carlson
Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, W.A. 98504

R. King 6-24-69

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