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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA MASON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The defendant raped his victim two separate times, and assaulted her in a variety of manners over the course of approximately seven hours. Do his two convictions for first-degree rape and his conviction for second-degree assault violate double jeopardy?

2. During a recorded jail phone call, the defendant instructed his rape and assault victim to call the detective and tell him that nothing happened. Could a rational trier of fact have found the defendant guilty of witness tampering?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged, and convicted by a jury, of the following crimes:

Count I: Rape in the First Degree

Count II: Rape in the First Degree

Count III: Assault in the Second Degree

Count IV: Felony Harassment

Count V: Unlawful Imprisonment

Count VI: Tampering with a Witness

CP 10-13, 57, 59, 61, 63, 65, 67. The jury also returned findings that the defendant was armed with a deadly weapon during the commission of the crimes charged in counts I through V. CP 58, 60, 62, 64, 66.

The court imposed sentence on counts I, II, III and VI. CP 98, 101-02. The court did not impose sentence on counts IV and V, finding that the counts encompassed the "same criminal conduct."¹ CP 99 (see subsection 2.1(i) of the Judgment and Sentence). On counts I and II, as required by RCW 9.94A.589(1)(b), the court imposed indeterminate consecutive standard range sentences of 120 months and 93 months, respectively. CP 102. On counts III and VI, the court imposed concurrent determinate standard range sentences of 29 months and 12 months, respectively. CP 101. The court also imposed consecutive deadly weapon enhancements as required.² CP 102.

¹ While not an issue on appeal, failure to enter a sentence on counts IV and V was in error. At sentencing, the prosecutor informed the court that the State was conceding that the felony harassment and unlawful imprisonment counts encompassed the same criminal conduct as the rape and assault counts, and therefore counts IV and V should not be included in the calculation of the defendant's offender score. See CP 84-85. In the State's sentencing memorandum, the prosecutor did not list a standard range for counts IV and V. The prosecutor was at least partly correct. Under RCW 9.94A.589(1), current offenses that encompass the same criminal conduct do not score, however, sentence is still imposed on each count.

² This did not include the deadly weapon enhancements on counts IV and V.

2. SUBSTANTIVE FACTS

Twenty-one-year-old Briana Brown and the defendant met in March of 2006 and began dating in September of that year. 4RP 4, 7-9. In February of 2007, the two moved into a Federal Way apartment together. 4RP 10. The defendant then learned that he might be the father of a child by another woman, Rashea Coleman. 4RP 12. While initially Briana was fine with this, Rashea soon began interfering in Briana and the defendant's relationship. 4RP 12-13. Ultimately, Briana and the defendant broke up, but continued to live together until the defendant could find a place of his own. 4RP 14-15. Despite the break up, Briana testified she was still very much in love with the defendant. 4RP 15. Briana also testified that she was a virgin, that she was not dating anyone else, and that the defendant did not like her being with her friends and suspected that she was seeing other men. 4RP 20, 26, 28.

On the evening of April 11, Briana was at a friend's house when she began receiving text and phone messages from the defendant that he needed to see her. 4RP 26, 29. When Briana spoke with the defendant, he was crying, saying that Rashea had lied to him about being her baby's father. 4RP 31. Worried

because the defendant professed that he could not handle this news, Briana agreed to meet the defendant. 4RP 29-32.

When Briana met the defendant at a gas station in Renton, he was crying but vacillated between asking where she had been, and ruing about what had happened to him. 4RP 33. He then drove the two of them back to their apartment. 4RP 34.

As soon as they walked in the door (at approximately 2:30 a.m.), things dramatically changed. 4RP 30. The defendant immediately displayed his anger, demanded to know "how could you do this to me," and ordered Briana to sit down. 4RP 36-37. When Briana tried to leave, the defendant pushed her back and pulled out a knife. 4RP 38-39. The defendant held the knife to Briana's throat and told her to shut up. 4RP 45. He said he would cut her throat if she screamed. 4RP 48. The knife was a steak knife with a four to four and a half inch blade. 4RP 46.

The defendant then proclaimed that "you lied to me about where you was at, you hurt me...now you're going to pay." 4RP 49. When Briana tried to get up, the defendant choked her with two hands for 20 to 25 seconds, threw Briana on the couch and again told her to shut up. 4RP 49-52.

The defendant then told Briana to get on her knees, as he opened a drawer and took out a cord with some cloth wrapped around it. 4PR 54. Telling Briana that he had planned this all out, he ordered her to put a sock in her mouth. 4RP 54, 57-58. He then tied the cord around her head, yelling, "I hate you and you're going to pay for this." 4RP 59.

A while later, the defendant professed that he was "horny," and ordered Briana to take off her clothes and get on her knees. 4RP 59-60. Believing the defendant's repeated threats to kill her, Briana complied. 4RP 60, 62. The defendant then removed the gag from Briana's mouth and forced her to perform oral sex on him. 4RP 63. Once he was erect, he threatened to stab Briana in her vagina if she screamed, told her to open her legs, and then raped her, all the while holding the knife to her neck. 4RP 69, 71-72, 124-25. When he was done, he looked at Briana and said "congratulations, you're pregnant." 4RP 74.

After raping Briana, the defendant's attitude changed from professing his remorse and saying he was going to take his own life, to blaming Briana for his actions. 4RP 75-79. Briana tried to calm the defendant down saying that she still loved him and they could be friends, but the defendant got angry again and claimed

she was lying. 4RP 80-82. When Briana pleaded for the defendant not to hurt her, the defendant stood up with the knife and told her to come to him. 4RP 83. The defendant then chased Briana around a table, threw her to the ground, choked her for about 30 seconds and then punched her in the face. 4RP 84-85. Waving the knife around, he cut Briana's hands. 4RP 85.

A while later, the defendant pulled out a bed in the living room and ordered Briana to lie down to sleep. 4RP 96-97. He then tied their wrists together so Briana could not escape while they slept. 4RP 97.

Later, as the defendant appeared to be sleeping, Briana was able to get her wrist free. 4RP 100. She then got up and made her way to the bathroom, wanting the defendant to think she wasn't trying to escape if he happened to wake up. 4RP 101. As soon as she got there, however, the defendant called her back. 4RP 101.

At approximately 7:00 a.m., the alarm on Briana's cell phone went off. 4RP 102. The defendant thought it was an incoming call, so he started scrolling through the numbers and text messages, asking Briana about each message. 4RP 103-04. The defendant then took Briana to the kitchen, ordered her to open a cabinet and take out a bottle of Pine Sol. 4RP 106-07. The defendant, still with

a knife in his hand, grabbed a larger knife from a drawer and told Briana to either drink the Pine Sol or he would kill her. 4RP 109-11. When Briana drank just a little bit, the defendant raised the knife and threatened, "obviously you want to die." 4RP 116. Briana then drank more, began having trouble breathing, and started vomiting. 4RP 116-17.

Briana began feeling worse and was drifting in and out of consciousness. 4RP 122. Her pleas to have the defendant take her to the hospital were met with the defendant's statement that he was going to watch her die. 4RP 120-22.

When Briana began to feel more awake, the defendant told her that he was feeling "horny" again. 4RP 122. He then took Briana over to the bed and raped her again, still with the knife and with a threat that he would stab her if she did not comply. 4RP 123-29. After raping Briana, the defendant ran the knife lightly across Briana's back a few times causing multiple small lacerations. 4RP 132.

The defendant then forced Briana to write a suicide note and call her mother and a friend. 4RP 133-34, 37-39. Later, the defendant decided to take Briana to the hospital, but only after saying that he would kill her if she said anything. 4RP 136. She

was to say she hit herself with a speaker and drank Pine Sol in an attempt to kill herself. 4RP 137.

Briana initially complied with the defendant's instructions, but later disclosed what the defendant had done to her. 4RP 142-46. Detectives returned to the apartment and located one of the knives, the gag, cord and other items used by the defendant. 4RP 151-52, 158-61; 6RP 60, 62-63, 66, 71, 73. A rape examine was also conducted, with the results of DNA testing showing the defendant did have intercourse with Briana. 4RP 147; 7RP 37. Testing also confirmed the presence of the defendant's DNA on the sock that was placed in Briana's mouth, and on Briana's underwear. 7RP 31-32. Briana suffered vagina injuries consistent with "pretty forceful" blunt force trauma. 8RP 154, 179.

The defendant testified and claimed that he had consensual sex with Briana the night prior to the 11th because Briana wanted to prove her love for him. 9RP 9. He claimed that "all hell broke loose" afterwards when he told Briana that he was moving on. 9RP 12. The two argued and then he left--no assault having occurred. 9RP 12. He then presented an alibi defense, claiming he was in a car with Rashea on the night of the 11th, variously having sex with Rashea and talking with Briana on the phone.

9RP 7. He claimed that he did not see Briana again until he returned home, found her on the floor, with a suicide note. 9RP 18. Instead of calling 911, he says he spent 30 minutes trying to start his car and then he took Briana to the hospital. 9RP 22-23.

On cross, the defendant admitted that he told a detective that he had picked up Briana in Renton, consistent with Briana's testimony, but professed at trial that this was not true and he didn't know why he told the detective that. 9RP 84-85. He admitted that he told a detective that he had consensual sex with Briana on the 11th, but proclaimed that he must have been confused about the date. 9RP 89-90, 150. He claimed Briana made up the entire story, that she drank the Pine Sol to get back at him, and that she fabricated the evidence to make it look like he assaulted and raped her. 9RP 109.

Pending trial, the defendant called Briana from the King County Jail. 4RP 170; 9RP 35. The call, the basis for the witness tampering charge, was recorded, played for the jury, and is discussed further in the argument section below. Exh 27; 6RP 166-67. During the call, the defendant tried to induce Briana to call the detective and tell him that nothing had happened. Exh 27. When confronted with the recording at trial, the defendant

confessed to making the call and claimed he called Briana because he "was shocked that, you know, she would do this to me."

9RP 35.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE TRIAL COURT HAD THE AUTHORITY TO PUNISH SEPARATELY THE DEFENDANT'S TWO RAPES, AND HIS BRUTAL ASSAULT OF BRIANA THAT LASTED OVER SEVEN HOURS.

The defendant contends that he cannot be punished for both raping Briana twice and assaulting her, that his crimes were but one offense for double jeopardy purposes. Specifically, he claims that his brutal seven hour assault upon Briana was merely part and parcel of his two rapes, and therefore his assault conviction must be vacated. This claim should be rejected. Under existing double jeopardy case law, there can be no question but that the trial court had the authority to impose punishment for each offense.

For the defendant to prevail, he must show that his two rape convictions and his assault conviction are in reality but one crime, for double jeopardy "protects against multiple punishments for the same offense." State v. Johnson, 92 Wn.2d 671, 678-79, 600 P.2d

1249 (1979), overruled in part on other grounds, State v. Sweet,
138 Wn.2d 466, 980 P.2d 1223 (1999).

As charged and convicted here under count III, to find the defendant guilty of second-degree assault the jury was required to find that the defendant (a) assaulted Briana Brown with a deadly weapon, (b) knowingly inflicted bodily harm upon Briana Brown that, by design, caused such pain or agony as to be the equivalent of torture, (c) assaulted Briana Brown by strangulation, (d) assaulted Briana Brown with the intent to commit the crimes of first-degree rape or unlawful imprisonment or (e) administered or caused to be taken by Briana Brown a poison or a destructive or noxious substance with the intent to inflict great bodily harm.
CP 11, 45; RCW 9A.36.021.

As charged and convicted here under count I and count II, to find the defendant guilty of first-degree rape, the jury was required to find that the defendant engaged in sexual intercourse with Briana Brown, that the sexual intercourse was by forcible compulsion, and that the defendant used or threatened to use a deadly weapon or what appeared to be a deadly weapon. CP 10-11, 37-38; RCW 9A.44.040.

In State v. Johnson, *supra*, the Supreme Court held that in certain situations, convictions for both first-degree rape and assault can violate principles of double jeopardy. Ultimately defined as the merger doctrine,³ the Court recognized that where the statute requires that the prosecutor prove not only that the defendant committed rape, but that the rape was accompanied by an act which is defined as a separate crime elsewhere in the criminal statutes, imposing punishment on both convictions may violate double jeopardy. Of course, a requirement of any double jeopardy claim is that the same act or transaction must violate both criminal statutes. State v. Parmelee, 108 Wn. App. 702, 709, 32 P.3d 1029 (2001), *rev. denied*, 146 Wn.2d 1009 (2002). As the Court stated in Johnson regarding the rape statute, the legislature intended that "conduct involved in the perpetration of a rape. . . should be punished as an incident of the crime of rape and not additionally as a separate crime." Johnson, 92 Wn.2d at 676.

³ The term "merger" is used in several different contexts. As used herein, it is a doctrine of statutory interpretation used to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. State v. Vladovic, 99 Wn.2d 413, 419 n 2, 662 P.2d 853 (1983). As this court has previously recognized, the merger doctrine is merely part of the double jeopardy analysis. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996).

Here, the conduct constituting the defendant's seven hour assault on Briana, and assault that included two acts of strangulation, poisoning, a blow to the face, torture, and a knife held to her neck multiple times, was not conduct involved in the perpetration of the rape. The same acts did not prove both crimes. The poisoning, strangulation, torture, and other acts were not the acts used to perpetrate the two rapes. Because the conduct constituting the assault and the conduct constituting the rapes are not the same, the defendant's double jeopardy argument fails.

In addition, the Supreme Court also recognized an exception to the application of double jeopardy/merger doctrine where the conduct involved in the perpetration of the rape has an independent purpose or effect. Johnson, at 676. If the conduct constituting the other crime (the assault) is merely "incidental" to the greater crime (the rape), then the single penalty for first-degree rape would apply. Id. However, where the conduct constituting the other crime (the assault), is not merely incidental to the rape, but has an "independent purpose or effect," the legislature intended each act be punished separately. Id.

In Johnson, the defendant was drinking wine and smoking marijuana with two young girls in a cabin when he held a knife to

the neck of one of the girls, bound her hands and said he was going to rape her. He then took both girls into the bedroom, bound them to a bedpost and raped each of them. Johnson was convicted of first-degree rape, first-degree kidnapping, and first-degree assault for the acts committed against each girl. Johnson, at 672-73.

The Court first found that the act of assault and kidnapping were elements that elevated the rape to first-degree rape. Next, the Court found that the exception to the merger doctrine did not apply.

Under the evidence in this case, the restraints and use of force were elements which elevated the acts of sexual intercourse to rape in the first degree. Although proof of only one such element was necessary, both were intertwined with the rape. They occurred almost contemporaneously in time and place. The sole purpose of the kidnapping and assault was to compel the victims' submission to acts of sexual intercourse. These crimes resulted in no injury independent of or greater than the injury of rape.

Johnson, at 681.

Here, the exception to merger clearly applies. The torture, poisoning and strangulation of Briana were not acts necessary to commit the two rapes. In fact, the poisoning had not even occurred until after the first rape. The purpose of the assault upon Briana

was to cause her physical and emotional harm, as evidenced by the defendant's own statements about wanting to cause her harm and wanting to watch her die. The assaults were not to compel Briana's submission to acts of sexual intercourse. Further, without question, Briana suffered injury independent of the injury caused by the rapes. For example, the hospitalization required as a result of being forced to ingest Pine Sol.

Finally, the defendant's reliance upon multiple old court of appeals cases is misguided. For example, the defendant cites to State v. Bresolin, 13 Wn. App. 386, 534 P.2d 1394 (1975), a case involving robbery and assault; and State v. Potter, 31 Wn. App. 883, 645 P.2d 60 (1982), a case involving reckless driving and reckless endangerment. These cases predate Johnson, supra, the definitive Supreme Court case involving first-degree rape and assault. In addition, these cases, and the defendant here, apply a long ago rejected same conduct test--the defendant arguing that the same facts proved both charges so double jeopardy applies. In 1993, the United States Supreme Court overruled the same conduct fact based test for determining double jeopardy that was

being used by some courts prior to the early 90's. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995); see also State v. Tanberg, 121 Wn. App. 134, 139-40, 87 P.3d 788 (2004) (recognizing that Bresolin either applied the since rejected "same conduct" test, or misapplied the "same evidence" test), overruled on other grounds, 154 Wn.2d 1012 (2005).

The defendant also cites to cases involving anticipatory crimes. For example, he cites to State v. Martin, 149 Wn. App. 689, 205 P.3d 931 (2009), a case involving assault and attempted rape. But as the Court noted in Martin, when one crime is an anticipatory crime, an abstract comparison of the elements does not work. Martin, 149 Wn. App. at 699.

In applying the relevant and controlling Supreme Court case law, Johnson, supra, it is apparent that the conduct of the assault upon Briana was not merely incident to the rape, the same facts did not prove all three charges, and there was clearly an independent purpose and effect to cause physical and emotional harm to Briana. As such, the defendant's double jeopardy argument fails.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF WITNESS TAMPERING.

The defendant argues that the evidence presented at trial was insufficient for any rational trier of fact to have found him guilty of witness tampering. Specifically, the defendant claims that no rational trier of fact could have found that when he instructed Briana to call the detective and tell him that nothing really happened, that this was not an attempt to get her to withhold information about what really happened. This claim has no merit. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. It is perfectly reasonable to infer from the defendant's instruction to Briana to lie and say nothing happened, that he wanted Briana to withhold information about the brutal assault and rape he perpetrated upon her.

As charged and presented here, the jury was required to find:

- (1) That on or about October 18, 2007, the defendant attempted to induce a person to withhold from a law enforcement agency information which he or she had relevant to a criminal investigation;

(2) That the other person was a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That the acts occurred in the State of Washington.

CP 59; RCW 9A.72.120.

Here, the defendant entered into a stipulation that was read to the jury stating that on October 18, 2007, he called Briana Brown from the King County Jail. 6RP 166-67. This call was recorded and played for the jury. 4RP 170-71; 5RP 166-67; Exh 27.

At the start of the call, after confirming that Briana knew he was in jail, the defendant instructed Briana to call the detective and tell him that nothing had happened:

Defendant: Oh man, Briana. Briana.

Briana: What?

Defendant: You need to call the detective.

Briana: And say what?

....

Defendant: You need...it comes out of your mouth to let me go and nothing happened. Nothing will be against you and nothing will be against me.

Exh 27. The defendant then reiterated that Briana should say that nothing happened and he assured her that "[n]obody's gonna hurt

you." When Briana told the defendant that she might not be able to contact the detective, the defendant instructed her to contact his brother James so that they could "resolve the problem."

Defendant: This is a problem. You know it's a big problem. We need to resolve this. I know you're not trying to have me up here like this, man. Are you?

Briana: I don't want to deal with this.

Defendant: Briana, don't don't do this to me. Now listen. You're not gonna have me locked in here like this are you?

Briana: No. I don't know if your, any of 'ya all are gonna try to come and hurt me.

.....

Defendant: Look. You need to um make some phone calls cause I know you're not trying to have me up in here like this, man. There's nobody that's gonna hurt you...That's what you're worried about but you need to worry about me.

Exh 27.

A claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court must affirm a conviction if, "after reviewing 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." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). Circumstantial evidence is equally as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant contends that in instructing Briana to contact the detective and profess that nothing happened, he was not asking her to withhold information and he could not have committed witness tampering because Briana had already given a statement to the police.

First, the statute contains no such timing mechanism. Whether Briana had already disclosed information to law enforcement is irrelevant to whether the defendant was attempting to induce her to withhold information relevant to the investigation leading up to his trial.

Second, it is a perfectly reasonable inference for the jury to conclude that when the defendant instructed Briana to tell the detective that nothing happened, implicit in his instruction was the order to withhold the facts of what he did to her. After all, it would make no sense to interpret the defendant's instruction to mean that Briana should tell the detective everything that the defendant did to her, but to then claim nothing happened. As the Court found in State v. Lubers, asking a witness to accuse another individual of the crime was affectively asking the person to recant an earlier statement made to the police, and "thereby, to withhold information necessary to a criminal investigation." State v. Lubers, 81 Wn. App. 614, 622-23, 915 P.2d 1157, rev. denied, 130 Wn.2d 1008 (1996).

Lubers was charged under subsection (a) of the statute that requires the defendant attempt to induce the witness to "[t]estify falsely or, without right or privilege to do so, **to withhold** any testimony." Lubers, 81 Wn. App. at 623 (emphasis added). Lubers asked a witness in his pending rape trial to write a letter saying Lubers was not the perpetrator and to finger someone else for the crime. Like here, Lubers challenged his conviction on appeal, arguing there was insufficient evidence to support the conviction.

The Court rejected Lubers' argument, finding that a reasonable jury could find his letter was an attempt to induce the witness to recant his earlier statement to the police and thus to withhold relevant information. Lubers, at 622-23.

With this evidence presented here, viewed as it must be on appeal, in the light most favorable to the State, there is no question that a rational trier of fact could have found the defendant attempted to induce Briana to withhold relevant information when he told her to lie and say that nothing had happened.

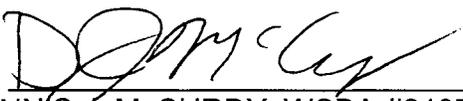
D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 14 day of August, 2009.

Respectfully submitted,

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