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COA No. 68061-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

MOHAMAUD SULDAN MOHAMED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Steven Gonzalez

REPLY BRIEF

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A. REPLY ARGUMENT

1. KNOWLEDGE IS AN ELEMENT AND THE INFORMATION FAILED ENTIRELY TO ALLEGE THAT ELEMENT.

a. State v. Lough speaks directly to the requirement for indecent liberties that the defendant must know of the other person's incapacity to consent. The Respondent contends that State v. Lough did not state except in dicta that a defendant must have knowledge of the other person's incapacity to consent in order to be guilty of indecent liberties for having sexual contact with that person. BOR, at 15-16. But the Court of Appeals addressed the issue by applying rules of statutory construction, and necessarily so held in making clear that the defendant, to be guilty under that crime, must know that the person is incapable of consent by physical helplessness. State v. Lough, 70 Wn. App. 302, 325-26, 853 P.2d 920 (1993) (evidence of prior acts of drugging women into physical helplessness for sexual purposes was relevant in defendant's current prosecution for indecent liberties by drugging victims with knowing plan to render helpless), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995).

Mr. Mohamed agrees with the Respondent that statements which are made in passing by an appellate court, and which are not

directly related to the holding of a case, are dicta. See BOR, at p. 15 (citing Ass'n of Washington Bus v. State of Washington, Dep't of Revenue, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005)).

However, this definition of dicta does not apply to the statements in question by the Lough Court. That case was a prosecution for indecent liberties based on incapacity, just as is the present case. The Court, in assessing the relevance of prosecution-proffered ER 404(b) evidence of prior similar acts by the defendant, stated:

In order to be guilty of indecent liberties upon an adult non-spouse in violation of RCW 9A.44.100(1)(b), a defendant must knowingly cause "sexual contact" and he must "knowingly" cause such contact with a person who is "physically helpless".

(Footnotes omitted.) Lough, 70 Wn. App. at 325-26. The Court related this determination in part on its reading of the statutory language:

That "knowingly" modifies both "causes another person . . . to have sexual contact" and "when the other person is . . . physically helpless" is apparent from the sentence structure and punctuation of the statute.

Lough, 70 Wn. App. at 325 n. 14. Both of these statements, and the determination whether indecent liberties includes an element of knowledge of the complainant's incapacity, were critical to the Court's

decision in that respect. The Court was being asked to determine whether certain evidence was admissible under ER 404(b), and therefore inquired whether prior similar acts showed a common scheme or plan to engage in the conduct charged by the prosecution. Lough, 70 Wn. App. at 324. The Court first noted:

The two crucial elements which the State was required to prove beyond a reasonable doubt were (1) P.A. lacked capacity to consent by reason of being physically helpless; and (2) Lough knew it, and had sexual contact with her, notwithstanding such knowledge.

Lough, 70 Wn. App. at 326. The Court answered the question in the affirmative, reasoning that the defendant's past behavior of having sexual contact with persons who he had drugged in order to incapacitate for sex, were relevant and highly probative of the crucial element of knowledge of the incapacity in the present prosecution. The Court therefore ultimately stated:

There can be no question that, if Lough had a criminal scheme, plan and design to drug and rape women and to escape punishment by the use of a drug which would render his victims partially or wholly amnesic, the State's theory that P.A. was one of several victims of such scheme is highly relevant and of great consequence to the crucial elements here at issue: P.A.'s lack of capacity to consent; and Lough's guilty knowledge of that fact.

Lough, 70 Wn. App. at 327.

The critical preliminary question in Lough was therefore whether knowledge of the incapacity is an element of the crime. None of this analysis would be necessary if that pivotal question had not been squarely addressed by the Court.

The subsequent Supreme Court decision in State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995), which affirmed, necessarily rests on the premises of the Court of Appeals. The Supreme Court addressed the question whether the prior bad acts were admissible to show a common scheme or plan, and concluded that the prior acts showed a “plan” to drug those past women in order to have contact with them. Lough, supra, 125 Wn.2d at 860-62. The Court deemed the existence of such a plan to be relevant to the central question whether the charged conduct occurred, and in particular whether the defendant drugged the current victim in order to render her so helpless she was incapable of consent. Lough, 125 Wn.2d at 862.

b. *State v. Lough* correctly addresses the question of construction of the statutory language. As noted, the Lough Court of Appeals concluded that the statutory language of the indecent liberties statute indicates that knowledge of the incapacity is an element. The Respondent cites a style manual for the proposition that the word

“knowingly” only modifies “causes . . . sexual contact,” and cannot modify other verbs appearing thereafter in the definition of the crime. BOR, at pp. 8-9.

But the State v. Shipp Supreme Court stated a rule that in a statute, the word “knowingly,” followed by a colon, modifies “everything which follows the colon.” State v. Shipp, 93 Wn.2d 510, 519, 610 P.2d 1322 (1980) (“in the promoting prostitution statute [RCW 9A.88.070(1)], the legislature has specifically included the requirement of knowledge. The word “knowingly” precedes a colon and modifies everything which follows the colon.”) (thus requiring proof of knowledge that the person whose prostitution was promoted was less than eighteen).

There is nothing different between the language of the former promoting prostitution statute at issue in Shipp, and the language of the statute at issue in the present case, which compels a different statutory construction result here. The Respondent’s additional argument regarding construction of the statutory language fails. BOR, at pp. 8-9. Respondent argues that the current statute would, if grammatically correct, read differently than it does if knowledge was required, and instead would state that the accused must have had sexual contact “with

knowledge that the other person is incapable of consent.” BOR, at p. 8. But the same critique of the promoting prostitution statute in Shipp would fail in the same way as it does here. That statute provided that a person is guilty if he “knowingly: . . . (b) advances or profits from prostitution of a person less than eighteen years old.” Former RCW 9A.88.070. The Shipp Court deemed this wording to require knowledge of age, because of the Legislature’s placement of the colon in the statutory language so as to precede all of the alternative means of committing the offense.

This rule of statutory construction provides a consistent method of determining the elements of the crime from the enacted language. In the present case, the indecent liberties statute provides that the defendant is guilty if he “knowingly causes another person who is not his spouse to have sexual contact with him or her or another: . . . (b) When that person is incapable of consent by reason of being [mentally incapacitated].” RCW 9A.44.100(1)(b). The word “knowingly” is followed by provisions requiring non-spouse *status* and including contact with “another” as a *victim*, and then, following the colon, states the requirement of victim incapacity, as to which knowledge is a required element.

Nothing in the statute in Shipp or here indicates that the foregoing rule (employed in Lough, supra, and in Shipp) should apply differently in the two instances. The plain language of the indecent liberties statute requires knowledge of the other person's incapacity, and there is no need to compare the indecent liberties statute with the crime of rape and the question of what knowledge or other *mens rea* is required for that crime, or the panoply of other sexual crimes. See BOR, at p. 10 (citing State v. Walden, 67 Wn. App. 891, 895, 841 P.2d 81 (1992) (second degree rape statute has no "intent" element)). Indeed, State v. Shipp and the former prostitution crime there at issue makes clear that the Legislature has in certain instances enacted statutory language specifically requiring knowledge of an attribute of the victim – there, age; and here, incapacity.

c. The information entirely failed to allege the requisite element of knowledge of M.M.'s incapacity. When even a liberal reading of the information indicates that an essential element is wholly missing, reversal of the conviction is required, without any requirement that the defendant must show he was prejudiced in his defense by the absence of the element in the charging document. State v. Marcum,

116 Wn. App. 526, 536, 66 P.3d 690 (2003) (prejudice need not be shown if charge cannot be saved by liberal construction).

In the absence of a colon, or other language indicating that the defendant was accused of knowing that the victim was incapable of consent due to incapacity, the information failed to allege that element. Here, the information stated:

That the defendant MOHAMAUD SULDAN MOHAMED in King County, Washington, on or about April 16, 2011, did knowingly cause M.M. (DOB 12/2/90), who was not the spouse of the Defendant and who was incapable of consent by reason of being (a) mentally defective, (b) mentally incapacitated, and (c) physically helpless, to have sexual contact with the Defendant.

CP 7. The information in Mr. Mohamed's case employed the word knowingly to refer to the causing of sexual contact, using two commas to set off the language "who was incapable of consent . . ." as a parenthetical phrase that modified and further described "M.M." CP 7. This language does not indicate the requisite element of knowledge that she was incapable of consent.

Using rules of sentence structure and punctuation, the information must be written in such a manner as to enable persons of common understanding to know what elements are charged. This information did not indicate that knowledge of incapacity was an

element that was charged. State v. Simon, 120 Wn.2d 196, 198-99, 840 P.2d 172 (1992) (finding that “knowingly” language in information did not apply to alternative means of advancing prostitution of person under 18, because means were separated by semicolons and “knowingly” was used only within first separated phrase).

Here, similar to Simon, the information in Mr. Mohamed’s case enclosed the language “incapable of consent” within a phrase set off by commas. CP 7. Reading the document in a common sense lay manner, the word “knowingly” did not relate to the complainant’s incapacity, but instead applied only to causing sexual contact. No notice was given of the knowledge element as to the victim being incapable of consent.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT M.M. WAS INCAPABLE OF CONSENT BECAUSE “PHYSICALLY HELPLESS” BY REASON OF BEING UNCONSCIOUS.

Mr. Mohamed relies on the arguments raised in his Appellant’s Opening Brief. AOB, at pp. 16-19. The Respondent argues that evidence that M.M. was asleep and then awoke to find that the defendant was already having sexual contact with her, would be sufficient to support the physically helpless allegation. BOR, at p. 22.

In this case, however, M.M.'s testimony was more than inconsistent on this point, it was inadequate to convict under the "physically helpless" element. Notably, Mr. Mohamed was initially charged with third degree rape, the information alleging that he had sexual intercourse with M.M. under circumstances where her non-consent was "clearly expressed by words or conduct." CP 1; see RCW 9A.44.060(1)(a). However, the information was later amended to charge Mr. Mohamed with indecent liberties per RCW 9A.44.100(1)(b), the prosecutor now claiming that Mr. Mohamed had sexual contact with M.M. when she was sleeping, and thus incapable of consent. CP 7; see also CP 10, 13 (State's trial brief).

At trial on the new charge, M.M. stated that when she awoke, it was Mr. Mohamed's fingers in her mouth that she felt. 9/22/11RP at 100. She made clear that the sexual contact with her vagina came *thereafter* – subsequent to her awakening:

Q: All right. And, once again, you were – you were woken by the finger in your mouth, not the penetration.

A: Yes.

9/22/11RP at 103. The Respondent contends that the complainant testified that "contact" (which is certainly adequate for indecent liberties) occurred before the penetration that she described. BOR, at

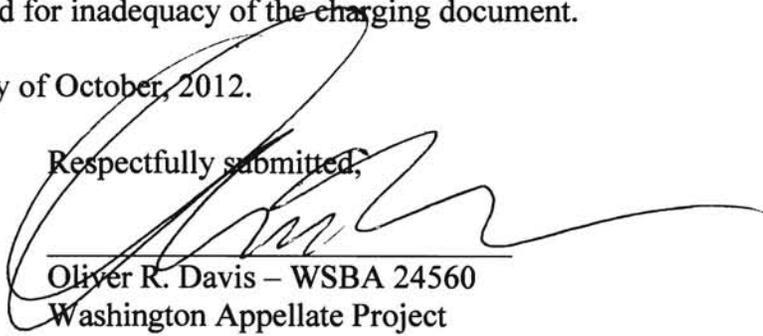
pp. 23-25. However, M.M. retracted her earlier testimonial claim that the touching of her vagina was what awoke her, making clear that she was awoken by the defendant's fingers at her mouth, and that vaginal contact and penetration was something she felt thereafter, and she was awake during the entire episode of touching that she alleged occurred. 9/22/11RP at 103. It is Mr. Mohamed's argument that this evidence is constitutionally insufficient under the Due Process clause of the 14th Amendment. AOB, at pp. 14-15. The defendant's conviction must be reversed with prejudice. State v. Spruell, 57 Wn. App. 383, 387, 788 P.2d 21 (1990); U.S. Const. amend. 14.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Mohamed respectfully contends that his judgment of guilty should be reversed for insufficiency of the evidence, or in the alternative, that the conviction be reversed for inadequacy of the charging document.

Dated this 16 day of October, 2012.

Respectfully submitted,



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DIVISION ONE**

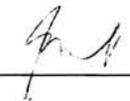
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68061-7-I
v.)	
)	
MOHAMAUD MOHAMED,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2012, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF OCTOBER, 2012.

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