

NO. 40680-2-II

COURT OF APPEALS, DIVISION II

09-1-00963-9  
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STATE OF WASHINGTON,

Respondent

vs.

CHARLES J. DAVIS,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Gary Tabor and Paula Casey, Judges  
Cause No. 09-1-00963-9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to allow Davis to present evidence that KC engaged in another act of prostitution after which she claimed rape in support of his consent defense.
2. The trial court erred in finding that the rape shield statute, RCW 9A.44.020, precluded Davis from presenting evidence that KC engaged in another act of prostitution after which she claimed rape in support of his consent defense.
3. The trial court erred in entering Findings of Fact and Conclusions of Law Re: Evidentiary Hearing/Rape Shield Law, [CP 61-69], that merely adopt and incorporate the court's oral ruling finding no relevance to the instant case, that the evidence was unduly prejudicial, and the exclusion of the evidence did not deny Davis substantial justice.
4. The trial court erred in failing to take the case from the jury for lack of sufficient evidence establishing beyond a reasonable doubt that Davis was guilty of rape in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to allow Davis to present evidence that KC engaged in another act of prostitution after which she claimed rape in support of his consent defense? [Assignments of Error Nos. 1-3].
2. Whether there was sufficient evidence elicited at trial to establish beyond a reasonable doubt that Davis was guilty of rape in the first degree? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

1. Procedure

Charles J. Davis (Davis) was charged by first amended information filed in Thurston County Superior Court with one count of rape in the first degree (kidnap or infliction of serious physical injury) or in the alternative rape in the second degree. [CP 25].

Prior to trial, no motions regarding CrR 3.5 or CrR 3.6 were made or heard. However, Davis did make a motion for the admission of evidence of sexual conduct by KC to support his consent defense addressing the admissibility of the evidence in terms of the rape shield law, RCW 9A.44.020, which motion the State opposed. [CP 10-16, 17-19, 20-21, 22-24]. The matter was heard by the Honorable Gary Tabor. After considering the documents filed by both parties and hearing argument from Davis and the State, the court denied Davis's motion and entered Findings of Fact and Conclusions of Law Re: Evidentiary Hearing/Rape Shield Law, [CP 61-69], that merely adopted and incorporated the court's oral ruling finding no relevance to the instant case, that the evidence was unduly prejudicial, and the exclusion of the evidence did not deny Davis substantial justice. [CP 27-34; 2-8-10 RP 11-27].

Davis was tried by a jury, the Honorable Paula Casey presiding. Davis had no objections and took no exceptions to the court's instructions

which included instructions of his defense of consent. [CP 39-50; Vol. II RP 305-318]. The jury found Davis guilty of rape in the first degree. [CP 60; Vol. II RP 368-371].

The court sentenced Davis to a standard range sentence of 136-months to life based on an offender score of one based on his prior conviction for felony VUCSA. [CP 95-96, 97-109; 5-6-10 RP 21-23].

A notice of appeal was timely filed on May 6, 2010. [CP 79-92]. This appeal follows.

2. Facts

On September 23, 2001, at about noon, KC,<sup>1</sup> a 16 year old girl, was dropped off at the Lacey Transit Center by her mother. [Vol. I RP 27-28, 51-52, 75-77]. KC had told her mother that she was going to see a friend when actually she was planning on seeing her much older adult boyfriend (he was in his fifties) of whom her mother did not approve. [Vol. I RP 28, 36, 51, 67, 78-79]. KC saw a group of six to seven mixed race young men and approached them to ask where the bus schedule was located. [Vol. I RP 29-30, 53-54]. The group of young men suddenly grabbed her and dragged her into the men's restroom. [Vol. I RP 30-33, 53]. KC testified that her arms and legs were held down and she was

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<sup>1</sup> This case involves the crime of rape in the first degree. The victim in this case was a juvenile girl. As such her initials, KC, will be used throughout this brief rather than her name.

raped (vaginal/penile penetration) by at least one and possibly two of the young men. [Vol. I RP 30-33, 58-59]. The young men left the restroom. [Vol. I RP 34]. KC, who was bleeding from her vagina, cleaned up and then she too left the restroom. [Vol. I RP 33-34]. KC saw a security guard close by reading a newspaper but did not report the incident to him. [Vol. I RP 34-35, 60-63]. KC went to see her boyfriend then returned to the home she shared with her family. [Vol. I RP 37, 63]. KC did not tell her boyfriend or her parents what had occurred at the Lacey Transit Center. [Vol. I RP 35-37, 64-65].

The next day, KC went to school but was in some considerable pain. [Vol. I RP 37, 65-67]. At school, KC revealed what had happened to her the day before. [Vol. I RP 37-38]. KC's mother was called and KC was taken to St. Peter's Hospital for an examination and treatment. [Vol. I RP 38-40, 80-82]. KC suffered from a serious tear to her vaginal area. [Vol. I RP 40, 120, 137-145; Vol. II RP 214, 242-248]. KC had no bruises or cuts on any other part of her body. [Vol. I RP 146; Vol. II RP 221]. A rape kit was performed on KC and a DNA profile was developed from semen samples collected. [Vol. I RP 39, 114-117, 152-156; Vol. II RP 218-220]. KC could not identify her attacker only describing him as a light-skinned black man about 20 years old wearing gold jewelry. [Vol. I RP 29-30, 52-53, 174].

In April of 2009, a match was found to the DNA profile from KC's case. [Vol. II RP 156-161]. The DNA profile matched Davis's DNA profile. [Vol. II RP 156-161]. The police contacted Davis, who admitted after being mirandized, that he had had sex with a girl in the men's restroom at the Lacey Transit Center years ago but insisted that the sex was consensual. [Vol. II RP 175-179]. The police learned that on September 24, 2001, Davis had pawned a gold bracelet. [Vol. II RP 173, 228].

Davis testified in his own defense.

Davis testified that he was alone at the Lacey Transit Center on September 23, 2001, when he was approached by a young girl, KC, asking for a cigarette. [Vol. II RP 280-281]. The two began talking with the conversation getting risqué to the point Davis believed that KC was a prostitute. [Vol. II RP 281-284]. KC agreed to have sex with Davis for \$25 in addition to getting \$40 worth of crack from KC's boyfriend that Davis would split with KC. [Vol. II RP 284-285]. The two went into the men's restroom and had consensual sex after which they got on a bus and went to the Olympia Transit Center and met KC's boyfriend. [Vol. II RP 285-286]. Davis didn't like KC's boyfriend, especially how he treated her, and decided not to buy crack from him so Davis left. [Vol. II RP 287-

288]. Davis admitted to pawning a bracelet on September 24, 2001. [Vol. II RP 296-297]. Davis denied raping KC. [Vol. II RP 289-290].

D. ARGUMENT

- (1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY DAVIS THE RIGHT TO PRESENT EVIDENCE THAT KC ENGAGED IN ANOTHER ACT OF PROSTITUTION AFTER WHICH SHE CLAIMED RAPE IN SUPPORT OF HIS CONSENT DEFENSE.

- a. Overview.

In the instant case, Davis was charged with and convicted of rape in the first degree. [CP 25, 60]. KC testified she was raped when she was dragged into the men's restroom at the Lacey Transit Center by a group of young men. [Vol. I RP 30-33, 58-59].

Davis's defense was consent. In support of his defense, Davis testified that KC was a prostitute agreeing to have sex with him for \$25 and getting \$40 worth of crack from KC's boyfriend that Davis would split with KC; the two had consensual sexual intercourse in the men's room of the Lacey Transit Center. [Vol. II RP 281-285]. The court instructed the jury on Davis's defense of consent in Instruction No. 15, which states:

A person is not guilty of rape if the sexual intercourse is consensual. Consent 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.

The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

[CP 56].

However, the court precluded Davis from presenting evidence in support of his consent defense that KC had apparently on another occasion close in time to the instant case had consensual sex with a group of men in a truck, seemingly an act of prostitution, and then remarked that she would tell her boyfriend that she had been raped. [CP 10-16, 22-24]. The court denied Davis's motion and entered Findings of Fact and Conclusions of Law Re: Evidentiary Hearing/Rape Shield Law, [CP 61-69], that merely adopted and incorporated the court's oral ruling finding the evidence had no relevance to the instant case, that the evidence was unduly prejudicial, and the exclusion of the evidence did not deny Davis substantial justice.

[CP 27-34; 2-8-10 RP 11-27].

- b. The Trial Court Erred In Holding The Rape Shield Statute, RCW 9A.44.020, Precluded Davis From Presenting Evidence That KC Had Engaged In Another Act Of Prostitution After Which She Claimed Rape In Support Of His Consent Defense.

RCW 9A.44.020, the rape shield statute provides in pertinent part:

- (2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history,

divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standard is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3)<sup>2</sup> of this section....

This statute is aimed at ending the misuse of prior sexual conduct evidence so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. State v. Hudlow, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). Prior sexual conduct cannot be used to attack the victim's credibility. However, evidence of past sexual conduct, such distinctive sexual patterns, could be relevant if it demonstrates "enough similarity between the past consensual sexual activity and the defendant's claim of consent." Id at p.11.

Here, Davis testified that KC consented to sex as an act of prostitution after which KC, who had a boyfriend, claimed rape. Davis sought to admit evidence that on another occasion close in time to the instant case that KC had engaged in a consensual act of sex (prostitution) and because she had a boyfriend claimed rape. The similarity between these two instances demonstrates a pattern of sexual conduct on the part of KC that supports Davis's testimony at trial that the sexual intercourse

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<sup>2</sup> Subsection (3) of RCW 9A.44.020, sets forth the procedure (by motion and affidavit) with the court weighing the probative value of the evidence compared to the substantial danger of undue prejudice and whether exclusion of the evidence denies the defendant substantial justice in determining whether a victim's sexual behavior is admissible on the issue of consent.

between KC and himself was consensual. Simple stated KC engages in a pattern of sexual conduct in which she: 1) has a boyfriend (in fact the same boyfriend in both instances—a man in his fifties while she was 16 years old); 2) commits an act of consensual sex (prostitution); and 3) claims rape afterwards. Davis should have been allowed to present evidence of this pattern of sexual conduct on the part of KC in support of his consent defense.

The trial court in denying Davis's motion for the admission of this evidence failed to recognize the import of KC's pattern of sexual conduct by erroneously declaring that it "find[s] no relevance to the facts in the present case." [CP 61-69]. Our State Supreme Court has concluded that the rape shield relevancy inquiry must be whether, under ER 401, "the [victim's] consent to sexual activity in the past, without more, makes it more probable or less probable that [he or] she consented to sexual activity on this occasion." *Id* at p.10. Factual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the relevancy test of ER 401. *Id*. Contrary to the court's holding, Davis has demonstrated the relevancy to his consent defense of KC's pattern of sexual conduct due to the similarities between his case and the conduct for which he sought admission. Moreover, given the import of this evidence to Davis's

consent defense, the trial court's holdings that this evidence was unduly prejudicial to the victim and did not deny Davis substantial justice cannot be sustained. Davis was precluded by the trial court from fully presenting his consent defense. Davis was entitled to have the jury consider his defense based on all the facts and circumstances that supported consent.

This court should find that the trial court erred in holding the rape shield statute, RCW 9A.44.020, precluded Davis from presenting evidence that KC had engaged in another act of prostitution (consensual sex) after which she claimed rape in support of his consent defense

c. The Court Denied Davis His Constitutional Right To Fully Present His Defense Of Consent.

Under the Sixth Amendment to the United States Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402; *see also* State v. Austin, 59 Wn. App. 186, 194-195, 796 P.2d 746 (1990).

If relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact finding process at trial.

State v Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). As argued above, the evidence of KC's pattern of sexual conduct was relevant to Davis's consent defense given the almost identical similarities between the two events such that the State cannot demonstrate that the evidence was so prejudicial as to disrupt the fact finding process.

Recently in State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), our State Supreme Court considered the issue of whether the defendant had been deprived of his constitutional right to present a consent defense where the trial court barred the evidence by applying the rape shield statute. In Jones, the victim claimed that her uncle, the defendant, forcibly raped her. The defendant attempted to present evidence that on the night of the alleged rape the victim used alcohol and cocaine, and engaged in consensual sex, not only with him, but with two other men. Essentially, Jones and the victim had picked up two men and a woman at a truck stop and engaged in an alcohol- and cocaine-fueled sex party at which the two women one of whom was the victim engaged in consensual sexual intercourse with all three men. The trial court precluded testimony about the sex party based on the rape shield statute as an attack on the victim's credibility. The State Supreme Court held that in doing so the trial court committed reversible error in that Jones was deprived of his constitutional right to present his consent defense. Id at p. 721. The State Supreme

Court also held that the rape shield statute did not apply to the case, but even if the rape shield statute did apply, it cannot be used to deprive a defendant of his Sixth Amendment right to present a defense. Id at p. 724.

Like the defendant in Jones, the trial court denied Davis the right to present evidence in support of his consent defense based on the rape shield statute. Like the defendant in Jones, Davis had a constitutional right to present all the evidence in support of his consent defense. Thus, like Jones, this court should reverse Davis's conviction for rape in the first degree because the trial court committed an error of constitutional magnitude when it deprived Davis of his right to fully present his consent defense.

Finally, an error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). An error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Here, it cannot be said that any reasonable jury would have reached the same result without the error of the trial court precluding Davis from presenting evidence in support of his consent defense. At its most basic, the instant case can be reduced to the fact that sexual intercourse occurred between

Davis and KC, and the fact that KC suffered an injury—bleeding and tearing in her vaginal area. Had the jury been allowed to consider the fact that KC engaged in a pattern of consenting to sex (an act of prostitution) and then claiming rape because she had a boyfriend, it is unlikely that the jury would have found Davis guilty of rape in the first degree beyond a reasonable doubt. This court should find the trial court’s error in depriving Davis from fully presenting his defense was not harmless, and reverse his conviction for raped in the first degree.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT DAVIS WAS GUILTY OF RAPE IN THE FIRST DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as

a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Davis was charged and convicted of rape in the first degree. [CP 25, 60]. As instructed in Instruction No. 11, the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about September 23, 2001, the defendant engaged in sexual intercourse with [KC];
- (2) That the sexual intercourse was by forcible compulsion;
- (3) That the defendant
  - (a) inflicted serious physical injury, or
  - (b) kidnapped [KC]; and
- (4) That any of these acts occurred in the State of Washington.

[CP 52].

As instructed in order to sustain Davis’s conviction for rape in the first degree, the State bore the burden of proving beyond a reasonable doubt that Davis had sexual intercourse with KC by forcible compulsion. This is a burden the State cannot meet.

The sum of the State's evidence to prove sexual intercourse by forcible compulsion (physical force which overcomes resistance— Instruction No. 7 [CP 48]) is KC's testimony that she was grabbed and dragged into the men's restroom at the Lacey Transit Center, held down, and raped all the while as she struggled to get away.

However, KC admitted lying to her mother. She was at the Lacey Transit Center not to take a bus to see a friend as her mother believed rather she was at the Lacey Transit Center to take a bus to see her boyfriend who was in his fifties while she was only 16 years old. Moreover, KC said she struggled while she was being attacked, but during her physical examination the day after the incident no cuts, scratches, or bruises were found on her body. KC also testified that there was a security guard nearby while the incident was occurring but she did not call to him for help during the incident or call to him to report the incident afterwards; KC got on a bus and went to see her boyfriend. Reviewing KC's testimony, without even considering Davis's testimony and his defense of consent, demonstrates that KC's claim of rape by forcible compulsion is suspect and her testimony does not establish proof beyond a reasonable doubt that Davis committed the crime for which he was charged and convicted.

Two additional facts support the lack of forcible compulsion: 1) the statement Davis gave to police readily admitting consensual sexual intercourse with a girl at the Lacey Transit Center when confronted 8 years after the fact; and 2) Davis's testimony at trial detailing his consensual encounter with KC. Given the totality of the evidence presented at trial it cannot be said that the State established beyond a reasonable that Davis had sexual intercourse with KC by forcible compulsion. This court should reverse and dismiss Davis's conviction.

E. CONCLUSION

Based on the above, Davis respectfully requests this court to reverse and dismiss his conviction.

DATED this 27<sup>th</sup> day of October 2010.

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