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Court of Appeals
Division II
State of Washington
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No. 52831-2-II

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

STATE OF WASHINGTON, Respondent

v.

KIVENSON ELIES, Appellant

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY
THE HONORABLE JUDGE SCOTT COLLIER

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The judgment and sentence incorrectly specify the convictions resulted from a guilty plea.
- B. The evidence was insufficient to sustain a conviction for rape in the second degree.
- C. The trial court erred when it entered conclusion of law 7. CP 117.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

- 1. Does the judgment and sentence contain a scrivener's error that should be corrected on remand?
- 2. Consent negates the required element of forcible compulsion in a charge of rape second degree. Where the alleged victim does not agree to perform a specific act and does not perform that act, is the evidence insufficient to sustain a conviction for rape in the second degree?

II. STATEMENT OF FACTS

Clark County prosecutors charged Mr. Elies by second amended information with rape in the first degree (domestic violence), kidnapping in the first degree (domestic violence), and assault in the second degree (domestic violence). CP 41-42. After a bench trial the court found him guilty of rape in the second degree,

unlawful imprisonment, and assault in the second degree. CP 34, 117; RP 71

Two days before January 16, 2018, Kivenson Elies and his girlfriend, S.E., saw each other. RP 116. They had dated off and on since 2012, for a total of about 18 months. RP 115-116. On January 16th, one of Elies's nephews was in the parking lot when S.E. got off work. The nephew told S.E. Elies was looking for her. RP 118. S.E. reported she waited for Elies to come to her car. She let Elies in the car. RP 119.

As she drove them out of the parking lot, he told her he wanted her to go to the bank because he needed 500 dollars. RP 120. She told him she did not have the money, and later testified he squeezed her hand and "told me not to piss him off because he would hurt me if I did." RP 122. She had heard he hit another girl. RP 122. She was angry, and a little scared. RP 123. She gave him 260 dollars from the ATM. She offered to get the rest of the money through a payday loan. RP 124-125, 159. She got a loan for 300 dollars and gave him the money. RP 127, 130-31.

They went to a store at Elies's demand so he could buy some clothing. RP 132. Then he told her to drive to Vancouver. RP 134. They stopped at a motel. RP 134. She sat in the car while he

went inside to rent a room. RP 134-135. She kept the engine running, and her cell phone was with her. RP 162.

Elies did not have ID, so returned to the car. She went in with him and used her ID to rent the room. RP 135-36.

Once in the room he told her to strip down, as he did the same. As they showered together, he told her he wanted oral sex and she complied. RP 139. She said she was afraid. She told him she wanted to go home. RP 139.

After they got out of the shower they got on the bed and had sex. RP 140. She reported he displayed no anger while they were in the shower or on the bed. RP 139, 163. She reported that she did not want to get on the bed, but she did so anyway. RP 140.

Then he told her he wanted her to give him oral sex again, and he wanted her to swallow his semen. RP 141. This time she reported she told him 'no', she would not swallow. RP 141. She said he became angry and punched the wall a few times. RP 141. He told her if she did not "give him what he wanted that he was gonna burn me." RP 141, 163-64.

She reported she "gave him oral" but stopped a few times to tell him she did not want to swallow. RP 142. He was angry and held his hand in a fist. RP 142. She said when he ejaculated, she

did not swallow his semen. He was angry and told her they were done. RP 142. She showered and dressed, and he did the same. RP 143.

They got back in her car, and he directed her to go to a gas station to buy matches because he was going to burn her. RP 143. He stayed outside while she went in to buy matches. RP 144. The cashier had none, so Elies borrowed a cigarette from someone and burned her hand twice. RP 144-45. She drove him home. RP 150. She went to a friend's home and then reported the incident to police. RP 151-52.

The court entered oral and written findings of fact and conclusions of law. The court found Mr. Elies intentionally assaulted S.E. and recklessly inflicted substantial bodily harm and found him guilty of assault second degree. RP 343; CP 116. The court found Mr. Elies not guilty of kidnapping first degree but did find him guilty of unlawful imprisonment once they got into the hotel room. RP 346; CP 117.

The court found Mr. Elies not guilty of first-degree rape. RP 346; CP 117. The court relied on the third act of sex, when Mr. Elies allegedly hit the wall and threatened to burn S.E. if she did not

swallow his semen for a guilty verdict of rape in the second degree.

RP 347-48. The court stated:

There's no question that there was sexual intercourse. There was penetration orally, vaginally, and even if you argued the third act alone just takes that away. One could make argument potentially about the first and second act and I can understand that, but the third act, cause the... As to the sequence of when things occurred, the threat to burn, the pounding on the wall, that occurred before the third act, sexual act. The fists being clenched, the intimidation that was going on.

RP 347.

The court entered findings of fact and conclusions of law, specifically:

Finding of Fact 45:

At a minimum, before the third sexual act, the defendant was pounding on the wall, clenching his fists, threatening to burn S.E. and that this behavior constituted an express and/or implied threat that reasonably placed S.E. in fear of physical injury.

CP 117.

Conclusion of Law 7:

The Court finds the defendant guilty of Rape in the Second Degree (Domestic Violence), a lesser included offense of Rape in the First Degree (Domestic violence).

CP 117.

The court sentenced Mr. Elies to a minimum of 280 months of incarceration. CP 70. He makes this timely appeal. CP 85.

III. ARGUMENT

A. A Scrivener's Error In the Judgment and Sentence Must Be Corrected.

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected at any time by the court. *In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

Mr. Elies submitted to a bench trial. Section 2.1 of the judgment and sentence has incorrectly listed the conviction to be the result of a guilty plea. CP 66. This error must be corrected. The proper remedy is remand to the trial court for correction of the scrivener's error. See *State v. Nailleux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct a scrivener's error in the judgment and sentence, which erroneously stated the defendant stipulated to an exceptional sentence).

B. The Evidence Is Insufficient To Sustain A Conviction For Rape In The Second Degree.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 95 P.2d 900 (1980). Whether evidence is sufficient to support a

criminal conviction is an issue of law. *State v. Knapstad*, 107 Wn.2d 346, 351-52, 729 P.2d 48 (1986).

The Due Process Clause of the Fourteenth Amendment and Article I, §§ 3,22 of the Washington State Constitution require the State to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3, 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the test is whether, viewed in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d. 628 (1980). An insufficiency claim admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The appellate court reviews a challenge to the sufficiency of the evidence presented at a bench trial to determine whether the challenged findings of fact are supported by substantial evidence, and whether the findings support the legal conclusions. *State v. Madarash*, 116 Wn. App. 500, 509, 66 P.3d 682 (2003). Substantial evidence exists where there is a sufficient quantity of evidence in

the record to persuade a fair-minded rational person of the truth of the finding. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1983). A trial court's conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Here, the court entered findings that S.E. was restrained through intimidation, which supported its conclusion that Mr. Elies unlawfully imprisoned her. CP 116-117.

Regarding the charge of rape, the court made finding of fact 45:

At a minimum, before the third sexual act, the defendant was pounding on the wall, clenching his fists, threatening to burn S.E. and that this behavior constituted an express and/or implied threat that reasonably placed S.E. in fear of physical injury.

CP 117.

However, the finding does not support the trial court's conclusion of law, that Mr. Elies was guilty of rape in the second degree. S.E. testified: "...he led me to at TV stand and told me to do it again but this time I had to swallow his semen . . . at that point I told him no." RP 141. Mr. Elies became angry and punched the wall and threatened he would burn her. RP 141. After he was angry, she testified: "I gave him oral, but I stopped a few times to

tell him that *I didn't want to do it. I didn't want to swallow his semen.*" RP 142.

To be found guilty of rape in the second degree, the State must prove that under circumstances not constituting rape in the first degree, the person engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a).

Forcible compulsion is defined as "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself.... " RCW 9A.44.010(6).

Here, S.E. was clear the threat of physical injury and hitting the wall was not to force her to perform oral sex. Rather, it was in response to her resistance to swallowing semen. She told him what she did not want to do, and despite Mr. Elies's threats, she did not swallow his semen. RP 142.

Under these facts, the State did not prove the element of forcible compulsion necessary for a conviction for rape in the second degree. This conviction must be reversed for insufficient evidence with instructions to the trial court to dismiss the charge with prejudice. *Hickman*, 135 Wn.2d at 103.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Elies respectfully asks this Court to remand with instructions to dismiss the rape conviction with prejudice, and to correct the scrivener's error on the judgment and sentence.

Respectfully submitted this 17th day of January 2020.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is positioned above a thin horizontal line.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on January 17, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov and to Kivenson Elies/DOC#384456, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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