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

STATE OF WASHINGTON, Respondent

v.

KIVENSON ELIES, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-00185-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The State concedes that Elies' Judgment and Sentence contains a scrivener's error.**
- II. The State presented sufficient evidence to support the conviction for Rape in the Second Degree.**

STATEMENT OF THE CASE

Kivenson Elies was charged 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) against S.E. CP 41–42.

Elies and S.E. dated on and off for around six years, considering themselves to have been in a relationship for a total of a year and a half during that time. RP 114–15, 154. On or about January 16, 2018, Elies met S.E. at her workplace in Tualatin, OR, when she was getting off at around 2:30 p.m. CP 12; RP 117, 120, 155. As S.E. was just about to drive out of the parking lot, she was approached by one of Elies' nephews, who then waved for Elies to come over. RP 118–19, 155. S.E. waited while Elies approached, and he told her to let him in, which she did. CP 113; RP 119. After getting in the car, Elies said he wanted to talk and preferred she drive somewhere private. CP 113; RP 119.

S.E. started driving out of the parking lot when Elies told her he wanted money. CP 113; RP 120, 156. He told her to drive to the nearest bank. CP 113; RP 120. As S.E. was driving to the Bank of America ATM, Elies was squeezing her hand, demanding \$500. CP 113; RP 121–22, 157. S.E. tried telling him she did not have \$500—that she only had half of what he wanted. RP 121–22. Elies told S.E. not to piss him off or he would hurt her and she would end up like the last girl. CP 113; RP 122, 158. S.E. did not know exactly what this meant, but she had heard rumors and knew that he had hit another girl. RP 122, 158. This scared S.E., so she did as Elies asked. RP 123.

Once at the ATM, S.E. withdrew all the money in her account, which came to \$260. CP 113; RP 124. Elies was angry and demanded she come up with the rest of the money because he “really wanted to hurt [her].” CP 113; RP 124. In fear, S.E. drove to a loan agency to take out a payday loan for the remaining balance Elies was demanding. CP 113; RP 124–25, 159. S.E. was approved for a \$300 loan. CP 113; RP 127. Elies, who had gone in with her, demanded she take the full amount and give it to him. CP 113; RP 129–31.

After getting the money he demanded, Elies told S.E. to drive him to a clothing store so he could buy some clothing. CP 113; RP 131. S.E. was scared and felt she had no choice but to do as Elies asked. CP 113. S.E.

drove him to the Top to Bottom store on 82nd Street in Portland. CP 113; RP 132, 160. S.E. went into the store with Elies while he picked out his clothes. RP 132, 160. After Elies was done at the store, he demanded that S.E. drive to a hotel in Vancouver, WA, located in Clark County. CP 113; RP 133, 161. S.E. wanted to go home, which was in Woodburn, OR, about an hour from Vancouver, and she tried telling Elies this. RP 133. But Elies would not let S.E. go home, so she did as he demanded and drove to Vancouver. RP 134.

When they arrived at the Motel 6 in Vancouver, S.E. waited in the car while Elies attempted to rent a room. CP 114; RP 134–35, 162. S.E. testified that she thought about driving away at this point. CP 114; RP 135. S.E. was feeling “emotional,” “angry,” and “scared,” but she was afraid of the consequences of angering Elies by leaving, so she stayed. CP 114; RP 135. S.E. hoped that if she just did enough things for him she would “get out of there.” RP 135. After being refused a room for lack of identification, Elies went back to the car to have S.E. try. CP 114; RP 134, 162. Elies returned to the motel lobby with S.E., who did qualify to rent a room. CP 114; RP 136–37, 162.

Once the two of them entered the room, Elies ordered S.E. to “strip down.” CP 114; RP 137. S.E. was uncomfortable with the demand and still scared of what would happen if Elies did not get what he wanted. CP

114; RP 138. After S.E. removed her clothes, Elies told her to get in the shower. CP 114; RP 138, 162. Even though she did not want to, S.E. got into the shower, and Elies got in with her. CP 114; RP 138. Elies demanded S.E. give him oral sex while they were in the shower. CP 114; RP 138. S.E. did not want to give Elies oral sex, but she was still scared of what Elies would do if she did not comply, so she began giving him oral sex. CP 114; RP 138–39. Elies urinated in her mouth while she was giving him oral sex, and he laughed at her. CP 114; RP 139. S.E. told Elies she wanted to go home, but he told her to “just keep going.” RP 139. Elies ejaculated in her mouth and then led her to the bedroom where he told her to get on the bed. CP 114; RP 139.

In fear, S.E. proceeded to the bed, where he told her he “wasn’t done with [her]” and got on top of her. CP 114; RP 140, 163. Then, the two of them had sexual intercourse. CP 114; RP 140. After the intercourse, Elies led S.E. to the television stand where he told her to give him oral sex again. CP 114; RP 141, 163. This time, he demanded that she swallow his semen. CP 114; RP 141, 163. S.E. told Elies she would not swallow his semen. CP 114; RP 141, 163. This response angered Elies, so he punched the wall several times, turned to her with clenched fists, and told her that if she did not swallow his semen he would burn her. CP 114, 117; RP 141, 163. Intimidated by this behavior and afraid that Elies would harm her if

she did not do what he wanted, S.E. proceeded to give him oral sex. CP 114; RP 142. S.E. stopped several times to tell Elies she did not want to do it, but he was mad and had his hand balled up in a fist. RP 142. Elies ejaculated into S.E.'s mouth, but S.E. did not swallow his semen. CP 115; RP 142, 163. Elies was angry and ordered her to get back in the shower and clean up her mess. CP 115; RP 142–43. After the shower, the two of them left the motel together in S.E.'s car. CP 115; RP 143.

When they got back in the car, Elies told S.E. he was serious about burning her if she did not do as he asked. CP 115; RP 143. Elies ordered S.E. to drive to the nearest gas station and buy some matches. CP 115; RP 143. S.E. drove to a gas station and went inside to get the matches. CP 115; RP 143. But the gas station did not have any matches, so she returned to the car without them. CP 115; RP 144. Angered by the news, Elies said they were not leaving until he did what he said he would do. CP 115; RP 144. Elies found someone pumping gas and purchased a single cigarette from them. CP 115; RP 144. The person lit Elies' cigarette for him. CP 115; RP 144.

Elies returned to the car and told S.E. to drive to his sister's house and park down the street. CP 115; RP 144. After S.E. parked the car near Elies' sister's house, Elies told S.E. to give him her hand. RP 144. Knowing he had a lit cigarette, S.E. refused at first. CP 115; RP 144. But

Elies told her it was either her hand or her face. RP 144. So S.E. extended her left hand toward him. CP 115; RP 144. Elies held the lit end of the cigarette to her hand and burned her. CP 115; RP 144. Saying the first burn was not deep enough, Elies held the lit end of the cigarette against her hand a second time, causing a second burn. CP 115; RP 144–45. S.E. showed her hand to the trial court, and her two burn scars were still visible seven months after Elies burned her. CP 116; RP 145.

After Elies burned S.E., he called his nephews out so he could pay them for driving him to S.E.'s work and show them what he did to S.E.'s hand. RP 147–48. Before letting S.E. finally go home for the evening, Elies had her take him to the gas station to get another cigarette from someone before dropping him off at his house. RP 149–50.

S.E. was relieved to finally be able to go home, but she was scared for her family to see her in the state she was in; she had burns on her hand and had been crying during the drive. RP 151. So instead of driving straight home, she called a friend first. RP 150. She told her friend what had just happened, and he told her she needed to report it. RP 151.

At bench trial, Elies was found guilty of Rape in the Second Degree (Domestic Violence), a lesser included offense of Rape in the First degree (Domestic Violence). CP 34, 117; RP 71. Elies was also found guilty of Assault in the Second Degree (Domestic Violence) and Unlawful

Imprisonment (Domestic Violence), a lesser included offense of Kidnapping in the First Degree (Domestic Violence). CP 117.

The trial court sentenced Elies to a standard range sentence. CP 87–105; RP 365–67. This appeal timely follows.

ARGUMENT

I. The State concedes that Elies' Judgment and Sentence contains a scrivener's error.

Elies properly points out that his Judgment and Sentence contains a scrivener's error. *See* Br. of App. at 6. That error is found in Section 2.1 of the Judgment and Sentence in which the conviction is incorrectly listed to be the result of a guilty plea. Because Elies pled not guilty, the Judgment and Sentence should reflect that he was convicted following his bench trial. Therefore, the State concedes that this scrivener's error should be corrected upon remand.

II. The State presented sufficient evidence to support the conviction for Rape in the Second Degree.

Elies argues there was insufficient evidence presented at trial to support his conviction for Rape in the Second Degree. When the evidence is viewed in the light most favorable to the State, it is clear that Elies' conviction is supported by sufficient evidence. His conviction should be affirmed.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362–65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When a defendant claims evidence is insufficient to sustain his conviction, this Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged 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, 2789, 61 L.Ed.2d 560 (1979)).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766–67, 539 P.2d 680 (1975).

The reviewing Court does not disturb the fact finder's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing Court's role does not include substituting its judgment for the fact finder's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green, supra*, at 221. "It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable [fact finder] could come to this conclusion." *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)). This standard of review focuses on whether the trier of fact *could* find the elements proved. *State v. Yallup*, 3 Wn.App.2d 546, 416 P.3d 1250, 1253 (2018) (citing *Jackson, supra*).

A defendant is guilty of second degree rape when he "engages in sexual intercourse with another person . . . [b]y forcible compulsion." RCW 9A.44.050(1)(a). "Forcible compulsion" includes use of "a threat, express or implied, that places a person in fear of . . . physical injury to herself" and "overcomes resistance." RCW 9A.44.010(6).

Elies argues that the evidence presented at trial does not prove beyond a reasonable doubt that a rape occurred. *See* Br. of Appellant, p. 9. Elies maintains that S.E. was not being forced to perform oral sex on him,

but that the specific act S.E. was being compelled to perform was the ingestion of his semen. *See* Br. of Appellant, p. 9. The State submits that Elies has only challenged the nexus between the threats and a single dimension of the sex act. Elies does not challenge the evidence to support the elements of second degree rape: forcible compulsion and sexual penetration.

Throughout the entirety of the evening, S.E. said on multiple occasions that she wanted to go home, that she did not want to do what Elies was telling her to do. And each time she resisted, Elies verbally threatened S.E. by saying things like she was angering him and she would end up like the last girl if she did not comply.

Before the third sexual act—the oral sex by the television stand—Elies responded to S.E.’s resistance by clenching his fists, punching the wall, and telling her that he would burn her if she did not perform the sexual act he was demanding in the way he was demanding. Elies made good on his threat to burn her by taking a lit cigarette and holding it up against her hand two separate times—the second time because the first burn was not deep enough. S.E. testified that she was scared, and that she performed the sex acts Elies was demanding because she hoped if she did she would eventually be able to return home safely that night.

Additionally, Elies does not challenge the sufficiency of the evidence for a reasonable fact finder to determine that he was guilty of unlawful imprisonment. Under RCW 9A.40.040, “[a] person is guilty of unlawful imprisonment if he or she knowingly restrains another person.”

RCW 9A.40.010(6) defines “restrain” as:

restrict[ing] a person’s movements without consent . . . in a manner which interferes substantially with his or her liberty. **Restraint is ‘without consent’ if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim[.]**

(emphasis added). The State presented overwhelming evidence that S.E. was restrained “without consent” due to Elies’s intimidation. And, in fact, the trial court specifically found that before the third sexual act, Elies was “hitting the wall . . . threatening with burns . . . [using] his fists.” CP 117; RP 346. “[T]his behavior,” the court found, “constituted an express and/or implied threat that reasonably placed [S.E.] in fear of physical injury.” CP 117.

If S.E. was being held there without her consent, it stands to reason that while being unlawfully restrained she could not have consented to the sexual acts being performed at the time of such restraint.

These facts provide sufficient evidence for a trier of fact to find, beyond a reasonable doubt, that the third sexual act was performed against

S.E.'s will, and that her performance was compelled by the implicit and explicit threats made by Elies. In addition to proving the forcible compulsion, the State more than met its burden of proof that penetration occurred, thus satisfying the statutory elements. Elies's claim fails.

CONCLUSION

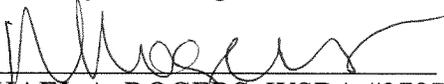
Elies's sufficiency claim is without merit and his conviction should be affirmed. When the evidence is viewed in the light most favorable to the State, it is clear there was more than sufficient evidence to convict Elies of second degree rape. For the reasons argued above, this Court should affirm the trial court's ruling.

DATED this 13 day of March, 2020.

Respectfully submitted:

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