

**FILED**

***Jul 07, 2014***

Court of Appeals

Division III

State of Washington

No. 31467-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JONATHAN KEENAN GORDON, Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. Mr. Gordon's right to speedy trial was violated.
2. The State's evidence was insufficient to support the convictions.

### *Issues Pertaining to Assignments of Error*

1. Was Mr. Gordon's right to speedy trial violated?
2. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt?

## II. STATEMENT OF THE CASE

Mr. Gordon was charged by second amended information with count one, second degree rape, and count two, second degree assault with sexual motivation. (CP 99).

Prior to trial, the State's motion for continuance of trial based on the unavailability of a witness, Dr. Kevin Hodges, was denied by Judge Matheson, who set a firm trial date of November 28, 2012. (11/20/12 RP 19). On November 27, 2012, upon filing of the second amended information, there was an agreement to set trial for December 12, 2012, as the defense had problems subpoenaing key witnesses. (11/27/12 RP 20).

On December 4, 2012, the State again moved for a

continuance because of the doctor's unavailability and anticipated going to trial on January 9, 2013. (12/4/12 RP 2). The defense objected because the judge had already denied a continuance based on the same reason and Mr. Gordon was ready to go to trial on December 12. (*Id.*). The good-cause continuance to the December trial date was prompted by the defense because it was having difficulty with two material witnesses, who had been uncooperative and hard to contact, and had been served with subpoenas for trial on December 12. (*Id.* at 6). But the defense objected to any further continuance. (*Id.*).

The court commented:

So I would like to just confirm that the continuance that was entered on November 27<sup>th</sup>, as I recall and as I have looked to at the record here, appears to be by agreement of the parties so that she could serve her witnesses, and that was a good-cause continuance from the 28<sup>th</sup>, which I had rejected previous efforts to continue that date, but so that was at the defendant's request and for good cause from the 27<sup>th</sup> to the 12<sup>th</sup> of December. (*Id.* at 7).

The State argued to Judge Matheson the continuance to December was for joint cause as it had also asked for a continuance and 14 days between November 28 and December 12 were thus excluded

under CrR 3.3(e)(3). (*Id.*). The January 9, 2013, trial date sought by the State included a 30-day “buffer period” after the excluded time under CrR 3.3(b)(v). (*Id.*). The court determined the January 9, 2013 trial date was within speedy trial. (*Id.* at 12). The case proceeded to jury trial

Braycie Baker was 19 on May 10, 2011. (1/9/13 RP 96). From injuries sustained that day, she suffered severe migraines and lower back pain, stemming from urinary tract and kidney infections). (*Id.* at 97). Ms. Baker was just going to let the May 10 incident go, but she had too much pain and went to emergency. (*Id.*). She identified Mr. Gordon as the man causing her injuries. (*Id.* at 100). They met on the transportation system and were friends. (*Id.* at 101).

On May 10, 2011, Ms. Baker called Mr. Gordon around 1 a.m. and they agreed to meet at the 7-11 across the street from her home. (1/9/13 RP 101). Earlier that day, she had a few drinks, but was not intoxicated. (*Id.*). Nathan Murphy and Jessica Hash were with Mr. Gordon when she got picked up at the 7-11. (*Id.*). They went to the Stoneridge Apartments in Pasco. (*Id.* at 104).

Ms. Baker went inside, was led to the back bedroom, was

told to take off her clothes, and had sexual intercourse with Mr. Gordon. (1/9/13 RP 104). Butcher knives were scattered around the room. (*Id.* at 104-05). Mr. Gordon did not pick up the knives. (*Id.* at 105). Ms. Baker did methamphetamine. (*Id.* at 107). Mr. Murphy, Ms. Hash, and Mr. Gordon also did drugs. (*Id.* at 105-06). Ms. Baker did not agree to have sex with Mr. Gordon. (*Id.* at 107).

She did not resist because she feared the consequences as every time she tried, she was hit and had bruises down her sides, legs, and bite marks. (1/9/13 RP 107). Mr. Murphy and Ms. Hash were in the bedroom in the beginning, but left before anything happened. (*Id.* at 108). Ms. Baker also did not call for help because she was afraid of what might happen. (*Id.*). Mr. Gordon had his hands around her neck and blocked her windpipe. (*Id.* at 118, 141). He used a lot of force around her neck and had an erection while he did it. (*Id.* at 110). Ms. Baker did not like rough sex. (*Id.* at 108).

She was hit, punched, bit on the right shoulder and nipple of her left breast, bruised, and had her hair pulled. (1/9/13 RP 108-09). Ms. Baker had sex four or five times with Mr. Gordon, who told her he was her daddy and master. (*Id.* at 108). In the afternoon on

May 10, she told him she had to be somewhere and was getting money so he thought she would return with it. (*Id.* at 111). Mr. Gordon agreed to let her leave around 4 p.m. (*Id.* at 112). He tried to get in touch with her after May 10, whereupon she told him to leave her alone and she would not contact the authorities. (*Id.* at 113).

Dr. Kevin Hodges, an emergency physician, saw Ms. Baker on May 14, 2011. (1/10/13 168). He reported seeing abrasions and bruises on her. (*Id.* at 168-71). She gave the doctor permission to contact the police, although she was not initially interested in police intervention. (*Id.* at 180). Dr. Hodges said Ms. Baker said nothing to him about methamphetamine use. (*Id.* at 179).

Mr. Murphy lived at the Stoneridge Apartments with two roommates, including Mr. Gordon. (1/10/13 RP 189). Ms. Hash was his girlfriend. (*Id.* at 190). Mr. Murphy “became associated” with Ms. Baker and saw her on May 10, 2011. (*Id.* at 191). There was a party going on in the apartment. (*Id.* at 193). Mr. Murphy did not see her give oral sex to anyone that night. (*Id.* at 193-94). But he told a detective she had. (*Id.* at 194). Mr. Gordon and Ms.

Baker talked about what was planned sexually, with him in control, and she agreed. (*Id.* at 196). Mr. Gordon told her what she was going to do and she was going to like it. (*Id.*) Mr. Murphy indicated to a detective that Mr. Gordon also told her she was going to walk on her hands and knees as he was her daddy now. (*Id.* at 197). He testified there were no knives in the room, although he had told the detective there were. (*Id.*) Mr. Murphy said Ms. Baker was naked and he touched her clitoris. (*Id.* at 198). He did not see Mr. Gordon and Ms. Baker having sex. (*Id.* at 199). He did not see him assault her. (*Id.* at 200). He said any sexual contact between Mr. Gordon and Ms. Baker was consensual. (*Id.* at 205). When she wanted to leave, he gave her a ride back to her house. (*Id.* at 207). Mr. Murphy was subsequently arrested and released after spending 11 days in jail. (*Id.* at 198).

Ms. Hash was Mr. Murphy's girlfriend for about 7 months. (1/10/13 RP 221). She knew Mr. Gordon. (*Id.*) On May 10, 2011, she picked Ms. Baker up at the 7-11 in her car. (*Id.* at 223). Mr. Gordon, Mr. Murphy, and Ms. Baker were doing methamphetamine. (*Id.* at 224). The two women kissed at the apartment. (*Id.* at 225).

Ms. Hash saw Mr. Murphy touch Ms. Baker once on her vagina. (*Id.* at 226). She said any sexual contact was consensual and included rough sex. (*Id.* at 227-28).

Detective Justin Greenhalgh said Mr. Murphy acknowledged he struck Ms. Baker multiple times and held her down on the bed. (1/10/13 RP 245). Ms. Baker had also taken a lot of methamphetamine. (*Id.* at 249).

Mr. Gordon testified in his own behalf. He said Ms. Baker was picked up at the 7-11 after she contacted him and they went back to Mr. Murphy's. (1/10/13 RP 268). She was submissive so he was going to play the dominant role to please her. (*Id.* at 269). Mr. Gordon testified he did not have sexual intercourse with Ms. Baker. (*Id.* at 270). He did not slap, hit, bite, choke, or strangle her. (*Id.* at 270, 271). He did not cause any injuries to Ms. Baker. (*Id.* at 282). No knives were in the bedroom. (*Id.* at 283). Mr. Gordon did, however, carry knives for protection because of his drug dealing. (*Id.* at 283-84).

No exceptions were taken to the court's instructions. (1/11/13 RP 24). The jury found Mr. Gordon guilty of second degree rape and second degree assault with a sexual motivation

enhancement. (CP 58-60). The court sentenced him under RCW 9.94A.507 to 264 months total confinement with a maximum of life. (CP 12, 19). This appeal follows. (CP 7).

### III. ARGUMENT

#### A. Mr. Gordon's right to speedy trial was violated.

The court determined it could continue the trial date from December 12, 2012, to January 9, 2013:

Mr. Gordon, let me talk to you about a couple things. The time period up until September 28<sup>th</sup> I think has been accounted for. There was a waiver of speedy trial. You were brought back from the department looks like. Trial was set February 23<sup>rd</sup>. On the – set February 22<sup>nd</sup>. On the 21<sup>st</sup> you executed a waiver to April 25<sup>th</sup>. Unfortunately failed to appear in court on March 20<sup>th</sup>, which is the omnibus date. So that trial date was stricken and a bench warrant was issued. And when you were arrested on that warrant and brought into court on September 28<sup>th</sup>, the time started running again. So I'm satisfied with that time period.

I'm also satisfied with moving this to the 9<sup>th</sup> under the – because there was a – there were two good-cause continuances. Well, I refused to move it from the 28<sup>th</sup> before, because I didn't think there was a good cause, but then there was a good-cause continuance and agreement to move it from November 28<sup>th</sup> to December 12<sup>th</sup> of this year. That, unfortunately, created a problem with a subpoenaed doctor, and under the Rules I think I can, with the 30-

day buffer and the 14 days exclusion, as way to move this to January 9<sup>th</sup> for trial with a pretrial on January 2<sup>nd</sup>. And we should have the doctor back here . . . by then. (12/4/12 RP 12).

Under CrR 3.3(e)(3), the court excluded 14 days from November 28 to December 12, 2012, for a good-cause continuance. That rule provides that continuances granted by the court under CrR 3.3(f) are indeed excluded. On motion by the defense so it could subpoena key witnesses, the court granted the trial continuance for good cause and no prejudice to the defendant. Accordingly, the question is whether the court could continue the trial beyond December 26, 2012, the date speedy trial ran with the 14 days excluded.

CrR 3.3(b)(v), Allowable Time After Excluded Period, states:

If any period of time is excluded pursuant to section (e), the allowable time for trial shall expire earlier than 30 days after the end of that excluded period.

Since 14 days were excluded for a good-cause continuance at the initial request of the defense on November 27, 2012, the court appears to be correct in that the 30-day buffer period in CrR 3.3(b)(v) allowed trial to be set for January 9, 2013, and did not violate Mr. Gordon's right to speedy trial. This assignment of error

was included, however, because Mr. Gordon insisted his rights were indeed violated by repeated continuances sought by the State. See *State v. Ollivier*, 178 Wn.2d 813, 312 P.3d 1 (2013).

B. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it 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). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

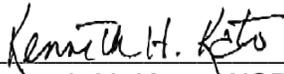
Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Even viewed in a light most favorable to the State, the evidence still fell short of proving beyond a reasonable doubt that Mr. Gordon committed second degree rape and second degree assault with sexual motivation. *Green*, 94 Wn.2d at 220-21. The evidence at trial showed that Ms. Baker had ample opportunity to

call for help or to leave the apartment. Instead, she did neither and was driven home when she asked to leave the next afternoon. (1/9/13 RP 112). The jury necessarily, and improperly, resorted to guess, speculation, or conjecture to fill in the blanks for its guilty verdicts. The facts were so contradictory that there can be no confidence in the jury's verdicts that the State proved the crimes beyond a reasonable doubt. In these circumstances, the conviction must be reversed and the charges dismissed. *Green, supra*.

#### IV. CONCLUSION

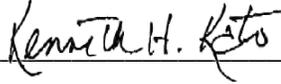
Based on the foregoing facts and authorities, Mr. Gordon respectfully urges this court to reverse his convictions and dismiss the charges.

DATED this 7<sup>th</sup> day of July, 2014.

  
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CERTIFICATE OF SERVICE

I certify that on July 7, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Jonathan Keenan Gordon, # 793350, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362; and by email, as agreed by counsel, on Maureen Lorincz at [airacheta@co.franklin.wa.us](mailto:airacheta@co.franklin.wa.us).

A handwritten signature in black ink, reading "Kenneth H. Kato", is written over a horizontal line.