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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 316106

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff

and

CHRISTOPHER CARLSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE EVAN SPERLINE

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to instruct the jury that third degree rape is an inferior degree offense of second degree rape.
2. The trial court erred by refusing to instruct the jury as to the defense of voluntary intoxication.
3. The trial court erred by altering the language of Jury Instruction No. 3 to omit the phrase, "... or lack of evidence" when describing reasonable doubt.
4. The trial court erred by not complying with the time for trial and setting Mr. Carlson's trial beyond the outside trial date in violation of his right to a speedy trial.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court's refusal to allow Mr. Carlson to instruct the jury that third degree rape is an inferior degree offense of second degree rape is reversible error?
2. Whether the trial court's refusal to allow Mr. Carlson to present his defense of voluntary intoxication is reversible error?
3. Whether the trial court committed reversible error and prejudice to Mr. Carlson by altering the language of Jury Instruction No. 3 from the standard language in WPIC 4.01 such that the phrase, "...or lack of evidence" was omitted?
4. Whether the trial court erred in setting the trial date beyond the outside deadline of February 15, 2013?
5. Whether the trial court erred in continuing the trial date without a showing that the State exercised due diligent in requesting a continuance?

II
STATEMENT OF THE CASE

Mr. Carlson was charged by Information on October 9, 2012 with Rape in the First Degree and Rape in the Second Degree, both by forcible compulsion. (CP 1-3). Later, an Amended Information was filed on October 29, 2012 charging Mr. Carlson instead with Rape in the Second Degree by forcible compulsion, Burglary in the First Degree with Sexual Motivation and Residential Burglary with Sexual Motivation. (CP 62-64).

Initially, Mr. Carlson was set for trial on December 5, 2012 with a trial deadline of December 17, 2012. (CP 42). On December 3, 2012 at the Readiness hearing, the trial date was continued to January 16, 2013 with a trial deadline of February 1, 2013. (CP 93). This was done with the consent of Mr. Carlson through his attorney. (RP 30). On January 3, 2013 a hearing was held where the court noted that the scheduling order set the trial deadline only two weeks past the trial date but generally the trial deadline was set out 30 days past the trial date. (RP 36-37). Mr. Carlson's attorney acknowledged that the court rule does state the time for trial is 30 days after the trial date when a continuance for cause is entered. (RP 36-37). Mr. Carlson's attorney again agreed the outside

date for trial was February 15, 2013 at a readiness hearing on January 14, 2013. (RP 51).

At this time the State was requesting a continuance of the trial date due to the unavailability of witnesses, one issue being the unavailability of the alleged victim due to a pre-planned trip out of the country. (RP 38-61). The trial court set the trial for the following Tuesday but the outside date of February 15, 2013 was maintained. (RP 60-61). On January 22, 2013 that matter was again addressed with the State indicating the alleged victim was now no longer in the country and another continuance was required until she returned. (RP 62). Mr. Carlson objected through his attorney but the trial court granted a continuance for witness unavailability and set a new trial date for February 6, 2013 with a trial deadline of March 8, 2013. (RP 64-65). This was formalized in a Second Amended Criminal Case Scheduling Order filed on January 22, 2013 although dated by Judge Sperline as October 16, 2013. (CP 131).

At the Readiness hearing on February 4, 2013 the court and parties discussed that the matter might be moved to a new Readiness hearing on February 11, 2013 due to the court's calendar. (RP 74). On February 11, 2013 the matter again came before the court at Readiness

hearing. (RP 75). The hearing was again moved one week to February 19, 2013 due to the court's trial calendar. (RP 76). On February 13, 2013, Mr. Carlson's attorney filed an Objection to Trial Setting contesting any trial setting beyond the outside date of February 15, 2013. (CP 136-138). Eventually the trial began on February 27, 2013. (RP-I 1).

At trial, the State called Detective Mike Williams (RP-II 33), Melea Johnson (RP-II 58), Taffien Wright (RP-II 82), Dan Hennagir (RP-II 114), Albert Wise (RP-II 126), Lori Bolin, RN (RP-II 137), Amy Olson, RN (RP-II 153), Detective Juan Rodriguez (RP-II 163) and Jonathan Crosier MD (RP-III 26).

It was established in testimony that Mr. Carlson was intoxicated on the date in question by several different witnesses produced by the State – Detective Williams (RP 58, 68), Melea Johnson (RP 97), Dan Hennagir (RP 171, 178), Albert Wise (RP 187). Mr. Carlson's attorney requested a jury instruction raising the defense of voluntary intoxication. This request was denied by the trial judge. Mr. Carlson's attorney also requested the jury instruction for the inferior degree offense of third degree rape. This request was also denied.

Mr. Carlson was ultimately found guilty of Second Degree Rape, First Degree Burglary with Sexual Motivation and Residential Burglary

with Sexual Motivation. (CP 259, 260, 263). He was sentenced on April 16, 2013. (CP 311). A Notice of Appeal followed. (CP 337).

III ARGUMENT

There is an entitlement for a defendant in a criminal case “to have the jury fully instructed on the defense theory of the case.” State v. Stanley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When the trial court refused to instruct the jury that rape in the third degree is an inferior offense of rape in the second degree, the court erred by failing to allow Mr. Carlson to have a fully instructed jury. By denying the requested instruction for the inferior offense, the trial court denied Mr. Carlson the right to fully present his defense. This was in direct contradiction to the established view that, “[i]f any one of the theories argued by [a] defendant [is] supported by substantial evidence, it should [be] submitted to the jury.” State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000) citing State v. Griffith, 91 Wn.2d 572, 574-75, 589 P.2d 799 (1979). Failure of the trial court to instruct on a defendant’s theory of the case, “where there is evidence supporting the theory, is reversible error.” State v. Stevens, 127 Wn.App. 269, 274, 110 P.3d 1179 (2005).

According to RCW 10.61.003, “Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or

information, and guilty of any degree inferior thereto ...” An instruction on an inferior degree offense is properly administered when three conditions are met:

(1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense”; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense. State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) citing State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997).

It should specifically be noted that “the analysis that the trial court engages in when considering a request for an instructions on an inferior degree offense differs from the analysis it engages in when considering a request for a lesser included offense instruction.” State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). Failure to observe this distinction results in a blurring of the difference between the two types of included offenses. Id. at 454.

The three conditions for administration of an instruction of the inferior offense of third degree rape were met in this case. The first and second conditions, the legal component, were met because it is established that third degree rape is an inferior degree offense of second degree rape. See State v. Ieremia, 78 Wn.App. 746, 754, 899 P.2d 16

(1995) (“Since third degree rape is clearly an *inferior degree* crime of second degree rape, an instruction on third degree rape, as an inferior degree crime rather than a lesser included offense, was proper.”) The issue of whether a inferior offense instruction should have been presented to the jury hinges upon the third component, or factual test.

In determining whether the factual test has been met, “the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In deciding if the evidence at trial is sufficient to support the giving of an instruction, the court must “view the supporting evidence in the light most favorable to the party that requested the instruction.” Id. at 455-456. A jury instruction on an inferior degree offense should be administered “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” Id. at 456 citing State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

The trial court cannot simply examine only the testimony, or lack thereof, of the defendant; instead, the trial court “must consider all the evidence that is presented at trial when it is deciding whether or not an instruction should be given.” State v. Fernandez-Medina, 141 Wn.2d 448,

456, 6 P.3d 1150 (2000). See also State v. Bright, 129 Wn.2d 257, 269-270, 916 P.2d 922 (1996). However, the trial court must be careful not to take the jury's position of weighing and evaluating evidence simply because the trial court believes the theory in the requested inferior degree instruction is "inconsistent" with another theory that finds support in the evidence. See State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000) (overruling the reasoning in State v. Hurchalla, 75 Wn.App. 417, 877 P.2d 1293 (1994) that a trial judge is empowered to weigh and evaluate evidence in determining a request for instruction).

The factual test for instruction on the inferior degree offense of third degree rape was met in Mr. Carlson's case. Mr. Carlson had the right to present his defense to the fact finding jury whose function it was "to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of the witnesses." State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). There was sufficient evidence in all the evidence presented at trial to support the inferior degree offense instruction.

The trial court stated, "while I concede that there is evidence for the jury to consider as to whether or not to decide that the State has

proved forcible compulsion beyond a reasonable doubt, I think what is missing is any affirmative evidence that it was not forced but was also nonconsensual.” (RP-IV 84). Third degree rape occurs when a person engages in sexual intercourse with another person “where the victim did not consent ... to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.” RCW 9A.44.060. The fact that the trial court conceded there was evidence for the jury to consider whether the State had proved forcible compulsion should have been enough in itself to warrant the inferior degree instruction for third degree rape. The trial court’s decision to refuse the inferior degree offense, especially when the issue of forcible compulsion was itself in doubt, was an abuse of discretion which placed the act of fact finding improperly in the judge’s hands rather than the jury’s.

There was sufficient evidence in the record to potentially acquit Mr. Carlson of the greater offense of second degree rape by forcible compulsion and find him guilty of the lesser charge of third degree rape. The trial judge himself conceded there was evidence presented to place the issue of forcible compulsion in question. (RP-IV 84). The alleged victim, Ms. Johnson, initially stated that she was pulled onto Mr. Carlson’s lap where she was nervous and awkward. (RP-II 64). She stated

that Mr. Carlson then put his fingers inside her ... “and then he was just sitting there.” (RP-II 64). She stated that he took his penis out and said she was going to “eat it” after which she told him no. (RP-II 64-65). She then testified that he took her down on the floor and was inside of her. (RP-II 66). Although she testified that Mr. Carlson “was just demanding” what she needed to do, she did not initially state that he made any threats to harm her or physically hurt her outside the act of intercourse. (RP-II 63-71). In fact, when asked if she was resisting her response was, “Yes, he’s bigger than me and stronger than me and there wasn’t anything – there was nothing I could do. And he was being so aggressive and yelling at me and being mean and bizarre and scary that I didn’t – I didn’t want to – I didn’t want to add to it. I didn’t – I didn’t want – I just wanted him to get down and be gone. That’s all.” (RP-II 68).

The trial court should have granted the request for an inferior degree instruction of third degree rape. There was sufficient evidence to support “an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The facts did support an inference that Ms. Johnson’s actions showed a lack of consent but that forcible compulsion was not used as defined for second

degree rape and an instruction on the inferior degree offense of third degree rape should have been presented to the jury.

When a proposed instruction is supported by evidence, properly states the law, is not misleading, and allows the defendant to argue his or her theory of the case that instruction should be given to the jury. State v. Webb, 162 Wn.App. 195, 208, 252 P.3d 424 (2011). Furthermore, “[w]hen whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” Id. at 208 citing State v. Hanson, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

The instruction regarding voluntary intoxication allows the jury to consider evidence of intoxication when determining “whether the State proved that the defendant acted with the requisite intent.” Id. at 208 citing State v. Thomas, 123 Wn.App. 771, 781, 98 P.3d 1258 (2004). No expert testimony is required when submitting a voluntary intoxication defense as the effects of intoxication “are commonly known and the jurors can draw reasonable inferences from the evidence presented.” Id. at 208.

In order to justify a voluntary intoxication instruction, three conditions must be met. In fact, the court must provide a voluntary intoxication instruction when:

(1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is evidence the drinking or drug use affected the defendant's ability to acquire the required mental state. State v. Webb, 162 Wn.App. 195, 208, 252 P.3d 424 (2011).

However, the evidence of alcohol consumption "is relevant only if it tends to establish that the consumption occurred before the charged event." State v. Priest, 100 Wn.App. 451, 454-455, 997 P.2d 452 (2000).

In this case, it is uncontroverted that a voluntary intoxication instruction meets the first two conditions as it relates to the First Degree Burglary and Residential Burglary charges. (RP-IV 88). The trial court denied Mr. Carlson's request for a voluntary intoxication instruction because he found that Mr. Carlson had failed to "offer some evidence of the impact that his intoxication had on his ability to form the intent to commit a crime." (RP-IV 89). In order to meet the third test, "the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." State v. Webb, 162 Wn.App.

195, 208, 252 P.3d 424 (2011) citing State v. Gabryschak, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996).

Evidence was presented in this case which supported the third condition and the instruction should have been allowed by the trial court as concerned the First Degree Burglary and Residential Burglary charges. Detective Williams testified that Mr. Carlson told them in his interview that, "he was drinking vodka and Red Bull and singing songs" and that "he passed out about 10:00 o'clock that night and then didn't wake up until the following day." (RP-II 36). Mr. Carlson's consumption of alcohol was verified during the search of his apartment when the Detective discovered a "nearly empty bottle of Burnett's vodka." (RP-II 43). Dan Hennagir testified that Mr. Carlson was "singing very loudly" and "he was drunk." (RP-II 116-117). He went on to state that his assessment that Mr. Carlson was inebriated was based on "the volume, the slurring, the kind of whoops and hollers in between certain phrases." (RP-II 122). Mr. Henniger stated that Mr. Carlson "sings normally fine" and that he "got a chuckle out of the fact that he was a little over the top." (RP-II 121-122). Mr. Wise reported the same thing, that it "sounded like somebody had been drinking and singing pretty loud." (RP-II 128). Amy Olson, RN

testified that Ms. Johnson had reported, “that he was intoxicated.” (RP-II 160).

Considering the amount of alcohol that was imbibed by Mr. Carlson, his own statements to the Detectives that he passed out early in the night, the reports of Mr. Carlson’s obviously intoxicated state due to his singing, and Ms. Johnson’s reports that he was intoxicated, there was sufficient evidence for the jury to be instructed on the defense of voluntary intoxication as to the first degree burglary and residential burglary charges. Because no expert testimony is required when submitting this defense, the jury was capable of “drawing reasonable inferences from the evidence presented.” State v. Webb, 162 Wn.App. 195, 208, 252 P.3d 424 (2011).

Tellingly, Ms. Johnson testified at some length about the bizarre things that Mr. Carlson said while in her home. She said several times, “he was just saying strange things to me,” “he just said just bizarre things,” and “I was so scared because it was so bizarre.” (RP-II 66-67). This testimony, combined with the evidence regarding the amount of alcohol consumed and other indicia of intoxication, was sufficient to meet the third prong of the test for a voluntary intoxication instruction. All of the evidence combined showed that Mr. Carlson’s ability to acquire

the required mental state was affected and thus a voluntary intoxication instruction was required to be presented to the jury.

The trial court erred in the language used in Jury Instruction No. 3. This instruction is based off of the language in WPIC 4.01. See State v. Bennett, 161 Wn.2d 303, 308, 165 P.3d 1241 (2007). The Supreme Court in Bennett went on to state:

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction ... We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt. Id. at 317.

When determining whether a jury instruction is appropriate, it must be remembered that, "Instructions must also properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case." Id. at 307. The Jury Instruction No. 3 used by the court in Mr. Carlson's case omits a significant and required phrase which directly affects the requirement that the State prove its burden beyond a reasonable doubt. Instructing a jury in a manner which does relieve the State of its burden to prove each element of the crime is

reversible error. Id. at 307. A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

In Mr. Carlson's case, the trial court instructed the jury in Jury Instruction No. 3 in part as follows: "... It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence." (CP 244). The trial court failed to include the language, "... or lack of evidence" as required by WPIC 4.01. See State v. Bennett, 161 Wn.2d 303, 308, 165 P.3d 1241 (2007). The omission of this phrase caused prejudice to Mr. Carlson because much of the defenses he raised relied upon a *lack* of evidence – i.e. of forcible compulsion.

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omission of this phrase caused prejudice to Mr. Carlson because much of the defenses he raised relied upon a *lack* of evidence – i.e. of forcible compulsion.

Mr. Carlson also argues that his constitutional speedy trial rights were violated when the court entered continuances of his trial date for reasons that did not reflect the exercise of due diligence and good faith by the State who moved for the continuances. “When determining whether delay is unconstitutional, the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstances as may be relevant.” State v. Iniguez, 143 Wn.App. 845, 855, 180 P.3d 855 (2008). In State v. Iniguez, the defendant was incarcerated and had persistently requested a speedy trial. Id. at 856. The defendant was not responsible for any of the reasons for delay which had to do with his co-defendant’s requests and those of the State. Id. at 856.

Although the unavailability of a key witness is a valid reason for delaying a trial, “for this reason to serve as a valid justification for delay, the government must not be responsible for the witness's unavailability, and it must diligently attempt to locate the witness or otherwise make him available to testify.” State v. Iniguez, 143 Wn.App. 845, 855, 180

P.3d 855 (2008) citing Barker v. Wingo, 407 U.S. 514, 531, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) and Cain v. Smith, 686 F.2d 374, 382 (6th Cir. 1982). "A defendant's speedy trial rights do not depend on how convenient the trial date is to potential witnesses." State v. Iniguez, 143 Wn.App. 845, 855, 180 P.3d 855 (2008) citing Cain v. Smith, 686 F.2d 374, 382 (6th Cir. 1982).

In the case at hand, Mr. Carlson began objecting to further delay or continuance of his case at the Readiness Hearing on January 14, 2013. (RP 38-39). Although the Readiness Hearing and Trial were continued one week to January 22, 2013 no change was made in Mr. Carlson's outside date for trial of February 15, 2013. (RP 61). On January 22, 2013 at the Readiness Hearing, Mr. Carlson again objected to continuance of the trial date but the court granted the State's motion to continue based on unavailability of a witness due to a trip to Europe and moved the trial date to February 6, 2013. (RP 65). Although this date was still within the outside time for trial of February 15, 2013, the trial court also changed the outside time for trial date to March 8, 2013 – again over the objection of Mr. Carlson. (RP 65). During the month of February Mr. Carlson's trial date was moved three times with trial finally commencing on February 27, 2013. (RP 74, 76-77; RP-I 1). This trial date

was outside the outside trial deadline of February 15, 2013 asserted as the correct time for trial by Mr. Carlson. It was not outside the new time for trial deadline of March 8, 2013 which was set in place by the trial court over Mr. Carlson's objection.

From the first motion by the State to continue that was objected to by Mr. Carlson and his attorney, the court continued Mr. Carlson's case a total of six weeks all over objection. The federal courts have found that, "[d]elay which occurs after a speedy trial is demanded should be scrutinized with particular care." Cain v. Smith, 686 F.2d 374, 382 (6th Cir. 1982). Even if the trial court was justified in granting continuances to the State due to its witness being in Europe, the trial date of February 6, 2013 should not have been subsequently moved. This trial date was still within the outside trial deadline of February 15, 2013 asserted by Mr. Carlson. The continued delays until February 27, 2013 were not sufficient to overcome Mr. Carlson's constitutional right to a speedy trial.

Although the issue of prejudice to a defendant is a major consideration, it is not essential to a finding of a violation of speedy trial rights. State v. Iniguez, 143 Wn.App. 845, 857, 180 P.3d 857 (2008). Interests of a defendant relevant to prejudice from speedy trial rights

violations include, "(1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired." Id. at 858. In fact, "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

The six week delay in Mr. Carlson's case was prejudicial. He was incarcerated during this time and certainly can be presumed to have suffered anxiety and concern over this continued delay. Especially in a case of this magnitude involving a sexual offense, the prejudice caused to witness testimony by a delay of weeks can be disastrous, particularly when the evidence against the defendant stems almost exclusively from witness memory. Mr. Carlson vociferously and repeatedly objected to continuance of the outside time for trial through his attorney. The trial should have taken place prior to the outside date of February 15, 2013, especially as there were still two weeks in February prior to the outside date when all witnesses were available. This case should be dismissed for violation of Mr. Carlson's constitutional speedy trial rights.

**IV
CONCLUSION**

It is hereby respectfully requested that this court vacate the verdicts of guilty against Mr. Carlson and the Judgment & Sentence entered on April 16, 2013 and remand this matter back to the lower court for a new trial for the errors addressed in this appeal.

Respectfully Submitted,


For Robert R. Cossey WSBA # 16481
Attorney for Appellant