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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,

Respondent,

No. 321452

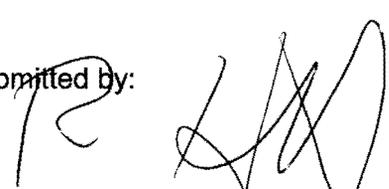
vs.

GUSTAVO DUARTE MARES,

Appellant.

APPELLANT'S BRIEF

Submitted by:



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A. ASSIGNMENT OF ERROR

1 . The trial court erred in entering judgment and sentence when there was insufficient evidence to prove each element of the offense of Rape in the Third Degree beyond a reasonable doubt.

Issues Pertaining to Error Number 1

Defendant was convicted of rape in the third degree which requires that lack of consent be clearly expressed by words or conduct by the victim. On the occasion of the alleged crime, the victim, after drinking with the defendant, awoke to find the defendant on top of her engaged in a sexual intercourse. Prior to the act, there was no clear expression of lack of consent. Only after awakening and finding the defendant on top of her, did the victim express lack of consent. According to the state's evidence, the victim had expressed lack of consent on previous occasions to acts which were not sexual intercourse, such as the defendant putting his arm around the victim. The issue is

whether there is substantial evidence of the victim's clear expression of lack of consent at the time of the act.

2. The trial court erred by entering judgment and sentence against the defendant when the statute under which the defendant was charged and convicted, RCW 9A.44.060, is unconstitutionally vague and ambiguous and violates the defendant's right to due process under the Sixth Amendment, the Fourteenth Amendment, and Art. 1, Section 3 of the Washington Constitution.

Issues Pertaining to Error Number 2

The defendant was charged and convicted of Rape in the Third Degree, RCW 9A.44.060. The State elected to charge the defendant under subsection (1) (a) which requires the victim clearly express lack of consent by words or actions. The statute is vague and ambiguous because it does not indicate when the lack of consent must be expressed. It does not indicate whether it must be prior to or after the act, or how long before or after the act it can be expressed. The issue is how this portion of the statute is to

be interpreted and whether the statute is either unconstitutional or unconstitutional as applied in this case.

3. The trial court erred by not granting the defendant's motion for mistrial and by not conducting an investigation as to whether prejudice occurred after the prosecutor's witness coordinator went to the witness stand and hugged the victim in front of the jury during emotional testimony.

Issues Pertaining to Error Number 3

The issues are whether the trial judge conducted an adequate investigation into whether prejudice occurred and whether the state proved lack of prejudice to the defendant as a result of extraneous influence on the jury when the prosecutor's witness coordinator hugged the victim on the stand during emotional testimony.

B. STATEMENT OF THE CASE

Gustavo Duarte Mares, was tried and convicted of the crime of rape in the third degree in Okanogan County. As

part of their rape in the third degree case, the state was required to prove beyond a reasonable doubt that the victim's lack of consent was clearly expressed by the victim's words or conduct. That was not proven in this case.

Mr. Duarte Mares was living with a relative in Omak at the time of the alleged offense. The victim, Claribell Duarte also resided in the same home. RP 51, L 5-9. Ms. Duarte occupied an upstairs bedroom and Mr. Duarte Mares occupied a bedroom in the basement. RP 63, L 12-22.

Mr. Duarte Mares and Ms. Duarte went shopping, went to movies, and went out together on a number of occasions. RP 54-57. According to the state's evidence, Mr. Duarte Mares made advances toward Ms. Duarte on a number of previous occasions, but his advances were rebuffed by Ms. Duarte.

On some occasion prior to the acts alleged, Ms. Duarte, her uncle, and cousin Brenda returned home from an outing and were trying to open the door, however, there was no light. Mr. Duarte Mares was at the home and put his

hand around Ms. Duarte shoulder and she “nudged away”.
RP 58, L 15-21.

On another occasion, while Ms. Duarte was driving Mr. Duarte Mares to Walmart, Mr. Duarte tried to put his arm around Ms. Duarte’s shoulder and put his hand on her thigh. She told him to stop. RP 59, L 23; RP 60, L 3.

This allegedly happened around February of 2013.
RP 61, L 10-13.

About two weeks later, Ms. Duarte claims she woke up and found Mr. Duarte Mares hovering over her bed. RP 62. According to Ms. Duarte, Mr. Duarte said he wanted to sleep with her in her room, and she told him to get out, and that if he did not leave, she would tell her aunt and uncle. RP 63, L 6-12; RP 64, L 9-12. On a later occasion she asked Mr. Duarte to go to the Casino near Chelan with her. RP 65, L 5-8. She drove, however, after several drinks, Mr. Duarte Mares drove home. RP 67, L 6-14. She fell asleep on the way home and recalls Mr. Duarte Mares attempting to wake her when they got home. RP 68. She went to bed and the next morning woke up with “hickies” on her neck, but

claims she had no idea how she got them. RP 70. She asked Mr. Duarte Mares what happened. He admitted he was the one who gave her the "hickies". RP 71. This occurred in February of 2013. RP 72, L 15-19.

On Friday, March 15, 2013, the pair were watching television and Ms. Duarte was interpreting for Mr. Duarte Mares. RP 75, L 20. Ms. Duarte asked Mr. Duarte Mares to go to Walmart to buy her some Smirnoff Vodka. Mr. Duarte Mares went to Walmart but returned with Arbor Mist, a different type of alcohol in wine size bottles. RP 75-76. Ms. Duarte and Mr. Duarte Mares were hanging out and watching television. RP 77, L 3. Ms. Duarte drank both bottles of Arbor Mist. RP 77. Later she went to her room and went to bed, and Mr. Duarte Mares remained in the living room. RP 78. Ms. Duarte next remembers waking up in her bed and finding Mr. Duarte Mares on top of her engaged in sexual intercourse, at which point she voiced her disapprove and, according to her testimony, she pointed a rifle at Duarte Mares and ordered him from her room. RP 79, L 4; RP 86, L 4 ; RP 87. She reported the incident to

police three days later on March 18, 2014. Mr. Duarte Mares testified that he had consensual sex with Ms. Duarte on two occasions. RP 166, L 1-2.

During the trial, Ms. Duarte, became emotional and “needed a couple of minutes.” RP 79, L 10. Apparently, some of the jurors were crying and the witness coordinator from the prosecutor’s office went to the stand and embraced Ms. Duarte in front of the jury. The defense moved for a mistrial. RP 80. The trial judge said he noticed the incident and “sort of cringed” himself. The trial judge asked the witness coordinator to refrain from that sort of thing in the future. RP 81, L14-16. The court asked whether the defense wanted a curative instruction, and the court expressed the opinion that such an instruction would draw more attention to the issue. The defense agreed and did not request a curative instruction. RP 82, L 22. The trial judge denied the defendant’s motion for mistrial without conducting an investigation as to whether prejudice occurred.

C. ARGUMENT

1. SUFFICIENCY OF THE EVIDENCE

The defendant was charged with rape in the third degree, RCW 9A.44.060, alleging Mr. Duarte Mares engaged in sexual intercourse with Ms. Duarte and that Ms. Duarte has clearly expressed her lack of consent by words or conduct. The evidence at trial indicated that at the time of the act, Ms. Duarte did not voice her lack of consent to the act of sexual intercourse until she learned the act was in progress at which time Mr. Duarte Mares stopped. RCW 9A.44.060 reads:

- (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person:
 - (a) Where the victim did not consent as defined RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or
 - (b) Where there is threat of substantial unlawful harm to property rights of the victim.

- (2) Rape in the third degree is a class C felony.

RCW 9A.010(7) defines consent. "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." It seems logical to infer that "lack of consent" must also be expressed at the time of the act of sexual intercourse.

Here Ms. Duarte, at the time of the act, did not clearly express her lack of consent by words or conduct until the act was in progress. When her lack of consent was expressed, Mr. Duarte discontinued the sexual intercourse. Although Ms. Duarte had, on previous occasion, rebuffed his advances, she did not do so here prior to the act. This appears to be due to the fact she was either asleep or overcome by alcohol.

It is important to note that Mr. Duarte Mares was not charged with Rape in the Second Degree which, arguably, he may have been given the state's evidence that Ms.

Duarte was asleep and under the influence of two bottles of Arbor Mist.

Rape in the Second Degree, unlike Rape in the Third Degree, can be committed by having sexual intercourse with one unable to give consent. RCW 9A.44.050(1)(b) provides that a person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person "when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." Rape in the Second Degree includes having sexual intercourse with a person incapacitated by alcohol use. *State v. Al-Hamdani*, 109 Wn. App. 599, 608 (Div. 1, 2001).

Here, the state chose to charge rape in the third degree and not rape in the second degree. It should be noted that rape in the third degree is a lesser degree of rape, but it is not a lesser included offense to rape in the second degree. *State v. Ieremin*, 78 Wn. App. 746 (Div. 1, 1995), *State vs. Wright*, 152 Wn. App. 64 (Div. 2, 2009).

Any argument by the State that the evidence proved Rape in the Second Degree and, therefore, the evidence was sufficient to establish the lesser offense of Rape in the Third Degree is without merit. Each crime has distinct elements which the state must prove beyond a reasonable doubt. In this case, the state did not prove the victim clearly expressed lack of consent at the time of the act.

The court reviews a challenge to the sufficiency of the evidence by determining whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. The test is whether the State has produced substantial evidence to support each element of the crime charged (a burden of production). *State v. Werneth*, 147 Wn. App. 549,551 (Div. 3, 2008). In the present case, the only evidence the state offered was, in the month prior to the acts alleged, the victim had expressed lack of consent to Mr. Duarte Mares putting his arm over her shoulder, putting his hand on her leg, Mr. Duarte Mares sleeping in her room, and Mr. Duarte Mares giving her "hickies." There was no evidence of an expressed lack of

consent to any act of sexual intercourse at any time until after the act alleged. The state did not prove this element of the offense beyond a reasonable doubt and the conviction must be reversed.

2. UNCONSTITUTIONALITY OF THE STATUTE

A party may raise for the first time on appeal a manifest error affecting a constitutional right. *State v. Kirwin*, 165 Wn.2d 818,823 (2009). A criminal statute which is vague violates due process. *Sixth and Fourteenth Amends. and Art 1, Secton 3 of the Washington Constitution*. Under the due process clause of the Fourteenth Amendment, a statute is void for vagueness if either: (1) the statute 'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed;' or (2) the statute 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.' *State v. Williams*, 144 Wn.2d 197,203 (2001). The constitutionality of a statute is an issue of law, which is reviewed *de novo*. If the statute

does not involve First Amendment rights, then the vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case. *State v. Watson*, 160 Wn.2d 1, 5 (2006).

The Rape in the Third Degree statute, RCW 9A.44.060 is vague because it does not indicate when the lack of consent must be clearly expressed. It does not indicate whether it can be weeks before, at the time of the act, or even after the act. The statute is susceptible to arbitrary enforcement as in this case.

At the very least, the statute is ambiguous and subject to judicial construction as to when the lack of consent must be expressed.

In determining the meaning and scope of a statute, the court applies general principles of statutory construction. Those principles provide that in interpreting a statute, the fundamental duty of the court is to ascertain and carry out the intent of the Legislature. If a statute is unambiguous, it is not subject to judicial construction and its meaning is to be derived from the language of the statute alone. The court

may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately. Additionally, a statute will be construed so as to avoid constitutional problems, if possible. *State v. Chester*, 133 Wn.2d 15, 21 (1997). When a statute is ambiguous, its meaning may be determined in light of other statutes on the same subject under the *In Pari Materia* rule of statutory construction. *Hallauer v. Spectrum Properties*, 143 Wn.2d 126 (2001). In light of the definition of “consent” in RCW 9A.010(7) which defines “consent” in terms of “at the time of the act of sexual intercourse”, it appears clear any lack of consent must be “at the time of the act of sexual intercourse” and not after or weeks before the act. At least two other rules of statutory construction also dictate this result, the rule of lenity and the rule to avoid absurdity. The rule of lenity requires ambiguous criminal statutes to be interpreted in favor of the accused. *State v. McGee*, 122 Wn.2d 783 (1993). The rule to avoid absurdity, requires the court to presume the legislature did not intend absurd results, and, where possible, to interpret statutes so

as avoid such absurdity. *State v. Vela*, 100 Wn.2d 636 (1983). In this case, that means interpreting the statute to mean the victim must express lack of consent "at the time of the act of sexual intercourse." It would be absurd to interpret it to mean at any time, either months or years before the act or even after the act.

The court should interpret the RCW 9A.44.060(1)(a) as requiring lack of consent must be made at the time of sexual intercourse and not weeks before and not after the fact.

3. EXTRANEOUS INFLUENCE ON THE JURY

The prosecutor's witness coordinator, in the presence of the jury, went to the witness stand during emotional testimony by the victim and hugged the victim. RP 80-82. This conduct communicated to the jury the prosecutor's support for the victim and it most probably invoked sympathy from the jury. This communication to the jury by conduct was not authorized by the court and was later admonished by the court. The court did not inquire of the jury regarding

any prejudice. The Supreme Court has long established the rule that communication with the jury is presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court. The Court said:

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954).

In *United States v. Gaston-Britio*, 64 F.3rd 11, 13 (1st Cir. 1995), a government agent made a hand gesture pointing toward the defendant during trial which suggested the defendant's involvement in threatening the witness family. The gesture or conduct was an unauthorized communication with the jury. The court said:

The law on the subject is well settled. "When a nonfrivolous suggestion is made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial." The district court has "broad, though not unlimited, discretion to determine the extent and nature of its inquiry into allegations of juror bias"... Thus, although the trial court must "conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred," it has "discretion to determine the extent and type of investigation requisite to a ruling on the motion [for mistrial.]" (cites omitted).

The same rule applies in Washington State. *State v. Murphy*, 44 Wn. App. 290 (1986).

Once the defense made a motion for mistrial based on conduct the court had itself observed, which suggested the jury may be biased or tainted by the incident, the trial court was required to hold a hearing to determine whether the incident occurred and whether it was prejudicial. The trial court did not inquire as to whether it was prejudicial. The trial court had a duty to investigate and develop the relevant facts as to any prejudice, not merely summarily conclude no prejudice occurred as the trial court did.

United States v. Gaston-Britio at 13. The conviction must be vacated and reversed.

D. CONCLUSION

The conviction must be reversed because the state failed to prove each element of the offense beyond a reasonable doubt and because the trial court denied defendant's motion for a mistrial without investigating whether the incident was prejudicial and for the other reasons set forth herein.

DATED this 24th day of August, 2014.

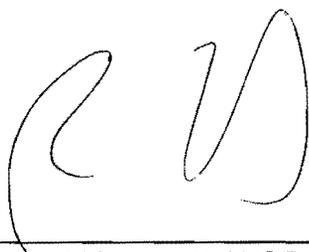


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