

MAR 06 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
NO. 34174-7-~~HI~~

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES KUNEKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00121-7

BRIEF OF RESPONDENT

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ASSIGNMENTS OF ERROR

1. The testimony of WSPCL forensic scientist Heather Pyles was not hearsay and did not violate the defendant's right to confront witnesses against him.

2. The State concedes that under the facts of this case the Felony Harassment conviction should be vacated as a violation of the defendant's double jeopardy rights.

3. In light of the State's concession the other issues raised by the defendant are moot.

STATEMENT OF THE CASE

The jury unanimously agreed that on the night of August 8, 2014, while sharing a cell in the Klickitat County Jail, Charles Kuneki ("defendant") held a pencil to Richard Maine's throat, threatened to kill him if he called out or resisted and forcibly raped him.

The evidence presented in this case is that on the evenings of August 7, 2014, and August 8, 2014, the defendant twice raped Maine. The first incident happened during the evening of August 7, 2014. During an argument about Maine's use of toothpaste, the defendant grabbed a pencil, held it to Maine's neck, threatened his life and then anally raped

him. RP 235-37.¹ At trial Maine stated he had asked the defendant to stop and inquired into why he was committing such acts, but the defendant just kept telling him to “shut up.” RP 238. Because of the death threat Maine was too scared to press the panic button. RP 238. The next day, Maine, still frightened of the defendant, did not tell anyone about the rape because the defendant was “basically following [Maine] everywhere and ...[Maine] couldn’t get away from him to talk to anybody.” RP 239. Maine “didn’t feel safe [reporting the rape], just right there in front of [the defendant].” RP 240. The next evening, August 8, 2014, Maine was asleep in his cell when he awoke to the defendant “on top of [him] with the pencil again.” RP 242. When Maine said “don’t do this again” the defendant told him “to shut up” and proceeded to rape him. RP 243.

The next morning Maine contacted a jail guard and handed her a note for the purpose “to get out of the cell...[and] get someone’s attention.” RP 244. The note said: “My life has been threatened I need to move now....if I say anything out loud he’ll come after me. I’m scared.” RP 245. After receiving the note Maine was taken upstairs to the booking area of the jail where Maine was visibly upset. RP 247. When Maine

¹ Pursuant to RAP 9.8 and RAP 10.4(f), citations to the Clerk's Papers are designated "CP" followed by the number of the applicable page. Citations to the verbatim report are designated as "RP" followed by the number of the applicable page.

calmed down he disclosed the rapes to a jail guard. RP 247. Law enforcement was contacted and Maine was taken to the hospital for a rape kit to be performed. RP 248. At the hospital the doctors found evidence of trauma to the anus, which resulted in Maine bleeding for “a week at least.” RP 249. Maine maintained the sexual encounters were not consensual as he had never indicated he wanted to engage in any type of sexual activity with the defendant, had never engaged in that type of sexual activity before, and had never told anyone he wanted to engage in that type of sexual activity. RP 250.

On August 13, 2014, the defendant was charged by Information with two counts of Rape in the First Degree, a violation of RCW 9A.44.040, and two counts of Harassment: Threats to Kill, a violation of RCW 9A.46.020. Both rape counts alleged that the defendant was armed with a deadly weapon at the time of the rape. The charges reflected the State’s theory of the case that between August 6, 2014, and August 9, 2014, the defendant twice raped and threatened to kill Maine while armed with a deadly weapon.

On February 5, 2016, the Jury returned a verdict finding the defendant guilty of one count of Rape in the First Degree and one count of Harassment: Threats to Kill, for events occurring on the night of August 8, 2014. The defendant was acquitted of one count of Rape in the First

Degree and one count of Harassment: Threats to Kill, for events occurring on the night of August 7, 2014. The Jury was unable to reach unanimity as to the Deadly Weapon special verdict.

ARGUMENT

I. THE TESTIMONY OF WSPCL FORENSIC SCIENTIST HEATHER PYLES WAS NOT HEARSAY AND DID NOT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

Heather Pyles, a Forensic DNA Analyst for the Washington State Patrol, testified to the results of DNA testing which had been performed by the Washington State Patrol Crime Laboratory. The person who had originally performed these tests, Wendy Cashawabara, had, prior to trial in this matter, left her employment for “another career step in forensics” on the East Coast. RP 309-10. Ms. Pyles testified that every case handled by the crime lab goes through a technical review and she was the one who performed the technical review of Ms. Cashawabara’s work in this case. RP 311. Ms. Pyle also reviewed the case files and case notes to determine that the lab’s standard operating procedures were followed, that the results were technically sound and scientifically relevant and, finally, that she agreed with Ms. Cashawabara’s conclusions. RP 312. As part of her review of Ms. Cashawabara’s work, Ms. Pyles determined that the original match estimated had been calculated incorrectly. RP 318. To address the

error Ms. Pyles recalculated the match estimates using the data that Ms. Cashawabara had generated with the corrected database numbers, ultimately arriving at the probability estimates she testified to. RP 318.

Ms. Pyles's testimony was not hearsay. ER 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 802 sets forth the circumstances in which hearsay is inadmissible: "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."

In combination ER 703 and ER 705 function as exceptions to the hearsay rule that permit disclosure on cross-examination of the facts or data on which an expert witness relies in forming his or her opinion.

ER 703 discusses the allowable bases for an expert witness's opinion:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 705 sets forth the circumstances in which an expert witness on cross-examination may be required to disclose the facts or data underlying his or her opinion:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

Hence, as in the case at bar, when an expert witness bases an opinion on facts or data, the expert may be required to disclose and discuss these facts or data on cross-examination, even if the underlying facts or data would otherwise be inadmissible as hearsay. The key is that the expert witness must have based an opinion on the facts or data, as set forth in ER 703, in order to be questioned thereon, as allowed by ER 705. This is what happened in this case and what Ms. Pyles testified to.

Ms. Pyles testimony also did not infringe on the defendant's right to confront witnesses against him. Confrontation Clause analysis depends upon whether the challenged testimony is lay or expert. Because this case involves expert testimony from a forensic scientist, the analysis for experts applies herein. In *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493 (2014), the Washington Supreme Court outlined the proper analysis for Confrontation Clause challenges involving experts. Under *Lui*:

[A] person is a "witness" for confrontation clause purposes only if he or she makes some statement of fact to the court (as opposed to merely processing a piece of evidence) and that statement of fact bears some inculpatory character (meaning that the evidence, without the need for expert interpretation, bears on some factual issue in the case).

Id. at 470. In its analysis the court in *Lui* recognized this was a

novel issue and looked to the United States Supreme Court for guidance:

In three important ways, this case brings us into uncharted constitutional territory. First, *Melendez–Diaz* did not reach back to encompass every factual predicate behind an expert witness’s findings. The confrontation clause does not demand the live testimony of “anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device....” In other words, while a break in the chain of custody might detract from the credibility of an expert analysis of some piece of evidence, this break in the chain does not violate the confrontation clause. Second, *Bullcoming* expressly did not reach the confrontation clause status of raw data generated by an automated process without human input. Rather, the subject matter of the confrontation clause concerns those “past events and human actions not revealed in raw, machine-produced data....” Finally, *Williams* did not address how the confrontation clause applies to the “panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians.” The same question *Williams* did not reach—the confrontation clause status of forensic reports, expert witnesses, and the technical data underlying their conclusions—is now squarely before us.

Id. at 470-71 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n. 1 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647, 660 (2011); *Williams v. Illinois*, ___ U.S. ___, 132 S.Ct. 221 (2012)). The issue raised in *Lui* is precisely the issue raised by the defendant in this case. As explained by the court, the defendant argued “the State violated the confrontation clause when it introduced DNA evidence through a supervisor, Gina Pineda, rather than the analysts who physically conducted the DNA testing.” *Id.* at 486.

In the case at bar, the question is whether the prosecution must call the forensic scientist who participated in the DNA testing process. The *Lui* court rejected this requirement, stating:

If [the witness at trial] had relayed the observations or memory of conventional witnesses, then *Lui* would be correct. But DNA evidence differs in several important ways from the testimony of conventional witnesses. As we explain below, the DNA testing process does not become inculpatory and invoke the confrontation clause until the final step, where a human analyst must use his or her expertise to interpret the machine readings and create a profile.

Id. at 486. For the confrontation clause to apply, the testimony must be by a witness *against* the defendant. *Id.* at 487. In its decision the court in *Lui* distinguished between the analysts and the technicians who assist in processing and testing evidence. *Id.* at 487-88 (“[T]he machine outputs an electropherogram....Only here does any element of human decision-making enter the process; an expert must translate ...the electropherogram into a DNA profile....[T]he only ‘witness against’ the defendant in the course of the DNA testing process is the final analyst who examines the machine-generated data, creates a DNA profile, and makes a determination that the defendant’s profile matches some other profile. Absent that expert analysis, we are left with an abstract graph or set of numbers that has no bearing on the trial.”).

The *Lui* court concluded the expert’s analysis of the test data and their opinion invoked confrontation:

In looking to the ultimate expert analysis, and not the lab work that leads into that analysis, we follow the Court in distinguishing between a person who attests to some fact and a person who aids an expert witness in reaching an attestation of fact... live testimony is not required if it merely helps to establish “the chain of custody, authenticity of the sample, or accuracy of the testing device.” This category of evidence encompasses taking the clippings, adding the chemicals, and running the machines.

Id. at 490 (quoting *Melendez-Diaz v.*, 557 U.S. at 311 n. 1). Stated more simply:

[N]o authority states that the analyst becomes a “witness against” anyone by virtue of adding chemicals to a mixture. Rather, while the analyst’s testimony might be helpful in bolstering the authenticity of the sample or the accuracy of the machine, *Melendez–Diaz* does not require that testimony.

Id. at 487. The *Lui* court held the “test allows expert witnesses to rely upon technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand.” *Id.* at 483-84. The court explained further:

Our test requires cross-examination, but only cross-examination of the witness who gives meaning to raw data. Not every laboratory analyst is required to testify. If DNA evidence is used in trial, someone must be subject to cross-examination. The “someone” required by the confrontation clause is the person who has made the final comparison that is used against the defendant.

Id. at 485 (citations omitted).

The confrontation clause is not concerned with the process of preparing for testing. Nor is the confrontation clause concerned with the testing device itself, which merely generates data that is largely

incomprehensible to the non-expert. Instead, the confrontation clause focuses on the expert's individualized opinion of the data. When the opinion presented in court is not subject to cross-examination, as in the case of *Melendez-Diaz* and *Bullcoming* where written opinion by non-witnesses were admitted, the confrontation clause is violated. *Id.* at 472. When the opinion presented in court is subject to cross-examination, as in *Lui* and *Williams*, the confrontation clause is not violated.

In this case because the forensic scientist Heather Pyles relied solely upon her own review of the test data and her own interpretation of the evidence, and was subject to cross-examination on her opinion, the confrontation clause and the defendant's right to confront witnesses against him were not violated.

II. THE STATE CONCEEDS THAT UNDER THE FACTS OF THIS CASE THE FELONY HARASSMENT CONVICTION SHOULD BE VACATED AS A VIOLATION OF THE DEFENDANT'S DOUBLE JEOPARDY RIGHTS.

The State concedes that the defendant's convictions for Rape in the First Degree and Felony Harassment violate double jeopardy. This will require remand for vacation of the Felony Harassment conviction. Because the defendant's standard range for all other offenses will change from an nine to an eight the defendant will need to be resentenced.

In *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995), the Court set forth a three-step test for determining whether multiple

punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. *Id.* Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. *Id.* at 777. This test asks whether the offenses are the same "in law" and "in fact." *Id.* at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. *Id.* at 778-80.

Neither the rape statute, RCW 9A.44.040, nor the felony harassment statute, RCW 9A.46.020, expressly allows or disallows multiple punishments for a single act. Because the statutes do not supply this Court with an answer, the Court must turn to the "same evidence" test.

The "same evidence" or "Blockburger" test asks whether the offenses are the same "in law" and "in fact." *Id.* at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. *Id.* at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. *Id.* at 777.

Here, the defendant's convictions are the same "in law" and "in fact." The convictions are the same "in fact" because the facts show that the defendant physically assaulted and threatened to kill Maine while he raped him.

As charged here, to convict the defendant of Felony Harassment, the State was required to prove that the defendant knowingly threatened to kill Maine and that his words or conduct placed Maine in reasonable fear that the threat would be carried out. As charged here, to convict the defendant of Rape in the First Degree, the State was required to prove that by forcible compulsion the defendant engaged in sexual intercourse with Maine. RCW 9A.44.040. In pertinent part, "forcible compulsion" means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person." RCW 9A.44.010(6).

Here, as charged and proven, while Rape in the First Degree contains an element not contained in the Felony Harassment charge (sexual intercourse), Felony Harassment does not appear to have an element that is not contained within the meaning of forcible compulsion, an element of Rape in the First Degree. Therefore the convictions meet the same "in law" prong of the same evidence test. Thus, this Court must find that the defendant's convictions violate double jeopardy principles

unless "there is a clear indication of contrary legislative intent." *Calle*, 125 Wn.2d at 780. The State can point to no such contrary legislative intent.

The double jeopardy violation requires the vacation of the Felony Harassment conviction. Because the vacation of this conviction will change the standard range, resentencing will be required.

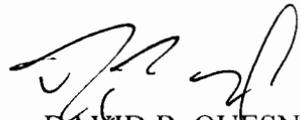
III. IN LIGHT OF THE STATE'S CONCESSION THE OTHER ISSUES RAISED BY THE DEFENDANT ARE MOOT.

The defendant has also claimed that the failure to give a "true threat" instruction requires reversal of the Felony Harassment conviction and that his trial counsel was ineffective for failing to argue that his convictions for Rape in the First Degree and Felony Harassment constituted the "same criminal conduct" for scoring purposes. Due to the State's concession that these two convictions violate double jeopardy, this issue is moot.

CONCLUSION

For the reasons set forth above the State asks this Court to affirm the defendant's conviction for Rape in the First Degree, vacate the conviction for Felony Harassment and remand this case for resentencing. The State takes no position on appellate costs and defers to this Court's discretion.

Respectfully submitted this 3rd day of March 2017.

A handwritten signature in black ink, appearing to read 'D. R. Quesnel', written in a cursive style.

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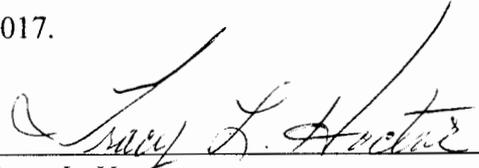
NO. 34174-7-III
Superior Court No. 14-1-00121-7
DECLARATION OF MAILING

I, Tracy L. Hoctor, declare that on March 3, 2017, I deposited in the United States mails by first class mail, proper postage affixed, a copy of the Brief of Respondent to:

Clerk of the Court
Court of Appeals-Division III
500 N. Cedar Street
Spokane, WA 99201

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of March, 2017.



Tracy L. Hoctor
Office Administrator