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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35901-8-III

STATE OF WASHINGTON, Respondent,

v.

LELAND KNAPP IV, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

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I. INTRODUCTION

The State charged Leland Knapp with second degree rape by forcible compulsion. At trial, Knapp testified that the intercourse was consensual and requested an instruction that the State bore the burden of disproving consent beyond a reasonable doubt. The trial court refused the instruction, and the jury convicted him. Knapp now appeals his conviction and sentencing, arguing that the trial court erred in declining his proffered instruction in the burden of proof and in imposing certain legal-financial obligations.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in declining to give Knapp's proposed instruction on the State's burden to disprove consent beyond a reasonable doubt.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in imposing a criminal filing fee and a DNA collection fee when Knapp was indigent and had previously been convicted of a felony requiring DNA collection.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the jury instructions relieved the State of its burden of proof on the element of forcible compulsion.

ISSUE NO. 2: Whether the outcome of the trial would not have differed beyond a reasonable doubt had the jury been instructed that the State bore the burden of disproving consent beyond a reasonable doubt.

ISSUE NO. 3: Whether the criminal filing fee and DNA collection fee should be stricken from the judgment and sentence in light of *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714 (Sept. 20, 2018).

IV. STATEMENT OF THE CASE

Leland Knapp and Brandy Spaulding met in high school and knew each other for almost two decades. IV RP 613-14. On February 7, 2016, Spaulding was at home looking forward to watching the Super Bowl when Knapp stopped by her house. IV RP 614-15. It was not unusual for Knapp to stop in and visit with her, and she let him in. IV RP 615, 627.

Spaulding and Knapp disputed what occurred next. According to Spaulding, Knapp began to make vulgar comments expressing his interest in having sex with her. IV RP 615. They had never had a sexual relationship and this type of talk was out of character for him, so Spaulding made it clear it was not going to happen. IV RP 615-16, 625. Knapp tried to kiss her and she refused, so he left. IV RP 616. But a short time later, he returned, telling her he'd left his bandana inside. IV RP 616. Spaulding again let him in and was sitting on the couch when Knapp

physically attacked her and threw her on the ground, then tried to pull down her pants. IV RP 617.

Spaulding then described a significant physical struggle in which she resisted Knapp, attempted to pull her pants back up, and said "No." IV RP 617. At one point, she heard her neighbors leaving so she screamed for help, but they did not hear her. IV RP 619. Knapp then took a bandana handkerchief and gagged her with it to stop her from screaming. IV RP 620. At another point, he attempted to tie her hands with the bandana, but failed. IV RP 620. Spaulding continued to try to scoot away from him on the floor but Knapp eventually pinned her against a wall, removed her underwear, and raped her. IV RP 621.

When Knapp finished, he got up and left. IV RP 626. Spaulding first called her mother and then called the police. IV RP 626. Police responded and took her to the hospital, where she underwent a sexual assault examination. IV RP 626.

Knapp's account differed substantially from Spaulding's. According to Knapp, he and Spaulding had engaged in sex together off and on over the years that they had known each other. IV RP 638. They had also used drugs together frequently. IV RP 639.

On February 7, 2016, Knapp stopped by her house to invite her to a birthday party and to repay her some money he owed her. IV RP 638. During their conversation, Spaulding realized he was high on methamphetamine and began hinting that she wanted some. IV RP 639-40. Aware that Spaulding was presently sober and not wanting to pull her back into a struggle with addiction, Knapp refused. IV RP 640-41. Spaulding got upset at that point, and Knapp decided to leave. IV RP 641. But he had only gone a short way before he realized he had forgotten his bandana, so he went back to retrieve it. IV RP 641-42.

On his return, Spaulding let him back into the house and continued to press him to get her high, offering to have sex in exchange. IV RP 642-43. Knapp gave in, and they had sex. IV RP 643-44. Afterward, Knapp could not find the methamphetamine he had promised her, and Spaulding became irate. IV RP 644. She told him to leave and that she would call the police for rape. IV RP 644. Knapp complied and was walking away through Columbia Park when police stopped him and arrested him. III RP 479, IV RP 645.

The State charged Knapp with rape in the second degree by forcible compulsion, and the case proceeded to a jury trial. CP 55. Several law enforcement officers testified about their investigation and

apprehension of Knapp. Aaron Hamel responded to Spaulding's home in response to her call and took statements from Spaulding and her mother. III RP 456-48. He also photographed several items and located the bandana that Knapp and Spaulding had described. III RP 462-44. The bandana was placed into an unsealed evidence bag, but the officer forgot to collect it and left it sitting on the kitchen counter. III RP 466-67. Another officer collected the bandana from Spaulding's house several hours later. III RP 490.

After about 15-20 minutes in the house, Hamel took Spaulding to the hospital. III RP 467, 473. Hamel observed that Spaulding was not crying and he saw no injuries on her. III RP 474-75. A sexual assault exam revealed that Spaulding had some bruising and abrasion around her vaginal area, but the injuries could have been caused by consensual sex. III RP 533, 540. She had no carpet burns or other bruising or abrasions on her body, despite the physical struggle she described occurring with Knapp. III RP 539. DNA analysis revealed the presence of Knapp's DNA in Spaulding's perineal area and Spaulding's saliva and skin cells on the bandana. III RP 568, 572-73, 576, 579.

Both Spaulding and Knapp testified to their accounts at trial. IV RP 613, 637. Because there was no dispute that intercourse had occurred,

both parties sought to emphasize discrepancies in the other's account to establish whether the intercourse was forcible or consensual. For the State, multiple officers testified that when they arrested Knapp, he spontaneously told them, "It's her word against mine" before they had told him why he was being taken into custody. III RP 479, 484, 487. Another officer said that Knapp told him in a post-arrest interview that he had stopped by Spaulding's house to tell her he had cancer, although Knapp later testified that he stopped to invite her to a party and to pay her back money he owed her. III RP 509, IV RP 638. Knapp focused on Spaulding's lack of physical injuries indicative of a struggle, her claim to have screamed for help without the neighbors hearing, changes in Spaulding's description of how the rape occurred, and Spaulding's substantial size advantage over Knapp. IV RP 628-34.

At the close of the evidence, Knapp requested an instruction on consent that would establish that the State bore the burden of disproving consent beyond a reasonable doubt. CP 412; IV RP 672-75. The proposed instruction, which slightly modified Washington Pattern Jury Instructions: Criminal 45.04, stated:

> Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating a freely given agreement to have sexual intercourse. The Defendant has no burden to prove that sexual intercourse

> was consensual. It is the State's burden to prove the absence of consent beyond a reasonable doubt.

CP 412. The State opposed the instruction, arguing that it was not a correct statement of the law and a consent instruction was not appropriate for a rape charge in which forcible compulsion was alleged. IV RP 675-76. Instead, it argued that WPIC 18.25 should be given. IV RP 677-79. That instruction states, "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal ("WPIC") 18.25.

The trial court declined to give Knapp's proposed instruction and instead gave WPIC 18.25. IV RP 681-82; CP 430. The jury convicted Knapp of second degree rape. CP 435. The trial court imposed a mid-range sentence of 110 months to life. RP (Sentencing) 13; CP 446. It also found that Knapp lacked the ability to pay discretionary costs but imposed a $200 criminal filing fee. RP (Sentencing) 13-14, CP 444. Knapp also had two prior felony convictions that would have required a DNA sample, but the sentencing court imposed a second DNA collection fee of $100. RP (Sentencing) 14, CP 442, 444. Knapp now appeals, and has been found indigent for that purpose. CP 453-54.

V. ARGUMENT

Knapp contends that two errors require reversal or, in the alternative, remand to strike the criminal filing fee and DNA collection fee from his judgment and sentence. First, by declining to give Knapp's proposed instruction on consent, the trial court relieved the State of its burden to prove forcible compulsion and disprove consent beyond a reasonable doubt. Second, because House Bill 1783 applies to Knapp's case, the criminal filing fee and DNA collection fee should be stricken from his judgment and sentence.

1. By declining to give Knapp's proposed instruction that the State bore the burden of disproving consent beyond a reasonable doubt, the trial court's instructions relieve the State of its burden of proof as to the essential element of forcible compulsion.

Each side is entitled to have the jury instructed on its theory of the case. *State v. Ponce*, 166 Wn. App. 409, 415–16, 269 P.3d 408 (2012). As a matter of due process, jury instructions must (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287

(2010), *review denied*, 170 Wn.2d 1022 (2011). A trial court's refusal to give a requested jury instruction is reviewed *de novo* where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (*citing State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)).

Instructions that relieve the State of its burden of proof on every essential element require automatic reversal. *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003) (*citing State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). However, if the State is relieved of fewer than all of the essential elements, the error is presumed to be prejudicial unless it is affirmatively shown to be harmless. *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

The due process guarantees of the Fourteenth Amendment obligate the State to present proof of each and every element of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). As a result, the trial court is constitutionally required to instruct the jury as to each element of the offence. *State v. Pawling*, 23 Wn. App. 226, 232, 597 P.2d 1367, *review denied*, 92 Wn.2d 1035 (1979) (*citing State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845

(1953)). Instructions that relieve the State of its burden of proof violate due process because they permit the jury to convict without adequate evidence. *State v. Hanson*, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990).

When a defense negates an essential element of the charge, the State bears the burden of disproving the defense beyond a reasonable doubt. *State v. W.R., Jr.*, 181 Wn.2d 757, 762-63, 336 P.3d 1134 (2014). In *W.R.*, the Washington Supreme Court expressly held that consent negates the element of forcible compulsion in rape prosecutions. *Id.* at 763. Therefore, once the defendant presents sufficient evidence to place consent at issue, the State "bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion." *Id.*

Here, the proposed defense instruction sought to apprise the jury of the State's burden to disprove consent. Read as a whole, the instructions failed to properly advise the jury that this burden was on the State. The "to convict" instruction required the State to prove that Knapp had sexual intercourse with Spaulding that "occurred by forcible compulsion." CP 427. Instruction no. 10, which reflected the terms of WPIC 18.25, advised the jury that it could consider evidence of consent to determine whether Knapp used forcible compulsion, but it did not advise the jury that consent negates forcible compulsion, or that consent and forcible compulsion

cannot coexist, or that if it found that the State had not disproved consent beyond a reasonable doubt, it must return a verdict of not guilty. Accordingly, the instructions did not adequately apprise the jury of the State's burden of proof because it did not foreclose the jury from convicting even if it had a reasonable doubt as to whether Spaulding consented.

In *dicta*, the *W.R.* Court cited WPIC 18.25 approvingly and stated that it was not necessary "to add a new construction on consent simply because evidence of consent is produced." 181 Wn.2d at 767, n. 3. But WPIC 18.25 was not at issue in *W.R.* and that Court's summary consideration of the instruction should not be construed as holding that giving WPIC 18.25 ensures an adequate and correct statement the law and the State's burden of proof with respect to consent. Here, because neither WPIC 18.25 nor the remaining instructions clearly places the burden of disproving consent beyond a reasonable doubt on the State, the instructions fail to meet minimum standards of due process.

Nor was the error harmless here. Instructional error that lightens the State's burden of proof is harmless only when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Brown*, 147 Wn.2d at 341 (*quoting Neder v. U.S.*, 527

U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) (internal quotations omitted). Here, both parties presented differing accounts of what transpired and both parties could fairly point to reasons to believe one account and disbelieve the other. As instructed, the jury could have believed both that Spaulding consented to the intercourse and that the intercourse was physically rough and controlling and still reached a verdict of guilty, because it was told only to consider evidence of consent, not to determine whether the State had disproven consent beyond a reasonable doubt. A properly instructed jury could have reached a different verdict. Accordingly, a new trial is required.

2. House Bill 1783 applies to Knapp's case and precludes the imposition of the $200 criminal filing fee and the $100 DNA collection fee.

House Bill 1783 took effect on June 7, 2018. Laws of 2018, c. 269. The bill modified several aspects of Washington's legal financial obligation ("LFO") system, including prohibiting imposition of the $200 criminal filing fee on defendants who are indigent within the meaning of RCW 10.101.010(3)(a) through (c) and eliminating the mandatory DNA collection fee if the defendant's DNA has been collected due to a prior conviction. *State v. Ramirez*, __ Wn.2d __, 426 P.3d 714, 721-22 (Sept.

20, 2018). These revisions apply to cases pending on appeal that are not yet final when the bill became effective. *Id.* at 723.

Here, Knapp was represented by a public defender at sentencing and was found indigent for purposes of appeal. CP 450, 453-54. In his Report as to Continued Indigency, he reports that he received nutrition assistance through the SNAP[1] program and has no other income. Trial counsel advised the court at the time of sentencing that Knapp had been intermittently homeless, and the court found that Knapp lacked the ability to pay discretionary LFOs. RP (Sentencing) 9, 13-14. The record thus reflects that Knapp was indigent within the meaning of RCW 10.101.010(3)(a) and (c), and therefore, House Bill 1783 prohibits imposition of the $200 criminal filing fee.

Likewise, the record reflects that Knapp was previously convicted of felony offenses in Washington in 2008. CP 442. Under the law in effect at the time of his conviction, the felony conviction required collection of a DNA sample for the database. Laws of 2002, c. 289, § 2. Accordingly, the court should presume that the law was followed and Knapp's DNA was collected at that time, rendering the collection of a

[1] "SNAP" stands for the Supplemental Nutrition Assistance Program overseen by the U.S. Department of Agriculture. https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap (last visited November 2, 2018).

second sample unnecessary under House Bill 1783. Because duplicative samples are no longer mandatory under House Bill 1783, and because the sentencing court concluded Knapp lacked the ability to pay LFOs that are not mandatory, the $100 DNA collection fee also should not have been imposed.

3. <u>If Knapp does not prevail on appeal, appellate costs should not be imposed.</u>

In the event Knapp does not prevail on appeal, appellate costs should not be imposed. Pursuant to the General Court Order dated June 10, 2016 and Title 17 of the Rules on Appeal, Knapp respectfully requests that due to his continued indigency, the court should decline to impose appellate costs in the event she does not prevail. His report as to continued indigency is filed contemporaneously with this brief and shows that he lacks assets and income, has received SNAP food assistance, carries substantial LFO debt, has only a 10th grade education, and has worked only low-paying food service and construction jobs for the last 10 years.

Knapp was found indigent for purposes of appeal. CP 454. The presumption of indigence continues throughout review. RAP 15.2(f). Costs should not be awarded under RAP 14.2 unless the Commissioner receives evidence of a substantial change in the appellant's financial

circumstances. No such evidence appears in the record. Under these circumstances, this court should decline to impose appellate costs.

VI. CONCLUSION

For the foregoing reasons, Knapp respectfully request that the court REVERSE his conviction and REMAND the case for a new trial; or, in the alternative, to STRIKE the $200 criminal filing fee and the $100 DNA collection fee from his judgment and sentence.

RESPECTFULLY SUBMITTED this 2 day of November, 2018.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Leland Honn Knapp IV, DOC #320754
Monroe Correctional Complex – WSR
PO Box 777
Monroe, WA 98272

And, pursuant to prior agreement of the parties, by e-mail to the following:

Andrew Kelvin Miller
Benton County Prosecutor's Office
prosecuting@co.benton.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 2 day of November, 2018 in Kennewick, Washington.

Andrea Burkhart

BURKHART & BURKHART, PLLC

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