

MAY 06 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
No. 363058-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

COUGAR RAY HENDERSON,

Appellant.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This brief is in reply to certain contentions by the State. Cougar Henderson's conviction of second degree rape lacked proof that the complaining witness was forcibly compelled to submit to an attack by him. The State's response misapplies controlling authority and mischaracterizes record evidence.

A medical record was erroneously received in evidence to the prejudice of Cougar Henderson. The State's response that the error was harmless overlooks the State's burden to prove harmlessness, misconceives the prejudicial impact of the document, and disregards a flagrant denial of the defendant's right of confrontation.

The appellant stands by his position concerning the trial court's refusal to allow cross-examination of the complaining witness about Graves' disease, and his position concerning instructional error. The State's contentions need no reply in this brief.

ARGUMENT

I. Controlling authority shows that the State failed to prove factual elements of forcible compulsion, and, therefore, the second degree rape conviction must be reversed.

Two cases underpin the correct analysis that leads to reversal of Cougar Henderson's second degree rape conviction. *State v. McKnight*, 54 Wn. App. 521, 774 P.2d 532 (1989) is misapplied by the State. *State v. Weisberg*, 65 Wn. App. 721, 829 P.2d 252 (1992) is ignored by the State. Both should guide this Court.

In its discussion of *McKnight*, the State purports to find similarities to this case. Attention to the *McKnight* opinion reveals the purported similarities to be inaccurately described or nonexistent. As important, significant factual dissimilarities are unacknowledged:

1. The State asserts that the parties in *McKnight* were of a similar age to the parties here (Brief of Respondent at 11). They were not: the victim in *McKnight* was 14 (*McKnight*, 54 Wn. App. at 522); the complaining witness here was nearly 17 (RP 168:3). One need neither be

a parent nor a pediatrician to know that the difference between a 14-year-old and a 17-year-old is large and stark.

2. The State asserts that “like the parties here” the parties in *McKnight* “engaged in mutual kissing.” (Brief of Respondent at 11). They did not: the victim of McKnight told him “to stop kissing her . . .” *McKnight*, 54 Wn. App. at 522; the complaining witness here willingly participated in kissing. (RP 129:5-9).

3. The State asserts that the defendant in *McKnight* “reclined the victim without her consent and lay on top of her,” “[l]ike the parties here.” (Brief of Respondent at 11). To the contrary, in this case, the complaining witness was in a reclined position, underneath Cougar Henderson, while he “stimulated me manually for awhile, all [both the reclining and the stimulating] of which I didn’t object to.” (RP 129:22-25).

4. The State asserts that the Court in *McKnight* was persuaded by the “parties’ size differential,” *inter alia*. (Brief of Respondent at 13). There was no evidence of a size differential reported in *McKnight*. Here, though Cougar Henderson was bigger than the complaining

witness, there is no evidence that this size differential was of material significance.

5. The State asserts that the scene in *McKnight* was an “isolated location.” (Brief of Respondent at 13). In fact, the scene in *McKnight* was not locationally isolated -- it was the victim’s own apartment; yet, “no one else was at home.” *McKnight*, 54 Wn. App. at 527. That the victim in *McKnight* might have felt isolated, given the aggression of the defendant, is unlike the instant case where the complaining witness planned and engaged in a consensual sexual adventure with Cougar Henderson in his car all the while in possession of her cell phone. (RP 127:15-128:21; 172:10-15).

6. The State asserts that the victim in *McKnight* was sexually inexperienced like the complaining witness in this case. (Brief of Respondent at 13). Although neither had had sexual intercourse, the complaining witness here described her history with Cougar Henderson:

We had met up a previous night and had made out a little bit, fooled around, nothing too serious, and I wasn't naïve, I was expecting something similar.
(RP 127:25 - 128:2).

This young woman was hardly the “unsophisticated” 14-year-old who “was sufficiently naïve not to comprehend fully what had happened during the assault.” *McKnight*, 54 *Wn. App. at 526*.

7. The State asserts that the complaining witness: “. . . cried out and physically resisted by scooting away. . . . For her efforts, E.J. was covered in bruises.” (Brief of Respondent at 13). There is no evidence that the complaining witness cried out at any time on the evening in question. There is no evidence that she scooted away. She reports that she thought about it or attempted it, but no act occurred. (RP 169:22-24). After all, the complaining witness here was voluntarily in a reclined position, underneath Cougar Henderson, enjoying his digital penetration of her vagina, before which she had voluntarily disrobed. (RP 129:22-25; 154:23--155:2; 147:11--150:10). The State’s assertion that the complaining witness was

covered in bruises as a result of resisting Cougar

Henderson's physical attack is plainly false and contrary to the record. (RP 170:15; 130:8-14).

The above points show that *McKnight* supports Cougar Henderson, not the State.¹

Judge Seinfeld's opinion in *State v. Weisberg*, 65 Wn. App. 721, 829 P.2d 252 (1992) establishes the conceptual framework for reviewing this case. In *Weisberg*, 65 Wn. App. at 725, the State conceded that the defendant did not use physical force, but, as here, contended that through his conduct and circumstances, the defendant put the complaining witness in fear of physical injury if she did not comply with his demands. In *Weisberg*, the complaining witness was frightened. Here, the complaining witness was not. Judge Seinfeld noted that proof of forcible compulsion requires more than proof that the defendant's disregard for the victim's feelings could make resistance futile. *Weisberg*, 65 Wn. App. at 726. The "victim's subjective reaction to particular conduct" will not support a claim of forcible compulsion. *Weisberg*, 65 Wn. App. at 725.

¹ Appellant's opening brief at 22-23 provides additional analysis of *McKnight* vis-à-vis this case.

II. Reading the record shows that the State mischaracterized certain evidentiary points that, when viewed accurately, expose the State’s failure to prove forcible compulsion.

The State’s mischaracterization of the record starts early --
in its issue statement:

Is there sufficient evidence that the rape was accomplished by forcible compulsion where the evidence is that the victim verbally objected and then strenuously resisted for several seconds while trapped underneath the defendant sustaining bruises across her neck and chest, finally wedging her elbow between them and then forcing him off of her?
(Brief of Responded at 1).

There is no evidence that the complaining witness here “strenuously resisted” anything. Actually, this assertion presupposes that which the State must prove: that force was exerted by the defendant to cause her to submit to his sexual attack. There is no evidence that Cougar Henderson used any force beyond the pressure of his penis against the complaining witness’s thighs and vulva immediately prior to partial insertion (RP 130:25; 132:8):

- Q. And then he inserted his penis in your vagina?
- A. Yes. He started by advancing towards me with it. He had one

hand on his penis and was pressing and rubbing it up against my vulva and my inner thighs. At that point I began to protest.

Q. Okay.

A. And then after that he *began* to insert it multiple times all the while, while I am protesting.

Q. By protesting you are saying that he was inserting his penis and you were saying don't do that?

A. Saying, 'No. Stop. I don't want to do this.'

(RP 160:5-15; emphasis supplied)

A. No, he never hit me.

Q. Did he use any other physical force or any weapon of any kind?

A. Weapons, no. I would say that the physical presence of him leaning over me, one arm between me and the door, and the car seat behind me, and his hand on his penis shoving it into me, I would call that a physical force.

Q. Okay. But that was all that happened before this event, the sexual intercourse, in terms of physical force?

A. Yes.

(RP 170:15-24).

Physical contact "began" (RP 160:11) and was sufficient to accomplish only partial insertion of the head of the penis. (RP 132:8; 130:25). Obviously, and by her own account, the complaining witness was never the victim of "physical force which

overcomes resistance....” RCW 9A. 44.010(6). Moreover, there is no evidence that the complaining witness “strenuously resisted” prior to penetration by Cougar Henderson’s penis. No force was resisted because there was nothing to resist, by the complaining witness’s own account. (RP 154:23--155:2; 160:5-15).

Far from being trapped, the complaining witness positioned herself voluntarily underneath Cougar Henderson. (RP 129:22-25; 130:2). Indeed, her inferior position was one of several postures and positions of the parties as their sex play entailed their migrating from one front seat to the other. (RP 153:11-154:5). Concerning isolation, the complaining witness had her cell phone and ignored at least one call from her parents on the night in question. (RP 172:10-15; 174:6-8).

No citation to the record is given for the State’s assertions that the complaining witness sustained bruises across her neck and chest as a result of Cougar Henderson’s physical attack. (Brief of Respondent at 1, 13). No citation could be given because the record shows that the bruises or hickeys were the result of sex play with Cougar Henderson that the complaining witness enjoyed. (RP 130:8-14).

A sequential account of the complaining witness's behavior shows that she was never forcibly compelled to submit to penetration. During the complaining witness's sexual engagement with Cougar Henderson on the night in question, the transition from digital to penile penetration was immediate and preceded by no force exerted by Cougar Henderson to compel the complaining witness to submit. There was no continuum of force applied to the complaining witness that culminated in penetration. Arguably, penile penetration occurred without consent, but inarguably, neither digital nor penile penetration occurred as a result of forcible compulsion. It should be noted that partial insertion of the head of penis only began. (RP: 130:25; 132:8; 160:11).

Neither the complaining witness's use of her forearm nor her reported attempt to scoot away shows forcible compulsion. Contrary to the State's assertion, there is no evidence that the complaining witness scooted back in the seat to avoid Cougar Henderson's pursuit, except for her own subjective account of "trying." Clearly, she could have changed seats as she had done previously. (RP 151:2-14; 153:24--154:8). It should also be remembered that the complaining witness had voluntarily placed

herself beneath Cougar Henderson so she could enjoy their sex play. (RP 129:22-25; 154:23--155:2).

As to the complaining witness's reported use of her forearm after Cougar Henderson's penis partially entered her vagina, nothing shows forcible compulsion had been exerted theretofore. No force preceded partial penile insertion. (RP 132:8; 130:25; 170:20-24). The complaining witness raised her forearm and pushed against Cougar Henderson *after* partial insertion occurred and this act was met with compliance in "a few seconds." (RP 169:1-7). One need not be a student of human reaction time to realize that Cougar Henderson immediately complied with the complaining witness's physical manifestation of a lack of consent. Her refusal to allow continued penetration is not resistance to forcible compulsion.

III. In contending that the erroneous admission of a medical record was harmless, the State fails to recognize its burden of proof, its purpose in offering the document, and its flagrant denial of the defendant's right of confrontation.

As shown in the appellant's opening brief, the receipt into evidence of an unauthenticated, hearsay medical record was a manifest abuse of discretion by the trial court. The State has conceded that the admission of the exhibit was erroneous, but now contends that the error was harmless.

In asserting that the erroneous admission of the medical record was harmless, the State contends that the defendant could not have been prejudiced. In reaching this conclusion, the State misconceives the purpose for which the exhibit was offered, and the prejudice presented by its admission.

The exhibit in question was offered not only to show that the complaining witness was not pregnant. The exhibit was offered as evidence that the complaining witness was raped by Cougar Henderson. The exhibit was offered to show that the complaining witness feared she was pregnant because of her sexual contact with Cougar Henderson. The exhibit was offered to corroborate the complaining witness's testimony that she feared pregnancy

because Cougar Henderson raped her. (RP 136:19-20; 301:11-12; 302:15-20; 303:1-4).

By receiving the hearsay medical record in evidence, Cougar Henderson was deprived of the opportunity to expose the actual grounds for the pregnancy test. As stated in the appellant's opening brief, the laboratory report was hearsay and could not be cross-examined. Its author was not there to authenticate it. The medical professional who ordered the laboratory test was not present to explain why it was ordered. This testimony could have been crucial to the defense. The report might have been ordered not because the complaining witness was concerned that the defendant had impregnated her. Indeed, the complaining witness might have been concerned that another person had impregnated her. The laboratory test could have been ordered as part of a medical protocol having to do with prescription medication, *e.g.*, for the Graves' disease from which the complaining witness suffered.

With the medical record in evidence without an opportunity to cross-examine the person who ordered it, and view other documents that would explain it, Cougar Henderson was deprived of a crucial opportunity to challenge evidence of his guilt. The

erroneously admitted exhibit was the only documentary evidence offered by the State to prove that Cougar Henderson was guilty of rape. Its erroneous admission prevented the jury from understanding the medical basis for the pregnancy test, which might well have been inconsistent with the defendant's guilt. Prejudice is clearly shown. The State has failed to carry its burden of showing that the error was harmless. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

Not only did the erroneous admission of the laboratory report constitute prejudicial hearsay. By admitting the report, Cougar Henderson was denied his right to confront witnesses under both the U.S. Const. amend. VI and the Wash. Const. art. I, § 22. The document in question was offered to show that the complaining witness was not pregnant and underwent the invasive test only because she had been raped. Thus, the expert who ordered the test and the expert who performed the test were both (1) witnesses and (2) witnesses against the defendant. Therefore, the “two-part test to determine whether the lack of testimony from a witness who assisted in the preparation of forensic evidence testing implicates the confrontation clause” is satisfied. *State v. Galeana*

Ramirez, 7 Wn. App. 2d. 277, 283, 432 P.3d 454 (2019), relying on *State v. Lui*, 179 Wn.2d 457, 470-71, 315 P.3d 493 (2014).

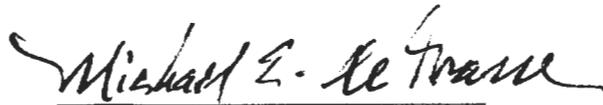
As stated in his opening brief, Cougar Henderson's right to confront adverse witnesses was infringed by the admission of the laboratory report. (Brief of Appellant at 31-32). It should be remembered that the document in question contains no ordinary language stating that someone is pregnant or not. (CP 107; Plaintiff's Exhibit No. 1, Appendix). The document should have been interpreted by a qualified witness who would have been subject to cross-examination. That confrontation right of the defendant was denied. The trial court should be reversed.

CONCLUSION

The trial court judgment and sentence of the defendant should be reversed and the charge dismissed for lack of sufficient evidence. Alternatively, based on the argument set forth concerning cross-examination of the complaining witness, the receipt of hearsay as an exhibit and instructional error, the trial court should be reversed and the case remanded for a new trial.

Dated this 3rd day of May, 2019.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael E. de Grasse". The signature is written in a cursive style with a horizontal line underneath the name.

Michael E. de Grasse,
WSBA No. 5593
Counsel for Appellant

Appendix

PLAINTIFF'S EXHIBIT No. 1
(REDACTED REPORT FROM WOMEN'S CLINIC)

Women's Clinic of Walla Walla

320 W. Willow
Walla Walla, WA 99362
(509) 525-5010

Patient: [REDACTED]

Age/Sex/DOB: [REDACTED]
EMRN: 157371
OMRN: 157371
Home: [REDACTED]
Work: [REDACTED]

Results

Lab Accession # 1342428
Ordering Provider: Reese, Cynthia B
Performing Location:

Collected: 10/28/2013 2:59:00PM
Resulted: 10/28/2013 4:49:00PM
Verified By: Reese, Cynthia B B
Auto Verify: N

HCG, Qual.

Stage: Final

| <u>Test</u> | <u>Result</u> | <u>Units</u> | <u>Flag Reference Range</u> |
|-----------------|---------------|--------------|-----------------------------|
| QUALITATIVE HCG | Negative | | Negative |

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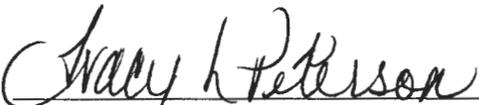
PROOF OF SERVICE
[REPLY BRIEF OF APPELLANT]

Under penalty of perjury, pursuant to the Laws of the State of Washington, RCW 9A.72.085, the undersigned states that copies of the Reply Brief of Appellant were served on James L. Nagle, counsel for the respondent, and Cougar Ray Henderson, appellant, by posting copies of the same on the 3rd day of May, 2019, first class, postage prepaid addressed to:

James L. Nagle
Walla Walla County Prosecuting Attorney
240 West Alder, Suite 201
Walla Walla, WA 99362

Cougar Ray Henderson, DOC #408376
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 3rd day of May, 2019.


Tracy L. Peterson

PROOF OF SERVICE
[REPLY BRIEF OF APPELLANT]

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May 3, 2019

Renee S. Townsley, Clerk/Administrator
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500 North Cedar Street
Spokane, WA 99201

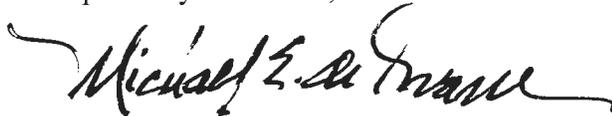
Re: State of Washington v. Cougar Ray Henderson
Cause No. 363058

Dear Ms. Townsley:

Enclosed for filing please find the appellant's reply brief.

Also enclosed for filing is a proof of service showing that a copy of this brief was mailed to counsel for the State and to the appellant.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael E. de Grasse". The signature is written in a cursive, flowing style with a long, sweeping underline.

Michael E. de Grasse

MEdG/tlp
Enclosures

cc: James L. Nagle, Prosecuting Attorney (w/ encls.)
Cougar Henderson, Appellant (w/ encls.)