

80587-3

21989-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN E. MINES, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ROBERT D. AUSTIN

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....7

 A. THERE WAS SUFFICIENT
 EVIDENCE FROM WHICH
 THE TRIER OF FACT COULD
 FIND THE REQUIRED
 ELEMENTS OF THE CRIME7

 B. THE TRIAL COURT DID NOT
 ERR IN IMPOSING AN
 EXCEPTIONAL SENTENCE.....17

CONCLUSION.....19

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BONISISIO, 92 Wn. App. 783, 964 P.2d 1222 (1998), <i>review denied</i> 137 Wn.2d 1024 (1999).....	9
STATE V. BRANCH, 129 Wn.2d 635, 919 P.2d 1228 (1996).....	18
STATE V. BRIGHT, 129 Wn.2d 257, 916 P.2d 922 (1996).....	8
STATE V. CAMARILLO, 115 Wn.2d 60, 794 P.2d 850 (1990).....	18
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980).....	9
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	8
STATE V. HILL, 123 Wn.2d 641, 870 P.2d 313 (1994).....	18
STATE V. JOY, 121 Wn.2d 333, 851 P.2d 654 (1993).....	8
STATE V. MYLES, 127 Wn.2d 807, 903 P.2d 979 (1995).....	8, 9
STATE V. NORDBY, 106 Wn.2d 514, 723 P.2d 1117 (1986).....	17
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988).....	8
STATE V. TILL, 148 Wn.2d 350, 60 P.3d 1192 (2003).....	18

STATUTES

RCW 9.94A.210 (4)..... 18
RCW 9.94A.210(4)..... 17

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to find the Defendant guilty of First Degree Rape.
2. There was insufficient evidence presented to find the Defendant guilty of Kidnapping in the First Degree.
3. There was insufficient evidence presented to find the Defendant guilty of Second Degree Assault.
4. The trial court erred in imposing an exceptional sentence.

II.

ISSUES PRESENTED

- A. WAS SUFFICIENT EVIDENCE PRESENTED FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE CONCLUDED THAT THE DEFENDANT WAS GUILTY OF ALL THREE CHARGES BEYOND A REASONABLE DOUBT?
- B. DID THE TRIAL COURT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE?

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with first degree rape, second degree assault and first degree kidnapping. CP 1-2.

The victim, Jennifer Robinson was shopping on November 7, 2002 and decided to get high on the way home. RP 47-48. She asked her friends to drop her off at a location Ms. Robinson knew about. RP 49. Ms. Robinson smoked some cocaine, took some heroin and then fell asleep. RP 49. After she awoke Ms. Robinson started walking home and was attempting to get a ride.

At some point a van stopped at a nearby stop light and a male passenger asked Ms. Robinson if she wanted a ride. RP 50. Ms. Robinson accepted a ride. RP 50. They were three persons in the van. RP 51. Ms. Robinson did not get a good look at the driver. RP 51. There was a male in the rear seat of the van and another passenger in the middle seats. RP 51.

The male in the back of the van asked Ms. Robinson to perform oral sex and she refused. RP 52. The male began striking Ms. Robinson. RP 52. The victim testified that she was knocked unconscious multiple times. RP 52. The male said that he was going to "...chop me up in little

pieces and drop me in the woods.” RP 53. “He said I was going to dies, he was going to kill me.” RP 53. Ms. Robinson testified that she was told these things several times and the strikings continued. RP 53.

At one point, Ms. Robinson returned to consciousness to find that a light green plastic pop bottle and a screwdriver were being inserted into her vagina and anus. RP 54.

Ms. Robinson repeatedly asked them to stop the van. RP 55. When she asked, she would be told to shut up and be struck again. RP 55. She described being hit so many times as to be barely able to move. RP 55.

Ms. Robinson testified that the van eventually stopped and she and her belongings were thrown out. RP 59. She managed to make it to a nearby residence and summoned help. RP 60-61.

Ms. Robinson picked the defendant’s photo from a montage and she pointed out the defendant in the courtroom. RP 65-66, 248. When asked why she picked defendant’s picture out of the montage she replied, “When somebody repeatedly hits you, and sticks things in you, you don’t forget what they look like.” RP 66.

Dr. Michael Ray, an emergency room doctor, testified regarding contusions to the victim’s forehead, cheeks and around her eyes. RP 107. He testified that there were a number of abrasions and contusions on the

victim's back and marks on the victim's throat consistent with having her throat squeezed. RP 108. The victim also had contusions and bruising on both of her arms. RP 108, 110. The victim had a large area of bruising, swelling and abrasions on her right ear and just behind her right ear.

When asked if he would classify the victim's injuries as "serious injuries," Dr. Ray said he would and that the injuries were consistent with the victim having been "...severely beaten." RP 112. Dr. Ray thought that the victim had sustained a concussion. RP 113.

Photographs of the victim's injuries were admitted throughout Dr. Ray's testimony. RP 107-112.

Dr. Ray examined the victim's rectum and saw scraps of grass and dirt. RP 114. There was also a laceration in the rectum that was approximately an inch long. RP 114. Dr. Ray noted that the victim's genitals were red but at the request of the patient, the doctor did not conduct a further exam. RP 113.

Sharon Smeltzer testified that she was working as a nurse at Deaconess Medical Center on November 8, 2002. RP 151. During a preliminary examination of the victim, Ms. Smelter noticed that the victim had debris everywhere on her body. RP 153. Ms. Smeltzer also noticed a mass between the victim's buttocks consisting of what appeared to be blue fibers, leaves and longer fibers. RP154. As Ms. Smeltzer removed the

mass, she could feel portions of the mass being pulled out of the rectum. RP 155.

Police were able to locate the spot where Ms. Robinson was ejected from the van. RP 189. Police discovered the victim's purse, bra and other belongings along the roadway. RP 189-90. A Mountain Dew pop bottle was located in the brush. RP 259.

The van was located in a local junkyard. RP 221. The van had been completely burned. RP 224, 265.

When interviewed by police, the defendant was angry. RP 268. In response to a question regarding picking up a young blonde female, the defendant stated, "That was a prostitute." RP 269. The defendant admitted to having the victim in the van. RP 272-73. He stated that the victim wanted to go someplace to get drugs and then tried to open the door of the van and jump out. RP 273. The defendant stated that at one point the victim grabbed the steering wheel and he grabbed her by the hair and pulled her down. RP 273. The defendant denied that anyone had hit the victim. RP 274. Later in the interview the defendant stated "That bitch was a smoker. I don't know who hit her, the only thing I did was grab that bitch by the hair because she was trying to wreck the van, because she is a smoker." RP 278. Towards the end of the interview, the defendant stated that he did hit the victim but he did not sexually assault her. RP 279.

Denise Olsen, a forensic scientist at the Washington State Patrol Crime Lab testified that a swab obtained from the recovered Mountain Dew bottle contained the victim's DNA. RP 324.

A co-defendant, Clinton Cramer testified that he was the owner of the van in question. RP 334. He stated that on the date in question he was in the van with the defendant and David McKibben. RP 334. Mr. Cramer testified that the defendant came up with a plan to pick up a prostitute, beat her up and take her money. RP 338. The reason for the planned robbery was because they were "...low on rent that month." RP 338.

Mr. Cramer testified that he was driving when they asked the victim if she wanted a ride. RP 340. Mr. Cramer testified that the victim asked to be let out of the van, but he kept driving. RP 342. Mr. Cramer stated that the defendant told him to continue driving. RP 343. Mr. Cramer stated that he heard sounds from the back of the van such as wrestling around and perhaps a fist hitting a face. RP 344. He also noted that his van contained tools including several screwdrivers. RP 345. Mr. Cramer heard the defendant ask the victim if she had any money. RP 348. At one point the victim came to the front of the van but was pulled back by the defendant and McKibben.

At one point the defendant asked Mr. Cramer to turn around and look at the activities. RP 355. Mr. Cramer saw the defendant inserting a

Mountain Dew bottle into one of the victim's body cavities. RP 356. Mr. Cramer described the victim's face as crying with blood on it. RP 357. She was completely nude. RP 357. Mr. Cramer said, "Let this girl out." RP 359. Mr. Cramer saw the defendant go through the victim's belongings and then throw them out of the van. RP 361.

Back at their residence, the defendant told Mr. Cramer that he had put a Mountain Dew bottle and a screwdriver into the victim. RP 364. Mr. Cramer related that the defendant described kicking the bottle once it was inside the victim. RP 364. According to Mr. Cramer, the defendant found the incident to be humorous. RP 364. The defendant also was laughing as he described hitting the victim. RP 367.

The defendant was convicted as charged. CP 227-28. This appeal followed. CP 240-41.

IV.

ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE TRIER OF FACT COULD FIND THE REQUIRED ELEMENTS OF THE CRIME.

Defendant claims that there was insufficient evidence to support his convictions. The problem with defendant's argument is that nowhere does the defendant outline the correct caselaw and standards for a

sufficiency of the evidence argument. The defendant applies a “beyond a reasonable doubt” standard. Brf. of App. 20. This standard has never been applied to a sufficiency of the evidence analysis.

The correct standard is well settled. “There is sufficient proof of an element of a crime to support a jury’s verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt.” *State v. Bright*, 129 Wn.2d 257, 266 n.30, 916 P.2d 922 (1996). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995).

“[T]he question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Myles*, 127 Wn.2d at 816 (quoting *State v. Joy*, 121 Wn.2d 333,

338, 851 P.2d 654 (1993)). All reasonable inferences from the evidence are drawn in favor of the State and interpreted against the defendant. *Myles*, 127 Wn.2d at 816.

The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

If the defendant is urging that this court reject the current standard and switch to a “reasonable doubt” standard, he has not provided any compelling logic for doing so. Because defendant’s arguments all assume a “beyond a reasonable doubt” standard, they are mostly irrelevant. Defendant’s arguments do not properly assume that every single piece of the State’s case is accepted valid and credible. Similarly, the defendant spends much time on credibility issues as related to various witnesses presented by the State. This is a complete waste of ink and paper. Credibility is never an issue in a sufficiency of the evidence argument. All of the State’s evidence is taken as true and all inferences from that evidence are resolved in the State’s favor.

The elements of first degree rape are:

1. Date
2. Sexual intercourse
3. Forcible compulsion
4. Serious physical injury
5. State of Washington.

The date and location were not contested.

The defendant claims on appeal that there was “...no evidence...” that he engaged in intercourse by forcible compulsion. Brf. of App. 23. This claim is based on the assertion that the victim “...was not able to say with certainly [sic] that he was the one who put anything into her body cavities.” Brf. of App. 23. The defendant was shown a photomontage in court and asked, “What was it about the person in number four that make you pick that individual out as the person that did these things to you on November 8th?” RP 66. The victim replied, “When somebody repeatedly hits you, and sticks things in you, you don’t forget what they look like.” RP 66. Further, the testimony of Mr. Cramer makes it very clear that the defendant was the person inserting the Mountain Dew bottle into the victim and also kicking the bottle while it was inside the victim.

The defendant acknowledges that Mr. Cramer’s testimony implicated the defendant as having inserted items into the victim. The defendant attempts to expunge Mr. Cramer’s testimony by pointing out

alleged credibility issues. As noted before, credibility issues are utterly irrelevant for the purposes of an insufficient evidence analysis.

The defendant also ignores the fact that the victim's DNA is found on a Mountain Dew bottle thrown out in the bushes near where the victim said she was ejected from the van. This is powerful corroborating evidence.

Defendant states on appeal that "...there was no direct testimony about a screwdriver (deadly weapon) being used...." Brf. of App. 23. Presumably, the reason the defendant raises this issue is because of the elements for first degree rape which the defendant lists in his brief. Unfortunately for the defendant's arguments, the list of elements he provides are not the ones given to the jury. There is no mention of "deadly weapon" anywhere in the elements of first degree rape as this jury was instructed. RP 454-55. The defendant's arguments regarding the recovery of a screwdriver have nothing whatever to do with the elements of first degree rape in this case.

Similarly, the defendant makes arguments regarding a "kidnapping element" for first degree rape. Brf. of App. 24. There was no "kidnapping element" in the rape charge submitted to this jury. RP 454-55

"Forcible compulsion" was defined as "...physical force which overcomes resistance..." RP 455. The testimony of the victim is such

that any rational trier of fact was supplied with sufficient evidence to support a finding that the insertion of the bottle and screwdriver were accomplished using “forcible compulsion.”

Likewise, the testimony of the ER doctor supplied ample evidence from which a rational trier of fact could conclude that the victim suffered serious physical injury. In an odd twist, the defendant faults the victim because she would not allow the doctor to do a thorough examination. Brf. of App. 24. The defendant neglects to mention that the reason the victim declined complete pelvic exam is because of pain from the defendant’s rape. The defendant is also apparently laboring under the misapprehension that the only injuries that “count” would be those occurring in the pelvic region. If so, he does not present any authority for that position. The State submits that the element of “serious physical injury” means injuries to any part of the body. As noted elsewhere, the ER doctor’s testimony, the victim’s testimony and the photographs of the injuries to the victim offer more than enough evidence for a rational trier of fact to conclude that all of the elements of first degree rape were met.

As for the kidnapping conviction, the defendant points out that the victim was not “intentionally abducted.” Brf. of App. 25. The defendant arrives at that startling conclusion by pointing out that the victim willingly got into the van. What the defendant fails to retrieve from the record is

that the plan was to abduct a prostitute and beat her up for her money. This scheme was to be carried out because the defendant and his friends were short of cash. The testimony of the victim as well as that of Mr. Cramer contain multiple instances of the victim asking to be let out of the van and attempting to flee. She was prevented from fleeing by the defendant.

Between the testimony of the victim as to the acts perpetrated on her and her identification of the defendant as one of those who were perpetrating the acts there was more than sufficient evidence to support the jury's verdicts.

The defendant's arguments regarding the sufficiency of the evidence to support the second degree assault conviction have a surreal quality. In his brief, the defendant only acknowledges the incident of "slapping" the victim while pulling her away from the steering wheel (during her efforts to flee). Brf. of App. 26-27. The defendant converts this incident in a quasi-self-defense action.¹ Brf. of App. 27. Defendant claims on appeal that there was "no evidence" that any actions by the defendant amounted to torture and it is "unclear" if a screwdriver was

¹ Apparently, by defendant's reasoning, the defendant was entitled to grab the victim away from the steering wheel by the hair and to strike her because "...almost cause the to crash." The defendant leaves out the part about the reason for the victim's grabbing of the steering wheel was a desperate attempt to escape from the defendant's repeated blows. The defendant leaves his argument hanging as to the motive for the victim's facially suicidal grabbing of the steering wheel.

actually used. Brf. of App. 27. This argument completely ignores the bulk of the record including the victim's testimony, the ER doctor's testimony as to the extensive contusions, the photographs, the testimony of Mr. Cramer, etc.

The defendant did not contest the date, or that the events occurred in Washington, so the first contested element for the assault charge is that the defendant "knowingly inflicted bodily harm" on the victim. RP 457. "Bodily harm" was defined for the jury as "physical pain or injury, illness or an impairment of physical condition." RP 459. Any rational trier of fact who listened to the victim's testimony and looked at the photographs of her injuries could have concluded that she suffered physical pain or injury. This element is clearly supported by the evidence.

The next element has two alternatives. The first one is that the "...bodily harm, by design, caused such pain or agony as to be the equivalent of that produced by torture." RP 457. The doctor testified as to the injuries being serious. RP 112. The victim testified to being struck multiple times and the doctor's testimony indicated contusions on the face, head, arms, back and throat. 52-53 107-110.

The alternative element, assaulting the victim with a deadly weapon, is met by the use of a screwdriver. For reasons that are not apparent, defendant asserts (again) that there was "...no proof..." that a

deadly weapon was used. As pointed out above, the victim testified that the defendant had a screwdriver. RP 54. Mr. Cramer testified that the defendant told him that the defendant had inserted a screwdriver into the victim. RP 364. As noted before, it was up to the jury to determine if the screwdriver amounted to a deadly weapon.

The conviction on the charge of second degree assault was supported by evidence from which a rational trier of fact could find all of the required elements. There was no error as to that charge.

The defendant also claims there was insufficient evidence to support his conviction for first degree kidnapping.

The contested elements for the first degree kidnapping charge in this case are:

1. Intentionally abduct another person.
2. Abduction was with intent to facilitate the commission of a felony or flight thereafter.

“Abduct” was defined for the jury. “Abduct means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found or using or threatening to use deadly force.” RP 460.

Inexplicably, the defendant ignores the definition of first degree kidnapping provided to the jury and argues from different language that

was never presented to the jury. Thus, the defendant formulates arguments such as "...there was nothing presented to show that she was held for ransom or reward or shield or hostage." Brf. of App. 25. The State never based its case on any of those theories, so there would be no reason to adduce evidence related to irrelevant topics. It appears the defendant is taking the position that there must be evidence produced to cover all possible alternative ways of committing first degree kidnapping. If so, the defendant has presented no authority to support that position.

Defendant discounts Mr. Cramer's testimony regarding the plans to abduct and rob a prostitute, saying that Mr. Cramer was not credible. Brf. of App. 25. At the risk of being repetitious, it does not matter in the slightest what the defendant thinks of Mr. Cramer's credibility. The witness' testimony is taken as truthful and *all* inferences are resolved in the State's favor.

The element of abduction would be fulfilled by the testimony that the victim was restrained in the van and the testimony regarding threats to kill the victim. RP 53, 55. Arguably other combinations of the facts could meet the element but the testimony cleared showed that the defendant intended to restrain the victim and used threats of death during the process of executing either the originally planned crime of robbery or the actualized crime of rape.

It is, perhaps, worthwhile to point out that the jury was given several alternative lesser-included charges from which they could have selected lesser crimes that they felt were more apt to the facts. The jury chose not to apply any of the lesser-included charges.

It is also relevant to note that the trial court found that all the crimes were committed in the "same course of conduct" and sentenced the defendant concurrently. Thus, the sufficiency of the evidence in the kidnapping and assault counts is largely academic.

B. THE TRIAL COURT DID NOT ERR IN IMPOSING AN EXCEPTIONAL SENTENCE.

The defendant claims there was insufficient evidence to support an exceptional sentence. This claim is a continuation of defendant's previous attempts to re-try the case.

The standards of review for examining an exceptional sentence are clearly established. An exceptional sentence may be challenged on any or all of three bases: (1) the reasons given for the exceptional sentence are not supported by the record; (2) the reasons given do not justify an exceptional sentence; (3) the sentence is clearly too lenient or too excessive. RCW 9.94A.210(4); *State v. Nordby*, 106 Wn.2d 514, 517-518, 723 P.2d 1117 (1986).

The defendant only challenges the first factor, claiming that the victim and Mr. Cramer were not credible.

The findings of the trial court will be reviewed under a clearly erroneous standard. *State v. Branch*, 129 Wn.2d 635, 646, 919 P.2d 1228 (1996); RCW 9.94A.210 (4). “Under the clearly erroneous standard, reversal is required only if there is not substantial evidence supporting the findings.” *Branch*, 129 Wn.2d at 646. “Substantial evidence” means evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The trial court relied on “deliberate cruelty” as the reason to impose a sentence outside the standard range. “Deliberate cruelty” during a rape is a valid aggravating factor. *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). As noted by the trial court at sentencing, the actions of the defendant were “...designed to humiliate, to injure.” RP 521.

The defendant does not actually dispute the amount of evidence to support the finding of “deliberate cruelty.” The defendant’s tack is that the evidence that is in the record should not be believed. That is not a valid argument on appeal and should be rejected. There was substantial

evidence to support the trial court's finding of "deliberate cruelty" and thus there was no error in imposing the exceptional sentence.

V.

CONCLUSION

For the reasons stated the conviction of the defendant should be affirmed.

Dated this 11th day of December, 2003.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent