

FILED
SUPREME COURT
STATE OF WASHINGTON
6/29/2020 2:55 PM
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No. 98067-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,

v.

LELAND HONN KNAPP, Petitioner.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 17-1-00008-0

SUPPLEMENTAL BRIEF

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I. IDENTITY OF PETITIONER

The State of Washington, by and through Benton County Prosecutor Andy Miller and Deputy Prosecuting Attorney Terry J. Bloor, asks this Court to accept review.

II. STATEMENT OF FACTS

The case against the defendant:

On February 7, 2016, which was Super Bowl Sunday, the defendant unexpectedly came to B.S.'s residence. RP at 614-15. B.S. was then 33 years old and had known the defendant since high school. RP at 613-14. She had been his manager at a Jack in the Box in 2000 and described their relationship as a friendship. RP 614, 627. She said that they had never had sex before. RP at 625.

Although it was not unusual for him to visit, on this date things were not normal. RP 615-16, 627. The defendant started speaking to her in vulgar, sexual terms. RP at 615. He leaned in to kiss her and she told him "No." RP at 616. He left after this rebuff. *Id.* But he returned on the pretense that he forgot a bandana at the residence. *Id.*, *See Ex 5.*

B.S. let the defendant in her residence again, but this time he immediately threw her to the ground and started pulling down her pants. RP at 616-17. She tried to scream, but he gagged her with the bandana. RP at 619. When she struggled, he tried to bind her hands or wrists with the

bandana. RP at 620.

She continued to struggle on the floor but was not able to get away. RP at 621. He threw her glasses somewhere, pulled down her underwear and raped her. *Id.*

She stated he was “really quick” and got off her. RP at 625. They both pulled up their pants and B.S. found her glasses. *Id.* The defendant told her that she would be his first or sixteenth rape, she would never know. RP at 626. He left on foot. *Id.*

B.S. stated she was in shock and telephoned her mother. *Id.* Michelle Hammers, B.S.’s mother, confirmed she received a telephone call from B.S. saying she had just been raped. RP at 588, 607. She stated that B.S. was crying and upset on the phone, which is out of the ordinary for her. RP at 588. She told B.S. to call the police and sped to her house. RP at 607. B.S. was still crying and upset when Ms. Hammers arrived at her house. RP at 608.

B.S. stated that her coffee table was pushed forward toward the TV, that her rug was messed up, and that coffee was spilled during the struggle. RP at 623-24. Exhibit 1 shows where the rape occurred, and Exhibit 4 shows the coffee stain. See Exs. 1, 4; RP at 623.

B.S. was taken to a hospital where she was seen by a Sexual Assault Nurse Examiner (SANE). RP at 515-16. The SANE nurse found

there was bruising to the prepuce, which is the clitoral head and also a tear to the posterior fourchette. RP at 533. On cross-examination the SANE nurse testified that these injuries could have been caused by consensual sex. RP at 540.

The bandana was examined by Alison Walker, a DNA scientist with the Washington State Patrol Crime Laboratory, who found B.S.'s saliva on it, with the odds against a random match at 1 in 40,000,000,000,000,000. RP at 577. Ms. Walker also found a DNA match of B.S.'s skin cells on the bandana with the odds against a random match at 1 in 4,000,000,000,000,000,000. RP at 579.

The defendant's version:

The defendant began with a direct statement that he did not force B.S. to have sex with him. RP at 637. From there things appear to have gone awry. Here are some highlights of his testimony.

In explanation of why he went to B.S.'s house, the defendant said he went to invite her to a birthday party, or to pay back a debt, or to tell her had cancer, which he does not have, or to say hello to a friend. RP at 638, 660. When asked about the inconsistencies, he stated, "Two different people. From there to them. No. From then to here." RP at 661.

The defendant admitted he was high on methamphetamine. RP at 639. He also used alcohol that day and the alcohol and methamphetamine

affected his judgment. RP at 650. In fact, he stated his consumption of methamphetamine and alcohol were to the point that he was incoherent. RP at 648.

The defendant said that B.S. noticed he was high, requested methamphetamine from him, and offered sex in exchange for the drug. RP at 639, 642-43. He did not want to have sex with her or give her methamphetamine, but caved in, even though he did not have any methamphetamine. RP at 642, 644, 649. When he did not provide her with methamphetamine, the defendant said B.S. became irate and said she would call the police and report she had been raped. RP at 644.

He did not believe she was serious about calling the police. RP at 645. When he was arrested, he thought it was for a warrant for a legal financial obligation. RP at 645-46. No officer had told him he was under arrest for rape or discussed allegations of rape with him. RP at 650. Nevertheless, he told Officer Sagan that “It’s her word against mine.” RP at 487, 647. He testified he deduced that B.S. had called the police about the rape. *Id.*

There was no attempt by the defendant to explain how B.S.’s saliva or skin cells got on his bandana.

Key instructions given by trial court:

The trial court gave the following instructions relevant to this

appeal:

“To convict the defendant of the crime of rape in the second degree, each of the following three elements must be proved beyond a reasonable doubt: . . . (2) That the sexual intercourse occurred by forcible compulsion” CP 427. The defendant did not object to this instruction. See App. A.

“Forcible compulsion means physical force that overcomes resistance” CP 429. See App. B.

“Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse.” CP 430. See App. C.

Defendant’s proposed instructions:

The defendant did not object to the “to-convict” instruction. However, the defendant proposed as alternatives to the other two:

“Forcible compulsion exists when both of the following elements are present: (1) a person has not consented to sexual intercourse; (2) that person has been subjected to physical force that overcomes resistance” CP 411. See App. D.

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 the sexual intercourse was consensual. It is the State’s burden to prove

the absence of consent beyond a reasonable doubt.

CP 412. See App. E.

III. ARGUMENT

A. Standard on review:

Jury instructions must convey to the jury that the State bears the burden of proving every element of the crime charged beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). The review is de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

B. The trial court's instructions met this standard, are consistent with *State v. W.R.*, and did not shift any burden to the defendant.

The defendant's proposed instructions added an element to the crime of Second Degree Rape in RCW 9A.44.050 (1)(a). The State would have to prove that a person engaged in sexual intercourse with another, by forcible compulsion *and a lack of consent*. That instruction is not consistent with caselaw or the statute. The trial court's instructions are consistent with caselaw, an accurate statement of the law, and do not shift any burden to the defendant.

The trial court's instructions on consent were based on a change in WPIC 18.25 following the decision in *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). The defendant reads *W.R.* as holding that the State must disprove a victim consented to a sexual assault. That was not the holding of *W.R.*

The Court in *W.R.* held that the defense of consent negates the element of forcible compulsion in a Second-Degree Rape case. *Id.* at 763. "Therefore, once a defendant asserts a consent defense and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion." *Id.* The burden of proof is improperly shifted to the defendant if he or she must affirmatively prove the alleged victim consented. *Id.* at 768.

The dissent in *W.R.* argued that the majority ruling would place the burden on the State to disprove consent and would invalidate years of work undertaken to refocus the law on rape on the perpetrator, not the victim. *Id.* at 772. The *W.R.* majority addressed these concerns. Regarding the fear of returning to days when the focus was on the rape victim, the majority cited a law review article, Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 Wash. L. Rev. 543, and said that the focus was still on the

actor's use or threatened use of force rather than the victim's conduct.
W.R., 181 Wn.2d at 767.

Regarding the dissent's concern that the State would have to disprove consent, the majority wrote in footnote 3, "Because the focus is on forcible compulsion, jury instructions need only require the State to prove the elements of the crime. It is not necessary to add a new instruction on consent simply because evidence of consent is produced."
Id. at 767 n.3.

The majority in *W.R.* two additional times stated that consent was included in the element of forcible compulsion, and that the prosecution was not required to prove both a lack of consent *and* forcible compulsion. "Recognizing that the State's burden to prove forcible compulsion encompasses the concept of nonconsent is consistent with rape reform laws." *Id.* at 767. "Washington and '[m]odern statutory and decisional law do not treat force and nonconsent as separate formal elements.'" *Id.*, citing the above law review.

As a result of *W.R.*, WPIC 18.25 was modified to read, "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have [sexual intercourse] [sexual contact]." The trial court in this case used that instruction.

This court commented on the amended WPIC 18.25 in *State v.*

Imokawa, 194 Wn.2d 391, 450 P.3d 159 (2019).

Thus, W.R. teaches, and the new WPIC recognizes, that so long as the burden is not shifted to the defendant in the instructions, the jury need not be instructed as to the State's burden to prove absence of a defense; it need only be specifically instructed on the essential elements of the crime.

Id. at 400-01.

The issue in *Imokawa* is analogous to the issue here. Mr. Imokawa was charged with Vehicular Homicide and Vehicular Assault. This Court held that instructions were sufficient where one instruction stated that the State had the burden of proving proximate cause and another instruction stated that proximate cause was not proven if there was a superseding intervening cause of death or injury. *Id.* at 402. Likewise, in this case if the jurors had a reasonable doubt about whether B.S. consented to the intercourse rather than was forced into it, they would have acquitted the defendant.

State v. Ortiz-Triana, 193 Wn. App. 769, 373 P.3d 335 (2016) is also helpful. That case involved a charge of Rape in the Second Degree and a defense of consent. The case was apparently tried before WPIC was amended. The defendant proposed an instruction which stated:

Consent is an affirmative defense to the crime of rape and the defense bears the burden of proving consent by a preponderance of the evidence. *Even if, however, you do not find consent established by a preponderance of the*

evidence, you may still consider evidence of consent in determining whether or not the defendant acted with forcible compulsion and if you find that there is sufficient evidence to raise a reasonable doubt as to that element, you must acquit the defendant of the charge of rape in the first degree.

Id. at 779-80. The Court held that the above italicized portion was consistent with the decision in *W.R. Id.* at 780.

If the State had to prove an absence of consent *and* that the defendant used forcible compulsion, it would lead to the kind of victim-shaming that the dissent in *W.R.* feared and would result in acquittals for defendants who used forcible compulsion but whose victims were unable to express themselves. In addition to proving that the defendant forced a victim to engage in intercourse, the State would have to prove the victim clearly expressed by words or conduct no agreement to have sexual intercourse or sexual contact. RCW 9A.44.010 (7); *State v. Higgins*, 168 Wn. App. 845, 854, 278 P.3d 693 (2012). While consent may negate forcible compulsion, the lack of words or actions by the victim telling the perpetrator “no” does not negate forcible compulsion. A perpetrator may use force whether or not a victim clearly states an objection to sexual contact or intercourse. Some scenarios may help explain.

First scenario: Adam displays a knife to Bill in a public bathroom, pushes him into a stall, pulls down Bill’s pants and has intercourse with

him. Bill, fearing Adam's knife, does not fight back and does not say anything. The State would be able to prove forcible compulsion. But if lack of consent and forcible compulsion are separate elements, it would be difficult to prove that lack of consent because Bill by his own words or conduct never indicated a lack of agreement for the intercourse.

Second scenario: Jill is talking to Tom at a party. Suddenly, Tom pushes Jill onto the floor, uses his body to pin her arms, pulls up her blouse and gropes her breasts. This happened so quickly Jill was unable to do or say anything. The State can prove forcible compulsion, but the prosecution could not prove lack of consent because Jill had no time to say anything.

Third scenario: While watching the Super Bowl, a man gags a woman, forces her onto the floor, and has sex with her. The defendant tells police "it's her word against mine" and the defense attorney in closing argument says "it's a problem" for the prosecution that no neighbor heard the victim yell for help. Since the victim was gagged before she could say anything, the prosecution may have difficulty proving she did not clearly express an objection to the intercourse.

The third scenario is close to what happened in this case, except that B.S. told the defendant, "Stop, no, don't do this." RP at 623. B.S. testified she was sitting on her couch when the defendant threw her to the

ground. RP at 617. He started pulling her pants down. *Id.* She was in shock. RP at 618. The defendant gagged her when she tried to scream for her neighbor's help. RP at 619.

In closing argument, the defense attorney said, "It's a problem" that she did not scream loudly enough for her neighbors to hear. RP at 717. This focus on the victim's actions is exactly the type of backward step the dissent and majority in *W.R.* wanted to avoid.

The instructions also allowed the defendant to argue his theory of the case—that B.S. consented to the intercourse. The defense attorney stated in closing argument, "Leland does not have to prove consent. This is all on the State." RP at 711. And, "The State cannot prove forcible compulsion because the State cannot foreclose the reasonable possibility that there was consent." RP at 712.

C. It is at least arguable that beyond a reasonable doubt the defendant would have been convicted if the trial court used his instructions.

The jury believed that the defendant used forcible compulsion in having intercourse with B.S. beyond a reasonable doubt. The evidence of forcible compulsion was strong. The DNA evidence from the defendant's bandana was consistent with B.S.'s testimony that he used the bandana to gag her and tried to bind her hands with it. The police found signs of a struggle at B.S.'s residence. B.S. had bruising that could be consistent

with rough sex but could also be consistent with being raped. If an affirmative statement of consent negates forcible compulsion, the jury would have found the defendant guilty even if his own instruction was used.

This Court will not guess how the jury viewed the testimony of the defendant, but by any objective measure, he did not do well when testifying. He gave four different versions of why he went to B.S.'s residence on that Super Bowl Sunday. He admitted he was using methamphetamine and alcohol to the point of incoherence. At times he seemed to speak in riddles.

Even if the defendant's instructions were used, he would have been convicted beyond a reasonable doubt. The conviction should be affirmed under a harmless error analysis. *State v. Fuller*, 169 Wn. App. 797, 813, 282 P.3d 126 (2012).

IV. CONCLUSION

For the foregoing reasons, the conviction should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of June, 2020.

ANDY MILLER

Prosecutor



Terry J. Bloor,

Deputy Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

#46390 for

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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E-mail service by agreement to:
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Signed at Kennewick, Washington on 29th day of June, 2020.


Demetra Murphy
Appellate Secretary

APPENDICES

Appendix A: CP 427
Appendix B: CP 429
Appendix C: CP 430
Appendix D: CP 411
Appendix E: CP 412

Appendix A

CP 427

INSTRUCTION NO. 7

To convict the defendant of the crime of rape in the second degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 7, 2016, the defendant engaged in sexual intercourse with Brandy Spaulding;

(2) That the sexual intercourse occurred by forcible compulsion;
and

(3) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (3), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

Appendix B

CP 429

INSTRUCTION NO. 9

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

Appendix C

CP 430

INSTRUCTION NO. 10

Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse.

Appendix D

CP 411

Instruction No. _____

Forcible compulsion exists when both of the following elements are present:

- (1) a person has not consented to sexual intercourse,
- (2) that person has been subjected to physical force that overcomes resistance, or a threat, express or implied, that places the person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

If after your deliberations you find beyond a reasonable doubt that both elements 1 and 2 exist, you are satisfied beyond a reasonable doubt that the State has proven the element of forcible compulsion. If, on the other hand, you have a reasonable doubt as to the existence of element 1 or 2 or as to both elements 1 and 2, then the State has not proven the element of forcible compulsion, and it will be your duty to render a verdict of not guilty.

Appendix E

CP 412

Instruction No. _____

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.

BENTON COUNTY PROSECUTOR'S OFFICE

June 29, 2020 - 2:55 PM

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