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September 2, 2016
Court of Appeals
Division I
State of Washington

No. 73452-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DOMINGO MONTAR-MORALES

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S REPLY BRIEF

MICK WOYNAROWSKI
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The State misses the point; the seizure was unlawful because it was an arrest made without probable cause.

At trial and on appeal, Domingo Montar-Morales has consistently argued the police had *arrested* him without probable cause, which is why the seizure was unlawful. AOB at 1-4, 11-20. The State’s response brief does not address the argument that what the police did to Mr. Montar-Morales exceeded what is allowed under Terry. Instead, ignoring the scope of the physical intrusion upon Mr. Montar-Morales’ liberty, the State clings to an isolated appellate opinion which deemed someone else’s thirty-minute detention as reasonable under Terry.¹

The State’s analysis is far too narrow. The length of the detention is just one indication of *arrest*; the forced transport away from the scene confirms the police action exceeded the scope of lawful investigatory detention.

The State avows that Officer McCloud could have taken Mr. Montar-Morales “to the scene of the alleged rape,” but the case turns on

¹ BOR at 18-19, 21, citing State v. Bray, 143 Wn.App. 148, 177 P.3d 154 (2008).

what the police did, not what could have been. BOR at 20. The seizure was unlawful because the police handcuffed Mr. Montar-Morales and forced him to go to a hospital as their charge.

The police decision not to attempt an eyewitness show-up confirms this was not an investigatory stop. Because Mr. Montar-Morales was arrested without probable cause, the motion to suppress evidence should have been granted. This Court should reverse and order a new trial.

This Court must analyze Mr. Montar-Morales' appeal through the line of cases which focus on how police-ordered movement of a suspect affects the lawfulness of a seizure. E.g. State v. Wheeler, 108 Wn.2d 230, 233, 737 P.2d 1005 (1987) (AOB at 12, 14); Florida v. Royer, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (AOB at 12-13, 18). Alarming, the State's response does not even cite to Florida v. Royer, let alone discuss it.

Unwilling or unable to respond to Mr. Montar-Morales' argument, the prosecution repeats that what was done to Mr. Montar-Morales can survive judicial scrutiny under State v. Bray. However, that case deals only with the duration of detention question and

provides nothing of use with respect to the transport issue critical to addressing Mr. Montar-Morales' appeal. AOB at 16-20.

It is plain from the record that Officer McCloud made Mr. Montar-Morales get into his squad car (handcuffed), drove him to the hospital against his will, and overruled Mr. Montar-Morales' repeated refusals of medical treatment. The State simply failed to discuss how moving a suspect, against his will and not for any witness show-up, affects the Terry stop scope issue.²

As discussed in the appellant's opening brief, the relevant cases establish that moving a suspect to a police station for questioning is most definitely an arrest. On the other hand, as in State v. Wheeler, simply bringing a suspect for a witness show-up may still be permissible under Terry. In this appeal, where there was a complete and lasting deprivation of Mr. Montar-Morales' liberty, combined with an objected-to movement away from the scene – critically, a movement done for a non-investigatory purpose – what occurred was an arrest.

The State has not supplied any authority to support the claim that the police can put handcuffs on a suspect, search him, order him to sit, leave him in handcuffs, drive him against his will to a hospital,

² The State also never responded to Mr. Montar-Morales' argument that the police action here violated his autonomy to decline medical treatment. AOB at 16.

make him go inside as he continues to say he does not want to go, lock him to a gurney, and order that he receive medical care he has refused, all under the guise of a Terry investigatory detention.

The State has not provided any such authority because none exists. All that State v. Bray indicates is that a lengthy duration of a detention, by itself, does not always transform a Terry stop into an arrest. Bray, however, does not change the rule of law that a Terry detention is supposed to be brief and as un-intrusive as possible.

Furthermore, Fifth Amendment caselaw dealing with police-suspect contacts occurring inside hospitals confirms that Officer McCloud arrested Mr. Montar-Morales. In deciding whether a patient/suspect is in custody for Miranda purposes, our courts have consistently looked to how they got to the hospital and who is controlling their freedom there.

For example, the suspect in State v. Kelter, 71 Wn.2d 52, 54, 426 P.2d 500 (1967) was in the hospital and under investigation for causing a fatal car crash when the police interviewed him. He had not “been placed under arrest or otherwise restrained by the police,” so the interview did not call for Miranda warnings. Similarly, in State v. McWatters, 63 Wn. App. 911, 915, 822 P.2d 787 (1992), as modified

(Feb. 18, 1992), paramedics brought a severely injured motorcyclist to the hospital. Later, a police officer visited to issue a traffic citation and McWatters made an inculpatory admission. His un-Mirandized statement was admissible at trial because McWatters was not in police custody.

The suspect in State v. Butler, 165 Wn. App. 820, 827–28, 269 P.3d 315 (2012), was brought to a hospital by ambulance, where he “remained in a coma and in intensive care for several days.” When the police saw him there, there again was no need for Miranda warnings because:

Mr. Butler similarly was restricted to his hospital room because of his injuries. No police were stationed inside or outside Mr. Butler's room. And it was Mr. Butler's nurse, Mr. Henry, who ultimately controlled access to Mr. Butler.

Id.

In contrast, the police brought Mr. Montar-Morales to the hospital and did so against his will. The police, not the hospital's medical staff, restricted his movements. The police handcuffed him to a gurney, not any doctor or nurse.³ The question of whether a suspect is

³ Compare with State v. Kendall, 2007 WL 541959 (2007) (defendant not in police custody at time of questioning because she was “restrained as part of [the hospital's] suicide watch, and not because of any police action). Non-binding unpublished opinion cited for persuasive value only. GR 14.1(a).

in custody turns on “whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest.” State v. Lorenz, 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004). Here, Mr. Montar-Morales was handcuffed, searched, left in handcuffs, put in the back of a squad car, moved against his will, made to submit to unwanted medical intervention, declared “fit for jail,” and finally taken to jail. This was an arrest.

The State has not met its burden of proving that the seizure effectuated against Mr. Montar-Morales was lawful at its inception and throughout its scope and duration. The trial court should have granted the motion to suppress. This Court should reverse.

2. Whether defense counsel renewed the motion to sever at the close of the State’s case is immaterial; the joinder of the charges was highly prejudicial.

Upon re-review of the record, undersigned counsel agrees with the State’s assertion that Mr. Montar-Morales’s trial counsel did not renew his motion to sever at the close of the State’s case. BOR at 22.

Under CrR 4.4(a), an attorney’s failure to renew a motion for severance amounts to a waiver. But counsel’s failure to move to sever may be addressed on appeal in the context of a claim of ineffective assistance of counsel and that is why this Court should nonetheless

reach the issue. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); U.S. Const. amend. VI. The Court presumes counsel was effective and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. McFarland, 127 Wn.2d at 335.

Counsel's failure to move to sever multiple charges amounts to ineffective assistance of counsel that requires reversal if there was no legitimate tactical reason for counsel's failure to act, and the defendant was prejudiced as a result. Sutherby, 165 Wn.2d at 884.

To be clear, trial counsel certainly briefed and litigated the severance issue pretrial. CP 161-70; 125-26; IRP 83-86. Those earnest pretrial efforts to separate the property charges from the sexual offense show that there was no tactical reason for the failure to renew the motion mid-trial. In all likelihood this was a simple human error. At

this point in time, the Court's focus should be on the ensuing prejudice to Mr. Montar-Morales.

The charges were related and did involve conduct occurring near the same time and place. But it is axiomatic that joinder is prejudicial and the State's arguments with respect to the four "prejudice-mitigating" factors are inadequate. BOR at 25-30.

The claim that the "evidence on each count is strong," is just not supported by the record. BOR at 25. As explained previously, evidence of the rape allegation is flat-out insufficient. AOB at 36-49. Evidence of *identity* may have been uniform, but the precise illegality of Mr. Montar-Morales' alleged conduct was in dispute.⁴

Joinder actually prejudiced Mr. Montar-Morales' ability to defend against the property crime allegations, because he could not question the property owner about his initial belief that Mr. Montar-Morales was in jail. AOB at 24-25; BOR at 27. The State claims that "any prejudice from being someone who goes to jail would be the same no matter what charge it was heard on," but this suggestion borders on the illogical. BOR at 27. With respect to the sex offense charge, the property owner's belief about Mr. Montar-Morales being in jail was

⁴ The State writes "[h]e returned to the unit trying to enter again," but Mr. Montar-Morales was not convicted of attempted burglary. BOR at 26; CP 236.

completely irrelevant and only damning. With respect to the burglary, it was both relevant and potentially helpful, but it had to be abandoned.

Next, the limiting instructions regarding the intermixed counts were of little use. It is well-recognized that joinder can be particularly prejudicial when the alleged crimes are sexual in nature. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). And here, as explained in the opening brief, the trial prosecutor used evidence across the counts to argue that Mr. Montar-Morales was guilty of all he was charged with because he is an opportunistic criminal equally willing to rape a child as he is to steal: “his intent was clear that night, to take advantage of the situation that had arose to him, whether it be child on the floor or theft from inside a building.” IVRP 76-77; see AOB at 26-29 (discussing prosecutor’s closing argument linking allegations together and making the point that Mr. Montar-Morales had a general criminal disposition that night).

In its response, the State never addresses the prejudice that flowed from how the trial prosecutor argued the case. BOR at 27-28.

Finally, with respect to the cross-admissibility prong, even if the res gestae doctrine would allow joinder, these were not inseparable offenses. AOB at 29-33. To the contrary, this was a close call, and in

such cases “the scale should be tipped in favor of the defendant and exclusion of the evidence.” State v. Sutherby, 165 Wn.2d at 887.

This Court should reverse because the joinder deprived Mr. Montar-Morales of his constitutional right to a fair trial.

3. The State’s evidence did not establish that rape occurred.

Simply put, substantial evidence does not support the rape conviction. State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011); see AOB at 35-49. In its response to Mr. Montar-Morales’ sufficiency challenge to this one charge⁵, the State spends time discussing the idea that credibility determinations are for the trier of fact and not subject to review. But Mr. Montar-Morales does not take issue with that principle of law.

The sufficiency problem on the rape charge does not hinge on any credibility determination or weighing of conflicting testimony. The evidence was insufficient because the entirety of the testimony introduced at trial was just too vague and too imprecise. AOB at 39-41. This Court should resist the State’s layered speculation that “stress and shame” caused the complainant not to talk about what the State

⁵ The sufficiency challenge does not affect the validity of the guilty verdict on the child molestation charge which does not require proof of penetration. CP 234.

believes happened. BOR at 37. In each and every case the government brings forward, including those seen as difficult to prove, the government bears the burden of proving each and every element. Here, that did not happen. The child denied a touching inside her. IIRP 82. She understood what anus and vagina means, but was never asked, in court, whether those orifices had been penetrated. IIRP 106, 110-11. Out-of-court, she had been asked that and said that nothing was put inside her. IIRP 110-11. See also AOB at 47-48. The State failed to prove rape.

There is a difference between respecting a jury's verdict and changing the evidence. Under the guise of the former, the State asks this Court to do the latter. This cannot be.

Mr. Montar-Morales respectfully requests that the Court carefully review this record and the sufficiency arguments laid out in his opening brief. Reversing this one count for insufficient evidence is required under State v. A.M. and it is how other jurisdictions would treat a similar absence of proof. See AOB at 43-46.

C. CONCLUSION

For all of the reasons set out above and in the opening brief, Mr. Montar-Morales' rape of a child in the second degree conviction should be reversed and dismissed. The other convictions should be reversed for a new trial.

DATED this 2nd day of September 2016.

Respectfully submitted,

/s Mick Woynarowski

Mick Woynarowski – WSBA #32801
Washington Appellate Project
Attorneys for Appellant

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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VIA COA PORTAL |
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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF SEPTEMBER, 2016.



X _____