COA No. 32543-1-III

FILED
MAY 22, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JAMES E. FURR, Appellant.

RESPONDENT'S BRIEF

Kittitas County Prosecutor's Office
205 W. 5th Street, Suite 213
Ellensburg, Washington 98926
509-962-7520

TABLE OF CONTENTS

ANSWERS TO ISSUES & ASSIGNMENTS OF ERROR 3

STATEMENT OF CASE 4-12

ARGUMENT..12-19

FIRST ISSUE 12-15

SECOND ISSUE...16-19

CONCLUSION 19

ANSWERS TO ISSUES AND ASSIGNMENTS OF ERROR

1. **THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE STATE PROVED THE CRIME OF RAPE IN THE SECOND DEGREE (TO WIT: THE ADULT VICTIM WAS INCAPABLE OF CONSENT, BY REASON OF BEING MENTALLY INCAPACITATED – STEMMING FROM FETAL ALCOHOL SYNDROME) AFTER HEARING TESTIMONY FROM THE ADULT VICTIM, HER FRIENDS AND FAMILY, AND EXPERT TESTIMONY FROM A CLINICAL PSYCHOLOGIST IN CONTRAST WITH THE APPELLANT'S TESTIMONY.**

2. **THERE IS NO REASON TO STRIKE THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS AND DISCRETIONARY COSTS BECAUSE THE APPELLANT HAS A REMEDY AT LAW UPON HIS RELEASE AND THE APPELLANT CANNOT BE DEEMED "INDIGENT" AT THIS TIME BECAUSE HIS FOOD, CLOTHING, HOUSING, AND HEALTH CARE NEEDS ARE ALL MET BY THE WASHINGTON DEPARTMENT OF CORRECTIONS.**

STATEMENT OF THE CASE

On May 9, 2014 a Kittitas County jury found the Appellant, 54, guilty of Rape in the Second Degree for having sexual intercourse with a 33-year-old developmentally disabled adult (Rita Evans) who was incapable of consent due to her mental incapacity stemming from fetal alcohol spectrum disorder. RP 566.

The victim's older brother, John Furr, testified that the Appellant, whom he had not seen in six years, came to visit, unannounced, in November 2013. He told the jury that he introduced his younger brother to the victim, who lived next door, about a week after the Appellant arrived. He testified that he had known Rita for eight years and treated her "like a daughter." However, he testified that his interactions with Rita were like "dealing with a 12-year-old." RP 177-179.

Mr. John Furr testified that after he made the introduction, he told his younger brother "don't mess with her" because the Appellant had made some "comments" towards her. Mr. John Furr testified that he reminded his younger brother several times that Rita was "an adult with the mind of a child." He testified that he had to remind the Appellant several times that he should not think about pursuing Rita because she was disabled. RP 177-180.

On January 11, 2014, Mr. John Furr testified that he was watching a football game with the Appellant when Rita came over to do his wife's nails. After she completed the manicure, Mr. John Furr testified that Rita sat down on one end of the couch and began "taking a road test" for a driver's license even though she does not drive. RP 183-184.

Mr. John Furr testified that, at some point between the third or fourth quarter of the game, the Appellant got up and stated that he was "going out to have a cigarette." He testified that his younger brother then asked Rita to come outside to join him on the back deck. He testified that, shortly after the commercial ended and he resumed watching the football game, he "heard a loud thump or bang" coming from the deck. RP 186-187.

Mr. John Furr testified that he got up, went to the kitchen window, and looked out to see "Jimmy bare-ass naked on his knees" thrusting his penis into the victim, from behind, while she was on her hands and knees. He testified that he immediately "yelled" at his brother: "What are you doing? What the hell do you think you're doing?" RP 187-190.

He testified that Rita nearly "tumbled" over, as he rushed onto the deck. He said he moved to catch-her as the Appellant began telling Rita to "Breathe air, Rita. Breathe air," because she seemed to be gasping for air. Mr. John Furr testified that as he began to stabilize Rita, he "lost it. I was

very upset at him." He testified that the Appellant did not respond but had a "grin" on his face. RP 190-191.

Mr. John Furr testified that he brought the victim into the house and assisted her on to a "little loveseat," where she "curled up into a fetal position." Mr. Furr testified that his wife arrived within 20 minutes and when she learned what happened began yelling: "You stupid son of a bitch, what the hell do you think you were doing?" Mr. Furr testified that the last thing he told his brother was: "Are you crazy? You're going to go to jail." He testified that the Appellant then began stammering, denying he penetrated Rita because he "couldn't get hard," at which point, his wife screamed: "Get out of my house. Leave." RP 194-197

Through it all, Mr. John Furr testified that Rita was "disconnected, disoriented, not herself." He said his wife was holding Rita in her arms as Rita was crying. He testified that he called the police, after the Appellant left. Later, he found the Appellant hiding in the loft of his garage and alerted law enforcement who made the arrest. RP 198-203.

The jury also heard from Diane Furr who corroborated her husband's account of her involvement. RP 225-261.

Janice Barnhart testified that she had known the victim for 16 years, the period of time she had lived with the victim's biological father. She testified that after Rita gave birth to her son, he was placed in a

relation's home where he remains to this day. Mr. Barnhart testified that after she learned what had happened she found Rita curled up in the fetal position, on the love seat, sucking her thumb. RP 306-307.

The victim, Rita, testified. She responded to short, simple questions. When asked "What is sex?" Rita responded: "Vagina and penis." When asked "When do people have sex?" Rita responded "I don't (inaudible)." RP 92-93.

Rita testified that she was "sexually assaulted" but could not remember all the details. When first asked what details she remembered, she testified that she remembered saying "breathe' two times." RP 95.

Rita remembered going over to her neighbor's house to "hang-out" and giving her neighbor a manicure but otherwise could not describe how she was "sexually assaulted." However, she testified that she knew she had been sexually assaulted because she cried and her "body was shaking." But when asked why was crying and shaking, Rita answered: "Because I didn't want to have sex with him." RP 97-98.

On cross-examination, appellant's counsel asked several questions about Rita having a child while in high school. Rita acknowledged that she became pregnant and gave birth to a son, due to "unprotected sex." But when defense counsel asked Rita why people have sex, Rita stated: "I don't know."

When defense counsel asked Rita to define sex, she testified "intercourse," defined as "vagina and penis." Rita admitted to being in "love" with the father of her child and that it was better to be in "love" with somebody with whom you have sex than not.

Rita mechanically defined pregnancy as "unprotected sex" which can lead to "STDs." She testified that persons engaging in sex must give their "Okay." None of Rita's answers to questions, posed by either party, were more than one word or one to two simple sentences.

The jury heard from a forensic scientist with the Washington State Crime Lab who testified that the Appellant's seminal fluid was found on, in and around the victim's anus and vagina. RP 311-332.

Last, the jury heard from Dr. Paul Connor, a clinical psychologist with a specialization in neuropsychology, with over 13 years conducting research focusing on the effects of prenatal alcohol exposure as it relates to neuropsychological evaluations and mental health functioning as well as the structure and functional brain anomalies often seen in these disorders. RP 332 – 333.

Dr. Connor testified that he conducts neuropsychological evaluations and assesses individuals known or suspected to have fetal alcohol spectrum disorders (FASD). He explained that he uses a battery of cognitive tests that have been clinically shown to be sensitive to the

effects of prenatal alcohol exposure in over 30 years of research on the subject. RP 333

Dr. Connor testified that persons with FASD tend to exhibit physical manifestations, such as odd facial features to include small eyes and thin upper lips. They also have growth deficiencies to include being short in stature and slender. Dr. Connor testified that these features are "obvious" to anybody. RP 335 – 336.

Dr. Connor testified that the mental capacities of persons with FASD can vary as much as the physical manifestations are not necessarily telling of each other. However, he testified that research says that persons diagnosed with FASD are highly suggestible and prone to be taken advantage of by others. RP 336-337.

In the case of Rita, Dr. Connor testified that he conducted an evaluation in April 2014 to determine Rita's current pattern of neuropsychological strengths and weaknesses, her reasoning and problem solving abilities, and whether she was prone to suggestibility. He testified that he was able to prepare for his evaluation by reviewing a 2001 evaluation by his predecessor at the University of Washington Dr. Brenda Townes who assessed with Rita with FAS. Dr. Connor testified that he conducted 19 tests broken down into several categories and domains. RP 337 – 338.

In taking Rita's medical history from her family, Dr. Connor testified that he learned that Rita's mother regularly consumed alcohol during the course of her pregnancy with Rita. He testified that Rita's family advised: "It has been like living with a 10-year-old for the last 33 years."

Dr. Connor testified that while Rita graduated from high school, she was a "special education" student whose employment has not extended beyond working as a waitress, prep cook, dishwasher, courtesy clerk, and house cleaner for a few months at a time – which is common among persons with developmental disabilities.

In observing Rita, he described her as being of short stature with a relatively small head, small eyes, thin upper lip, flattened mid-face, large and somewhat flattened and bulbous nose, small but protruding chin, and gaps between her teeth. He testified that all are physical - traits consistent with a person who has FASD. In interacting with Rita, during the course of his evaluation, Dr. Connor testified that it would be obvious, to the average person, that the victim "function(ed) at a fairly low level." RP 399.

In measuring her intellectual functioning (otherwise known as IQ), Dr. Connor testified that Rita had an IQ of 65 which placed her in the

"intellectually disabled range," 5 percentage points below the benchmark for intellectual disability. RP 350-351.

Dr. Connor testified that the victim was highly susceptible to be led by leading questions. He testified that Rita tested moderately to severely impaired in her ability to understand social cues and facial expressions and perceive how another person may feel. Connor testified that Rita's communication skills were one of her most significant weaknesses, rating below 1 percentile. He testified that that Rita functions the equivalent of a 7 year, 7 month old child, possessing neurological deficits consistent with having FASD. RP 350-365.

Dr. Connor testified that adults with FASD are able to develop emotional bonds with others and both understand the mechanics and participate in the mechanics of sexual intercourse. He testified that her level of suggestibility made her "very prone" to being victimized and taken advantage of others. He testified that her mental capacity has largely unchanged since her last clinical evaluation in 2001. RP 384-385

After the State of Washington rested its case, the appellant testified. The Appellant testified that he was around Rita alone many times and never felt she was intellectually impaired. He testified that he responded to Rita's advances after "she grabbed my manhood." The

Appellant testified that he didn't think he "completed" but after hearing the forensic evidence, guessed he must have. RP 420-476

The jury found the appellant guilty. RP 566.

The court sentenced the Appellant to 100 months in prison and imposed legal financial costs of $2,705.81 at a rate of $100 per month, "commencing one month after you are released from incarceration." In imposing the LFOs, the trial court found that "right now there's no reason to think" that the Appellant could not work. The trial court found that the Appellant was "able-bodied and strong – and intelligent." Further, the trial court found that it was premature for the Appellant to challenge the imposition of LFOs, at this time, because "we will cross that bridge when we come to it." RP 593-594.

This appeal followed.

ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT THE STATE PROVED THE CRIME OF RAPE IN THE SECOND DEGREE (TO WIT: THE ADULT VICTIM WAS INCAPABLE OF CONSENT, BY REASON OF BEING MENTALLY INCAPACITATED – STEMMING FROM FETAL ALCOHOL SYNDROME) AFTER HEARING TESTIMONY FROM THE ADULT VICTIM, HER FRIENDS AND FAMILY, AND EXPERT TESTIMONY FROM A CLINICAL PSYCHOLOGIST IN CONTRAST WITH THE APPELLANT'S TESTIMONY.

Evidence is sufficient if a "rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010) (*quoting* State v. Wentz, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant, when challenging sufficiency of evidence, admits the truth of the State's evidence and all reasonable inferences therein. Id. at 35. A distinction between direct and circumstantial evidence is not made; circumstantial evidence is considered "equally reliable" in determining sufficiency. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The court gives the fact finder deference to any issue of witness credibility, persuasiveness of evidence, or conflicting testimony. State v. Thomas, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). All evidence is viewed in the light most favorable to the state. State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

On a claim of insufficiency of the evidence, the reviewing court considers whether, after viewing the evidence in a 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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.44.050 provides that a person is guilt of the crime of

Rape in the Second Degree if the person has sexual intercourse with another person who is incapable of consent by reason of being mentally incapacitated, defined as a "condition existing at the time of the offense which prevent a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4).

A rational trier of fact can conclude from victim's testimony that victim was mentally incapacitated and did not understand nature or consequences of sexual intercourse even without expert testimony. State v. Summers, 70 Wn. App. 424, 853 P.2d 953 Review Denied (1993).

Even in the case cited by the Appellant, State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994), and conceded in Appellant's Brief: ".... the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand."

In this case, the jury was able to look at Rita, listen to Rita, and assess her physical and mental abilities based upon what they observed and heard from her when she responded to questions on both direct and cross-examination. The jury was able to hear from the Appellant's older brother who both provided his assessment of the victim's mental

limitations and testified that he told his younger brother that Rita had the mind of a child.

The jury was able to hear from Dr. Connor and decide whether his testimony and conclusion about Rita's mental abilities and disabilities comported with what they saw and heard from Rita.

Last, the jury was able to assess the credibility of the Appellant's testimony and decide for themselves whether it was reasonable for the Appellant to believe that Rita was capable of consent in the absence of any mental incapacity. The jury clearly did not find the Appellant's account compelling who, in challenging the sufficiency of the evidence, must admit the truth of the State's evidence and all reasonable inferences therein.

The totality of the evidence, combined with the facts and circumstances of the case, permitted the jury to reasonably find that the State of Washington introduced sufficient evidence to prove the essential element of the crime of Rape in the Second Degree – that the victim was incapable of consent due to her mental incapacity.

Therefore, the Appellant's conviction should be affirmed.

2. THERE IS NO REASON TO STRIKE THE TRIAL COURT'S IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS AND DISCRETIONARY COSTS BECAUSE THE APPELLANT HAS A REMEDY AT LAW UPON HIS RELEASE AND THE APPELLANT CANNOT BE DEEMED "INDIGENT" AT THIS TIME BECAUSE HIS FOOD, CLOTHING, HOUSING, AND HEALTH CARE NEEDS ARE ALL MET BY THE WASHINGTON DEPARTMENT OF CORRECTIONS.

A motion to vacate costs from the Judgment and Sentence is not proper and not ripe for review, at this time, because the defendant has an adequate remedy at law. Once imposed, a defendant may only obtain an adjustment to the LFO's by following the procedure in RCW 10.01.160(4) as to trial costs:

> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

RCW 10.73.160(4) provides, as to appellate court costs:

> (4) A defendant or juvenile offender who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant, the defendant's immediate family, or the juvenile offender, the sentencing

court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

A motion for remission of costs may be filed at any time. A defendant may even file multiple motions for remission of costs. Fortunately, remission requires a showing of "manifest hardship". Mere indigency is insufficient. Even more important, a decision denying a defendant's motion for remission of costs is not an appealable order. *See State v. Smits*, 152 Wn. App. 514 (2009).

In this case, the trial court record found that "right now there's no reason to think" that the Appellant could not work. The trial court found that the Appellant was "able-bodied and strong – and intelligent." Further, the trial court found that it was premature for the Appellant to challenge the imposition of LFOs, to be paid at a rate of $100 per month, "commencing one month after you are released from incarceration," because "we will cross that bridge when we come to it." CP 593-594.

The record establishes that the Appellant is not "indigent" in the constitutional sense. A person is "indigent" in the constitutional sense only when he lacks any assets and cannot meet his housing and food needs. *See State v. Johnson*, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 83 U.S.L.W. 3188 (Oct. 6, 2014). Indigency, moreover, is a relative term that must be considered and measured in each case by reference to the need or

service to be met. *Id.*, at 555; *State v. Rutherford*, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964).

Here, the Appellant, 55, is employable at the prison. His meals, housing, clothing, and health care needs are all met by the Washington State Department of Corrections, leaving him more "disposable income" from which to reimburse the public for the cost of the instant litigation. *Cf. Braden v. Estelle*, 428 F. Supp. 595 (S.D. Tex. 1977) (because inmates are provided the necessities of life even small bank accounts may be able to afford the costs of litigation); *Temple v. Ellerthorpe*, 586 F. Supp. 848, 851 (D. R.I. 1984) (surveying cases in which in forma pauperis status was denied for prisoners who had access to funds ranging from $45.00 to $500.00).

Imposing costs will not deprive the Appellant of such "small physical and material comforts", *In re Williamson*, 786 F.2d 1336, 1339 (8th Cir. 1986), that are available to him in prison. During any remaining period of confinement, the State's collection of appellate costs will be restricted to a small percentage of the Appellant's earnings. *See generally* RCW 72.09.111(no more than 20 percent of wages may be deducted to pay legal financial obligations); RCW 72.09.480 (same). No deductions, moreover, will be made from the Appellant's earnings if he is an "indigent inmate." *See* RCW 72.09.111(1).[1]

Upon the appellant's release, if the rate currently set ($100/month) proves to be too much, the Appellant will have the ability to seek a modification, and the trial court, unlike an appellate court, will have the capacity to hear and weigh evidence in setting an appropriate amount. *See* RCW 10.73.160(4).

Therefore, the trial court's imposition of LFOs and discretionary costs should be affirmed.

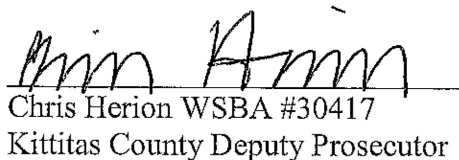
CONCLUSION

Based upon the foregoing legal analysis, the State of Washington respectfully requests that this court find that there was sufficient evidence to prove that the victim was incapable of consent due to her mental incapacity and sustain the Appellant's conviction. In sustaining the Appellant's conviction, the State of Washington also respectfully requests that the Judgment and Sentence ordering the Appellant to pay legal financial obligations and the discretionary costs be affirmed.

Dated this 22ND Day of May 2015

Respectfully submitted,

GREG ZEMPEL
Kittitas County Prosecuting Attorney

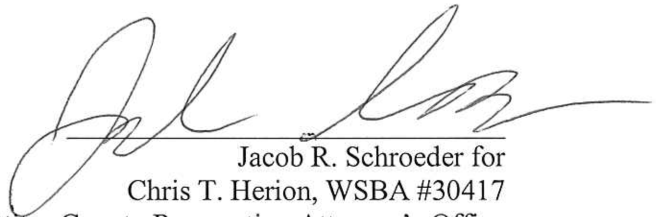


Chris Herion WSBA #30417
Kittitas County Deputy Prosecutor

PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on May 22nd, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Response to Motion for Discretionary Review:

David N. Gasch,
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005
gaschlaw@msn.com
Attorney for Appellant



Jacob R. Schroeder for
Chris T. Herion, WSBA #30417
Kittitas County Prosecuting Attorney's Office
205 W. 5th Ave, Ste. 213
Ellensburg, WA 98926
509-962-7660
prosecutor@co.kittitas.wa.us