

FILED
Oct 31, 2016
Court of Appeals
Division I
State of Washington

NO. 74872-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

STEVEN L. COOK,

Appellant

BRIEF OF RESPONDENT

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I. ISSUE

Witnesses at trial testified that even if the touching occurred as described by the victim it would be unlikely that you would find DNA on the vaginal swabs. In light of this evidence, has the defendant shown that it is more probable than not that DNA testing would demonstrate his innocence?

II. STATEMENT OF THE CASE

On July 6, 2014, the defendant was a health care provider, a massage therapist. N.R. was his client. During a treatment session, while N.R. was lying face down on a massage table, the defendant placed his left hand on her lower back to prevent her from getting up and using his right hand digitally penetrated her vagina, touched her vaginal area, kissed her thigh and attempted to kiss her vaginal area. The State charged the defendant by amended information with one count of second degree rape and one count of indecent liberties. The jury acquitted the defendant of second degree rape but convicted him of indecent liberties. 9/23/13¹ RP 45, 47-48, 66-70; CP 54, 55, 57, 94-95.

¹Although the first two volumes of the transcript indicate the testimony took place on September 22, 2013, and September 24, 2013, it is clear from the record as a whole that the year is a scrivener's error and should read 2014.

In June of 2014, N.R. began receiving her message therapy from the defendant at Urgent Care Chiropractic Center in Lynnwood. The first four times the defendant massaged N.R., it was consistent with other massage therapy N.R. had received from other providers. The fifth time was on Sunday, July 6, 2014, at 7:00 p.m., and things were very different. The defendant greeted N.R. and told her to go back to the massage room. No one else was at the clinic. N.R. noticed the defendant's eyes were glassy. The defendant accompanied N.R. to the therapy room and told her he was going to do something a little bit different that day. He told her to sit on the side of the massage table. N.R. asked if he wanted her to disrobe and put on the drape first. The defendant indicated he did, but then didn't leave the room. N.R. waited for him to leave and eventually he did. N.R. then got ready for the massage. 9/22/13 RP 44, 48-51, 57-59.

When the defendant reentered the room, N.R. was seated on the side of the massage table, as directed, with the drape tucked under each arm to cover her. The defendant told her they were going to do a "boxer's massage". The defendant then began massaging her back while she was seated. The defendant then told N.R. to hold both her arms straight out. N.R. held one arm out and

used the other to hold the drape in place. The defendant then told her he needed her to hold the other arm out, so she switched arms. The defendant continued to ask for the arm holding the drape to be held out and N.R. kept switching arms to keep the drape in place. This happened a couple of times before the defendant chuckled and told N.R. to lie down on her stomach. N.R. complied, pulling the drape over her lower back so her back was exposed but her buttocks were covered. The defendant massaged her back for a normal amount of time, moved down to her lower back and then moved quickly to her buttocks. 9/22/13 RP 59-60, 62-65.

The defendant did not massage N.R.'s buttocks but was touching them more softly. N.R. described it as being like her husband would do; a sensual caress. The defendant then quickly moved his right hand between her butt cheeks and down between her legs and on the labia. N.R. testified the defendant then put his finger in her vagina. With his left hand the defendant was pressing on the victim's lower back preventing her from getting off the table. The defendant told N.R. "your pussy's so hot". "Tell me it feels good." N.R. was trying to pull the defendant's arm away with her left hand and was kicking her legs. The defendant then tried to place his mouth on N.R.'s vaginal area. She put her legs together to try to

stop the defendant. The defendant kissed the back of her leg. He was still holding her down with his left hand. He then softly rubbed the area right outside her labia. N.R. told the defendant the massage had to end. The defendant continued massaging her so she said it again. The defendant then stopped and N.R. got off the massage table. The defendant then wiped his hands on a towel and asked N.R. if she had a vibrator at home. When N.R. refused to answer, the defendant left the room. N.R. leaned against the door as she got dressed. 9/22/13 RP 65-73.

When asked why she didn't fight the defendant, N.R. explained that he weighed at least twice as much as she did and was about a foot taller. N.R. said she didn't call the police because she just wanted to get out of there. As she was leaving, N.R. had to walk past the defendant who was in the reception area smoking a cigarette. The defendant told the victim, "I am so embarrassed. I'm really attracted to you. I couldn't help myself. I have special appointments for special clients. I want to get to know you better. I want to take you for drinks and dinner." N.R. made excuses about being on vacation for the next week. Her focus was on getting out the door without a confrontation. 9/22/13 RP 73-75.

N.R. did not immediately report the incident to the police. She likely would not have reported it at all if the defendant hadn't started repeatedly calling her at home. The defendant called the next day and told N.R. he needed to know she forgave him and again asked her to dinner and drinks. N.R. was going through a divorce at the time and had three young boys at home. She became worried for her and her children's safety when the defendant kept calling her. N.R. used an app on her phone that sent calls from the defendant's phone numbers immediately to voicemail. The jury heard the messages the defendant had left on the victim's voicemail. After talking with a friend about it, N.R. reported the incident to the police four days later. 9/22/13 RP 75-81, 87-97.

The defendant was interviewed by Det. Arnett and Det. Jorgensen of the Lynnwood Police Department. The defendant admitted he had touched N.R.'s vagina during the massage. The defendant admitted to being attracted to the victim, and to having asked her out, but claimed he did that on the third massage and when she did not answer him, he took that as a decline. The defendant claimed it was N.R. who was acting oddly on the final massage. He said N.R. just allowed the drape to fall, exposing her

breasts. He didn't say or do anything in response, but continued to provide the massage. He claimed that N.R. was a client who was comfortable being naked. N.R. remained naked and uncovered for the remainder of the massage. Later in the interview, the defendant contradicted himself, saying N.R. appeared to be more quiet and withdrawn and her body language appeared to be uncomfortable during the massage. When asked about his intent, the defendant backtracked and said he might have touched her vagina and if he did, it was accidental. The defendant claimed to have only called N.R. twice since the last appointment. The victim's call history and the defendant's phone records documented that he had called N.R. three times the day he was contacted by police alone plus the additional times right after the incident. 9/23/13 RP 162-65, 168-69, 170-71, 175-76.

A. TESTIMONY RELEVANT TO DNA MOTION.

At trial Dale Fukura testified as a forensic nurse for Providence Intervention Center for Assault and Abuse. She performed a forensic exam on N.R. N.R. told her the defendant had digitally penetrated her during a massage session approximately four days before seeing Ms. Fukura. N.R. had showered and used the restroom numerous times before seeing Ms. Fukura. Ms.

Fukura took swabs of N.R.'s vagina. Ms. Fukura said it is their policy to swab if it is within seven days of the assault. When asked if it was likely that you would ever find DNA from a brief finger penetration, Ms. Fukura responded that it's probably not highly likely, but it is likely. Everyone transfers evidence to everyone when you touch them. When applied to the facts in this case, Ms. Fukura said she didn't think it was really likely, that there was a slim possibility. Ms. Fukura explained that capturing the DNA on the swab would require touching the same spot inside the vagina with the Q-tip. The vagina is about the size of a fist and she would be operating blindly trying to cover as much of the area as she could without being able to see where she was swabbing. 9/23/13 RP 210, 213, 214-215, 217, 219.

Detective Arnett testified she is a detective for the Lynnwood Police Department specializing in persons crimes. At the time of trial she had been a detective for four years. She testified that she primarily gets sexual assault cases. Det. Arnett testified that in her experience it would be incredibly unlikely they would be able to locate touch DNA in N.R.'s vagina. The defendant admitted to Det. Arnett that he may have accidentally touched N.R.'s vagina while

massaging her legs. The swabs were not tested for DNA. 9/23/13
RP 153, 177, 179.

The jury convicted the defendant of Indecent Liberties, but acquitted him of second degree rape. CP 54, 55. From the safety of an acquittal on the second degree rape charge, the defendant requested the Superior Court grant a post-conviction motion for DNA testing regarding the vaginal swabs that were collected from the victim but not tested before trial. That motion was denied. CP 13, 14.

III. ARGUMENT

THE DEFENDANT HAS NOT SHOWN THAT A FAVORABLE RESULT DNA TESTING WOULD MORE PROBABLY THAN NOT DEMONSTRATE HIS INNOCENCE.

RCW 10.73.170 requires the defendant to show the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. RCW 10.73.170(3). State v. Riofta, 166 Wn.2d 358, 367, 209 P.2d 467 (2009). When determining if it is likely the DNA evidence would demonstrate innocence, a court should presume DNA evidence would be favorable to the convicted person. State v. Crumpton, 181 Wn.2d 252, 255, 332 P.3d 448, 450 (2014). A trial court must look to whether, considering all the evidence from trial and assuming an exculpatory DNA test result, it

is likely the individual is innocent on a more probable than not basis. Crumpton, 181 Wn.2d at 260-61, 332 P.3d 448. Testing should be limited to situations where there is a credible showing that it could benefit a possibly innocent individual, not only because that is the goal of the statute, but also to avoid overburdening labs or wasting state resources without good reason. Id. at 261.

Under the facts of this case, a favorable DNA result would not meet the standard to entitle the defendant to an expenditure of public funds for testing. The defendant argues that a testing of the swabs might show a lack of DNA. Presuming that result, a lack of DNA on the swabs would not demonstrate the defendant's innocence. The defendant asserts that if no DNA were found, it would prove that no sexual assault occurred. There is no basis for this assertion. The jury heard testimony from multiple sources that it would be highly unlikely or incredibly unlikely that touch DNA would be found in N.R.'s vagina. A negative result for DNA would be consistent with that testimony. The court must consider all the evidence against the individual when deciding a DNA testing motion.

Given all the evidence in this case, a negative result for DNA on the swabs would not demonstrate the defendant's innocence on

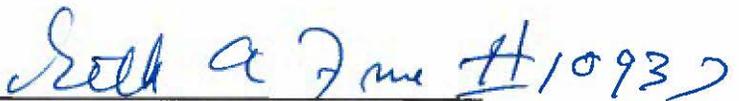
a more probable than not basis. It would be consistent with the evidence provided to the jury. The lack of DNA evidence would shed no light on the defendant's guilt or innocence. The Superior Court properly denied the defendant's post-conviction motion for DNA testing under RCW 10.73.170.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court uphold the order denying the petition for post-conviction DNA testing.

Respectfully submitted on October 31, 2016.

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THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

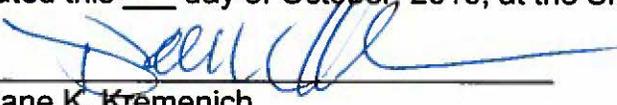
The undersigned certifies that on the 31st day of October, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jennifer J. Sweigert, Nielsen, Broman & Koch, Sweigertj@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of October, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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