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Nº. 34023-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

FLOYD WAYNE DRANE,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 03-1-05262-2
The Honorable Rosanne Buckner, Presiding Judge

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support finding Mr. Drane guilty of rape in the first degree against Ms. Mattern.
2. There was *insufficient* evidence to support finding Mr. Drane guilty of kidnapping in the first degree against Ms. Mattern.
3. There was insufficient evidence to support a finding of guilty on the charge of robbery.
4. There was *insufficient* evidence to support a finding that Mr. Drane was armed with a firearm during the commission of the robbery.
5. There was insufficient evidence to support finding Mr. Drane guilty of rape in the first degree against Ms. Jacques.
6. There was *insufficient* evidence to support finding Mr. Drane guilty of rape in the first degree while armed with a deadly weapon or firearm against Ms. Jacques.
7. Error is assigned to Finding of Fact RE: Same Criminal Conduct No. 1 which reads:

The court further finds that the act of strangulation (Assault 1) of Jacques (Count 1) occurred and was completed before the act of rape and constitutes a separate criminal act unrelated to the rape (Count IV), kidnapping (Count II) and robbery (Count III).

The court further finds that the intent of the rape of Jacques was intercourse, the intent of the kidnap was to inflict bodily injury, the intent of the robbery was to take property, and the intent of the assault was to inflict great bodily harm. Furthermore, the rape was completed before the robbery, the assault was completed before the robbery and the rape.

The court further finds that the intent behind the crime of assault in the first degree is to inflict great bodily harm, which is a much greater injury than the bodily injury that is intended for kidnapping.

8. Error is assigned to Finding of Fact RE: Bench Trial No. III which reads:

That once inside the defendant's home, defendant and Mattern smoked crack cocaine and drank beer. They both removed their clothes. When the crack was gone, defendant became angry and accused Mattern of stealing his crack cocaine. Defendant began to whip Mattern with a looped cable cord. He then plugged an iron into the wall and demanded that Mattern return his drugs. When Mattern was unable to return his drugs, defendant burned her with the iron on her legs. He also pointed a handgun at Mattern. Mattern told defendant she wished to leave, but defendant refused to allow her to leave. *The injuries caused by the whipping and burning caused significant serious permanent disfigurement. Each wound left a scar which on its own would constitute serious permanent disfigurement.*

9. Error is assigned to Finding of Fact RE: Bench Trial No. IV which reads:

Because Mattern was not allowed to leave and did not know where she was, and because defendant burned her with an iron, whipped her with a cord, *the court finds that Mattern's movements were restricted without her consent and that this was accomplished by physical force and intimidation and without legal authority and in a manner which interfered substantially with Mattern's liberty. Further, the court finds that Mattern was restrained by holding her in a place where she was not likely to be found and by threatening to use deadly force*

10. Error is assigned to Finding of Fact RE: Bench Trial No. V which reads:

That shortly after defendant whipped Mattern with the cable cord and burned her with an iron and pointed a gun at her, he penetrated Mattern's vagina with his penis. This was without Mattern's consent. That the sexual intercourse was with forcible compulsion in that defendant's acts of physical force enumerated above (burning and whipping) and the defendant's act of pointing what appeared to be a gun at Mattern and threatening to kill her overcame Mattern's resistance to intercourse with the defendant

11. Error is assigned to Finding of Fact RE: Bench Trial No. VI which reads:

That after raping Mattern, defendant used a cord, such as a common lamp cord, to strangle Mattern. The cord was placed around Mattern's neck with sufficient force to leave ligature marks and cause hemorrhaging in Mattern's eyes. As a result, Mattern lost consciousness for several hours. Strangulation such as this constitutes a force or means likely to cause great bodily harm or death in that it restricts the flow of blood from (and potentially to) the brain, thereby depriving the brain of oxygen. This is likely to lead to permanent brain damage and death. The court further finds that defendant acted with intent to inflict "great bodily harm" as defined in RCW 9A.04.110, and used force or means likely to inflict "great bodily harm". The court finds defendant guilty of Assault in the First Degree based on his act of strangulation of Mattern, although the court finds that the injuries enumerated above would also support a verdict of guilty for Assault in the First Degree.

12. Error is assigned to Finding of Fact RE: Bench Trial No. VIII which reads:

The defendant refused to take Jacques to her house when she asked him to take her home and she felt intimidated by the defendant due to his size and his repeated refusal to take her home as he had promised to do. She did not feel as if she were able to escape while he was away from the car. After purchasing drugs the defendant took Jacques to his house in North East Tacoma but took an indirect route so that Jacques was unsure of where they were going.

13. Error is assigned to Finding of Fact RE: Bench Trial No. XIII which reads:

After binding Jacques in the laundry room the defendant began threatening Jacques that he would pour bleach down her throat or in her vagina and that he would put a hot curling iron in her vagina. Jacques was held in the laundry room for two days while the defendant continued to torture her. During the two days Jacques was held in the laundry room he prevented her from falling asleep by shooting her with a bb-gun at least 18 times causing significant serious permanent disfigurement. During the beating, Jacques became so terrified that she defecated on her self and the laundry room floor.

14. Error is assigned to Finding of Fact RE: Bench Trial No. XIV which reads:

After the victim defecated, the defendant became so angry with her that he insisted she clean up laundry room. Jacques was unable to clean the laundry room to the defendant's satisfaction so he untied her and took her to a bathroom where he allowed her to clean herself. The defendant then ordered Jacques into the living room where he demanded that she lie down on a comforter blanket. The defendant then penetrated Jacques' vagina with his penis. This was

without Jacques consent. The sexual intercourse was with forcible compulsion in that defendant's acts of physical force enumerated above (beating and kicking) and the defendant's act of pointing what appeared to be a gun at Jacques along with his threatening to kill her, overcame Jacques' resistance to intercourse with the defendant.

15. Error is assigned to Finding of Fact RE: Bench Trial No. XV which reads:

Once the defendant completed his rape of Jacques he told her that she was not worth killing and directed her to get dressed. Jacques was unable to find several personal items the defendant had taken from her before raping her, including: undergarments, boots, socks, a watch, two silver rings a chain with a cross and her bus pass. Jacques gave the defendant her personal items when he requested them because he had already beaten her and she feared that if she did not do as he asked he would beat her again. The court finds that the defendant took Jacques' personal items by the use or threatened use of force or actions that caused Jacques to fear she would be injured if she did not comply. Jacques told the defendant that she was missing these items and wanted them back. The defendant would not allow her to retrieve her personal items, instead he told her to sit still or he would tie her up again. The court further finds that during the course of taking Jacques property, or in the immediate flight therefrom, the defendant was armed with a deadly weapon (handgun) or displayed what appeared to be a deadly weapon (bb-gun or handgun) and that he inflicted bodily injury upon Jacques. The court finds that the defendant's handgun was readily capable of causing death or substantial bodily injury. The court specifically finds that the evidence supports findings for both deadly weapon or bodily injury and that the court

would return a verdict of guilty to Robbery in the first degree based on either basis.

16. Error is assigned to Finding of Fact RE: Bench Trial No. XVI which reads:

The court finds that during the commission of the Robbery and Rape against Theresa Jacques, the defendant was armed with a firearm as defined under RCW 9.41.010. The court further finds that there was in fact a nexus between the firearm and the robbery and between the firearm and the rape. The firearm was accessible to the defendant during both the rape and the robbery and the defendant used the firearm to instill fear in Jacques so that he could commit the robbery and the rape.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence to support a finding of guilt on the charge of raping Ms. Mattern where Ms. Mattern admits to working as a prostitute and having consensual sex with Mr. Drane? (Assignments of Error Nos. 1, 8, 9, 10, 11)
2. Is there sufficient evidence to support a finding of guilt on the charge of kidnapping Ms. Mattern where Ms. Mattern has given contradictory accounts of her interaction with Mr. Drane, Ms. Mattern told police she went with Mr. Drane voluntarily, and the only evidence Ms. Mattern was ever held against her will came from Ms. Mattern alone? (Assignments of Error Nos. 2, 8, 9)
3. Is there sufficient evidence to support a finding that Mr. Drane robbed Ms. Jacques when Ms. Jacques testified she gave the items alleged stolen by Mr. Drane to Mr. Drane freely and Mr. Drane didn't threaten her when he asked for them? (Assignments of Error Nos. 3, 15, 16)

4. Is there sufficient evidence to support a finding that Mr. Drane robbed Ms. Jacques while armed with a firearm when Ms. Jacques testified she did not see any firearm until after Mr. Drane asked her to give the allegedly stolen items to him? (Assignment of Error No. 4, 15, 16)
5. Is there sufficient evidence to convict Mr. Drane of raping Ms. Jacques where there is no physical evidence indicating a rape occurred and Ms. Jacques told police that she did not have intercourse with Mr. Drane? (Assignments of Error Nos. 5, 14, 15, 16)
6. Is there sufficient evidence to convict Mr. Drane of raping Ms. Jacques while armed with a firearm or deadly weapon when Ms. Jacques testified that no firearm or other weapon was present when Mr. Drane allegedly raped her? (Assignments of Error Nos. 6, 14, 15, 16)
7. Is there substantial evidence to support Finding of Fact RE: Bench Trial No. V? (Assignments of Error Nos. 1, 10)
8. Is there substantial evidence to support Finding of Fact RE: Bench Trial No. XIII? (Assignment of Error No. 13)
9. Is there substantial evidence to support Finding of Fact RE: Bench Trial No. XIV? (Assignments of Error Nos. 6, 14)
10. Is there substantial evidence to support Finding of Fact RE: Bench Trial No. XV? (Assignments of Error Nos. 3, 4, 15)
11. Is there substantial evidence to support Finding of Fact RE: Bench Trial No. XVI? (Assignments of Error Nos. 4, 6, 16)

12. Is there substantial evidence to support Finding of Fact RE: Same Criminal Conduct No. 17 (Assignment of Error No. 4, 6, 7)

C. STATEMENT OF THE CASE

Procedural Background

On November 10, 2003, Mr. Drane was charged with one count of assault in the first degree, one count of kidnapping in the first degree, one count of robbery in the first degree while armed with a firearm or deadly weapon, one count of rape in the first degree as a domestic violence incident while armed with a firearm or deadly weapon, all crimes being committed against Ms. Theresa Jacques between October 5, 2003, and October 6, 2004. CP 1-5.

On November 14, 2003, the charges were amended to include one count of kidnapping in the first degree, assault in the first degree, and rape in the first degree, all crimes being committed against Ms. Valeria Mattern on or about September 18, 2003. CP 14-19.

On April 8, 2004, Mr. Drane filed a motion to sever counts I, II, III, and IV, the crimes against Ms. Jacques, from counts V, VI, and VII, the crimes against Ms. Mattern. CP 21-29. The trial court denied the motion. RP 13-14, CP 127.

On May 12, 2005, Mr. Drane stipulated that his statements to police were admissible pursuant to CrR 3.5. CP 125-126.

The charges against Mr. Drane were amended several times, with the final charges being filed on May 17, 2005, and comprising the following: Count I- assault in the first degree against Ms. Jacques between October 3, 2003 and October 5, 2003, alternatively, assault in the first degree with a firearm or deadly weapon against Ms. Jacques between October 3, 2003, and October 5, 2003; Count II- kidnapping in the first degree of Ms. Jacques between October 3, 2003 and October 5, 2003; Count III- robbery in the first degree while armed with a firearm or deadly weapon against Ms. Jacques between October 3, 2003 and October 5, 2003; Count IV- rape in the first degree, a domestic violence incident, while armed with a deadly weapon or firearm against Ms. Jacques between October 3, 2003, and October 5, 2003; Count V- kidnapping in the first degree of Ms. Mattern between September 18, 2003, and September 21, 2003; Count VI- assault in the first degree against Ms. Mattern between September 18, 2003 and September 21, 2003, alternatively, assault in the first degree with a firearm or deadly weapon against Ms. Mattern between September 18, 2003, and September 21, 2003; and Count VII- rape in the first degree against Ms. Mattern between September 18, 2003, and September 21, 2003. CP 45-49.

On May 16, 2005, Mr. Drane waived his right to a jury trial. CP 130.

On June 1, 2005, the trial court entered a Memorandum Decision finding Mr. Drane guilty of Count I as charged in the alternative, Count II, Count III, Count IV, Count V, Count VI as charged in the alternative, and Count VII. CP 150-151.

On October 14, 2005, Findings of Fact and Conclusions of Law regarding the bench trial and regarding the issue of same criminal conduct for sentencing were entered. CP 193-195, 196-205.

Mr. Drane was sentenced to 772 months of confinement. CP 206-219.

Notice of Appeal was timely filed on November 10, 2005. CP 220-242.

Factual Background

Each of the victims in this case gave testimony at trial regarding the facts of the case as well as giving a different description of events to police and interviewers prior to trial. Therefore, a summary of the victims' different versions of events will be presented.

Valerie Mattern- trial testimony

On September 18, 2003, Ms. Mattern was doing drugs and working as a prostitute. RP 307-308. Ms. Mattern was born with "alcohol syndrome" and suffered a head injury in a car accident in 2001. RP 308. During the night of September 18, 2003, Ms. Mattern was walking by the

Bay Motel in Downtown Tacoma when she encountered Mr. Drane sitting in a white four door car. RP 309-310. Mr. Drane told Ms. Mattern to get into the car so she did. RP 311. Prior to her getting in the car, Ms. Mattern discussed with Mr. Drane the possibility of their going and getting high as well as the possibility of him "having a date," which meant in the language of prostitution some kind of sex. RP 356.

When Ms. Mattern entered the vehicle, Mr. Drane was in the process of buying crack from a big, short, black woman who was in the front passenger seat of the car. RP 311. When the deal concluded, the black woman got out of the car, Ms. Mattern got into the front seat of the car, and she and Mr. Drane got onto the freeway. RP 311-312. Mr. Drane told her they were going to get high. RP 312. This was fine with Ms. Mattern, but she didn't know where they were going. RP 312-313. It took a long time to get there, but eventually they stopped at Mr. Drane's house. RP 316.

Along the way to Mr. Drane's house, they stopped a few times and smoked crack. RP 316. Prior to arriving at Mr. Drane's home, Ms. Mattern had never asked to be let out of the car or taken home. RP 316-317.

Upon arriving at Mr. Drane's home, Mr. Drane and Ms. Mattern stayed downstairs and smoked more crack. RP 320. Mr. Drane then said

he had to go to work and would be back in a couple of hours. RP 320. Ms. Mattern thought that Mr. Drane was giving her crack to smoke because he was expecting to have sex with her, even though Mr. Drane never asked for sex. RP 321. Mr. Drane left, but returned with a pack of cigarettes and some candy for Ms. Mattern, then left again for two or three hours. RP 321, 359-360. Mr. Drane gave Ms. Mattern \$30 before he left. RP 322. Ms. Mattern knew the money was for sex. RP 362.

Prior to Mr. Drane leaving, Ms Mattern had no problems with Mr. Drane and didn't feel threatened by him in any way. RP 322.

While Mr. Drane was gone, Ms. Mattern explored Mr. Drane's home, looked through Mr. Drane's belongings then left the house. RP 322. Ms. Mattern returned to Mr. Drane's home because she didn't know the area. RP 322. Ms. Mattern then fell asleep. RP 364-365.

When Mr. Drane returned home, he and Ms. Mattern smoked more crack in Mr. Drane's upstairs bedroom. RP 323-324. Both Mr. Drane and Ms. Mattern smoked while nude on Mr. Mattern's bed, each having removed their own clothes. RP 323-324.

Mr. Drane started "throwing a fit" and accused Ms. Mattern of both losing a large chunk of his crack or of stealing it from him. RP 324. Mr. Drane accused Ms. Mattern of hiding the crack in her vagina. RP 324.

Mr. Drane was angry and had Ms. Mattern help him look for the missing crack. RP 325.

Mr. Drane began hitting Ms. Mattern with a metal broomstick and a cord. RP 325-326. Mr. Drane retrieved an iron and plugged it in in the bathroom attached to the bedroom. RP 327. While the iron got hot, Mr. Drane continued to ask Ms. Mattern to return his drugs. RP 328. Mr. Drane began to burn Ms. Mattern with the iron while yelling for her to give his crack back. RP 328.

Ms. Mattern was burned with the iron while lying unrestrained on Mr. Drane's bed. RP 329. Mr. Drane did not hold Ms. Mattern down in any way at that time. RP 329.

At some point Mr. Drane retrieved a small black gun from a closet in the hallway and threatened to kill Ms. Mattern if she didn't return his crack. RP 329-330.

Ms. Mattern told Mr. Drane that she wanted to leave, but Mr. Drane wouldn't let her and told her that all the windows were locked and didn't unlock. RP 330.

When Mr. Drane finished burning Ms. Mattern, they had sex on his bed in the bedroom. RP 332. When they were done, Mr. Drane put a cord around Ms. Mattern's neck and they went downstairs and sat on his couch for awhile. RP 332.

At some point, Ms. Mattern went back upstairs, drew a bath and got in the water. RP 333-335. Ms. Mattern got in the water but Mr. Drane told her that he would drown her if she didn't give his drugs back. RP 334. Mr. Drane actually pushed Ms. Mattern under the water two or three times. RP 336. Ms. Mattern got out of the tub and told him she was going to look for his drugs again. RP 334.

At some point while Ms. Mattern was in the hallway upstairs, Mr. Drane choked Ms. Mattern with the cord until she passed out for several hours. RP 333. When Ms. Mattern woke up she was in the same place where she passed out. RP 333.

At some point during the search for the drugs, Mr. Drane sprayed chemicals on Ms. Mattern's vagina, which caused her pain. RP 341-342.

When Ms. Mattern got out of the bathtub, she went downstairs. RP 336. Someone came to the house and Mr. Drane put Ms. Mattern into the garage, handcuffed her to something, and told her that if she screamed he would kill her. RP 336-337. Mr. Drane went and spoke to the person for ten or fifteen minutes then came back to the garage. RP 337.

Ms. Mattern was never handcuffed to a bed or anything else and was handcuffed in the garage for under twenty minutes. RP 338. Ms. Mattern testified that she did not consent to any of this. RP 338.

Two and a half to three days later Mr. Drane dropped Ms. Mattern off downtown. RP 338. Mr. Drane never left the house during this time. RP 339. Mr. Drane transported Ms. Mattern in his four door sedan, and Ms. Mattern was sitting unrestrained in the back seat of the car. RP 338-339. When he dropped Ms. Mattern off, Mr. Drane told her that she was lucky to be alive and that if she reported to the police he would kill her. RP 338-339. Mr. Drane took back the \$30 he had given Ms. Mattern. RP 339.

Eventually, Ms. Mattern went to the hospital. RP 340.

Ms. Mattern testified that she never consented to having sex with Mr. Drane or to being beaten by Mr. Drane. RP 343.

At some point in December of 2003, Ms. Mattern was in jail with Ms. Jacques for two days. RP 351. The women discussed Mr. Drane and what he had done to them. RP 352.

On cross-examination, Ms. Mattern admitted the she didn't know from her own memory everything that happened. RP 381. However, she did remember at trial having sex with Mr. Drane. RP 385, 387-388. Ms. Mattern is sure that she saw the gun only after everything else had happened. RP 391.

Valerie Mattern- pre-trial version of events

On October 5, 2003, Ms. Mattern told Officer Jeffrey Robillard that she had been working as a prostitute in the area of the Bay Motel and that she had been picked up by a gentleman and agreed to go with him for the purpose of having sex. RP 488-495. The gentleman gave her \$60 for a date and she had consensual sexual intercourse with the man during which time he wore a condom. RP 494-495. Ms. Mattern told Officer Robillard that there was no other sexual contact with the man other than the initial consensual contact. RP 494, 496. Ms. Mattern described that the man beat her, but did not describe any weapon of any kind. RP 494. Ms. Mattern told Officer Robillard that after the sexual intercourse the man took the money back from her and struck her with a black electrical extension cord approximately five times. RP 495-496. Ms. Mattern thought that the man might have burned her legs but she didn't remember if he had. RP 496. Ms. Mattern told Officer Robillard that the man struck her twice with a closed fist in the face, handcuffed her to a metal bed frame, and kept her in the house for the next two days. RP 496.

In a December 2004 interview, Ms. Mattern stated that Mr. Drane never had sex with her. RP 381. Ms. Mattern also stated that she didn't remember if Mr. Drane penetrated her sexually. RP 383. Ms. Mattern stated that Mr. Drane did not ejaculate. RP 383.

Theresa Jacques-trial testimony

Ms. Jacques testified that in the fall of 2003 she was kidnapped, beaten, robbed, and raped. RP 102. Ms. Jacques first encountered the man who kidnapped her on October 3, 2003. RP 102-103. Ms. Jacques had worked as a prostitute in the past, but in October of 2003 she was not engaged in prostitution. RP 104.

In the afternoon of October 3, Ms. Jacques went to the gas station by the Bay Motel in Tacoma to buy some chicken. RP 104-107. After purchasing her food and leaving the gas station, Ms. Jacques saw the man who kidnapped her standing by a phone booth. RP 107. The man asked Ms. Jacques what she was doing and offered her a ride home. RP 107. Ms. Jacques accepted the man's offer for a ride home. RP 108. Ms. Jacques identified Mr. Drane as the man who offered her a ride home. RP 110.

After Ms. Jacques got into Mr. Drane's car, Mr. Drane drove to the Red Apple on 56th. RP 111. Ms. Jacques was concerned because the Red Apple was not on the way to her house, and she told Mr. Drane that she would like to go. RP 111-112. Mr. Drane said, "No", then went inside the Red Apple for five to ten minutes and purchased green bottles of Heineken beer. RP 112, 197. Ms. Jacques felt comfortable staying in the car and felt at ease. RP 197-198. Mr. Drane put the beer in the car then made a

telephone call. RP 112-113. Mr. Drane then met a man who looked like Wesley Snipes wearing a yellow jogging outfit. RP 113. Mr. Drane and the man walked down to the end of the street out of Ms. Jacques' view for about ten minutes. RP 199. Mr. Drane then got back into the car and drove to his house. RP 113.

Mr. Drane and Ms. Jacques went into Mr. Drane's house and sat on the couch. RP 123. Mr. Drane and Ms. Jacques then drank beer and smoked crack and listened to music. RP 124. Mr. Drane and Ms. Jacques smoked all the crack Mr. Drane had while watching videos for six or seven hours, then left the house together to get more crack. RP 128-129, 206. Mr. Drane and Ms. Jacques then returned to his house and continued smoking crack. RP 129. Ms. Jacques never made any attempt to leave Mr. Drane's house between arriving and leaving to buy more crack. RP 207.

After the crack was all gone, Ms. Jacques asked Mr. Drane if she could go home. RP 129. Mr. Drane told her she wasn't going anywhere. RP 130. Mr. Drane then accused her of stealing his money and hiding it inside "the front part of her" and that he was going to look for it. RP 130. Mr. Drane then became violent and hit Ms. Jacques on her face with his hands. RP 131. Ms. Jacques fell and Mr. Drane began stomping on her with his boot all over her body. RP 132.

Mr. Drane put a dark blue comforter or sleeping bag on the floor of the living room and asked Ms. Jacques to lie down on it. RP 148. Mr. Drane then took Ms. Jacques' pants off. RP 148. After Mr. Drane removed his pants, he lay on top of Ms. Jacques. RP 151. Ms. Jacques could not recall whether or not Mr. Drane obtained an erection and did not recall whether or not Mr. Drane ever touched her "private areas." RP 151-152, 223.

Mr. Drane lay on top of Ms. Jacques for four minutes then began crying and weeping. RP 152. Mr. Drane then tied Ms. Jacques up in the laundry room. RP 153, 223.

Ms. Jacques defecated prior to being put in the laundry room. RP 146. Mr. Drane told her to clean up the mess and became upset when she couldn't clean the stain off of the floor and the couch. RP 146. Ms. Jacques had fecal matter on herself, so Mr. Drane asked Ms. Jacques to go into the bathroom and "clean up a little." RP 156. Ms. Jacques was only able to clean a little of the fecal matter off of herself. RP 156.

Immediately after Mr. Drane tried to make Ms. Jacques clean up the fecal matter he sexually assaulted her again. RP 157. This second assault also took place in the living room on the blue comforter. RP 157. During this second assault, Mr. Drane did the same thing he did in the first--he lay on top of Ms. Jacques for a few minutes after removing his

clothes. RP 157. Initially, Ms. Jacques could not remember whether or not Mr. Drane ejaculated. RP 158. After reading the police report of Detective John Rosenquist (RP 160), Ms. Jacques remembered that Mr. Drane did achieve an erection and placed his penis in her vagina. RP 161.

Ms. Jacques did not initially believe that Mr. Drane ejaculated inside of her, but at trial she stated she believed he did. RP 161. However, Ms. Jacques later testified that she was not certain that Mr. Drane ever ejaculated. RP 241. Ms. Jacques also could not recall whether or not Mr. Drane had an erection during the second sexual assault. RP 242. Ms. Jacques testified that she didn't really know whether Mr. Drane ever penetrated her at all. RP 247.

After beating Ms. Jacques, Mr. Drane put a "dog choke chain" around her neck and shackled her in the laundry room. RP 133. The shackles bound Ms. Jacques' hands and feet. RP 134. Mr. Drane also used a belt to restrain Mr. Jacques. RP 134. Ms. Jacques started yelling so Mr. Drane wrapped tape around her face and mouth. RP 134. Mr. Drane choked Ms. Jacques with the choke chain. RP 144. As Ms. Jacques struggled, the chain got tighter until Ms. Jacques lost consciousness for several seconds. RP 144-145.

Mr. Drane threatened to pour bleach down Ms. Jacques throat, put a curling iron in her vagina, and pour bleach in her vagina. RP 136. Mr. Drane also sprayed her with bleach. RP 136.

Ms. Jacques was in Mr. Drane's house from Friday afternoon until Sunday. RP 137. Ms. Jacques was restrained in the laundry room from Saturday morning until Sunday. RP 137. Twice Ms. Jacques almost fell asleep, but Mr. Drane shot Ms. Jacques with a pellet rifle every time she would start to fall asleep. RP 138. After shooting Ms. Jacques with the pellet gun, Mr. Drane pulled out an old handgun. RP 140. Mr. Drane put the gun to Ms. Jacques head and threatened to shoot her with it. RP 141. The gun jammed and the bullets fell out of it. RP 141. Mr. Drane became upset and accused Ms. Jacques of sabotaging the gun. RP 142.

Some time after Mr. Drane threatened her with the handgun, Ms. Jacques was sexually assaulted again. RP 154-155.¹ When she was sexually assaulted the second time, Ms. Jacques did not know where the handgun was located. RP 155.

After the second sexual assault, Mr. Drane took Ms. Jacques back to the laundry room and tied her up again. RP 162. Several hours later

¹ Ms. Jacques gave conflicting testimony as to the sequence of events regarding the second sexual assault. Her initial testimony was that she was sexually assaulted, put in the laundry room, shot with the pellet gun, threatened with the handgun, then sometime later was sexually assaulted again. Upon further examination, Ms. Jacques testified that

Mr. Drane told Ms. Jacques that she wasn't worth killing or hurting and that he was going to release her. RP 162. Mr. Drane removed the restraints on Ms. Jacques and told her to put her clothes on. RP 163. Ms. Jacques got dressed but Mr. Drane could not find her underwear, socks, or shoes. RP 163.

Besides the clothing, Ms. Jacques also left behind her watch, silver earrings, two silver rings, a silver chain, a silver cross, and her bus pass. RP 168. When Ms. Jacques and Mr. Drane first arrived at Mr. Drane's home, Mr. Drane asked Ms. Jacques to remove these items and give them to him. RP 169. Mr. Drane did not use any force when he did this, and Ms. Jacques gave the items to him. RP 169. Mr. Drane did not threaten Ms. Jacques when he asked her to give him these items. RP 170. Mr. Drane asked for the items before Ms. Jacques had seen the pellet gun. RP 170.

Once Ms. Jacques was dressed, she laid face down in the back seat of Mr. Drane's car. RP 170. Mr. Drane took her to Min's Market on Portland Avenue. RP 171. Mr. Drane got out of the car, opened the back door, tossed Ms. Jacques out of the car, then went into the store. RP 171. Mr. Drane told Ms. Jacques that if she "told anything to anyone" he would kill Ms. Jacques and her family. RP 172.

the second sexual assault occurred immediately after she attempted to clean the fecal

After she got out of the car, Ms. Jacques was grabbed by two white people who put her in their car and called 911. RP 173. Ms. Jacques was then transported to the hospital by an ambulance. RP 173.

Theresa Jacques- pre-trial version of events.

On October 5, 2003, Tacoma Police Officer Piotrowski spoke with Ms. Jacques at the hospital after she had been transported there by ambulance. RP 260-265. Ms. Jacques told Officer Piotrowski at least three times that she had not been sexually assaulted. RP 267-268. Ms. Jacques told Officer Piotrowski that the first name of the man who assaulted her was Kevin. RP 275. Ms. Jacques told Officer Piotrowski that she had met Kevin at a bar on 38th Street, possibly the Flying Boots Cafe. RP 275-276.

Also on October 5, 2003, Ms. Jacques was examined by Ms. Lynne Berthiaume (RP 429-430), the program coordinator for the forensic nurse examiner services at Tacoma General. RP 410-411. Ms. Jacques told Ms. Berthiaume that she had been assaulted on October 5 at 7 pm. RP 431. Ms. Jacques stated that she had met a man at the Poodle Dog or at the Great Western and the man asked her if she wanted to go to his house. RP 435. She went to the man's house and drank beer and smoked crack for four hours. RP 435. The man wanted more crack and accused

matter up, which occurred immediately after the first assault.

Ms. Jacques of stealing his drugs and \$800 in cash. Ms. Jacques told the man she didn't have any idea that he had any money, then Ms. Jacques and the man went back to the bar and got a 12 pack of beer and another \$100 worth of crack. RP 435-436.

Ms. Jacques told Ms. Berthiaume that her vagina had been penetrated by a penis and that the penis had been rubbed on top of her. RP 431-432. Ms. Jacques told Ms. Berthiaume that on October 3, 2003, prior to Ms. Jacques being released, her attacker penetrated her with a finger. RP 432. Ms. Jacques stated that her rectal area had been penetrated by a finger and that the man had ejaculated on top of her. RP 432. Ms. Jacques reported that no other acts occurred. RP 432.

On October 7, 2003, Detective Rosenquist interviewed Ms. Jacques. RP 632. Ms. Jacques said that she had been picked up at the Poodle Dog by a man named Kevin she had known since 1995. RP 632-633. Ms. Jacques said that the man who picked her up had a tube coming out of his body for urine. RP 633. Ms. Jacques told Detective Rosenquist that after the bullet fell out of the gun, the man never used it again and never pointed it at her again. RP 249.

On October 13, 2003, Ms. Jacques gave a tape recorded statement to Detective Rosenquist. RP 212. Ms. Jacques told Detective Rosenquist that the man who picked her up was named Kevin and drove an older

Mercedes-Benz. RP 213. Ms. Jacques told Detective Rosenquist that Mr. Drane and the man who looked like Wesley Snipes took a walk around the Red Apple. RP 214.

Ms. Jacques told Detective Rosenquist that prior to leaving Mr. Drane's house to purchase more crack, Mr. Drane asked Ms. Jacques to take her top off and she did. RP 215-216. Ms. Jacques also only described one incident of sexual assault to the police, saying it occurred just before Mr. Drane put her back into the car. RP 216. Ms. Jacques did not tell Detective Rosenquist that Mr. Drane had threatened her with a handgun. RP 219.

On March 12, 2004, defense counsel for Mr. Drane conducted a tape-recorded interview of Ms. Jacques. RP 220-221. Ms. Jacques told defense counsel that when the man picked her up from the gas station, he asked her if she wanted to "go for a beer" and she said "sure." RP 254-255. Ms. Jacques told defense counsel that she couldn't remember whether or not Mr. Drane had an erection. RP 223.

Ms. Jacques told defense counsel that the second sexual assault occurred prior to Mr. Drane shooting Ms. Jacques and that she did not recall whether or not Mr. Drane had an erection during the second sexual assault. RP 227-228.

Ms. Jacques told defense counsel that she had met Ms. Mattern in December of 2003 when both women were in jail. RP 234. The women discussed their respective experiences with Mr. Drane. RP 234.

Uncontested facts

Ms. Lynne Berthiaume is the program coordinator for the forensic nurse examiner services at Tacoma General. RP 410-411. On September 21, 2003, Ms. Berthiaume performed a sexual assault examination on Ms. Mattern. RP 416. Ms. Mattern had burns on her body which were consistent with an iron and had ligature marks all the way around her neck. RP 417. Ms. Mattern also exhibited patterned injuries to different areas of her body. RP 420.

On September 22, 2003, Officer John Rosenquist was assigned to the investigation involving Ms. Mattern. RP 617.

On September 23, 2003, Ms. Berthiaume attended the evaluation of Ms. Mattern's genital and rectal areas pursuant to Ms. Mattern's disclosure that she had been assaulted there. RP 424-425. Ms. Berthiaume observed superficial burns to Ms. Mattern's labia consistent either chemical burns or burns caused by a hot object. RP 428-429. The injuries exhibited by Ms. Mattern were consistent with injuries sustained within three days prior to September 21, 2003. RP 429.

On October 5, 2003, Ms. Berthiaume performed an examination on Theresa Jacques. RP 429-430. Ms. Jacques had multiple bruises to her face and body, ligatures circumferential to her neck, approximately 27 three millimeter wounds to her back. RP 430-431. The three millimeter wounds were consistent with a pellet gun. RP 438. Ms. Jacques exhibited injuries to her vaginal area consistent in age with what she reported to Ms. Berthiaume regarding sexual assault. RP 439-441.

Ms. Berthiaume collected four external anal swabs and four oral swabs from Ms. Jacques. RP 430-442.

Ms. Berthiaume testified that she could not determine whether or not Ms. Jacques injuries pre-existed her interaction with Mr. Drane. RP 464. Ms. Jacques also disclosed to Ms. Berthiaume that from time to time she worked as a prostitute. RP 464.

On November 3, 2003, Detective Rosenquist met with Ms. Mattern and showed her a photo-line up which included a picture of Mr. Drane. RP 619-620. Ms. Mattern identified Mr. Drane's picture as the man who assaulted her. RP 624. Detective Rosenquist performed a photomontage identification procedure with Ms. Jacques three times, including a montage with Mr. Drane's photo. RP 629. Ms. Jacques never made a photo identification of Mr. Drane. RP 632. Ms. Jacques did select another man named Donald Ray Betts from one montage. RP 631-632.

On November 6, 2003, Tacoma Police Detective Jeff Turner and Detective Rosenquist drove Ms. Jacques past Mr. Drane's residence twice to see if Ms. Jacques could identify the house. RP 477-482, 603-604. Ms. Jacques did not react either time they drove by. RP 482, 603-604.

Detective Turner participated in serving the search warrant on Mr. Drane's home on November 7, 2003, and recovered a BB gun. RP 482, 486-487.

Detective John Ringer also assisted in the November 7, 2003 search of Mr. Drane's home. RP 499-500. While searching Mr. Drane's home, Detective Ringer recovered handcuffs, leg irons, a handgun, a smoking kit for rock cocaine, women's shoes, a dog leash and chain, and a large knife. RP 500-509.

On December 17, 2003, Detective John Rosenquist met with Ms. Jacques and showed her the items recovered from Mr. Drane's home. RP 615. Ms. Jacques recognized the black suede boots, the handgun, and the BB rifle recovered from Mr. Drane's home. RP 616. A blue comforter was also recovered from Mr. Drane's home (RP 612-613) but Ms. Jacques did not recognize it. RP 616.

Jeremy Sanderson, a DNA lab tech for the Washington State Patrol (RP 534), performed a DNA analysis on the rape kit collected from Ms. Jacques. RP 541. The vaginal swabs indicated the presence of semen but

the anal swabs did not. RP 548-549. A DNA profile on the vaginal swab identified three contributors (RP 553-553); Ms. Jacques, Mr. Drane, and another unidentified individual. RP 554-572.

Ms. Brenda Robinson, a firearms and toolmark examiner for the Washington State Patrol, tested the firearm recovered from Mr. Drane's home. RP 576-578. The firearm was missing the firing pin and was inoperable. RP 583-584. The firearm could have chambered a round but could not have fired. RP 586.

Mr. Drane admitted to using drugs (RP 657) and purchasing crack cocaine. RP 663. Mr. Drane admitted to police that he had had numerous women over to his house for the purpose of having sex, including a woman named Theresa and a woman named Tina. RP 664-665. Mr. Drane was shown pictures of Ms. Jacques and Mr. Drane identified her as the woman he knew as Tina. RP 670-671. Mr. Drane told police that he had met Tina at the 76 gas station on Puyallup avenue, went with her to purchase dope and beer, then took her to his home where they smoked, had sex, and listened to records. RP 666-667. Mr. Drane admitted to having sex with her and admitted that he had ejaculated. RP 667.

D. ARGUMENT

1. **Where the only evidence of a crime is the inconsistent, contradictory, and uncorroborated testimony of one witness, there is insufficient evidence to convict a defendant.**

The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501, 120 P.3d 559; Salinas, 119 Wn.2d at 201, 829 P.2d 1068. A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501, 120 P.3d 559; Salinas, 119 Wn.2d at 201, 829 P.2d 1068. "We may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). A reviewing court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the

evidence. State v. Jackson, 129 Wn.App. 95, 109, 117 P.3d 1182 (2005); State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992).

While it is true that a reviewing court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence, this case presents an issue of first impression with regard to how to apply this principle. In all cases found by counsel for appellant dating back to 1922, the contradictory evidence and credibility determinations which the fact finder was faced with involved evidence and testimony coming from multiple witnesses or witnesses and physical evidence. See State v. Jackson, 129 Wn.App 95, 117 P.3d 1182 (2005); State v. Hernandez, 85 Wn.App 1016, 935 P.2d 623 (1997); State v. Walton, 64 Wn.App. 410, 824 P.2d 533 (1992); State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (1990); State v. Carver, 113 Wn.2d 591, 781 P.2d 1308 (1989); State v. Lawson, 37 Wn.App. 539, 681 P.2d 867 (1984); State v. Gerber, 28 Wn.App 214, 622 P.2d 888 (1981); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Theroff, 15 Wn.App. 590, 608 P.2d 1254 (1980); State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. McDaniels, 30 Wn.2d 76, 190 P.2d 705 (1948); American Products v. Villwock, 7 Wn.2d 246, 109 P.2d 570 (1941); State v. Kichinko, 122 Wn. 251, 210 P. 364 (1922).

In the instant case, the evidence that any crime has been committed comes only from one witness' testimony alone, the victim of the crime at issue, but that witness was also the source of the contradictory evidence either due to conflicting testimony at trial and/or prior contradictory statements to police and defense counsel, all of which was before the trial court.

While no Washington case has addressed this issue, Washington courts have held that, "Where a case stands or falls on the credibility of essentially one witness, that witness's credibility or motive must be subject to close scrutiny." State v. Eggelston, 129 Wn.App 418, ¶86, 118 P.3d 959 (2995). In Louisiana, courts have held that, "testimony of a victim alone may be sufficient to establish the elements of a sexual offense provided there is no internal contradiction or irreconcilable conflict with physical evidence." State v. Ware, 929 So.2d 240, 2005-1451 (La.App. 3 Cir.) *5 (2006).

Appellant urges this court to adopt the reasoning of the Louisiana courts.

- a. *There was insufficient evidence to support a finding of guilt on the charge of raping Ms. Mattern.*

It is well established that the State must prove each essential element of a charged crime beyond a reasonable doubt. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

Ms. Mattern initially told officers that she had been working as a prostitute and engaged in consensual sex with Mr. Drane for \$60. RP 488-496. Later, Ms. Mattern stated that Mr. Drane had never had sex with her. RP 381-383. At trial Ms. Mattern testified that Mr. Drane raped her and that the sexual intercourse was against her will. RP 332, 343.

In order for an act of sexual intercourse to constitute rape, the intercourse must be performed by forcible compulsion. RCW 9A.44.040. Even assuming that Mr. Drane did engage in sexual intercourse with Ms. Mattern, the State still had to prove that the intercourse was not consensual.

The only evidence which might establish that Ms. Mattern did not consent to have sex with Mr. Drane is Ms. Mattern's testimony at trial and her pre-trial statements to police and defense counsel. As described above, these statements are inconsistent or directly contradictory, ranging from no sex occurred, to consensual sex occurred, to rape occurred. Because this was the only evidence upon which the trial court could base its decision of whether or not there was forcible compulsion, and because

this evidence was internally contradictory, there was insufficient evidence to establish beyond a reasonable doubt that Mr. Drane raped Ms. Mattern.

Because the State presented insufficient evidence to prove all the elements of rape, this court should vacate Mr. Drane's conviction for raping Ms. Mattern.

b. There was insufficient evidence to support a finding of guilt on the charge of kidnapping Ms. Mattern

Similar to the charge of raping Ms. Mattern, the only evidence that Mr. Drane held Ms. Mattern against her will for any length of time comes from Ms. Mattern herself. Also similar to the evidence relating to the charge of raping Ms. Mattern, Ms. Mattern's statements regarding the details of her kidnapping are contradictory and unsupported by any independent evidence.

Ms. Mattern told police and testified at trial that she initially went with Mr. Drane voluntarily. RP 309-316, 488-495. Pretrial Ms. Mattern told police that she was handcuffed to a bed for two days (RP 338) but at trial Ms. Mattern testified that she was never handcuffed to anything. RP 496.

Ms. Mattern testified that she told Mr. Drane that she wanted to leave, but Mr. Drane wouldn't let her and told her that all the windows were locked and didn't unlock. RP 330. However, Ms. Mattern also

testified that after Mr. Drane had allegedly raped her, he put a cord around her neck and she and Mr. Drane went downstairs and watched television. RP 332. In describing how Mr. Drane allegedly burned her with a hot iron, Ms. Mattern testified that she was not held down or restrained by Mr. Drane in any way. RP 329. Ms. Mattern testified that at some point she decided that she wanted a bath so she filled a bathtub with water in the upstairs bathroom and got in. RP 333-335.

The facts testified to by Ms. Mattern surrounding her alleged kidnapping, especially when considered in light of her contradictory and inconsistent testimony regarding other details of her experience with Mr. Drane, suggest a more likely scenario that Ms. Mattern was hired by Mr. Drane to engage in deviant sexual acts and that she remained in his home voluntarily, at liberty to draw her own bath and move about the house at will.

As stated above, the State must prove each essential element of a charged crime beyond a reasonable doubt. RCW 9A.40.020 defines kidnapping as the intentional abduction of another person. RCW 9A.40.010 provides that "abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.

The only evidence dealing with whether or not Ms. Mattern had been “abducted” was her own internally contradictory testimony. Because no other evidence was presented regarding whether or not Ms. Mattern was restrained against her will, and because Ms. Mattern’s testimony was internally contradictory and therefore unreliable, the State presented insufficient evidence to prove beyond a reasonable doubt that Ms. Mattern was kidnapped.

c. There was insufficient evidence to support a finding of guilt on the charge of raping Ms. Jacques

Like the evidence relating to the charge of raping Ms. Mattern, the only source of evidence relating to the charge that Mr. Drane raped Ms. Jacques was Ms. Jacques herself. Also like Ms. Mattern’s testimony, Ms. Jacques testimony was conflicting and internally contradictory.

When Ms. Jacques was initially contacted by police, she denied that any sexual intercourse ever occurred between herself and Mr. Drane. RP 267-268. Further, Ms. Jacques identified another man named Kevin, who Ms. Jacques claimed to have known since 1995, as the man who had assaulted her. RP 213, 275, 632-633.

Ms. Jacques also gave conflicting testimony regarding the timing of the sexual assaults. Ms. Jacques initially testified that she was beaten (RP 130-132), then Mr. Drane put a blue comforter on the floor, made her

lay down on it then lay on top of her for a few minutes until he started crying. RP 148-152. Ms. Jacques then defecated on the floor and the couch (RP 146) and Mr. Drane told her to clean herself up in a bathroom, immediately after which he sexually assaulted her again. RP 156-157. Mr. Drane then tied her up in the laundry room. RP 146. However, Ms. Jacques later gave a different timeline and testified that the second assault occurred after she had been tied up in the laundry room and only shortly before she was released by Mr. Drane. RP 162.

The results of the rape kit introduced at trial suggest that Mr. Drane engaged in sexual intercourse with Ms. Jacques (RP 554-572), however, the only evidence that the sexual intercourse was not consensual comes from Ms. Jacques's internally contradictory testimony. At best, the evidence presented by the State merely proves that Mr. Drane and Ms. Jacques had sex, not that Ms. Jacques was raped.

Like the evidence provided by Ms. Mattern regarding her alleged rape by Mr. Drane, the evidence regarding Mr. Drane's alleged rape of Ms. Jacques is internally inconsistent and therefore not reliable enough to support a conclusion beyond a reasonable doubt that Mr. Drane raped Ms. Jacques.

- 2. There was insufficient evidence to support finding Mr. Drane guilty of robbing Ms. Jacques**

Here, Mr. Drane is charged with robbery against Ms. Jacques, but the items Mr. Drane is accused of robbing from Ms. Jacques are not identified in the charging document. CP 135-138. Ms. Jacques testified that Mr. Drane asked her to remove her watch, silver earrings, two silver rings, a silver chain, a silver cross, and her bus pass and give them to him when they first arrived at his home. RP 168-169.

RCW 9A.56.190 provides, in pertinent part:

A person commits robbery when he unlawfully takes personal property from the person of another...against his will by the use or threatened use of immediate force, violence, or fear of injury to that person...Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Ms. Jacques testified that Mr. Drane did not use any force when he did this, and Ms. Jacques gave the items to him. RP 169. Mr. Drane did not threaten Ms. Jacques when he asked her to give him these items. RP 170. Further, at the time Mr. Drane was putting Ms. Jacques back into his car, Ms. Jacques testified that Mr. Drane tried to locate these items as well as her underwear, socks and shoes, but could not find them. RP 167.

Ms. Jacques testimony fails to establish that Mr. Drane took Ms. Jacques property. Further, even if Mr. Drane can be considered to have

taken Mr. Jacques property, Ms. Jacques testimony fails to establish that her property was taken with force or threat of force.

3. There was insufficient evidence to support a finding that Mr. Drane was armed with a firearm during the commission of the robbery.

Ms. Jacques testified that Mr. Drane did not use any force when he allegedly robbed Ms. Jacques. RP 169. Ms. Jacques also testified that Mr. Drane did not threaten Ms. Jacques when he asked her to give him these items. RP 170. Ms. Jacques testified that Mr. Drane asked for the items before Ms. Jacques had seen the pellet gun. RP 170. Ms. Jacques testified that Mr. Drane revealed the handgun after she had been shot with the pellet gun. RP 140-142.

Mr. Drane had completed the robbery prior to his arming himself with either the pellet gun or the handgun. According to Ms. Jacques own testimony Mr. Drane was not armed with a firearm at the time he allegedly robbed her.

4. There was insufficient evidence to support finding Mr. Drane guilty of raping Ms. Jacques while armed with a deadly weapon or firearm.

RCW 9.41.010 defines a firearm as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as

gunpowder.” No evidence was introduced as to how the pellet gun propelled the pellets. The only weapon which meets the definition of firearm under RCW 9.41.010 is the handgun Ms. Jacques testified that Mr. Drane wielded while she was restrained in the laundry room.

According to Ms. Jacques testimony, Mr. Drane was armed with the handgun after she had been shot with the pellet gun. RP 140-142. Ms. Jacques testified that she was shot with the pellet gun while she was restrained in the laundry room. RP 137-138.

According to one version of the two alleged sexual assaults told by Ms. Jacques, both assaults occurred prior to Ms. Jacques being placed in the laundry room. RP 130-132, 146, 148-152, 156-157. If this is the case, the sexual assaults occurred prior to Mr. Drane arming himself either with the handgun.

Under the second version of the alleged sexual assaults, Ms. Jacques testified that the second assault occurred after she had been tied up in the laundry room. RP 162. This would make it possible that that the second sexual assault occurred after Mr. Drane had displayed the handgun, however, Ms. Jacques testified that when she was sexually assaulted the second time, she did not know where the handgun was located. RP 155.

While it is true that “the perpetrator of a crime need not be armed with a weapon in order to threaten to use one, if the victim knows that the

weapon is available because it is in possession of the perpetrator or an accomplice,” (State v. Eker, 40 Wn.App 134, 139, 687 P.2d 273, review denied, 104 Wn.2d 1002 (1985)), here Ms. Jacques never testified that Mr. Drane threatened her in relation to the alleged rapes. Mr. Drane made generalized threats (RP 136) and threatened Ms. Jacques in relation to her revealing where she had hidden his drugs (RP 130), but Ms. Jacques never testified that Mr. Drane threatened to shoot her if she did not have sex with him. Even if Ms. Jacques knew the handgun was nearby, and no testimony was presented that she did, no evidence was presented that Mr. Drane ever threatened Ms. Jacques with a handgun in relation to the alleged rapes.

There was insufficient evidence presented to establish that Mr. Drane was armed with a firearm when he allegedly raped Ms. Jacques.

5. There was not substantial evidence to support Finding of Fact RE: Bench Trial No. V

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002) (internal citations omitted).

As stated above, the only source for the factual details of the events surrounding each woman's interaction with Mr. Drane is the statements of each woman.

Ms. Mattern's testimony does not give a clear timeline as to when she was shown the handgun in relation to when she and Mr. Drane had sexual intercourse. Ms. Mattern's testimony does not establish that Mr. Drane threatened to kill Ms. Matern and pointed a gun at her prior to engaging in sexual intercourse with her. Therefore, there was not substantial evidence to support the trial court's finding that "the defendant's act of pointing what appeared to be a gun at Mattern and threatening to kill her overcame Mattern's resistance to intercourse with the defendant."

6. There was not substantial evidence to support Finding of Fact RE: Bench Trial No. XIII

Ms. Jacques' testimony at trial was that she defecated on the couch and floor of the living room, prior to being tied up in the laundry room. RP 146. Therefore, there was not substantial evidence to support the trial court's finding that, "during the beating, Jacques became so terrified that she defecated on her self and the laundry room floor."

7. There was not substantial evidence to support Finding of Fact RE: Bench Trial No. XIV

Ms. Jacques' testimony at trial was that she defecated on the couch and floor of the living room, prior to being tied up in the laundry room. RP 146. Further, as discussed above, there was conflicting testimony from Ms. Jacques regarding whether she was raped the second time before or after Mr. Drane threatened her with the handgun. Therefore, there was not substantial evidence to support the trial court's finding that, "After the victim defecated, the defendant became so angry that he insisted she clean up laundry room. Jacques was unable to clean the laundry room to the defendant's satisfaction..." or that, "the defendant's act of pointing what appeared to be a gun at Jacques along with his threatening to kill her, overcame Jacques' resistance to intercourse with the defendant."

8. There was not substantial evidence to support Finding of Fact RE: Bench Trial No. XV.

As stated above, Ms. Jacques testified that Mr. Drane did not use any force when he allegedly robbed Ms. Jacques. RP 169. Ms. Jacques also testified that Mr. Drane did not threaten Ms. Jacques when he asked her to give him these items. RP 170. Ms. Jacques testified that Mr. Drane asked for the items before Ms. Jacques had seen the pellet gun. RP 170. Ms. Jacques testified that Mr. Drane revealed the handgun after she had been shot with the pellet gun. RP 140-142. Therefore, there was not substantial evidence in the record to support the finding that "the

defendant took Jacques' personal items by the use or threatened use of force or actions that caused Jacques to fear she would be injured if she did not comply," or that, "during the course of taking Jacques property, or in the immediate flight therefrom, the defendant was armed with a deadly weapon (handgun) or displayed what appeared to be a deadly weapon (bb-gun or handgun)."

Ms. Brenda Robinson, a firearms and toolmark examiner for the Washington State Patrol, tested the firearm recovered from Mr. Drane's home. RP 576-578. The firearm was missing the firing pin and was inoperable. RP 583-584. The firearm could have chambered a round but could not have fired. RP 586. No evidence was presented to establish that the handgun was in working order at the time Ms. Jacques observed it. Therefore, there was not substantial evidence to support the trial court's finding that, "the defendant's handgun was readily capable of causing death or substantial bodily injury."

Based on the above stated testimony, there was also not substantial evidence to support the trial court's conclusion that, "the evidence supports findings for both deadly weapon or bodily injury and that the court would return a verdict of Guilty to Robbery in the first degree based on either basis."

9. There was not substantial evidence to support Finding of Fact RE: Bench Trial No. XVI.

As discussed above, Ms. Jacques testified that Mr. Drane did not use any force when he allegedly robbed Ms. Jacques. RP 169. Ms. Jacques also testified that Mr. Drane did not threaten Ms. Jacques when he asked her to give him these items. RP 170. Ms. Jacques testified that Mr. Drane asked for the items before Ms. Jacques had seen the pellet gun. RP 170. Ms. Jacques testified that Mr. Drane revealed the handgun after she had been shot with the pellet gun. RP 140-142. Therefore, there was not substantial evidence in the record to support the finding that, “during the commission of the Robbery and Rape against Theresa Jacques, the defendant was armed with a firearm as defined under RCW 9.41.010.”

Further, for the reasons discussed above, there was not substantial evidence to support the trial court’s conclusion that, “the defendant used the firearm to instill fear in Jacques so that he could commit the robbery and the rape.”

10. There was not substantial evidence in the record to support Finding of Fact RE: Same Criminal Conduct No. 1

As stated above, Ms. Jacques gave conflicting testimony regarding the sequence of events. One version had both sexual assaults occurring before she was tied up in the laundry room, the other had the second

sexual assault occurring after she had been tied up in the laundry room. Ms. Jacques did consistently testify that she was choked with the choke chain after being tied up in the laundry room. RP 144-145. Ms. Jacques also testified that Mr. Drane asked her to give him the items he allegedly stole from her when they first arrived at his home. RP 169.

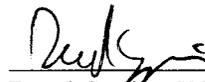
Because of this testimony, there was not substantial evidence to support the finding that, “the act of strangulation (Assault 1) of Jacques (Count 1) occurred and was completed before the act of rape...Furthermore, the rape was completed before the robbery, the assault was completed before the robbery and rape.”

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Drane’s convictions for the rape of Ms. Mattern, the rape of Ms. Jacques, the kidnapping of Ms. Mattern, and the robbery of Ms. Jacques, and remand for resentencing.

DATED this 26th day of June, 2006.

Respectfully submitted,



Reed Speer, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 26th day of June, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Floyd Drane, DOC# 883802
W.C.C.
P.O. Box 900
Shelton, WA. 98584

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 26th day of June, 2006.



Reed Speir, WSPA No. 36270
Associate, Law Offices of Mary Kay High

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Court of Appeal of Louisiana, Third Circuit.
STATE of Louisiana
v.
Calvin WARE.
No. 05-1451.

April 12, 2006.
Rehearing Denied June 7, 2006.

Background: Defendant was convicted in the Thirteenth Judicial District Court, Parish of Evangeline, No. 66773FB, Thomas F. Fuselier, J., of attempted forcible rape, and he appealed.

4Holding: The Court of Appeal, Thibodeaux, C.J., held that evidence was insufficient to sustain defendant's conviction.

Conviction reversed; acquittal entered; sentence set aside and vacated.

West Headnotes

[1] Criminal Law 110 ↔ 1144.13(3)

110 Criminal Law

110XXIV Review

110XXIV(M) Presumptions

110k1144 Facts or Proceedings Not Shown by Record

110k1144.13 Sufficiency of Evidence

110k1144.13(2) Construction of Evidence

110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

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Criminal Law 110 ⇌ 1159.2(7)

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.2 Weight of Evidence in General

110k1159.2(7) k. Reasonable Doubt. Most Cited Cases

When the issue of sufficiency of evidence is raised on appeal, the critical inquiry of the reviewing court 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 proven beyond a reasonable doubt.

[2] Criminal Law 110 ⇌ 1159.4(2)

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.4 Credibility of Witnesses

110k1159.4(2) k. Province of Jury or Trial Court. Most Cited Cases

It is the role of the fact finder to weigh the respective credibility of the witnesses, and therefore, the appellate court should not second guess the credibility determinations of the triers of fact.

[3] Criminal Law 110 ⇌ 1159.2(7)

110 Criminal Law

110XXIV Review

110XXIV(P) Verdicts

110k1159 Conclusiveness of Verdict

110k1159.2 Weight of Evidence in General

110k1159.2(7) k. Reasonable Doubt. Most Cited Cases

In order for appellate court to affirm a conviction, the record must reflect that the state has satisfied its burden of proving the elements of the crime beyond a reasonable doubt.

[4] Rape 321 ⇌ 51(1)

321 Rape

321II Prosecution

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The elements of forcible rape are set forth in La.R.S. 14:42.1, which provides, in pertinent part:

A. Forcible rape is rape committed when the anal, oral, or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

Attempt is defined in La.R.S. 14:27 as:

A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

....

C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.

***242** [1][2][3] The analysis for a claim of insufficient evidence is well-settled:

When the issue of sufficiency of evidence is raised on appeal, the critical inquiry of the reviewing court 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 proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, rehearing denied, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State ex rel. Graffagnino v. King*, 436 So.2d 559 (La.1983); *State v. Duncan*, 420 So.2d 1105 (La.1982); *State v. Moody*, 393 So.2d 1212 (La.1981). It is the role of the fact finder to weigh the respective credibility of the witnesses, and therefore, the appellate court should not second guess the credibility determinations of the triers of fact beyond the sufficiency evaluations under the *Jackson* standard of review. See *State ex rel. Graffagnino*, 436 So.2d 559 (citing *State v. Richardson*, 425 So.2d 1228 (La.1983)). In order for this Court to affirm a conviction, however, the record must reflect that the state has satisfied its burden of proving the elements of the crime beyond a reasonable doubt.

State v. Kennerson, 96-1518, p. 5 (La.App. 3 Cir. 5/7/97), 695 So.2d 1367, 1371.

In *State v. Bernard*, 98-994 (La.App. 3 Cir. 2/3/99), 734 So.2d 687, 691, this court stated:
 It is well settled in Louisiana law that a jury may rely on a single witness's testimony to

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establish a factual element required to prove guilt, provided there is no internal contradiction or irreconcilable conflict with physical evidence. *State v. Henry*, 95-428 (La.App. 3 Cir. 10/4/95); 663 So.2d 309, *writ denied*, 96-0681 (La.5/16/97); 693 So.2d 793. According to *State v. Jeansonme*, 580 So.2d 1010 (La.App. 3 Cir.), *writ denied*, 584 So.2d 1170 (La.1991), the trier of fact may accept or reject, in whole or in part, any portion of a witness's testimony.... The testimony of one witness, if believed by the trier of fact, is sufficient to support the requisite factual conclusion in the absence of internal contradictions or irreconcilable conflict with the physical evidence. *State v. Henry*, 95-428 (La.App. 3 Cir. 10/4/95); 663 So.2d 309, *writ denied*, 96-0681 (La.5/16/97); 693 So.2d 793. The fact that the record contains evidence which conflicts with the testimony accepted by the trier of fact does not render the evidence accepted by the trier of fact insufficient. *State v. Tompkins*, 403 So.2d 644 (La.1981), *appeal after remand*, 429 So.2d 1385 (La.1982).

[4] The victim testified about the events from which the charge against the Defendant arose. She was a passenger in the Defendant's car. Accompanying them were the victim's minor son and the Defendant's daughter and her boyfriend, whom they drove to their residence at Chicot. After dropping off the Defendant's daughter, the remaining occupants of the car were the Defendant, the victim, and the victim's nine-year-old son. Shortly after leaving the Chicot area, the victim realized that the Defendant was drinking from a bottle he had underneath his seat. The Defendant allowed the victim to drive, but he later resumed driving the vehicle.

The victim eventually fell asleep while the Defendant was driving in the back roads of Oakdale, a rural area. She awoke when she felt the passenger door of the vehicle being opened by the Defendant. She attempted to exit the vehicle but the Defendant, according to the victim's testimony, shoved her back into the car. As she attempted to exit from the driver's side, the Defendant grabbed her leg and began to pull her jeans off as she was *243 "fighting and trying to get away" from the Defendant. Eventually, her jeans were pulled from one leg only. The Defendant, she claims, managed to pull down her underwear as she "was struggling with him" and while she was screaming during this ordeal.

The victim further testified that she attempted to kick and push the Defendant away from her. The Defendant, however, "slammed [her] down into the car seat," pinned her down, and held his forearm against her throat. He then penetrated her vaginally. She later managed to escape from the car with her son who was asleep in the back seat during this occurrence.

The victim's son was nine years old at the time of the incident and ten years old at the time of his testimony at the trial. He testified that he was awakened during this confrontation and heard his grandfather, the Defendant, "hollering" at his mother, the victim. He did not see or

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[5] This court is well aware that the testimony of a victim alone may be sufficient to establish the elements of a sexual offense "provided there is no internal contradiction or irreconcilable conflict with physical evidence." *State v. Bernard*, 734 So.2d at 691. When faced with the overwhelming physical evidence which militates against the finding of a sexual offense, the testimony of the investigating officers, the testimony of the victim's ten-year-old son who was present in the back seat during this occurrence, and the medical evidence submitted through the testimony of Dr. Steele, we are convinced that a fair reading of the whole record leads us to the inescapable conclusion that a rationale trier of fact could not have found the Defendant guilty beyond a reasonable doubt.

CONCLUSION

The evidence in this record is insufficient to sustain the Defendant's conviction for attempted forcible rape or for any responsive verdict. We, therefore, reverse the Defendant's conviction and order an acquittal be entered and that the Defendant's sentence be vacated and set aside.

CONVICTION REVERSED; ACQUITTAL ENTERED; SENTENCE SET ASIDE AND VACATED.

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**History
Direct History**

=> 1 **State v. Ware, 929 So.2d 240, 2005-1451 (La.App. 3 Cir. 4/12/06) (La.App. 3 Cir. Apr 12, 2006) (NO. 05-1451), rehearing denied (Jun 07, 2006)**

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