

FILED

AUG 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293033

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS ALAN PITTS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL E. SCHWAB, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred as a matter of law in concluding that third degree rape was an inferior degree offense to second degree rape?

B. ANSWER TO ASSIGNMENTS OF ERROR.

1. On the facts present in this case, the court was correct in concluding that third degree nonconsensual rape was a lesser degree offense to second degree, “incapable of consent”, rape.

II. STATEMENT OF THE CASE

The State adopts the Statement of the Case contained in Pitts’ opening brief, but will supplement that narrative herein. RAP 10.3(b).

III. ARGUMENT

1. The trial court did not err in finding the defendant guilty of the lesser degree crime of third degree rape.

In his opening brief, Mr. Pitts states that he is not challenging the trial court’s findings of fact entered after a bench trial. Indeed, unchallenged findings of fact become verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The court found, in relevant part:

7. The victim described an incident, on or about August 28, 2008 during which the Defendant provided him with alcohol and then injected a substance into his body, which caused him to go in and out of consciousness, at one point fearing his own death.

...

9. The victim could not move, he asked the Defendant: "What are you doing?" He told the Defendant "no" and to stop.

...

13. The victim did not want to have sexual intercourse with the Defendant.

...

23. The victim did not consent to any act of sexual intercourse by the Defendant.

(CP 28-29)

Pitts does, however, assign error to the trial court's conclusions of law that the victim did not consent to sexual intercourse with the defendant, that the lack of consent was expressed, and that the defendant was guilty of the crime of third degree rape. **(Appellant's Opening Brief, p. 1)** The issues raised on appeal are without merit.

Under the so-called *Workman* test, a defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (legal prong), and the evidence supports an inference that only the lesser offense was committed

(the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000), (clarifying that to satisfy the fact-based prong “the evidence must raise an inference that only the lesser included . . . offense was committed to the exclusion of the charged offense”). *See, also*, State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990); State v. Speece, 115 Wn.2d 360, 363, 798 P.2d 294 (1990).

A criminal defendant may be convicted at trial of the charged offense, or “any degree inferior thereto.” RCW 10.61.003. Third degree rape is a lesser degree crime to second degree rape. State v. Bucknell, 144 Wn. App. 524, 530-31, 183 P.3d 1078 (2008).

A trial court judge, as the trier of fact in a bench trial and not constrained by jury instructions, “may properly find defendant guilty of any inferior degree crime of the crimes included within the original information.” State v. Peterson, 133 Wn.2d 885, 892-93, 948 P.2d 381 (1997). *See, also*, State v. Heidari, 159 Wn. App. 601, 609-10, 248 P.3d 550 (2011).

Pitts cites a number of cases which hold that third degree rape is not a lesser included offense when the original charge is second degree rape under the “forcible compulsion” prong, RCW 9A.44.050(1)(a). The State respectfully disagrees with his assertion that the analysis in those

cases is likewise applicable where, as here, the original charge was brought under the “incapable of consent” prong, RCW 9A.44.050(1)(b).

The reason why third degree nonconsensual rape is not an lesser degree offense to forcible second degree rape was articulated by the Washington Supreme Court in State v. Charles, 126 Wn.2d 353, 894 P.2d 558 (1995). In that case, the court reversed a Court of Appeals decision that sufficient evidence would have supported a lesser degree instruction for third degree rape. The victim testified that the defendant forced her to the ground; she struggled, and he then forcibly raped her:

According to Charles, the two engaged in a consensual act of intercourse, and he was not guilty of any degree of rape. In order to find Charles guilty of third degree rape, the jury would have to disbelieve **both** Charles’ claim of consent **and** the victim’s testimony that the act was forcible. But there is no affirmative evidence that the intercourse here was unforced but still nonconsensual. Thus, the trial court properly refused to instruct the jury on third degree rape.

Charles, 126 Wn.2d at 355-56. (Emphasis added)

Charles was followed by the Court of Appeals in State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009), *review denied*, 168 Wn.2d 1017, 227 P.3d 853 (2010), as well as in State v. Jeremia, 78 Wn. App. 746, 753-54, 899 P.2d 16 (1995).

In Wright, the victim testified that she was pushed or pulled into the room where the sexual assault occurred, her clothes were pulled off,

and she was held down with sufficient force that she was prevented from getting up and leaving. She told the individuals assaulting her to stop. The defendant denied any sexual contact with the victim. Wright, 152 Wn. App. at 73-74. Just as in Charles, the court held that since the victim's testimony supported only second degree rape, and the defendant's testimony supported only no rape at all, the court erred in giving the third degree rape instruction. Id.

On similar facts, the Court of Appeals affirmed the trial court's refusal to instruct on third degree rape in Ieremia, where the jury could only convict the defendants of second degree forcible rape if it believed the victim, or acquit if it believed the defendants. 78 Wn. App. at 756.

In contrast, this court's decision in Bucknell is more on point with respect to the facts present here, as the defendant in that case was also charged under the "incapable of consent" prong of second degree rape. In that case, the victim suffered from a debilitating disease, Lou Gehrig's disease, and as a result, she was bedridden and unable to move from her chest down. However, the Court of Appeals noted that since she could talk, answer questions, as well as understand and perceive information, she was not "physically helpless" as defined under RCW 9A.44.050(1)(b). There was sufficient evidence that the defendant did commit third degree rape, however, since even though the defendant testified that sexual

intercourse was consensual, there was no evidence that the victim consented to the sex through words or conduct. Id., 144 Wn. App. at 530-31.

Just as in Bucknell, the trial court here found that the State had not met its burden of proving that L.C.H. was incapable of consent, since he testified that he told Pitts “no”, and to stop. Pitts’ testimony was that it was L.C.H. who sexually pursued *him*, and that while he did attempt anal sex, he was not able to remain erect. (3-26-09 RP 88-89; 109; 113-14; 128) On these facts, the trial court could properly find Pitts guilty of third degree rape, since to do so, the court could *believe* the victim’s testimony, while *disbelieving* Pitts’ testimony that any sexual intercourse was consensual. Stated another way, and in light of the analysis dictated by Charles, there was affirmative evidence that the intercourse was not forced, but was also not consensual.

Pitts also argues that since the trial court found that L.C.H. was not incapable of consent, there is a reasonable inference that the court concluded that the “reasonable belief” defense stated at RCW 9A.44.030(1) applied in this case. Reasonable belief is an affirmative defense which must be proven by a preponderance of the evidence by the defendant, and the court’s findings and conclusions here would seem to be

logically inconsistent with a finding of reasonable belief that consent was given.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction for one count of third degree rape.

Respectfully submitted this 19th day of August, 2011.


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