

FILED
April 1, 2013
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31289-5-III

STATE OF WASHINGTON, Respondent,

v.

STEPHEN JASPER HOSSZU, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Stephen Hosszu was charged with third degree rape and first degree burglary arising from an incident that occurred in a neighbor's home. Pretrial, Hosszu sought to introduce evidence under RCW 9A.44.020(3), the rape shield statute, that the night before, he was asked to check in on the neighbor and she made sexual advances to him. The trial court found that the evidence was not relevant and did not conduct a hearing or admit the evidence. Hosszu was convicted and now appeals, arguing that the trial court erred in refusing to admit testimony about the encounter the previous night as proof that the victim consented.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in finding the proffered evidence not relevant under RCW 9A.44.020(3).

ASSIGNMENT OF ERROR 2: The trial court's refusal to admit evidence relevant to the issue of consent deprived Hosszu of the ability to present a defense under U.S. Const. Amend. VI and Wash. Const. Art. 1, § 22.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is evidence of sexual advances from the victim to the defendant the night before the incident charged relevant to the issue of the victim's consent? YES.

ISSUE 2: Was the error in refusing to admit relevant evidence harmless? NO.

IV. STATEMENT OF THE CASE

The State charged Hosszu with first degree burglary with sexual motivation and rape in the third degree arising from an incident with his neighbor, Sally Voight, that occurred on July 29, 2011. CP 27-29. Voight reported the incident to police on August 2, 2011 with her boyfriend, Don Key. CP 5. Voight told police that she was in her kitchen making jam when Hosszu, who lived across the street, came into her kitchen through the garage door. CP 5. According to Voight, Hosszu put his hand on her shoulder, spoke to her suggestively, and put his hand down her shorts, penetrating her vagina with his finger. CP 5. Voight claimed that she wiggled away and escaped through the garage door. CP 6. When she looked back at him, she saw his pants were open and his penis was erect. CP 6.

Initially, Voight told Key several days later that Hosszu had only made sexual comments to her. CP 6. Key confronted Hosszu at his house and told him he was not welcome at Voight's house and if he went over, things would go badly. CP 7. Key also returned a second time to retrieve a house key that Voight had given Hosszu. CP 7.

Voight later told police that Hosszu came back to her house a few days later on August 1, 2011 and brought her some adding tape. CP 9. She claimed that Hosszu told her he could make her feel good but his wife was sick; that he watched her in her house; and that he knew what she wore to bed. CP 9. She told Hosszu to leave and he did not, so she left herself and he went home several minutes later. CP 9.

Police interviewed Hosszu about the incident. CP 10. He told them first about taking the adding machine tape to Voight's house on August 1. According to Hosszu, when he arrived, he called out to Voight and she acknowledged him, so he went in the house through the garage. CP 10. He put the adding machine tape on a table and spoke with Voight briefly when she told him she needed to get something out of her car. CP 10. He stayed in the house for about a minute, then left and told Voight, "See you later." CP 10.

In response to police questioning, Hosszu initially denied that anything had happened on July 29. However, when the detective asked him whether the incident had been a “one-time thing,” he admitted that it was. CP 11. He admitted placing his hand in Voight’s clothing and touching her vagina, and expressed remorse about the incident. CP 11. He stated that he did it because she was not feeling affection from Key. CP 11.

Before trial, Hosszu moved to admit evidence of prior sexual behavior pursuant to ER 412¹. CP 22. As an offer of proof, Hosszu indicated that he and his wife would testify that on the night of July 28, 2011, Key had asked them to check on Voight as he was concerned for her and had not been able to contact her. CP 23. Voight answered the door and invited them in to talk. CP 23. She repeatedly stated that she was nude under the bathrobe and told them about sex acts with Key. CP 23. She opened and closed her bathrobe in a suggestive manner and when hugging Mrs. Hosszu, told her it was nice to have somebody hug her breasts. CP 23.

In a memorandum ruling, the trial court found that “[t]he conduct and comments attributed to [Voight] are irrelevant to the issue of consent

¹ As to criminal cases, ER 412 cites to and incorporates RCW 9A.44.020, the rape shield statute.

to sexual contact with Defendant several days later.” The court further ruled that her conduct, at most, indicated “sexual openness,” and there was no proof of similar attire or behavior on July 29, 2011. CP 25. Because, in the trial court’s view, the proffered evidence amounted to “she was asking for it,” and established nothing more with respect to Hosszu than that she was dressed provocatively on an earlier occasion. CP 25. Accordingly, the trial court denied Hosszu’s motion to admit the evidence. CP 25.

At trial, Hosszu testified that he had lived in his home in Moses Lake for twenty-five to thirty years. II RP (Trial)² 233. He and his wife had gotten to know Voight over the past couple of years that she had lived across the street, visiting the house a number of times and helping her with small home projects. II RP (Trial) 235-36. Voight had also given him a key to her house so that he could look after her house and her animals if she was away. II RP (Trial) 238.

² The verbatim report of proceedings consists of: A single volume containing hearings on 3/12/12, 4/4/12, and 4/11/12; three volumes designated as “Trial” proceedings consecutively paginated to each other, but not to other volumes; and a single volume designated as “Sentencing” containing a hearing on November 27, 2012 that is not consecutively paginated to any other volume. For purposes of this brief, the single volume of pretrial proceedings is not cited; the trial volumes will be cited as “(volume number) RP (Trial) at (page)”; and the sentencing volume will be cited as “RP (Sentencing) at (page).”

Hosszu testified that on the night of July 28, he and his wife had received a message from Key asking to check in on Voight. II RP (Trial) 239. Voight answered the door, invited them in, and they stayed for about an hour. II RP (Trial) 240. Pursuant to the pretrial ruling, Hosszu did not testify about Voight's provocative behavior towards himself and his wife.

On July 29, Hosszu testified that he went to Voight's house because while cleaning out a back bedroom, he found a number of pens and pencils that he thought Voight could use with her school kids. II RP (Trial) 241. He testified that he knocked and entered through the front door when Voight invited him in. II RP (Trial) 242. She told him to put the pencils down and he put them on the kitchen cabinet. II RP (Trial) 243. Voight pulled out one of the pens and commented that it looked like Key's penis. II RP (Trial) 243. She walked toward the garage and he followed. II RP (Trial) 244. Hosszu placed his hand on the back of her shoulder and asked, "Is that what you missed?" and she replied yes, in a manner that Hosszu described as "a wanting way." II RP (Trial) 244-45. He then reached down and touched her vagina and she said "yes" again and pushed her body into his. II RP (Trial) 245-46. At that point, Hosszu stopped and pulled his hand away, feeling that it was not right. II RP (Trial) 245. Feeling that he had to leave, he turned and went out through the garage door. II RP (Trial) 246.

On August 1, Hosszu went back to Voight's house to give her the adding tape. II RP (Trial) 249. At that time, he told Voight he was not going to have a sexual relationship with her. II RP (Trial) 249.

The jury convicted Hosszu on all counts. CP 67-70. The trial court sentenced Hosszu to 44 months to life and imposed a special sex offender sentencing alternative. CP 107, 110; RP (Sentencing) at 103. Hosszu appeals. CP 129.

V. ARGUMENT

Hosszu contends that the trial court erred in denying his motion to admit evidence of Voight's sexually provocative behavior towards him and his wife the night before the charged incident. The evidence was relevant to the issue of Voight's consent. Moreover, without admission of the evidence, the jury had no context for considering Hosszu's perception that Voight responded to him "in a wanting way" on the date in question. Because the ruling unfairly deprived Hosszu of the ability to present a defense to the charge, the conviction should be reversed and the case remanded for a new trial.

Washington's rape shield law, RCW 9A.44.020(3), provides that a defendant charged with rape may not introduce evidence of the alleged victim's past sexual behavior for purposes of challenging the credibility of

the victim. Moreover, to be admissible on the issue of consent, the defendant must make a pretrial motion with an offer of proof. The trial court first determines whether the offer of proof is sufficient; if so, it then holds a closed hearing on the proffered evidence for the purpose of establishing whether the proffered evidence is relevant to the issue of the victim's consent; whether the probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and whether its exclusion would result in denial of substantial justice to the defendant. This process "must take into account the potential impact upon the criminal defendant's constitutional rights" to present a defense under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution. *State v. Morley*, 46 Wn. App. 156, 159, 730 P.2d 687 (1986).

The purpose of the rape shield law is to correct the antiquated common law rule that a woman's sexual misconduct affects her character and veracity. *State v. Hudlow*, 99 Wn.2d 1, 8-9, 659 P.2d 514 (1983). Rejecting the general premise that a woman who is unchaste is more likely to have consented to sex with the defendant, the rape shield law serves to exclude the victim's prior sexual activity if it is not "factually similar in some respects to the consensual sex act claimed by defendant." *Id.* at 11. The statute further promotes the jury's fact-finding function by excluding

prejudicial evidence that serves only to confuse the issue, mislead the jury, or cause emotional decision-making. *State v. Gregory*, 158 Wn.2d 759, 783, 147 P.3d 1201 (2006). The admission of prior sexual conduct is within the discretion of the trial court and is reviewed for abuse of that discretion. *Gregory*, 158 Wn.2d at 459 (citing *State v. Kalamarski*, 27 Wn. App. 787, 790, 620 P.2d 1017 (1980)).

In determining whether proffered evidence is relevant under the rape shield statute, the primary consideration is whether the victim's consent to sexual activity in the past, without more, makes it more probable or less probable that she consented to sex on the occasion in question. *Gregory*, 158 Wn.2d at 785 (quoting *Hudlow*, 99 Wn.2d at 10). In *Hudlow*, the court observed that mere past consent to sex alone is not relevant, as consent to sex with one man does not make a woman more likely to consent to sex with other men. 99 Wn.2d at 10. But the *Hudlow* court also set forth several examples of particularized conduct that could be relevant to the issue of consent, including evidence of prior sexual conduct by the victim with the defendant. 99 Wn.2d at 11.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable. ER 401. In the present case, the question of Voight's consent to

a sexual encounter with Hosszu was the primary issue for the jury to determine. Third degree rape requires proof that the victim did not consent to intercourse and the lack of consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a). "Consent" is defined as giving actual words or conduct at the time of the act indicating freely given agreement to have sexual contact. RCW 9A.44.010(7). Consequently, the words and conduct between Voight and Hosszu at the time of the incident and the meanings the parties ascribed to those words and conduct comprised the heart of the defense case.

Here, the interaction between Hosszu and Voight on the night of July 28, the day before the charged incident, was critical for understanding the relationship between the parties on July 29 and why Hosszu would have perceived Voight's behavior as sexually inviting. The trial court's ruling that the evidence was not relevant to the question of Voight's consent on the following day is unreasonable and an abuse of discretion. First, the trial court appears to have misapprehended the timeline in question as it referred to the prior incident as occurring several days earlier, when in fact it was the night before the charged incident. Second, the trial court's conclusion that Voight's behavior did not amount to an invitation to sex with Hosszu was an unreasonably restrictive interpretation of the minimal standard of relevance. To be blunt, whether

“she was asking for it” is a *highly* relevant issue in a rape case. This is not a case where the victim is alleged to have merely dressed provocatively, or gone out to a bar alone, or such similar behavior that in days past might have been regarded as the provenance of a “loose” woman. Instead, this is a circumstance where the victim openly discussed her lack of sexual satisfaction while dressing and behaving provocatively towards Hosszu and his wife. This interaction the day before the incident in question is what primed Hosszu to perceive her behavior and response to him the following day as “wanting.” It was, accordingly, acutely relevant to the disputed issue of consent on the day in question.

Moreover, the error in dismissing the evidence of the previous night’s interaction was not harmless because it deprived the jury of any context to understand Hosszu’s interpretation of Voight’s actions as “wanting.” Presented in a vacuum as it was, Hosszu’s testimony suggested little more than a neighborly relationship that escalated suddenly one day when, out of the blue, she suddenly appeared to him to be “wanting” sex without saying anything to invite it. Without context, Hosszu’s story strains credibility. But understood in light of the previous night’s interaction, including Voight’s expressions of sexual dissatisfaction, the conduct on the day in question and the perception of sexual invitation by Voight is far more understandable.

In short, this is a case where exclusion of the proffered evidence resulted in far more confusion of the issues and creation of undue prejudice than its admission. In *Hudlow*, the court observed that the prejudice to be evaluated is not the possibility of embarrassment to the victim, but instead whether the truthfinding process itself is jeopardized. 99 Wn.2d at 13. For this reason, the defendant's constitutional rights to present a defense require admission of highly probative evidence of prior sexual history, even if embarrassing to the victim. *Hudlow*, 99 Wn.2d at 16.

Here, Hosszu's offer of proof was not the kind of generalized testimony about a promiscuous past at issue in *Hudlow*; instead, it presented a prior interaction, very close in time, between the accused and the victim, that necessarily colored their perceptions on the date of the charged incident. No reasonable person could take the view that Voight's sexually charged and inviting conduct the night before had no tendency to establish whether she consented to sexual contact with the same person the very next day.

VI. CONCLUSION

The trial court abused its discretion in denying Hosszu's motion to admit evidence of Voight's sexually suggestive and inviting behavior

towards him and his wife the night before the charged incident. The proffered evidence was highly relevant to explain Hosszu's perception that Voight responded to him "in a wanting way" and thereby consented to sexual contact with him. Moreover, exclusion of the evidence impaired the trial's truthfinding function and deprived Hosszu of his ability to present a defense to the charge, by requiring him to explain the interaction with Voight without any context for the jury to understand why he perceived her to be inviting. Had the proffered evidence been admitted, it is very likely the outcome of the trial would have been different because the jury would have better understood the history between the parties that led to their perceptions of consent on the day in question.

Because the trial court denied Hosszu the opportunity to present evidence relevant to the issue of her consent, it deprived Hosszu of the opportunity to present a defense under the Sixth Amendment to the U.S. Constitution and Article I, section 22 of the Washington Constitution. Accordingly, the conviction should be vacated and the case remanded for a new trial.

RESPECTFULLY SUBMITTED this 1st day of April, 2013.

A handwritten signature in black ink, appearing to read "Andrea Burkhardt", written over a horizontal line.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 1st day of April, 2013 in Walla Walla, Washington.



Andrea Burkhart