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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31382-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEVEN P. HARRINGTON,

Defendant/Appellant.

BRIEF OF APPELLANT STEVEN P. HARRINGTON IN REPLY

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A. ARGUMENT IN REPLY

1. Contrary to the assertions of the STATE OF WASHINGTON, there was insufficient evidence to convict the defendant, STEVEN P. HARRINGTON, beyond a reasonable doubt, of any of the charges associated with counts 1 and 2 of the information as alleged by said plaintiff. [Issues Nos. 1 and 2].

On pages 13 through 14 of the "Brief of Respondent," the STATE OF WASHINGTON reiterates the standards of review associated with a challenge to the sufficiency of the evidence beyond a reasonable doubt. However, the prosecution then goes on through page 21 of its brief claiming without regard to the controverting facts that there was sufficient evidence upon which to convict the defendant, STEVEN P. HARRINGTON, of both the crime of rape in the second degree and unlawful imprisonment.

In this regard, the STATE argues there was proof of guilt beyond a reasonable doubt, without taking into account the hotly disputed facts and circumstances outlined in the appellant's opening brief at pages 4 through 15, that clearly demonstrates the evidence submitted was inadequate to satisfy this standard. In other words, the STATE in its response summarily overlooks the trial evidence and testimony as a whole to avoid the obvious fact this case amounted to nothing more than a "he said, she said" situation. [See, "Brief of Respondent," at page 15. The respondent's weighing and over-emphasis of selective facts clearly does not rise to the required level of proof beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d

560, 99 S.Ct. 2781 (1979); Juan H. v. Allen, 408 F.3d 1262, 1274 (9th cir. 2005); Gibson v. Ortiz, 387 F.3d 812, 820 (9th cir. 2004); State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Dvkstra, 127 Wn.App. 1, 10, 110 P.3d 758 (2005); State v. Warnick, 121 Wn.App. 737, 741, 110 P.3d 758 (2004); State v. Soderquist, 63 Wn.App. 144, 148, 816 P.2d 1264 (1991).

Furthermore, and contrary to the STATE's assertion on page 16 of its "Brief in Response, there is nothing whatsoever in appellant's assessment of the overall evidentiary facts to suggest that he in anyway "asking this Court to invade the province of the jury and make determinations of credibility of the witnesses." Rather, it is Mr. HARRINGTON's position on this appeal that, even when viewing the evidence in a light most favorable to the prosecution, inevitably no rationale juror could have determined guilt beyond a reasonable doubt as required under the state and federal constitutions. State v. Salinus, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A review of Mr. HARRINGTON's statement of facts and argument in his open brief makes this abundantly clear.

As stated before, the gravamen of the defense at trial was that the sexual liaisons at issue were consensual in nature, and not the result of any "forcible compulsion" claimed by the STATE OF WASHINGTON. Contrary to the respondent's claim at pages 18 and 19 of its brief, Mr. HARRINGTON did, in fact, prove the sexual intercourse at issue was

consensual by a preponderance of the evidence. Accordingly, given the controverted evidence, the charges against Mr. HARRINGTON for the crimes of rape in the second degree by forcible compulsion [RCW 9A.44.050(1)(a)], and unlawful imprisonment [RCW 9A.40.040 and RCW 9A.40.010(1)], were not subject to proof beyond a reasonable doubt.

Once again, in reviewing the sufficiency of evidence to convict, the appellate court must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements and facts necessary to establish the crime for which the defendant is charged beyond a reasonable doubt. Green, at 221. Stated differently, the reviewing court must be convinced beyond a reasonable doubt that the prosecution's evidence against the accused is substantial and compelling, tending to establish the circumstances from which the jury could have reasonably inferred the act or acts required to be proved. See, State v. Isom, 18 Wn.App. 62, 66-67, 567 P.2d 246 (1977). In this vein, the evidence when considered as a whole, rather than in isolation as the STATE would like, must be consistent with the hypothesis the defendant is guilty. Id.

a. Rape in the second degree [revisited].

Once again, the record reflects that the defense requested inclusion in the court's instructions to the jury the so-called consent instruction [WPIC 18.25] and, after considering the request, the trial court granted this

request. [August 9, 2012 RP 323-25]. Under the court's instruction no. 8, the jury was instructed:

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

[CP 91].

In turn, the prosecution's theory of the case as set forth in jury instruction no. 4 was that "[a] person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another person by forcible compulsion." [CP 87]. Under instruction no. 6, "[f]orcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." [CP 89].

Given the indisputable fact the evidence presented in this case is a classic "he said, she said" situation, it is just as likely that the parties engaged in consensual sex rather than a rape having occurred on February

5, 2012. The later situation is even more plausible when the fact Ms. Padillo harbored ongoing jealousy and anger over Mr. HARRINGTON's involvement with other women, had a habit of over-reacting when upset, and was accustomed to acting out and engaging in dramatics. Clearly, these factors and characteristics draw her accusations of rape squarely into doubt. Furthermore, even Ms. Padillo acknowledged during her testimony that she and the defendant had at least twice attempted to have consensual sex that evening, and she took her jeans off so that Mr. HARRINGTON might believe she was "cute." Thus, the STATE's flat rejection of these key facts in terms of this being a "he said, she said" situation is totally unfounded.

Thus, the simple fact Ms. Padillo appeared distraught, traumatized and upset could just as easily be explained as her response to having been assaulted by Mr. HARRINGTON during the physical altercation which both parties described and acknowledged during each of their testimonies. Likewise, the physical evidence taken by both the STATE's experts, Dr. Roberts and Mr. Baggenstoss, is equivocal at best. There was nothing in terms of physical evidence either reflecting or confirming a rape, as opposed to any sexual relations having been consensual.

Once again, there was more than sufficient evidence to establish the defense's claim of consent by a preponderance of the evidence [CP 91] and the jury should have found otherwise, whereas there was clearly no physical

or medical evidence of "forcible compulsion" beyond a reasonable doubt except for Ms. Padillo unsubstantiated claims which could have been easily fueled due to jealousy and anger over Mr. HARRINGTON alleged acts of "cheating." Thus, Mr. HARRINGTON conviction for rape in the second degree should be reversed on this appeal. RAP 12.2.

b. Unlawful imprisonment [revisited] . For the same reasons, the charge of unlawful imprisonment [RCW 9A.40.040] cannot stand in the face of compelling evidence of consensual sexual relations, nor can it attributed to any physical altercation which occurred that evening since both parties' acknowledge that Ms. Padillo was at some point free to get out of the truck and run away. Instruction no. 9 provided that:

A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception.

The offense is committed only if the person acts knowingly in all these regards.

[CP 92]. In this regard, unlawful imprisonment can only occur when the "means of escape . . . present a danger or more than a mere inconvenience." State v. Kinchen, 92 Wn.App. 442, 452 n.16, 963 P.2d 928 (1998). In other words, if there is a known, safe means of escape involving only a slight inconvenience, there is no imprisonment. Id. Here, Ms. Padillo clearly had means of escape which she availed herself in this instance.

Consequently, the allegation that Mr. HARRINGTON at one point took Ms. Padillo's keys while they were at his sister's house does serve to make out the crime of unlawful imprisonment. After all, by her own testimony, she later found the keys in the sofa.

In sum, Mr. HARRINGTON conviction for unlawful imprisonment should likewise be reversed on this appeal. RAP 12.2. The STATE's arguments to the contrary on pages 19 and 20 of the "Brief of Respondent," do not address or defeat Mr. HARRINGTON's position on this appeal that the evidence of unlawful imprisonment was equivocal at best and does not rise to the required level of guilt beyond a reasonable doubt. Green, at 221. 2. Contrary to the claims of the STATE OF WASHINGTON, the failure of the superior court to abide by the mandates of Bone-Club, as identified in Part C, above, violated Mr. HARRINGTON's constitutional "public trial right" as guaranteed under the sixth and fourteen amendments to the United States constitution and Article I, sections 10 and 22, of the Washington state constitution. [Issues nos. 3 through 5].

As outlined in the appellant's "Statement of Case," in Part C of his opening brief at pages 3 through 19, it is clear the superior court violated on at least two [2] occasions the public trial right of the appellant, STEVEN P. HARRINGTON, with respect to its failure to adhere to the mandate of State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Further, as indicated in appellant's Assignment of Error No. 5, the court once more

erred in removing the names of the jurors prior to scanning them into the court record. The STATE's assertions which either nominalize, or take direct issue thereto, on pages 22 through 33, of its brief, do not change the facts and law governing this case.

a. Juror no. 23. On pages 25 through 30 of its brief, the respondent erroneously takes issue whether Bone-Club was in any way implicated in terms with respect this juror. Again, during the course of jury selection, the superior court allowed the plaintiff, STATE OF WASHINGTON, to voir dire prospective juror no. 23 [Mirrick Nordhaugen] about the contents of her jury questionnaire with respect to her having been previously named as a "defendant in a criminal case." [August 7, 2012 RP 92-94]. This was done without the prosecution having first disclosed in open court the nature or substance of the crime for which the juror had been charged, nor its final disposition after trial. [August 7, 2012 RP 92-94].

in fact, no analysis was undertaken by the court beforehand with respect to the requirements mandated by State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). [August 7, 2012 RP 92-94]. This was so even though Bone-Club had been referenced as a consideration when selecting this particular juror questionnaire. [August 7, 2012 RP 27-28]. Curiously enough, the STATE chose to overlook or downplay this key fact. Ms. Nordhaugen was eventually dismissed for cause by the prosecution based upon her answers to the juror questionnaire and her inaudible

comments during oral examination by the STATE. [August 7, 2012 RP 92-94].

Suffice it to say, there is no question that the guaranty of open criminal proceedings extends to voir dire. State v. Leyerle, 158 Wn.App. 474, 479, 242 P.3d 921 (2010). As the court further noted in Leyerle, at 484, "[s]eparate questioning of potential jurors is routinely recorded . . . , and the mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures. [Citations omitted]. Here, the inquiries address to Ms. Nordhaugen were in open court and were recorded. However, her specific answer to the questionnaire which drew attention to her by the prosecution in terms of having previously been named as a criminal defendant was not.

While, once again, the appellant is fully mindful of the decisions in In re Yates, 117 Wn.2d 1, 29-30, 296 P.3d 872 (2013), and State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013), where the questionnaire itself has no independent effect on the trial, and only served as a "framework" for oral voir dire, so as not to implicate the openness of the proceeding, this is not the case here. The STATE's statement that the foregoing cases should dispose of the issue in this case is entirely misplaced for the reason initially set forth in appellant's opening brief, at 25 through 29.

Again, it is clear that the undisclosed nature of the criminal charge

against prospective jury no. 23 obviously drew attention to her from the prosecution. Likewise, even the court became concerned after the fact, so as to think it wise in terms of Bone-Club to require the jury questionnaires be "scanned" and made a part of the record, this was "too little, too late" as suggestion by the court in Leyerle, at 484.

Hence, the appellant once again submits that this constituted prejudice and a violation of the public trial right with the remedy being reversal of his convictions in this case. See, State v. Frawley, 140 Wn.App. 713, 721, 167 P.3d 593 (2007); State v. Easterling, 157 Wn.2d 167, 174, 181, 137 P.3d 825 (2006). This is notwithstanding the decisions in Yates and Beskurt, and the prosecution misplaced reliance on those decisions.

This same error involving a violation of the public trial right, and failure to apply and make Bone-Club findings, was further compounded by the court's allowing a seated jury to later be examined outside public view. It is axiomatic that the trial court may not close a courtroom without first applying and weighing the requirements set forth in Bone-Club, and entering findings justifying such closure. Frawley, at 720-21, Easterling, at 175.

b. Juror no. 8. On pages 23 through 25 of its brief, the respondent takes issue as to circumstances under which this juror was questioned. Again, the record reflects, that during the presentation of the prosecution's

case-in-chief, the court allowed juror no. 8 [Carrie Cockle] to be interviewed in closed session, out of the hearing of the other seated jurors and the public, about her acquaintance and familiarity with the defendant's sister, Sophia Harrington, without again conducting any analysis under Bone-Club. [August 8 Trial RP 64, 65, 67-68].

Such contacts between Juror no. 8 and Ms. Harrington included Ms. Cockle's having worked with her at Wal-Mart and also being friends on Facebook. [August 8, 2012 RP 67]. It was only after the closed examination of Ms. Cockle that the court advised the other jury members that the one juror was acquainted with a potential witness and a relative of the defendant, and that the panel would continue. [August 8 Trial RP 69]. Ms. Harrington was never identified to the jury panel as being this person. [August 8 Trial RP 69].

Once again, the ruling and opinion expressed in Leyerle, at 484, characterize the present matter involving Juror no. 8 to constitute reversible error. The simple fact this examination of juror was recorded is not enough. The entire matter should have been conducted in public view as mandated by the sixth and fourteenth amendments to the United States constitution, and Article I, sections 10 and 22 of the Washington state constitution. Id.

c. Redaction of juror names. Finally, on pages 31 through 33 of the "Brief of Respondent," the STATE once more claims that the trial court's

redaction of the jurors' names before scanning the juror questionnaires into the record was of no consequence under the holdings In re Yates, 117 Wn.2d 1, 29-30, 296 P.3d 872 (2013), and State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013). Clearly, this was a "closure" implicating the mandate and requirements of State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), which were not followed in this case. It also compounded the Bone-Club errors associated with jurors nos. 23 and 8. The STATE simply chooses to overlook this fact. Furthermore, the stated claim of respondent that "redactions are a lesser form of sealing" is at best misleading, if not outright inaccurate, insofar as the sealing of a file does not amount to a total destruction of a part of the record as occurred here.

Finally, the STATE's secondary reliance upon the doctrine of invited error is likewise entirely misplaced insofar as it was not the defendant who first raised the issue of redaction of juror names and it was the court which ultimately made the decision to do so.

Consequently, and once again, the facts and governing law of this case dictate that the convictions, judgment and sentence entered against the appellant, STEVEN P. HARRINGTON, should be reversed. RAP 12.2.

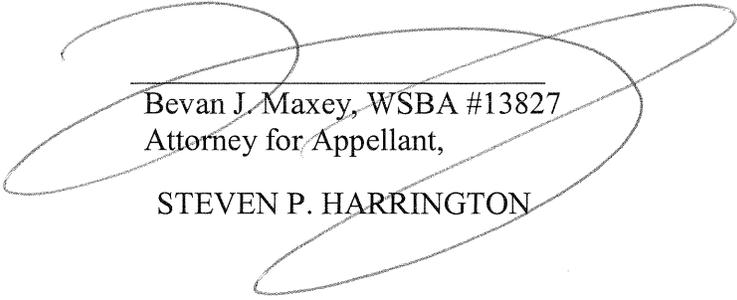
B. CONCLUSION

Based upon the foregoing points and authorities, the appellant, STEVEN P. HARRINGTON, once again respectfully requests that the

criminal convictions, judgment and sentence entered against him in this case be reversed, and the underlying charges be dismissed with prejudice.

DATED this 30th day of July, 2014.

Respectfully submitted:



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