

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO LOPEZ RAMOS,

Appellant.

No. 41663-8-II

UNPUBLISHED OPINION

Penoyar, C.J. — Eduardo Lopez Ramos appeals his convictions for attempted first degree rape (count I) and second degree robbery (count III), contending that the State’s evidence was insufficient to sustain these convictions. He also challenges his offender score calculation as to counts III and IV (another second degree robbery conviction). Finally, he contends that the judgment and sentence contains a scrivener’s error regarding a monetary recoupment amount. The State concedes the sentencing errors. We affirm Lopez Ramos’s convictions and remand for resentencing as the parties agree.

Facts

EA and her husband Edgar lived in Lakewood in 2009. Lopez Ramos is EA’s husband’s uncle. Lopez Ramos arrived at EA’s house, unexpectedly on January 30, 2009 at 6:30 A.M. asking for Edgar. EA called her husband at work, and he told her to tell Lopez Ramos to go lay on the couch. EA then went into her bedroom and locked herself and her one-year-old daughter into the room.

Lopez Ramos told EA to get up and make food for him. When she refused, Lopez Ramos barged into the room breaking the lock on the door. EA told him to leave and he got mad, pulled

her by her shirt and dragged her into the living room. EA tried to call 911 but she dropped her cell phone as Lopez Ramos dragged her into the living room.

Lopez Ramos proceeded to attack EA for thirty to forty-five minutes, saying that he was going to teach her to respect him. During the attack, Lopez Ramos forced his penis into EA's mouth, repeatedly hit her, and choked her. He took EA's cell phone and car keys when he left her home. EA's description of the attack is described in more detail in the analysis sections that follow.

The State charged Lopez Ramos with one count of first degree rape (count I), one count of second degree assault (count II), and one count of first degree robbery (count III), regarding the incident with EA.¹ The jury found Lopez Ramos guilty of the lesser charge of attempted first degree rape (count I), second degree assault (count II), and the lesser charge of second degree robbery (count III) regarding the incident with EA.²

The trial court sentenced Lopez Ramos on January 7, 2011, and ruled that the attempted rape charge (count I) and the second degree assault charge (count II) constituted the same criminal conduct. The trial court reduced Lopez Ramos's offender score from a 10 to an 8 on the attempted rape and assault charge, but left the offender score for the robbery counts (counts III and IV) at 10. The trial court sentenced Lopez Ramos to a standard range sentence of 170 months to life on the attempted rape count (count I) with all of the other counts to run

¹ The State also charged Lopez Ramos with one count of second degree robbery (count IV), one count of attempted theft of a motor vehicle (count V), one count of unlawful possession of methamphetamine (count VI), and one count of possession of a legend drug: Viagra (count VII) regarding other incidents that are not part of this appeal. Count V, which concerned a different vehicle than EA's, was dismissed at trial. Facts regarding these other charges are not discussed.

² The jury also convicted Ramos on the remaining counts IV, VI, and VII.

concurrently. The court also imposed financial obligations including a “\$400 DAC recoupment.” Report of Proceedings (RP) (Jan. 7, 2011) at 25. Lopez Ramos’s judgment and sentence lists the recoupment amount as \$1,500. Lopez Ramos appeals.

analysis

I. Sufficiency: Count I

Lopez Ramos contends that the evidence was insufficient to convict him of attempted first degree rape. We disagree.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in the State’s favor and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *Goodman*, 150 Wn.2d at 781 (quoting *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). In other words, all crimes of attempt contain two elements: intent to commit

a specific crime and the taking of a substantial step toward the commission of that crime. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The trier of fact may infer the intent to commit a crime from all the facts and circumstances presented in the evidence. *State v. White*, 150 Wn. App. 337, 343, 207 P.3d 1278 (2009). To constitute a substantial step, the conduct in question must be “strongly corroborative” of the actor’s criminal purpose. *White*, 150 Wn. App. at 343 (quoting *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 539, 167 P.3d 1106 (2007) (quoting *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002))). While an attempt must be more than mere preparation to commit a crime, “[a]ny slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime.” *White*, 150 Wn. App. at 343 (quoting *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000)). An attempt conviction does not depend on the ultimate harm that results or on whether the crime was actually completed. *White*, 150 Wn. App. at 343 (quotation marks and citation omitted).

Under the unchallenged instructions, to convict Lopez Ramos of attempted first degree rape as charged in count I, the State had to prove “(1) That on or about [the] 30th day of January, 2009, the defendant did an act that was a substantial step toward the commission of Rape in the First Degree[;] (2) That the act was done with the intent to commit Rape in the First Degree[;] and (3) That the act occurred in the State of Washington.” Clerk’s Papers (CP) at 34; Instr. 15. Instruction 8 explained that first degree rape occurs when the defendant: “engages in sexual intercourse with another person by forcible compulsion and inflicts serious physical injury.” CP at 27. Instruction 16 defined “substantial step” as “conduct, that strongly indicates a criminal purpose and which is more than mere preparation.” CP at 35. Instruction 12 defined “[p]hysical injury” as “physical pain or injury, illness, or an impairment of physical condition.” CP at 31.

Lopez Ramos does not challenge that forcible sexual intercourse occurred, instead he contends that the State failed to prove that he “intended” to inflict serious physical injury. Appellant’s Br. at 13. Serious physical injury, includes but is not limited to physical injury which renders the victim unconscious. RCW 9A.44.040(c); *State v. Frawley*, 140 Wn. App. 713, 723, 167 P.3d 593 (2007).

The State presented ample evidence that Lopez Ramos took a substantial step toward committing first degree rape, including evidence that he took a substantial step toward inflicting serious bodily injury. Lopez Ramos broke through a locked bedroom door and dragged EA from her bedroom into the living room by her shirt. Lopez Ramos then repeatedly struck her face using both an open and closed hand. Facial trauma, bruises, and abrasions corroborated that EA had been pulled, dragged, and hit. Lopez Ramos lay on top of EA as she struggled, put his forearm against her neck, and used his full weight to choke her. EA testified that it was painful, that she had difficulty breathing and that she “went blank” for about 20 seconds. 4 RP at 456.

Considering this evidence in the light most favorable to the State, a reasonable jury could logically conclude that Lopez Ramos attempted to inflict a serious physical injury on EA. We hold that Lopez Ramos’s actions, including choking EA with his full body weight such that she experienced pain, difficulty breathing, and a temporary blackout, show more than mere preparation, they demonstrate a substantial step toward first degree rape. Lopez Ramos’s assertion of insufficient evidence regarding count I fails.

II. Sufficiency: Count III

Lopez Ramos contends that the evidence was insufficient to convict him of second degree robbery (count III). Specifically, he contends that the State's evidence does not show that he used force to obtain EA's property or that he had the intent to steal. We disagree.

In order to find Lopez Ramos guilty of second degree robbery, the jury was instructed as follows:

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt[:]

(1) That on or about the 30th day of January, 2009, the defendant unlawfully took personal property from the person or in the presence of another[;]

(2) That the defendant intended to commit theft of the property[;]

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That any of these acts occurred in the State of Washington.

CP at 56; Instr. 37.

Lopez Ramos does not dispute that he used force regarding the attempted rape and assault. He denies that he used force to obtain EA's cell phone and car because it was her suggestion that he take them. Lopez Ramos's argument ignores the context of EA's comment.

As described above, Lopez Ramos committed a brutal attack on EA to "teach [her] how to respect him." 4 RP at 446. The evidence in the light most favorable to the State indicated that Lopez Ramos forced himself on EA and repeatedly hit her and choked her in an attack that lasted thirty to forty-five minutes.

EA testified that she tried to use her cell phone and car as bargaining chips to get Lopez Ramos to stop his attack and leave her apartment. As the attack wore on, EA's infant continued to cry and scream from the bedroom, making Lopez Ramos angry. A jury could reasonably infer that EA was desperate to try anything to get Lopez Ramos out of her home for her and her child's safety. EA testified that each time she screamed as Lopez Ramos attacked her, her daughter would scream more, and he became angrier. So she pleaded with him, saying:

What do you want? Do you want money? Take my phone. Take anything. I won't tell anybody; just leave me alone.

And I know he's got three kids, so I brought them up. I said: I won't say anything to anybody. You have kids too. Can't you hear my daughter?

So he grabbed me from my hair and asked me for my car keys, and he took my phone and he left.

4 RP at 457.

This evidence does not show that EA voluntarily offered Lopez Ramos her car and phone and gave him permission to use them as he suggests. The coercive circumstance here negates any voluntariness in EA's offer of her car and phone. EA testified that she did not want to give Lopez Ramos her cell phone and car, but she offered them in an attempt to get him to leave her apartment. "[A]t the end he asked for [my phone] and my keys." 4 RP at 468. "[H]e grabbed me by my hair and I told him where they were at so I could give it to him." 4 RP at 469.

Lopez Ramos grabbed EA by her hair in order to collect the car keys and also took her phone and fled the apartment. A reasonable jury could logically conclude that Lopez Ramos intended to take EA's property and used force to get it. *Goodman*, 150 Wn.2d at 781 (we may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability). Lopez Ramos's assertion of insufficient evidence regarding count

III fails.

III. Sentencing Errors

Finally, Lopez Ramos asks us to remand his case for resentencing, contending that the judgment and sentence reflects an incorrect offender score for the two robbery counts (counts III and IV) and for correction of a scrivener's error regarding the amount of the DAC recoupment listed in the judgment and sentence. The State concedes these errors and asks us to remand for correction of the offender score as Lopez Ramos requested, resentencing accordingly, and for correction of the scrivener's error in the judgment and sentence regarding the DAC recoupment amount. Given the State's concession, we remand for resentencing as both parties request, and affirm Lopez Ramos's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Johanson, J.