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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29303-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
CURTIS ALAN PITTS,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — The court can find a defendant guilty of a lesser degree offense when the facts support the elements of the lesser degree offense. Here, the State charged the defendant with second degree rape and alleged that the victim was incapable of consent because of physical or mental incapacity. The evidence showed that the victim was capable of consent and objected to the rape by both words and conduct. The court then concluded that the defendant was guilty of third degree rape. We conclude that the court could find the defendant guilty of the lesser degree crime of third degree rape and we affirm the conviction.

FACTS

The State charged Curtis Pitts with second degree rape and alleged that he "engaged in sexual intercourse with a victim, L.C.H., who was incapable of consent by being physically helpless or mentally incapacitated." Clerk's Papers (CP) at 3. The case proceeded to a bench trial.

Mr. Pitts managed a business in Toppenish. He hired L.C.H. in early 2008. Mr. Pitts visited L.C.H. on August 28, 2008, after work and brought him beer. L.C.H. drank two beers. Then Mr. Pitts injected something into L.C.H. without permission. L.C.H. started going in and out of consciousness and lost motor control.

Mr. Pitts then rolled L.C.H. onto his stomach, pulled his pants and underwear down, and had anal intercourse with L.C.H. L.C.H. continued to drift in and out of consciousness during the intercourse. Mr. Pitts held L.C.H. against the floor by lying on him and putting his forearm or hand on L.C.H.'s head. L.C.H. tried to lift himself onto his elbows, but could not move. L.C.H. said he "was telling him no, I didn't want to have sex with him." 3 Report of Proceedings (RP) at 355. L.C.H. still could not move after the intercourse. Mr. Pitts cleaned L.C.H. with a tissue and helped L.C.H. onto a couch as L.C.H. regained motor control.

Mr. Pitts said that L.C.H. voluntarily used cocaine intravenously on August 28. He testified that he and L.C.H. had consensual oral intercourse, but that they never had

anal intercourse.

The trial judge did not believe Mr. Pitts' story and found that Mr. Pitts gave L.C.H. alcohol and then injected him with something. The court found that the substance caused L.C.H. to go in and out of consciousness and that he could not move after the injection. The court found that Mr. Pitts had anal intercourse with L.C.H. and that L.C.H. asked, "What are you doing?" and told Mr. Pitts "no" and to stop. CP at 28. The court found that L.C.H. still could not move after the intercourse and that Mr. Pitts cleaned L.C.H. with a tissue and helped him off the floor onto a couch.

The court found Mr. Pitts not guilty of second degree rape, but guilty of third degree rape: "The evidence indicates . . . that [L.C.H.] understood the nature and extent of the sexual and other acts that were being committed with and upon him, and he did in fact object to these acts by words and conduct, by trying to push the Defendant off with what limited physical ability he had at that point, and by telling Mr. Pitts he was hurting him, and by telling the Defendant to stop." 9 RP at 1303-04.

DISCUSSION

Mr. Pitts contends that the court could not find him guilty of the lesser degree crime of third degree rape because the State charged him with second degree rape and alleged that L.C.H. was incapable of consent. He argues that the State failed to prove

lack of consent and that should require dismissal, since lack of consent was the element at issue here. He argues that to convict a defendant of a lesser degree offense, there must be insufficient evidence to convict on the charged offense, but some evidence to infer that the lesser degree offense was committed. And here he says there was none.

The question presented—whether the trial court could conclude Mr. Pitts was not guilty of second degree rape, as charged, but was guilty of third degree rape is a question of law that we will review de novo. *State v. Crittenden*, 146 Wn. App. 361, 365, 189 P.3d 849 (2008) (propriety of a lesser degree offense instruction is a question of law).

"A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: . . . [w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). *Physically helpless* refers to "a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5). *Mentally incapacitated* refers to a "condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4). Mr. Pitts was charged with engaging in sexual intercourse

"with a victim . . . who was incapable of consent by being physically helpless or mentally incapacitated." CP at 3.

There is also a statutory defense to second degree rape:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1).

Third degree rape contemplates a lack of consent by a person who is capable of consent. *Compare* RCW 9A.44.060, *with* RCW 9A.44.050(b). Third degree rape is:

> [U]nder circumstances not constituting rape in the first or second degrees, [a] person engages in sexual intercourse with another person, not married to the perpetrator: (a) [w]here the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim by words or conduct.

RCW 9A.44.060(1).

As a general rule, a defendant charged with a crime may be found not guilty of that crime, but guilty of an inferior degree of the same offense or a lesser included offense. RCW 10.61.003, .006. There are two requirements—one legal and one factual—that must be met before a trier of fact considers a lesser included offense. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). But where the legislature has already denominated the crime a lesser

degree offense, we need only consider the factual requirement. *State v. Ieremia*, 78 Wn. App. 746, 755 n.3, 899 P.2d 16 (1995). The factual requirement is that the evidence supports an inference that the lesser degree crime was committed. *See Workman*, 90 Wn. App. at 448.

State v. Bucknell[1] and *State v. Charles*[2] both address whether third degree rape satisfies *Workman*'s factual prong when a defendant is charged with second degree rape. In *Bucknell*, Mr. Bucknell threatened to hurt his female victim if she did not have intercourse with him. 144 Wn. App. at 526. The woman had Lou Gehrig's disease and could not move from the chest down. *Id.* But she could communicate orally. *Id.* Mr. Bucknell claimed that the two had consensual intercourse, but was convicted of second degree rape of a person "incapable of consent by reason of being physically helpless or mentally incapacitated." *Id.* at 528.

We concluded that the woman was not "physically helpless" even though she was paralyzed from the chest down. *Id.* at 528-29. A victim is *physically helpless* when "'a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.'" *Id.* at 528 (quoting RCW 9A.44.010(5)). So a person is not physically helpless when that person was able to orally communicate "even if unable to

[1] *State v. Bucknell*, 144 Wn. App. 524, 183 P.3d 1078 (2008).

[2] *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995).

express an objection by any other means." *Id.* at 529. We ultimately concluded that the evidence was insufficient to support second degree rape, but sufficient to support third degree rape. *Id.* at 530.

In *Charles*, a woman alleged that Mr. Charles held her down, removed her clothes, and forced her to have intercourse. 126 Wn.2d at 354. Mr. Charles claimed that they had consensual intercourse, but was convicted of second degree rape by forcible compulsion. *Id.* at 354-55; *see* RCW 9A.44.050(1)(a). This court concluded that the jury should have been instructed on third degree rape. *Charles*, 126 Wn.2d at 355. The Supreme Court reversed, relying on *Workman*'s factual prong. *Id.* at 355-56 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990) (citing *Workman*, 90 Wn.2d at 447-48)). The evidence suggested that the intercourse was either forced nonconsensual intercourse or consensual intercourse. *Id.* The court explained that there was no evidence of unforced nonconsensual intercourse and therefore insufficient evidence to support a third degree rape instruction:

> Charles forced her to the ground, she struggled, and he forced her to have sex with him. If the jury believed this testimony, Charles was guilty of second degree rape. RCW 9A.44.050. 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.

Id. at 355-56.

Mr. Pitts argues that *Charles* requires reversal. He suggests that the trial court's reasoning here parallels the Court of Appeals' incorrect reasoning in *Charles*. According to Mr. Pitts, this is because the court had to reject Mr. Pitts' evidence that he reasonably believed L.C.H. was capable of consent as well as the State's evidence that L.C.H. was incapable of consent. Br. of Appellant at 7; Reply Br. of Appellant at 3-4. But *Charles* is distinguishable. The court here did not reject both parties' evidence. The trial court clearly believed the State's evidence. Indeed, as Mr. Pitts notes, "The trial court's Findings of Fact essentially incorporate the testimony of L.C.H." Br. of Appellant at 5. The trial court merely rejected the State's conclusion about the evidence—that is that it amounted to second degree rape.

Also, unlike *Charles*, there is sufficient evidence to support third degree rape here. In *Charles*, the evidence of third degree rape was insufficient because there was no evidence of rape that is "unforced but still nonconsensual." 126 Wn.2d at 355. There, "forcible compulsion" was an element of second degree rape and the evidence of rape showed forced intercourse. The evidence did not satisfy an element of third degree rape because the evidence showed rape only under circumstances constituting second degree rape. *Id.* at 355-56; *see* RCW 9A.44.060(1). Here, second degree rape required that the "victim is incapable of consent by reason of

being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). According to *Bucknell*, evidence that a victim is physically unable to move but can otherwise communicate does not satisfy second degree rape's element that the victim is incapable of consent. 144 Wn. App. at 528. But such evidence does satisfy third degree rape's requirement that there be intercourse under circumstances not constituting second degree rape. *Id.* at 530-31. Here, L.C.H. could not muster the strength to lift his body, but he could and did communicate with Mr. Pitts during the intercourse. This evidence is sufficient to prove third degree rape. *See id.* Therefore, the trial court properly relied on *Bucknell*'s conclusion that a person who can communicate orally is not incapable of consent due to physical helplessness or mental incapacity.

The trial court properly found Mr. Pitts guilty of third degree rape.

STATEMENT OF ADDITIONAL GROUNDS (SAG)

SAG 1. Mr. Pitts claims that his trial counsel and appellate counsel were ineffective for many reasons, but mainly for failures to investigate. To claim ineffective assistance of counsel, Mr. Pitts must show that "(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's

unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The record on appeal does not show whether counsel actually failed to investigate anything. Mr. Pitts then necessarily relies on information outside of the record and his complaint is more properly addressed in a personal restraint petition. *Id.* at 335.

SAG 2. Mr. Pitts argues that the trial court denied Mr. Pitts his "compulsory right to confront witnesses." We presume that this is because the trial court, counsel for the State, and Mr. Pitts' counsel were allowed to examine L.C.H.'s mental health records, but Mr. Pitts was not personally allowed to examine those records. He also charges that the prosecutor engaged in misconduct by not providing Mr. Pitts with exculpatory evidence.

The Fifth Amendment due process clause does require that the State disclose certain evidence to a criminal defendant. *See United States v. Agurs*, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). However, no constitutional error exists when undisclosed evidence does not create a reasonable doubt. *Id.* Here, the trial court reviewed L.C.H.'s medical records in camera and determined that they were consistent with his testimony. These documents contained no exculpatory evidence.

SAG 3. Mr. Pitts argues that the State did not prove its case beyond a reasonable doubt because L.C.H. was an unreliable witness. However, as Mr. Pitts points out, the

trier of fact is the sole judge of witness credibility and the strength of the State's evidence. The trial court is in a better position than this court to judge the credibility of witnesses and the strength of the State's evidence. Accordingly, we will not review whether the State met its burden of persuasion.

SAG 4. Mr. Pitts states that the trial court abused its discretion and was biased, and that his speedy trial rights were violated. However, he does not provide any supporting argument.

We affirm the conviction for third degree rape.

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

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Sweeney, J.

WE CONCUR:

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Brown, J.

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Siddoway, A.C.J.