627768-6

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NO. 62768-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

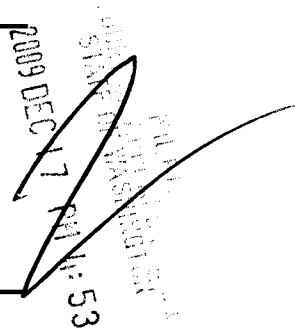
v.

JAYDEANE FRANCIS ELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura
The Honorable Charles R. Snyder



APPELLANT'S REPLY BRIEF

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A. ARGUMENTS IN REPLY

1. MR. ELL HAD AN IRRECONCILABLE CONFLICT WITH HIS ATTORNEY AND THE TRIAL COURT MADE AN INADEQUATE INQUIRY INTO THE CONFLICT

In determining whether an irreconcilable conflict exists, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion for new counsel. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724,16 P.3d 1 (2001). The State does not argue Mr. Ell's motion was not timely. See Brief of Respondent 16. Instead, the State argues the conflict between Mr. Ell and his attorney was not irreconcilable and that the trial court adequately inquired into the conflict. As will be seen below, the State's position is not viable.

a. The conflict between Mr. Ell and his trial attorney was irreconcilable. Contrary to the State's assertion, Mr. Ell established an irreconcilable conflict with Mr. Hendrix. The State argues that because there was not a complete breakdown in communication between Mr. Ell and Mr. Hendrix, there was no irreconcilable conflict. Brief of Respondent 15-16. However, a complete breakdown in communication is not the only method of establishing

an irreconcilable conflict. For example, an irreconcilable conflict exists if there is a "serious breakdown in communications." United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2001). Similarly, in United States v. Williams, the court found a conflict where the "client-attorney relationship had been a stormy one with quarrels, bad language, threats, and counter-threats." 594 F.2d 1258, 1260 (9th Cir. 1979).

In this case, there is ample evidence of an irreconcilable conflict based on a serious breakdown of communication and a stormy attorney-client relationship complete with bad language and the revealing of client confidences. In terms of communication, Mr. Ell accused Mr. Hendrix of failing to communicate with him about his case in a consistent, meaningful manner. On July 17, 2008, Mr. Ell alleged Mr. Hendrix had contacted him only twice during the first four months of his pretrial incarceration, and those contacts were made simply to persuade Mr. Ell to agree to a continuance. 2RP 5. Mr. Ell also alleged a complete breakdown of attorney-client communication at that point. 2RP 6-7. Shockingly, the court did not have a problem with this, opining, "I was defense counsel and probably defended two thousand people, and the worst way an

attorney can spend time, Mr. Ell, is spending his time with a client." 2RP 7.

Mr. Ell further alleged Mr. Hendrix had revealed client confidences, and even offered a document from a witness that stated "Mr. Hendrix of the Whatcom County Public Defenders office revealed the confidences improperly of Mr. Ell's case by way of yelling...." 2RP 7; Pretrial Ex. 1. Based on an overly literal reading of the document, the court concluded that counsel had only raised his voice at Mr. Ell, not revealed client confidences, even though Mr. Ell also offered testimony to that effect. 2RP 7. The more reasonable reading of the document was that the writer had heard Mr. Hendrix yell confidential information related to Mr. Ell's case.

Mr. Ell also accused Mr. Hendrix of using "bad language," stating Mr. Hendrix "has blown up on me several times, Your Honor, cussed me out, called me a dumb fucking so and so mother...." 2RP 8. He stated he did not think he could work with Mr. Hendrix any more. 2RP 9. Judge Mura offered Mr. Ell the option of representing himself and told Mr. Ell he did not get to choose his counsel. 2RP 9-10. The court denied Mr. Ell's motion for change of counsel. 2RP 10-11. Mr. Ell continued to object,

saying his attorney was ineffective. 2RP 13. Judge Mura told him he could take it up on appeal. 2RP 13.

Mr. Ell again complained about Mr. Hendrix's representation right before trial and asked for a continuance because they had not had sufficient time to talk about the case or prepare an adequate defense. 3RP 5. Mr. Hendrix failed to attend an appointment with Mr. Ell scheduled the night before trial where Mr. Hendrix was supposed to answer Mr. Ell's questions and had only come to see him in jail once during the nine months prior to trial. 3RP 5. During trial, Mr. Ell attempted to voice his displeasure about Mr. Hendrix's representation, but the court did not allow Mr. Ell to express his concerns. 3RP 765-66. After trial, Mr. Ell told the court that he felt his attorney did not present several key pieces of evidence in his defense. 5RP 21-22.

This conflict between Mr. Ell and Mr. Hendrix was obvious and irreconcilable. When facing such serious felony charges, a mere two hour meeting in nine months and the disrespectful actions of Mr. Hendrix caused a serious breakdown in communication such that there was an irreconcilable conflict between Mr. Ell and Mr. Hendrix.

b. Mr. Ell has also proven the trial court inadequately inquired into the conflict. Arguing the court properly addressed Mr. Ell's concerns, the State concludes the "judge inquired regarding Ell's concerns and addressed Ell's main concern about not getting certain documents." Brief of Respondent at 16. The State, however, offers little analysis to support its position that the inquiry was adequate.

A trial court should question the attorney or defendant privately and in depth, asking specific, targeted questions. Nguyen, 262 F.3d at 1004 (citing United States v. Moore, 159 F.3d 1154, 1160 (9th Cir. 1998)); United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir. 2001). An inquiry is adequate if it provides a sufficient basis for reaching an informed decision. Daniels v. Woodford, 428 F.3d 1181, 1200 (9th Cir. 2005).

Here, the court's inquiry into the extent of the conflict was inadequate. Even though the court did address Mr. Ell's concerns that Mr. Hendrix was not giving him access to the entire discovery, the court's acknowledgement that Mr. Hendrix was denying his client discovery should have alerted the court to inquire further about Mr. Ell's other allegations. Instead, the court's questions were only cursory. When Mr. Ell complained of Mr. Hendrix

contacting him only two times in four months for the purpose of talking him into continuing his trial rather than trial preparation, Judge Mura did not see this as a problem. 2RP 7. When Mr. Ell alleged Mr. Hendrix was violating the Rules of Professional Conduct by revealing client confidences, the court did not inquire further. 2RP 7.

As in Nguyen, the trial court asked the defendant and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses, even though Mr. Ell offered a witness statement. Nguyen, 262 F.3d at 1005. The court gave Mr. Ell the option of staying with Mr. Hendrix or representing himself. 2RP 9-10. However, there was another clear option - appointing a conflict-free attorney. By assuming it had no power to appoint a new attorney, the trial court conducted an inadequate inquiry.

c. Mr. Ell's conviction must be reversed and remanded for a new trial. An irreconcilable conflict undermines confidence in trial proceedings and is reversible error. Moore, 159 F.3d at 1161; Nguyen, 262 F.3d at 1005. Because Mr. Ell has shown: (1) an irreconcilable conflict between himself and Mr. Hendrix throughout all stages of the proceedings, (2) the trial court failed to adequately

inquire about the conflict, and (3) Mr. Ell's request to substitute counsel was timely, Mr. Ell's conviction should be reversed.

2. THERE WAS INSUFFICIENT EVIDENCE OF RAPE IN THE SECOND DEGREE

In order to prove rape in the second degree, the State had to prove Mr. Ell engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050; CP 97. Forcible compulsion is "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6); CP 99. To establish that a defendant engaged in sexual intercourse by forcible compulsion, the State must show that the defendant exerted force greater than that normally required to achieve penetration and that this force was directed at overcoming resistance by the victim. State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989).

The State argues there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Mr. Ell engaged in sexual intercourse by forcible compulsion because Ms. Honcoop-Miller testified she was beaten before and after the sexual intercourse, she tried to defend herself from the beatings, she

feared the defendant, she told medical personnel she had been raped or sexually assaulted, there was physical evidence of injuries from the beating, and Mr. Ell was a contributor to semen found in Ms. Honcoop-Miller's vagina. Brief of Respondent at 17. The State argues that because Mr. Ell hit Ms. Honcoop-Miller before and after the intercourse, the sex must have been the result of forcible compulsion. Brief of Respondent at 22. It is easy to become overwhelmed, distracted, and confused by the litany of impeachment witnesses and the extent of Ms. Honcoop-Miller's physical injuries, but once the evidence is clearly separated, there is no evidence of forcible compulsion.

Ms. Honcoop-Miller testified she and Mr. Ell had consensual sex and she stated unequivocally several times that Mr. Ell did not rape or sexually assault her. 3RP 83-84, 134, 248, 255. There was no physical evidence introduced consistent with physical force that overcame her resistance. 3RP 399, 504, 511. The State would like this Court to believe Ms. Honcoop-Miller testified she was beaten right up to the sexual act, and then the beating began right afterwards. The record, however, does not support this version of the sequence and timing of events.

Ms. Honcoop-Miller testified that at some point during the evening, Mr. Ell attempted anal intercourse. 3RP 79. She stated she agreed to try anal sex because they had been talking about it for a while. 3RP 83-84. Ms. Honcoop-Miller also admitted she may have made allegations out of anger because at one point Mr. Ell said he was kissing another woman. 3RP 103. This evidence does not support a verdict of rape in the second degree because there is no testimony that Mr. Ell exerted force directed at overcoming Ms. Honcoop-Miller's resistance or that any force was more than that which is normally required to achieve penetration, as required by statute. Because Ms. Honcoop-Miller testified the act of sex was consensual, there was no evidence Mr. Ell used forcible compulsion to achieve the act of sexual penetration.

Ms. Honcoop-Miller established that Mr. Ell did not make her have sexual intercourse by forcible compulsion; the only remaining evidence is from medical personnel. Because this testimony was conclusory in nature, there were no facts that support a finding of forcible compulsion. The State does not address Mr. Ell's argument that a medical treatment provider's testimony that a person was "sexually assaulted" is not sufficient evidence to prove

the specific legal requirements of sexual intercourse by forcible compulsion.

The only possible evidence of forcible compulsion came from Sexual Assault Nurse Examiner Cathy Hardy and Dr. Nils Naviaux. Ms. Hardy testified that at some point, "someone figured out [Ms. Honcoop-Miller] was there for a sexual assault...." 3RP 366. Ms. Hardy testified Ms. Honcoop-Miller told her she was vaginally, orally, and rectally penetrated. 3RP 387. There was no obvious redness or bruising of her anal area. 3RP 399. Dr. Naviaux testified Ms. Honcoop-Miller said she had been punched, choked, and sexually assaulted. 3RP 503; Trial Ex. 81. She complained of pain in the area of her vagina and rectum, but there were no visible vaginal or anal injuries. 3RP 504, 511.

Importantly, all testimony describing a forced sexual act was admitted for impeachment purposes only. The only substantive evidence the court admitted to prove forcible compulsion was Ms. Hardy's and Dr. Naviaux's conclusory testimony that Ms. Honcoop-Miller was "sexually assaulted" and penetrated vaginally, orally, and anally. 3RP 366, 387, 503. The doctor and nurse did not testify to any specific acts or physical evidence that led them to these legal conclusions. The definition of "assault" given to the jury does not

include the elements of forcible compulsion because it does not require force to overcome resistance.[1] Therefore, because there was no substantive evidence that Mr. Ell used physical force to overcome Ms. Honcoop-Miller's resistance, there was insufficient evidence of rape in the second degree.

A finding of insufficient evidence to support a verdict necessitates dismissal with prejudice rather than remand for a new trial. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because no rational trier of fact could find the essential elements of Mr. Ell's rape charge beyond a reasonable doubt, this Court must reverse and dismiss Mr. Ell's rape in the second degree conviction.

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[1] The court instructed the jury on assault:

> An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

CP 103.

3. EVIDENCE OF MR. ELL'S ALLEGED THREAT WAS NOT ADMISSIBLE AS A STATEMENT TO A MEDICAL PROVIDER BECAUSE IT WAS NOT PERTINENT TO DIAGNOSIS OR TREATMENT

The State argues that Mr. Ell's counsel was not ineffective for failing to object to Nurse Hardy's testimony about a threat because that testimony was admissible under ER 803(a)(4). Brief of Respondent at 27. The State alleges that the threat allegation was admissible because it was a statement attributing fault to a particular abuser and was relevant to creating a safety plan. Brief of Respondent at 25-26. However, the State confuses the admissibility of testimony about the identity of the perpetrator and information needed for treatment with the necessity of admitting the exact words of the threat.

The cases cited by the State demonstrate the identity of an assailant is admissible in the circumstances of this case. However, because Ms. Honcoop-Miller already had plans to stay with her aunt and get out of the domestic violence situation, the specific language of any alleged threat was not "reasonably pertinent to diagnosis or treatment." ER 803(a)(4). The statement did not describe any symptom, pain, or sensation. Therefore, Mr. Ell's

counsel should have objected to its admission and his failure to do so fell below an objective standard of reasonable attorney conduct.

This statement was the only substantive evidence of the crime of felony harassment. Ms. Honcoop-Miller denied Mr. Ell threatened her at all. Absent this hearsay statement, there is no way any rational trier of fact could find the essential elements of the charge beyond a reasonable doubt. Therefore, Mr. Ell has proven there is a reasonable probability that the outcome would be different but for the attorney's conduct and his harassment charge should be reversed.

The State failed to address Mr. Ell's alternative argument regarding the harassment charge: that even if the exact language of the threat were admissible, the State did not prove Ms. Honcoop-Miller reasonably feared the threat would be carried out. Ms. Honcoop-Miller testified she could not say for sure whether she was threatened or not. 3RP 247. She offered no testimony that she was afraid of Mr. Ell because of a threat. Because she testified there was no threat to kill her and there was no other evidence showing she was afraid Mr. Ell might kill her because of a threat, the State did not prove this element beyond a reasonable doubt. Therefore, this Court should reverse and dismiss this charge.

4. THE JUDGE'S RESPONSE TO THE JURY'S QUESTION OUTSIDE THE PRESENCE OF MR. ELL AND HIS COUNSEL WAS NOT HARMLESS ERROR BECAUSE DEFENSE COUNSEL CHALLENGED THE INSTRUCTION AT ISSUE

Mr. Ell argues his assault charges must be reversed because the court denied his right to be present at a critical stage in the proceedings when the court answered a jury question outside his presence. In State v. Langdon, the trial court answered a jury's question about one of the court's instructions without notifying counsel. 42 Wn. App. 715, 717, 713 P.2d 120 (1986). The court's answer referred the jury back to the instructions: "You are bound by those instructions already given to you." Id. at 717. On appeal, this Court found this error to be harmless because the instruction was neutral and the instruction at issue was not challenged on appeal or at the trial level. Id. at 718.

Although the answer given by the judge in this case and in Langdon was neutral, in Mr. Ell's case there was an underlying issue with the exact instruction involved in the jury's question. In its response, the State failed to address this critical distinction between this case and Langdon. Here, over defense objection, the court included the definition of the lesser included offense of assault in the fourth degree 17 pages away from the rest of the

assault definitions. CP 102-119. This was a confusing placement, as the assault in the fourth degree instruction was after instructions for harassment and the no-contact order violations and appeared to have no connection to the other assault definitions. This confusion was exactly what defense counsel sought to avoid. 3RP 861.

The jury question indicates the jury was not able to connect the multiple instructions on assault: "The jury requests a definition for assault in the fourth degree, similar to the definition of assault in the second degree found in instruction no. 21." CP 80. Instruction number 21 was an instruction defining substantial bodily harm. CP 104. Likely the jury was confused about what sort of level of harm, if any, was necessary for the lesser included offense of assault in the fourth degree.[2] Seven minutes after the question was submitted, Judge Snyder responded ex parte: "The definitions provided in the instructions are sufficient for the jury to use. Refer to the instructions as a whole." CP 80.

The State also fails to address Mr. Ell's harmless error analysis. Before deliberations, defense counsel challenged the jury instructions because the order was overly confusing. Had defense

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[2] The definition of assault in the fourth degree was instruction number 36: "A person commits the crime of assault in the fourth degree when he or she commits an assault." CP 119. The definition of assault was instruction number 20, 16 pages prior. CP 103.

counsel been given the opportunity to argue about the jury question, it is likely a more informative answer to the question could have been crafted that would have remedied the confusion, such as specifically referring the jury to instruction number 20.

As explained in Mr. Ell's opening brief, while evidence of some sort of assault was strong in this case, evidence tending to show the assaults rose to the level of assault in the second degree was quite weak. In terms of the assault charge based on substantial bodily harm, the only evidence to sustain that charge was bruises and bite marks. 3RP 373, 866. Regarding the strangulation charge, the evidence was similarly weak because Ms. Honcoop-Miller did not testify she had the sensation of having the air cut off so she was unable to breathe. 3RP 93. The denial of Mr. Ell's right to be present during the answering of the jury question about the assault instructions coupled with the lack of evidence of an assault rising to the level of strangulation or substantial bodily harm requires reversal of Mr. Ell's assault charges.

5. PROSECUTORIAL MISCONDUCT DEPRIVED MR. ELL OF A FAIR TRIAL.

Mr. Ell contends the prosecutor committed misconduct in her closing argument when she argued that evidence admitted solely

for impeachment was substantive evidence of Mr. Ell's guilt. Specifically, she argued that testimony of the impeachment witnesses was corroborated by physical evidence: "She was so consistent telling all these people [the medical staff and police officers]. I don't know, add them up, seven, eight, nine people what happened to her, and the injuries that are consistent with that and corroborate that." 3RP 877. Further, the State argued that Ms. Honcoop-Miller told the truth about the incident when she was talking to these impeachment witnesses: "She is seriously caught between the truth which is what she told on the 16th when she went through initially all these statements. Even she keeps that same truth on February 14th [the date of the defense investigator interview] and you got to look at that here." 3RP 882-83. The prosecutor went on to describe statements Ms. Honcoop-Miller made to police officers, which were admitted for impeachment purposes only, to prove rape. 3RP 902-903. These statements clearly argued the substantive truth of statements that were admitted only for impeachment.

The State does not address the specific statements Mr. Ell raised in his opening brief, instead arguing that the prosecutor explained the difference between impeachment and substantive

evidence and that this Court should look at the full context of the prosecutor's closing argument. Brief of Respondent at 42-44. This argument glosses over the prosecutor's inappropriate statements about the substantive value of the impeachment witnesses' testimony.

Mr. Ell was prejudiced by the prosecutor's misconduct. Here, the prosecutor impermissibly relied on impeachment evidence to argue Mr. Ell's guilt. This misconduct was exacerbated by the nonspecific jury instruction on impeachment. In a case with 21 witnesses, the jury was likely confused about which testimony was substantive and which was for impeachment. Because the prosecutor misstated the purpose for which evidence could be considered, the jury likely based its verdict on improper grounds. This misconduct was so flagrant and ill-intentioned that it caused enduring prejudice that could not have been cured by the vague impeachment instruction. Therefore, this court should reverse Mr. Ell's convictions and order a new trial.

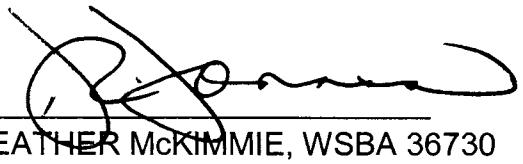
B. CONCLUSION

Based on the foregoing and the arguments presented in his opening brief, Mr. Ell respectfully requests this court reverse and dismiss his convictions for rape in the second degree and felony

harassment. In the alternative, Mr. Ell asks his felony convictions be reversed and remanded for a new trial.

DATED this 17th day of December, 2009.

Respectfully submitted,



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	)	
JAYDEANE ELL,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF FO APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF DECEMBER, 2009.

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