IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON,	)	Benton County Circuit Court
Plaintiff,	)	
	)	Case No. 18CR74761
vs.	)	
	)	
DAVID ESPARZA,	)	
	)	Volume 1 of 1
Defendant.	)	Pages 1 - 21
	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on regularly for trial before the Honorable JOAN ELAINE DEMAREST Judge of the Benton County Circuit, Friday, March 13, 2020, at the Benton County Courthouse, Corvallis, Oregon.

APPEARANCES

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GENERAL INDEX

WITNESS INDEX

FOR THE PLAINTIFF:

None

FOR THE DEFENDANT:

None

CORVALLIS, OREGON; FRIDAY, MARCH 13, 2020

-OOO-

(Call to Order of the Court at 2:27 p.m.)

THE COURT: -- your last three minutes.

MS. MATUSKO: The State's ready, Your Honor.

MR. THOMPSON: Defense is ready, Your Honor.

THE COURT: All right. So, just a minute. Okay, so, we're now back on the record in State versus Esparza.

We finished closing arguments yesterday and the parties were given some additional time to provide the Court with additional information regarding whether the Court can consider lesser-included offenses. If so, which ones.

And, I received the information from the parties and I appreciate it. And I know that Ms. Matusko wanted to make some record further, so you may do so now.

MS. MATUSKO: Thank you, Your Honor.

On the basis of *State v. Berry*, and the particularities of that case being highly factual, the State wished to inform the Court that in this matter, the State originally made an offer to the Defendant including an attempt rape in the first degree and sexual abuse in the second degree. And the Defendant declined that offer.

The State in no way made any indication to the Defense that in declining that offer, the State would not

further seek to have a lesser included considered by the Court at trial. We made no such representation and would indicate that the Defendant was put on notice particularly that that was a potential possibility by the basis of the offer.

Under *State versus Berry*, the Defendant would have been put on notice. The date didn't change that notice in this case. And we wish to just make those facts part of the record.

THE COURT: Okay, thank you.

Mr. Thompson?

MR. THOMPSON: Your Honor, I'm going to take a little bit of time because I want to make sure that this is laid out correctly.

And my reading of *Berry* is that *Berry*, ultimately, the Court concluded that it was not appropriate in that -- case to do in essence what I believe the State's potentially requesting the Court do here. But it was because of some very particular facts in that case.

I think, similarly, there are very particular facts in this case that would lead the Court to the same conclusion that the Court reached in *Berry*. Namely, it is true that there was a plea offer that was, you know, tendered. But that in no way would have indicated that we would have thought once we were trying this case that the

State was asking for anything other than a rape in the first degree conviction.

So, I know you've read my memo and you've seen some of the arguments. I'm not going to hash out everything there. But in verity, from a due process standpoint, there's two elements to due process. One is the notice issue. And the other is the ability to prepare a defense.

And I really think the focus here is on the ability to prepare a defense. Because even if we were put on notice that rape in the first degree has a lesser included of attempted rape in the first degree, we were not prepared to present any defense to that because the State never even -- it never even implied that that was going to be in play.

Now, had we had a jury trial, you would have requested jury instructions at some point before certainly rebuttal closing argument. And we would have had some ability to be put on notice of that.

And because, you know, we were in a bench trial posture, and then the State brings this request up in rebuttal closing argument, technically, we're not even entitled to say anything. I mean, we don't even have a surrebuttal closing argument that's really allowed for under the -- under the rules. I mean, we've kind of gotten

it now through this weird process that we're in now. But the bottom line is, as the way the case was tried, the strategic decisions that we made, the strategic decisions that we discussed with our client with our experts, who were here all week long, I still can't tell you right now what the State would be requesting the Court find that were Mr. Esparza's actions that would be enough to constitute attempted rape in the first degree.

But certainly, if we were have then moved for an election at the time I moved for the election on the charged defense, if the State would have said, well, we're relying on this fact and that fact, it's very, very likely that our whole strategy here would have been different.

It is certainly reasonable to think that Mr. Esparza would have wanted to actually address some of those things, because clearly, when he was interviewed by law enforcement in this case, they weren't saying, hey, what about, you know, just attempting something. There was no opportunity for him to even give statements regarding an attempted rape in the first degree.

So, from a -- from a fundamental due process standpoint, I think the process, the procedure here, and where we're at, is -- fundamentally flawed. And I think if the Court were to find Mr. Esparza guilty of the lesser-included offense, I believe we'd have a *State versus*

Esparza with a very interesting written appellate opinion that might be very similar to *State versus Berry*.

And it's not identical, I understand, but I think the focus from a due process standpoint is more on that opportunity to prepare a defense. And clearly, we made decisions yesterday right around this time yesterday in terms of how were going to proceed at that point in time, and that was based on the fact that we did not believe that there was a lesser included in play here, because no one had ever requested it.

And that the whole case was about what was charged. In fact, you heard my closing argument. My closing argument, one of the things that I pointed out in closing argument is that potentially Mr. Esparza even committed a different crime. That was part of our strategic decision in this particular case, given all of the evidence that came out. DNA evidence, I mean, their experts, a week of trial.

So, I think at this point to be changing that up on us at that very last minute would violate due process.

More importantly, well, I shouldn't say more importantly, just as importantly, I think it would violate the equal privileges and immunities clause because had he been in the trial posture of a jury trial, we would have clearly known this before rebuttal closing argument. And

therefore, there's no reason why he should be treated any differently than somebody who has a jury. Both of those individuals have certain rights that they can exercise and certain rights that they can waive.

Mr. Esparza, in this particular case, has chosen to waive his right to a jury trial. But had he not, he would have been in virtually no different position than having a jury. And had he had a jury, this clearly would not have come up.

And so, because of that, I just think it's inappropriate for the Court to even consider that.

I don't think we have a disagreement on the sexual abuse in the third degree just because of, you know, the way it's charged. So, I don't really need to add anything else on that.

And the only thing I can say in terms of any potential even argument, if the Court was to -- deny my reasons why the Court could even consider a lesser-included offense in this case, is -- purely what I pointed out yesterday and what is here. Because I don't know exactly what the State's theory of the attempt is. I don't really know.

I mean, if it's just, oh, well, he was starting to. Well, was it when he came back from the bar? Was it when he started kissing her? Was it when he was close to

her? Was it when he was told to go on the other -- what, at what point, what are they relying on? I don't know.

And that is what I would have been requesting yesterday. And we just didn't, we never got there. We didn't have it. There was no reason why it should have.

So, because of that, I think it would be completely inappropriate and, quite frankly, violate Mr. Esparza's due process rights, and equal protection rights, rights under the Oregon and United States Constitution, for the Court to even consider that at this point.

And we're just asking the Court to just announce its verdict on the charges that we were put on notice of, and had an opportunity to defend in this.

Thank you, Your Honor.

THE COURT: Okay, thank you.

Ms. Matusko?

MS. MATUSKO: Your Honor, I wasn't sure if the Court actually wanted argument on this issue. But if the Court will allow me to at least respond to Defense Counsel?

THE COURT: Okay.

MS. MATUSKO: Your Honor, Counsel seems to have missed the general idea that every crime has a lesser included offense included within an indictment or another charging instrument. *State versus Washington* is very clear

about that and that any defendant is on notice that that can be considered. So, the fact that he didn't even think about it is his error. Okay.

And just for the fact that he didn't present any evidence is his error.

The State is not required to elect whether to choose an underlying lesser included at the end of their case. He couldn't make that argument to the Court that the State was required to elect under either physically helpless or mentally incapacitated, so he cannot also make this requirement that the State elect also at that point to indicate to the Court that we might proceed on an attempted.

He cites no case law for that. He has a generalized argument about equal rights. And that doesn't even apply in a jury trial.

The idea behind this, as *State versus Washington* indicates, is to allow the prosecution on the basis of the evidence to include those lesser included. What does that tell the Court? That it's an inclusive process that is allowed.

So, the question is not can the State ask for a lesser included, it's more about when the State asks for a lesser included. Because honestly, the Defendant was under constructive notice that this could occur.

Now, given that constructive notice, when you look at *Berry*, *Berry* says, yes, there was constructive notice, but there were additional facts that negated that constructive notice. We do not have that here.

And when you're talking about a defendant's rights, what the case law that the State has cited has indicated is that the idea is that the Defendant has the ability to argue. Not the ability to present on evidence, the ability to argue that instruction to the Court.

And the Defense had that ability. The Court gave them that ability, okay. They could have argued any way that they wanted to against an attempt. They took that ability and if they felt like they needed more, I would certainly be fine if the Court wanted to entertain more argument for them.

But all of the cases cited by the State have to do with the ability to argue to that.

Now, he wants to say, well, in the case of a jury, you know, they wouldn't have that ability after they had their closing. But we're not doing a case to the jury. And that's why the State particularly cited those cases wherein it was decided it was not an abuse of discretion when that request came late because of the effect it would have on the jury.

And in that instance, it would make more of a

highlight on the attempted than it would have been under the other types of charges.

But in this instance, Your Honor doesn't have that, okay. Your Honor can understand in the process and the way it is that an attempt doesn't have any more emphasis than the other charges merely for the fact in the way that it was argued.

So, this is really an abuse of discretion standard on when the Court will allow such argument, whether the parties have the ability to argue that in front of the Court, and whether the Court will consider those things.

And one of the cases the State cited, it was about the judge even giving notice to the parties if the judge wanted to consider that so that the parties could argue it. That was the issue with the *State versus Berry*, is that the parties weren't notice, okay.

In this instance, we've had notice. The Defense had an opportunity to argue and the lesser includeds are before the Court.

Thank you.

THE COURT: Okay, thank you.

All right, so, this is obviously a very emotionally-charged case. We have a lot of folks in the courtroom today. And I just want to remind everybody that

it's an important rule of Court that we all maintain decorum regardless of whether we're pleased with the outcome of the case or not.

There's been a lot of discussion about how a court trial differs from a jury trial.

If this had been a jury trial and I were on a jury, you would have found out in the jury selection process that I have been a volunteer for the Center Against Rape and Domestic Violence off and on since I was 13 years old. I served on the board. I've been a donor. I have spoken at their fundraisers.

When I was a young prosecutor, here in the Benton County District Attorney's Office, I went to a special training regarding sexual assault. And I came back and I asked my boss, hey, I heard about this thing called the Sexual Assault Response Team, it sounds pretty good. Can I start one? And he said, yes. And that's what we did.

In the early days, one of our community partners insisted on having some time on our agenda, and brought in a video that we watched showing young women dancing in a provocative manner at an OSU party and explaining that that was a reason why we should, not to be as aggressive in prosecuting sexual assaults that happened in relation to such behavior.

We have come a very, very long way. The law used

to say that if someone is voluntarily intoxicated, it's not as serious of a crime if they are sexually violated if they're -- as if they -- as opposed to if they are involuntarily intoxicated. And I was a part of the legislative effort that changed that.

And so, now intoxication is intoxication, and you can't violate anyone who is intoxicated, regardless of whether they became voluntarily intoxicated or involuntarily intoxicated.

I spent, if you -- if we had done jury selection, we would also have learned that I spent a summer delivering pizza at night, so that I could volunteer at the ACLU of Northern California during the day.

You might have found out that in the household I grew up in, the Constitution was kept more closely to the night stand than the bible.

You might have also learned that I went to college. And I had a lot of experiences in college that are pretty typical to a lot of college students.

I have almost 50 years of lifetime experience and jurors are always welcomed to use their experience as they deliberate in criminal matters.

If this were a jury trial, you would hear instructions that instruct the jury that they are not to allow themselves to be influenced at all by personal

feelings, sympathy for, or prejudice against, anyone involved in the case.

They would also have been instructed that they may draw reasonable inferences from the evidence and they would be instructed not to guess or speculate.

The jury would have been instructed that in deciding the case, they are to consider all evidence they find worthy of belief. That it is their duty to weigh the evidence calmly and dispassionately, and to decide the case on its merits.

The trier-of-fact is not to allow bias, sympathy, or prejudice any place in deliberations.

The trier-of-fact is not to decide this, the case based on guesswork, conjecture, or speculation.

The trier-of-fact is also not to consider what sentence might be imposed by the Court if the Defendant is found guilty. And we discussed that at a few points during the course of the trial, and the Court is not considering that in its deliberation.

And it is also true, and the jury would have been instructed that, the testimony of any witness, whom I believe, is sufficient to prove any fact in dispute. But I am also to weigh the evidence.

In evaluating witness testimony, the jury would be instructed that every person is presumed to be telling

the truth, but the person -- but the trier-of-fact can also consider the manner in which the witness testifies, the nature or quality of the witness's testimony, evidence that contradicts the testimony of the witness, evidence concerning the bias, motives, or interest of the witness, and evidence that the witness has been convicted of a previous crime.

The jury would have been instructed that in deciding this case, they may draw inferences and reach conclusions from the evidence if their inferences and conclusions are reasonable and based on their common sense and experience.

They would also be instructed on the definition of proof beyond a reasonable doubt.

The Defendant is -- innocent unless and until the Defendant is proven guilty beyond a reasonable doubt. The burden is on the State and the State alone to prove the guilt of the Defendant beyond a reasonable doubt.

Reasonable doubt is doubt based on common sense and reason. Reasonable doubt is not an imaginary doubt. Reasonable doubt means an honest uncertainty as to the guilt of the Defendant.

And then the jury would be instructed that they must return a verdict of not guilty if after careful and impartial consideration of all the evidence in the case,

they are not convinced beyond a reasonable doubt or to a moral certainty that the Defendant is guilty.

There is a jury instruction that is offered occasionally entitled, less satisfactory evidence. And it says, when you evaluate the evidence, you may consider the power of the State to gather and produce evidence. If the evidence offered by the State was weaker and less satisfactory than other stronger or more satisfactory evidence which the State could have offered, then you should view the weaker evidence and the less satisfactory evidence with distrust.

I think it's common knowledge and we all know that when alcohol and drugs and youth and sex mix, there will likely be trouble.

We all probably know that memory is very complicated, and scary and dangerous. Add to that alcohol, drugs, emotion, and the passage of time, and it's a recipe for a very bad outcome, potentially.

I think it was proven in this case that something sexual happened to Ms. Bains (phonetic) that she didn't want.

It was also proven in this case that David Esparza was not a gentleman, and that he did something wrong, and he was scared.

There are some problems with asking the Court to

believe one person in a case like this in light of all the evidence, albeit limited, that is before the Court.

The problems -- there are a couple of larger problems in -- in the State's case here, and one of them was the fact that Ms. Bain woke up when Mr. Esparza leaned on her, and said to get off. But later, the trier-of-fact is expected to believe that Mr. Esparza unbuttoned her jeans and pulled them off, and pulled off her tights and underwear, and apparently pulled off her shoes, all while she was in the position that she demonstrated on the floor with one leg bent up from the other one, with her knees at least a foot apart from each other.

The underwear doesn't stretch that far. It's just not possible physically for it to have happened that way. That's not to say that nothing bad happened to Ms. Bain.

But it is a problem and it is something that could be dealt with, with additional investigation.

Another problem is that she said she was pretty intoxicated when she went to sleep, but then she said she was sober when she woke up. And based on the testimony about what was consumed that evening, that's just not credible.

There's also the trouble of the prior conviction for theft.

All of this doesn't mean what Ms. Bain says happened didn't happen. But what it does mean is that the State needs to do further investigation. They need to investigate the case beyond a reasonable doubt before they should even be in a courtroom trying to prove it to a trier-of-fact beyond a reasonable doubt.

Now, Detective Roach (phonetic) said he had enough to arrest the Defendant with just Ms. Bain's statement. And that may have been true because his standard for making an arrest is probable cause.

But the standard in this Court is beyond a reasonable doubt.

When you have a situation like this that's being investigated, it does -- or that's being investigated and choices are made not to uncover or turn over every possible, not every possible stone, but the stones that are right there in your path that you're about to trip on, those need to be turned over and looked at, especially when there's evidence that exonerates, or at least eliminates. I'm talking about the DNA evidence in the underwear that was not Mr. Esparza's. It belonged to someone else.

I also have trouble with the fact that the State asked the trier-of-fact to find that the DNA found in the vaginal cavity would be Mr. Esparza's, when the DNA found in her underwear was clearly not Mr. Esparza's.

Again, those facts do not mean that what Ms. Bain said happened didn't happen. But what it means is there needs to be additional investigation. The case needed to have been investigated beyond a reasonable doubt. And it just wasn't. There was a lot of -- there were a lot of questions that Detective Roach admitted he didn't bother asking.

I don't know why. I don't know why this wasn't thoroughly investigated. It's perhaps because of lack of resources. But lack of resources cannot be a weight on the scale of justice in determining whether there is proof beyond a reasonable doubt.

It was very clear that Detective Roach decided not to follow up with the crime lab, and decided not to ask for additional items to be examined.

And sure, if something had come back positive from Mr. Esparza, I'm sure Mr. Thompson would have argued that there was DNA contamination. That's the job of the defense attorney. But it doesn't mean that finding DNA elsewhere would not have been helpful to establishing proof beyond a reasonable doubt.

There was discussion about the rough handling of the underwear. That might have yielded something. The jeans that Ms. Bain was wearing, they have a button that would have, I assume, needed to have been unbuttoned to

remove the jeans. What if -- if Mr. Esparza had to handle that button, you know, it's got texture to it, presumably, his DNA might very well have landed there.

And you can't ask the Court to speculate about what, what certain results could possibly mean, when 50 percent of the population, frankly, could have been up inside Ms. Bain based on the DNA evidence.

It's very easy to record witnesses and to record witness interviews. And there's no excuse to not record them when the contact is by telephone. Because they don't need to be advised. It doesn't impair the investigation. All it does is add evidence.

It does a disservice to the progress that we've made over the last 20 years in believing people in Ms. Bain's situation and proceeding despite intoxication and despite it just being two people's stories. It does a disservice to not thoroughly investigate. And bring legitimacy and validity to those cases.

And frankly, it does a disservice to the Oregonians. The District Attorney's Office represents the State of Oregon, the people of the State of Oregon. They don't represent Ms. Bain. It's not their job to close their eyes and blindly go forward prosecuting someone without enough evidence in the name of vindicating Ms. Bain.

That's not what the criminal justice system is for. The people of the State of Oregon demand that cases be thoroughly investigated and that defendants are only prosecuted when there's proof beyond a reasonable doubt.

People of the State of Oregon do not want wrongful convictions. And our Constitution and our heritage is based on the premise that it's better to have someone go free. Someone who's guilty, go free, than to convict someone wrongfully.

So, I find Mr. Esparza not guilty of rape in the first degree, not guilty of sexual abuse in the second degree, and not guilty of attempted rape in the first degree.

And Mr. Thompson, will you please prepare the order.

MR. THOMPSON: I will, Your Honor, thank you.

THE COURT: Any security posted can be released.

MR. THOMPSON: Thank you.

THE COURT: Mr. Esparza, if there's a conditional release agreement or a security release agreement, I'm dismissing that right now.

All right. Thank you.

Court's in recess.

(Proceedings adjourned at 2:53 p.m.)

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CERTIFICATE OF TRANSCRIBER

I, John Buckley, court-approved proofreader, certify that the foregoing is a full and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Transcriber: Anne Diamos

/s/

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Date: May 18, 2019