

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DONALD CHARLES SMITH,

Appellant.

No. 33631-6-II

UNPUBLISHED OPINION

HOUGHTON, C.J. -- Donald Smith appeals his conviction of second degree rape by forcible compulsion, arguing that the trial court erred in admitting DNA evidence and allowing an in-court photographic identification. He also argues that insufficient evidence supports his conviction. We affirm.

FACTS

On July 30, 2003, D.S., a developmentally disabled 23-year-old female, walked home from an unsuccessful attempt to purchase cigarettes. On her way, she encountered a stranger smoking a Marlboro cigarette. At a later trial, she described the man as taller than her, “thin, small-boned, white, sandy blond hair” about down to the middle of the ear. 3 Report of Proceedings (RP) at 222. She said he wore jeans, a t-shirt, and sneakers or running shoes.

D.S. asked the stranger for a cigarette. He gave her the one he was smoking and they

walked and talked while she finished the cigarette. Although it was night, she testified that the high school track lights from across the street illuminated the area and she “got a good look” at the man as they talked. 3 RP at 244.

D.S. asked the man if he had more cigarettes. He said he did and suggested they both go into the woods. The “woods” she referred to several times during testimony is more like a heavily dense brush area.

D.S. followed the man into the brush alongside the road, an area overgrown with blackberry bushes. She testified that she was only one to two feet away from him while they were in the woods. When he did not offer her another cigarette, she said she “had this weird feeling that something just wasn’t right.” 3 RP at 227. She noticed the man had unzipped his pants. She tried to run, but the man grabbed her, knocked her down, and forced her onto her knees.

D.S. told the man, “I am not a prostitute. I don’t do stuff like this, and this is against my religion.” 3 RP at 229. The man held her down and demanded that she put her mouth on his penis. She tried to resist but eventually complied because she thought he would seriously injure or kill her. He forced her to the ground onto her stomach and pulled down her shorts and underwear. She felt him insert his penis into her vagina. She then bit his arm and screamed. During the assault, she lost her eyeglasses, which she wore for nearsightedness.

The man turned D.S. onto her back and inserted his penis into her vagina several more times. She continued to scream, and her attacker put his hands around her neck and choked her until she promised to “behave.” 3 RP at 237. The man eventually moved far enough away from her that she was able to get up and run out of the bushes.

Larry Franklin lived in a home near the brush area. He heard sounds coming from the

area, “sticks popping,” and a low tone of voice, like “somebody had their hand over somebody’s mouth.” IV RP at 5. He then heard a female crying, saying, “Oh my God. Stop.” IV RP at 5. He also heard a man’s voice but could not hear the exact words. He told his sister to call the police “because somebody is being raped right next to [the] house.” IV RP at 6. His sister made the call and the police arrived at the scene within a few minutes. The police were at the scene when D.S. ran out of the brush screaming, “I was raped.” IV RP at 14.

Police Officer Darin Kelly placed D.S. in the back of a patrol car. Kelly, Officer Chris Karl, and a police canine approached the area of thick blackberry bushes from which D.S. had emerged. After a canine announcement, Smith emerged from the bushes. He was sweating and breathing heavily and had scratches all over his body.

The police arrested Smith. No one asked D.S. to identify Smith as her attacker at the time of his arrest. On arrival at the Pierce County jail, the police collected Smith’s clothing as evidence.¹ This evidence included a box of Camel cigarettes, brown sandals, jean shorts, and a white t-shirt.

An aid car took D.S. to Tacoma General Hospital where Noelle Krueger, a sexual assault nurse, examined her. Krueger collected evidence using the hospital’s standard sexual assault kit. Krueger examined D.S. using a diagram found in the rape kit and took swabs from D.S.’s genitalia for secretions. After examining D.S., Krueger found a small hymenal tear and a small amount of blood leaking from around her “cervical os.” 3 RP at 291. Tests of the swabs from D.S. did not reveal any semen. Krueger also performed a full physical examination. During the

¹ Although D.S. was menstruating at the time of the attack, lab tests did not reveal any of her blood on Smith’s clothing.

examination, D.S. explained to Krueger much of what had happened, including that she had bitten her assailant on the forearm.

Police cleared and secured the crime scene in order to proceed with their investigation. Toni Martin, a forensic specialist with Tacoma Police Department, arrived to photograph and process the scene. She began by photographing Smith before police transported him to the Pierce County jail.

After leaving the scene, Martin went to the hospital to photograph D.S. She learned that D.S. claimed to have bitten her attacker so she went to the jail to photograph Smith again. She photographed an injury on Smith's forearm consistent with a bite mark. Martin also collected physical evidence from the bite mark. Martin placed the swab used to collect this evidence in the crime lab to dry.

The State charged Smith with second degree rape by forcible compulsion. To prepare for trial, Karen Lindell, a forensic scientist for the Washington State Patrol Tacoma Crime Lab, used the Short Tandem Repeat (STR) technique and Preliminary Chain Reaction (PCR) process to test DNA evidence connected to this crime.

Lindell created DNA profiles for both D.S. and Smith. She also obtained a partial DNA profile on the swab from Smith's forearm; partial because she located only 5 of the 13 sites of the DNA. She determined the swab contained a mixed sample from at least two people. The swab came from a wound on Smith's forearm and Lindell testified that a portion of the DNA in the sample was consistent with Smith's DNA. Lindell also testified that the "foreign DNA that was in that profile was consistent with [D.S.]" IV RP at 114. Lindell stated that the odds of a random match within the United States population would be one in 25,000.

Before trial, the defense moved in limine to exclude the DNA evidence on two grounds: (1) *Frye* prong two (questions regarding methodology used in testing relatively small quantities of a sample and results based on mixed and degraded sample) and (2) ER 702² admissibility. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). At a hearing, defense expert Dr. Donald Riley testified about the validity of the tests used to examine the DNA in this case. Riley, a University of Washington professor, primarily researches DNA, PCR, and STR testing. He identified several problems regarding the DNA sample taken from Smith's forearm, including the unknown low initial amount of DNA, the mixture of DNA sources in the sample, and the "very degraded" nature of the sample. 1 RP 20.

The trial court determined DNA evidence was admissible under *Frye* and ER 702 and questions regarding testing methodology went to weight not admissibility.

When asked to identify her attacker at trial, D.S. stated, "there is somebody with their head down" and "[h]e looks different," referring to Smith. 3 RP at 245. But she could not state for certain that Smith was the man who had raped her. Consequently, the State sought to admit the photograph Martin had taken of Smith at the time of his arrest.

Defense counsel objected to the State using the photograph to help D.S. identify Smith as her attacker. The trial court, however, agreed with the State and ruled that that the in-court photographic identification went to its weight rather than admissibility.

On the stand, D.S. looked at this photograph and, with "100 percent" certainty, identified

² ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

the man in the picture as her attacker. 2 RP at 245. But even after this photographic identification, she could not say for sure that the man sitting at the defense table was her attacker. The State then called other witnesses who testified that Smith was the man in the photograph.

The jury found Smith guilty of rape in the second degree and he appeals.

ANALYSIS

In-Court Photo Identification

Smith first contends that D.S.'s in-court photographic identification was impermissibly suggestive and violated his due process rights. The State concedes that showing D.S. Smith's photo taken at the time of his arrest was impermissibly suggestive. The State's concession misses the point.

Because D.S. *never* identified Smith as her attacker, we need not decide whether there was a misidentification. Rather, the question is one of credibility. D.S. could not identify Smith in front of the jury. She could, however, identify the man in the photo as her attacker and the State otherwise established that Smith was the man pictured. It was left for the jury to decide whether D.S. was credible. As we do not disturb a fact finder's credibility determinations on appeal, Smith's argument fails. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

DNA Evidence

Smith next contends that the trial court erred in admitting DNA evidence and a resultant statistical calculation. He claims that this evidence and testimony fails the *Frye* test and violates ER 702.

We leave the admission of evidence to the trial court's sound discretion, and we do not disturb it on review absent a showing of abuse of discretion. *State v. Stubsjoen*, 48 Wn. App.

139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). The trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Erroneous admission of evidence is not grounds for reversal “unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Smith asserts that the DNA evidence used here did not satisfy the *Frye* test. In Washington, the *Frye* test consists of two prongs: (1) whether the scientific theory on which the evidence is based is generally accepted in the community, and (2) whether the technique used to implement that theory is also generally accepted by that scientific community. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995). Smith concedes that the scientific theory used satisfies the first prong of the test. Instead, he asserts that the mixed and degraded sample fails the second technique prong of the *Frye* test. We disagree.

Lindell performed PCR testing to implement the scientific theory of DNA identification in this case. *See Gentry*, 125 Wn.2d at 586. “It is now settled law in this state that the PCR technique of DNA analysis passes the *Frye* test and is admissible evidence in Washington.” *Gentry*, 125 Wn.2d at 587. *See also State v. Roberts*, 142 Wn.2d 471, 522, 14 P.3d 713 (2000).

Smith’s argument involving the nature of the sample more accurately questions whether the crime lab performed the PCR technique correctly on this occasion. This is a third prong of the *Frye* test some states use to judge admissibility, but Washington does not. In Washington, “prong three inquiries go to weight, not to admissibility.” *Gentry*, 125 Wn.2d at 586. As long as the scientific community generally accepts both the theory and the technique, the jury may hear all

arguments related to the particular results in that case. *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

The same analysis applies to Lindell's STR testing for calculating the statistic of only one in 25,000 would have this same DNA profile. Again, the technique satisfies both prongs of *Frye* and any questions regarding the reliability of the results go to weight not admissibility and the jury makes that determination.

Smith next asserts that admitting the DNA evidence violated ER 702. ER 702 addresses these concerns of whether the expert testimony would be helpful to the fact finder. *Russell*, 125 Wn.2d at 51; *see also Roberts*, 142 Wn.2d at 522-23. Under ER 702, the jury may assess the possibility that a degraded or contaminated DNA sample affected test results. *Russell*, 125 Wn.2d at 51.

Essentially, the trial court faced a dispute between experts about the reliability of the test conducted. The State relied on Lindell's testimony. Conversely, Smith offered Riley's testimony, attempting to show that the DNA evidence was questionable and therefore unreliable.

Under ER 702, "the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact." *Russell*, 125 Wn.2d at 51. *Gentry* involved similar issues regarding the validity of the DNA test results. 125 Wn.2d at 586. *Gentry* made similar arguments, contending the trial court erred in admitting the DNA evidence. Our Supreme Court disagreed, stating:

Once PCR evidence is determined to be generally accepted, as it has been, then both proponents and opponents of a particular test should be able to garner the necessary information to present both sides of the issue of whether errors were committed in a given test to the factfinder [sic] when there is a challenge to the validity of the laboratory procedure. That is precisely what occurred in this case. The jury heard knowledgeable scientists for both the State and the defense testify

at length on the issue of the validity of these particular tests. We find no error in the trial court's decision to allow the evidence concerning the PCR method of testing DNA to go to the jury.

Gentry, 125 Wn.2d at 588-59. This statement applies here. Scientific testing results may be inadmissible only if shown to be so flawed as to be unreliable and therefore the evidence would not assist the fact finder. *Russell*, 125 Wn.2d at 51. Smith failed to prove such flaws and unreliability at trial. Therefore, the trial court did not abuse its discretion in admitting this testimony.

Sufficiency of the Evidence

Finally, Smith contends that the State failed to prove beyond a reasonable doubt that he raped D.S. Smith first asserts that without the suggestive in-court identification and the improperly admitted DNA evidence, insufficient evidence showed that he committed the rape. As we have already discussed his suggestive identification and DNA arguments, we do not address them further in analyzing Smith's sufficiency claims.

Smith further asserts that insufficient physical evidence established him as the attacker. Notably, he argues that D.S. identified him as wearing different clothing and smoking a different cigarette and that D.S.'s menstrual blood was not found on him.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational fact finder could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. We defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v.*

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Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To prove that Smith committed second degree rape by forcible compulsion, the State had to show that he engaged in sexual intercourse with another by forcible compulsion. RCW 9A.44.050 (1)(a).

Sufficient evidence supports Smith's conviction. The police stopped and arrested Smith as he emerged from the woods after a neighbor called 911 to report a rape in progress. He had a wound on his forearm and had scratches on his body. Properly admitted DNA evidence linked Smith to the crime. Finally, D.S. identified her attacker from a picture taken of Smith shortly after the attack.

Affirmed.

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.

Houghton, C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.