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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,)	Case No. 19CR53657
)	
Plaintiff,)	DEFENDANT'S MOTION FOR NEW
)	TRIAL (ORCP 64B)
v.)	
)	
THEMBA HASAAN KELLEY,)	
)	
Defendant.)	

DEFENDANT by and through his attorney Barry W. Engle moves this court for an order pursuant to ORCP 64B(4), granting a new trial on the grounds of newly discovered evidence.

The following are incorporated in this motion:

- 101 Declaration of Frederick Gove
- 102 Recording of interview of Olivia Ordenes
- 103 Excerpt of police report
- 104 Excerpt of recorded statement
- 105 Email from Brian Davidson

FACTUAL HISTORY

Themba Kelley was charged by superseding indictment with counts of Sodomy in the First Degree (x2), Unlawful Sexual Penetration in the First Degree, Sexual Abuse in the First Degree, and Rape in the First Degree, all alleging as an element "forcible compulsion."

1 Following a jury trial, the jury gave a verdict of “guilty” of Sodomy and Rape, and
2 verdicts of not guilty on Sexual Abuse and Unlawful Sexual Penetration. Parris alleged that
3 Wendy Parris and Themba Kelley met at a park and spent a day together at various locations.
4 Parris alleged that Kelley invited her to a hotel room. She alleged that once they arrived at the
5 room, he pulled a gun out and sexually assaulted her. She alleged that they left the room and
6 went to find an additional female for him to kidnap. She said that they met Olivia Ordenes at a
7 convenience store and Kelley convinced her to come back to the hotel with them. Upon arrival
8 at the hotel, Parris left the parking lot and Kelley and Ordenes continued to the hotel room.

9 Ordenes was interviewed at the hotel shortly after Kelley’s arrest. Ex. 103, 104. There,
10 she said that she did not see a gun, but moved something “heavy” off of a coffee table in the
11 room. By the time of the trial, though, she told a different tale. On April 4, 2023, DDA Brian
12 Davidson sent an email to the defense, Ex. 105, saying that Olivia Ordenes told agents of the
13 state, including Davidson, that Kelley had “flashed a gun” to her and that she described the gun
14 as “small, black and having a barrel.”
15

16 Ordenes testified at the trial that the gun had been “flashed” at her. She was cross-
17 examined on her statements made at the time of the arrest. She responded in effect that she was
18 on drugs at the time of the arrest and remembered the event better at the time of the trial.

19 After the jury verdict, the defense interviewed Ordenes. Ex. 101. This was primarily to
20 determine if there had been any influence on her by the state that caused her to change her
21 testimony at the trial. She said that she had given false testimony at the trial because she was
22 overwhelmed by the experience of being a witness. She denied that she saw a gun in the hotel
23 room. She specifically said that she confused this incident with another where she had a gun
24 “flashed” at her. This statement was audio recorded by the investigator who took it. Ex. 102.
25

MEMORANDUM

- 1
2 1. Defendant is entitled to a new trial because of newly discovered evidence, material to
3 the party making the application, which such party could not with reasonable
4 diligence have discovered and produced at the trial.

ORCP 64B (4) provides:

5 A former judgment may be set aside and a new trial granted in an action
6 where there has been a trial by jury on the motion of the party aggrieved for any
7 of the following causes materially affecting the substantial rights of such party:
8 (...) (4) Newly discovered evidence, material for the party making the
9 application, which such party could not with reasonable diligence have discovered
10 and produced at the trial.

11 A party may move for a new trial when material evidence is newly discovered evidence
12 that could not have been reasonably discovered before the trial. The motion in a criminal case is
13 not fundamentally different than in a civil case. *State v. Starr*, 210 Or App 409 (2007). This
14 motion is granted at the discretion of the trial court. *Oberg v. Honda Motor Co., Ltd.*, 316 Or
15 263, 272 (1993). A new trial is justified when the new evidence is “such as will probably change
16 the result if a new trial is granted.” *State v. Arnold*, 320 Or 111 (1994); *State v. Walker*, 223 Or
17 App 554 (2008); *State v. McCool*, 221 Or App 56, 61 (2008). Such evidence should not have
18 been available before the trial. It must be material to an issue, not merely cumulative, and not
19 merely impeaching or contradicting. The last three factors are closely related to the likelihood
20 that the evidence will probably change the result. *State v. Farmer*, 210 Or App 625, 641 (2007);
21 *State v. Acree*, 205 Or App 328, 334 (2006).

22 The gun was an essential element of the state’s presentation. “Forcible Compulsion” was
23 an element of every charge. *State v. Beckner*, 303 Or App 744 (2020) recently conducted a close
24 analysis of the requirements to establish forcible compulsion. *Id.* at 749. Brandon Becker
25 assaulted a victim in a public restroom. *Id.* at 746. He came up behind her as she was standing

1 at the sink. He put his finger to his lips which she interpreted as threatening and understood it to
2 mean “stay quiet.” *Id.* She turned to face him and he grabbed her hips in “a pretty firm grab” for
3 “maybe a couple of seconds.” *Id.* She “felt like she couldn’t move.” *Id.* He then released her
4 hips and grabbed her breasts. She then ran out the door and away. *Id.*

5 The state argued that “by grabbing the victim’s hips, defendant physically compelled her
6 to submit to the grabbing of her breasts.” Alternatively, the state pointed to defendant’s finger-
7 to-lips gesture as a threat of harm. *Id.* at 748. The court, however, rejected both theories. The
8 court found that “forcible compulsion” means “physical force that overcomes earnest resistance.”
9 *Id.* at 751. The state must prove that the person used enough force to overcome the victim’s will,
10 *i.e.*, the victim’s desire not to engage in the sexual contact, regardless whether the victim was
11 actively resisting, passively submitting to, or unwillingly engaging in the sexual contact. *Id.*
12 (citing *State v. Marshall*, 350 Or 208, 225 (2011) (stating that the statute requires the use of
13 physical force “of a degree or quality that is sufficient to *compel* the act at issue – sufficient that
14 is, to cause a victim to submit to, or to engage in, the sexual contact against his or her will”)
15 (emphasis in the original). *Beckner*, 303 Or App at 752.

17 Further, the state must prove that forcible compulsion specifically was applied during
18 each act alleged. *Marshall*, 350 Or at 222. In that case, the court found “forcible compulsion”
19 when Corey Marshall forced the hand of a victim down his own pants, but that forcible
20 compulsion did not apply when Marshall fondled her buttocks immediately after. *Id.* That is,
21 the forcible compulsion did not apply across the entire event but must be specific to each.

22 In the present case, then, the evidence of the firearm was essential to the state’s
23 presentation. Outside of the threat of the gun, the state produced no evidence to support forcible
24 compulsion as to either act of sodomy or rape. Parris alleged that a fight ensued at the beginning
25

1 of the encounter. She alleged that she was dragged to the bathroom.¹ But once in the bathroom,
2 she alleged that she complied because she was “terrified” of the gun. That was where the first
3 alleged sexual act occurred. That is that she performed the additional acts of oral sex and the act
4 of vaginal sex because of the threat of the gun.

5 The defense argued, correctly, that the state was “desperate” for there to be a gun. It was
6 a huge problem for the state that no gun was found in the tiny hotel room by a group of police
7 officers with a search warrant. The state was so desperate for that gun, that the prosecutor
8 suggested in his closing that Ordenes herself took the gun, a suggestion with no basis of fact at
9 all. The state also unsuccessfully tried to produce a police detective who claimed that she could
10 testify as an expert that a smudge on a screen was in fact a firearm. That firearm was a huge part
11 of the state’s case.

12 Ordenes’s testimony now is critical to the defense theory. That is, that she didn’t see a
13 gun in this tiny hotel room and that there was no attempt by Kelley to hide it while she was in
14 there. The only explanation is that there was not a gun and never was one. Ordenes’s current
15 testimony is not “mere impeachment.” Impeachment would be just to discredit Parris. While the
16 absence of the gun in the hotel room does that, it also does much, much more. It means that
17 there was no evidence at all of forcible compulsion and means that each of the crimes of
18 conviction should have resulted in acquittal. That is, but for the evidence of the gun, there
19 couldn’t have been any evidence of forcible compulsion at all.
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24 ¹ The state had originally charged kidnapping in regard to this interaction, but dismissed that charge
25 shortly before trial.

1 Finally, there was no way that the defense could have discovered this evidence before or,
2 indeed, during the trial. Ordenes seems to have recalled it herself only after the trial. That is,
3 she now says that the ordeal of testifying caused her to confuse this event with an unrelated event
4 where a man flashed a gun at her. The defense did cross examine on her earlier statements about
5 a “heavy object” at the trial, but she said that she was on drugs then and wasn’t reliable, which
6 was obviously an effective explanation. There was no way for the defense to discover or use this
7 evidence during the trial because the witness only identified her error after the trial.

8 This is a unique circumstance, and frankly one of only a few where a grant of a new trial
9 for newly discovered evidence is well-founded. New evidence was discovered after the trial but
10 before sentence and judgment. That evidence is critically material to an essential fact at the trial,
11 one that was heavily disputed by the parties, and central to important elements of the charges.
12 The defense had no way to obtain that before or during the trial. It is available now and very
13 likely would result in the opposite verdict to the convictions. A new trial must be granted.
14

15 2. Defendant is entitled to a new trial because of insufficiency of the evidence to justify
16 the verdict.

17 ORCP 64B (5) provides:

18 A former judgment may be set aside and a new trial granted in an action
19 where there has been a trial by jury on the motion of the party aggrieved for any
20 of the following causes materially affecting the substantial rights of such party:
21 (...) (5) Insufficiency of the evidence to justify the verdict (...)

22 As above, it is impossible to come to a logical conclusion as to how the jury found
23 “forcible compulsion” in this matter. Parris testified that she stopped resisting before any sexual
24 contact. That is, that she testified that she was “terrified” of the gun and so submitted to the
25 sexual contact. Therefore, the only way that the jury could have found “forcible compulsion” is

1 if they believed that she was threatened by a gun. However, the jury answered “no” to the
2 question “did the defendant cause or threaten to cause serious physical injury.”

3 Assuming then that they didn’t believe the gun, because of the answer to the
4 enhancement question, the evidence is not sufficient to demonstrate “forcible compulsion” on
5 any count. *State Beckner, supra*. Therefore, Defendant is entitled to a new trial on the grounds
6 that the evidence was insufficient to find “forcible compulsion” beyond a reasonable doubt on
7 any charge that was submitted to the jury. Defendant should be granted a new trial.

8 3. Defendant is entitled to a new trial on the grounds of irregularity in the proceedings
9 of the court.

10 ORCP 64B (1) provides:

11 A former judgment may be set aside and a new trial granted in an action
12 where there has been a trial by jury on the motion of the party aggrieved for any
13 of the following causes materially affecting the substantial rights of such party:
(...) (1) Irregularity in the proceedings of the court, jury or adverse party.

14 Defendant restates his motion for dismissal regarding the thousands of pages of new
15 discovery that were provided during the trial. The oral arguments made at the trial are
16 incorporated herein and restated as a motion for a new trial.

17 CONCLUSION

18 A new trial must be granted.

19 DATED this 16th day of June, 2023.

20 BARRY W. ENGLE PC

21 s/ Barry W. Engle
22 Barry W. Engle, OSB No. 960598
23 barry@benglelegal.com
24 Attorney for Defendant Kelley

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT'S MOTION FOR NEW TRIAL on:

DDA Brian Scott Davidson
Multnomah County District Attorney's Office
brian.davidson@mca.us

by emailing a copy thereof to said attorney at his last-known email address on the date set forth below.

DATED this 16th day of June, 2023.

/s/ Barry W. Engle

Barry W. Engle, OSB 960598
Attorney for Defendant Kelley

1 asked if I could call her and she said that would be OK, but to call during the
2 middle of the day when here kids were not there. I told her I had tried to call a few
3 times and she said she had seen the name "Frederick" on her caller ID, but didn't
4 know who that was so she did not answer.

- 5 4. On May 24, 2023, at approximately 10:45 AM, I called Ms. Ordenes using the
6 same phone number I had used previously, the phone number that was in the email
7 provided by MCDA Investigator Robbie Thompson. When she answered the
8 phone, I recognized her voice from our in-person contact the day before. Her
9 comments were also consistent with our in-person contact the day before.
- 10 5. I recorded my conversation with her on May 24, 2023. I have reviewed that
11 recording and confirm that it is exactly the same as the conversation that I had with
12 Olivia Ordenes on May 24, 2023. A copy of the recording is incorporated in this
13 declaration as a true and correct copy of my conversation with Olivia Ordenes on
14 May 24, 2023.
- 15 6. I specifically explained to her that I was an investigator working for the defense
16 and for Themba Kelley in particular in both our in-person meeting on May 23,
17 2023 and in our phone conversation on May 24, 2023.
- 18 7. I found this conversation to be relevant to the trial in this case because she told me
19 that she did not see a gun in the hotel room, that when she testified that she did see
20 a gun it was because of the stress of the proceedings. She specifically indicated
21 that the testimony that she gave during the proceedings was incorrect and that the
22 truth was that she didn't see a gun in the hotel room. When I asked her about her
23 statement that she remembered Mr. Kelley flashing a gun, she stated that she had
24
25

1 misremembered this incident and confused it with another incident that occurred
2 around the same time period with her ex-boyfriend who flashed a gun. I asked her
3 about her interview with DDA Brian Davidson on April 4, 2023. She told me that
4 Davidson was concerned that her testimony was different on April 4 than it was in
5 2019 right after the incident. She said that Davidson told her that "somebody
6 might be calling her about this, an investigator."

- 7 8. Because of the importance of this information, I called Barry Engle, one of the
8 attorneys for the defense, for further direction. He asked me to go back to her as
9 soon as possible, play the recording of her statement, and ask her to sign a sworn
10 declaration that the recording was in fact her true statement, and incorporating the
11 recorded statement in her declaration.
- 12 9. I contacted Olivia Ordenes on May 25, 2023, by telephone, to ask her if I could meet with
13 her to have her sign a declaration based on our interview from the day before. She said
14 she was not available because she had to go shopping later that day. I stated I could come
15 by before she went shopping and she could review the statement. At this time, Ms.
16 Ordenes became uncooperative, and agitated, and said she did not want to meet with me.
17 She said that the district attorney had told her that she was all done with this case and she
18 did not want to have anything more to do with it. She then specifically told me that "They
19 told me that I shouldn't talk to you." In the conversation on May 25, 2023, Ms. Ordenes
20 sounded like she regretted having spoken to me the day before and then she made this
21 statement of how she was told she shouldn't talk to me.
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10. At the end of our conversation Ms. Ordenes was very agitated and stated she would not meet with me and she would not sign anything. I discontinued the conversation. I do not know if her change in attitude was because she didn't want to be called back to trial, or because she realized the implication of telling me that she gave false testimony at the trial. In any event, her attitude on May 25, 2023 is a good reason why I could not get a sworn statement from her.

11. I am willing to testify about the matters contained herein.

I hereby declare that the above statements are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and are subject to penalty for perjury.

DATED this 7th day of June, 2023.

/s/ Frederick Gove
Frederick Gove, Declarant

6/16/2023 1:41 PM
19CR53657

STATE v. THEMBA KELLEY
CASE NO. 19CR53657
EXHIBIT 103
GO 41 2019-44474

KIDNAP-OTHER CRIMINAL
PURPOSE

Gresham Police Department
DISTRICT ATTORNEY RELEASE

FOLLOWUP REPORT #2				
ASSIGNED TO STEWART, JORDAN (59404)		RANK		
ORG UNIT PATROL		CAPACITY 1-INVESTIGATOR, SECONDARY		
ASSIGNED ON 08/14/2019	ASSIGNED BY STEWART, JORDAN	SUBMITTED ON 08/14/2019	APPROVED ON 08/14/2019	APPROVED BY HOGAN, SCOTT T
ACTION TAKEN (NARRATIVE)				
AUTHOR STEWART, JORDAN (59404)			DATE/TIME 08/14/2019 0823	
SUBJECT NARRATIVE				
SUMMARY:				
<p>I assisted to the report of a welfare check at 18323 SE Stark St. I spoke with a witness, Olivia Ordenes, about the incident.</p>				
ACTION TAKEN:				
<p>I spoke with the victim, Olivia Ordenes, after she exited the hotel room. She stated she was on her bicycle near the 7/11 on SE Stark and SE 162 Ave. Olivia said she was approached by an unknown black male in a dark SUV with an unknown white female passenger, later identified as Wendy Parris.</p>				
<p>Olivia stated the black male, later identified as Themba Kelley, asked her if she wanted to come back to his hotel room to "hang out". Olivia stated she told Themba she did not want to leave her bike behind and Themba offered to pay her \$20 to leave her bike. Olivia agreed and entered Themba's vehicle.</p>				
<p>Olivia stated while she was in the car, the three agreed to have a threesome when they arrived back at the hotel room. She stated she never had a direct interaction with Wendy.</p>				
<p>Olivia said they arrived at the hotel and the three exited the vehicle. She said her and Themba walked up to the room but Wendy stayed behind to care for her cat and didn't return.</p>				
<p>Olivia said once in the room, Themba immediately started smoking methamphetamine and continuously smoked it during the 30 minutes she was in there. She said Themba began making advances at her, touching her breasts and he tried putting his hand down the front of her pants. Olivia said she told Themba to stop and repeatedly pushed his hands away. She said that Themba was acting very strange and told Olivia to remove her shoes. She said Themba began licking and spitting on her feet.</p>				

Gresham Police Department
DISTRICT ATTORNEY RELEASE

Olivia stated she wanted to leave, but was worried how Themba would react due to his erratic behavior. She said Themba never verbally threatened her, but felt threatened by his demeanor. Olivia said she never saw a gun with Themba.

Olivia stated that she was relieved when police arrived and was worried that Themba was going to harm her.

Interview of Olivia Ordenes

STATE v. THEMBA KELLEY
CASE NO. 19CR53657
EXHIBIT 104

1 A -- karma.

2 Q Okay. And what'd he say about that?

3 A I'm just like, "Okay. Well, I gotta go.
4 Like, you're not gonna keep me in here. I'm not gonna
5 stay in here. You can figure it out." He's like,
6 "Don't say anything." I'm not gonna say anything, but
7 I will speak on my part.

8 Q Gotcha. Okay. All right. So he said,
9 "Don't say anything"?

10 A Yeah. But what is -- like, what are you
11 talking about? So --

12 Q Did he hold you against your will in there?

13 A Ah, no.

14 Q Okay. All right. So you were free?

15 A Mm-hmm.

16 Q Okay. And you walked out, is my
17 understanding?

18 A Yeah.

19 Q Okay. Good. Ah, did you know anything or
20 have you heard anything about any gun at all?

21 A No.

22 Q Okay. Did you ever see a gun?

23 A No. But when I was on the, ah -- okay. So
24 when you walk in the room, there's --

25 Q Mm-hmm.

Interview of Olivia Ordenes

1 A -- the dresser and then the bed and then,
2 ah, the other side of the bed. I was right there on
3 that side and I --

4 Q Okay.

5 A -- bumped into the bed, right? Well,
6 something fell on the other side. Like, if it fell
7 from the mattress, like, it could have been a gun or
8 ashtray, but --

9 Q Okay.

10 A -- either/or.

11 Q But you're not sure?

12 A No.

13 Q Okay. All right. So what's in the room
14 right now?

15 A Well, there was cat food. There was nothing
16 really, just there's a little garbage on the table,
17 like --

18 Q Okay.

19 A -- a little bit of meth, like, crumbs.

20 Ah --

21 Q Did you say meth?

22 A Yeah, just, like --

23 Q Okay. Gotcha. Okay.

24 A Yeah.

25 Q Okay. All right.

6/16/2023 1:41 PM
19CR53657

STATE v. THEMBA KELLEY
CASE NO. 19CR53657
EXHIBIT 105

Barry Engle

From: Davidson Brian <brian.DAVIDSON@mcda.us> on behalf of Davidson Brian
Sent: Tuesday, April 4, 2023 1:53 PM
To: Westbrook Johnson; Barry Engle
Subject: FW: DA# 2408159 State v. Kelley. Themba

FYI

From: Thompson Robbie <Robbie.THOMPSON@mcda.us>
Sent: Tuesday, April 4, 2023 1:24 PM
To: Davidson Brian <brian.DAVIDSON@mcda.us>
Cc: DUNDON Anthony <Anthony.Dundon@mcda.us>; Herrera Martin Alhena <Alhena.HERRERA-MARTIN@mcda.us>
Subject: DA# 2408159 State v. Kelley. Themba

On April 4, 2023, at approximately 10:30AM, a meeting took place with Olivia N. Ordenes. In addition, present at the meeting was DDA Brian Davidson, DDA Anthony Dundon, Advocate Alhena Herrera-Martin and myself. We met in a conference room on the fifth floor of the Multnomah County District Attorney's Office.

DDA Davidson asked Ms. Ordenes if she recalled events of three and a half years ago that involved her, a guy and police. She said, in fact, she did recall the events and has been waiting for some notice regarding what would be happening because of the incident. She acknowledged she had previously received subpoenas regarding this case.

In recalling the events that occurred with a man Themba Kelley, in the area of a 7-Eleven Store on SE Stark Street and a Motel 6, also on Stark Street, Ms. Ordenes said that she spoke to Kelley about him buying her bike. She said he was in a vehicle with writing on it and the conversation centered on the sale of the bike and the return to the motel for money (for the bike) and drugs. The conversation was not focused on the subject of a three-way sexual encounter with Wendy Parris.

Ms. Ordenes stated the sexual contact that occurred between she and Kelley was consensual. She did not feel he forced himself on her and felt she could leave anytime she wanted.

When asked if she saw any weapons in the room, Ms. Ordenes stated she recalls Kelley "flashing" a gun in a manner as to show off the gun. She recalls this action to be moments before they saw police lights from the outside. Ms. Ordenes said at that moment Kelley appeared to panic and behave in an anxious manner. She said Kelley hid the gun, but she did not recall where.

She described the gun as small, black and having a barrel. She said she did not know what happened to the gun.

Witness Contacted:

Olivia N. Ordenes
2441 SE 17th Avenue Apartment 430
Portland, Oregon 97233
Cell: 541-368-0669 (text and calls)
2nd Cell: 503-991-7738

Robbie J. Thompson, Investigator
Multnomah County District Attorney

1200 SW 1st Avenue, Suite 5200
Portland, Oregon 97204
Main Office (503) 988-3162
Phone (503) 988-5323
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www.mcdca.us

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