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State v. Allen Appellant's Brief Dckt. 35497

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IN THE SUPREME COURT OF THE STATE OF IDAHO

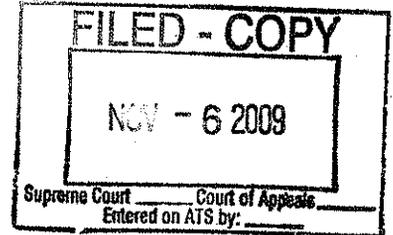
STATE OF IDAHO,)
)
Plaintiff/Respondent,)
)
vs.)
)
JAMES A. ALLEN,)
)
Defendant/Appellant.)
_____)

S.Ct. No. 35497

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Second
Judicial District of the State of Idaho
In and For the County of Latah

HONORABLE JOHN R. STEGNER
District Judge



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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a judgment following a jury trial. Clerk's Record

(R) 347.

B. Procedural History

Appellant James Allen was charged with burglary, I.C. §§ 18-1401, 18-1403, two counts of rape, I.C. §§ 18-6101(4) and (7), 18-6104, attempted rape, I.C. §§ 18-306, 18-6101(7), 18-6104, intimidating a witness, I.C. § 18-2604, and violation of a no contact order, I.C. § 18-920. R 66-70.

Prior to trial, Mr. Allen moved for dismissal of the attempted rape charge pursuant to I.C. § 19-815A. R 85-86. That motion was denied and the case proceeded to trial. R 127.

At the close of the state's case, Mr. Allen moved for acquittal on all charges. R 191. However, that motion was denied, Mr. Allen presented his defense, and the case went to the jury. R 192-196.

At the close of the trial, the jury found Mr. Allen not guilty of burglary and the first count of rape, but guilty of the second count of rape, attempted rape, and intimidating a witness. R 243-244. In addition, Mr. Allen pled guilty to the misdemeanor count of violation of a no contact order. R 195.

Prior to sentencing, Mr. Allen filed a motion to dismiss the count of attempted rape pursuant to ICR 29(c) on the basis that the state did not prove that he had performed an act which was a step toward commission of the crime of rape. R 245-246. A hearing was held and that motion was denied. R 268.

Following a sentencing hearing, the District Court sentenced Mr. Allen to a term of ten years for rape with two fixed, five years for attempted rape with one fixed, five years for intimidating a witness with one fixed, all to run concurrently, and time served of 193 days for violation of the no contact order. However, the Court retained its jurisdiction for 180 days. R 326-332.

Following a period of retained jurisdiction, the District Court suspended execution of Mr. Allen's sentence and placed him on probation for a period of 10 years. Supplemental Clerk's Record (SR) 14-21.

Sometime later, Mr. Allen entered a stipulated probation violation admissions and disposition. Thereafter, the District Court continued probation adding the condition that Mr. Allen immediately transfer supervision to the state of Louisiana and not return to Idaho without prior written permission of the Court. R 113-116.

This appeal followed. R 347-352. The state also filed a cross-appeal stating "The issue on cross-appeal concerns whether the district court properly perceived the scope of its authority in limiting the scope of the no contact order." R 341-343. However, the cross-appeal appears to be moot because the District Court later extended the no contact order to include all persons requested by the state. SR 13.

C. Statement of Facts

James Allen and Tambi Hoskins had a nearly eight year long relationship by the time of the events in issue in this case. They started out as friends, became best friends, and were sexually active together. Tr. Vol. III, p. 288, ln.17 - p. 289, ln. 4. In fact, Ms. Hoskins's youngest child may be Mr. Allen's daughter. Ms. Hoskins does not know who the father is, but

Mr. Allen is one of the possibilities. Tr. Vol. III, p. 287, ln. 13-22.

The cause of the series of events that led to the charges against Mr. Allen is disputed. According to Ms. Hoskins, she and Mr. Allen were best friends, and she has always tried to maintain that. But, in July of 2007, they had an altercation that resulted in the police being called and Mr. Allen being arrested after grabbing her hair. At that point, she wanted to just be Mr. Allen's best friend but not be boyfriend/girlfriend. Still, they saw each other, Mr. Allen stayed at her house, and they continued to have sex. Ms. Hoskins testified that this was all consensual sex. Tr. Vol. III, p. 289, ln. 7 - p. 290, ln. 22.

According to Mr. Allen, things started out differently and were rooted in paternity issues. He and Ms. Hoskins had been dating for about seven years. Together, they had a daughter. Although there has never been paternity testing and Ms. Hoskins did not put his name on the birth certificate, Mr. Allen has always treated this girl as his daughter. Tr. Vol. IV, p. 544, ln. 6-25.

Throughout the years, Mr. Allen had asked Ms. Hoskins about their daughter and she had always replied that no matter what he would always be her only father. So, Mr. Allen did not worry about remaining part of the girl's life. And, he helped support her financially. He also helped Ms. Hoskins out financially. Tr. Vol. IV., p. 545, ln. 5-24.

Ms. Hoskins testified at the trial that she had not put a father's name on her daughter's birth certificate because she did not know who the father was. Tr. Vol. III, p. 410, ln. 1 - 3. However, the summer before, Ms. Hoskins while under oath told a judge in a civil matter that she and Mr. Allen had always believed that he was the father of her daughter, but that she did not put his name on the birth certificate because she wanted to have total control of the girl with no

rights for Mr. Allen. Tr. Vol. III, p. 413, ln. 10-25.

Mr. Allen agrees that he and Ms. Hoskins had an altercation in July that resulted in him pleading guilty to disturbing the peace. However, he testified that when the altercation happened Ms. Hoskins was drunk. She had slapped him the day before and now was coming at him, so he stuck his hand out and palmed her head as one would a basketball. Tr. Vol. IV, p. 547, ln. 1 - p. 548, ln. 1-3.

Mr. Allen testified that, after this, things were not quite the same, but he thought that they were working back towards the sort of relationship they had previously shared. In fact, on October 22, 2008, he went to Ms. Hoskins's house around 9:30 or 10:00 p.m., had sex with her, and spent the night. Likewise on October 23, he went to her house in the afternoon, had sex with her, and spent the night. The same happened on October 24. On the 25th, he did not spend the night, but on the 26th, he again had sex with Ms. Hoskins and spent the night. On the 27th, they had sex around 8:30 or so, and then went into Moscow and hung around. Tr. Vol. IV, p. 549, ln. 22 - 25; p. 551, ln. 1 - p. 554, ln. 25.

On Sunday, October 28, Mr. Allen tried to call Ms. Hoskins, but she would not answer. So, he drove out to her house at 2:30 or 3:00 a.m., and knocked on her window. She let him in and they talked about why she had failed to pick him up after going to the bars. Tr. Vol. IV, p. 555, ln. 2-13. On the 29th through the 31st, Mr. Allen did not see Ms. Hoskins, although they talked on the phone. But, the time they had spent in that prior week was probably the best time they had spent together in the last six or seven months. Mr. Allen felt good about the week. Tr. Vol. IV, ln. 1 - 13.

Both Ms. Hoskins and Mr. Allen agree that on November 1, 2008, they were at the

Sandpiper in Moscow, that he used her phone and found messages from another man on the phone, and that Ms. Hoskins left shortly after this. Tr. Vol. III, p. 291, ln. 7 - p. 292, ln. 13, Vol. IV, p. 558, ln. 1 - p. 559, ln. 10.

Mr. Allen testified that he took the message he saw as a bad sign because it was from another man and said, "Love you, babe." He was not upset, however. Ms. Hoskins had already told him that she was in Seattle the weekend before and had slept with another guy there, but that it was just sex, not a relationship. But, this message did make him feel like he wanted to know what was going on. Mr. Allen felt that as long as he and Ms. Hoskins were having sex, it was relevant to him. Tr. Vol. IV, p. 558, ln. 23 - p. 560, ln. 16.

Ms. Hoskins testified that Mr. Allen did get upset by the message. Tr. Vol. III, p. 292, ln. 11-13.

In any event, both Ms. Hoskins and Mr. Allen agree that Ms. Hoskins went to her home in Troy. Tr. Vol. III, p., 292, ln. 24-25, Vol. IV, p. 560, ln. 17 - 18. Also, both Ms. Hoskins and Mr. Allen agree that they spoke on the phone after she left. Tr. Vol. III, p. 293, ln. 3-5, Vol. IV, p. 562, ln. 3 - 4.

According to Ms. Hoskins, Mr. Allen wanted to come out to her house and have sex. She also claimed that he told her he had some pictures that would ruin her life and that he would take them to her work and put them on the internet. She said that Mr. Allen told her that the photos were of her doing cocaine at a party. Tr. Vol. III, p. 293, ln. 15-24. Ms. Hoskins also claimed that she told Mr. Allen that she did not want to have sex with him. Tr. Vol. III, p. 294, ln. 19-21.

Mr. Allen testified that the telephone conversation was fine and that he just asked Ms. Hoskins questions about her relationship with this other man so that he could make up his mind

as to whether he should just move on with his life. He testified that he did not tell Ms. Hoskins he was going to come over to her house to have sex and that he did not say anything about any photographs. Mr. Allen testified that he does have some photos of Ms. Hoskins naked, but that he did not have any photos of her using cocaine or that would ruin her life. Tr. Vol. IV., p. 562, ln. 6 - p. 564 ln, 3.

Mr. Allen testified that there were other phone calls that evening and that when he called Ms. Hoskins from John's Alley, a bar, they had a polite conversation. During that conversation, Mr. Allen told Ms. Hoskins he wanted to have sex with her and she did not say anything in reply. He told her he would call her when he got home and she said that would be fine. Tr. Vol. IV, p. 565, ln. 1 -12.

Mr. Allen testified that when he got home he called Ms. Hoskins and they talked for almost two hours. During that time she told him that he could come out to her house and have sex with her. She said something to the effect of, "You're not really worried about me, you just want to come out here and have sex with me." But, she said it in a joking way and he replied, "Yeah, I do." Her actual words were, "If you want to come out and fuck me, you know, come out and fuck me and get it over with." And, Mr. Allen's response was, "Well, yeah." Tr. Vol. IV, p. 566, ln. 5-25.

Ms. Hoskins testified that after they finished talking on the phone, about 2:00 a.m., she went to sleep. Tr. Vol. III, p. 300, ln. 11 - 12.

Ms. Hoskins testified that the next thing she knew, it was about 4:00 a.m., and she was awakened by Mr. Allen, who was laying on top of her. Tr. Vol. III, p. 300, ln. 12 - 16.

Mr. Allen testified that he drove to Ms. Hoskins's house in Troy. The door was locked,

so he walked around to her bedroom window. He knocked on the window and she got up and let him in. Tr. Vol. IV, p. 568, ln. 4 - 9.

Ms. Hoskins testified that she told Mr. Allen she did not want to have sex, but he grabbed the back of her hair and penetrated her. Tr. Vol. III, p. 301, ln. 11 - 18. Mr. Allen testified that he kissed Ms. Hoskins, had a snack with his daughter who was in the living room, went into Ms. Hoskins bedroom, bushed her hair back, and rubbed her hair and back. She responded and they had consensual sex in a manner not unlike how they have had sex in the past. Tr. Vol. IV, p. 568, ln. 15 - p. 572, ln. 15.

The jury believed Mr. Allen and not Ms. Hoskins, because it found he was not guilty of the burglary and rape charges based upon the events of November 1-2. R Vol. II, 243-244.

Both Ms. Hoskins and Mr. Allen agree that he left her house around 5:30 or 6:00 a.m. on November 2. Tr. Vol. III, p. 303, ln. 21 - 24, Vol. IV, p. 573, ln. 17-21. However, they talked on the phone later that morning. Tr. Vol. III, ln. 1 - 4, Vol. IV, p. 573, ln. 25.

Mr. Allen testified that they spoke about the issue of the man who left the text message on her phone, and that he still wanted to know whether he should end their relationship. In that conversation, Ms. Hoskins told him that if he ever wanted to see his daughter again, he needed to get a paternity test. Tr. Vol. IV, p. 574, ln. 2 - 17.

Ms. Hoskins claimed a different content of the conversations. She claimed that Mr. Allen told her that he wanted her to come after work to Jared's house where he was staying because he wanted to have sex again, that he had pictures, and that he was not going to let her go. Tr. Vol. III, p. 304, ln. 3 - 11.

Mr. Allen testified that in response to Ms. Hoskins's demand for paternity testing, he

called several places to get prices on testing. All he wanted to do was to be able to see his daughter. Tr. Vol. IV, p. 575, ln. 1 - p. 576, ln. 7. Around noon, he called Ms. Hoskins and asked her if she wanted to split the cost of testing with him, but she did not really respond. And that was why he asked her to come to his house. Tr. Vol. IV, p. 576, ln. 2 - 20. Mr. Allen never told Ms. Hoskins she was supposed to come over to have sex, nor did he threaten her in any way. Tr. Vol. IV, p. 577, ln. 1 - 6.

Mr. Allen testified that during the course of these conversations about Ms. Hoskins coming over to discuss the paternity tests, she was kind of frantic, like she did not want to come over. And, she asked, "Do you have those pictures?" In response, Mr. Allen asked what she was talking about and said that he did not have any pictures. This was the first he ever heard of any pictures. Tr. Vol. IV, p. 577, ln. 13 - 25.

Ms. Hoskins testified that she spoke with Mr. Allen several times, begging him not to have her come to his place. But, he kept saying that it was in her best interest to come over. Ms. Hoskins drove around for about an hour, and finally drove to Mr. Allen's house around 5:00 p.m. Tr. Vol. III, p. 306, ln. 23 - p. 307, ln. 11. During this time driving around, Ms. Hoskins also had a 12 minute phone conversation with her friend Heather and told her everything that was going on and that Mr. Allen wanted her to come to his place to have sex against her will. Heather advised Ms. Hoskins not to go to Mr. Allen's, but Ms. Hoskins did not follow this advice, nor did she call the police. Tr. Vol. III, p. 393, ln. 16 - p. 395, ln. 17.

Mr. Allen testified that when Ms. Hoskins got to Jared's house, he was in bed. She walked into the guestroom which was his bedroom, and laid down beside him. Mr. Allen testified that they talked for about five minutes, and then Ms. Hoskins said that she was going to

be late to pick up their **laughter**, so if he wanted to have sex, they should have sex. Ms. Hoskins rolled over, into the same position as the night before, unsnapped her pants, and they had sex. Ms. Hoskins was crying when she arrived at Jared's, but when he asked her why she was crying she said it was nothing. In fact, Mr. Allen sat and held Ms. Hoskins for a bit because she was crying. It was then that she said they should have sex. But, during sex she really started crying and so he stopped and went to get her some water. When he did that, Ms. Hoskins got up and followed him into the kitchen. There, she put her hands on the table and started bawling. He did not want her to leave crying like that, but she said she was going to be late and left. Tr. Vol. IV, p. 579, ln. 23 - p. 582, ln. 24.

According to Ms. Hoskins, when she arrived at Jared's house, Mr. Allen was in bed in the guestroom. She walked into the room and stood in the doorway crying and begging him not to do anything. But, he said, "No" and patted the bed for her to sit down. So, she sat next to him on the bed and he grabbed her and while she was still crying and begging him had sex with her. She also testified that Mr. Allen told her that she was going to enjoy it, and when she said she would not enjoy it, he said they would have sex every day until she did. Tr. Vol. III, p. 307, ln. 12 - p. 308, ln. 10.

According to Ms. Hoskins, about 20 minutes after she arrived at Jared's, she left. Her friend, Amber, had picked up her daughter, and she went to Amber's flower shop in Troy. Ms. Hoskins said that she was still upset when she got to the flower shop and that she told Amber everything that had happened. In response, Amber told her that she needed to call someone for help, so Ms. Hoskins called her aunt at Alternatives to Violence. There she was directed to a hotline, where she was directed to go to the hospital. Tr. Vol. III, p. 310, ln. 1 - 25.

According to Mr. Allen, after Ms. Hoskins left, he started trying to call her on the phone. There is a dead zone between Moscow and Troy so he could not reach her for a bit, but then when she got to Troy, they spoke as she sat outside Amber's flower shop. At that time, Ms. Hoskins told him that she felt as if he had raped her, and Mr. Allen just could not believe this. Tr. Vol. IV, p. 584, ln. 1 - p. 585, ln. 12.

About an hour later, they spoke again on the phone. And, this conversation did not go well. Mr. Allen had been thinking about Ms. Hoskins going around and telling people that he had raped her and he became upset and angry. So, in anger, he said that if she was accusing him of rape, then he did have pictures of her. Tr. Vol. IV, p. 585, ln. 17 - p. 586, ln. 5.

Ms. Hoskins decided to go to the hospital and when she arrived she was taken to a room, and the nurse called the police. So, Ms. Hoskins told the police officer, the Alternatives to Violence representative, and the nurse all that had happened. Tr. Vol. III, p. 311, ln. 12 - 25.

Throughout this, Ms. Hoskins refused to tell the police officer what was in the photos she claimed Mr. Allen had. She also refused to participate in the completion of a rape kit by medical personnel. Tr. Vol. III, p. 312, ln. 10 - 15, Vol. IV, p. 503, ln. 17 - 23. However, Ms. Hoskins did sign the paperwork for a No Trespass order to be served on Mr. Allen and stayed at the hospital while the order was served. Tr. Vol. III, p. 313, ln. 6 - 16.

Ms. Hoskins used her cell phone a lot. Her cell phone call records were admitted in evidence. For example, on October 26, she had records of 34 calls and on the 27th, she had records of 38 calls. Defendant's Exhibit A p. 1 - 4. And, so, not unexpectedly, Ms. Hoskins checked her voice mail as she headed out of the hospital. Tr. Vol. III, p. 315, ln. 8 - 10. And, according to her testimony, there was a voice mail from Mr. Allen. Tr. Vol. III, p. 315, ln. 8 - 13.

Mr. Allen recalled leaving that particular voice message. In it, he told her that she was “fucking me out of a place to live” and that she was “screwing up.” Tr. Vol. IV, p. 587, ln. 1- 12.

Ms. Hoskins testified that she and Mr. Allen communicated a lot over the rest of the weekend. There were phone calls and messages, which, according to Ms. Hoskins, included apologies from Mr. Allen, as well as escalation of threats about the supposed photos. Tr. Vol. III, p. 315, ln. 18 - p. 316, ln. 1.

Voice mail messages were recorded from Ms. Hoskins’s phone and played for the jury. While Mr. Allen did dispute when the calls were made, and the phone itself did not record any date or time for any of the calls, he did not dispute that his was the voice recorded. Tr. Vol. III, p. 317, ln. 9 - 13, Vol. IV, p. 586, ln. 21 - p. 25. The state played for the jury some voice mail messages that Ms. Hoskins said were from that November 1 or 2. Tr. Vol. III, p. 295, ln. 10 - p. 299, ln. 20.

The transcripts of these messages were included as state’s exhibits at trial and are in the record before this Court. The messages tend to short and crude. For example, one message that Mr. Allen states was left after Ms. Hoskins told him she believed he had raped her, was as follows:

You know if you want to play this with me, I have pictures that I (inaudible) bullshit that will ruin your life. I have shit that will ruin your fucking life. If you want to do this to me, I have shit that will ruin your fucking life. You have no idea what I have on you. You have no fucking idea. If you want to play this game with me, I fucking love you as much as fucking love, love itself, but if you want to do this to me, I will fucking ruin your life and this is my last resort for you. I will fucking ruin your whole entire fucking life. I will and that’s my determination right now is to fucking ruin your life. Okay, image that. Bye.

State’s Exhibit 2a.

During the weekend, Ms. Hoskins met Mr. Allen at a gas station to give him a jacket. Tr. Vol. III, p. 318, ln. 17 - 22. She also agreed to meet at a place called Friendship Square the first part of the next week. According to Ms. Hoskins, at that meeting, Mr. Allen told her how sorry he was and that he was going to leave her alone. Then he gave her a hug and walked away. Tr. Vol. III, p. 319, ln. 7 - 18. Mr. Allen's recollection of this meeting was similar to Ms. Hoskins's. Tr. Vol. IV, p. 597, ln. 1 - 11.

According to Mr. Allen, they spoke on the phone again that night because he had called to be sure she was okay. Tr. Vol. IV, p. 597, ln. 16 - 22.

Mr. Allen testified that by Tuesday of the next week, he was angry because he had heard that Ms. Hoskins was claiming that he had raped her and he lost his head. Tr. Vol. IV, p. 598, ln. 18 - 25. That was when he started leaving the angry threatening voice mails saying that he had photos of Ms. Hoskins. Tr. Vol. IV, p. 599, ln. 25 - p. 600, ln. 25. Ms. Hoskins was telling him that he could not see his daughter anymore and he believed that she was claiming rape in order to scare him away from getting a paternity test. Tr. Vol. IV, p. 602, ln. 8 - 21. He started referring to photos only to get her to call him back, not in order to get her to have sex. Moreover, he has never even had any pictures of Ms. Hoskins using cocaine. Tr. Vol. IV, p. 603, ln. 1 - 11. Mr. Allen testified that he said a lot of stupid stuff on the phone because he was upset and irrational. Tr. Vol. IV, p. 613, ln. 1 - 10.

Mr. Allen testified that in the past, when he and Ms. Hoskins would disagree, she would often say that they would never have sex again, but then she would change her mind. Tr. Vol. IV, p. 641, ln. 1 - 7. And, both Ms. Hoskins and Mr. Allen testified that they were not "in a relationship" but that they still had sex with each other. Tr. Vol. IV, p. 641, ln. 11 -12. And, that

did seem to be in accord with the nature of Mr. Allen and Ms. Hoskins's interactions. Their testimony bespoke a pattern of sexuality not necessarily linked with any sort of romantic or committed monogamous relationship. Ms. Hoskins testified that they continued to have consensual sex without an emotional boyfriend/girlfriend relationship. And, Mr. Allen, when asked per a juror's question: "Are your conversations back and forth between you and Tambi always vulgar when discussing sex?" responded, "I really don't understand that question. Vulgar, as to?" Tr. Vol. V, p. 660, ln. 23 - p. 661, ln. 1. Mr. Allen testified that on this occasion, just as before, he had expected that Ms. Hoskins did not really mean that they would never have consensual sex again. Tr. Vol. IV, p. 641, ln. 11 -12. Rather, he testified that he thought this time was "same as before, that's what we did. Even though we weren't in a relationship, we still had sex. I mean, we had sex all the time." Tr. Vol. V, p. 641, ln. 8 - 14.

On November 7, Mr. Allen left a message that said, "I think you should come over today and let me tap that ass again. I really do think you should do that, you know. I really do." Exhibit on Appeal, State's Exhibit 6a, p. 1. However, there was no evidence of any sort that Ms. Hoskins felt compelled by that message to go visit Mr. Allen.

Ms. Hoskins did, however, decide to get a protection order the next day. She went to the courthouse. From there, she went to speak with the prosecutor, who sent her to the sheriff's office. And, while she was talking with the sheriff's deputy, Mr. Allen called on her cell phone. She took the call and it was recorded. Tr. Vol. III, p. 323, ln. 2 - p. 324, ln. 13, p. 326, ln. 10- 12.

The telephone call was played for the jury, and the transcript of the call is included as an appendix to this brief. Exhibit on Appeal, State's Exhibit 16a. Throughout the call Ms. Hoskins accused Mr. Allen of having raped her and Mr. Allen maintained that what had happened

between them was not rape. Mr. Allen also stated that he did not want to force Ms. Hoskins or have sex with her without her consent. He said, "I don't want to do it unless you want to give it to me;" "I'll let you be the judge, I'll let you be the, the, the, the decision maker on that one [whether he would ever touch her again];" and "I don't want to force you." He also replied "Alright" when Ms. Hoskins told him that she was not going to allow him to touch her again. Exhibit on Appeal, State's Exhibit 16a, p. 1, ln. 30-31, p. 2, ln. 15-17; p. 5, ln. 1-2; and p. 27, ln. 27.

Mr. Allen also said that Ms. Hoskins "[had] no other choice." Exhibit on Appeal, State's Exhibit 16a, p. 1, ln. 28, p. 6, ln. 3-6. He also said, "I think I will" when Ms. Hoskins said he could not touch her again. Exhibit on Appeal, State's Exhibit 16a, p. 5, ln. 3-5. And, when Ms. Hoskins asked Mr. Allen if he planned to force her to have sex again, he said, "Yep. Before I leave." Exhibit on Appeal, State's Exhibit 16a, p. 7, ln. 25. And, he said that she was going to have to bargain with her body. Exhibit on Appeal, State's Exhibit 16a, p. 8, ln. 25-28. He referred to this as blackmail. Exhibit on Appeal, State's Exhibit 16a, p. 11, ln. 16-21.

During the conversation, Mr. Allen also spoke to Ms. Hoskins about how they could compromise with each other and how he was planning to leave for Louisiana. Exhibit on Appeal, State's Exhibit 16a, p. 2, ln. 1 - 4, p. 7, ln. 5 - 11. Mr. Allen spoke of his intent to leave and said that he would call Ms. Hoskins just one more time before he left and that he believed that when he called they would have sex. At times, it sounded as if he believed that when he called for this final meeting, that they would have consensual sex. At other times, it sounded as if he intended to have sex whether or not it was consensual. And, at other times, it sounded like he believed Ms. Hoskins would have sex with him voluntarily because that would be an effective

way to be rid of him. Exhibit on Appeal, State's Exhibit 16a, p. 2, ln. 3-5, p. 7, ln. 10 - 28, p. 8, ln. 24 - p. 9, ln. 8. Mr. Allen also told Ms. Hoskins that he had been out to her house since she got the no trespass order against him and that if she read the order she would see that it did not go into effect for a few more days. Exhibit on Appeal, State's Exhibit 16a, p. 2, ln. 7 - 14.

At no time did Mr. Allen attempt to set up an actual time or place to meet with Ms. Hoskins. He didn't even mention a specific time or place or ask her to agree to a particular meeting. He just referred to "once" before he left for Louisiana. Likewise, he never mentioned any supposed photos of her or made any threats to publicize photos if she did not have sex with him. Exhibit on Appeal, State's Exhibit, 16a.

For her part, Ms. Hoskins repeatedly accused Mr. Allen of rape, repeatedly told him she did not want to have sex with him again, and repeatedly asked him if he intended to rape her again. Toward the end of the conversation, Ms. Hoskins started to tell Mr. Allen about her new boyfriend, J.T. Exhibit on Appeal, State's Exhibit 16a, p. 10, ln. 3 - 29. Ms. Hoskins then told Mr. Allen that if he continued, she would call the police. When Mr. Allen replied by pointing out that if she called the police, the police would come out to her house, she abruptly terminated the call, saying "Oh, I, I, I'm done with this conversation. I got to go." Exhibit on Appeal, State's Exhibit p. 12, ln. 16 - 20.

It was this recorded conversation that formed the basis for the charge of attempted rape. R 68. The state argued that the attempted rape was more than just this single call, it was a ongoing course of conduct by Mr. Allen. Tr. Vol. I, p. 6, ln. 6 - 18.

Later that day, after the telephone call was recorded, Mr. Allen was arrested. Tr. Vol. IV, p. 470, ln 11 - 12. A recording and transcript of Mr. Allen's interview with Deputy Aston was

presented to the jury. Tr. Vol. IV, p. 471, ln. 3 - 8, Exhibit on Appeal, State's Exhibit 16a. In that conversation, Deputy Aston questioned Mr. Allen about having gone out to Ms. Hoskins's house, about events at Jared's house, and about the telephone call recorded that afternoon.

Throughout the interview, Mr. Allen stated that he did not have any pictures other than some of Ms. Hoskins naked. He also maintained that he had told Ms. Hoskins he had no pictures of her using cocaine, although he did admit that he let her think he had such pictures for a bit. Exhibit on Appeal, State's Exhibit 16a p. 6 - 8.

When Mr. Allen was questioned about the day Ms. Hoskins came to Jared's and they had sex, Mr. Allen said that he told her after that he had no pictures of her and that she did not need to worry about anything. Exhibit on Appeal, State's Exhibit 16a, p. 19, ln. 11 - 29. Mr. Allen also acknowledged that he had said "some dumb shit." Exhibit on Appeal, State's Exhibit 16a, ln. 15.

The evidence relating to the charge of intimidating a witness was recordings made of a telephone conversation and messages between Mr. Allen and Ms. Hoskins made in violation of a no contact order. In particular, Mr. Allen left a message the day before the preliminary hearing saying:

Hey, it's me. You need to put an end to this tomorrow when you come, come here tomorrow you cannot go on that stand. You cannot do it. You cannot do it. I love you. Bye.

Exhibit on Appeal, State's Exhibit 15a, p. 6, ln. 25 - 27.

At the end of the case, the jury acquitted Mr. Allen of burglary and Count II of rape. They convicted him of rape, attempted rape, and intimidation of a witness, and he pled guilty to violation of a no contact order. R 327.

III. ISSUE PRESENTED FOR REVIEW

Was the evidence sufficient to support the conviction on Count IV of attempted rape?

IV. ARGUMENT

The Evidence was Insufficient to Convict Mr. Allen of Attempted Rape

A criminal conviction requires proof beyond a reasonable doubt of every element of the charged offense. In this case, the conviction of attempted rape must be reversed because there was not proof beyond a reasonable doubt of an act in furtherance of the intent to commit rape.

The Due Process Clause of the United States Constitution precludes conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970). A conviction cannot stand where no rational trier of fact could have found guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

The standard of review is whether, viewing the evidence in the light most favorable to the state, there is substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Grazian*, 144 Idaho 510, 516, 164 P.3d 790, 796 (2007).

Attempted rape comes from the general attempt statute and the rape statute. I.C. §§ 18-306, 18-6101.

“An attempt consists of: ‘(1) an intent to do an act . . . which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation.’” *State v. Grazian*, 144 Idaho at 516, 164 P.3d at 796, quoting *State v. Otto*, 102 Idaho 250, 251, 629 P.2d 646, 647 (1981)(emphasis omitted).

In this case, Mr. Allen was charged under subsection 7 of § 18-6101. R 68. Thus, the underlying act of rape as charged against Mr. Allen consists of “the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis accomplished with a female . . . where she submits under the belief, instilled by the actor, that if she does not submit, the actor will . . . expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt or ridicule.” I.C. § 18-6101(7).

Attempted rape requires: (1) an intent to commit rape; and (2) an act beyond mere preparation in furtherance of that intent. I.C. §§ 18-306, 18-6101, *State v. Grazian, supra*. See also, *State v. Glass*, 139 Idaho 815, 818, 87 P.3d 302, 306 (Ct. App. 2003), *rev. denied*, (2004).

The preparatory phase consists of ‘devising or arranging the means or measures necessary for the commission of the offense.’ *State v. Glass, supra*, citing *State v. Otto*, 102 Idaho at 251, 629 P.2d at 647 (quoting PERKINS CRIMINAL LAW 557 (2d ed. 1969). “To go beyond mere preparation, the actions of the defendant must ‘reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime.’” *Id.* In other words, the defendant must have taken a step of “perpetration in dangerous proximity to the commission of the offense planned.” *State v. Grazian, supra*, citing *State v. Otto*, 102 Idaho at 255, 629 P.2d at 651.

In *Glass*, the defendant was found to have committed acts beyond mere preparation towards the commission of lewd conduct when he arranged to meet a police detective who had been portraying himself on the internet as a 14-year-old girl. Glass arranged to meet the “girl” at a specific time and place for the expressed purpose of sexual activity and arrived at that time and place with a box of condoms. In *Grazian*, the defendant was found to have committed acts

beyond mere preparation towards the commission of procurement of prostitution when, as the manager of an adult entertainment business, she met with three undercover officers posing as prospective employees on three occasions, during which meetings she admitted violating the law by allowing customers to give her back rubs and directing escorts not to check in at hotels as required by law, described to 'prospective employees' illegal activities that occurred during 'tip sessions,' and discussed the option of engaging in prostitution noting that escorts could make a lot of money.

In both these cases, there was an act 'in dangerous proximity to the commission of the offense planned.' *Grazian, supra*. In *Glass*, there was the arrangement of a time and place and the arrival at the time and place bearing a box of condoms. In *Grazian*, there were three meetings at which the defendant set out the case and the means for prostitution to the undercover officers.

In Mr. Allen's case, by contrast, there was no act 'in dangerous proximity to the commission of the offense planned.' *Grazian, supra*. Mr. Allen did not set up a time and place to meet Ms. Hoskins in order to rape her. Rather, he spoke only of a vague time sometime in the future when he would call her and then some vague time after that call they would meet for sex. And, while Mr. Allen sometimes made statements to the effect that when in this vague future he called Ms. Hoskins, he would have sex with her by force, he never made any reference in any way to an intent to cause her to submit based upon a belief that if she did not he would expose photos of her. Thus, there was no evidence of the offense as charged. Mr. Allen stands in sharp contrast to *Glass* with his box of condoms outside the public pool. He also stands in sharp contrast to *Grazian* with her interviews for escorts during which she urged them to work as

prostitutes.

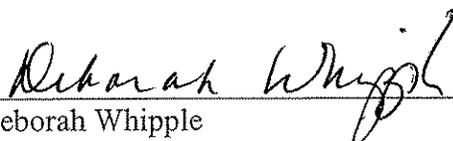
Mr. Allen spoke only in vague terms. He made no arrangements with Ms. Hoskins to meet. He did not even set up a specific time to call her again. He did not ask her to come to him. He did not establish plans to come to her. He just alluded to some time in the future, one last time before he moved out of state, when he would call her. This simply was not an act beyond mere preparation, an act that 'reach[ed] far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime.'" *State v. Glass*, *supra*, citing *State v. Otto*, 102 Idaho at 251, 629 P.2d at 647 (quoting PERKINS CRIMINAL LAW 557 (2d ed. 1969)). This was not the commencement of the consummation of the crime but rather vague statements about a possible sexual encounter sometime in the future which might be consensual or might be an offense under a different section of the rape statute, I.C. § 18-6101(3), an offense not listed in Count IV. There was not sufficient evidence to support a conviction of attempted rape.

Therefore, Mr. Allen requests that his conviction on that count be reversed.

V. CONCLUSION

For the reasons set forth above, Mr. Allen asks that his conviction for attempted rape be reversed.

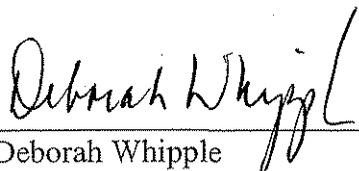
Respectfully submitted this 6th day of November, 2009



Deborah Whipple
Attorney for Appellant James Allen

CERTIFICATE OF SERVICE

I, Deborah Whipple, do hereby certify that on this 6th day of November, 2009, I deposited two true copies of the foregoing brief in the United States mail, postage prepaid, addressed to: Office of the Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.


Deborah Whipple

1 November 8, 2007
2 James Allen
3 Tambi Hoskins
4 Call from Allen to Hoskins @ LCSO
5 07-489 (#10023)
6
7

8 [Music]

9 HOSKINS: Hello.

10 ALLEN: Hey.

11 HOSKINS: Hay.

12 ALLEN: What are you doing?

13 HOSKINS: I'm just sitting at home.

14 ALLEN: You know, well you didn't call me.

15 HOSKINS: Nope I didn't.

16 ALLEN: Why didn't you call me?

17 HOSKINS: Cause.

18 ALLEN: Cause why?

19 HOSKINS: Because I'm not going to come over there.

20 ALLEN: Why not?

21 HOSKINS: Because I'm not going to let you do to me what you did the other two times.

22 ALLEN: Oh alright.

23 HOSKINS: You know, how, I mean how can I.

24 ALLEN: I don't know. I don't know.

25 HOSKINS: What you did to me Thursday and Friday.

26 ALLEN: Um.

27 HOSKINS: Why would I allow you to do that to me again?

28 ALLEN: Cause you have no other choice.

29 HOSKINS: So I don't have a choice for you to rape me again?

30 ALLEN: I don't want to do that honey. I don't want to do it unless you want to give it to

31 me.

1 HOSKINS: I don't want to give it to you. Like I didn't want to give it to you Thursday or
2 Friday.

3 ALLEN: Um. Well maybe we'll both have to compromise on something before I leave.

4 HOSKINS: Comprise what?

5 ALLEN: We'll, we'll both have to compromise something before I leave.

6 HOSKINS: I told you, I told you that I wasn't going to let you touch me again.

7 ALLEN: Well, that piece of tape on your window will decide that.

8 HOSKINS: You were at my house?

9 ALLEN: Huh um. You know what, the funny thing about it is, the no trespass order
10 doesn't go into, in, in, in contact until the 11th.

11 HOSKINS: What?

12 ALLEN: Your, your, your no trespassing order doesn't go, to in effect until the 11th.

13 HOSKINS: My no trespassing order doesn't go into effect until the 11th?

14 ALLEN: Yep.

15 HOSKINS: Well I'm, you, um, I'm not coming over. You're not going to see me and I'm not
16 going to allow you to touch me and do what you've already done to me.

17 ALLEN: Alright.

18 HOSKINS: You've already raped me twice James.

19 ALLEN: Well whatever, (inaudible) fucking rape you.

20 HOSKINS: Oh, why, why don't you think it's rape?

21 ALLEN: God, because nobody else thinks its rape either.

22 HOSKINS: No, me sitting there and begging you not to touch me, begging you and pleading
23 and crying –

24 ALLEN: Oh god.

25 HOSKINS: That's not rape.

26 ALLEN: Nope.

27 HOSKINS: Why, what is your definition of rape? Why don't you think you raped me?

28 ALLEN: Because I don't.

29 HOSKINS: Because why?

1 ALLEN: Because I don't. It wasn't, it wasn't a physical thing. You came over here
2 willing, willingly –

3 HOSKINS: No, I told you I didn't want to come over there and –

4 ALLEN: Whatever.

5 HOSKINS: I begged and pleaded you.

6 ALLEN: Oh forget it. Forget about it.

7 HOSKINS: What about, what about when you showed up at my house in the middle of the
8 night.

9 ALLEN: What about it?

10 HOSKINS: You know I told you not to come over then either.

11 ALLEN: And then once I got there what did you do?

12 HOSKINS: What did I do? I laid there so I wouldn't wake my children and then you laid
13 there and had your way with me at that point too.

14 ALLEN: Um. Whatever. If that's the way you want to see it.

15 HOSKINS: Why how do you see it?

16 ALLEN: I'm not worried about it Tambi. I'm not worried about it.

17 HOSKINS: You know, you, you, you just think that, you know, it was, it was okay what you
18 did.

19 ALLEN: No it wasn't okay what I did.

20 HOSKINS: But it wasn't rape?

21 ALLEN: Well, nope it wasn't.

22 HOSKINS: But why? I don't, I don't understand that. If you would have done that to any
23 other woman it would have been rape.

24 ALLEN: Whatever. No it wouldn't.

25 HOSKINS: Why? Some, a woman sitting there begging and pleading and telling you to stop
26 and don't do it?

27 ALLEN: Well, um,

28 HOSKINS: Huh?

29 ALLEN: Nope. It wasn't rape.

30 HOSKINS: But I don't understand –

1 ALLEN: Nope, it wasn't.
2 HOSKINS: How you figure it wasn't.
3 ALLEN: Because it wasn't.
4 HOSKINS: So what you did to me was –
5 ALLEN: [sighs]
6 HOSKINS: Was what?
7 ALLEN: That, that'd be no different that me doing it when you're asleep.
8 HOSKINS: But I wasn't asleep and I was begging you to stop.
9 ALLEN: Huh huh. You didn't beg me to stop Thursday night.
10 HOSKINS: Yes I did –
11 ALLEN: You didn't say nothing –
12 HOSKINS: I told you no. I didn't say nothing yeah, exactly because Kiana was asleep right
13 on the couch. I did not want to take the chance of waking up my kids and having them
14 walk in there, but you asked me if I was enjoying it and I told you no and you continued
15 to tell me that I better enjoy it. Correct?
16 ALLEN: Wrong.
17 HOSKINS: Oh, oh what, what's wrong?
18 ALLEN: It's wrong.
19 HOSKINS: What was wrong? You didn't say those things?
20 ALLEN: Nope.
21 HOSKINS: Oh, what do, what do you recall of that?
22 ALLEN: Well, where are you at?
23 HOSKINS: I'm driving home.
24 ALLEN: Whatever.
25 HOSKINS: I've got, I have senior pictures to look at tonight.
26 ALLEN: Um.
27 HOSKINS: Now, but this is something I'm dealing with and I, I, I just can't fathom, I, I, I
28 mean, you think you've done nothing wrong.
29 ALLEN: Hum.
30 HOSKINS: And you think you're going to touch me again.

1 ALLEN: I'll let you be the judge, I'll let you be the, the, the, the, the decision maker on that
2 one.

3 HOSKINS: And how am I in the decision maker? I already told you you'd never touch me
4 again.

5 ALLEN: Okay. I think I will.

6 HOSKINS: And how are you going to do that James?

7 ALLEN: Hum.

8 HOSKINS: How are you going to touch me again?

9 ALLEN: Uh, (inaudible) a motion sensor light put in at our house?

10 HOSKINS: Yeah my dad did that for me.

11 ALLEN: Um, why did he do that?

12 HOSKINS: Because I'm scared.

13 ALLEN: Why are you scared?

14 HOSKINS: Because I'm --

15 ALLEN: Is that what you told him?

16 HOSKINS: Scared of you --

17 ALLEN: Is that you told him you were scared?

18 HOSKINS: Yeah, I'm scared of you.

19 ALLEN: So now your parents know?

20 HOSKINS: I'm scared, I scared of, of, of you know all your threats everything that you said --

21 ALLEN: [laughing]

22 HOSKINS: Everything that you've already done to me.

23 ALLEN: [laughing] Well I thought you didn't, you hadn't talked to anybody about it.

24 HOSKINS: Well I was scared and I needed, thought I needed motion sensor lights --

25 ALLEN: Um.

26 HOSKINS: So I asked my dad to put some in.

27 ALLEN: Um. Great. Great so I'm just the talk of the town now I bet.

28 HOSKINS: I don't know.

29 ALLEN: Hum. Um huh.

1 HOSKINS: Well you're not going to touch me again. I'm not going to allow you to do what
2 you've already done to me again.

3 ALLEN: Well you have no other choice.

4 HOSKINS: Why don't I have a choice?

5 ALLEN: Because you don't.

6 HOSKINS: Why don't, I always have a, I have a choice in anything in my life.

7 ALLEN: Bull.

8 HOSKINS: Why don't I have a choice about you --

9 ALLEN: Bull.

10 HOSKINS: Touching me again.

11 ALLEN: Because you don't. Because that piece of gray tape on your window explain it for
12 you.

13 HOSKINS: The piece of gray tape on the outside of my window?

14 ALLEN: Um huh.

15 HOSKINS: What does that have to do with anything?

16 ALLEN: Um. Nothing. Nothing. Just forget about it.

17 HOSKINS: How can I forget about you, uh, forget about it when you continue to threaten me?
18 You know. How can I forget what you've already done?

19 ALLEN: Oh.

20 HOSKINS: Hum?

21 ALLEN: I'm just telling you. That piece of tape will come in handy before I leave.

22 HOSKINS: How will that piece of tape come in handy before you leave?

23 ALLEN: Because it will.

24 HOSKINS: Because why? What does a --

25 ALLEN: Because it will.

26 HOSKINS: Piece of tape have to do with anything?

27 ALLEN: Hum.

28 HOSKINS: It just shows that you were out at my house.

29 ALLEN: Hum. Alright. I'm going to go. Hello.

30 HOSKINS: Yeah.

1 ALLEN: I'm going to go.

2 HOSKINS: Well you need to stop calling me.

3 ALLEN: I'm going to at least call you once before I leave.

4 HOSKINS: Why, where, where, when and where are you leaving to?

5 ALLEN: I'm going to Louisiana.

6 HOSKINS: When are you going back to Louisiana?

7 ALLEN: Don't worry about it.

8 HOSKINS: Do you long you've (inaudible) without telling me you were going back to
9 Louisiana?

10 ALLEN: Well, well as soon as I get my shit together I'm to Louisiana. I still have to take
11 care of this court date on the thirteenth and I told you that from the beginning.

12 HOSKINS: What is, what is your court date on the thirteenth?

13 ALLEN: Um, that no insurance ticket I got for driving Dave's car.

14 HOSKINS: Hum. So you're going, you, so you say that you're going to continue to call me
15 and -

16 ALLEN: No I'm not saying I'm going to continue to call you. I told you I'd call you once
17 from now until I get ready to leave.

18 HOSKINS: And what's that once going to be?

19 ALLEN: Um, you know what it's going to be.

20 HOSKINS: For what?

21 ALLEN: Um,

22 HOSKINS: What to have sex with me again?

23 ALLEN: Yep.

24 HOSKINS: To force me to have sex with you again?

25 ALLEN: Yep. Before I leave.

26 HOSKINS: Yep, just to force me like you did the other two times.

27 ALLEN: Um. I don't want to force you.

28 HOSKINS: Well you're going to have to force me because there is no way that I would ever,
29 ever, ever willingly have sex with you ever.

30 ALLEN: Well, well, like I say the one phone call from here (inaudible) now until I leave.

1 HOSKINS: A phone call that –
2 ALLEN: You need to –
3 HOSKINS: Huh?
4 ALLEN: (inaudible) what?
5 HOSKINS: What does the phone call have, I mean that, I don't understand.
6 ALLEN: Because I'm going to call you once when I get ready to leave, either you do or
7 you don't and then I do what I do.
8 HOSKINS: You do what, what, what do you mean you do what you do?
9 ALLEN: Don't worry about it. Don't worry about it.
10 HOSKINS: Alright.
11 ALLEN: Um, I want you to look sexy too.
12 HOSKINS: Nope and it's not going to happen.
13 ALLEN: I'm telling you it's going to.
14 HOSKINS: No.
15 ALLEN: Yes it is.
16 HOSKINS: No it's not.
17 ALLEN: Yes it is.
18 HOSKINS: Uh huh.
19 ALLEN: (inaudible)
20 HOSKINS: Then I guess you will just rape me again then won't you?
21 ALLEN: No I won't have to rape you.
22 HOSKINS: What do you mean you won't have to rape me? If I'm not a willing –
23 ALLEN: (inaudible)
24 HOSKINS: participant like the other two times it's considered rape.
25 ALLEN: Because you going to have to bargain, you're going to have to bargain for what
26 your, for your freedom.
27 HOSKINS: Um. Bargain for my freedom. Bargain with my body in other words.
28 ALLEN: Uh huh.
29 HOSKINS: Hum. Hum. Nice. Nice. Alright.
30 ALLEN: Isn't, isn't, isn't that worth it, isn't that worth the price of getting rid of me?

1 HOSKINS: Have sex with you --
2 ALLEN: Uh huh.
3 HOSKINS: is the price of getting rid of you? No.
4 ALLEN: Uh huh.
5 HOSKINS: You know, I, no. I, the thought of you touching me, no. Huh
6 ALLEN: I've touched you for seven years.
7 HOSKINS: Well, uh, that was then, this is now. This is a totally different, this is different.
8 ALLEN: Huh.
9 HOSKINS: You know I don't want to be touched and I've made that very clear to you.
10 ALLEN: Oh, somebody else is probably touching you huh?
11 HOSKINS: I am seeing other people and you know that.
12 ALLEN: Who are you seeing?
13 HOSKINS: I, it doesn't matter. That's none, it's none of your business.
14 ALLEN: Are, are you seeing Joe now?
15 HOSKINS: No.
16 ALLEN: Who are you seeing? Are you seeing, still seeing J.T.?
17 HOSKINS: It's none of your business who I see.
18 ALLEN: I'm just curious.
19 HOSKINS: It doesn't matter.
20 ALLEN: Don't piss me off or else I'll do it tomorrow.
21 HOSKINS: You'll do it tomorrow?
22 ALLEN: I could. I could do it now if I wanted to.
23 HOSKINS: Do what? Do what? [laugh]
24 ALLEN: [laugh]
25 HOSKINS: You know.
26 ALLEN: [laugh]
27 HOSKINS: Do what?
28 ALLEN: I thought we were --
29 HOSKINS: Force yourself on me and make me do something I don't want to do?
30 ALLEN: Uh, yeah. So, so who are you seeing?

1 HOSKINS: It doesn't matter and I got to go. I have senior pictures tonight and I've got to go
2 get Kiana and Kyler and my mother and deal with that tonight.

3 ALLEN: Okay. Why, why don't you tell me who you are seeing?

4 HOSKINS: You already know who I am seeing. You know, you know, you know I'm seeing
5 J.T.

6 ALLEN: Oh, I, I didn't know you were still seeing him. Has he been over to see you yet?

7 HOSKINS: No.

8 ALLEN: Oh. Is he coming to see you?

9 HOSKINS: No.

10 ALLEN: Why not?

11 HOSKINS: Because [laugh] and it doesn't matter.

12 ALLEN: (inaudible)

13 HOSKINS: It doesn't matter. You know --

14 ALLEN: Are you going --

15 HOSKINS: (inaudible)

16 ALLEN: Are you going, are you going back over to see him?

17 HOSKINS: No I'm not. No.

18 ALLEN: Yes you are.

19 HOSKINS: I'm just trying to deal with and try to, you know, pick the pieces up from what
20 you've created and where --

21 ALLEN: (inaudible)

22 HOSKINS: you've put me.

23 ALLEN: So how are you seeing him if you're not having any contact with him? (inaudible)

24 HOSKINS: Well, we're talking on the phone.

25 ALLEN: Are you having phone sex with him?

26 HOSKINS: No I am not.

27 ALLEN: Yeah. [laugh]

28 HOSKINS: You know you've pretty much destroyed all that in me.

29 ALLEN: Oh too bad.

1 HOSKINS: Alright. I've got to go. Don't ever call me, alright and don't ever stop by and
2 would you just get out of my life? Alright, just please, get out of my life.

3 ALLEN: I'm telling you I'm making one more phone call from now until I leave.

4 HOSKINS: Oh.

5 ALLEN: If you say no right now, I'll do it tomorrow.

6 HOSKINS: Say no to what?

7 ALLEN: [laugh] say no to, to me not making my one phone call and having sex with you
8 before I leave. If you say no right now, I will do it tomorrow.

9 HOSKINS: I got to go.

10 ALLEN: What's your answer?

11 HOSKINS: I've already told you that I'm not having sex with you again.

12 ALLEN: No. I'm, I'm doing what I got to do then.

13 HOSKINS: So you're going to do what you have to do because I'm not going to have sex
14 with you? [laugh]

15 ALLEN: Yep.

16 HOSKINS: And that's not rape?

17 ALLEN: Nope.

18 HOSKINS: What is it?

19 ALLEN: That's blackmail.

20 HOSKINS: It's life.

21 ALLEN: That's blackmail. The price you pay for getting rid of me.

22 HOSKINS: You know, if, I mean, if you continue all this, you know, I, I need to call the cops.
23 I need to protect me and my children.

24 ALLEN: [Sigh] Well if you call the cops, they are coming to your house. If you call the
25 cops on me and the cops will be at your house.

26 HOSKINS: Hey I got to go because I've got to pick up Kyler and I'm done. Alright? Don't
27 call me again.

28 ALLEN: Well I'm telling you I'm going to call you one more time before I leave. Alright?
29 Hello.

30 HOSKINS: Yeah, I got to go.

1 ALLEN: Well what's your answer? Tell me your answer now?
2 HOSKINS: You know I don't want you to call me.
3 ALLEN: Well you don't -
4 HOSKINS: I've made it very clear to you.
5 ALLEN: I told you time, the night before I leave, the night before I leave.
6 HOSKINS: The night before you leave what?
7 ALLEN: I'm calling you.
8 HOSKINS: And?
9 ALLEN: And you're coming to meet me and we are going to have sex.
10 HOSKINS: I'm not, I've already told you that I'm not having sex with you.
11 ALLEN: And then I'll call you -
12 HOSKINS: Just like I wasn't going to have sex, just like I didn't and, on Thursday and
13 Friday.
14 ALLEN: You, you -
15 HOSKINS: And told you no.
16 ALLEN: tell me now, you tell me now and I'll tell you where everything is that I left in
17 your house.
18 HOSKINS: Oh, I, I, I'm done with this conversation. I got to go.
19 ALLEN: Alright.
20 HOSKINS: Bye. Bye.
21 [END OF CALL]
22
23 [END OF RECORDING]
24
25
26
27