CHAPTER SEVEN: ATTEMPT, CONSPIRACY, AND SOLICITATION

DID LE BARRON VOLUNTARILY ABANDON HIS ATTEMPT TO RAPE THE VICTIM?

LE BARRON V. STATE
145 N.W.2d 79 (Wis. 1966)

Opinion By: Currie, J.

Facts

On March 3, 1965, at 6:55 p. m., the complaining witness, Jodean Randen, a housewife, was walking home across a fairly well-traveled railroad bridge in Eau Claire. She is a slight woman whose normal weight is 95 to 100 pounds. As she approached the opposite side of the bridge she passed a man who was walking in the opposite direction. The man turned and followed her, grabbed her arm and demanded her purse. She surrendered her purse and at the command of the man began walking away as fast as she could. Upon discovering that the purse was empty, he caught up with her again, grabbed her arm and told her that if she did not scream he would not hurt her. He then led her -- willingly, she testified, so as to avoid being hurt by him -- to the end of the bridge. While walking he shoved her head down and warned her not to look up or do anything and he would not hurt her.

On the other side of the bridge along the railroad tracks there is a coal shack. As they approached the coal shack he grabbed her, put one hand over her mouth, and an arm around her shoulder and told her not to scream or he would kill her. At this time Mrs. Randen thought he had a knife in his hand. He then forced her into the shack and up against the wall. As she struggled for her breath he said, "You know what else I want," unzipped his pants and started pulling up her skirt. She finally succeeded in removing his hand from her mouth, and after reassuring him that she would not scream, told him she was pregnant and pleaded with him to desist or he would hurt her baby. He then felt of her stomach and took her over to the door of the shack, where in the better light he was able to ascertain that, under her coat, she was wearing maternity clothes. He thereafter let her alone and left after warning her not to scream or call the police, or he would kill her.

After he had left, she proceeded to a nearby restaurant, had a cup of coffee, and kept calling home by phone until she reached her husband. He came to the restaurant for her and upon reaching home he called the police to report the incident. Based on a description given by Mrs. Randen to city police, defendant was determined to be a suspect. Subsequently, he was arrested by the sheriff's department. At the police station Mrs. Randen identified the defendant as the man who accosted her.

Defendant, who was twenty-six years of age, denied being in the vicinity of the scene of the alleged attempted rape on the evening of March 3, 1965. He claimed that he was at the Wingad farm home between 6:30 and 7 p. m. on that night in the company of Janet Wingad, then seventeen years of age. However, neither Janet nor her mother were able to verify this alibi.

Issue

The material portions of the Section 944.01(1) provides that “any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 30 years.” The attempt statute, Section 939.32(2) defines an attempt as an intent to commit a crime and an act “toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent would commit the crime except for the intervention of another person or some other extraneous factor.”

The two statutory requirements of intent and overt acts which must concur in order to have an attempt to rape:

(1) The male must have the intent to act so as to have intercourse with the female by overcoming or preventing her utmost resistance by physical violence, or overcoming her will to resist by the use of threats of imminent physical violence likely to cause great bodily harm;
(2) the male must act toward the commission of the rape by overt acts which demonstrate unequivocally, under all the circumstances, that he formed the intent to rape and would have committed the rape except for the intervention of another person or some other extraneous factor.

The thrust of defendant's argument, that the evidence was not sufficient to convict him of the crime of attempted rape, is twofold: First, defendant desisted from his endeavor to have sexual intercourse with complainant before he had an opportunity to form an intent to accomplish such intercourse by force and against her will; and, second, the factor which caused him to desist, viz., the pregnancy of complainant, was intrinsic and not an "extraneous factor" within the meaning of sec. 939.32 (2), Stats.

Reasoning

It is difficult to consider the factor of intent apart from that of overt acts since the sole evidence of intent in attempted rape cases is almost always confined to the overt acts of the accused, and intent must be inferred therefrom. In fact, the express wording of sec. 939.32 (2), Stats., recognizes that this is so.

We consider defendant's overt acts, which support a reasonable inference that he intended to have sexual intercourse with complainant by force and against her will, to be these: (1) He threatened complainant that he would kill her if she refused to cooperate with him; (2) he forced complainant into the shack and against the wall; and (3) he stated, "You know what else I want," unzipped his pants, and starting pulling up her skirt. The jury had the right to assume that defendant had the requisite physical strength and weapon (the supposed knife) to carry out the threat over any resistance of complainant.

We conclude that a jury could infer beyond a reasonable doubt from these overt acts of defendant that he intended to have sexual intercourse with defendant by force and against her will. The fact that he desisted from his attempt to have sexual intercourse as a result of the plea of complainant that she was pregnant, would permit of the opposite inference. However, such desistance did not compel the drawing of such inference nor compel, as a matter of law, the raising of a reasonable doubt to a finding that defendant had previously

intended to carry through with having intercourse by force and against complainant's will.

Defendant relies strongly on *Oakley v. State* where this court held that defendant Oakley's acts were so equivocal as to prevent a finding of intent beyond a reasonable doubt to have sexual intercourse by force and against the will of the complainant. The evidence in the case disclosed neither physical violence nor threat of physical violence up to the time Oakley desisted from his attempt to have sexual intercourse with the complainant. He did put his arm around her and attempted to kiss her while entreating her to have intercourse, and also attempted to put his hand in her blouse and to lift up her skirt but did not attempt to renew this endeavor when she brushed his hand away. Thus the facts in *Oakley* are readily distinguishable from those of the case at bar. To argue that the two cases are analogous because, in the one instance the accused desisted because the complainant was menstruating and in the other because of pregnancy, is an oversimplification. Such an argument overlooks the radical difference in the nature of the overt acts relied upon to prove intent.

The argument, that the pregnancy of the instant complainant which caused defendant's desistance does not qualify as an "extraneous factor" … is in conflict with our holding in *State v. Damms*. There we upheld a conviction of attempt to commit murder where the accused pulled the trigger of an unloaded pistol intending to kill his estranged wife thinking the pistol was loaded. It was held that the impossibility of accomplishment due to the gun being unloaded fell within the statutory words, "except for the intervention of . . . some other extraneous factor." Particularly significant is this statement in the opinion: “An unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt ... and a defendant should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result.”

Holding

The unloaded condition of the gun was every bit as much a part of the intrinsic fact situation in the *Damms Case* as was complainant's pregnancy in the instant case. We determine that such pregnancy constituted the intervention of an "extraneous factor"….

Questions

1. What facts support the conclusion that David Le Barron attempted to rape Jodean Randean.? What of the claim that Le Barron never went beyond preparation?
2. Was the victim’s pregnancy an extraneous factor? Would your answer differ in the event that David Le Barron was aware that Jodean was pregnant when he first approached her?
3. Why should it matter whether the defendant abandoned a criminal design “voluntarily” or in response to an “extraneous factor?”
4. How does the Wisconsin Supreme Court distinguish *Le Barron* from *Oakley* and *Dams*? Do you find the court’s reasoning persuasive?
5. As a juror would you vote to convict Le Barron of attempted rape or would you favor a less serious charge such as indecent exposure or assault?