

## Bergstrom rape conviction overturned

### Appeals court says judge gave improper instruction

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Former Carmel physician Carl Bergstrom, center, is serving a six-year prison... (HERALD FILE)

The 6th District Court of Appeal on Monday narrowly overturned the forcible rape conviction of former Carmel physician Carl Bergstrom.

In a 2-1 decision, the San Jose-based panel said Judge Russell Scott prejudicially erred by reading jurors an instruction defining "legal consent" that normally accompanies the charge of raping an unconscious person.

A jury convicted Bergstrom of sodomizing an acquaintance in his Carmel home after a night of drinking and socializing in April 2009.

A spokeswoman for the state Attorney General's Office, which defended the conviction, said her office was reviewing the decision and had not decided its next step. It can ask for a hearing before the full 6th District panel, appeal to the state Supreme Court or allow the case to return to Monterey County for a new trial.

After delivering the verdict in late July 2009, the jury forewoman told The Herald that jurors thought the victim, whose blood-alcohol level was estimated to be a potentially fatal 0.31, was too drunk to have given consent.

"The letter of the law that (Scott) gave us was that you had to know and understand what you were consenting to and, to a reasonable degree, understand the consequences," said Jean-Marie Piini, who used to work with the Pacific Grove City Attorney's Office. "We felt like, with her level of alcohol, there was no way she could have understood."

The problem with that, said Bergstrom's trial and appellate attorneys, is that their client was only

charged with forcible sodomy, which requires the absence of "actual consent."

### Language important

Attorney James F. Campbell of San Francisco argued Scott should only have read the established instruction for forcible rape. Duplicate arguments by Salinas defense attorneys Tom Worthington and Carolyn Keeley, made before and after Bergstrom's conviction, were rejected by Scott.

Justice Nathan Mihara and Justice Pro Tem Patricia Lucas agreed with the defense.

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"The jury might well have understood that the improper language in the instruction allowed it to avoid resolving the credibility contest between Jane Doe 1 and defendant by simply finding that Jane Doe 1 was so intoxicated that she lacked the capacity to give 'legal consent,' thereby establishing the lack of consent element of the offense, which was the only contested element at trial," Mihara wrote in the majority opinion.

In a dissenting opinion, Justice Patricia Bamattre-Manoukian said the entirety of the evidence, arguments and instructions in the case showed beyond a reasonable doubt the jury would have reached the same verdict regardless of an error in the contested instruction.

While she said she would have affirmed the verdict, Bamattre-Manoukian used the opportunity to caution lower courts about massaging the state's established jury instructions.

"I would strongly caution trial courts that rarely should a trial court ever modify CALCRIM pattern instructions, as the trial court did in this case over defendant's objection," she said.

All three justices rejected other grounds of the appeal, which included Scott's admission of evidence regarding past, uncharged sexual assaults by Bergstrom, videos on his cellphone of him engaged in consensual anal sex with another woman and his purchase of and offers to sell cocaine for cash or sex while working in his Carmel office.

## **Forfeited license**

Bergstrom, 55, is serving a six-year prison sentence for the conviction. A former "concierge" doctor, whose clients paid privately for his services, he forfeited his medical licenses in California and Idaho in the midst of a revocation action by the Medical Board of California in 2009. Part of that action involved Bergstrom's abuse of illegal and prescription drugs, which was also part of evidence at his trial.

Campbell, Bergstrom's appellate attorney, could not be reached for comment Monday. Worthington lauded the decision, which echoed arguments he made in his unsuccessful motion for a new trial in September 2009.

"It was reversed on exactly the grounds we argued," he said. "It was unfair for the judge to give that definition of legal consent in a forcible rape case. There is a difference between rape of an intoxicated woman and forcible rape.

"It was especially prejudicial because the judge decided to give the instruction after evidence closed," he added. "When the DA made the request regarding legal consent, it was too late for us to present evidence to address the issue."

## **Testimony of past acts**

Prosecutor Cristina Johnson said she was disappointed the verdict was overturned, but happy the decision affirmed Scott's rulings on the admissibility of contested evidence.

Among such evidence was testimony by two women who said they had been forcibly raped or sodomized by Bergstrom after drinking socially with him in the past. Both women eventually testified they thought they may have been drugged.

Worthington objected that he only learned the identity of one of the women shortly before trial and the other midtrial. Johnson said she informed Worthington immediately when the women agreed to testify.

In rejecting the appeal on those grounds, the appellate panel noted that Scott repeatedly gave Worthington the opportunity for a continuance to prepare for the testimony and the Salinas attorney declined.

The District Attorney's Office subsequently decided not to pursue charges against Bergstrom in connection with the other two women because they did not want to have to return to the stand.

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Johnson said Monday if the case comes back to Monterey for a second trial, the women's testimony should be secure. If they were to refuse to go through the trauma of testimony again, she said, the judge could rule them "unavailable" and allow their prior testimony to be read into the record.

It is not clear how the appellate ruling will effect Jane Doe 1's civil lawsuit against Bergstrom. Monterey attorney Art Hudson, who represents the woman, declined to comment on Monday's ruling, but said the civil case will proceed on its own.

A trial is scheduled for March 12, but motions in the case were previously delayed because the appellate ruling in the criminal case was pending.

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