90346-8

NO. 43532-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONALD WAYNE COREY,

Petitioner.

PETITION FOR REVIEW

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

FILED IN COA ON MAY 27, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules

A. *IDENTITY OF PETITIONER*

Donald Wayne Corey asks this court to accept review of the decision designated in Part B of this motion.

B. *DECISION*

Petitioner seeks review of each and every part of the decision of the Court of Appeals published decision affirming the Clark County Superior Court judgment and sentence. A copy of the Court of Appeals decision is attached.

C. *ISSUES PRESENTED FOR REVIEW*

> Does a trial court err if, over defense objection, it instructs a jury on the uncharged lesser degree offense of third degree rape when the complaining witness at trial testified that the defendant "cornered her in the pool," bit her chest, attempted to put his hand up her thigh, that she pushed his hand away, and he then "forcibly" put his hand up her thigh and penetrated her vagina with his finger?

D. *STATEMENT OF THE CASE*

On the evening of February 29th, 2012, 19-year-old Autumn Bruce went to the Days Inn Motel by the Vancouver Mall to use the Jacuzzi and pool with her friend Amanda, who was a guest at the motel with her aunts. RP 53-57, 158-160, 206-211.[1] Since neither Autumn nor Amanda had swimsuits with them, they went to the pool area in tank tops with bras underneath and boxer shorts and got into the jacuzzi. *Id.* A short while later the defendant

---

[1]The record on appeal includes four volumes of continuously numbered verbatim reports referred to herein as "RP [page #]."

Donald W. Corey also got into the Jacuzzi and began talking with them. *Id.*

The conversation quickly turned sexual in nature and Autumn claimed that the defendant continually moved closer and brushed up against her. RP 60-63, 66-70, 160-166. At an early point in the conversation, Autumn told the defendant " I don't like dick." indicating that she was not interested in men. *Id.* She stated that she repeatedly pushed him away as he tried to brush up against her and touch her with his hands. *Id.* Autumn also claimed that the defendant repeatedly tried to touch Amanda and that she also pushed him away and told him to leave her alone. RP 160-165, 174. Both young women claimed that the defendant asked them to go to a nearby sex shop with him to get "toys" to use in his motel room and that he would buy them pizza and get them alcohol if they wanted it. RP 74-77, 169-171.

Autumn and Amanda later reported that they were in the pool and Jacuzzi area for around an hour to an hour and one-half, the whole time with the defendant, although a number of people came into the area and used the facilities during this period. RP 79-84. According to both Autumn and Amanda, at one point the defendant bit Autumn on the breast to the point he left a bruise and a bite mark while Autumn tried to push him away and told him to stop touching her. RP 70-71, 167-168. Autumn also claimed that at one point while in the Jacuzzi the defendant tried to pull her shorts off but was unsuccessful as she was able to push him away while telling him to stop

touching her. RP 66-70. He then reached up the inside of her shorts with his hand and forcibly penetrated her vagina with his finger while she told him to stop and struggled to push him away. *Id.* Autumn also reported that at one point the defendant took off his swimming suit and touched her with his penis. RP 74-77.

Eventually, Autumn and Amanda left the pool area and returned to Amanda's motel room, got dressed and told Amanda's aunts what had happened. RP 95-99, 171-173. At the insistence of one of Amanda's aunts, Autumn reported the unwanted touching to the manager at the front desk just before Amanda's aunt drove her to a friend's house where she spent the night. RP 95-96. Upon receiving the report, the desk manager called the motel manager, who later called her superior, who told the motel manager to make a report to the police. RP 243-244, 254-256, 260-261.

The next day, the motel manager called the police and asked for assistance removing the defendant from the motel. RP 254-256. The police officer who arrived took a report from the manager, interviewed Amanda and her aunts, and then interviewed Autumn after having her brought back to the motel. RP 274-279. During these interviews, both Autumn and Amanda told the officer that Autumn had a bruise on her breast where the defendant had bitten her the night previous. *Id.* When the officer asked to take a picture of it, Autumn consented but only if Amanda could go into the bathroom with

her and be the person taking the picture. RP 305-309. The officer agreed, gave Amanda his camera, and then retrieved it with the pictures when Autumn and Amanda returned. *Id.* After speaking with Autumn, the officer went to the defendant's room, took a short statement from him, and then placed him under arrest. RP 280-281.

Procedural History

By information filed March 5, 2012, the Clark County Prosecutor charged the defendant Donald Wayne Corey with one count of Indecent Liberties with Forcible Compulsion under RCW 9A.44.100(1)(a), and one count of Rape in the Second Degree under RCW 9A.44.050(1)(a). CP 1-2. The case later came on for trial with the state calling seven witnesses: Autumn Bruce, Amanda Bjornberg, one of Amanda's aunts, the desk manager at the motel, the motel manager, and two police officers. RP 53, 157, 206, 236, 250, 268, 274. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. In addition, during their testimony, both Autumn and Amanda identified Exhibits 1, 2 and 3 as the photographs Amanda took of the bite mark and bruise on Autumn's breast that the defendant made when he bit her. RP 70-73, 174-176. Both young women testified that the photographs accurately depicted an actual injury to Autumn's person. *Id.*

Following the close of the state's case, the prosecutor revealed to the

defense attorney and the court that one of the officers who testified arrested Amanda Bjornberg on a warrant after she finished her testimony, and that after he did so, Amanda revealed to him that her testimony and Autumn's testimony had not been completely truthful nor accurate. RP 265-268. By later offer of proof on the witness stand, Amanda revealed that while she and Autumn had accurately explained the defendant's conduct, they had misrepresented their own conduct. RP 304-309. Specifically, Amanda stated that (1) they had both been active participants in the conduct, (2) that on a number of occasions they had initiated contact, including physical contact with the defendant, contrary to their denials of any such conduct before the jury, (3) that they were both laughing after leaving the pool area, and (4) that Autumn had told her that she intended to lie at trial in order to avoid having to admit that she had given a false report to the investigating officer. *Id.* Amanda testified as follows concerning this last fact:

> Q. And did you indicate to him that a big motivator to her testifying today was that she felt if she came clean about this incident she'd be punished herself?
>
> A. Yeah, that's what – because I asked her, because I told her – because I talked to her on the phone yesterday, and she told me she was on her way out. And I said, like, this is why I didn't want to be involved with it, because I knew she was lying about some stuff. And most of the stuff is true, she just left things out. And she said something like I was on speaker, and then she just like clicked on me. And she didn't talk to me for that day, like the rest of the day.

RP 305-306.

In addition, Amanda also revealed that (1) there had been no bruise or bite mark on Autumn's breast, (2) that the real reason Autumn told the police officer that she wanted Amanda to take the photographs was so Autumn could use makeup and ink to fake the injury, and (3) that Autumn had indeed used makeup and ink to make the photographs look like there was a bruise and bite mark when, in fact, none existed. RP 304-309.

Following these revelations, the defense called Amanda Bjornberg as a witness. RP 314-323. During her testimony, she repeated all of the statements she made to the officer during her offer of proof with one exception. *Id.* That exception flowed from the court's order that precluded the defense from eliciting the fact that Autumn had told Amanda that she intended to perjure herself in order to avoid getting in trouble for having given the investigating officer a false report and for having falsified evidence. *Id.* The court had precluded any mention of this evidence after granting a state's motion *in limine* to exclude it. RP 312-313.

After Amanda Bjornberg finished her testimony for the defense, the state called two witnesses in short rebuttal. RP 324, 330. The court then instructed the jury on both crimes charges. 361-376. Over defense objection, the court also instructed the jury on the lesser degree offense of Rape in the Third Degree. RP 352-356, 360. Counsel then presented closing arguments, after which the court released the jury for the day. RP 376-429, 430. The

jury returned at 9:00 am the next morning and began what ended up being one and one-half days of deliberation and two separate questions to the court. RP 436-442. The jury then returned verdicts of "not guilty" to Indecent Liberties with Forcible Compulsion, "not guilty" to Rape in the Second Degree, and "guilty" to the lesser degree offense of Rape in the Third Degree. RP 442-466; CP 140-142. The court later sentenced the defendant within the standard range on this offense, after which the defendant filed timely Notice of Appeal. CP 143, 166-177, 178.

On appeal the defendant argued that the trial court had erred when it instructed the jury on the charge of third degree rape because both of the state's witnesses had testified that the defendant had forcibly penetrated Autumn's vagina. *See* Brief of Appellant. By opinion filed April 1, 2014, the Court of Appeals Division II of the Court of Appeals ruled that the trial court did not err when it instructed the jury on third degree rape because Autumn and Amanda's testimony that (1) Autumn repeatedly pushed the defendant away, (2) that the defendant bit Autumn on the breast, (3) that the defendant "cornered [Autumn] in the pool," (4) that the defendant repeatedly attempted to put his hand up her thigh with her pushing him away, and (5) that he then put his hand up her thigh and "forcibly" penetrated her vagina with his finger, was insufficient to constitute evidence of force. Rather, it was merely evidence of the amount of force "that [] is normally required to

achieve penetration." *See* Opinion, page 6. As such, the court found no error in the trial court instructing on third degree rape.

E. *ARGUMENT WHY REVIEW SHOULD BE ACCEPTED*

Under RAP 13.4(b)(2), this court should accept review because the decision in this case is in conflict with other decisions of this court and the Court of Appeals. Specifically, the decision in this case conflicts with the decisions in *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995) and *State v. Wright*, 152 Wn.App. 64, 214 P.3d 968 (2009). The following addresses these arguments.

Under RCW 10.61.003 the legislature has provided that a jury may convict a defendant of an uncharged lesser degree offense even if it is not a lesser included offense to the greater degree offense. This statute states as follows:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.003.

Although the legislature has placed no limitation on convicting a defendant of lesser degree offenses solely upon a charge to the greater offense, our case law does. This limitation comes in the form of a rule that it is error for a court to instruct a jury on a lesser degree offense unless the evidence presented at trial proves that the defendant committed only the

lesser degree offense. *State v. Ieremia*, 78 Wn.App. 746, 899 P.2d 16 (1995). When addressing this question, it is not sufficient that the jury simply disbelieve a portion of the State's evidence supporting the charged crime. Rather, the evidence must support an inference that the defendant committed the lesser offense only. *Id.* The Court of Appeals has stated the proposition as follows:

> Although a defendant may, under RCW 10.61.003, be convicted of a lesser degree of a crime than the one charged, a lesser degree offense instruction is improper unless there is evidence that he or she committed only the lesser degree offense. It is not sufficient that the jury might simply disbelieve the State's evidence supporting the charged crime. Rather, the evidence must support an inference that the defendant committed the lesser offense instead of the greater one. [The defendants] were entitled to lesser degree instructions only if their juries could have concluded that they committed third degree instead of second degree rape.

State v. Ieremia, 758 Wn. App. at 754 (footnote and citations omitted)..

For example, in *State v. Charles*, *supra*, the State charged the defendant with second degree rape under an allegation that he engaged in sexual intercourse with the complaining witness "by forcible compulsion." The complaining witness testified that the defendant forced her to the ground and made her have sex with him. The defendant claimed the intercourse was consensual. The Washington Supreme Court held that under these facts, the defendant was not entitled to an instruction on third degree rape because there was no evidence that the intercourse was non-consensual but unforced.

The court reasoned that if the jury believed the testimony of the

complaining witness, then the defendant was guilty of second degree rape. If, however, the jury believed the defendant's testimony, he was not guilty of any crime at all. Thus, the court concluded that in order to find the defendant guilty of third degree rape, "the jury would have to disbelieve both the defendant's claim of consent and the victim's testimony that the act was forcible." *State v. Charles*, 126 Wn.2d at 356. Since there was no "affirmative evidence that the intercourse . . . was unforced but still non-consensual[,]. . . the trial court properly refused to instruct the jury on third degree rape." *State v. Charles*, 126 Wn.2d at 356.

Similarly, in *State v. Wright*, *supra*, the Pierce County Prosecutor charged the two defendants with second degree rape following the allegations of the complaining witness that they had held her down and had sexual intercourse with her against her will one evening when they were all at a party at a private residence. Following the reception of evidence, the State submitted a jury instruction for the lesser-degree crime of third degree rape, arguing that since there was no physical evidence of force, the jury could simply find lack of consent without force. The defendants objected, arguing that no factual basis supported the instruction because the complaining witness had contended that she was forced to have sex and that she was restrained during the act. The trial granted the state's request and gave the instruction.

Ultimately, the jury was unable to return a verdict on the charge of second degree rape, leaving the verdict form blank as the court had instructed them to do if they could not come to a verdict on that charge. However, the jury did return verdicts of guilty on the lesser-degree offense of third degree rape. The defendants thereafter appealed, arguing in part that the trial court had erred when it gave the instruction on third degree rape because the evidence supported the offense of second degree rape only. The Court of Appeals agreed, holding that since the state's evidence only supported a conclusion that the defendants had acted with forcible compulsion, it was error to instruct on third degree rape. The court stated the following concerning the state's evidence:

> The State maintains that S.F.'s testimony could be consistent with only third degree rape because her description of the incident does not involve force that is more than necessary or usual to achieve penetration. The State points out that S.F. said she was held down in a manner that felt like someone leaning over her, and that only the weight of that individual held her down. But S.F. also testified that (1) she was pushed or pulled into the room; (2) she did not willingly lay down on the bed; (3) someone pulled her clothes off of her body; she did not willingly remove them; (4) she was held down on the bed by the body weight of one man while another man penetrated her; (5) something on her left side was holding her shoulder back so that she could not get up; and (6) she told them to stop. Although S.F. was reluctant to say that she was "raped" because she does not like that word, her testimony consistently reflected rape by forcible compulsion.

State v. Wright, 152 Wn.App. at 73-74.

Similarly, in the case at bar, the only evidence presented at trial was that the defendant forcibly penetrated Autumn's vagina with his fingers while she

was actively attempting to physically repel him. Her various descriptions of the alleged rape included the following claims.

> Q. Okay. So, during the time that you were in the hot tub, the initial time before you get in the pool, what exactly does the Defendant do to you?
>
> A. He tries to cram his fingers inside me, and pull my pants down, and touch me in my private areas.
>
> Q. And that was the first – when you were – the first time that you were in the hot tub with him?
>
> JUDGE LEWIS: Sorry, you have to answer out loud.
>
> BY MS. BANFIELD: (Continued.)
>
> Q. Is that the first time you were in the hot tub with him?
>
> A. Yes.
>
> Q. What did you do in response to that? I mean, what do you mean by he tried to cram his fingers inside of you?
>
> A. ***He tried to forcibly put his fingers inside of me.***
>
> Q. And was this the first – when you were first entered the hot tub?
>
> A. Yes.
>
> Q. Okay. You got out of the pool, or you got out of the hot tub and went into the pool. Tell us what happened then.
>
> A. I was sitting on the side of the pool to get into the pool, and he came around me and I didn't – me and Amanda were talking and I didn't notice that he had came round to get in the pool. And he went down the stairs and he started grabbing on me and trying to pull me in the pool, and I told him I didn't know how to swim and that I didn't like cold water. And he kept telling me that it was okay because he was a swim teacher, so he kept trying to pull me into the pool.

Q. Did you push him away?

A. Yes. (Witness begins to cry.)

Q. What did you do then?

A. I told him to stop touching me.

RP 68-69 (emphasis added).

Q. You had indicated that he put his fingers near your, at least near your vagina, you had indicated?

A. Yes.

Q. Can tell – please describe for us how that occurred?

A. I was sitting down in the Jacuzzi and he was trying to touch the inside of my thighs, and I pushed his hand away. And he pushed his hand up there more, and he went inside.

Q. His finger actually entered your vagina?

A. Not – um – all the way, but yes.

Q. Okay. So, if this is your vagina, and this is your labia, did his finger pass the labia?

A. Yes.

Q. Yes. Okay. And did – what did – how did you respond?

A. I pushed him and I seen Amanda's aunt walking, and I got out the pool and left.

RP 75-76 (emphasis added).

Q. What had he already – how had he already sexually touched you at this point when he made this comment?

A. He cornered me in the pool. He shoved his fingers inside me, and he bit my chest.

RP 78.

In each of these three renditions, Autumn claims that the defendant penetrated her vagina by use of force. As in *Ieremia* and *Wright*, they are only consistent with the commission of second degree rape. Consequently, just as the trial court erred in *Wright* when it gave the state's requested lesser degree instruction on third degree rape, so in the case at bar the trial court erred when it gave the state's requested lesser degree instruction on third degree rape.

Although the trial court in the case at bar committed the same error as did the trial court in *Wright*, the remedy necessary to ameliorate the error in the case at bar is different than the remedy employed in *Wright*. The reason is that in *Wright*, the jury had been unable to return a verdict on the charge of second degree rape and had left the verdict form blank, which was what the court instructed the jury to do if it could not reach a verdict. As a result, the appropriate remedy was for the court to remand for a new trial on the charge of second degree rape. The court stated the following on this issue:

> Because the jury left the second degree rape verdict form blank after the court instructed the jury to leave it blank if the jurors were unable to reach a verdict on second degree rape, double jeopardy principles do not bar retrial on that charge. *State v. Daniels*, 160 Wash.2d 256, 262-64, 156 P.3d 905 (2007), *adhered to on recons.*, 165 Wn.2d 627, 200 P.3d 711 (2009). Consequently, we reverse the third degree rape convictions and remand for retrial on the second degree rape charges. And we do not discuss the other issues defendants raised because they are unlikely to rise on retrial.

State v. Wright, 152 Wn.App. at 74-75.

By contrast, in the case at bar the jury returned a verdict of "not guilty" on the charge of second degree rape. CP 141. Thus, the appropriate remedy here is to vacate and remand with instructions to dismiss. Any other remedy would violate the defendant's right to be free from double jeopardy.

In this case the Court of Appeals held that the decisions in *Charles* and *Wright* were distinguishable because in the case at bar the evidence presented at trial only supported a conclusion that "any force used by [the defendant] to achieve sexual intercourse with AB was not "'more than that which is normally required to achieve penetration.'" *See* Decision. page 6 (quoting *State v. Wright*, 152 Wn.App. at 71). As the following explains, the facts from this case are not distinguishable from those in either *Charles* or *Wright* and the court's published holding in this case directly conflicts with those decisions.

The error in the Court of Appeals' holding in this case can perhaps best be illustrated by posing the following hypothetical. Suppose the jury in this case had convicted the defendant of second degree rape and indecent liberties and the defendant had then appealed on an argument that there was insufficient evidence to support the force element in either offense. The issue then would be whether or not there was "any evidence" from which a reasonable juror could conclude that the defendant used force beyond that

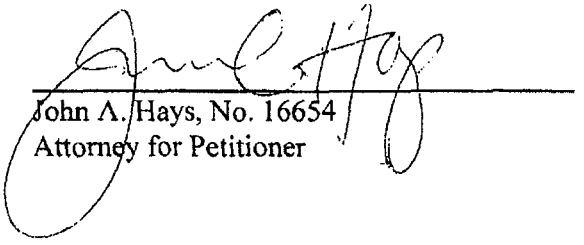
necessary to effect a penetration. It is hard to believe that upon this record any court would reverse on a finding that no evidence existed to support the essential element that there was force used exceeding that necessary to constitute penetration. The fact of the matter is that in this case there is more than enough evidence of force to sustain a conviction for Second Degree Rape had the jury decided to convict. However, the jury did not convict, and by the same token that the evidence would have been sufficient to support a finding of force sufficient to sustain a conviction for second degree rape so it is also true that this same quantum of evidence should have been sufficient to preclude the trial court from giving a lesser included instruction on third degree rape.

F. ***CONCLUSION***

For the reasons set out in this motion, this court should accept review of this case and reverse the decision of the Court of Appeal.

Dated this 27th day of May, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Petitioner

APPENDIX

RCW 9A.44.050
Rape in the Second Degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

RCW 9A.44.060
Rape in the Third Degree

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

RCW 10.61.003
Degree Offenses – Inferior degree – Attempt

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **DONALD WAYNE COREY,** **Appellant.**	**NO. 43532-2-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
   Clark County Prosecuting Attorney
   1013 Franklin Street
   Vancouver, Washington 98666
   prosecutor@clark.wa.gov

2. Donald Wayne Corey
   608 East 4th Plain Blvd.
   Vancouver, WA 98663

Dated this 27th day of May, 2014 at Longview, Washington.

John A. Hays, No. 16654
Attorney at Law

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD WAYNE COREY, Appellant.	No. 43532-2-II ORDER PUBLISHING OPINION

APPELLANT has moved to publish the opinion filed on April 1, 2014. The Court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED, that the motion to publish is granted and the opinion's final paragraph reading:

> A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED, that this opinion will be published.

DATED this 20TH day of MAY, 2014.

Worswick, C.J.

Johanson, J.

Lee, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD WAYNE COREY, Appellant.	No. 43532-2-II UNPUBLISHED OPINION

WORSWICK, C.J. – A jury returned verdicts finding Donald Wayne Corey not guilty of indecent liberties with forcible compulsion, not guilty of second degree rape, and guilty of the lesser-degree offense of third degree rape. Corey appeals his conviction, asserting that the trial court erred by instructing the jury on the uncharged lesser-degree offense of third degree rape. Because the evidence at trial supported a jury finding that Corey engaged in nonconsensual sexual intercourse with the victim without forcible compulsion, we hold that the trial court did not err by instructing the jury on the lesser-degree offense of third degree rape and, thus, we affirm Corey's conviction.

FACTS

One evening in 2012, 19-year-old AB went to a motel in Vancouver, Washington to visit her 17-year-old friend ARB.[1] ARB was staying at the motel with her aunt and had invited AB to

[1] We identify the sex crime victim and the juvenile witness by their initials to protect their privacy interests. General Order 2011-1 of Division II, *In Re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crimes* (Wash. Ct. App.), available at http://www.courts.wa.gov/appellate and trial courts.

the motel to use the pool and hot tub. AB and ARB entered the hot tub and began conversing with a couple. Sometime after the couple left the pool area, Corey entered the hot tub and began speaking with AB and ARB in a sexual manner. AB told Corey that she was 16 years old, that she was not interested in men, and that she was dating ARB. Corey, who was then 63 years old, told AB that he has had several girlfriends that were younger than her. Corey also asked AB if she wanted to go to a nearby sex store with him; AB told him no.

While in the hot tub, Corey began rubbing AB's leg. AB pushed Corey's hand away and moved to the other side of the hot tub. Corey moved next to AB, slowly put his hand up her shorts, and tried to touch her private areas. AB told Corey to stop and that she didn't like to be touched. Corey laughed and told AB that he wasn't going to hurt her. According to AB, Corey then tried to "cram his fingers inside" her. Report of Proceedings (RP) at 68. When asked to elaborate on this statement, AB replied, "He tried to forcibly put his fingers inside of me." RP at 68.

AB left the hot tub and sat on the side of the pool. Corey entered the pool and tried to pull AB in with him. AB told Corey to stop touching her and pushed him away. AB then left the pool and got back in the hot tub. Corey followed AB into the hot tub and bit her on the chest. Corey also took off his shorts and touched AB on her back with his penis. Corey also touched the inside of AB's thighs and, when AB pushed his hand away, pushed his hand up further and digitally penetrated her vagina. AB pushed Corey back, saw ARB's aunt walking by, and left the pool area.

When AB and ARB got back to the motel room, ARB's aunt encouraged AB to report the incident to the front desk. After reporting the incident to the front desk, AB left the motel.

Following an investigation, the State charged Corey with indecent liberties with forcible compulsion and second degree rape.

At trial, over defense objection, the trial court instructed the jury on the offense of third degree rape. The jury returned verdicts finding Corey not guilty of indecent liberties with forcible compulsion, not guilty of second degree rape, and guilty of third degree rape. Corey timely appeals his conviction.

ANALYSIS

Corey contends that the trial court erred by instructing the jury on the lesser-degree offense of third degree rape. We disagree.

Generally, a criminal defendant may only be convicted of crimes charged in the State's information. *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). But, under RCW 10.61.003, a criminal defendant may also be convicted of a lesser-degree offense to a crime charged in the information. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

A trial court may instruct the jury on a lesser-degree offense only when the following factors are met:

> "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

Fernandez-Medina, 141 Wn.2d at 454 (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). Corey challenges the third factor, arguing that the evidence at trial was insufficient to establish that he had committed only third degree rape.

When determining whether the evidence at trial was sufficient to support the trial court's giving of a lesser-degree offense jury instruction, we view the supporting evidence in the light most favorable to the instruction's proponent, here the State. *Fernandez-Medina*, 141 Wn.2d at 455-56. But such supporting evidence must consist of more than the jury's disbelief that the defendant committed the greater-degree offense and, instead, must affirmatively establish that the defendant committed the lesser-degree offense. *Fernandez-Medina*, 141 Wn.2d at 456. A trial court should give a requested lesser-degree jury instruction "'[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Fernandez-Medina*, 133 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). A trial court's decision about whether to instruct on a lesser-degree offense involves the application of law to facts, which we review de novo. *Fernandez-Medina*, 141 Wn.2d at 454 (stating a three-part test that includes legal and factual components); *State v. Dearbone*, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

Here, the State charged Corey with second degree rape under RCW 9A.44.050(1)(a). RCW 9A.44.050(1)(a) defines second degree rape as follows:

> A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion.

"Forcible compulsion' means that 'the force exerted was [(1)] directed at overcoming the victim's resistance and [(2)] was more than that which is normally required to achieve penetration.'" *State v Wright*, 152 Wn. App. 64, 71, 214 P.3d 968 (2009) (quoting *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). In other words, "Forcible compulsion is not the force inherent in any act of sexual touching, but rather is that 'used or threatened to overcome or prevent resistance by the [victim].'" *State v. Ritola*, 63 Wn. App. 252, 254-55, 817 P.2d 1390 (1991) (quoting *McKnight*, 54 Wn. App. at 527).

Third degree rape is an inferior degree offense of second degree rape. *State v. Ieremia*, 78 Wn. App. 746, 753, 899 P.2d 16 (1995). Former RCW 9A.44.060(1)(a) (1999) defined third degree rape as follows:

> A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator . . . [w]here the victim did not consent as defined in RCW 9A.44.010(7)[2] to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

Here, the evidence presented at trial was sufficient to support the jury finding that AB, by her words or conduct, clearly expressed a lack of consent to engage in sexual intercourse with Corey. AB testified that after Corey made sexual advances toward her, she told him that she was not interested in men and that she was in a relationship with ARB. Then, when Corey began rubbing her leg, AB pushed his hand away and moved away from him. And when Corey tried to put his hand in AB's shorts and tried to touch her private areas, AB told him to stop and that she

[2] Under RCW 9A.44.010(7), "'consent' means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."

did not want to be touched. AB again told Corey to stop touching her and pushed him away after he pulled her into the pool.

The evidence also supported a reasonable inference that any force used by Corey to achieve sexual intercourse with AB was not "'more than that which is normally required to achieve penetration.'" *Wright*, 152 Wn. App. at 71 (quoting *McKnight*, 54 Wn. App. at 528). With regard to AB's testimony about Corey rubbing her leg, initially trying to touch her private areas, biting her chest, and touching her back with his penis, AB did not describe any force used by Corey beyond that which was required to make physical contact with her. And although AB testified that at some point in the evening Corey had pulled her shorts down and had "tried to *forcibly* put his fingers inside of [her]," she did not elaborate on what she had meant by "forcibly," and did not describe Corey's level of force or her resistance to such force. RP at 68 (emphasis added). Thus, AB's statement that Corey "forcibly put his fingers inside of [her]" did not preclude a jury from finding that the level of force Corey used was not more than what was required to achieve sexual intercourse. Similarly, AB's testimony that she had pushed Corey's hand away from her thighs before Corey "pushed his hand up there more" and digitally penetrated her vagina, did not preclude a jury from finding that Corey's conduct did not amount to forcible compulsion. RP at 75.

Corey argues that *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995), and *Wright* require us to reverse his third degree rape conviction. But *Charles* and *Wright* are clearly distinguishable from the present case. In *Charles*, the victim testified that the defendant

> grabbed her around the shoulders. He then walked her past two houses and pushed her onto her back on the ground behind a bush. He took off her shoes, T-shirt, and socks, and partially removed her jeans and underpants. She pleaded with him to stop, struggled, scratched him, and may have hit him once. He then

> forcibly engaged in vaginal and oral intercourse with her. [She] eventually managed to run away.

126 Wn.2d at 354. In contrast with the victim's testimony, the defendant in *Charles* testified that his sexual intercourse with the victim was consensual. 126 Wn.2d at 354-55. Our Supreme Court held that under these circumstances the trial court erred by instructing the jury on third degree rape, reasoning that "[i]n order to find Charles guilty of third degree rape, the jury would have to disbelieve both Charles' claim of consent and the victim's testimony that the act was forcible. But there is no affirmative evidence that the intercourse here was unforced but still nonconsensual." *Charles*, 126 Wn.2d at 356. Similarly in *Wright*, we held that the trial court erred by instructing the jury on third degree rape where the victim testified that

> (1) she was pushed or pulled into the room; (2) she did not willingly lay down on the bed; (3) someone pulled her clothes off of her body, she did not willingly remove them; (4) she was held down on the bed by the body weight of one man while another man penetrated her; (5) something on her left side was holding her shoulder back so that she could not get up; and (6) she told them to stop.

152 Wn. App. at 73. In so holding, we reasoned that the evidence at trial did not support a jury finding that the defendant committed "an unforced, nonconsensual rape." *Wright*, 152 Wn. App. at 72.

Here, unlike in *Charles* and *Wright*, the evidence at trial supported a jury finding that Corey did not engage in forcible compulsion to achieve his nonconsensual sexual intercourse with the victim. In contrast with the State's evidence in *Charles* and *Wright*, in which the victims had provided detailed testimony regarding the specific instances where the defendants' exerted force to overcome their physical resistance to sexual intercourse, here AB's descriptions of Corey's conduct in trying to "forcibly put his fingers inside of [her]" and pushing his hand up her thighs before digitally penetrating her vagina was vague and did not describe the level of

force Corey used to achieve sexual intercourse. Thus, unlike in *Charles* and *Wright*, the jury here could have believed the victim's testimony but still have found that the defendant's conduct did not amount to forcible compulsion. Accordingly, the trial court did not err by instructing the jury on third degree rape as a lesser-degree offense of second degree rape, and we affirm Corey's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Johanson, J.

Lee, J.

HAYS LAW OFFICE

May 27, 2014 - 12:05 PM

Transmittal Letter

Document Uploaded: 435322-Petition for Review.pdf

Case Name: State v. Donald Corey
Court of Appeals Case Number: 43532-2

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov
jahays@3equitycourt.com