Supreme Court No. 88016-6

Court of Appeals No. 67039-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MAX ORTIZ-TRIANA,

Appellant.

PETITION FOR REVIEW

Presented By:

Max Ortiz-Triana
DOC #346883
Petitioner, Pro Se
MCC -- TRU
P.O. Box 888
Monroe, WA 98272

A. IDENTITY OF PETITIONER

Petitioner, Max Ortiz-Triana, respectfully requests for this Court to review the Court of Appeals' decisions referred to in Section B.

B. COURT OF APPEALS' DECISIONS

Petitioner requests review of the Court of Appeals' decision affirming his conviction in State v. Ortiz-Triana, COA No. 67039-5-I, filed July 23, 2012 (attached as Appendix A), as well as their order denying his Motion for Reconsideration, filed September 14, 2012 (attached as Appendix B).

C. ISSUES PRESENTED FOR REVIEW

1. The State charged Petitioner with first degree rape and Petitioner asserted a defense of consensual intercourse. In Washington, consent is an affirmative defense and must be proved by the defense by a preponderance of the evidence, yet forcible compulsion is an element that the State must prove beyond a reasonable doubt. This Court has grappled with this problem of overlapping burdens and WPIC 18.25 in State v. Gregory, 158 Wn.2d 759, 801-03, 147 P.3d 1201 (2006), to which former Justice Sanders dissented. See id. at 868-70. The Ninth Circuit has also noted constitutional problems with WPIC 18.25 in Spicer v. Gregoire, 194 F.3d 1006 (9th Cir. 1999). In light of this serious problem, Petitioner proposed an instruction to clarify the matter. The trial court refused Petitioner's instruction and the Court of Appeals held there was no

error. Where WPIC 18.25 shifts the burden of proof to the defendant to disprove an element of the charge and therefore creates a constitutional contradiction, is review appropriate under RAP 13.4(b)(1), (3) & (4)?

Since this also denied Petitioner his constitutional right to present his defense, in part, by the use of proper jury instructions to support the defense, is review appropriate under RAP 13.4(b)(1), (3) & (4)?

The U.S. Supreme Court in Dixon v. U.S., 548 U.S. 1, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006) emphasized that the burden for an affirmative defense may be placed on a defendant only because "the existence of [the affirmative defense] does not controvert any of the elements of the offense itself." 548 U.S. at 6. Dixon shows that State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989) was wrongly decided and should be overruled, as it conflicts with U.S. Supreme Court precedent and the Federal Constitution. Is review appropriate under RAP 13.4(b)(1), (3) & (4) to correct this area of law?

2. The trial court refused to instruct the jury on third degree rape as an inferior degree offense, even though there was evidence to support the instruction. The Court of Appeals misstated the record and refused to follow this Court's decisions which hold that in such situations, the instruction must be given. This also denied Petitioner his Constitutional right to present a defense. Is review appropriate under RAP 13.4(b)(1), (3) & (4)?

3. The State presented evidence of two acts upon which

the jury could have relied upon to convict, yet the Court failed to instruct the jury that it must be unanimous as to which act formed the basis for the charge. This denied Petitioner his right to a unanimous jury verdict. Is review appropriate under RAP 13.4(b)(3) & (4)?

D. STATEMENT OF THE CASE

Petitioner's appellate attorney, Mrs. Dana Nelson, summarized the facts in the Court of Appeals as follows:

1. Procedural Facts

> Following a jury trial in King County Superior Court, appellant Max Ortiz-Triana was acquitted of first degree rape, [and] third degree child molestation, allegedly committed against M.P. CP 17-18, 82-83. The jury convicted Ortiz-Triana of second degree rape, however, as an inferior degree offense of the rape charge. CP 81.
>
> Ortiz-Triana admitted he engaged in sexual intercourse with M.P., but claimed it was consensual.[1] 6RP 52-54. Ortiz-Triana denied any untoward contact with M.P. when she was underage. 6RP 58.
>
> In light of Ortiz-Triana's consent defense, the state proposed -- and the court gave (CP 72) -- an instruction explaining the defense bore the defense bore the burden of proving consent by a preponderance of the evidence:
>
> > A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
> >
> > The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case,

[1] M.P. was born May 19, 1993. 4RP 9, 59. This brief refers to the complainant by her initials, because she was not 18 years old on the date of the alleged rape, although she was of legal age to consent to sexual intercourse. 5RP 7, 22.

that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

Supp. CP __ (sub. no. 49, State's Supplemental Instructions to the Jury, 1/31/11), WPIC 18.25 (2008).[2]

Although consent is an affirmative defense the defense must prove, the state nonetheless retains the burden to prove forcible compulsion as an element of first or second degree rape. See Spicer v. Gregoire, 194 F.3d [at 1008]; RCW 9A.44.040; RCW 9A.44.050. Accordingly, in light of the conceptual overlap between consent and "forcible compulsion," the defense proposed the following [instruction] (instead of WPIC 18.25), to clarify that evidence of consent -- even if not rising to the level required to establish an affirmative defense -- may still be considered insofar as it establishes reasonable doubt of forcible compulsion:

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[2]The constitutionality of allocating this burden to the defense has been upheld. As the comment to WPIC 18.25 explains:

The Supreme Court recognized consent as a valid defense to a charge of rape in State v. Camara, 113 Wn.2d 631[.] In Camara, the defendant was convicted of second degree rape under RCW 9A.44.050(1)(b), the "forcible compulsion" alternative. Separate instructions were given that defined the terms forcible compulsion and consent for the jury. The defendant argued that consent negates the element of forcible compulsion and therefore the State has the burden of proving the absence of consent beyond a reasonable doubt. The court rejected this argument and held the burden of proving consent could constitutionally be placed upon the defendant.

In State v. Gregory, 158 Wn.2d 759, [] the Washington Supreme Court approved an instruction that was essentially worded the same as the pattern instruction above. The court, in its discussion of the instruction refused to overrule Camara, holding that the conceptual overlap between the consent defense and the forcible compulsion element did not relieve the State of its burden of proving forcible compulsion beyond a reasonable doubt.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.25 (3d Ed).

Consent is an affirmative defense to the crime of rape and the defense bears the burden of proving consent by a preponderance of the evidence. Even if, however, you do not find consent established by a preponderance of the evidence, you may still consider evidence of consent in determining whether or not the defendant acted with forcible compulsion and if you find that there is sufficient evidence to raise a reasonable doubt as to the element, you must acquit the defendant of the charge of rape in the first degree, or in the alternative rape in the third degree.[3]

CP 53 (citing [Gregory, supra]);[4] 7RP 10-12. The defense also proposed instructions defining "preponderance of the evidence" and consent. CP 52, 54; 7RP 10.

Noting the defense proposed instructions were "a correct statement of the law," the prosecution deferred to the court as to which consent instructions to give -- WPIC 18.25 or the three proposed by the defense. 7RP 12. To the court, WPIC 18.25 and the defense proposed instructions seemed to do "exactly the same thing" insofar as explaining consent. 7RP 13.

Counsel point out an important distinction, however:

MR. SJURSEN [defense counsel]: As to that, it might. But as to my concern, I think the main concern is that [WPIC 18.25] does not explain to the jury that the burden still rests on the State to prove forcible compulsion. That is why I quoted directly from [Gregory] regarding the jury instruction. Because it doesn't say that.

It says: "If you find the defendant has established the defense, it will be your duty to return a verdict of [not] guilty as to this charge." And what I think it does, it seems to shift or not explain that the burden is still on the State to prove forcible compulsion.

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[3]Defense counsel explained during the instructions conference that the reference to "third degree" was the crime discussed in Gregory and counsel "would have edited that to be in compliance" with the court's other instructions, had the court agreed to give the Gregory instruction regarding consent. 7RP 14.

[4]Significantly, the Gregory Court held there was no due process violation in allocating the burden of proving consent to the defense "so long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion." Gregory, 158 Wn.2d at 803 (emphasis added).

7RP 13. Nonetheless, the court found the state's consent instruction to be more clear and resolved to give it instead of the defense proposed instruction. 7RP 13-14.

As indicated above, the court granted the state's request to instruct the jury on second degree rape as an inferior degree offense. The defense also proposed instructions on an inferior degree offense -- third degree rape. CP 20-25, 36-37. The court granted the state's request, but denied that of the defense.[5] 7RP 6.

The court sentenced Ortiz-Triana to an indeterminate sentence at the top of the standard range (102 months to life), based on an offender score of zero. CP 111-121. [ ]

2. Trial Testimony

On June 2, 2010, M.P. was caught drinking at school. 4RP 21, 39-40; 5RP 67. As a consequence, she was facing a 30-day suspension. 4RP 23. It would be M.P.'s second suspension that spring, as she just returned to school after a suspension for fighting. 5RP 67.

School counselor Karen Brown testified M.P. seemed more upset than typical for the circumstances. 4RP 22. M.P. testified she began crying when she found out she would be suspended, because she did not want to stay home alone. 5RP 71, 73. In response to further questioning, M.P. eventually stated she did not want to stay home because of her mother's boyfriend. 5RP 75. When Brown asked if he "raped" her, M.P. shook her head yes. 5RP 75; 4RP 31; 5RP 18, 53.

M.P. testified that on May 11, 2010, she went to bed around 1:00 a.m. 5RP 22. Although she shared a room with her younger sister, her sister was spending the night at their father's house. 5RP 23-24. M.P. claimed she awoke to find Ortiz-Triana in her bed touching her leg. 5RP 26. Reportedly, M.P. sat up and called for her mother. 5RP 26. Ortiz-Triana said she was at work. 5RP 27.

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[5]The defense initially proposed to instruct the jury on third degree rape as a lesser included offense, but later amended its proposal to instruct on the offense as an inferior degree offense. 7RP 3; see State v. Ieremia, 78 Wn.App. 746, 752, 899 P.2d 16 (1995) (third degree rape is an inferior degree offense of second degree rape).

M.P. alleged that she continued calling for her mother, but Ortiz-Triana said he was going to kill her and pointed a knife toward her neck. 5RP 27, 30-31. M.P. testified the knife was one of her mother's kitchen knives, "short and silver." 5RP 28. Her mother used it frequently to cut potatoes. 5RP 28.

According to M.P., Ortiz-Triana got on top of her and put her legs around him. 5RP 34. M.P. testified Ortiz-Triana pulled her underwear halfway down. 5RP 35. M.P. claimed that when she tried pulling them back up, Ortiz-Triana said, "Where is the knife at, and then he picked it up." 5RP 38. M.P. reportedly said, "okay, I'll stop." 5RP 38. According to M.P., Ortiz-Triana set the knife by her pillow and engaged in vaginal intercourse with her. 5RP 38-39.

M.P. testified that on "two or three occasions," Ortiz-Triana allowed her to use the bathroom. 5RP 45. M.P. described the details of only two bathroom trips, however. 5RP 36, 40, 45-46. M.P. alleged that on each occasion, Ortiz-Triana accompanied her and took the knife. [Ibid.] On each occasion when they returned, M.P. sat on her sister's bed, in a reported attempt to stall the encounter. 5RP 41, 47. M.P. testified that each time, Ortiz-Triana directed to her to get back in bed, which she did. [Ibid.]

M.P. testified that after Ortiz-Triana ejaculated, she asked whether he really intended to kill her. 5RP 48. Ortiz-Triana said no, that he wished he could pay M.P. to be his girlfriend, but not like a prostitute. 5RP 48-50. M.P. reportedly responded, "you are with my mom, I wouldn't do that." 5RP 50. According to M.P., Ortiz-Triana said, "okay, just one more time." 5RP 54.

M.P. testified that during the next act of intercourse, she "wasn't paying attention to the knife anymore" and "did not know where it was." 5RP 54. According to M.P., she "just kept asking him if we could be done, if we were almost done." 5RP 56.

M.P. claimed Ortiz-Triana responded, "just a couple more minutes" and stopped about 15 minutes later. 5RP 56. M.P. testified it was approximately 4:00 a.m. 5RP 56.

At this point, the prosecutor attempted to hone in on the timing of this second act and the following exchange occurred:

Q. So this time, this is after you had gone to the bathroom two times?

A. Yes.

Q. Was there another time?

A. I think it was only twice. But we got up one more time because I said I was thirsty. So we went downstairs into the kitchen. And he had the knife with him the whole time. And we got two water bottles. I got myself one and then he got him on[e]. And then we went back up into the room.

Q. Were the water bottles from the refrigerator?

A. Yes.

Q. Did you see where the knife was?

A. No.

Q. Did you see it at any point during the time that you walked from your bedroom to go down to the kitchen?

A. It was in his hand.

Q. Do you recall whether or not he ever set the knife down when you were in the kitchen?

A. No, I don't think he did. We were only in there for a second to get something to drink.

...

Q. At what point was it that you got up to go downstairs to go to the bathroom?

A. To the bathroom?

Q. I'm sorry. To the kitchen.

A. It had to be like three-something.

Q. So what was it that happened at about 4:00?

A. I'm sorry, what?

Q. What was it that happened at about 4:00? You said about 4:00 it stopped.

A. Yes. And then he got up and put his basketball shorts back on. And I said I had to use the bathroom again. And he told me to hurry up, so I did. And then I got back in my bed.

5RP 59. M.P. testified Ortiz-Triana left thereafter. 5RP 59.

M.P. claimed that Ortiz-Triana touched her inappropriately once before, approximately two years earlier. 5RP 52, 76. The jury acquitted him of this charge, however. CP 83.

Ortiz-Triana testified that during the early morning hours of May 11, 2010, he and M.P.'s mother, Sophie Pfutzner, were texting while Pfutzner was at work. Ortiz-Triana indicated he wanted to go [to] Pfutzner's house and wait for her to get off work. 6RP 42-43. After getting the key, Ortiz-Triana went to Pfutzner's house and sat down on a couch by the downstairs bathroom. 6RP 43-45. He was going to relax, but heard footsteps on the stairs and saw M.P. poke her head out from around the corner, looking to see who was there. 6RP 47. M.P. said Ortiz-Triana startled her and asked what he was doing there. 6RP 48. Ortiz-Triana said he was waiting for M.P.'s mother, and M.P. said she was going back to sleep. 6RP 48.

Ortiz-Triana testified he asked M.P. if she wanted to have some fun. 6RP 48. According to Ortiz-Triana, M.P. asked "what kind of entertainment?" 6RP 48. Ortiz-Triana said, "you know." 6RP 48. When he added, "I can give you some money[,]" M.P. reportedly turned around and said, "well, one never knows." 6RP 49. Ortiz-Triana testified he waited a few seconds and then went into M.P.'s bedroom, where the two engaged in consensual sexual intercourse. 6RP 49, 52-54. Ortiz-Triana did not have a knife and he did not threaten or force M.P. to do anything. 6RP 55.

Ortiz-Triana suspected M.P. fabricated the rape allegation because M.P. feared she was pregnant and because she was ashamed she slept with her mother's boyfriend. 6RP 13. M.P. had told a friend shortly after the incident she feared she was pregnant. 5RP 62-63, 112-113.

E. ARGUMENT FOR WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT'S REFUSAL TO GIVE THE DEFENSE INSTRUCTIONS ON CONSENT AND AN INFERIOR DEGREE OFFENSE VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

The court's refusal to give the defense instructions on consent and an inferior degree offense violated Petitioner's constitutional rights. The Sixth Amendment and the Due

Process Clause guarantees a defendant a "meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)); see also Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

This includes the use of jury instructions to support a defense. Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case."); Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002); Barker v. Yukins, 199 F.3d 867, 875-76 (6th Cir. 1999) (granting habeas relief under Antiterrorism and Effective Death Penalty Act because an erroneous instruction deprived defendant of a "meaningful opportunity to present a complete defense") (relying on Trombetta, supra); see also Mathews v. U.S., 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

The State must also prove all elements of a charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions that relieve or shift this burden violate the Constitution. Martin v. Ohio, 480 U.S. 228, 237, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987); Patterson v. New York, 432 U.S. 197, 206-07, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1979).

(i) The Consent Instruction

The refusal to give the defense instruction on consent -- which the State agreed was a correct statement of law -- violated Petitioner's right to present a complete defense, see cases cited supra at 10, and the use of WPIC 18.25 created an overlap of burdens -- because consent is an affirmative defense, yet forcible compulsion is an element the State must prove, see supra at 3-6 -- which improperly shifted the burden of proof to the Petitioner and relieved the State of their burden of proving all elements beyond a reasonable doubt. Dixon, supra.

This Court and the Ninth Circuit have struggled with WPIC 18.25. Gregory, 158 Wn.2d at 801-03, cf. id. at 868-70; Spicer v. Gregoire, supra. And the U.S. Supreme Court's decision in Dixon further shows that Camara, supra, was wrongly decided and should be overruled. Thus, review is appropriate to correct this constitutional contradiction. RAP 13.4(b)(1), (3) & (4).

Contrary to the Court of Appeals' assessment, WPIC 18.25 does not explain to the jury that the burden still rests on the State to prove forcible compulsion or that the jury may consider evidence of consent (even if not rising to a preponderance) insofar as it establishes reasonable doubt of forcible compulsion. 7RP 13. Although defense counsel attempted to argue that -- regardless of consent -- the State still bore the burden to prove forcible compulsion, 7RP 60-61, the jury was instructed "to disregard any remark,

statement, or argument that is not supported by the evidence or the law in [the] instructions." CP 58. The jury instructions as a whole did not inform the jury of the applicable law and therefore prevented Petitioner from arguing his defense. See e.g. State v. Buzzell, 148 Wn.App. 592, 600-01, 200 P.3d 287 (2009) (error not to instruct on consent as defense to indecent liberties by forcible compulsion).

Nor was the error harmless in this case, as the two verdicts of acquittal indicate the jury did not find M.P. entirely credible. CP 82-83; cf. Buzzell, 148 Wn.App. at 601 (failure to instruct on consent harmless because Buzzell argued consent and case turned on whether the jury believed him). The jury's double acquittal shows they did not find M.P. entirely credible and they did, in fact, believe Petitioner's defense. Thus, based on the instructions, it is likely the jury disbelieved the State's proof of forcible compulsion yet still convicted, based on Petitioner's failure to prove consent -- due to the unclear instructions. This amplifies the need to grant review. RAP 13.4(b)(3) & (4).

(ii) The Inferior Degree Offense Instruction

Since there was evidence to support an inference that the lesser crime of third degree rape was committed, the Court erred in failing to instruct on this charge. Where a defendant is charged with an offense that is divided by inferior degrees of a crime, the jury may find the defendant not guilty of the charged offense, but guilty on any lesser

degrees of the crime. RCW 10.61.003, .006. An instruction on a lesser offense is proper only if there is evidence to support an inference that the lesser crime was committed. Buzzell, 148 Wn.App. at 602.

Whether there is sufficient evidence is determined in light of the entire record as viewed most favorably toward the defendant. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Once any evidence is produced to support the instruction, the defendant has a due process right to have his theory of the case presented under proper instructions. See e.g. State v. Adams, 31 Wn.App. 393, 396, 641 P.2d 1207 (1982); Fernandez-Medina, 141 Wn.2d at 455-56; see also Barker v. Yukins, 199 F.3d at 875-76; Crane v. Kentucky, supra.

The State charged Petitioner with first degree rape, under RCW 9A.44.040:

> (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
>
> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon[.]

As indicated in the procedural facts, the court granted the State's motion to instruct the jury on second degree rape as an inferior degree offense, under RCW 9A.44.050:

> (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[.]

As also indicated above, Petitioner sought instructions on third degree rape, under RCW 9A.44.060:

> (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[.]

"Consent" means that at the time of the act of sexual intercourse or sexual content there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact. RCW 9A.44.010(7).

Clearly, rape is divided into degrees. See e.g., State v. Ieremia, 78 Wn.App. 748 (third degree rape is an inferior degree offense of second degree rape). Thus, Petitioner was entitled to have the jury instructed on the offense if there was any evidence in the record to support it.

In denying the defense request for this instruction, the Court reasoned Petitioner testified the sexual intercourse was consensual and there was accordingly no indication of a lack of consent in his testimony. But both the trial Court and the Court of Appeals failed to view the record in its entirety, as it must. Fernandez-Medina, 141 Wn.2d at 455-56. Contrary to both the trial Court's ruling, 5RP 5-6, and the Court of Appeals' decision at 9-10, there was evidence of lack of consent (in the absence of forcible compulsion) -- although it came from M.P., not Petitioner.

M.P. testified that after Petitioner ejaculated, she asked whether he really intended to kill her. 5RP 48. Petitioner reportedly said no and indicated he wanted M.P. to be his girlfriend. 5RP 48-50. When M.P. wasn't interested, 5RP 50, Petitioner allegedly said, "Okay, just one more time." 5RP 54. Although M.P. testified Petitioner engaged in sexual intercourse with her again, there was no allegation he used forcible compulsion. In fact, M.P. testified she "wasn't paying attention to the knife anymore" and "did not know where it was." 5RP 54.

Nevertheless, if believed, her testimony also establishes she did not consent to the sexual intercourse. Indeed, M.P. testified she "just kept asking him if we could be done, if we were almost done." 5RP 56. Yet, Petitioner continued for another 15 minutes, according to M.P.'s testimony. 5RP.

Based on M.P.'s testimony, a reasonable juror could have found M.P. did not consent, but that Petitioner did not commit the rape by forcible compulsion, either. The trial court thus erred in failing to instruct the jury on this viable defense theory, and the Court of Appeals failed to correctly follow Fernandez-Medina which holds that in cases like this one, the lesser degree offense instruction must be given. Review is therefore appropriate under RAP 13.(b)(1).

Further, the failure to so instruct the jury violated Petitioner's due process rights, Adams, 31 Wn.App. at 396, his right to present a complete defense, see cases cited

supra at 10, and it violated Petitioner's Winship rights. See e.g. Beck v. Alabama, 447 U.S. 625, 633-35, 100 S.Ct. 2382 (1984) (jury should be instructed on lesser offense to give defendant full benefit of reasonable doubt standard); Mullaney v. Wilbur, 421 U.S. 684, 690-704, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (applying holding and principles of Winship to different degrees of the defendant's charge).

Thus, this Court should grant review to address the Court's failure to protect Petitioner's Constitutional rights. RAP 13.4(b)(3).

These are also matters of substantial public interest which should be decided by this Court. RAP 13.4(b)(4).

2. PETITIONER WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the State presents evidence of multiple acts of like misconduct -- any one of which could form the basis of charge -- either the State must elect which of such acts they are relying on for a conviction or the court must instruct the jury to agree on a specific act. Coleman, 159 Wn.2d at 511. These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt. Id. at 511-12.

A recent Division Two case is illustrative. In State v. York, 152 Wn.App. 92, 216 P.3d [illegible] (2009), Richard York was convicted of four counts of second degree child rape. The

first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she spent the night at Cindy York's house "like, every Friday night" and that York would have sex with her "[m]ost of the time." York, 216 P.3d at 437 (citation to record omitted).

The prosecutor, however, supported count four in closing argument. Ibid. Division Two reversed because the jury was presented with multiple acts of like misconduct, "any one of which could form the basis of count four[,]" yet, because the State did not specify which act was count four, "the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts [] described, supported the count four conviction beyond a reasonable doubt." Ibid. (citing State v. Coleman).

Similarly here, M.P. testified to two acts of "like misconduct, any one of which" could have formed the basis for the charge. See Opening Brief below, at 25.

Nor did the State elect which act the jury should rely on to convict. 7RP 20-30. Rather, the State argued amorphously that the jury should find Petitioner raped M.P. at knifepoint. 7RP at 20-23. Nor did the court instruct the jury it must be unanimous as to which of the acts Petitioner committed. CP 53-68. This was error.

However, the Court of Appeals found no error because it claimed that the "offense was a continuing course of conduct, [so] the trial court did not err in failing to give a unanimity instruction." Slip Op. at 8 (citing cases). The Court also effectively equated the facts at issue with cases of "same criminal conduct." Id. But if an intermission, such as the one described in the facts here, prevents the two acts from constituting the same criminal conduct for sentencing purposes, it stands to reason that the acts are thus separate and should require unanimity where either act could form the basis of one count charged. This is an important constitutional issue and is of substantial public interest that should be decided by this Court. RAP 13.4(b)(3) & (4).

Nor was the error harmless. Constitutional error is presumed prejudicial and the State bears the burden to prove it was harmless beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Harmless error cannot be found here: Although some jurors may have believed the knife on the trip to the kitchen constituted forcible compulsion during the second act, some jurors may have found the knife trip actually occurred during the first encounter, and the State therefore failed to prove forcible compulsion for the second act. Consequently, it is possible some jurors relied on the second act to convict while others relied on the first act. But because the instructions allowed jurors to convict even if they disagreed as to which act Petitioner may have

committed, Petitioner was prejudiced by the error. Accordingly, his conviction should be reversed. RAP 13.4(b)(3) & (4).

F. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests for this Court to grant review and reverse his conviction.

Dated this 11TH day of October, 2012.

Respectfully submitted,

Max Ortiz-Triana
Petitioner, Pro Se

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67039-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
MAX ORTIZ-TRIANA,	)	
	)	
Appellant.	)	FILED: July 23, 2012

SCHINDLER, J. – A jury rejected Max Ortiz-Triana's affirmative defense of consent and found him guilty of rape in the second degree. We conclude the jury instructions accurately set forth the law on consent and permitted Ortiz-Triana to argue his theory of the case. We also reject Ortiz-Triana's argument that the trial court erred in failing to give a unanimity instruction and instructing the jury on the lesser degree offense of rape in the third degree, and affirm.

FACTS

In May of 2010, 16-year-old M.P. lived with her mother S.P. and three sisters in Auburn. S.P. generally worked from midnight to 7:00 a.m. Ortiz-Triana and S.P. had been in a romantic relationship since about 2007.

On May 11, 2010, M.P. went to bed at about 1:00 a.m. Sometime later, she awoke to find Ortiz-Triana in her bed, rubbing her thigh with his hand. After M.P. repeatedly called out for her mother, Ortiz-Triana told M.P. that her mother was at work. In a low voice, Ortiz-Triana told M.P. he was going to kill her and pointed a kitchen knife at her.

M.P. eventually told a school counselor, and Auburn police officers arrested Ortiz-Triana. M.P. later disclosed an earlier incident in which Ortiz-Triana put his hand down the front of her pants while showing her a pornographic video.

The State charged Ortiz-Triana with one count of rape in the first degree with a deadly weapon and one count of child molestation in the third degree for the earlier incident.

Ortiz-Triana testified that he had been drinking on the evening of May 10, 2010. Later, he called S.P. at work and asked if he could go over to her house and wait until she came home. When S.P. agreed, Ortiz-Triana drove to her workplace, picked up the key, and drove over to S.P.'s house.

A short time after Ortiz-Triana entered the house, M.P. came down the stairs and asked him what he was doing there. Ortiz-Triana explained he was waiting for her mother and then asked M.P. whether she "want[ed] to have fun for a little while." Encouraged because M.P. appeared to be "flirting," Ortiz-Triana followed her upstairs and into her bedroom. According to Ortiz-Triana, the two began kissing and eventually had consensual intercourse. M.P. never told him to stop.

Ortiz-Triana denied using a knife or threatening M.P. at any time. Ortiz-Triana acknowledged that he denied having sex with M.P. when he talked to police officers, but explained he was concerned the incident would affect his relationship with his fiancée.

The court instructed the jury on the affirmative defense of consent using the standard 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC) instruction, WPIC 18.25, at 288. The court declined to give Ortiz-Triana's proposed instruction on consent. At the State's request, the court also instructed

continued to bear the burden of proving forcible compulsion despite the defendant's burden to prove consent.

The trial court declined to give the proposed instruction. The court found the proposed instruction confusing and concluded that the instructions as a whole made the State's burden of proof clear. The court gave the jury instruction on consent that was based on WPIC 18.25. Instruction No. 14 states:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

On appeal, Ortiz-Triana contends that the instructions were insufficient to explain the State's continuing burden to prove forcible compulsion. Ortiz-Triana claims the jury could have "disbelieved the [S]tate's proof of forcible compulsion yet still convicted, based on Ortiz-Triana's failure to prove consent." In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), our supreme court rejected an analogous argument.

In Gregory, the defendant asked the court to revisit the well-established rule imposing the burden of proving consent in a rape prosecution on the defendant. Gregory, 158 Wn.2d at 801-04; see State v. Camara, 113 Wn.2d 631, 640, 781 P.2d 483 (1989). Gregory argued that

> requiring him to prove consent by a preponderance of the evidence violated due process because the jury could have become confused, thinking that it could acquit only if consent is proved by a preponderance of the evidence, even if a reasonable doubt may have been raised with regard to the

Ortiz-Triana has not identified any provisions in the instructions that would have permitted the jury, despite having a reasonable doubt about forcible compulsion, to find him guilty because he failed to prove consent. The instructions accurately set forth the State's burden of proof on forcible compulsion and permitted Ortiz-Triana to argue his theory of the case. See Gregory, 158 Wn.2d at 803-04.[3]

Ortiz-Triana next contends the trial court violated his constitutional right to a unanimous jury when it failed to give a unanimity instruction. He maintains that M.P. described a second sexual assault when Ortiz-Triana informed her that he did not intend to kill her and then resumed sexual intercourse with her. He argues that the evidence therefore established two distinct acts of rape that could have formed the basis for his conviction.

When the State presents evidence of several acts that could constitute the crime charged, the jury must unanimously agree on which act constituted the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity, the State must either elect the act on which it relies, or the court must instruct the jury to unanimously agree that at least one particular act constituting the charged crime has been proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411; see also State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

But no election or unanimity instruction is required if the evidence establishes a

[3] Ortiz-Triana's reliance on the comment to WPIC 18.25, which advises the trial court to "use caution if the defendant objects to the use of this instruction," is misplaced. WPIC 18.25, comment at 289. That comment is expressly directed to instructing the jury on an affirmative defense over the defendant's objection. See State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005) (error to compel defendant to rely on an affirmative defense to child luring). Because Ortiz-Triana raised the affirmative defense of consent, the sole issue is whether the instructions given were sufficient to advise the jury of the applicable law. Consequently, the WPIC comment has no application to the facts of this case.

Ortiz-Triana's reliance on State v. Grantham, 84 Wn. App. 854, 932 P.2d 657 (1997), is misplaced. Grantham involved the issue of whether two rapes constituted the "same criminal conduct" for purposes of sentencing. Grantham, 84 Wn. App. at 857. Because Grantham does not address jury unanimity, it has no application here.

Finally, Ortiz-Triana contends the trial court erred in refusing to give his proposed instruction on the lesser degree offense of rape in the third degree. A criminal defendant is entitled to an instruction on an inferior degree offense if:

> "(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."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979))). We review the evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

The trial court instructed the jury on rape in the first degree and rape in the second degree, both of which required the State to prove forcible compulsion. See RCW 9A.44.040(1)(a); 9A.44.050(1)(a). Rape in the third degree is an inferior degree offense of rape in the second degree. State v. Ieremia, 78 Wn. App. 746, 753, 899 P.2d 16 (1995). A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degree, he or she engages in sexual intercourse with another person and that person does not consent. See RCW 9A.44.060(1); RCW 9A.44.010(7) (defining consent).

M.P. testified that Ortiz-Triana pointed a knife at her, threatened to kill her, and

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MAX ORTIZ-TRIANA, Appellant.	)	No. 67039-5-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Max Ortiz-Triana, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 14th day of September, 2012.

FOR THE COURT:

Judge