NO. 43506-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WYLIE DEAN RHODES,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it sentenced him on the offense of indecent liberties with forcible compulsion because the jury only returned a verdict on the offense of indecent liberties.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdict on the offense of indecent liberties without forcible compulsion because this verdict was not supported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it sentences that defendant on the offense of indecent liberties with forcible compulsion when the jury only returned a verdict of guilty on the offense of indecent liberties?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts a jury's verdict on the offense of indecent liberties without forcible compulsion when there is not substantial evidence to support the conclusion that the defendant committed at least one of the five alternative methods of committing that offense?

STATEMENT OF THE CASE

Factual History

On October 24, 2011, the defendant Wylie Dean Rhodes texted his ex-girlfriend Stephanie Stocker and asked if they could meet. RP 61-63.[1] The two of them had been involved in a live-in, sexual relationship the previous year, and had kept up contact after separating. RP 58-61. At the time, Ms Stocker was living with a new boyfriend who insisted that she not allow men into their apartment when he was gone. RP 63-64. At the time Ms Stocker received the defendant's text message she was on a bus returning to her apartment after having lunch with her then current boyfriend. RP 61-63. She responded "why" to the defendant's text, and then "whatever" when he responded "why not." RP 149.

Not long after the text exchange Ms Stocker arrived at her apartment to find the defendant in the parking lot. RP 68-70. Upon meeting, the two of them stood on the stairs outside her apartment and talked while they each smoked a cigarette. *Id.* According to the defendant, he was there to buy methamphetamine from Ms Stocker and perhaps have sex. RP 194-196. In fact, they had occasionally had sexual encounters after breaking up. RP 101-102,188-192. However, Ms Stocker later denied that she had ever supplied

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

drugs to the defendant. RP 103-107.

Once the defendant and Ms Stocker had finished smoking, Ms Stocker unlocked the door to her apartment. RP 68-70. According to her, she intended to put her purse in the apartment and return outside to talk more with the defendant. *Id.* However, once she unlocked the door, the defendant shoved his way inside, shoved her onto the couch, and then shoved her on the floor, saying that he wanted a "blow job." RP 71-72. By contrast, according to the defendant, he entered the apartment with permission and they then engaged in a consensual sexual encounter, although not intercourse. RP 194-196. Stephanie Stocker's version was that the defendant forcefully held her down by holding both of her wrists above her head in one of his hands while straddling her, and that he pulled his penis out of his pants with his other hand and masturbated until he ejaculated onto her hair, face and shirt. RP 68-84.

While the defendant and Ms Stocker had vastly different versions concerning consent, they both agreed that the defendant left shortly after the encounter and then texted that he was sorry about what had happened. RP 84-88, 202-210. In fact, a friend of the defendant's stopped by just as the defendant was leaving. RP 133-135. When Ms. Stocker told her what had happened, this friend tried to convince her to report the incident. *Id.* However, instead of calling the police, Ms Stocker first called another friend,

who did convince Ms Stocker to go to the police station. RP 84-88. As a result, a couple hours after the incident Ms Stocker went to a satellite police station and made a report to an officer. RP 84-88, 112-118.

The officer who interviewed the defendant took pictures of one of her wrists and face, in which these photographs showed some bruising on a wrist and a black eye. RP 112-118. However, Ms. Stocker explained to the officer that (1) the defendant did not hit her and she was unsure how she got the black eye, and (2) the mark on her wrist might well have been caused by a "scrunchie"[2] that she had wrapped around her wrist. RP 103-107, 116-118. The officer saw no marks on Ms Stocker's arms and noted that her shirt was not torn. RP 116-118. In addition, Ms Stocker did not tell the officer that the defendant had held her wrists above her head. RP 136-137. Rather, she told him that he had held her wrists behind her back. *Id.* A second officer later arrested the defendant, who gave a recorded statement admitting to the sexual encounter but denying that it was in any way forced. RP 142-174.

Procedural History

By information filed October 31, 2011, the Clark County Prosecutor charged the defendant with the following four offenses, claiming that each constituted a crime of domestic violence:

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[2]A "scrunchie" (or scrunchy) is a fabric-covered elastic hair tie, commonly used to fasten long hair.

I. Indecent Liberties with forcible Compulsion under RCW 9A.44.100(1)(a);

II. First Degree Burglary with Sexual Motivation;

III. Unlawful Imprisonment with Sexual Motivation; and

IV. Fourth Degree Assault.

CP 1-2.

The case later came on for trial with the state calling Ms Stocker, her friend who arrived as the defendant left, and the two investigating officers. RP 56, 112, 127, 139. During the state's case in chief, the court allowed the state to play a redacted version of the defendant's recorded statement to the police. RP 142-174. After the state rested, the defendant took the stand as the only witness for the defense. RP 187. The state then presented brief rebuttal evidence. RP 220. At this point, the court instructed the jury without objection by the state, and the parties presented their closing arguments. RP 238-256, 256-289. During deliberations, the jury sent out a written jury question form with the following three notations:

(1) Need to be able to listen to DVD

(2) Can we have transcript of testimony on DVD?

(3) Time elapsed between when Wylie leaves apartment & Stephanie goes to police?

CP 96.

Without objection from either party, the judge brought the jury back

into the court, denied requests (2) and (3), and granted the first request by playing the defendant's redacted statement to the police again. RP 290-329. The jury then retired again for further deliberations, after which it sent out the following note:

> We are unable to agree (guilty or not guilty) on counts 3 & 4.

CP 97.

The court responded with the following, again without objection by either party:

> Please complete the verdict form or forms as to any count on which you are able to reach a verdict. Advise the bailiff when you have completed the forms.

CP 97.

A short time later, the jury returned a verdict of "not guilty" to the charge of first degree burglary, and "guilty" on the charge of indecent liberties. CP 98-99. The jury also answered "yes" to a special verdict form asking if the defendant and Ms Stocker were family or household members. CP 104. The verdict form on the indecent liberties charge, proposed by the prosecutor, submitted by the court and used by the jury stated as follows:

> We, the jury, find the above-named defendant ___Guilty___ of the crime of **INDECENT LIBERTIES.**

CP 98 (emphasis and capitalization in original, the word "guilty" added to the written form); CP 214.

After polling the jury, the court accepted and recorded this verdict without objection by the state. RP 346. Based upon this verdict, the court later sentenced the defendant to life in prison with a minimum mandatory time to serve of 55 months before he can first be considered for release based upon a standard range of 51 to 68 months. CP 142-156. The sentence also imposed community custody for life. *Id*. Following imposition of sentence, the defendant filed timely notice of appeal. CP 159-174.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND THE RIGHT TO JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT SENTENCED HIM ON THE OFFENSE OF INDECENT LIBERTIES WITH FORCIBLE COMPULSION BECAUSE THE JURY ONLY RETURNED A VERDICT ON THE OFFENSE OF INDECENT LIBERTIES.

The due process requirement that the state prove every element of an offense charged beyond a reasonable doubt also requires the state to prove all charged sentencing enhancements beyond a reasonable doubt. *State v. Gunther,* 45 Wn.App. 755, 727 P.2d 261 (1986). Originally, this requirement inured from the fact that the court's considered some enhancements so significant that they were treated as if they were an element of the offense that had to be pled and proved beyond a reasonable doubt. *In re Hunter*, 106 Wash.2d 493, 723 P.2d 431 (1986). Later, under the decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the United States Supreme court held that (1) "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," and (2) "the 'statutory maximum' for

Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." This requirement was also part of each defendant's right to jury trial under both Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010).

For example, in *State v. Williams-Walker, supra*, which consolidated three cases, the defendants each appealed after the trial courts imposed firearms enhancements based upon jury findings that the defendant's had each committed their crimes while armed with a "deadly weapon." The court first stated as follows in addressing the defendants' arguments that the trial court had violated their due process and jury trial rights by sentencing them to firearm enhancements upon "deadly weapon" verdicts.

> Our state constitution provides that "[t]he right of trial by jury shall remain inviolate...." Our prior cases have held this language to establish that in some circumstances, our state constitution provides greater protection for jury trials than the federal constitution. But under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict.

State v. Williams-Walker, 167 Wn.2d at 895-896 (citations omitted).

The court then noted that in both *Apprendi* and *Blakely*, the United States Supreme Court had reaffirmed that these requirements also existed

under United States Constitution, Sixth Amendment. Finally, in *Williams-Walker*, the court noted that the prohibition against sentencing a defendant absent a jury determination on all of the facts necessary for imposition of that sentence was also a requirement of due process under Washington Constitution, Article 1, § 3. The court noted the following on this point:

> Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

State v. Williams-Walker, 167 Wn.2d at 896 (quoting *State v. Frazier*, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972).

Based upon these decisions, the court in *Williams-Walker* found the trial courts had erred when they sentenced the defendant on the firearms enhancements because the various juries had only returned "deadly weapon" verdicts.

In the case at bar, the state charged the defendant with indecent liberties with forcible compulsion under RCW 9A.44.100. This statute provides as follows:

> (1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:
>
> (a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(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 contact 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 contact with the knowledge that the sexual contact 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.

RCW 9A.44.100.

Under this statute, the legislature has enumerated six separate ways to commit this crime. In the case at bar, the state charged the defendant under the first alternative, alleging that he had committed the offense "by forcible compulsion." CP 1. This distinction was critical in this case because section (2) of the statute states that indecent liberties committed

under any other alternative is a Class B felony while indecent liberties committed by forcible compulsion under alternative (1)(a) is a Class A felony. Subsection (2) of the statute states:

> (2)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.
>
> (b) Indecent liberties by forcible compulsion is a class A felony.

RCW 9A.44.100(2).

The distinction in punishment between indecent liberties on the one hand and indecent liberties with forcible compulsion on the other hand is indeed dramatic. The standard range on the former offense with an offender score of 0 points is 15 to 20 months in prison with a statutory maximum of 10 years in prison and a $20,000.00 fine. The sentence for the latter offense with an offender score of 0 points is life in prison with a recommended minimum time to serve before first being considered for conditional release of 51 to 68 months in prison. Under the latter sentencing scheme, the court also imposes community custody for life, and a defendant who obtains conditional release is always subject to have that release revoked.

Given the distinction in punishment, there should be no question that the requirements of Washington Constitution, Article 1, § 3, Washington Constitution, Article 1, § 21, United States Constitution, Sixth Amendment, and United States Constitution, Fourteenth Amendment, all require that a

jury return a verdict that the defendant committed the offense "with forcible compulsion," before the court has the constitutional authority to impose the more severe sentence.

In the case at bar the jury did not return a verdict finding that the defendant had committed the crime of indecent liberties "with forcible compulsion." The reason is that the state submitted a verdict form to the court for the lesser offense of indecent liberties. The court submitted this form to the jury, who returned it as follows:

> We, the jury, find the above-named defendant ___Guilty___ of the crime of **INDECENT LIBERTIES.**

CP 98 (emphasis and capitalization in original, the word "guilty" added to the written form); CP 214.

As is apparent from this verdict form, in the case at bar the jury did not return a verdict that it had found the aggravating element of forcible compulsion proven beyond a reasonable doubt. As a result, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as the defendant's right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it sentenced the defendant on the greater offense of indecent liberties with forcible compulsion. This is precisely the same thing that happened in the

consolidated *Williams-Walker* cases. Consequently, as in *Williams-Walker*, this court should vacate the defendant's sentence and remand to the trial court with instructions to resentence the defendant on the offense reflected in the jury's verdict: indecent liberties.

In this case, the state may concede the trial court's error in sentencing the defendant on an offense greater than the offense reflected in the jury's verdict but argue that any error was harmless beyond a reasonable doubt. However, any such argument should fail for two reasons. First, under Washington Constitution, Article 1, § 21, this type of error is structural and not subject to harmless error analysis. Second, even if the error was not structural, under the facts of this case the error was not harmless. The following addresses both of these arguments.

In *Williams-Walker*, the court addressed the issue whether or not a jury's use of a verdict form that reflected a finding on a lesser offense or enhancement was subject to harmless error analysis. As previously mentioned, in these combined cases the state had alleged firearms enhancements and the court had instructed on firearms enhancements. However, for some reason, the court had submitted the "deadly weapon" verdict forms to the juries. Indeed, the only weapons used in the cases were firearms. Thus, the state argued that the error in using the wrong verdict form was harmless beyond a reasonable doubt. The defense responded by

arguing that the only error that occurred was that the trial court imposed a sentence not authorized by the juries' findings. Thus, the defense argued that the only remedy was to vacate the sentence and remand for imposition of the sentence authorized by the verdicts that the juries returned. The Washington State Supreme Court agreed, stating as follows:

> The dissent mischaracterizes the error that occurred. No error exists in the charging document, and no error exists in the instructions or jury findings. The error occurred when the judge imposed a sentence not authorized by the jury's express findings. The problem arises from the statutory definition of "deadly weapon" as including a firearm. Former RCW 9.94A.602. Because of this definition, the only way to determine the applicable sentence enhancement is to look to the jury's findings. Quite simply, only three options exist: First, if the jury makes no finding, no sentence enhancement may be imposed. Second, where the jury finds the use of a deadly weapon (even if a firearm), then the deadly weapon enhancement is authorized. Finally, where the jury finds the use of a firearm, then the firearm enhancement applies. Critically, the sentencing judge can know which (if any) enhancement applies only by looking to the jury's special findings. Where the jury makes such a finding, the sentencing judge is bound by that finding. Where the judge exceeds that authority, error occurs that can never be harmless.

State v. Williams-Walker, 167 Wn.2d at 902.

In the same manner, the trial court's error in sentencing the defendant on a verdict the jury did not return also can never be harmless. However, even were the error subject to harmless error analysis, under the facts of this case, this court should still vacate the defendant's sentence. The reason is that the facts as presented at trial, the jury's questions, the jury's verdict on the first degree burglary charge, and the jury's inability to return verdicts on

the two misdemeanors all strongly indicate that the jury seriously questioned the claims of the complaining witness. Indeed, the not guilty verdict on the first degree burglary charge indicates that the jury was not convinced beyond a reasonable doubt that the defendant had forced his way into the apartment as claimed by Ms Stocker. In addition, their inability to return verdicts on the misdemeanors of unlawful imprisonment and fourth degree assault also indicate that at least some of them were not convinced beyond a reasonable doubt that Ms Stocker's version of events was truthful.

The inability to return a verdict on the fourth degree assault charge is particularly damaging to the state's claim because it indicates that at least some jury members were not convinced beyond a reasonable doubt that the defendant had ever touched Ms Stocker in an offensive manner, much less used forcible compulsion to have non-consensual sexual contact with her. Thus, in the case at bar, even were harmless error analysis available in this case it would not apply to save the court's sentence.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ACCEPTED THE JURY'S VERDICT ON THE OFFENSE OF INDECENT LIBERTIES WITHOUT FORCIBLE COMPULSION BECAUSE THIS VERDICT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with indecent liberties under RCW 9A.44.100. As was mentioned in the previous argument, there are six alternative methods of committing this offense. The first alternative requiring proof of forcible compulsion is a class A felony while the remaining five are class B felonies. As set out in the previous argument, the jury did not find forcible compulsion. This left the remaining five alternatives, which are as follows:

> (1) When the other person is incapable of consent;
>
> (2) When the victim is a person with a developmental disability and the perpetrator has supervisory authority over the victim or was providing transportation within the course of his or her employment at the time of the offense;

(3) When the perpetrator is a health care provider and the victim is a client or patient;

(4) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator has supervisory authority over the victim; or

(5) When the victim is a frail elder or vulnerable adult who had a significant relationship with the victim or was providing transportation within the course of his or her employment at the time of the offense.

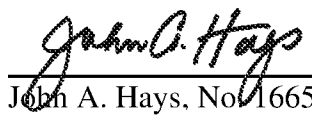
The problem in the case at bar is that the record at trial contains no evidence relating to any of these alternatives. Thus, there is no evidence to support the jury's verdict that the defendant committed this offense. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss the charge.

CONCLUSION

The trial court denied the defendant due process when it entered judgment against him on an offense unsupported by substantial evidence. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss. In the alternative, this court should vacate the defendant's sentence and remand with instructions to resentence him on the offense of indecent liberties because the jury did not find that the defendant acted with forcible compulsion.

DATED this 21st day of November, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

UNITED STATES CONSTITUTION,
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.44.100
Indecent Liberties

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

(a) By forcible compulsion;

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

(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 contact 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 contact with the knowledge that the sexual contact 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)(a) Except as provided in (b) of this subsection, indecent liberties is a class B felony.

(b) Indecent liberties by forcible compulsion is a class A felony.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. WYLIE DEAN RHODES, Appellant.	NO. 43506-3-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On November 21st, 2012, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

TONY GOLIK CLARK COUNTY PROS ATTY 1200 FRANKLIN ST. P.O. BOX 5000 VANCOUVER, WA 98666-5000	WYLIE D. RHODES - #355273 COYOTE RIDGE CORR CTR. P.O. BOX 769 CONNELL, WA 99326

Dated this 21ST day of November, 2012, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

HAYS LAW OFFICE

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