NO. 43532-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DONALD W. COREY,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

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

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it instructed the jury on the lesser degree offense of third degree rape because the state's evidence only supported a conviction for second degree rape.

Issues Pertaining to Assignment of Error

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 state's evidence only supports a conviction for second degree rape?

STATEMENT OF THE CASE

Factual History

On the evening of February 29th, 2012, 19-year-old Autumn Bruce took a cab to the Days Inn Motel by the Vancouver Mall at the invitation of her friend Amanda Bjornberg. RP 53-57.[1] Amanda was staying at the Motel with two of her aunts following some sort of family dispute concerning Amanda's conduct. RP 206-211. Amanda had invited Autumn to use the Motel jacuzzi and pool with her. RP 53-57, 158-160. Once Autumn arrived, the two of them changed in Amanda's motel room. *Id.* However, neither had a swimming suit so they both wore tank tops with a bra underneath and boxer shorts. *Id.*

Once Autumn and Amanda got to the pool area they got in the jacuzzi and started talking with a couple who were already there. RP 57-60, 160-165. Within a few minutes the couple got out of the jacuzzi and left the pool area. *Id.* At some point right before or after Autumn and Amanda arrived, the defendant 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 close and brushed up against her. RP 60-63, 66-70, 160-166. At an early point in the conversation,

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

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. In addition, 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. RP 95-99, 171-173. Neither Autumn nor Amanda claimed that the defendant ever threatened them, forced them to stay in the pool area, or in any way prevented them from leaving. RP 53-156, 157-202. However, they both claimed that he repeatedly forcibly touched them, particularly Autumn, without their encouragement or consent and against their best efforts to push him away and prevent him from touching them. *Id.*

Once Autumn and Amanda got back to the motel room and got dressed, they 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 RA.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 and 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.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON THE LESSER DEGREE OFFENSE OF THIRD DEGREE RAPE BECAUSE THE STATE'S EVIDENCE ONLY SUPPORTED A CONVICTION FOR SECOND DEGREE RAPE.

A party is entitled to have the jury instructed on a lesser included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case affirmatively supports an inference that the defendant committed the lesser crime. *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). The Washington Supreme Court has stated this proposition as follows: "A lesser included offense instruction is proper only if each element of the lesser offense is necessarily included in the charged offense and there is sufficient evidence to support the inference that the lesser crime was committed." *State v. Charles*, 126 Wn.2d 353, 355, 894 P.2d 558 (1995). If it is possible to commit the greater offense without committing the lesser offense, the latter is not a lesser included offense and the use of an instruction stating so is error. *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

In the case at bar, the state charged the defendant in Count II with the offense of second degree rape under RCW 9.94A.050(1)(a). This statute states as follows:

> (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;

RCW 9.94A.050(1)(a).

By contrast, the offense of third degree rape is defined in RCW 9A.44.060, which states as follows:

> (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.

RCW 9A.44.060.

Under this statutory language, in order to secure a conviction for third degree rape, the state has the burden of proving, *inter alia*, that (1) the victim not be married to the perpetrator, and (2) that the victim clearly express a lack of consent by words of conduct. By contrast, in order to secure a conviction for second degree rape which was charged in this case, the state only had the burden of proving that the defendant engaged in sexual intercourse with the complaining witness and that he did so by forcible compulsion. Thus, the offense of third degree rape contains elements not

required in the second degree rape statute, and not every second degree rape includes within it the offense of third degree rape. As a result, since second degree rape can be committed without committing third degree rape, third degree rape is not a lesser included offense of second degree rape under the *Workman* test. *See also State v. Ieremia*, 78 Wn.App. 746, 899 P.2d 16 (1995).

Although third degree rape is not a lesser included offense to second degree rape and it would be error to so instruct a jury, third degree rape is a lesser degree offense to second degree rape. In such cases, RCW 10.61.003 ostensibly allows a jury to convict a defendant of third degree rape if it first acquits that defendant on a charge of second degree rape. 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*, *supra.* 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*, 126 Wn.2d 353, 894 P.2d 558 (1995), 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*, 152 Wn.App. 64, 214 P.3d 968 (2009), 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. This division of 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 that 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.

CONCLUSION

The trial court erred when it submitted the lesser included charge of third degree rape to the jury. As a result, this court should vacate the conviction for that offense and remand with instructions to dismiss

DATED this 19th day of February, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

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 THE STATE OF WASHINGTON
DIVISION II

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

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On February 19th, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

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Dated this 19TH day of February, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

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