NO. 43532-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

DONALD WAYNE COREY, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-00410-2

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE INFERIOR DEGREE OFFENSE OF RAPE IN THE THIRD DEGREE

B. STATEMENT OF THE CASE

The State charged Donald Corey (hereafter 'Corey') with Indecent Liberties with forcible compulsion and Rape in the Second degree by forcible compulsion. CP 1. The case proceeded to a jury trial where the State called 7 witnesses in total; the defendant did not testify. RP Vol. 1 at 53; RP Vol. 2A at 157, 206, 236, 250; RP Vol. 2B at 274, 314, 324, 330.

Autumn Bruce went to visit her friend Amanda Bjornberg at the Days Inn Motel in Vancouver, Washington on February 29, 2012. RP Vol. 1 at 54-57. Ms. Bruce's intent was to go swimming with her friend in the pool at the motel. RP Vol. 1 at 54. Ms. Bruce wore underwear, a sports bra, a T-shirt and a pair of shorts to the swimming pool area. RP Vol. 1 at 56. Ms. Bruce did not have a phone with her in the swimming pool area. RP Vol. 1 at 57.

Once in the pool area, Ms. Bruce and her friend Ms. Bjornberg spoke with a couple who were in the Jacuzzi. RP Vol. 1 at 57-58. The couple then left the pool area, and another small group of people left the

pool area and Ms. Bruce and Ms. Bjornberg had contact in the pool area with the defendant, Corey. RP Vol. 1 at 58-59.

Corey engaged in conversation with Ms. Bruce and Ms. Bjornberg. RP Vol. 1 at 60. The conversation became sexual in nature. RP Vol. 1 at 60-61. Corey sat next to Ms. Bruce and moved to get closer to her. RP Vol. 1 at 65-66. Corey rubbed Ms. Bruce's leg and followed her as she tried to move away. RP Vol. 1 at 66. Corey slowly put his hand up Ms. Bruce's shorts and tried to put her hand on his "private areas." RP Vol. 1 at 66. Ms. Bruce told Corey to stop and that she did not like to be touched. RP Vol. 1 at 66. Corey also touched Ms. Bruce on the insides of her thighs. RP Vol. 1 at 67. Ms. Bruce pushed his hand away and moved to the other side of the Jacuzzi. RP Vol. 1 at 67. During this first incident, Corey "tried to cram his fingers inside" Ms. Bruce and "tried to forcibly put his fingers inside of [her]." RP Vol. 1 at 68.

Ms. Bruce then got out of the Jacuzzi and went to sit at the side of the pool. RP Vol. 1 at 68-69. Corey followed her and tried to pull her into the pool. RP Vol. 1 at 69. Ms. Bruce pushed Corey away and told him to stop touching her. RP Vol. 1 at 69. Ms. Bruce then got out of the pool and moved back to the Jacuzzi. RP Vol. 1 at 69. Corey followed Ms. Bruce back to the Jacuzzi. RP Vol. 1 at 70. Corey bit Ms. Bruce on her breast while she stood up in the Jacuzzi. RP Vol. 1 at 70. This bite left a mark on her chest. RP Vol. 1 at 70.

During the time Ms. Bruce was in the pool area, Corey took off his shorts tried to touch her with his private area. RP Vol. 1 at 74. Corey touched Ms. Bruce on the back with his penis and she pushed him away. RP Vol. 1 at 75. During part of the incident, Corey's finger passed the labia and partially penetrated Ms. Bruce's vagina. RP Vol. 1 at 76.

After Ms. Bruce recounted all the above facts, the prosecutor engaged in this line of questioning with Ms. Bruce:

> PROSECUTOR: Okay. How many minutes—and, how long had you been in the pool area with him at this point?
> MS. BRUCE: Like 45 minutes, 30, 45 minutes.
> PROSECUTOR: What had he already—how had he already sexually touched you at this point when he made this comment?
> MS. BRUCE: He cornered me in the pool. He shoved his fingers inside me, and he bit my chest.
> PROSECUTOR: Okay. Those are all the things that he did. And so you're saying that he asked you about the sex toy store after that?
> MS. BRUCE: Yes.

RP Vol. 1 at 78-79. After these incidents with Corey in the pool area, Ms. Bruce went to her friend's hotel room and immediately went into the bathroom. RP Vol. 1 at 80-81. Ms. Bruce told her friend's aunt about what had happened and upon her encouragement Ms. Bruce reported it to the front desk of the hotel. RP Vol. 1 at 82-83. She then left the hotel. RP Vol. 2A at 95.

Amanda Bjornberg testified twice during the trial. RP Vol. 2A at 157-202; RP Vol. 2B at 314-323. Initially Ms. Bjornberg testified that she observed Corey touch Ms. Bruce's leg and grab her while she told him to stop. RP Vol. 2A at 166.

Ms. Bjornberg observed Corey bite or kiss Ms. Bruce on the breast area. RP Vol. 2A at 167. She observed a mark, similar to a bruise, on top of Ms. Bruce's breast. RP Vol. 2A at 176. The second time Ms. Bjornberg testified she indicated that Ms. Bruce initiated verbal contact with Corey more than five times and agreed to go to a sex store with him. RP Vol. 2B at 315. Ms. Bjornberg testified that Ms. Bruce did not have a mark on her breast and that she observed Ms. Bruce put makeup on her breast to make it look like a mark. RP Vol. 2B at 315-16.

The day after this incident, the hotel manager called the police to ask for assistance removing Corey from the hotel. RP Vol. 2A at 254. Officer Jeffrey Starks of the Vancouver Police Department arrived at the Days Inn for a report of an unwanted person. RP Vol. 2B at 276. Officer Starks then phoned Ms. Bruce to ask her to make a statement regarding the incident. RP Vol. 2B at 278. During his contact with Ms. Bruce, Officer Starks observed she was visibly upset, crying and shaking. RP Vol. 2B at 278.

Officer Starks spoke with Corey who told him he was just "playing with the girls." RP Vol. 2B at 280. Corey admitted to taking his pants off while in the pool area. RP Vol. 2B at 281.

The State requested a jury instruction of an inferior degree offense of Rape in the Third Degree. RP Vol. 3 at 352. The defense objected to this instruction. RP Vol. 3 at 352. The jury returned verdicts of not guilty on the charges of

Indecent Liberties and Rape in the Second degree. CP 140, 141. The jury convicted Corey of Rape in the Third Degree. CP 142.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE INFERIOR DEGREE OFFENSE OF RAPE IN THE THIRD DEGREE

Appellant alleges the trial court abused its discretion in granting the State's request to instruct the jury on the inferior degree offense of Rape in the Third Degree. The trial court's action in instructing the jury was supported by statute and case law as the evidence at trial established a rational inference that only the inferior degree offense of Rape in the Third Degree was committed.

It may be appropriate for a trial court to instruct the jury on inferior degree offenses pursuant to RCW 10.61.003. RCW 10.61.003 allows a defendant charged with an offense that is divided into degree to be found not guilty of the charged degree and guilty of any inferior degree instead. An inferior degree offense instruction is appropriate if "1) the statues for both the charged offense and the proposed inferior 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))).

Corey was charged with Rape in the Second Degree. CP 1. 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). Prior to closing arguments, the State requested an inferior degree instruction on Rape in the Third Degree, and the court granted that request over defense's objection. RP Vol. 3 at 354. Based on the standard set forth in *Fernandez-Medina, supra*, it is clear that the statute for Rape in the Second Degree and Rape in the Third Degree 'proscribe but one offense;' and that it is such an offense that the information charged Corey with. The issue on appeal, is whether the evidence at trial supported that Corey committed only the inferior offense.

This court reviews a trial court's decision to given an instruction that rests on a factual determination for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). When determining whether the evidence was sufficient to support giving an instruction, this court views the evidence in the light most favorable to the party requesting the instruction, here, the State. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *overruled on other grounds by Seeley*

v. State, 132 Wn.2d 776, 940 P.2d 604 (1997)). Only when a trial court's decision is manifestly unreasonable or based upon untenable grounds will this court find it abused its discretion. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)).

The evidence in Corey's trial showed that a rational Trier of fact could infer that only the inferior degree offense was committed. Upon review, the evidence must have been sufficient to permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). Such evidence must be affirmative; it is not enough that the jury might disbelieve the evidence pointing to the defendant's guilt. *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Supreme Court held that a party is entitled to an inferior degree offense instruction if the evidence raises an inference that *only* the inferior degree offense was committed to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455 (citing *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) and *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997)). In

Fernandez-Medina, the defendant was initially charged with Assault in the First degree and the trial court refused to instruct the jury on the inferior degree offense of Assault in the Second Degree. *Fernandez-Medina*, 141 Wn.2d at 449. The Supreme Court held that it was error for the trial court to refuse this instruction. *Id.* The Court found that evidence was presented at trial that affirmatively raised the inference that Fernandez-Medina was guilty of only second degree assault instead of first degree assault. *Id.* at 462.

Where evidence at trial supports an inference that the inferior degree offense was committed instead of the greater degree offense, it is appropriate to give the inferior degree instruction. In *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995), the victim alleged the defendant held her down, removed her clothes and forced her to have intercourse. *Charles*, 126 Wn.2d at 354. The defendant claimed the intercourse was consensual. *Id.* at 354-55. The defendant was tried and convicted of Rape in the Second Degree. *Id.* The Supreme Court ruled that there was no evidence of unforced nonconsensual intercourse and therefore insufficient evidence to support a third degree rape instruction. *Id.* at 355-56. The Supreme Court explained that if the jury believed the victim's testimony, the defendant was guilty of Rape in the Second Degree, and if the jury believed the defendant's version, he was not guilty of any crime. *Id.* There was no affirmative evidence that the intercourse here was unforced but still nonconsensual, therefore an instruction on Rape in the Third Degree would have been inappropriate. *Id.*

Unlike *Charles, supra*, there is affirmative evidence to support Rape in the Third Degree here. In *Charles*, there was no evidence of a rape that was "unforced but still nonconsensual," however in this case there is evidence of unforced but nonconsensual intercourse that supported the Rape in the Third Degree instruction. The theory of a Rape in the Third Degree is entirely consistent with the testimony at trial.

RCW 9A.44.050 defines Rape in the Second Degree as follows:

> "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) by forcible compulsion;..."

RCW 9A.44.050(1), (1)(a). 'Forcible compulsion' means that "the force exerted" was "directed at overcoming the victim's resistance," and was "more than that which is normally required to achieve penetration." *State v. McKnight*, 54 Wn. App. 521, 527-28, 774 P.2d 532 (1989).

RCW 9A.44.060(1) defines rape in the third degree as follows:

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

RCW 9A.44.060(1), (1)(a).

The force to which reference is made in the definition of "forcible compulsion" is not "the force inherent in the act of penetration, but the force used or threatened to overcome or prevent resistance by the female." *State v. McKnight*, 54 Wn. App. 521, 527, 774 P.2d 532 (1989) (citing 3 C. Torcia, *Wharton on Criminal Law* § 288, at 34 (14th ed. 1980) (citing *Mills v. United States*, 164 U.S. 644, 648-49, 41 L. Ed. 584, 17 S. Ct. 210 (1897)); and *People v. Tollack*, 105 Cal App. 2d 169, 171, 233 P.2d 121, 122 (1951); and *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200, 203, 172 A.L.R. 916 (1947)). The court in *McKnight, supra* went on to stated,

> "Where the degree of force exerted by the perpetrator is the distinguishing feature between second and third degree rape to establish second degree rape the evidence must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration."

McKnight, 54 Wn. App. at 527-28. The court also noted that, "...in situations where the trier of fact is not persuaded by the evidence that forcible compulsion has been established, the lesser included offense of third degree rape remains available." *Id.* at 528, fn 2.

In *State v. Ritola*, 63 Wn. App. 252, 817 P.2d 1390 (1991), *superseded on other grounds by* RCW 9A.44.010(7), this Court reversed a defendant's conviction for Indecent Liberties by Forcible Compulsion because the defendant did not use any more force than was necessary to achieve the sexual contact.

Ritola, 63 Wn. App. at 255. The Court noted that "[f]orce in the pure scientific sense is what puts an object or body into motion, the result sometimes but not always being contact with another object or body." *Id* at 254. (citing *Webster's Third New International Dictionary* 887 (1986)). "Force in this scientific sense is involved in every act of sexual touching." *Id.* Thus, 'forcible compulsion' is not the "force inherent in any act of sexual touching." *Id.*

Ms. Bruce's testimony is consistent with the inference that Corey committed only Rape in the Third Degree. She testified that she told the defendant "no," and that she expressed by both words and conduct that she did not consent to the touching. Though Ms. Bruce used the word "forcefully/forcibly" when describing how the defendant inserted fingers into her vagina, this is unclear and does not support only a finding of forcible compulsion. The legal sense of the word "force" may not always have the same meaning as it does when used by a lay person. Forcible compulsion means "acts of force over and above what is necessary to achieve intercourse." *See State v. McKnight*, 54 Wn. App. at 528. However, as the Court in *Ritola, supra* noted, "[f]orce in the pure scientific sense is what puts an object or body into motion...." *Ritola*, 63 Wn. App. at 254. Ms. Bruce's testimony using a form of the term "force" could have meant either the definition as set forth in *Ritola, supra*, the legal definition as set forth in *McKnight, supra*, or any other definition as understood by the person using the term.

Ms. Bruce's testimony clearly supported a finding of nonconsent. Her testimony also supported an inference that the intercourse was not accomplished with forcible compulsion. To establish forcible compulsion, the evidence must "show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration." *McKnight*, 54 Wn. App. at 528. The force described by Ms. Bruce is very limited. Her testimony also showed there was a lack of resistance, and a lack of force that was designed to overcome any resistance, and none that was more than normally required to achieve penetration.

Ms. Bruce's testimony included her saying "I pushed his hand away. And he pushed his hand up there more, and he went inside." RP, Vol 1 at 75. She also stated, "He tried to forcibly put his fingers inside of me." RP, Vol. 1 at 68. Ms. Bruce testified in reference to this first time in the hot tub, "He starts touching me on the inner side, insides of my thighs.... ...I pushed his hand away and pushed him away and moved to the other side of the Jacuzzi." RP, Vol. 1 at 67. Ms. Bruce testified that later, after she had gone to the pool and then back to the Jacuzzi, Corey "he bit my chest." RP Vol. 1 at 70. She described no force used to achieve the biting on her chest, nor that the biting on her chest was force to achieve penetration of her vagina. The comment Corey cites to in his brief at page 17. "He cornered me in the pool. He shoved his fingers inside me, and he bit my chest" was clearly, by the preceding line of questions, a summary of what had

occurred in terms of sexual touching between Corey and Ms. Bruce up to that point. See Br. of Appellant, p. 17; RP Vol. 1 at 78. This comment is not a turn of events as to how the events unfolded, in chronological order or in order of time.

Corey argues these statements alone show that there was no evidence to support an inferior degree offense instruction. However, looking at each statement, they do not preclude the inferior degree offense by inference. Ms. Bruce described absolutely no force being used in Corey biting her chest. This act is similar to the act described in *State v. Ritola, supra*. In that case, the defendant suddenly reached over and grabbed the victim's breast. The Court found that it was not sexual contact achieved by force. Ms. Bruce described no force, other than the bite itself. The State alleged the bite as the sexual contact, not the force. Clearly this event occurred separately from the Rape and had no bearing on whether force was used to achieve penetration.

Ms. Bruce also stated Corey "cornered" her. This language is vague, and not indicative of physical force alone. It is reasonable to infer she meant that Corey's physical presence closed in near her to the point where she was in the corner of the hot tub and he was very close to her. This is not physical force that would constitute forcible compulsion.

Ms. Bruce's statement of "forcibly put his fingers inside of me" is insufficient as well to establish forcible compulsion. The word "force" or "forcibly" may not mean the same thing to a lay person as the term does in a legal

sense. In this statement alone, Ms. Bruce does not describe any act of force that was used to achieve the penetration, other than the act of penetration itself. Case law has indicated that to constitute forcible compulsion, the defendant must use force more than that which is normally required to achieve the act of penetration. *State v. McKnight, supra* at 527-28. This statement cannot support that Corey used "forcible compulsion" as it is legally defined, to penetrate the victim's vagina.

Throughout Ms. Bruce's testimony she repeatedly described how she told Corey no, not to touch her, etc. This demonstrates that she made her lack of consent known to Corey. Based on the evidence as a whole, in the light most favorable to the State, an instruction on the inferior degree offense was appropriate. The trial court did not abuse its discretion: it was not manifestly unreasonable or based upon untenable grounds will this court find it abused its discretion. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)). Looking at the case as a whole, the inferior degree offense instruction on Rape in the Third Degree was appropriate and lawful under the circumstances.

D. CONCLUSION

The trial court did not abuse its discretion in submitted the inferior offense of Rape in the Third Degree to the jury for consideration. A rational Trier of fact could have inferred, and did, from the evidence as a whole, that Corey committed only the inferior degree offense. Corey's conviction should be affirmed.

DATED this _____ day of April, 2013.

Respectfully submitted:

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