Supreme Court No. 96543-9
(COA No. 76756-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID HOSTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

David Hoston, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Hoston seeks review of the Court of Appeals decision dated October 22, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court deprive Mr. Hoston of due process and his right to present a defense when it failed to instruct the jury that consent negates the essential element of forcible compulsion after the defense had raised some evidence of consent?

2. Did the right to present a defense require the trial court to instruct the jury that forcible compulsion requires the victim of a rape to perceive a threat communicated to them by the defendant in order to coerce compliance?

3. Do principles of double jeopardy require the court to vacate Mr. Hoston's conviction for assault in the second degree when the offenses were the same in law and in fact, proved by the same evidence?

D. STATEMENT OF THE CASE

Mr. Hoston met Chawntee Duncan in 2005-06. RP 890. They married in 2011. RP 893. They had one child together, but Mr. Hoston acted like a father to Ms. Duncan's other children. RP 890-91. They attended Into His Chambers Ministries and were involved in church activities together RP 888-89, 896. They lived together for part of the time that they were married. RP 895.

Mr. Hoston was not faithful to Ms. Duncan. RP 894. He became involved with Shamirr Perkins after the birth of his daughter with Ms. Duncan in September 2014. RP 898, 1691. Ms. Perkins gave birth to Mr. Hoston's second child in October 2015. RP 1694.

Ms. Duncan learned about Ms. Perkins in November 2014 and filed for divorce, which the court finalized in March 2015. RP 899. Mr. Hoston and Ms. Duncan continued to see each other at church and to co-parent their daughter. RP 903. Their relationship improved and they attempted to reconcile. RP 902-03.

When Ms. Duncan discovered that Mr. Hoston had still not broken off communications with Ms. Perkins, the mother of his second child, she insisted on ending the relationship with Mr. Hoston. RP 919.

She made no further attempts to reconcile but did continue to have contact with him through their child. RP 932-33.

Mr. Hoston had a sexual relationship with at least one other person, a woman named Jessica Holton. RP 1913-14. These two relationships continued through January 31, 2016. RP 1700.

On January 31, 2016, Ms. Duncan alleged Mr. Hoston entered her house without permission, then raped and assaulted her. RP 953. Ms. Duncan said she had fallen asleep with her clothes on when she woke to someone hitting her in the face. RP 947. She was alone, as her children were spending the night with their grandmother. RP 949.

Ms. Duncan alleged the person beating her had on a mask and gloves. RP 957. She said he ripped her clothes off, tearing a hole in her jeans. RP 959. Ms. Duncan stated he then attempted to rape her anally and then did vaginally rape her. RP 1114-15. As this was occurring, Ms. Duncan recognized the perpetrator as Mr. Hoston. RP 958.

She asked him to stop, which he eventually did. RP 958. Mr. Hoston then expressed remorse. RP 1112. He went to the kitchen to get her some water and food. RP 1114. He told Ms. Duncan he would take her to the hospital to treat her injuries. RP 1127.

Ms. Duncan testified that while Mr. Hoston was out of the room, she sent text messages to friends and family alerting them to her situation. RP 1120-21. When Mr. Hoston left the apartment to get his car, she locked the door and called the police. RP 1127, 1131. She did not let him back into the apartment. RP 1131.

The government charged Mr. Hoston with burglary in the first degree, rape in the first degree, assault in the second degree, and attempting to elude a police officer. CP 1-3. The also charged him with assault in the second degree for a previous incident. CP 1.

Mr. Hoston denied that the rape. He admitted the assault occurred, but argued the sexual intercourse was consensual. RP 2195. Mr. Hoston established there were no traumatic injuries that could distinguish between consensual and non-consensual intercourse. RP 1026. In addition, the medical examiner found evidence of saliva in the vaginal area, suggesting that Mr. Hoston had also engaged in consensual oral sex. RP 1049. The medical expert was unable to rule out consensual sex. RP 1033. The detectives were also able to verify that they observed a pile of Ms. Duncan's clothing on the floor, suggesting that she took them off without force. RP 1212.

Mr. Hoston also provided evidence to create doubt regarding the credibility of Ms. Duncan's allegations. He established that Ms. Duncan did not trust him. RP 899, 1379. Their relationship had been tumultuous and Ms. Duncan resented Mr. Hoston's relationship with Ms. Perkins, the mother of his second child. RP 899, 1382. Even though Mr. Hoston told Ms. Duncan he would not see Ms. Perkins and her daughter until he established paternity, he continued to do so. RP 1384. One or two days before the assault, Mr. Hoston took Ms. Duncan's daughter to visit with his second daughter, over Ms. Duncan's express desire for them not to meet. RP 1455.

In addition to the standard instruction on forcible compulsion, Mr. Hoston asked the court to instruct the jury on the following language:

> The alleged victim must perceive a threat, and the defendant must communicate an intent to inflict physical injury in order to coerce compliance.

CP 206, RP 2078.

The court denied this request. The court instead adopted the prosecution's proposed instruction. CP 68, RP 2085.

The court did not instruct the jury on the definition of consent. The court did not tell the jury that consent negates forcible compulsion

and that it was the prosecution's burden to disprove consent beyond a reasonable doubt when there is evidence of consent at trial.

The jury convicted Mr. Hoston of burglary in the first degree, rape in the first degree, and assault in the second degree. RP 2228. They acquitted him of the separate assault charge. RP 2228.

At sentencing, the court entered separate convictions for both rape and assault, even though the evidence of assault was necessary to prove the rape. CP 118. Mr. Hoston had no prior criminal history. CP 118. The court sentenced him within the standard range to 138 months to life. CP 120, RP 2389.

E. ARGUMENT

1. Clear guidance on whether an instruction that consent negates the essential element of forcible compulsion when the defense raises some evidence of consent is required.

The Court of Appeals found that the trial court properly instructed the jury on the burden of proof and, even if it was not, that the error was not manifest. Slip Op. at 6. This Court should accept review to resolve a significant question of constitutional law and because this issue is of substantial public interest. RAP 13.4(b).

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime with which he is charged." *State v. Ortiz-Triana*, 193 Wn.App. 769, 774, 373 P.3d 335 (2016); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. To satisfy due process, the court must fully instruct the jury on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions, taken as a whole, must make the relevant legal standard "manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

In *State v. W.R.*, this Court held that consent negates the essential element of forcible compulsion. 181 Wn.2d 757, 770-71, 336 P.3d 1134 (2014). This Court also held that shifting the burden to the defense to disprove consent violated due process. *Id*. But because W.R. was a juvenile, there were no jury instructions. In a footnote, however, this Court stated that a jury instruction on consent is not generally be required when the defense raises consent. *See Id*. at 767, n. 3.

This footnote has created confusion for superior courts. A decision on whether the court must instruct the jury on the burden of proof will resolve this conflict. Because consent was a central issue in

Mr. Hoston's case, this petition provides the opportunity to resolve this constitutional question.

There is also some conflict within the courts. Unlike this case, the Court of Appeals found reversible error in *Ortiz-Triana*, where the trial court improperly instructed the jury on forcible compulsion and consent. 193 Wn.App. at 772. In *Ortiz-Triana*, the complainant testified Mr. Ortiz-Triana had raped her over a period of several hours. *Id.* While he was raping her, he held a knife and threatened to kill her. *Id*. Like here, Mr. Ortiz-Triana admitted the sexual intercourse but denied the force. *Id*. He testified the sexual intercourse was consensual and denied displaying a knife or threatening the complainant. *Id.*

The defense in *Ortiz-Triana* requested that the court instruct the jury that they could consider consent and that the government was not relieved of its burden of proving forcible compulsion where defense raised consent as a defense. *Id*. at 773. The trial court refused to provide the requested instruction. *Id*. After the Supreme Court ruled in *W.R.*, the Court of Appeals reversed its initial decision denying Mr. Ortiz-Triana's appeal and reversed his conviction. *Id*. at 772.

Here, the Court of Appeals ruled otherwise, distinguishing *Ortiz-Triana* because the instructions in that case expressly placed the

burden of proving consent by a preponderance of the evidence on the defense. Slip Op. at 6. And while the instructions here clearly did not have that language, they do not explain that consent negates forcible compulsion. By accepting review, this Court could resolve this issue.

a. The trial court should have instructed the jury that that consent negates forcible compulsion and that the government had the burden to disprove consent.

Where the defense presents some evidence of consent, the government has the burden of disproving the defense. *W.R.*, 181 Wn.2d at 770-71. Mr. Hoston raised some evidence of consent, which entitled him to an instruction.

Mr. Hoston challenged the physical evidence as consistent with rape, although he never denied assaulting Ms. Duncan. Even the government's expert could not declare that the physical evidence supported non-consensual sex. The expert admitted that it was not possible to conclude that there was evidence of vaginal or anal trauma that conclusively suggested rape. RP 1049. None of the medical evidence could confirm this conclusion either. RP 1033.

Other evidence supported consent as well. Ms. Duncan testified Mr. Hoston tore her clothing from her body, but the detectives discovered that some of the clothing folded into a pile by her bed. RP

1212. The medical examiner also discovered a fluid commonly found in saliva in Ms. Duncan's vaginal area, suggesting the possibility of consensual oral sex with Mr. Hoston. RP 1049.

Mr. Duncan's history with Ms. Duncan also suggested consent. RP 892, 895. Despite their marital troubles, they attempted to reconcile and continue their relationship. RP 1424. There was also no evidence of prior sexual assault or any indication from Mr. Hoston's history that he would sexually assault his ex-wife. RP 895.

Mr. Hoston also presented motive evidence to discredit Ms. Duncan's version of events. Ms. Duncan was upset about that the day before this occurred. Mr. Hoston had taken their child to meet his other daughter, despite Ms. Duncan's express instructions to the contrary. RP 912. Mr. Hoston asserted it was this anger that caused Ms. Duncan to be untruthful about the rape allegations. It was also clear that Mr. Hoston had assaulted Ms. Duncan, leaving additional reasons for Ms. Duncan to overstate what had happened to her.

Consent was a concern for the government. The prosecutor spent considerable time arguing that Ms. Duncan had not consented to sex with Mr. Hoston on January 31. Consent was a primary focus of the prosecutor's closing argument, as outlined in the chart below. The

prosecutor focused on consent, using the word at least eight different times in his opening and rebuttal closing arguments.

Prosecutor references to consent in closing arguments	**RP**
"Is that a face of consent?"	2148
"Was that a willing sexual consent?"	2148
"She didn't consider consent; she didn't consider the idea that he was invited over, and her primary objective was to build a case against Mr. Hoston."	2167
"If she had consensual sex, why not say the same thing she said in November."	2207
"What's the difference between rape and normal consensual sex?"	2214
"The difference is consent."	2214
"The difference between consent and nonconsensual sex, consent is usually fun for both parties versus done with the aspect of it being fun."	2214
"Not consent. It's an intimate humiliation."	2215

Even so, the court did not instruct the jury on what consent means and whose burden it was to disprove consent. Instead, the court only instructed the jury on the elements of rape and the prosecutor's requested definition of forcible compulsion. CP 65, 68. The court never told the jury that consent negates forcible compulsion.

Without an instruction on the burden of disproving consent, the jury could not have known consent negates forcible compulsion and that the government was required to disprove it. *W.R.*, 181 Wn.2d at

770-71. With only the elements of the offense and the prosecutor's requested definition of forcible compulsion, these instructions were insufficient for the jury to understand their obligations. This error was of a constitutional magnitude and requires review. RAP 13.4(b).

b. This Court should grant review to address when a trial court should instruct a jury that consent negates forcible compulsion.

Under RAP 2.5(a)(3), an "appellate court may refuse to review any claim of error which was not raised in the trial court," but there are exceptions to this general rule. One exception is that "a party may raise ... manifest error affecting a constitutional right" for the first time on appeal. *Id*. This exception recognizes that "[c]onstitutional errors are treated specially because they often result in serious injustice to the accused." *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). This issues raised here were of constitutional magnitude and required review. Instructional errors that fail to properly instruct the jury on the burden of proof meet this standard. RAP 2.5(a)(3).

Mr. Hoston's only defense to the rape charge was that the sexual intercourse was consensual. With evidence of consent raised at trial, the burden fell to the government to disprove consent beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 770-71. And while the Court of Appeals

held otherwise, this Court should address this issue. RAP 13.4(b). Mr. Hoston presented evidence to establish doubt as to whether the sexual intercourse had been a rape, but the jury could not have understood that by presenting evidence of consent, this required the government to disprove consent. *W.R.*, 181 Wn.2d at 770-71. This Court should accept review.

2. This Court should accept review of whether the trial court deprived Mr. Hoston of his right to present a defense when it denied his requested instruction on forcible compulsion.

The Court of Appeals rejected Mr. Hoston's argument that the trial court deprived him of the opportunity to present a defense when it refused his request to instruct the jury on forcible compulsion. Slip Op. 7. Mr. Hoston's request for review satisfied RAP 13.4(b) because the question of whether the trial court deprived Mr. Hoston of the right to present a defense raises significant questions of constitutional law.

Mr. Hoston asked the court to provide a definition of forcible compulsion based on the holding in *State v. Weisberg*. 65 Wn. App. 721, 725, 829 P.2d 252 (1992). In *Weisberg*, the Court of Appeals reversed the conviction because of insufficient evidence of forcible compulsion. *Id*. In doing so, the court held that forcible compulsion requires proof that the victim perceived a threat and that the defendant

communicated an intent to inflict physical injury in order to coerce compliance. *Id.*, at 725.

Mr. Hoston proposed a jury instruction to the court based on *Weisberg*. CP 206, RP 2078. This instruction was necessary because of the rare defense offered by Mr. Hoston. Mr. Hoston did not deny the assault but argued it occurred after he and Ms. Duncan had engaged in consensual sexual intercourse. RP 2195.

Mr. Hoston presented substantial evidence that no threat was communicated prior to when he engaged in consensual sex with Ms. Duncan. *See* RP 1023, 1033 (no traumatic injuries that could distinguish between consensual and non-consensual sex); RP 1049 (evidence of saliva in the vaginal area, suggesting consent); RP 1212 (Ms. Duncan's folded clothing beside the bed, suggesting they had been taken off without force).

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). "A defendant is entitled to have his theory of the case submitted

to the jury . . . when the theory is supported by substantial evidence in the record." *State v. Griffith*, 91 Wn.2d 572, 574, 589 P.2d 799 (1979).

Despite this clear guidance, the Court of Appeals denied Mr. Hoston relief because it found that Mr. Hoston exerted physical force on Ms. Duncan. Slip Op. at 9. But Mr. Hoston never denied that he had assaulted Ms. Duncan. His theory was that the sexual contact occurred before the assault. RP 2195. As such, he was entitled to his requested instruction.

An accused is entitled to jury instructions that support their theory of the case when there is substantial evidence in the record to support it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). To guard against false convictions, the trial court should only deny a requested jury instruction that presents a theory of the defendant's case where the theory is completely unsupported by evidence. *Koch*, 157 Wn. App. at 33. Depriving him of this instruction deprived him of his right to present a defense. Because this error raises significant questions of constitutional law, this Court should accept review. RAP 13.4(b).

3. Because the federal and state constitutions prohibit multiple punishments for the same crime, this Court should grant review on whether Mr. Hoston's convictions for rape in the first degree and assault in the second degree offend the double jeopardy principles.

The Court of Appeals determined that Mr. Hoston's convictions for rape in the first degree and assault in the second degree did not offend principles of double jeopardy. Slip. Op. at 9. Both this Court and the United States Supreme Court have ruled otherwise, holding that both the state and federal constitutions prohibit multiple punishments for the same crime. *See State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); *see also State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); *Albernaz v. United States*, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981). Review should be granted because of this conflict and because this error raises important questions of constitutional law. *See* U.S. Const. amend. V; Const. art. I, § 9.

Washington generally uses the "same evidence test" to determine whether merger is required. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Under this test, a court must merge the conviction when it determines that the two offenses are the "same in fact" and the "same in law." *Id.* Offenses are the same in fact if they are proved by the same evidence. *In re Fletcher*, 113 Wn.2d 42, 47–48,

776 P.2d 114 (1989). They are the same in law if proof of one crime would always prove the other. *Calle*, 125 Wn.2d at 779. Where there have been convictions for two charges, the conviction for the lesser charge must be set aside. Id. at 777.

The Court of Appeals found that the rape and assault charge were not the same in law. Slip Op. at 10-11. The Court held that the government was required to prove strangulation to prove assault, while it was required to prove felonious entry to prove rape. *Id*. The Court also found that the acts were not the same in fact. *Id*. at 11. While acknowledging that the facts overlapped, the court held that the prosecution presented evidence supporting each crime. *Id*.

This Court has held otherwise. In *State v. Johnson*, this Court vacated underlying convictions for assault and kidnapping, holding that the conviction for rape required proving the underlying acts. 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), *cert. denied*, 446 U.S. 948 (1980). Like here, proof of the underlying felony in *Johnson* operated to enhance the punishment for rape by converting it from a lesser to a greater degree of the offense. *Id*. at 676. The Court held that once the jury found Mr. Johnson guilty of the greater offense, the lesser offense merged into the completed crime of rape in the first degree. *Id*. at 680.

Johnson holds that merger is required unless the greater felony involves some injury to the victim that is separate and distinct from, and not merely incidental to, the greater felony. *Id*. at 681-82.

This Court should take review to declare that merger was required here. Mr. Hoston's actions on January 31 constituted a single course of conduct. Ms. Duncan woke to being assaulted and then raped in her bedroom. RP 947. There was no separation of time between the assault and the rape. The entire event took place in Ms. Duncan's bedroom. RP 1112. The government alleged Mr. Hoston continued to assault Ms. Duncan as the rape occurred and stopped both simultaneously when he began to apologize to Ms. Duncan. RP 1112. The government presented no evidence the rape and assault were separated in time or place. There was no evidence introduced that the assault was gratuitous or for any other purpose. Instead, the prosecution's clear theory was that the rape and assault occurred simultaneously. The evidence to prove the assault is the same evidence necessary to prove the rape. Under *Johnson*, merger is required. 92 Wn.2d at 680.

Mr. Hoston's sentence violates principles of double jeopardy. This Court should accept review in order to address this important

constitutional question and to resolve when a court should vacate a conviction. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner David Hoston respectfully requests this Court grant review pursuant to RAP 13.4(b).

DATED this 16th day of November 2018.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID TYRONE HOSTON, Appellant.	No. 76756-9-I DIVISION ONE UNPUBLISHED OPINION FILED: October 22, 2018

MANN, A.C.J. — David Hoston was convicted of first degree rape, second degree assault, first degree burglary, and attempting to elude the police after breaking into his ex-wife's apartment and beating and raping her. Hoston argues for the first time on appeal that the trial court's failure to instruct the jury that consent negates forcible compulsion, an essential element of rape, is a reversible error. Hoston further argues that the trial court erred by failing to offer his proposed definition of forcible compulsion, and by entering separate convictions for rape and assault. We affirm.

I.

On January 31, 2016, Chawntee Duncan awoke to being choked and punched. She could not breathe and realized someone was hitting her face. Her assailant was wearing a mask and gloves. Eventually, Duncan recognized her assailant as her ex-

husband Hoston and asked him to stop. Hoston tore off Duncan's pants, attempted to penetrate her anally, and then penetrated her vaginally. Hoston then abruptly stopped the attack, removed his mask, and began to express remorse. Hoston stated he had entered the apartment through the patio sliding door. Hoston told Duncan that he would take her to the hospital. Duncan said she would make up a story.

When Hoston went into the kitchen to get water for Duncan, she texted her mother and friends for help. After Hoston returned he helped dress Duncan and left to get his car. When Hoston left the apartment, Duncan locked the doors and called 911.

Hoston was charged with burglary in the first degree, rape in the first degree, assault in the second degree, and attempting to elude a police offer. He was also charged with assault in the second degree for a previous incident involving Duncan. A jury convicted Hoston of rape in the first degree, assault in the second degree, burglary in the first degree, and eluding the police. Hoston was acquitted of the separate assault charge. Hoston was sentenced to an indeterminate sentence with a minimum term of 138 months for rape in the first degree to run concurrent with a 29-month sentence for assault in the second degree, a 54-month sentence for burglary, and a 6-month sentence for eluding. Hoston appeals.

II.

Hoston argues for the first time on appeal that the trial court erred in failing to instruct the jury on the definition of consent and the State's burden of disproving consent beyond a reasonable doubt. We disagree.

A.

An appellate court may refuse to review any claim of error not raised in the trial court. State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009) (internal citation omitted). Appellate courts "will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." O'Hara, 167 Wn.2d at 98. One exception to the general rule is a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

In order to demonstrate a manifest error under RAP 2.5(a)(3), the appellant must demonstrate both (1) an error of constitutional magnitude and (2) the error is manifest. If the reviewing court determines that the appellant has claimed a manifest constitutional error the error is still subject to review for harmless error. O'Hara, 167 Wn.2d at 98.

The court first determines whether the alleged error raises a constitutional interest. "We look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." O'Hara, 167 Wn.2d at 98. If the court determines the alleged error raises a constitutional interest, it looks next to whether the error is manifest. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "To demonstrate actual prejudice, there must be a 'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935).

The actual prejudice analysis to determine a manifest error is separate from a harmless error analysis. A harmless error analysis occurs after the reviewing court

determines that there was a manifest constitutional error. O'Hara, 167 Wn.2d at 99. The focus of the actual prejudice analysis is whether the error is obvious on the record. O'Hara, 167 Wn.2d at 99-100.

> It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 100.

B.

Hoston argues that the trial court erred in failing to instruct the jury that consent negates forcible compulsion and that it was the prosecutor's burden of disproving consent beyond a reasonable doubt. Jury instructional errors that shift the burden of proof are considered constitutional error. See State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); O'Hara, 167 Wn.2d at 100.

However, even if the alleged error is constitutional, Hoston fails to demonstrate that the error is manifest. Hoston first fails to demonstrate actual prejudice because the trial court properly instructed the jury on elements of rape in the first degree, including forcible compulsion, and that the State had the burden to prove all of the elements. Using pattern instruction WPIC 40.02,[1] jury instruction 19 provided:

> To convict the defendant of the crime of rape in the first degree, as charged in Count 2, each of the following four elements of the crime must be proved beyond a reasonable doubt:

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 40.02 (4th ed. 2016) (WPIC).

> (1) That on or about January 31, 2016, the defendant engaged in sexual intercourse with Chawntee Duncan;
> (2) That the sexual intercourse was by forcible compulsion;
> (3) That the defendant feloniously entered into the building where Chawntee Duncan was situated; and
> (4) That any of these acts occurred in the State of Washington.
> If you find from the evidence that elements (1), (2), (3), and (4) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 2.
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty as to Count 2.

Relying on State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014), Hoston argues that the trial court's failure to explicitly instruct the jury that consent negates forcible compulsion was reversible error. In W.R., our Supreme Court held that "consent . . . negates the element of forcible compulsion [and t]herefore, once a defendant asserts a consent defense and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion." 181 Wn.2d at 763. The Supreme Court's focus, however, was where the trial court's instructions placed the burden of proof. It violates a defendant's due process rights for the trial court to force the defendant to disprove an essential element of the crime charged. But as the Court explained "[b]ecause the focus is on forcible compulsion, jury instructions need only require the State to prove the elements of the crime. It is not necessary to add a new instruction on consent simply because evidence of consent is produced." W.R., 181 Wn.2d at 767 n.3.

Therefore, the real question is not whether the trial court instructed the jury that consent negates forcible compulsion but instead whether the burden of proof was improperly placed upon the defendant. Here, the trial court's written and oral instructions placed the burden of proof squarely upon the State.

Hoston also relies on State v. Ortiz-Triana, 193 Wn. App. 769, 373 P.3d 335 (2016), and argues that it is closely analogous to the case at hand. In Ortiz-Triana, this court reversed the appellant's conviction for rape in the second degree based on an improper jury instruction. 193 Wn. App. at 771. But the jury instructions at issue in Ortiz-Triana expressly placed the burden of proof on the defendant. The trial court instructed the jury that "[t]he defendant has the burden of proving [consent] by a preponderance of the evidence." Ortiz-Triana, 193 Wn. App. at 774. Further, on appeal, the State expressly conceded that this instruction was an error and violated the defendant's due process rights. Ortiz-Triana, 193 Wn. App. at 776. Here, unlike Ortiz-Triana, the jury was not instructed that Hoston carried the burden to prove consent. The jury was instructed that "[t]he State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements."

Moreover, in determining whether the error is practical and identifiable, and thus manifest, we must place ourselves "in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." O'Hara, 167 Wn.2d at 100. Here, the pattern jury instructions expressly support the trial court's instructions. The comments to the pattern instruction for first degree rape, discuss "consent" and provide: "Although consent negates the element of forcible compulsion, no separate instruction on consent is needed." WPIC 40.02 cmt (citing W.R., 181 Wn.2d at 767, n.3). Further, comments to the pattern instruction defining consent provide: "Under no circumstances should this instruction be given unless

requested, or expressly agreed to, by the defense." WPIC 40.02 cmt (citing State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013)).

Because the trial court properly instructed the jury on the correct burden of proof, there was nothing before the court that would have caused it to believe an error needed to be corrected. Further, because the burden of proof was placed solely upon the prosecution, and therefore the asserted error does not have any practical and identifiable consequences, the alleged error is not manifest and Hoston cannot raise it for the first time on appeal.

III.

Hoston next contends that the trial court committed reversible error by refusing to instruct the jury on his proposed definition of "forcible compulsion." Based on State v. Weisberg, 65 Wn. App. 721, 725, 829 P.2d 252 (1992), Hoston proposed an instruction that expanded the statutory definition of forcible compulsion by adding "[t]he alleged victim must perceive a threat, and the defendant must communicate an intent to inflict physical injury in order to coerce compliance."

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). "A defendant is entitled to have his theory of the case submitted to the jury . . . when the theory is supported by substantial evidence in the record." State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). But a "trial court is not required to

give an instruction which is erroneous in any respect." State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).

To be convicted of rape in the first degree, the State was required to prove that Hoston "engag[ed] in sexual intercourse with another person by forcible compulsion." RCW 9A.44.040(1). The jury instructions defined forcible compulsion using the statutory definition: "[f]orcible compulsion means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury." Jury instruction 22; RCW 9A.44.010(6). The plain language of RCW 9A.44.010(6) indicates that forcible compulsion can be found in two different situations: (1) physical force which overcomes resistance or (2) an express or implied threat. The word "or" in between the physical force and threat portions of RCW 9A.44.010(6) creates a disjunction and indicates that the legislature intended for the two phrases to act as separate situations.[2]

In Weisberg, the case relied upon by Hoston, the 54-year-old defendant was neighbors with the victim, a 39-year-old, developmentally disabled woman. 65 Wn. App. at 723. The defendant invited the victim over to his house to try on clothes. Weisberg, 65 Wn. App. at 723. The defendant helped the victim undress, asked her to lie on his bed, and had intercourse with her. Weisberg, 65 Wn. App. at 723-24. The victim testified that she did not try to stop the defendant because she was afraid that he

[2] For an example of a threat-based case see, e.g., State v. Perez, No. 69005-1-I, slip op. at 42 (Wash. Ct. App. July 14, 2014) (unpublished), http://www.courts.wa.gov/opinions/pdf/690051.pdf (The defendant and another party threatened to kill the victim if she did not have sex with them. The victim "testified that she thought [the defendant] would kill her if she did not have sex with them and that she had seen them both with guns."). For an example of a physical force case, see State v. Quasim, noted at 168 Wn. App. 1034, 2012 WL 2086961, at *1, *3 (The court held that there was sufficient evidence of forcible compulsion because the victim "was badly injured in a physical confrontation the night of the rape [and] [t]here was ample evidence . . . that [the victim] suffered significant injuries to her head, face, and vaginal area.").

would hurt her. Weisberg, 65 Wn. App. at 724. At no point did the defendant use physical force or expressly threaten the victim. Instead, the State argued only that the defendant "through his conduct and the circumstances, impliedly threatened [the victim] such that she feared physical injury if she did not comply with his demands." Weisberg, 65 Wn. App. at 725. On appeal, the court held that "there must be some evidence from which the jury could infer that not only did [the victim] perceive a threat, but also that [the defendant] in some way communicated his intention to inflict physical injury in order to coerce compliance." Weisberg, 65 Wn. App. at 726.

Here, unlike in Weisberg, Hoston exerted physical force on the victim. The jury did not have to find that the victim perceived a threat or that Hoston communicated an intent to inflict physical injury, as Hoston's proposed instruction would have required, because Hoston inflicted physical injury. The jury simply had to find that Hoston exerted physical force which overcame resistance, as the trial court instructed. Therefore, Hoston's proposed instruction misstated the law as applicable to this case and, if accepted, would have risked confusing the jury.

The trial judge did not err in refusing to instruct the jury according to Hoston's proposed instruction.

IV.

Finally, Hoston argues that his convictions for rape in the first degree and assault in the second degree constitute double jeopardy because they constituted a single course of conduct. We disagree.

Both the state and federal constitutions prohibit a court from enforcing multiple punishments against the same individual for the same offense. U.S. Const. amend. V;

Washington Const. art. I, § 9; State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). We review alleged double jeopardy and merger violations de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

When reviewing an alleged double jeopardy violation, the reviewing court first considers "any express or implicit legislative intent." Freeman, 153 Wn.2d at 772. "[W]hen the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." Freeman, 153 Wn.2d at 772.

Under the "same evidence" rule, a defendant's double jeopardy rights are violated "if he or she is convicted of offenses that are identical in both fact and law." Calle, 125 Wn.2d at 777. However, "if each offense, as charged, included elements not included in the other, the offenses are different and multiple convictions can stand. Calle, 125 Wn.2d at 777. Washington's same evidence test is similar to that approved in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 75 L. Ed 306 (1932):

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Here, assault in the second degree and rape in the first degree are not the same in law as they each contain elements not required in the other. To convict Hoston of rape in the first degree, the State had to prove that the Hoston had sexual intercourse with Duncan; the sexual intercourse was by forcible compulsion; that Hoston feloniously entered the building where Duncan was; and that the act occurred in the state of Washington. To convict Hoston of assault in the second degree, the State had to prove that Hoston intentionally assaulted Duncan by strangulation; and the act occurred in the

state of Washington. The rape charge required proof of felonious entry into the building which was not required for assault. The assault charge required proof of strangulation, which was not required for rape. The two crimes were not the same in law.

The two crimes were also not the same in fact. The rape charge was supported by the facts that Hoston broke into Duncan's apartment and forcibly raped her by tearing off her pants and having sexual intercourse with her. The assault charge was supported by facts that Hoston strangled Duncan. Even if some of the facts overlapped, evidence was presented supporting each crime. Under the facts of this case, rape in the first degree and assault in the second degree are neither the same in fact nor in law. The trial court did not violate Hoston's right to be free from double jeopardy.

Hoston also contends that his convictions for rape in the first degree and assault in the second degree should have merged at sentencing. Hoston relies on State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979). In Johnson, the Supreme Court "adopted a merger rule prohibiting separate conviction and punishment for criminal offenses used to enhance another crime." State v. Collicott, 118 Wn.2d 649, 657, 827 P.2d 263 (1992). In Johnson, the defendant picked up two hitchhiking women, took them back to his house, and raped them at knife point. Johnson, 92 Wn.2d at 672. At trial, the defendant was found guilty of first degree rape, first degree kidnapping, and first degree assault. Our Supreme Court reversed the convictions as contrary to the double jeopardy and merger doctrines. The court held that because both the assault and kidnapping charges were necessary elements of first degree rape, "an additional conviction cannot be allowed to stand unless it involves some injury to the person or

property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." Johnson, 92 Wn.2d at 680.

RCW 9.79.170(1) provides:

> A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person not married to the perpetrator by forcible compulsion where the perpetrator or an accessory:
>
> (a) Uses or threatens to use a deadly weapon; or
> (b) Kidnaps the victim; or
> (c) Conflicts serious physical injury; or
> (d) Feloniously enters into the building or vehicle where the victim is situated.

Former RCW 9.79.170(1) (1975); RCW 9A.44.040. In Johnson, the defendant's convictions were required to merge because his actions in kidnapping and assaulting the victims were necessary elements of his conviction of rape in the first degree. If the defendant had not kidnapped or assaulted the victims, he could not have been found guilty of first degree rape.

Here, however, Hoston's assault conviction was not a necessary element of his conviction of first degree rape because Hoston was charged with rape while feloniously entering the building where the victim was situated. The jury was instructed that that "[a] person commits the crime of rape in the first degree when he or she engages in sexual intercourse with another person by forcible compulsion when he or she feloniously enters into the building or vehicle where the other person is situated." WPIC 40.01; RCW 9A.44.040. Accordingly, the fact that Hoston also assaulted the victim did not elevate his charge from a lower degree of rape to rape in the first degree. As such, Hoston's assault and rape convictions were not required to be merged at sentencing.

We affirm.

Mann, A.C.J.

WE CONCUR:

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76756-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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