



## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT & AUTHORITIES.....	5
	A. <u>The trial court's finding of fact on the element of forcible compulsion is not supported by the evidence presented at trial.</u> .....	5
	B. <u>Clay was improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, which has been found to violate the Federal Voting Rights Act.</u> .....	10
V.	CONCLUSION .....	12

## TABLE OF AUTHORITIES

### CASES

<u>City of Tacoma v. Luvene</u> , 118 Wn.2d 826, 827 P.2d 1374 (1992).....	6
<u>Farrakhan v. Gregoire</u> , ___ F.3d ___, 2010 Westlaw 10969 (9th Cir. 2010) .....	11, 12
<u>South Carolina v. Katzenbach</u> , 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) .....	10
<u>State v. Banks</u> , 149 Wn.2d 38, 65 P.3d 1198 (2003).....	5, 6, 8
<u>State v. Jones</u> , 34 Wn. App. 848, 664 P.2d 12 (1983) .....	10
<u>State v. McKnight</u> , 54 Wn. App. 521, 774 P.2d 532 (1989) .....	6, 9
<u>State v. Mewes</u> , 84 Wn. App. 620, 929 P.2d 505 (1997) .....	6

### OTHER AUTHORITIES

42 U.S.C. § 1973(a).....	10
CrR 6.1(d).....	5
RCW 9A.44.010(6) .....	6
RCW 9A.44.050(1)(a).....	6
RCW 29A.04.079.....	11
Wash. Const. Article VI, § 3.....	10

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it entered Finding of Fact V in its Findings of Fact and Conclusions of Law Re: Bench Trial.
2. The trial court's Finding of Fact V pertaining to the element of forcible compulsion is not supported by the evidence presented at trial.
3. Appellant was improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, which has been found to violate the Federal Voting Rights Act.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Should Appellant's second degree rape conviction be vacated and the case remanded for reentry of findings, where the trial court's finding of fact pertaining to the element of forcible compulsion is not supported by substantial evidence in the record, and where it is not clear from the record what facts the court would have relied upon to find that this element had been proved beyond a reasonable doubt? (Assignments of Error 1 & 2)
2. Was Appellant improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement

law, where that law has recently been found to violate the Federal Voting Rights Act? (Assignment of Error 3)

### **III. STATEMENT OF THE CASE**

In April of 2007, C.S. was 13 years old and living with her foster mother, Paula Gillson. (RP 52, 89) C.S. did not like the rules and restrictions that Gillson had imposed, so she ran away and stayed for over a week at her boyfriend's house. (CP 54, 77, 90-91, 92) On the afternoon of April 30th or May 1st, police came to that house looking for C.S. (RP 55) C.S. climbed out a window and hid from police. (RP 55)

C.S. then climbed over several fences, and began walking through the grounds of an apartment complex. (RP 55) She heard a man call her name, and she walked over to where he was sitting. (RP 56) C.S. testified that she recognized the man as Avery Pierre Clay because he was friends with her biological mother, and she first met him when she was about nine years old. (RP 51, 55, 56, 63)

C.S. testified that she and Clay walked to a store and purchased beer. They returned to the apartment and shared the beer and smoked cigarettes together. (RP 57-58, 59) Eventually, they walked to Clay's friend's apartment. (RP 61) Clay knocked on

the door, and a woman answered and let them in. (CP 61-62)

C.S. went to the bathroom, but Clay followed her in and said he needed to use the bathroom too. (RP 62, 64) After they used the toilet, C.S. tried to walk out of the bathroom, but Clay picked her up and carried her to a bedroom. (CP 64)

According to C.S., Clay locked the door and turned off the lights. (RP 65) She testified that Clay pushed her to the floor, pulled off her pants and underpants, and got on top of her. (RP 65-66) She testified that she told Clay that she did not want to have sex, but that he ignored her and put his penis into her vagina. (RP 67, 68) Clay subsequently turned C.S. over onto her stomach, pushed her leg up towards her chest, and placed his penis into her anus. (RP 69) C.S. began to cry, and Clay told her to "shut up" or he would "break the side of [her] face." (CP 67-68, 72) C.S. testified that Clay then rolled her over onto her back, and again placed his penis back into her vagina. (RP 70)

C.S. testified that, after about 25 minutes, Clay sat back and told her to perform oral sex. (RP 71) C.S. told Clay that she would get sick if she did, but Clay told her that he did not care. (RP 71) C.S. testified that she tried to put Clay's penis into her mouth, but she gagged and had to stop. (RP 71) Clay then threw her clothes

at her and told her to get dressed. (RP 72)

They left the apartment, and began walking down Bridgeport Way. (RP 74) Gillson, who had been out every night looking for C.S., saw them walking together. (RP 92) Gillson pulled up beside them and pushed C.S. into her car. (RP 74, 93) C.S. told Gillson that she had been raped, and Gillson took C.S. to the hospital. (RP 75, 94)

The State charged Clay with three counts of second degree rape of a child (RCW 9A.44.076) and one count of second degree rape with an aggravating factor that the victim was under 15 years old (RCW 9A.44.050(1)(a), 9.94A.837). (CP 5-6) Clay waived his right to a jury and agreed to a bench trial. (RP 47-48)

At trial, the State introduced a statement made by Clay to investigators after his arrest, wherein he denied having sex with C.S., and he states that he had known C.S. since she was nine or 10 years old, and denied that his DNA would be found on rape kit samples taken from C.S. (RP 111; Exh. P3)

At trial, Clay testified that he lied during his interview because he was scared after learning that C.S. was under 18 years of age. (RP 115-16) He testified he did not know C.S. before that day, and assumed she was 18 because he saw her buy cigarettes.

(RP 115-16, 119, 124-25) He did not know she was underage until after he was arrested. (RP 121)

Clay also testified that C.S. never indicated that she did not want to have sex, that he did not threaten C.S., and that he never forced her to stay with him or have sex with him. (RP116, 117, 121)

The trial court found Clay guilty on two counts of second degree rape of a child and one count of second degree rape. (RP 142; CP 37-40) The trial court sentenced Clay to a term of 25 years to life. (CP 47; RP 160) This appeal timely follows. (CP 59)

#### **IV. ARGUMENT & AUTHORITIES**

A. The trial court's finding of fact on the element of forcible compulsion is not supported by the evidence presented at trial.

In criminal cases tried to the court without a jury, the court must enter written findings of fact and conclusions of law. CrR 6.1(d). Following a bench trial, the findings of fact and conclusions of law must address each element of the crime separately, and each conclusion of law must be supported by a factual basis. State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) (citing State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)). The findings must expressly indicate that an element has been met. Banks, 149

Wn.2d at 43 (citing State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)).

When an appellant assigns error to the sufficiency of evidence to support a finding, the reviewing court must determine whether substantial evidence supports the trial court's findings of fact. State v. Mewes, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (citing Rae v. Konopaski, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

To convict Clay of second degree rape as charged in this case, the State had to prove, and the trial court had to find beyond a reasonable doubt, that Clay engaged in sexual intercourse with C.S. “[b]y forcible compulsion[.]” RCW 9A.44.050(1)(a); City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992). (CP 6) “Forcible compulsion’ means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6). 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.” State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989).

In finding that this element was proved, the trial court entered Finding of Fact 5, which states:

Once inside the bedroom, the defendant turned off the lights, threw C.S. to the ground and shortly thereafter forcibly removed C.S.'s clothing. C.S. told the defendant that she did not wish to have sex with him. The defendant forced C.S. to perform oral sex on him, placing his penis into her mouth. He additionally forced his penis inside C.S.'s vagina and then forced his penis inside C.S.'s anus. He told her that he would break her face if she did not submit to his demands for sex. The threats made by the defendant to harm C.S. and the physical force he used to restrain C.S. in the bathroom and to bring her to the bedroom and to throw her to the floor and to remove her clothes overcame her resistance to having sexual intercourse with the defendant.

(CP 38-39) This summary of the evidence supporting the element of forcible compulsion is not supported by substantial evidence.

First, C.S. testified that Clay *pushed* her onto the floor; she never testified that he "threw [her] to the ground." (RP 65) C.S. testified that Clay pulled off her pants, but she did not testify as to the amount of force used, and she specifically testified that her shirt remained on, so the court's finding that Clay "forcibly removed C.S.'s clothing" is also inaccurate. (RP 65-66, 66-67)

There is also no evidence that Clay forced C.S. to perform oral sex by "placing his penis into her mouth." Rather, C.S.'s testimony was that Clay told her to perform oral sex, she said that

she did not want to, he said he did not care, and that she “tried to” do it. (RP 71)

Finally, the trial court’s finding that Clay “told her that he would break her face if she did not submit to his demands for sex” is not supported by the testimony either. C.S. testified she was crying while she lay on her stomach, and Clay then told her if she “*didn’t shut up*” he would break her face. (RP 68, 71 (emphasis added)). The testimony is clear that the threat was directed at getting C.S. to stop crying, and that it was made once the acts had already begun. (RP 68, 71)

It is clear from a review of C.S.’s testimony that the facts relied on by the trial court to support its conclusion that the State proved the element of forcible compulsion were either incorrect, inaccurate, or nonexistent. Accordingly, the findings of fact as to this essential element of second degree rape are insufficient.

Insufficiency of findings of fact from a bench trial is subject to a harmless error analysis. Banks, 149 Wn.2d at 43. In this case, the error is not harmless, because the actual evidence of forcible compulsion presented by the State is not overwhelming.

The facts are similar to those of McKnight, supra., where the victim testified that the defendant pushed her onto a couch, pulled

off her clothes, and engaged in intercourse after the victim told the defendant to stop and that she was in pain. 54 Wn. App. at 522-23. On appeal, the court noted that: "Reasonable minds can differ as to whether the acts of slowly pushing [the victim] to a prone position and then removing her clothes in response to the victim's requests that the advances stop manifest a degree of force greater than that which is inherent in the act of intercourse." 54 Wn. App. at 528. But the court deferred to the jury's determination of guilt, and affirmed McKnight's conviction. 54 Wn. App. at 528.

Similarly here, reasonable minds could differ about whether Clay's acts of carrying C.S. to the bedroom, pushing her to the ground, pulling off her pants, and engaging in intercourse and oral sex despite her verbal protest were sufficient to establish forcible compulsion. (RP 64, 65-66, 67, 68-71) Because the finding entered in this case is erroneous, it is impossible to determine what facts the trial court could have or did rely upon to find this element, and impossible to determine whether those facts are sufficient to prove the element beyond a reasonable doubt.<sup>1</sup>

When the record contains no finding of fact as to an element

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<sup>1</sup> In its oral ruling, the trial court makes a conclusory statement that "forcible compulsion was used[,]" but does not specify the factual basis of its conclusion. (RP 142)

of the crime charged, the appropriate disposition is vacation of the conviction and remand. State v. Jones, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). Clay's conviction for second degree rape should be vacated, and his case remanded for a proper determination of whether the State proved the element of forcible compulsion.

B. Clay was improperly disenfranchised when he lost his right to vote under Washington's felon disenfranchisement law, which has been found to violate the Federal Voting Rights Act.

The United States Congress enacted the Voting Rights Act (VRA) of 1965 for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." South Carolina v. Katzenbach, 383 U.S. 301, 315, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). The VRA currently provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

42 U.S.C. § 1973(a).

Washington's felon disenfranchisement law, set forth in Article VI, § 3 of the Washington Constitution, provides: "All persons convicted of infamous crime unless restored to their civil rights ... are excluded from the elective franchise." An "infamous

crime” is defined as one that is “punishable by death in the state penitentiary or imprisonment in a state correctional facility.” RCW 29A.04.079.

In the recent Ninth Circuit case of Farrakhan v. Gregoire, \_\_\_ F.3d \_\_\_, 2010 Westlaw 10969 (9th Cir. 2010), the plaintiffs challenged Washington’s felon disenfranchisement law as violating the VRA. The plaintiffs, who had all lost their right to vote pursuant to Washington’s felon disenfranchisement law, argued that Washington’s law interacts with a racially discriminatory criminal justice system and, as a result, racial minorities are disproportionately denied the right to vote. 2010 Westlaw 10969 at 14.

The Ninth Circuit agreed, finding first that the expert reports submitted by the plaintiffs “provide compelling circumstantial evidence of discrimination in Washington’s criminal justice system.” 2010 Westlaw 10969 at 16. The Court then held:

Plaintiffs here established a violation of [the VRA] by adducing evidence sufficient to establish a vote denial claim—that there is discrimination in Washington’s criminal justice system on account of race, . . . and that such discrimination clearly hinder[s] the ability of racial minorities to participate effectively in the political process.

2010 Westlaw 10969 at 14 (internal quotation marks and citations

omitted). The Court concluded that Washington's felon disenfranchisement law violates the VRA. 2010 Westlaw 10969 at 23.

Similarly here, Clay, who is also a member of a racial minority group, has lost his right to vote pursuant to Washington's felon disenfranchisement law. (CP 5, 53, 55) But Washington's law has been struck down by the Ninth Circuit because it violates the Voting Rights Act. Accordingly, the State does not have any legal authority at this time to deprive Clay of his voting rights. This portion of the Judgment and Sentence should be stricken and the trial court should issue an order restoring Clay's voting rights.

#### **V. CONCLUSION**

The trial court's finding of fact pertaining to the essential element of forcible compulsion is not supported by substantial evidence. Because the findings are flawed and inaccurate, it is impossible to determine which facts the trial court relied upon to find that this element was proved, and it is also impossible to determine whether those facts are sufficient to prove the element beyond a reasonable doubt. Accordingly, Clay's second degree rape conviction should be vacated and the case remanded for reconsideration of this element and reentry of findings.

Additionally, because Clay's disenfranchisement violates the Voting Rights Act, the trial court should be directed to enter an order restoring his constitutionally guaranteed right to vote.

DATED: January 8, 2010

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**CERTIFICATE OF MAILING**

I certify that on 01/08/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Avery Pierre Clay, #820361, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

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