

FILED  
JAN 14 2011  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B1

NO. 29303-3-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**CURTIS ALAN PITTS,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## ASSIGNMENT OF ERROR

1. The trial court's Conclusions of Law 5, 6 and 7 are contrary to the existing case law in the State of Washington. (CP 30; Appendix "A").

## ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Is third degree rape an inferior degree offense to second degree rape under the facts and circumstances of Curtis Alan Pitts' case?

## STATEMENT OF CASE

An Information was filed on September 11, 2008 charging Mr. Pitts with second degree rape pursuant to RCW 9A.44.050(1)(b). The Information states:

On or about August 29, 2008, in the State of Washington, you engaged in sexual intercourse with a victim, L.C.H., who was **incapable of consent by being physically helpless or mentally incapacitated.**

(CP 1). (Emphasis supplied.)

Mr. Pitts waived his right to a jury trial on March 19, 2009. (CP 2).

An Amended Information was filed on March 23, 2009. It merely corrected the statutory citation to reflect the correct subparagraph. (CP 3).

Mr. Pitts contended that any sexual activity with L.C.H. was consensual.

The Hon. Michael E. Schwab found Mr. Pitts not guilty of second degree rape. He concluded that Mr. Pitts was guilty of third degree rape. (CP 5; CP 60).

Mr. Pitts filed a motion to dismiss the guilty verdict on the basis that the facts and circumstances presented to the Court do not constitute the inferior degree offense of third degree rape. (CP 7).

Findings of Fact and Conclusions of Law were entered on August 13, 2010. Judgment and Sentence was entered the same date. Mr. Pitts immediately filed a Notice of Appeal. (CP 31; CP 40).

#### **SUMMARY OF ARGUMENT**

When the trial court determined that Mr. Pitts was not guilty of second degree rape under RCW9A.44.050(1)(b), a necessary and reasonable inference is that the Court concluded that the statutory “reasonable belief” defense set forth in RCW9A.44.030(1) applied.

Application of the “reasonable belief” defense is consistent with Mr. Pitts claim of consensual sex. Consensual sex between adults is not a crime.

## ARGUMENT

RCW9A.44.050(1) states, in part:

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)...;

(b) When the victim is **incapable of consent by being physically helpless or mentally incapacitated... .**

(Emphasis supplied.)

The State elected to proceed on a theory that L.C.H. was incapable of consenting to sexual intercourse with Mr. Pitts.

The trial court ruled that the State failed to prove its case beyond a reasonable doubt as to second degree rape. That determination supports an inference that the Court applied the “reasonable belief” defense under RCW9A.44.030(1).

Nevertheless, the Court then determined that Mr. Pitts was guilty of the inferior degree offense of third degree rape.

RCW9A.44.060(1) defines the crime of third degree rape, in part, as follows:

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

(a) Where the victim **did not consent...**to sexual intercourse with the perpetrator **and such lack of consent was clearly expressed** by the victim's words or conduct... .

(Emphasis supplied.)

Mr. Pitts testified at trial. He denied raping L.C.H. (3/26/09 RP 6, ll. 8-9).

Mr. Pitts and L.C.H. were using considerable amounts of cocaine on August 28, 2008. Mr. Pitts helped L.C.H. to inject the cocaine because he was having problems doing a self injection. (RP 3/26/09 RP 22, ll. 4-11; RP 45, ll. 6-19; RP 50, l. 17 to RP 51, l. 7).

Mr. Pitts described his interactions with L.C.H. These included oral sex, masturbation, and L.C.H. attempting to ride Mr. Pitts. Mr. Pitts testified that he refused to perform anal sex on L.C.H. (3/26/09 RP 35, ll. 16-22; RP 37, ll. 11-21; RP 39, ll. 10-17; RP 51, ll. 13-17; RP 53, ll. 9-16; RP 55, ll. 14-17; RP 57, ll. 4-7; RP 58, ll. 15-20).

L.C.H. continued to work for Mr. Pitts after August 28, 2008. They used cocaine together on September 1, 2008. (3/26/09 RP 73, ll. 19-20).

Mr. Pitts fired L.C.H. on September 7, 2008. He testified that he fired him because L.C.H. continued to try and convince him to do drugs again and was also sexually pursuing him. (3/26/09 RP 85, ll. 1-22; RP 88, ll. 7-20; RP 89, ll. 4-17; RP 109, ll. 1-11; RP 113, ll. 9-22; RP 114, ll. 3-18).

On cross-examination Mr. Pitts admitted telling the police that he did try to have anal sex with L.C.H. However, he could not stay erect. (3/26/09 RP 128, ll. 5-10).

The trial court's Findings of Fact essentially incorporate the testimony of L.C.H. Mr. Pitts is not challenging the Findings of Fact. Rather, since the Court incorporated the trial testimony into the Findings of Fact and Conclusions of Law (CP 29), it is Mr. Pitts position that, to determine if third degree rape is an inferior degree offense under the facts and circumstances of his case, a balance must be struck between the findings and his testimony.

The trial court's not guilty verdict on the charge of second degree rape clearly indicates that either the State failed to present sufficient evidence of mental incapacity or physical helplessness and/or the "reasonable belief" defense applies. *See: State v. Bastinelli*, 81 Wn. 2d 947, 506 P. 2d 854 (1973); RCW9A.04.100.

The trial court relied upon *State v. Bucknell*, 144 Wn. App. 524, 530, 183 P. 3d 1078 (2008) in making its determination of guilt. The

*Bucknell* Court held: “Third degree rape is a lesser offense to the charged crime of second degree rape.”

The trial court also referenced RCW10.61.003 which states:

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.

*See also:* RCW10.61.010.

Washington has developed what is known as the *Workman* rule. It provides:

Under the Washington rule, a defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. *State v. Bowen*, 12 Wn. App. 604, 531 P. 2d 837 (1975) *See:* RCW10.61.006. *See also:* 2 C. Torcia, *Wharton's Criminal Procedure* § 375, 337 (12<sup>th</sup> ed. 1975). Second, the evidence in the case must support an inference that the lesser crime was committed. *State v. Snider*, 70 Wn. 2d 326, 422 P. 2d 816 (1967).

*State v. Workman*, 90 Wn. 2d 443, 447-48, 584 P. 2d 382 (1978).

The trial court's determination that Mr. Pitts is not guilty of second degree rape fulfills one of the elements of third degree rape (i.e., “circumstances not constituting rape in the ...second degree...”).

Mr. Pitts contended throughout trial that any sexual acts with L.C.H. were consensual. Consent is not a defense to second degree rape.

However, it is the defense to third degree rape. *See: Comment to WPIC 45.04* (Appendix “B”).

Once the trial court determined that Mr. Pitts was not guilty of second degree rape, consent as a defense came to the forefront. This is so because of RCW9A.44.030(1) which states that:

...any prosecution under chapter 9A.44 RCW in which consent is based solely upon the victim’s mental incapacity or upon being physically helpless, it is a defense that the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

Several cases have discussed the issue involved when considering a defendant’s claim of consensual sexual intercourse. The issue has generally been discussed in relation to the giving of, or failure to give, a jury instruction.

In *State v. Buzzell*, 148 Wn. App. 592, 604 (2009) a trial court’s refusal to give a defendant’s requested lesser third degree rape instruction was upheld. The Court ruled that:

...[a]ccording to the testimony, the sexual contact was either though forcible compulsion or it was consensual. We hold that the trial court properly refused to give the rape in the third degree instruction.

In the more recent case of *State v. Wright*, 152 Wn. App. 64, 71 (2009) the Court determined that:

Third degree rape is a not a lesser included offense of second degree rape; rather, it is an inferior degree offense. *State v. Jeremia*, 78 Wn. App. 746, 753-54, 899 P. 2d 16 (1995)... . **For the trial court to instruct on an inferior degree offense, the evidence must support an inference that only the lesser crime was committed.** *Jeremia*, 78 Wn. App. at 754-55. In other words, the evidence must permit a rational juror to find the defendant guilty of the lesser offense and acquit him or her of the greater. [Citation omitted.]

To prove second degree rape, the State must present evidence that the defendant had sexual intercourse with the victim by forcible compulsion. ...In comparison, third degree rape requires the State to prove that the defendant had intercourse with a person who was not the defendant's spouse, who did not consent to the act, and who clearly expressed lack of consent by words or conduct; it does not require forcible compulsion. [Citation omitted.] It specifically requires circumstances "not constituting rape in the ... second degree... ." RCW9A.44.060(1)(emphasis added).

**The trial court may not instruct on third degree rape as an inferior degree offense to second degree rape when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse was forced.** See: *State v. Charles*, 126 Wn. 2d 353, 355-56, 894 P. 2d 558 (1995). *Jeremia*, 78 Wn. App. at 756.

(Emphasis supplied).

The *Bucknell*, *Buzzell*, *Ieremia* and *Wright* cases all involve situations where there is a claim of forcible compulsion versus consensual sexual intercourse.

Mr. Pitts asserts the same analysis is applicable to the offense of second degree rape under RCW9A.44.050(1)(b). The issue is “ability to consent” as opposed to forcible compulsion. However, if consent is the defense and the trier-of-fact determines that the person was neither mentally incapacitated nor physically helpless, then the “reasonable belief” defense applies.

Mr. Pitts contends that *State v. Charles*, 126 Wn. 2d 353, 894 P. 2d 558 (1995) is the controlling authority in the State of Washington.

The Supreme Court in *Charles* disagreed with the conclusion reached by the Court of Appeals. It held at 355;

The Court of Appeals reasoned that the evidence here would support an inference that S.S. did not consent to intercourse with Charles and clearly expressed her lack of consent, but that Charles did not use forcible compulsion to overcome her resistance. ... We disagree.

*State v. Charles, supra 355.*

The trial court’s reasoning parallels the erroneous reasoning by the Court of Appeals in the *Charles* case. The trial court determined that L.C.H. was neither physically helpless nor mentally incapacitated. Therefore, any sexual act between L.C.H. and Mr. Pitts was consensual.

The facts and circumstances of Mr. Pitts case do not meet the legal prong of the *Workman* test.

### CONCLUSION

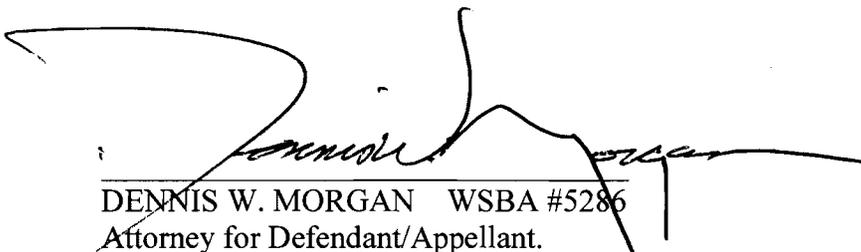
If third degree rape under RCW9A.44.060(1)(a) is not an inferior degree offense of second degree rape as defined by RCW9A.44.050(1)(b), as Mr. Pitts argues, then he must be found not guilty of third degree rape.

The *Charles* case is the controlling authority and all lower courts in the State of Washington are bound by it. *See: Fondren v. Klickitat County*, 79 Wn. App. 850, 856, 905 P. 2d 928 (1995).

Mr. Pitts respectfully requests that his conviction be reversed and the case dismissed.

DATED this 13<sup>TH</sup> day of January, 2011.

Respectfully submitted,



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# APPENDIX "A"

5. The victim did not consent to sexual intercourse with the Defendant.
6. The victim expressed his lack of consent by his words and conduct.
7. The Defendant is guilty of the crime of Rape in the Third Degree.

Incorporated herein by reference is the Court's oral decision.

## APPENDIX "B"

## WPIC 45.04

## CONSENT—DEFINITION

Consent means that at the time of the act of sexual [intercourse] [contact] there are actual words or conduct indicating freely given agreement to have sexual [intercourse] [contact].

## NOTE ON USE

Use this instruction, as applicable, with WPIC 42.02 (Rape—Third Degree—Elements) or WPIC 49.02 (Indecent Liberties—Elements). Use the bracketed phrase “intercourse” in rape cases and the bracketed phrase “contact” when the crime charged is indecent liberties.

For cases involving first or second degree rape, see the Comment below.

## COMMENT

RCW 9A.44.010(7).

In *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), the court discussed the role of consent under current rape laws. For a detailed discussion of this aspect of the *Camara* case, see the Introduction to Part IV (Defenses).

An instruction on consent is generally not appropriate in prosecutions for first or second degree rape. To prove first degree rape, or second degree rape under RCW 9A.44.050(1)(a), the State must prove that sexual intercourse occurred by forcible compulsion. In the overwhelming majority of cases, the focus should be on forcible compulsion rather than consent. Except in unusual cases, such as *Camara*, an instruction on consent will usually confuse the jurors about the burden of proof, without providing them meaningful guidance.

*[Current as of 2005 Update.]*