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Court of Appeals
Division III
State of Washington

NO. 321452

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

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

GUSTAVO DUARTE MARES

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I. Statement of Facts.

The following statement of facts consists of those relevant to the issues presented by Appellant. As Appellant's challenge regarding sufficiency of the evidence concerns only the element of expressed lack of consent, Respondent presents those facts relevant to that issue and the issue of extraneous juror influence.

The defendant, Gustavo Duarte Mares, and the victim, Claribell Parra Duarte, are cousins. [RP 49:9]. They did not know each other well and first met in 2009. [RP 49:12-14]. Ms. Duarte moved from North Carolina to Washington in January of 2013 and moved into her aunt and uncle's house, where Mr. Duarte lived. [RP 51:6-9]. Mr. Duarte and Ms. Duarte would socialize with other family and on a few occasions spent time together alone. [RP 54:20-55:6]. They went to a movie together once, went to a restaurant together once, and occasionally went to get fast food. [RP 57:1-11]. The two never did any activities that Mr. Duarte could have considered a date. [RP 57:15]. They would rarely spend time together at the house, just the two of them. [RP 57:19-23].

Ms. Duarte began feeling uncomfortable around Mr. Duarte when, one night, he had been at the house drinking and he approached Ms. Duarte and put his hand around her shoulder. [RP 58:16-21]. Ms. Duarte

nudged him away. [RP 58:24]. Another time, when Mr. Duarte and Ms. Duarte were in the car on the way to Walmart, Mr. Duarte kept trying to put his arm around Ms. Duarte's shoulder and trying to put his hand on her thigh. [RP 59:24-60:2]. Ms. Duarte kept telling him to stop. [RP 60:2]. Mr. Duarte asked her, "Why?" [RP 60:4]. She replied that they are cousins. [RP 60:7]. She told him that if he did not stop that she was going to take him back to the house. [RP 60:16]. This occurred in February of 2013. [RP 61:10-11].

One night, Ms. Duarte woke up to Mr. Duarte hovering over her bed. [RP 61:24]. When she woke up, his face was almost in her face. [RP 62:18]. Ms. Duarte asked him what he was doing and he replied that he missed her a lot and that he wanted to sleep with her in her room. [RP 63:7-9]. Ms. Duarte told him that he needed to get out. [RP 63:11]. Mr. Duarte kept trying to stay. [RP 64:7]. Mr. Duarte tried to come onto the bed. [RP 64:9]. Ms. Duarte moved away and told him that if he did not leave she was going to tell her aunt and uncle. [RP 64:9-11]. Mr. Duarte finally left the room. [RP 64:14]. This incident occurred approximately two weeks after the incident in the vehicle on the way to Walmart. [RP 62:4].

Mr. Duarte and Ms. Duarte later went to Mill Bay Casino together. [RP 64:16-21]. While there, the two had drinks. [RP 65:21]. Ms. Duarte

was feeling the effects of the alcohol so Mr. Duarte drove them home. [RP 67:9-14]. Ms. Duarte fell asleep in the car on the way home. [RP 68:4]. Mr. Duarte woke her up and she remembered walking into her room where she went back to sleep. [RP 68:10-25]. The next morning, Ms. Duarte looked in the mirror and noticed that she had hickies on her neck. [RP 70:4]. She had no idea how the hickies had gotten there. [RP 70:7]. Ms. Duarte asked Mr. Duarte about the hickies and he eventually admitted that he had given her the hickies. [RP 71:24]. He said he had done it because he wanted to. [RP 72:3]. Ms. Duarte told him that what he did was wrong and that it wasn't okay. [RP 72:7]. This incident also happened in February of 2013. [RP 72:19].

On March 15, 2013, Mr. Duarte and Ms. Duarte were in the living room watching television. [RP 12:4, 74:5]. Ms. Duarte asked Mr. Duarte to go to Walmart and buy her some alcohol. [RP 76:1]. Mr. Duarte brought back two bottles of Arbor Mist wine. [RP 76:3]. Ms. Duarte drank most of the two bottles by herself. [RP 76:17, 77:14]. Ms. Duarte then went to her bedroom and went to sleep. [RP 78:2].

Ms. Duarte then woke up and Mr. Duarte was on top of her. [RP 84:14]. Mr. Duarte was naked and Ms. Duarte's pants and underwear had been removed. [RP 85:11-16]. Mr. Duarte's penis was inside Ms. Duarte's vagina, engaged in sexual intercourse. [RP 86:4]. Ms. Duarte

immediately grabbed the rifle she keeps next to her bed, pulled the bolt back, and pointed it at Mr. Duarte. [RP 86:9-21]. Mr. Duarte then got off of Ms. Duarte. [RP 86:23]. Ms. Duarte told him to leave and he did. [RP 87:21-23].

Mr. Duarte testified at trial that he and Ms. Duarte did not have intercourse on the night for which he was charged with rape. [RP 158:6]. Mr. Duarte also testified that he and Ms. Duarte had consensual intercourse on two occasions after the incident date. [RP 166:2-6]. Ms. Duarte testified that she never had sex with the defendant after the incident date and the only time they had intercourse was the date of the incident. [RP 174:9-13].

During Ms. Duarte's testimony, she became emotional and the Court took a short break. [RP 79:13]. During the break, the State's victim/witness coordinator embraced Ms. Duarte while the jury was still seated in the courtroom. [RP 80:14]. Mr. Duarte's counsel made a motion for mistrial alleging the conduct was prejudicial to Mr. Duarte. [RP 80:16]. The trial court heard argument by both defense counsel and the State. [RP 80:10-81:9]. Defense counsel argued that many of the jurors were emotional and indeed crying throughout the testimony, thus it was prejudicial to Mr. Duarte when the victim/witness coordinator embraced Ms. Duarte in front of the jury. [RP 80:18]. The State responded,

I don't think the jurors even know who Ms. Fritz is and, as far as they know, it could be a friend or a family member of the victim, but I think a lot of times victims are actually allowed to have advocates present in Court, even like sometimes child victims have them sitting right up there, so I don't, I don't think it impacts her testimony or gives it any more credibility. We were already taking a break due to the high emotions, so I, I just don't see any prejudice.

[RP 81:1-9]. The court asked the victim/witness advocate to refrain from doing that sort of thing in the future. [RP 81:15]. The court then conducted an analysis as to whether there was any prejudice to the defendant:

I think, [the State] is correct, the jury doesn't really know who Ms. Fritz is, she could be a relative, she could be a friend, it doesn't really matter, it was simply a show of support and—by someone, an unknown individual, and, and for that matter, there's a brand new case out of the Washington Supreme Court that, that suggests kind of along these lines that it's okay to have—to allow the witness even to have a pet, in this—in that case it was a dog actually by their side to comfort them while they were testifying, and so it just seems to me that while I'll ask Ms. Fritz to refrain from that in the future, I, I don't think that it was prejudicial to the Defendant, and certainly not to the extent that it will require a mistrial.

[RP 81:18-82:9].

The court then addressed whether or not to give a curative instruction. The court considered whether it would make matters worse by offering a curative instruction rather than just letting it go. [RP 82:12].

The court believed it would draw more attention to the issue, but informed

defense counsel that the court would give a curative instruction if defense counsel wanted one. [RP 82:11-18]. Defense counsel took exception to the ruling on mistrial, but stated, “I would prefer not to mention it any further.” [RP 82:22]. The court continued on with the trial.

II. Procedural History.

Gustavo Duarte Mares was charged in Okanogan County Superior Court Cause Number 13-1-00115-1 with one count of Rape in the Third Degree, Lack of Consent. A jury trial was held on October 2, 2013 through October 4, 2013. Mr. Duarte was found guilty of Rape in the Third Degree, Lack of Consent.

ARGUMENT

I. There was sufficient evidence to support a conviction for Rape in the Third Degree under RCW 9A.44.060.

Appellant first challenges the sufficiency of the evidence to support a conviction for Rape in the Third Degree. Specifically, Appellant only challenges whether there was sufficient evidence to support a finding that the victim expressed lack of consent as required under RCW 9A.44.060.

A. Standard of Review.

The standard of review on a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable

to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v. McPherson*, 111 Wn.App. 747, 756, 46 P.3d 284 (Div. 3, 2002). When the sufficiency of evidence is challenged on appeal, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201; *McPherson*, 111 Wn.App. at 756. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201; *Mines*, 163 Wn.2d at 391; *McPherson*, 111 Wn.App. at 756. The reviewing court considers circumstantial evidence equally reliable as direct evidence. *McPherson*, 111 Wn.App. at 756. Finally, credibility determinations are for the trier of fact and are not subject to review. *Mines*, 163 Wn.2d at 391.

B. Sufficiency of the evidence must be evaluated under the current statute, not Appellant's proposed interpretation.

Under RCW 9A.44.060,

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... 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.

“Consent,” under RCW 9A.44.010(7), means that “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.”

The jury was instructed on the applicable law for the crime of Rape in the Third Degree as follows:

Instruction number 8: “To consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.”

Instruction number 9: “To convict the Defendant of the crime of rape in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt: One, that on or between March 15 and March 16 of 2013, the Defendant engaged in sexual intercourse with Claribell Parra Duarte; Two, that Claribell Parra Duarte was not married to the Defendant; Three, that Claribell Parra Duarte did not consent to sexual intercourse with the defendant and that such lack of consent was clearly expressed by words or conduct; and Four, that any of these acts occurred in the State of Washington.”

[RP 195:5-196:4].

Appellant’s claim of lack of sufficiency of the evidence is a veiled attempt to have this Court insert language into RCW 9A.44.060 that the Legislature has elected not to include. Appellant phrases the issue as “whether there is substantial evidence of the victim’s clear expression of lack of consent at the time of the act.” [Appellant’s Brief: 2]. However,

the “at the time of the act” language is not included in the statutory definition of Rape in the Third Degree. The definition under RCW 9A.44.060, merely requires that the lack of consent be “clearly expressed,” with no designation as to the proximity in time to the act of sexual intercourse. Appellant improperly requests this Court step into the shoes of the Legislature and add language to the statute in the guise of attacking sufficiency of the evidence, thus altering the elements of the crime of Rape in the Third Degree.

Leaving aside Appellant’s constitutional challenge to RCW 9A.44.060 for the time being, when determining sufficiency of the evidence, this Court may not add language to the statute that the Legislature has chosen not to include. When the court interprets a criminal statute, it gives it a literal and strict interpretation. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002). “[The court] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.* “[The court] assumes the legislature means exactly what it says.” *Id.*

Under the definition of “consent,” the individual must express “actual words or conduct...at the time of the act of sexual intercourse.” RCW 9A.44.010(7). Appellant thus argues that it seems logical to infer that lack of consent must also be expressed at the time of the act of sexual

intercourse. [Appellant's Brief: 9]. However, that argument directly contradicts principles of statutory construction. "It is well settled that where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed. *In re Bratz*, 101 Wash. App. 662, 675, 5 P.3d 759 (Div. 2, 2000) citing *Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998). Given that the Legislature specifically included the "at the time of sexual intercourse" language in the definition of "consent," it is presumed that it was intentionally left out of the definition of Rape in the Third Degree and thus presumed that the Legislature intended the lack of consent need not be expressed at the time of sexual intercourse.

Appellant's argument essentially asks this Court to impose a change in the law, not to review the actual sufficiency of the evidence. Appellant cannot urge this Court to read language into a statute that the Legislature chose not to include in the context of a sufficiency of evidence argument. The Court's authority to do so is limited to statutes that are vague and ambiguous, thus this issue is more thoroughly addressed in Respondent's reply to Appellant's vagueness challenge to RCW 9A.44.060. The proper standard of review is whether there was sufficient evidence under the actual wording of the statute, not under Appellant's proposed alteration of the statute.

C. There was sufficient evidence of expressed lack of consent by which the jury found Mr. Duarte guilty of Rape in the Third Degree.

The timing of a victim's expression of lack of consent is an issue for the jury. Because the Legislature expressly left a time frame out of RCW 9A.44.060, they left the issue whether there was lack of consent to a jury. The jury should determine, under all the circumstances of the case, including prior contacts between the defendant and victim, whether the victim had expressed a lack of consent. The jury has done so in this case and has found that Ms. Duarte expressed lack of consent.

Appellant cites to *State v. Jeremin*, 78 Wn.App. 746, 899 P.2d 16 (Div. 1, 1995) and *State v. Wright*, 152 Wn.App. 64, 214 P.3d 968 (Div. 2, 2009) for the proposition that Rape in the Third Degree is not a lesser included of Rape in the Second Degree. Respondent concedes that Rape in the Third Degree is not a lesser included of Rape in the Second Degree. However, neither *Jeremin* nor *Wright*, suggest that evidence supporting a charge of Rape in the Second Degree could not also support a charge of Rape in the Third Degree.

There is sufficient evidence to support a charge of Rape in the Second Degree as the victim was incapable of consent due to intoxication. However, that does not preclude a finding of Rape in the Third Degree by lack of consent. The inability to consent due to unconsciousness,

regardless of the reason, is conduct indicating lack of consent and is circumstantial evidence that the victim in fact is not consenting.

Furthermore, the issue in this case is not whether there was evidence to support a conviction for Rape in the Second Degree and it is irrelevant whether or not such evidence exists. Appellant was charged with Rape in the Third Degree and the sole issue regarding sufficiency of the evidence is whether there was sufficient evidence to support a conviction for Rape in the Third Degree. The fact that the State *could* have charged Rape in the Second Degree has no bearing on whether the State, in fact proved Rape in the Third Degree.

Here, under the actual wording of RCW 9A.44.060, the question is whether the defendant clearly expressed her lack of consent, not whether she expressed lack of consent at the time of the act of sexual intercourse. There is substantial evidence that such lack of consent was expressed.

For the month prior to the incident of sexual intercourse, Ms. Duarte had had expressed lack of consent to every sexual advance Mr. Duarte had attempted. When Mr. Duarte put his hand around Ms. Duarte's shoulder, she nudged him away. [RP 58:16-24]. When the two were riding in the car, Mr. Duarte kept trying to put his arm around Ms. Duarte's shoulder and trying to put his hand on her thigh. [RP 59:24-60:2]. Ms. Duarte kept telling him to stop and when asked why, she said

that they are cousins and she was going to take him home if he did not stop. [RP 60:2-16].

When Ms. Duarte woke up to Mr. Duarte leaning over her sleeping body, he replied that he missed her a lot and that he wanted to sleep with her in her room. [RP 63:7-9]. Ms. Duarte told him that he needed to get out. [RP 63:11]. When Mr. Duarte tried to come onto the bed, Ms. Duarte moved away and told him that if he did not leave she was going to tell her aunt and uncle. [RP 64:9-11]. When Ms. Duarte found out that Mr. Duarte had given her hickies while she was asleep, she got upset and told him that what he did was wrong and that it wasn't okay. [RP 72:7]. These are all incidents of sexual advances in the month leading up to the incident that Ms. Duarte clearly expressed her lack of consent to any sexual contact with him whatsoever.

Furthermore, the fact that the victim was unconscious at the time is evidence of conduct expressing lack of consent. While consent requires "actual words or conduct," lack of consent need only be "expressed." A victim's inability to consent is evidence of an expression that they are not affirmatively giving "actual words or conduct" of their agreement with sexual intercourse. "Conduct" need not be affirmative; it may be passive. As put in *Higgins*,

‘Clearly expressed’ is not defined by the statute, but ‘clearly’ ordinarily means something asserted or observed leaving no doubt or question and ‘expressed’ ordinarily means to make known an emotion or feeling. So, RCW 9A.44.060(1)(a) requires that the State show that (1) [the victim] did not freely agree to sexual intercourse with [the defendant], and (2) the lack of consent was made known to [the defendant] by words or conduct without doubt or question.

State v. Higgins, 168 Wn.App. 845, 854, 278 P.3d 693 (Div. 3, 2012).

Under this standard, passive non-responsiveness can be considered conduct making known that the victim is not consenting, especially when “consent” requires actual words or conduct at the time of intercourse. Thus the jury may consider a victim’s unconsciousness when determining whether lack of consent was clearly expressed.

This Court must view this evidence in the light most favorable to the State and all inferences that can reasonably be drawn from that evidence must be interpreted against the defendant. See *Salinas*, 119 Wn.2d at 201; *McPherson*, 111 Wn.App. at 756; *Mines*, 163 Wn.2d at 391. Under this standard there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt of the crime of Rape in the Third Degree. Appellant cannot claim that the multitude of times Ms. Duarte rejected his sexual advances have no relevance or basically- don’t count, because she did not reject his advances in this instance- she was unconscious.

II. RCW 9A.44.060 is not unconstitutionally vague or ambiguous and the Court may not add additional language to the statute.

Appellant next argues that RCW 9A.44.060 is unconstitutionally vague and ambiguous. However, a statute is not vague or ambiguous merely because the statute leaves the question to the jury to decide under all the facts of the case, including timing, whether lack of consent was clearly expressed.

A. RCW 9A.44.060 is not unconstitutionally vague or ambiguous.

The constitutionality of a statute is an issue of law, which is reviewed de novo. *State v. Watson*, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). A vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case. *Id.* at 6. A statute is only void for vagueness if the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Id.* A statute is ambiguous if it is susceptible to two or more reasonable interpretations. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Appellant argues that RCW 9A.44.060 is void for vagueness and ambiguity because it does not

indicate when lack of consent must be clearly expressed- whether it may be weeks before, at the time of the act, or after the act. [Appellant's Brief: 13].

Courts apply the void for vagueness doctrine with a strong presumption in favor of the statute's validity. *State v. Harrington*, 181 Wn.App. 805, 824, 333 P.3d 410 (Div. 3, 2014). One who challenges a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that it is unconstitutionally vague. *Id.* citing *Watson*, 160 Wn.2d at 11. When assessing whether a statute is void for vagueness, the context of the entire statute is evaluated, and the language of the statute is afforded a sensible, meaningful, and practical interpretation. *Id.* citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990).

A showing of uncertainty in terms is insufficient to prove a statute is constitutionally vague. Our State Supreme Court has previously held that "some measure of vagueness is inherent in the use of language." *Watson*, 160 Wn.2d at 7 citing *Haley v. Med. Disciplinary Bd.*, 117 Wn2d 720, 740, 818 P.2d 1062 (1991). Because of this, the Court does not require "impossible standards of specificity or absolute agreement. *Id.* Vagueness in the constitutional sense is not mere uncertainty. *Id.* Similarly, a statute is not ambiguous merely because different

interpretations are conceivable. *Tili*, 139 Wn.2d at 115. Thus, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his or her actions would be classified as prohibited conduct. *Watson*, 160 Wn.2d at 7.

“The fact that a statute requires interpretation does not make it void for vagueness.” *State v. Evans*, 177 Wn.2d 186, 205, 298 P.3d 724 (2013). “Few statutes could withstand a test so strict.” *Id.* The meaning of a term is allowed to depend on context. *Id.* As this Court succinctly put in *Harrington*, “If all words in a statute were defined there would be no end to the definitions because we would need to define the defining words and the definer’s defining words.” *Harrington*, 181 Wn.App. at 824. “If men of ordinary intelligence can understand a penal statute, notwithstanding some possible areas of disagreement, it is not wanting in certainty.” *Evans*, 177 Wn.2d at 205 citing *Jordan v. De George*, 341 U.S. 223, 231, 71 S.Ct. 703, 95 L.Ed. 886 (1951) (emphasis original). A statute is not unconstitutionally vague so long as “ordinary people need not guess blindly at [its] meaning.” *Id.* citing *Watson*, 160 Wash.2d at 11. The court does not invalidate a statute for vagueness merely because the legislature could have drafted the statute with more precision. *Harrington*, 181 Wn.App. at 825.

Earlier this year, the Court decided *Harrington*, a case involving a vagueness challenge to the phrase “extreme emotional distress” as used in RCW 9A.40.020. *State v. Harrington*, 181 Wn.App. 805 (Div. 3, 2014). This Court undertook a rather in-depth look at the vagueness doctrine and held the statute constitutional. *Id.* at 829. The *Harrington* decision also laid out an extensive list of cases involving vagueness challenges that were upheld as constitutional:

State v. Galbreath, 69 Wash.2d 664, 419 P.2d 800 (1966) (The words “indecent” and “obscene” in the indecent liberties statute, RCW 9.79.080(2), are not unconstitutionally vague.); *Matter of Welfare of Adams*, 24 Wash.App. 517, 601 P.2d 995 (1979) (The phrase “sexual or other intimate parts” found in RCW 9A.88.100 is not unconstitutionally vague.); *State v. Worrell*, 111 Wash.2d 537, 761 P.2d 56 (1988) (Terms “without legal authority” and “interferes substantially with his liberty,” found in kidnaping statute, RCW 9A.40.010, are not unconstitutionally vague.); *City of Seattle v. Huff*, 111 Wash.2d 923, 924, 767 P.2d 572 (1989) (An ordinance criminalizing telephone calls threatening the listener or his family with physical or property damage and made with “intent to harass, intimidate or torment” was not unconstitutionally overbroad or vague.); *State v. Bohannon*, 62 Wash.App. 462, 814 P.2d 694 (1991) (RCW 9.68A.011(3)(a), the sexual exploitation statute, which defines the mental element of that offense as exhibition “for the purpose of sexual stimulation of the viewer” is not void for vagueness.); *City of Tacoma v. Luvene*, 118

Wash.2d 826, 827 P.2d 1374 (1992) (Tacoma's drug loitering ordinance that declared it "unlawful for any person to loiter ... in a manner and under circumstances manifesting the purpose to engage in drug-related activity" is not unconstitutional.); *State v. Halstien*, 122 Wash.2d 109, 857 P.2d 270 (1993) (The term "sexual motivation" within the meaning of RCW 13.40.135, the juvenile sexual motivation statute, was not unconstitutionally vague.); *State v. Dyson*, 74 Wash.App. 237, 247, 872 P.2d 1115 (1994) (Provisions in RCW 9.61.230, a telephone harassment statute, dealing with "lewd, lascivious, profane, indecent, or obscene words or language" and dealing with calls made at an "extremely inconvenient hour" or made "repeatedly" were not unconstitutionally overbroad or vague.); *City of Seattle v. Eze*, 111 Wash.2d 22, 759 P.2d 366 (1988) (The phrase "loud and raucous" found in city ordinance was not unconstitutional.); *State v. Bradford*, 175 Wash.App. 912, 308 P.3d 736 (2013) (RCW 9A.46.010, the state stalking statute, which renders one guilty if he "repeatedly harasses" another person during a "course of conduct" is not unconstitutionally vague.).

Harrington, 181 Wn.App. at 830-832. The *Harrington* decision also included a list of statutes that have been declared unconstitutionally vague. Those cases were largely held unconstitutionally vague because of their use of the term "lawful" without more explanation of the term:

City of Bellevue v. Miller, 85 Wash.2d 539, 536 P.2d 603 (1975), *impliedly overruled in State v. Smith*, 111 Wash.2d 1, 14 n. 3, 759 P.2d 372 (1988) (The Supreme Court struck

as void for vagueness a Bellevue prowling statute that declared anyone guilty “who wanders or prowls in a place ... under circumstances which manifest an unlawful purpose.”); *City of Seattle v. Rice*, 93 Wash.2d 728, 612 P.2d 792 (1980) impliedly overruled in *State v. Smith*, 111 Wash.2d 1, 14 n. 3, 759 P.2d 372 (1988) (The term “without lawful order” in a city criminal trespass ordinance was unconstitutionally vague.); *State v. Hilt*, 99 Wash.2d 452, 662 P.2d 52 (1983) (Former RCW 9A.76.170, a State bail jumping statute that prohibited the “knowingly” failure “without lawful excuse to appear,” was unconstitutional because of the phrase “lawful excuse.”); *State v. Richmond*, 102 Wash.2d 242, 683 P.2d 1093 (1984) (Former RCW 26.20.030(1)(b), which criminalized willfully failing to support one's children “without lawful excuse,” was unconstitutionally vague.); *City of Bellevue v. Lorang*, 140 Wash.2d 19, 992 P.2d 496 (2000) (The phrase “without purpose of legitimate communication” in city telephone harassment ordinance unconstitutionally vague.); *State v. Williams*, 144 Wash.2d 197, 26 P.3d 890 (2001) (The phrase “mental health” in the former misdemeanor harassment statute, RCW 9A.46.020, which provided: “Without lawful authority, the person knowingly threatens ... [m]aliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety,” is unconstitutionally vague.).

Harrington, 181 Wn.App. at 829-830. However, many of those earlier cases are now inconsistent with the later case of *State v. Smith*, 111 Wn.2d

1, 6, 759 P.2d 372 (1988) which held that the concept of “lawfulness” is actually not inherently unconstitutionally vague.

RCW 9A.44.060 has already survived a challenge based on vagueness and ambiguity. See *Higgins*, 168 Wn.App. 845 (Div. 3, 2012). In *Higgins*, the defendant argued that the term “clearly expressed” as contained in RCW 9A.44.060 was unconstitutionally vague and ambiguous because it is unclear from whose perspective- the victim or the defendant. *Id.* at 853.

The defendant argued that what counts is not the victim’s protestations to stop, but his subjective perception of her response as expressed by her words and conduct. *Id.* The court rejected the defendant’s proposed interpretation that clearly expressed was from the defendant’s point of view as that interpretation would turn the legislative intent on its head:

For policy reasons it makes sense that the Legislature would focus on the issue of the victim’s consent, or rather lack thereof, rather than the perpetrator’s subjective assessment of the situation. To do otherwise would lead to the ludicrous result that a perpetrator could be exonerated simply by arguing that he did not know the victim’s expressed lack of consent was genuine or that he did not intend to have nonconsensual sexual intercourse with the victim.

Higgins, 168 Wn.App. at 855.

This Court held that RCW 9A.44.060 was not vague or ambiguous, and that the problem for the defendant was not that the jury could have been confused by the term “clearly expressed,” but that the jury simply did not believe him when he urged the jury to believe that the victim’s objections were not clearly expressed. *Id.* at 856-857.

Appellant essentially makes the same argument here, arguing that the statute isn’t clear at what point in time “clearly expressed” refers to. As in *Higgins*, Appellant’s problem is not that the statute is vague or ambiguous, but that the jury did not accept his argument at trial that the defendant had not clearly expressed lack of consent.

The Court’s primary duty in interpreting any statute is to discern and implement the intent of the Legislature. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point must always be the statute’s plain language and ordinary meaning. *Id.* Following the long line of cases cited in *Harrington*, RCW 9A.44.060 and the term “clearly expressed,” are not unconstitutionally vague or ambiguous as an ordinary person is on proper notice as to what conduct is prohibited by the statute.

B. This Court may not read RCW 9A.44.060’s term “clearly expressed” to include a temporal aspect that the Legislature chose not to include.

As part of Appellant’s challenge to sufficiency of the evidence, Appellant asks this Court to read into “clearly expressed” a temporal

requirement that lack of consent be expressed at the time of intercourse.

However, when the plain language is unambiguous- that is, when the statutory language admits of only one meaning- the legislative intent is apparent, and the court will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d at 450. The court may not add words or clauses to an unambiguous statute when the Legislature has chosen not to include that language. *Id.*

When the court interprets a criminal statute, it gives it a literal and strict interpretation. *Delgado*, 148 Wn.2d at 727. “[The court] cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.” *Id.* “[The court] assumes the legislature means exactly what it says.” *Id.* The court will not add or subtract from the clear language of a statute even if it believes the legislature intended something else but did not adequately express it. *State v. Castillo*, 144 Wn.App. 584, 591, 183 P.3d 355 (Div. 3, 2008). “It is well settled that where the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed. *Bratz*, 101 Wash. App. 662 citing *Millay*, 135 Wn.2d at 202.

In *Delgado*, the Court refused to read a comparability clause into the then active “two-strike” law as a comparability clause had been

included in the preceding “three-strike” law, but was left out of the “two-strike” law:

[T]he legislature knew how to include comparable offenses in the definition of a persistent offender. Yet, the legislature neither directly included a comparability clause, nor incorporated the definition of ‘most serious offense’ into the definition of two-strike persistent offenders directly following the three-strike definition. ... We therefore presume the absence of such language in the two-strike scheme was intentional.

Delgado, 148 Wn.2d at 728-729. See also *State v. Moses*, 145 Wn.2d 370, 37 P.3d 1216 (2002) (Indian Tribes not considered “another state or country” under double jeopardy statute as “Indian Tribes” are specifically listed in other statutes but not in the double jeopardy statute, thus the omission must be intentional.); *Bratz*, 101 Wash. App. 662 (The court would not read the term “displays” a deadly weapon in the first degree Robbery statute to include conduct that “threatens” use of a deadly weapon as doing so would negate the presumed distinction the Legislature intended in enacting the first and second degree Robbery statutes.)

The same applies in the current case. The Legislature knew that they could require lack of consent to be expressed at the time of intercourse as they had put that requirement in the consent definition. They elected not to do so.

The court will only add or subtract language if doing so is required to make the statute rational. *Castillo*, 144 Wn.App. at 591. However, in this case, adding language, which Appellant is essentially asking this Court to do, will have the effect of making the statute irrational, rather than rational. Requiring a victim to make an affirmative act or actual words at the exact moment the defendant attempts sexual intercourse in order for that intercourse to be considered rape would be a gross deviation from the current idea of rape and would undoubtedly contradict what the Legislature is intending to accomplish within the rape statutes. The overriding theme of the rape statutes is this-- It is the affirmative consent at the time of intercourse that makes what would otherwise be rape, be consensual sex. It is not an affirmative denial at the time of intercourse that makes what would otherwise be consensual sex, be rape.

If the Court were to rule that lack of consent requires actual affirmative conduct or words at the time of the act of sexual intercourse, we would be left with a category of intercourse where the victim neither affirmatively consented nor affirmatively showed lack of consent at the time of intercourse. Because the victim would not have consented under the "consent" definition, it would be considered non-consensual sex. However, because the victim did not, or could not, affirmatively give words or conduct at the time of intercourse indicating lack of consent, the

act could not be charged as a crime. We would thus have an entire category of acts that are essentially legal rape as it could not be prosecuted.

Similar to *Higgins*, Appellant's proposed interpretation would turn the Legislative intent on its head. A defendant would be able to make the argument that he did not know the victim was not consenting because she did not say no at the time he attempted intercourse, even if she had rejected his advances a few hours prior. Likewise, to put a statutory time frame on expressing lack of consent will have the practical effect of putting a time limit on an individual's refusal- essentially sending the message that "no means no... but only for a short period of time." This certainly is not the Legislature's intent.

Appellant asks this Court to apply the rule of lenity and in pari materia to the statute. However, the rule of lenity is applied in favor of the defendant only after considering both plain language and legislative history to resolve apparent ambiguities. *Evans*, 117 Wn.2d at 206. RCW 9A.44.060 is neither vague nor ambiguous. The Legislature specifically chose to include an "at the time of sexual intercourse" designation for "consent," but left that requirement out of RCW 9A.44.060. This Court must give weight and deference to the Legislature and must presume that this difference in language was intentional. Furthermore, *Higgins* gave

“clearly expressed” a broad definition and this Court should follow that rationale and do the same again.

III. Mr. Duarte was not prejudiced by any influence on the jury.

Appellant lastly argues that there was extraneous influence on the jury when the State’s victim/witness coordinator embraced Ms. Duarte during a break in testimony.

Appellant cites primarily to *United States v. Gaston-Britio*, 64 F.3d 11 (1st Cir., 1995) in support of this argument. As a threshold matter, *Gaston-Britio* is a US Court of Appeals, Division 1 case so its controlling value is limited, if not non-existent in this case.

Respondent does not assert by any means that communication with jurors during trial is appropriate. However, in order for this Court to vacate judgment in this case, the Court must find that any communication or influence on the jury was not harmless error. See *State v. Saraceno*, 23 Wn.App. 473, 475, 596 P.2d 297 (Div. 3, 1979); *State v. Murphy*, 44 Wn.App. 290, 296, 721 P.2d 30 (Div. 3, 1986). Any presumption of prejudice for communication with jurors may be overcome if the trial court determines such misconduct was harmless to the defendant. *Murphy*, 44 Wn.App. at 296; *Saraceno*, 23 Wn.App. at 475.

In this case, there was no communication with the jury. During a break in testimony, the victim/witness advocate, approached the victim on the stand and momentarily embraced her as she was very emotional. This was not a communication, either directly or indirectly, with the jurors such as would presume any prejudice.

However, even if this Court finds that this was a communication, or that the same principles apply, this was harmless error. The victim/witness coordinator merely gave Ms. Duarte a hug during a break in testimony, which the jury saw. Multiple cases have held that much more direct communications with jurors did not constitute error. See *Saraceno*, 23 Wn.App. 473 (Harmless error when Judge and Bailiff clarified definitions of words to jury without notifying counsel); *Murphy*, 44 Wn.App. 290 (Harmless error when juror, during break in deliberations, asked daughter whether she thought defendant was guilty and daughter replied she thought defendant was guilty); *State v. State v. Yonker*, 133 Wn.App. 627, 137 P.3d 888 (Div. 2, 2006) (No error where Bailiff took jury to lunch during break in deliberations when there was no evidence that the case was discussed during lunch).

Appellant's argument is more appropriately analyzed under the spectrum of courtroom conduct, rather than actual communication with the jury. The standard of review in these cases is abuse of discretion. *State v.*

Lord, 161 Wn.2d 276, 283, 165 P.3d 1251 (2007). It is undisputed that “the constitutional safeguards relating to the integrity of the criminal process... embrace the fundamental conception of a fair trial, and ... exclude influence or domination by either a hostile or friendly mob. *Id.* at 284. Inherent prejudice requires an unacceptable risk of impermissible factors. *Id.* citing *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340 (1986).

When courtroom conduct is challenged as inherently prejudicial to the defendant, the court must determine whether “an unacceptable risk is presented of impermissible factors coming into play to affect the jury. *Lord*, 161 Wn.2d at 286. Some small risk of inherent prejudice is not automatically fatal as long as inherent prejudice does not pose an unacceptable threat to the outcome. *Id.* In *Lord*, it was not abuse of discretion for the trial court to allow several spectators to wear button pictures of the victim during the first three days of a 31 day trial. *Id.* at 285. The court “must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant’s right to a fair jury trial by the presence of spectators who may have some type of associational identity with the victim of the crime.” *Id.* at 290 citing *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879, 889 (1982).

In *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997), the Court addressed two instances of spectator misconduct, and found both to be insufficient to vacate the defendant's conviction. First, multiple jurors saw a couple spectators glaring at witnesses. The Court rejected this as prejudicial as the extent to which someone "glares" as opposed to merely "stares" is largely subjective and without additional evidence, a new trial is not warranted. *Id.* at 408.

Second, and more significant, during testimony a spectator made a hand-gesture in the nature of pointing a gun at the witness. *Id.* The Court first agreed with the trial court that the conduct constituted spectator misconduct. *Id.* at 409. However, the pertinent question was whether it caused sufficient prejudice to warrant a new trial. In determining the effect of such misconduct, the court considers (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. *Id.* The misconduct was directed at a State's witness. It could be viewed as a threat against the witness, and because fear and retaliation were central themes of the State's case, the gesture arguably reinforced the impression that the defendant and his friends were the type of people that harm those who testify against them. *Id.*

However, there was no indication that the defendant directed the spectator to make the threat, or even that the spectator making the gesture was associated with him in any way. *Id.* The juror's assumption that the spectator was a friend of the defendant's is irrelevant. *Id.* citing *State v. Ng*, 110 Wash.2d 32, 43, 750 P.2d 632 (1988) (jurors thought process inures in the verdict and cannot be used to impeach verdict). The Court concluded that, while the misconduct was fairly serious, the misconduct was not so significant that the defendant will have been treated unfairly unless granted a new trial. *Id.* "The jury was instructed that it could consider only 'the testimony of the witnesses and the exhibits admitted into evidence.' We assume that the jury followed this instruction and therefore disregarded extraneous matters." *Id.*

The Court's rationale in *Bourgeois* is controlling and directly applicable to the case at hand. The jury in this case was instructed exactly the same that they are only to consider "the testimony that [they] have heard from witnesses and the exhibits that [the Judge had] admitted during the trial." [RP 188:4-10].

When brought to the attention of the court, the court allowed both defense counsel and the State to make argument as to any prejudice the victim/witness coordinator's actions may have caused. Both sides made

arguments and the court ruled that there was not sufficient prejudice to grant a mistrial:

I think, [the State] is correct, the jury doesn't really know who Ms. Fritz is, she could be a relative, she could be a friend, it doesn't really matter, it was simply a show of support and—by someone, an unknown individual, and, and for that matter, there's a brand new case out of the Washington Supreme Court that, that suggests kind of along these lines that it's okay to have—to allow the witness even to have a pet, in this—in that case it was a dog actually by their side to comfort them while they were testifying, and so it just seems to me that while I'll ask Ms. Fritz to refrain from that in the future, I, I don't think that it was prejudicial to the Defendant, and certainly not to the extent that it will require a mistrial.

[RP 81:18-82:9].

This was not abuse of discretion and any prejudice this may have had on Mr. Duarte is minimal, certainly not sufficient to vacate his judgment.

CONCLUSION

There was sufficient evidence to support a conviction for Rape in the Third Degree and this Court should not insert a temporal requirement into a statute that the Legislature elected not to include. Appellant has not met his burden to prove that RCW 9A.44.060 is vague or ambiguous; it merely leaves the question of whether lack of consent was expressed to the jury. While the victim/witness coordinator's conduct may be considered misconduct, it did not prejudice Mr. Duarte from receiving a fair trial.

Dated this 21st day of November, 2014

Respectfully Submitted:



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PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 21st day of November, 2014, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

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