

No. 363058-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON

Respondent,

vs.

COUGAR RAY HENDERSON,

Appellant.



AMENDED BRIEF OF APPELLANT

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INTRODUCTION

In September 2013, two young people, E.J., nearly 17, and Cougar Henderson, 18, arranged an evening of sexual play. They had enjoyed a previous like engagement. Thus, in her own terms, E.J. was “not naïve;” “I was expecting something similar.” (RP 127:25-128:5). Cougar and E.J. met at a Walla Walla park and traveled together in Cougar’s car to the shoulder of a country road where they stopped and began their sexual encounter. Their sex play involved aggressive kissing, touching, E.J.’s voluntary disrobing, and digital penetration of E.J.’s vagina by Cougar. All this activity was with E.J.’s consent and enjoyment. According to E.J., in the course of Cougar’s vaginal stimulation of her, he partially inserted his penis into her vagina. This penetration was without consent and E.J. pushed Cougar with her forearm to stop it. Cougar complied.

The foregoing account is denied by Cougar with respect to penetration. Plain from the record is an absence of any force or threat by Cougar to compel E.J. to submit to penile penetration; digital penetration was admittedly consensual.

Owing to delay by E.J. who made no report of her complaint against Cougar until April 2017, what might have been

an ordinary charge of third degree rape was imaginatively transformed into a prosecution of second degree rape by forcible compulsion. In its zeal to avoid the time bar of a third degree rape charge, the State conflated forcible compulsion with lack of consent. This categorically mistaken conceptual fusion, compounded with the blurring of the distinction between force needed to achieve penetration and force needed to compel submission, led to Cougar's conviction. In a light most favorable to the State, only unconsented penetration was proven, not forcible compulsion.

Cougar's conviction of second degree rape lacks sufficient evidence. The judgment below should be reversed and the charge dismissed. Alternatively, the decision below should be reversed and the case should remanded for a new trial based on an erroneous refusal to allow cross-examination of the complaining witness, receipt into evidence of an unauthenticated document, and instructional error.

**ASSIGNMENTS OF ERROR, ISSUES,
AND STANDARD OF REVIEW**

Assignments of Error

1. The trial court erred by entering a judgment of guilty of second degree rape by forcible compulsion against the defendant because that judgment was unsupported by sufficient evidence.
2. The trial court's refusal to allow cross-examination of the complaining witness concerning Graves' disease was erroneous and prejudicial.
3. By receiving an unauthenticated, hearsay medical record into evidence over the defendant's objection, the trial court erred and prejudiced the defendant.
4. By refusing to give the defendant's proposed jury instruction concerning forcible compulsion, the trial court erred and prejudiced the defendant.

Issues

1. Whether the trial court erred by entering a judgment of guilty of second degree rape by forcible compulsion against the defendant because that judgment was unsupported by sufficient evidence.

2. Whether the trial court's refusal to allow cross-examination of the complaining witness concerning Graves' disease was erroneous and prejudicial.

3. Whether by receiving an unauthenticated, hearsay medical record into evidence over the defendant's objection, the trial court erred and prejudiced the defendant.

4. Whether by refusing to give the defendant's proposed jury instruction concerning forcible compulsion, the trial court erred and prejudiced the defendant.

Standard of Review

Whether the verdict was supported by sufficient evidence is reviewed de novo. *State v. Rich*, 184 Wn. 2d 897, 903, 365 P.3d 746 (2016).

The scope of cross-examination allowed a defendant in a criminal trial, and the receipt into evidence of a document purporting to be a business record exception to the hearsay rule are reviewed under the manifest abuse of discretion standard. *State v. Darden*, 145 Wn. 2d 612, 619, 41 P.3d 1189 (2002); *State v. Devries*, 149 Wn. 2d 842, 847, 72 P.3d 748 (2003).

Whether the jury instructions state the applicable law is reviewed de novo. *State v. Stevens*, 158 Wn. 2d 304, 308, 143 P.3d 817 (2006).

STATEMENT OF THE CASE

Course of Proceedings

On January 26, 2018, Cougar Ray Henderson was charged by information with rape by forcible compulsion (second degree rape) and indecent liberties by forcible compulsion. (CP 4). The defense moved to dismiss both charges. (CP 6). The motion to dismiss the rape charge was denied without prejudice, and the indecent liberties charge was dismissed as time-barred. (RP 15:17-18).

The indecent liberties charge was refiled as a charge of indecent liberties by mental incapacity, and a new charge of indecent liberties by forcible compulsion was added. (CP 19). Separate trial of each count was ordered on the defendant's motion. (CP 24).

Trial of the rape charge resulted in a guilty verdict. (CP 60). After that trial, the other two counts were resolved by negotiated pleas to assault in the fourth degree with sexual

motivation and assault in the third degree. (CP 142). The defendant has appealed the judgment and sentence on the verdict of second degree rape. (CP 171).

Facts

In late September 2013, E.J. and Cougar Henderson arranged an evening of sexual adventure. (RP 127:14-128:2). E.J. and Cougar knew each other from high school and shared interests in drama. (RP 127:5-6). On the occasion of their encounter in September 2013, E.J. (born October 1, 1996) was nearly 17 years old, and Cougar (born June 8, 1995) had turned 18 about three months before. (RP 168:3; RP 232-10). Although no plan to have sexual intercourse was verbalized, both E.J. and Cougar knew their evening was set for sexual play. (RP 253:9-17; RP 252:25-253:2; RP 127:25-128:2). As stated by E.J.:

We had met up a previous night and had made out a little bit, fooled around, nothing too serious, and I wasn't naïve, I was expecting something similar. (RP 127:25-128:2).

Thus, the arrangement made by E.J. and Cougar was not for casual conversation or coffee, but for mutual sexual pleasure. Their plan was made deliberately, in advance, and soberly. (RP 127:15-17).

There is no suggestion that either Cougar or E.J. was influenced by alcohol or another substance on the evening in question.

In accordance with their plan, they drove their own cars to Howard Tietan Park in Walla Walla where they met.¹ (RP 127:15-17). E.J. then voluntarily got into Cougar's car. (RP 127:16-17; RP 234:22-25). Cougar drove them to a country road and parked on the shoulder. (RP 128:19-21; RP 235:12-17). At no time was any limitation, reservation, or objection expressed by E.J. to this trip.

Around 8:00 or 9:00 o'clock on the evening in question, while in Cougar's Toyota Camry, E.J. and Cougar began kissing and touching each other (RP 128:13-129:6). Initially, the two occupied the separate front seats, and both were fully clothed. (RP 129:2-18). Soon, the sexual engagement of E.J. and Cougar intensified.

The nature of Cougar's sexual approach was exciting to E.J.:

I remember there being a really intense aggressive nature about the entire moment, and the entire time in the car. I had never been with anyone who took such a confident or aggressive approach to that, and I remember being startled by that, the way he would grip

¹ The parties differ concerning the exact date of their encounter (September 21 or 24, 2013), but that difference is not material to this appeal. (RP 127:9-11; RP 233:16).

me and the way he would kiss me and bite me, and he left multiple hickeys and bruises all over my neck and my chest. (RP 130:8-14).

Early in their encounter, Cougar reached across E.J., pulled the seat lever, and caused her seat to recline. (RP 129:10-12; RP 157:5-7). This action opened the seat to a more oblique angle, but less than a fully horizontal position. (RP 157:21-158:5). Though E.J. later reported that she was shocked at the change in seat position, she expressed no shock at the time and was not interrupted in her sexual activity with Cougar (RP 157:12-16). E.J. expected to be underneath Cougar and was “okay with that at the moment.” (RP 130:2). In fact, the sex play of Cougar and E.J. was neither confined to a single position nor clothed. (RP 153:24-154:5; RP 148:24-152:25).

After her seat was put in a reclined position, the sexual play of Cougar and E.J. deepened:

He was on top of me and I was under, underneath him. He fingered me, stimulated me manually for awhile, all of which I didn't object to. (RP 129:22-25).

After the seat reclined and before repeated, digital, vaginal penetration, E.J. voluntarily took her clothes off. (RP 147:8-11; RP 157:5-7).

E.J. and Cougar were cooperatively involved in E.J.'s

disrobing:

Q. And you were affectionately feeling each other?

A. Yes.

Q. And that was consensual?

A. Yes.

Q. How long did that go on?

A. A few more minutes. Like a natural progression.

Q. Five minutes?

A. Yeah, five, 10, yeah.

Q. More? And at that point were you fully clothed?

A. Yeah. I think at the beginning we both were. And then during that time that we were touching each other and making out, and kissing, we disrobed partly.

(RP 147:1-11).

...

Q. You removed what items of your clothing?

A. My shorts were off. And I think my sweatshirt was off as well. And I don't recall if my underwear was still on and just moved to the side or if it was off completely.

Q. Okay. So how did your shorts come off?

A. There was a button and a zipper. Just --

Q. And did you unbutton and unzip your shorts?

A. I don't remember that. Probably a combination of both of us.

(RP 147:17-25).

...

Q. You didn't object to that?
A. No.
Q. And then did your shorts come down
your legs and off your feet so they were
completely off?
A. Yes.
Q. And did you move them down?
A. Probably at some point.
Q. You didn't object to that?
A. No.
(RP 148:1-9).

...

Q. I'll restate or go in a slightly different
direction. You removed your shorts?
A. Yes.
Q. And that was all voluntary?
A. Yes.
Q. No objection?
A. No.
(RP 148:24-:149:5).

...

Q. Okay. And did you take your sweatshirt
off in the usual way, like pulling it over
your head and pulling your arms out of
the sleeves?
A. Yes.
Q. Okay. You didn't object to doing that?
A. No.
Q. Now, you were wearing underpants?
A. Yes.
Q. Underneath the shorts?
A. Um hmm.
Q. And did they come off?
A. I don't remember that.
Q. They might have come off?
(RP 149:13-25).

...

- A. Yes.
Q. And would you have removed them?
A. If I, if they were removed it would have been a joint effort like everything else.
Q. Cooperative?
A. Yes.
Q. No objection from you?
A. No.
Q. Completely voluntary?
A. Yes.
Q. Would they have come off over your feet?
A. If they were then, yes.
Q. You are just a little vague about where the panties ended up; is that it?
A. They were either on me and shifted to the side or they were completely off. I don't remember that.
(RP 150:1-16).

Cougar did not remove his pants, but E.J. unbuttoned his shirt.
(RP 152:9;13-15). Before and after E.J. disrobed, she and Cougar continued sexual play while migrating between the passenger seat and the driver's seat. (RP 151:2-14; RP 153:24-154:8).

The sexual play of E.J. and Cougar progressed from touching and kissing to vaginal penetration. After E.J. disrobed, Cougar penetrated her vagina digitally. (RP 154:5-11). Penetration was not sudden as it was part of a process that had been progressing for 15-20 minutes after their encounter began (RP 154:17-22). Penetration was neither slight nor momentary, nor

unwelcome; rather, it involved repeated stimulation by Cougar's fingers to the pleasure of E.J.:

Q. And so his fingers were in your vagina manually stimulating you and that was quite voluntary on your part?

A. Yes.

Q. You were enjoying it?

A. Yes.

(RP 154:23-155:2).

During this period of, "a few minutes," Cougar was kneeling over E.J. in the passenger seat. (RP 155:17-23). Vaginal penetration, and related sexual touching were all consensual. (RP 155:24-25).

As Cougar knelt over E.J. manually stimulating her vagina he exposed his penis. (RP 155:9-12). He was not then lying on top of her. (RP 155:18-20). After exposing his penis, Cougar then pressed and rubbed it against E.J.'s vulva and inner thighs.

Penetration immediately followed:

Q. And then he inserted his penis in your vagina?

A. Yes. He started by advancing towards me with it. He had one hand on his penis and was pressing and rubbing it up against my vulva and my inner thighs. At that point I began to protest.

Q. Okay.

A. And then after that he began to insert it multiple times all the while, while I am protesting.

- Q. By protesting you are saying that he was inserting his penis and you were saying don't do that?
- A. Saying, "No. Stop. I don't want to do this."
(RP 160:5-15).

Cougar "never fully" inserted his penis. (RP 132:7-8). He did not ejaculate. (RP 131:11-12).

On the evening in question, E.J. was concerned about the lack of a condom.

- A. Saying, "No. Stop. I don't want to do this."
- Q. Okay. And were you concerned about that because he had no condom?
- A. That, and I wasn't comfortable with having sex that night. I had no intention of having sex. I was fine with foreplay, and touching, and kissing. I had no intention of having sex that night. And there was no ask for a consent or talk about protection at all.
- Q. And had you expressed these views to him before that night?
- A. Not prior. But with enough time before he touched me with his penis.
(RP 160:15-25).

After Cougar penetrated E.J. ("three to six times;" "multiple times") with his penis, she pushed him with her forearm and he stopped. (RP 132:6; RP 168:18-169:10).

Cougar used no physical force to cause E.J. to submit to penile penetration. In E.J.'s view, "his hand on his penis shoving it

into me, I [E.J.] would call that a physical force.” (RP 170:20-21).

Thus, this exchange on cross-examination:

- Q. He was on top of you?
A. Yes.
Q. And he had been on top of you for some time, correct?
A. Yes.
Q. And he had been digitally stimulating your vagina for some time?
A. Yes.
Q. And that was all consensual?
A. Yes.
Q. Apart from his being on top of you did he use any physical force to cause you to submit to sexual intercourse?
A. Like holding me down?
Q. Yeah, or hitting you?
A. No, he never hit me.
Q. Did he use any other physical force or any weapon of any kind?
A. Weapons, no. I would say that the physical presence of him leaning over me, one arm between me and the door, and the car seat behind me, and his hand on his penis shoving it into me, I would call that a physical force.
Q. Okay. But that was all that happened before this event, the sexual intercourse, in terms of physical force?
A. Yes.
(RP 170:2-24).

Cougar never threatened E.J.. (RP 170:25-171:18).

E.J. made no complaint to the authorities about any part of the September 2013 evening with Cougar until April 2017, when she was motivated by a Facebook post. (RP 141:14-17). E.J.’s

current version of the events of that evening is a result of her interpretation and ability “to look at it a little bit differently.” (RP 141:6-7; RP 142:5-7). The different look and interpretation is stark. Indeed, in a Facebook message to Cougar shortly after the evening in question she described the taking of her cell phone by her parents because she had ignored their call to her on that night. (RP 173:19-174:22). E.J. characterized the events on the evening in question as “worth” the loss of her cell phone. (RP 174:6-8; (RP 174:11-22).

The foregoing is an objective presentation of the State’s evidence concerning the charge of rape by forcible compulsion. That charge is supported by no physical evidence, no medical evidence, no documentary evidence, no contemporaneous account, and no testimonial evidence apart from E.J.’s own. Cougar Henderson denies the charge. The foregoing is submitted not to buttress the defendant’s conflicting account, but instead to expose the State’s position vis-à-vis material facts.

E.J. has Graves’ disease which was diagnosed in April 2014. (RP 165:14-20). Among other symptoms, she suffered from anxiety, depression, voices in her head and cognitive difficulties. (RP 165:21-24). These problems had been experienced from

around the time of the evening with Cougar. (RP 165:21-166:2).

The trial court refused to permit defense counsel to cross-examine E.J. concerning the effects of her Graves' disease and how it might explain difficulties she had attributed to the defendant's behavior. (RP 166:3-16).

ARGUMENT

I. Where, as here, the evidence is bereft of proof that the defendant applied force to compel the complainant to submit to sexual intercourse, his conviction cannot stand.

A. *The governing legal standard favors Cougar Henderson and is constitutional, specific, and severe.*

The challenge by the defendant, Cougar Henderson, to the sufficiency of the evidence that purports to support the verdict against him in this case is of constitutional magnitude. As succinctly stated by Justice Gordon McCloud: "The sufficiency of the evidence is a question of constitutional law that we review de novo." *State v. Rich*, 184 Wn. 2d 897, 903, 365 P.3d 746 (2016).

As this is a criminal case, the standard of proof is severe, reasonable doubt, and the burden is always on the State:

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S.

CONST. art. I, § 3. To determine if sufficient evidence supports a conviction, we consider ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.’ *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980) (some emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wash.2d 1, 16, 309 P.3d 318 (2013). A “‘modicum’ “ of evidence does not meet this standard. *Jackson*, 443 U.S. at 320, 99 S. Ct.2781.

All elements of a charge must be proven “*beyond*” reasonable doubt. Here, the proof utterly fails.

B. The State failed to prove beyond a reasonable doubt that the complaining witness was made to submit to sexual intercourse by forcible compulsion exerted by the defendant.

Crucial to the analytical framework required here is the difference between rape in the second degree and rape in the third degree. The difference is legislated, wide, and deep. Rape in the second degree is a class A felony. RCW 9A.44.050 (2). Rape in the third degree is a class C felony. RCW 9A.44.060 (2). Third degree rape may not be prosecuted more than three years after its commission. RCW 9A.04.080(1)(h). Second degree rape is

governed by various periods of limitation, depending on the circumstances, all of which are longer than three years.

RCW 9A.04.080(1)(b). Under the sentencing statute, second degree rape is a level XI offense, while third degree rape is a level V offense. RCW 9.94A.515. Assuming an offender score of zero, the standard sentencing range for rape in the second degree is 78-102 months, while that for rape in the third degree is 6-12 months. RCW 9.94A.510. These legislated differences are large and derived from the differing elements of the two crimes.

Comparing elements of rape in the second degree with rape in the third degree shows why the legislature categorized the two crimes in radically different ways in terms of felony classification, seriousness level, sentencing range, and limitations. For purposes of this discussion, rape in the third degree is simply sexual intercourse without consent. RCW 9A.44.060 (1)(a).² In contrast, rape in the second degree differs in terms of violence and egregiousness. For purposes of this analysis, rape in the second

² A threat of substantial unlawful harm to the victim's property rights will also prove rape in the third degree.

degree is sexual intercourse by forcible compulsion.

RCW 9A.44.050 (1)(a).³

Certain definitions are essential to a proper understanding of the difference between second and third degree rape. Forcible compulsion is defined by statute:

“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).

Also defined by statute are sexual intercourse and consent:

“Sexual intercourse” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes . . . RCW 9A.44.010(1) (a), (b).

“Consent” means 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. RCW 9A.44.010(7).

³ Rape in the second degree may be perpetrated other than by forcible compulsion, but these means are not germane to this discussion.

Case law has elaborated the definitions in ways that advance the analysis of this case.

Sexual intercourse may occur without penetration by a penis. Penetration of the vagina by an “object” constitutes sexual intercourse. RCW 9A.44.010(1)(b). A finger is an “object” within the meaning of the statute. *State v. Cain*, 28 Wn. App. 462, 465, 624 P.2d 732 (1981). Thus, on the night in question E.J. and Cougar engaged in consensual sexual intercourse.

Q. And so his fingers were in your vagina manually stimulating you and that was quite voluntary on your part?

A. Yes.

Q. You were enjoying it?

A. Yes.

(RP 154:23-155:2).

The change from digital to penile penetration of E.J. was punctuated by no application of physical force to compel submission. (RP 170:25-171:18).

As with the definition of “object,” “forcible compulsion” has been refined by case law. Judge Morgan articulated an essential distinction that is dispositive of this case:

Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact. *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). Force in the pure scientific sense

is what puts an object or body into motion, the result sometimes but not always being contact with another object or body. *See Webster's Third New International Dictionary* 887 (1986). Force in this scientific sense is involved in every act of sexual touching, and if forcible compulsion and force were synonymous, every such act would be criminal. It seems obvious, however, that the Legislature did not want to make every act of sexual touching criminal, for some such acts are beneficial, perhaps even necessary, to the maintenance of human society. Thus, the Legislature defined forcible compulsion so as to require more force than that needed to bring about sexual intercourse or sexual contact. It said:

“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). As paraphrased by Division One of our court, this means that forcible compulsion is not the force inherent in any act of sexual touching, but rather is that “used or threatened to overcome or prevent resistance by the female.” *State v. McKnight*, 54 Wn. App. at 527.

State v. Ritola, 63 Wn. App. 252, 254-55, 817 P.2d 1390 (1991).

Judge Coleman’s opinion, in *McKnight*, frames the inquiry needed to resolve this case.

In *State v. McKnight*, 54 Wn. App. 521, 774 P.2d 532

(1989) a divided court affirmed a second degree rape conviction based on forcible compulsion. Judge Coleman notes the distinction that controls here:

Where the degree of force exerted by the perpetrator is the distinguishing feature between second and third degree rape, to establish second degree rape, the evidence must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration. [footnote omitted] *State v. McKnight*, 54 Wn. App. at 527-528.

Here, there is no evidence that Cougar exerted force to overcome E.J.'s resistance to penetration.

In *McKnight*, 54 Wn. App. at 522-24, the victim is readily seen as forcibly compelled. Unlike this case, the 14-year old victim and the defendant were only "vaguely acquainted;" they had had no prior sexual encounter like Cougar and E.J. had had.

(RP 127:25-128:2). In *McKnight*, the parties' meeting on the night in question was a chance encounter; unlike Cougar and E.J., they had not arranged an evening of sexual adventure. (RP 127:14-128:2). In *McKnight* the defendant pushed the victim down. In this case, there was no pushing. E.J. expected to be underneath Cougar

and consented to that position. (RP 130:2; RP 170:2-10). In *McKnight*, the base of the victim's vagina was lacerated and the hymenal ring was torn and bleeding; here there is no evidence of physical injury to E.J.'s genitalia. In *McKnight*, the victim was disrobed by the defendant over her objection. Here, E.J. voluntarily took her clothes off. (RP 147-150). Nothing in the situation of E.J. on the night in question and nothing in her report of the details of her encounter with Cougar on the night in question shows a scintilla of evidence indicating physical force applied by Cougar to E.J. to cause her to submit to sexual intercourse. Cougar Henderson's conviction should be reversed, and the charge of second degree rape should be dismissed.

C. A conclusion supporting rape by forcible compulsion is based on speculation.

Two components of E.J.'s own testimony show that rape by forcible compulsion is pure conjecture. First, E.J. expressed satisfaction with the encounter between Cougar and herself on the evening in question. Owing to her sexual activities with Cougar on that night, she had failed to respond to a mobile phone call from her parents. (RP 174:6-7). As a disciplinary consequence of this failure, her parents took her phone. (RP 173:19-174:14). In E.J.'s

view, the pleasure of the evening was “worth” the disciplinary loss of her phone. (RP 174:6-14). E.J.’s nearly contemporaneous evaluation of her experience with Cougar belies her account of rape by forcible compulsion that was first made in April 2017. (RP 141:14-17). Not only is there no account of physical force to compel E.J. to submit to sexual intercourse, her own nearly contemporaneous account undercuts any claim of rape.

Second, E.J.’s own account of a claimed use of physical force is, in its own terms, conjectural. As noted, there is no claim of threat, express or implied. The claim of forcible compulsion is based on the application of physical force. Curiously, E.J.’s own description of the application of physical force is in the subjunctive mood.

A. . . . his hand on his penis shoving it into me, I would call that a physical force.

Q. Okay. But that was all that happened before this event, the sexual intercourse, in terms of physical force?

A. Yes.
(RP 170:20-24).

Literally, E.J. did not describe the events of the evening in question as they occurred, in fact. Rather, she simply said, at trial, how she “would” characterize those events. E.J. also conceded that her current version of the events of that evening is a result of her

interpretation and ability “to look at it a little bit differently.”

(RP 141:6-7; RP 142:5-7).

Where, as here, the complaining witness submits testimony based on her recent interpretation of events, any verdict based on that testimony is speculative. In her opinion reversing a second degree rape conviction, Judge Seinfeld noted a “[A] finding of forcible compulsion cannot be based solely on the victim’s subjective reaction to particular conduct.” *State v. Weisberg*, 65 Wn. App. 721, 725, 829 P.2d 252 (1992). The rule applied by Judge Seinfeld should apply here and Cougar Henderson’s conviction should be reversed.

D. Nothing in the correct analysis of this case, which requires reversal of the conviction, depends on resolving issues of conflicting evidence, credibility, or persuasiveness of the evidence.

The State is expected to argue that forcible compulsion is shown by E.J.’s push against Cougar with her forearm. The timing of the push and Cougar’s response negate this contention. E.J. “raised an elbow,” but only “*after* Cougar had inserted his penis.” (RP 168:19-24; emphasis supplied). E.J. testified she gave him “a good shove.” (RP 169:7). But, this “good shove” occurred after penetration. (RP 168:20-24). Moreover, the move by E.J. was met

with Cougar's immediate, unobjecting compliance. (RP 169:1-6). No evidence shows an application of force by Cougar to compel E.J. to submit to penetration. No evidence shows Cougar overcoming E.J.'s resistance to compel penetration. There is no need to weigh the evidence or evaluate credibility. The record is clear and shows no forcible compulsion.

As noted by Chief Judge Houghton in determining whether the evidence is sufficient to support a conviction, the reviewing court defers "to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." (citing *State v. Thomas*, 150 Wn. 2d 821, 874-75, 83 P.3d 970 (2004)). *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007). As shown by the foregoing discussion, nothing in Cougar Henderson's challenge to the sufficiency of the evidence supporting his conviction involves questions of conflicting testimony, credibility of witnesses, or the persuasiveness of the evidence. Rather, the challenge is based on the unadorned testimony of the complaining witness. The foregoing analysis is detached from any issue of conflicting testimony, credibility of witnesses, or persuasiveness of the evidence.

II. The trial court's refusal to allow cross-examination of the complaining witness concerning Graves' disease was erroneous and prejudicial to the defendant.

Fundamental and integral to a defendant's constitutional right to confront adverse witnesses is cross-examination. As summarized by Justice Sanders in *State v. Darden*, 145 Wn. 2d 612, 620, 41 P.3d 1189 (2002):

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. CONST. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *Hudlow*, 99 Wn. 2d at 15. In the constitutional sense, "confrontation" means more than mere physical confrontation. *Davis*, 415 U.S. at 315. The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn. 2d 441, 455-56, 957 P.2d 712 (1998). The purpose is to test the perception, memory, and credibility of witnesses. *State v. Parris*, 98 Wn. 2d 140, 144, 654 P.2d 77 (1982); *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Confrontation therefore helps assure the accuracy of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. *Id.* As such, the right to confront must be zealously guarded. *State v. Kilgore*, 107 Wn. App. 160, 184-85, 26 P.3d 308 (2001).

Moreover, where cross-examination “would serve to expose untrustworthiness or inaccuracy,” denial is error of constitutional first magnitude and prejudice need not be shown. *State v. Ryan*, 103 Wn. 2d 165, 175, 691 P.2d 197 (1984).

E.J., the complaining witness, has Graves’ disease. (RP 165:15). This malady was diagnosed in April 2014. (RP 165:18-120). Among other symptoms described by E.J. as related to the disease were anxiety, depression, voices in her head, and cognitive difficulties. (RP 165:21-23). These difficulties were ongoing around the time of the evening in question. (RP 165:21-166:2). The diagnosis, the symptoms, and the time E.J. was symptomatic were never disputed. Obviously, these difficulties affect the value of E.J.’s testimony against Cougar concerning the core of the State’s case. Where, as here, the trial court refused to allow cross-examination of E.J. on this point that directly affected the truth of her testimony, reversible error is established. The trial court’s refusal to allow cross-examination by the defendant of the complaining witness, the sole witness to the alleged crime, denied the defendant his right of confrontation.

In sustaining the State’s objection to the defendant’s cross-examination of E.J. concerning her “psychosomatic difficulties, her

physical problems and mental problems,” the trial court remarked on a “gap” between the problems associated with Graves’ disease and their effect on the credibility of E.J.’s testimony against Cougar. (RP 166:3-16). Yet, there was no dispute that E.J. suffered from Graves’ disease. There was no dispute that she had symptoms that could affect her credibility and her recollection of the events on the night in question. There was no dispute that the difficulties she described were ongoing around the time of her evening with Cougar. (RP 165:15; 21-24; RP 165:25-166:2). No more foundation is necessary. Cross-examination should have been allowed. The trial court should be reversed.

III. The trial court’s receipt into evidence of an unauthenticated, hearsay medical record was erroneous and prejudicial to the defendant.

Although Cougar Henderson never ejaculated during his encounter with E.J., she testified that she feared she was pregnant after the evening in question. (RP 131:11-12; RP 132:17-19). A pregnancy test was done at the Walla Walla Women’s Clinic. (RP 132:32-35). Over the defendant’s objection a one-page laboratory report was received in evidence as plaintiff’s exhibit 1 (RP 137:10-11).

The laboratory report was received in evidence under the business records exception to the hearsay rule. (RP 135:24-136:10). The business records exception to the hearsay rule is statutory. Among its qualifying prerequisites, the Uniform Business Records Act, RCW 5.45.020, allows receipt of a purported business record “if the custodian or other qualified witness testifies to its identity and the mode of its preparation.” That requirement was not met below. (RP 135:24-136:25).

As noted by Justice Chambers in *State v. Devries*, 149 Wn. 2d 842, 847, 72 P.3d 748 (2003):

The UBRA provides an exception for business records to the general hearsay rules. RCW 5.45.020. This court has interpreted the UBRA as applying to medical records and has set forth criteria to ensure the reliability of these records. *See State v. Ziegler*, 114 Wn. 2d 533, 538-40, 789 P.2d 79 (1990). While the UBRA is a statutory exception to hearsay rules, it does not create an exception for the foundational requirements of identification and authentication. 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.42, at 23 (4th ed. 1999). A trial court’s decision to admit records under the act is reviewed for manifest abuse of discretion. *Ziegler*, 114 Wn. 2d at 538.

Plaintiff’s exhibit 1 was never properly identified or authenticated.

At trial, defense counsel set forth the objection to the laboratory report, and the grounds therefor:

MR. De GRASSE: Your Honor, it's hearsay. There is no qualification for a business records exception here. This witness cannot provide the foundation necessary for an admission under the business records exception rule. She is not competent to testify as to the authenticity of this document. Moreover, it refers to a blood test that was ordered by Cynthia Rees [Reese]. We have no record indicating that order. You can't just walk into the Walla Walla Clinic and order a blood draw. It has to be prescribed. It has to be ordered by a medical professional. If that document is going to be admitted it has to be accompanied with other documents indicating the office visit, the history, the basis for the record. Standing alone it's not admissible. (RP: 136:22-137:9).

By receiving the laboratory report without proper identification and authentication the trial court manifestly abused its discretion.

State v. Devries, 149 Wn. 2d at 847.

By receiving the laboratory report in evidence the defendant's right to confront adverse witnesses was infringed. Undeniably, the laboratory report as hearsay could not be cross-examined. Its author was not there to authenticate it. The medical professional who ordered the laboratory test was not there to explain the grounds for that order. Indeed, the testimony of the

medical professional who ordered the report could have been crucial to the defense. The report might have been ordered not because E.J. was concerned that the defendant had impregnated her. E.J. might have been concerned that another person had impregnated her. The laboratory test could have been ordered as part of a medical protocol having to do with prescription medication. Pregnancy tests are frequently ordered before prescribing medication that could affect a fetus. Thus, the pregnancy test could well have been related to E.J.'s Graves' disease, or some other affliction, and have nothing to do with her evening with Cougar Henderson. By receiving the laboratory report, the trial court abused its discretion and prejudiced the defendant.

IV. The refusal of the trial court to give the defendant's proposed jury instruction concerning forcible compulsion was erroneous and prejudicial to the defendant.

As is set forth in the first part of this argument, the question of forcible compulsion is central to this case. As a matter of law, forcible compulsion involves force exerted against the victim to overcome her resistance and more force than that "normally required to achieve penetration." *State v. McKnight*, 54 Wn. App. at 527-528. To clarify the definition of forcible compulsion and its

application to this case, the defendant proposed this jury instruction:

Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact. (CP 27).

The trial court refused to give this proposed instruction, and the defendant registered his exception. (RP 289:16-290:10).

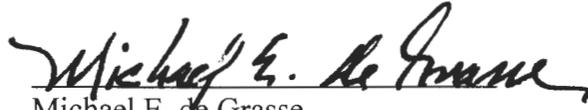
Without the legal support of the proposed instruction, the State was improperly empowered to blur the distinction between force needed to achieve penetration and force needed to compel submission. Thus, the defendant was deprived of his right to have the jury instructed on his theory of the case. This failure by the trial court is error and should be reversed. *State v. Williams*, 132 Wn. 2d 248, 259-260, 937 P.2d 1052 (1997).

CONCLUSION

The trial court judgment and sentence of the defendant should be reversed and the charge dismissed for lack of sufficient evidence. Alternatively, based on the argument set forth concerning cross-examination of the complaining witness, the receipt of hearsay as an exhibit and instructional error, the trial court should be reversed and the case remanded for a new trial.

Dated this 16TH day of May, 2019.

Respectfully submitted,


Michael E. de Grasse,
WSBA No. 5593
Counsel for Appellant

Appendix

REDACTED TRIAL TESTIMONY OF
COMPLAINING WITNESS (RP 126-180)

1 truancy docket at 8:30 tomorrow morning. Sometimes we have
2 people sitting in the jury box. So be sure to take your
3 notebook and secure it in the jury room. It will be left
4 undisturbed there.

5

6 [REDACTED], having been first duly sworn,
7 testified as follows:

8

9

DIRECT EXAMINATION

10 BY MR. HOLCE:

11 Q. Could you please state your name for the record and spell
12 your first and last names.

13 A. [REDACTED], [REDACTED], [REDACTED]

14 Q. What county do you live in currently?

15 A. Walla Walla.

16 Q. Have you ever testified before?

17 A. No.

18 Q. Are you nervous at all?

19 A. A little.

20 Q. Where did you grow up?

21 A. Walla Walla.

22 Q. And where did you attend high school?

23 A. Walla Walla High School.

24 Q. What years did you attend there?

25 A. 2010 to 2014.

1 Q. Did you participate in any extra-curricular activities?
2 A. I did a lot of music and drama.
3 Q. Do you know the defendant?
4 A. Yes.
5 Q. How do you know him?
6 A. Through school and plays.
7 Q. How long have you known him?
8 A. Oh, since probably right before high school.
9 Q. Okay. Going back to September 21, 2013, do you recall that
10 evening?
11 A. Yes.
12 Q. Were you with the defendant that evening?
13 A. Yes.
14 Q. How did you come to be with him?
15 A. We had texted that we were going to meet up and we both met
16 up at Howard Tietan Park in our own cars and we took off in
17 his car.
18 Q. How do you remember that specific date is what we are
19 talking about?
20 A. The next morning I had my senior photo shoot to take my
21 senior pictures and my make up artist had to cover a lot of
22 hickeys and bruises.
23 Q. So going back, so you met up with the defendant at Howard
24 Tietan Park. What were you expecting to happen that night?
25 A. We had met up a previous night and had made out a little

1 bit, fooled around, nothing too serious, and I wasn't
2 naive, I was expecting something similar.

3 Q. Do you remember what you were wearing?

4 A. I think it was a WA-HI T-shirt or sweatshirt, and then a
5 pair of shorts.

6 Q. Was it warm out, cool out; do you recall?

7 A. It was September, so -- and the sun had gone down, but,
8 yeah, warmish.

9 Q. Do you remember what he was wearing?

10 A. I think it he had just gotten off work and I remember a
11 white button-down with green and purple stripes on him,
12 like a pair of khakis.

13 Q. Do you remember what he was driving?

14 A. Like a late nineties white Toyota Camry.

15 Q. Does it have bench seating or bucket seating? What kind of
16 seating in the front?

17 A. Two individual front seats separated by a center console.

18 Q. So where did you go after he picked you up?

19 A. So we drove around for awhile and eventually we parked on
20 some country back road with enough of a shoulder to pull
21 off without going off into a ditch.

22 Q. And were you familiar with where you stopped?

23 A. No.

24 Q. Do you remember what time of day it was that you stopped?

25 A. It was night. The sun had gone down. Probably at least

1 8:00 or 9:00.

2 Q. So how did that evening begin once you pulled over?

3 A. Yeah, we were talking and hanging out and I remember him

4 showing me something on his phone and we were leaning over

5 that center console together and then we began kissing and

6 making out and touching each other.

7 Q. And did you consent to that conduct?

8 A. Yes. There wasn't a lack of consent but there wasn't any

9 request for it either.

10 Q. And where were you sitting when this was going on?

11 A. I was in the passenger seat.

12 Q. Front passenger?

13 A. Yes.

14 Q. Okay. And were you still fully clothed when that was going

15 on?

16 A. Yeah, in that first bit.

17 Q. And was he?

18 A. Yeah, I believe so.

19 Q. Okay. So what happened as that continued on?

20 A. Yeah, I remember in one fluid motion he reached over me and

21 depressed the lever and pushed the passenger seat all the

22 way back until we were in a fully reclined position. He

23 was on top of me and I was under, underneath him. He

24 fingered me, stimulated me manually for awhile, all of

25 which I didn't object to. We kissed, we touched some more.

1 Q. Were you expecting that kind of activity?

2 A. Yeah. I was okay with that at the moment. Later, he
3 withdrew his penis and attempted to penetrate me and
4 succeeded.

5 Q. Back up a little bit.

6 A. Sure.

7 Q. Were you startled at all when he reclined you?

8 A. Yeah. I remember there being a really intense aggressive
9 nature about the entire moment, and the entire time in the
10 car. I had never been with anyone who took such a
11 confident or aggressive approach to that, and I remember
12 being startled by that, the way he would grip me and the
13 way he would kiss me and bite me, and he left multiple
14 hickeys and bruises all over my neck and my chest.

15 Q. Okay. So after he had digitally fingered you, and you
16 mentioned that he withdrew his penis, did you consent to
17 further conduct?

18 A. No. In fact I opposed. I said, "No. Please, I don't want
19 to do this right now. Please, stop." Eventually he
20 started pressing the head of his penis up again my vulva
21 and my inner thighs and trying to penetrate me. The whole
22 time he was getting verbal warnings, and --

23 Q. Did you do anything physically?

24 A. Eventually I had to after he ended up penetrating me
25 multiple times with the head of his penis I had to put my

1 elbow up in front of me and then push him back into the
2 passenger seat -- or the driver's side seat.

3 Q. Did you at any point try to pull away from him?

4 A. Yeah, we were reclined in a car. There wasn't a lot of
5 space I could go but when he is coming at me I remember
6 trying to scoot back in the seat.

7 Q. Did he have a condom with him?

8 A. No.

9 Q. Did he offer a condom at any point?

10 A. No.

11 Q. So you said that you brought your elbow up?

12 THE COURT: The Court reporter has a hard time getting
13 head shakes and things so repeat your last question, Mr.
14 Holce?

15 MR. HOLCE:

16 Q. So after you put up your elbow what did he do?

17 A. I had to use physical force to push him into the front seat
18 of the car, the driver's side seat. And eventually he
19 withdrew and flopped over into the driver's side seat and
20 proceeded to masturbate for 15, 20 seconds.

21 Q. Did he ever ejaculate?

22 A. No.

23 Q. Did you try to get away? Did you try to leave the car?

24 A. No. He had his, I guess his left arm over me, and he was
25 blocking the door. He was physically on top of me.

1 Q. Did you consider leaving the car?

2 A. I don't think I really did. I didn't know where we were
3 and it was nighttime. I don't think I would have felt
4 comfortable with that.

5 Q. Do you recall how many times he inserted his penis?

6 A. A few; three to six times.

7 Q. How far did he insert his penis?

8 A. Only the first few inches, never fully.

9 Q. What happened after he stopped masturbating?

10 A. I asked to be taken back to my car, and he drove me back in
11 silence.

12 Q. Do you remember how long it took to get back to the park?

13 A. Probably 10 minutes.

14 Q. Did you have any concerns after that night?

15 A. I did.

16 Q. What were they?

17 A. A few weeks later, I don't remember how long it was, I was
18 late for my period, and as a 16 year-old, worst possible
19 thing to be getting pregnant, and I expressed this fear to
20 my mother and mentioned that I had missed my period and
21 that I had spotted. She jokingly said, "you're not
22 pregnant are you?" I ended up confiding to her and telling
23 her what happened and then I ended up having to go to the
24 Women's Clinic to take a pregnancy test.

25 Q. What was the result of that test?

1 A. It was negative.
2 Q. Did you receive documents indicating that it was negative?
3 A. I did.
4 Q. Did you tell anyone about what happened that night prior to
5 the pregnancy test and talking to your mother?
6 A. I did. I ended up telling my mother and I told I think
7 some of my closest friends at the time.
8 Q. Okay.
9 MR. HOLCE: May I approach?
10 THE COURT: Yes.
11 CLERK: Plaintiff's identification 1 and 2 are marked.
12 MR. DeGRASSE: Your Honor, I think we should be heard
13 on this outside the presence of the jury.
14 THE COURT: Well, has it been offered?
15 MR. HOLCE: Not yet.
16 THE COURT: Well, let's get it identified first:
17 MR. HOLCE:
18 Q. Did you receive a copy of your medical record from the
19 Clinic?
20 A. I did.
21 Q. Do you recall what it, did it confirm that you were not
22 pregnant?
23 A. Yes.
24 Q. Do you recall what the date was that you had that blood
25 test taken?

1 A. It was in October. Maybe the 20-something, October 23rd.
2 Q. Would it be helpful to review --- did you provide a copy of
3 that document to law enforcement?
4 A. Yes.
5 Q. And do you still have a copy of that document?
6 A. I don't. I turned it over to --
7 Q. Would it refresh your recollection if you looked at this?
8 MR. HOLCE: If I may approach.
9 THE COURT: Yes.
10 MR. HOLCE:
11 Q. To just look at the date?
12 A. 28th, yep. That's correct. That's what I gave them.
13 Q. Okay. Did those documents reflect anything else other than
14 just the date and --
15 A. Nope, just that I got a blood draw to determine pregnancy.
16 Q. So showing you what's been identified as number 1, do you
17 recognize this?
18 A. Yes.
19 Q. Is it a fair and accurate representation of the document?
20 A. Yes.
21 Q. Has it been modified in any way?
22 A. There is a stamp at the bottom and the top; other than
23 that, no.
24 MR. HOLCE: The State offers number 1.
25 THE COURT: Do you want to be heard, Mr. deGrasse?

1 MR. DeGRASSE: Yes.

2 THE COURT: I am going to excuse the jury. Again, I
3 want to caution you not to discuss the case among
4 yourselves or allow anybody to do it. So you may step out
5 of the courtroom.

6

7 (The following was heard out
8 of the presence of the jury:)

9

10 THE COURT: All right. Counsel, you want to be heard.

11 MR. DeGRASSE: I did, Your Honor. With respect to
12 what's been marked for identification as State's
13 identification number 1, which is a single page,
14 purportedly from the Women's Clinic of Walla Walla, we
15 object to the admission of that document. The document is
16 hearsay. The document has not been authenticated and the
17 document is incomplete. We have been supplied with no
18 other records that would be part and parcel to that
19 document. As I understand it that document is simply the
20 report of a lab result. It does not mention pregnancy. It
21 is not does not explain -- there is no basis for admitting
22 it into evidence.

23 THE COURT: All right.

24 MR. HOLCE: So for authentication and foundation, Your
25 Honor, court rule requires that it be in record form, which

1 it is, that it be an act or condition or event, and it is
2 an event, be made in the regular course of business, which
3 it is a medical document made in the regular course of
4 business, and it's referring to the business document
5 exception, be made at or near the time of the fact,
6 condition or event. [REDACTED] has corroborated that this
7 was made around the time of the event it was created. And
8 the Court must be satisfied that the source or sources of
9 information, method and time of preparation justify
10 admitting the evidence.

11 So the State's position is that this is a document that
12 was created around the time and it is Ms. Janis' medical
13 record, doesn't purport to have any other information other
14 than what she has already testified to.

15 THE COURT: Well, I guess that's my question is what
16 relevance does it have? She used it to refresh her
17 recollection and that was perfectly fine. What other
18 relevance is there?

19 MR. HOLCE: Merely best evidence. Also, that it
20 reflects the fact that she did go to the Women's Clinic.

21 THE COURT: All right. Well, yeah, go ahead.

22 MR. DeGRASSE: Your Honor, it's hearsay. There is no
23 qualification for a business records exception here. This
24 witness cannot provide the foundation necessary for an
25 admission under the business records exception rule. She

1 is not competent to testify as to the authenticity of this
2 document. Moreover, it refers to a blood test that was
3 ordered by Cynthia Rees. We have no record indicating that
4 order. You can't just walk into the Walla Walla Clinic and
5 order a blood draw. It has to be prescribed. It has to be
6 ordered by a medical professional. If that document is
7 going to be admitted it has to be accompanied with other
8 documents indicating the office visit, the history, the
9 basis for the record. Standing alone it's not admissible.

10 THE COURT: Your objections are noted and overruled. 1
11 is admitted.

12 MR. HOLCE: I haven't offered it yet.

13 THE COURT: Go ahead and offer it when the jury is
14 back.

15 MR. HOLCE: Thank you.

16

17 (The following was heard in
18 the presence of the jury:)

19

20 THE COURT: Please be seated. The Court and the
21 parties, I'm sure, appreciate your patience. Sometimes we
22 will have these little meetings outside the presence of the
23 jury and overall I have found that they actually tend to
24 make the rest of the trial smoother and more
25 understandable. So I appreciate your patience, and let's

1 continue.

2 MR. HOLCE: May I approach?

3 THE COURT: Yes.

4 MR. HOLCE: The State offers 1.

5 THE COURT: Any objection? Mr. deGrasse? Excuse me,
6 we have already taken care of that. 1 is admitted.

7 MR. HOLCE: Thank you.

8 Q. Where was this pregnancy test conducted?

9 A. At the Women's Clinic of Walla Walla.

10 Q. Okay. Did you see the defendant after the pregnancy test?

11 A. Well, I saw him eventually, but I --

12 Q. Did you contact him?

13 A. I messaged him about it and I told him that was something I
14 was concerned with and the result was negative.

15 Q. How did he respond?

16 A. Not well. Not in a mature way. A lot of bullying, a lot
17 of denying. And I realize that I, at the time, probably
18 wasn't rational going to those extremes, but that was
19 something that I was worried about and I handled it in a
20 mature way and was willing to let that stand. But after
21 that --

22 Q. Do you still have those text messages?

23 A. No.

24 Q. What happened to them?

25 A. I've switched phones and carriers since then.

1 Q. Were you in any plays that fall?

2 A. That fall, yes.

3 Q. What play were you in?

4 A. It was a show called Flowers for Algernon at WA-HI.

5 Q. Did you ever see the defendant at any of the rehearsals?

6 A. Yeah, he would come and stand in the auditorium, and be

7 there. He had graduated already. There was no reason for

8 him to be there; making lots of eye contact, showing up at

9 events that I was at, just making me feel uncomfortable.

10 Q. At any point do you recall him not showing up? Do you

11 recall him not showing up or stopping his appearances at

12 rehearsals?

13 A. Only after I talked with our drama director and his wife at

14 the time. They approached me about how I was feeling

15 because I wasn't acting myself. I was just nervous and

16 anxious all the time and I ended up telling them what

17 happened and they had him removed. They told him that he

18 couldn't come back.

19 Q. How were your interactions with your friends around that

20 time?

21 A. It wasn't great. I had probably like one friend who

22 believed me in that whole time, and a lot of my other

23 friends also floated in the same circle with the defendant,

24 and so he did a lot of damage control per se.

25 Q. What do you mean?

1 A. He would talk to them and deny ever doing anything with me
2 and deny having sex with me and deny the events of that
3 evening and really do anything to break my bonds with my
4 friends. Called me a liar and kind of turned all my
5 friends against me, and --

6 Q. Did you have any physical changes at that time?

7 A. Yeah. I was really depressed, and I ended up -- I mean I
8 gained a lot of weight. And I ended up losing it, but
9 yeah, I health-wise too, I was mentally and physically -- I
10 was not well.

11 Q. Could you describe the play Flowers for Algernon? What was
12 the floor plan like?

13 A. Yeah. So we performed on the round so on the WA-HI stage
14 we had risers set up on the stage to form a rectangle
15 around the players which performed in the center to all
16 sides.

17 Q. And did the defendant attend any of the shows?

18 A. He did. Sat right in the front row.

19 Q. Did you see him that night?

20 A. I did.

21 Q. What did he do?

22 A. Just, again, making me feel very uncomfortable; a lot of
23 prolonged eye contact. And after the show I remember
24 running into him and not behaving very well because I was
25 so furious that he was there and he obviously didn't

1 respect the wishes of the director and his wife and myself
2 to not show up at those events.

3 Q. Did you tell the police that immediately after this night?
4 A. Not immediately.

5 Q. And why not?
6 A. At the time it took me a lot to be able to interpret and
7 unpack it for what it really was. There was a lot of time
8 when I discussed the event but used words like, "oh, you
9 know it wasn't consensual" or, "oh, that was messy" or "I
10 didn't realize what it was" until I was able to be able to
11 look back on it from a better place.

12 Q. Are you in a better place now?
13 A. I would say so, yeah.

14 Q. When did you come forward to make a statement?
15 A. It was April of 2017.

16 Q. What led you to come forward ultimately?
17 A. There was a Facebook post.

18 Q. So, what I mean is, do you have some kind of vendetta
19 against the defendant, or do you -- what's your motivation?
20 A. No. I wouldn't say that I have a vendetta. I would say my
21 feelings are justified, but I think this is coming from a
22 place more of an accountability rather than vengeance or
23 unnecessary action.

24 Q. Has the passage of time affected your memory of that night?
25 A. Not really. Little details around the event, but the

1 actual, in the car, it's very clear to me. I haven't lost
2 much of that at all.

3 Q. And you were able to talk about this fairly matter of
4 factually; why is that?

5 A. I think it has to do with the amount of time that has
6 passed and the amount that I have grown and be able to look
7 at it a little bit differently.

8 Q. Do you want to see the defendant punished?

9 A. I think this comes from a place of accountability. I think
10 you need to pay for what you do to people.

11 MR. HOLCE: I have nothing further. Thank you.

12 THE COURT: All right. Mr. deGrasse, do you have any
13 cross-examination?

14 MR. DeGRASSE: I do, Your Honor. But I understood that
15 there might be an interruption here because of another
16 witness that the State wanted to put on and get off because
17 it was economical in terms of time?

18 THE COURT: I don't know about that. Mr. Holce?

19 MR. HOLCE: Christine Janis, yes, Your Honor. I
20 believe her schedule was free after 3:00, but I believe she
21 might have other scheduling issues tomorrow morning if we
22 can resolve her testimony.

23 THE COURT: All right. I take it there is no objection
24 to that?

25 MR. DeGRASSE: No. We can interrupt and do Christine

1 Janis and resume tomorrow or whatever.

2 THE COURT: Again, I caution counsel that I have a 4:00
3 hearing today.

4 Ma'am, you can step down, subject to recall.

5 MR. HOLCE: Your Honor? Ms. Rabidue, she has confirmed
6 that Ms. Christine Janis has freed her schedule.

7 THE COURT: All right. You may resume the stand you
8 are still under oath.

9 (Ms. ██████████ resumed the
10 stand and continued testifying
11 as follows:)

12
13 CROSS-EXAMINATION

14 BY MR. DeGRASSE:

15 Q. Ms. ████████, I want to talk about this night in September of
16 2013, when you had the encounter with Cougar Henderson in
17 the car. And it's helpful to the reporter if you verbally
18 express your answer, even though I didn't ask you a
19 question, and not the nods and head shakes, okay?

20 A. Okay.

21 Q. So I want mainly to go back and cover this in some detail
22 because I think it's important to know what happened and
23 how it happened, and when it happened. Do you understand?

24 A. Yes.

25 Q. Okay. Did you say in your direct examination that you met

1 Cougar Henderson at Howard Tietan Park that evening?
2 A. Are you asking if that was included in my original
3 statement?
4 Q. Well, yes, I thought you met him in the evening at Howard
5 Tietan Park?
6 A. I'm not sure if that was in my original statement or not.
7 But that's what I say now.
8 Q. Now. Okay. You might have said something different in
9 your original statement?
10 A. I don't believe so.
11 Q. Okay. And what time was the meeting?
12 A. Some time after the sun had gone down. So in September
13 maybe 8:00 or 9:00.
14 Q. And the car that Cougar was driving was a Toyota Camry?
15 A. Yes.
16 Q. Late 1990's or early 2000's?
17 A. Yes.
18 Q. And so at Howard Tietan Park you got in his car and drove
19 off?
20 A. Yes.
21 Q. You went to someplace in the country and parked?
22 A. Yes.
23 Q. And once you parked, what then happened immediately after
24 you stopped the car?
25 A. After he stopped the car we talked for awhile, and I

1 distinctly remember him showing me something on his phone
2 and leaning over to me over that center console and we were
3 leaning in together and then he proceeded to kiss me.
4 Q. And how long were you parked before the kissing started?
5 A. Probably a few minutes.
6 Q. And I think you said you were wearing a Walla Walla High
7 School sweatshirt?
8 A. Um hmm. Yes.
9 Q. And you were wearing shorts?
10 A. Yes.
11 Q. What kind of shorts?
12 A. I think they were khaki shorts.
13 Q. How long were they, if you --
14 A. Probably mid-thigh.
15 Q. Were you wearing any shoes?
16 A. Yes.
17 Q. What kind of shoes?
18 A. I don't remember.
19 Q. Cougar was wearing a button-down collar, long-sleeved
20 shirt?
21 A. I think so, yes.
22 Q. And he was wearing khaki pants?
23 A. I believe so.
24 Q. Did he have a belt holding up his pants?
25 A. I don't remember. I think so. Yeah.

1 Q. And the, I think the car you said had individual seats in
2 front?
3 A. Yes.
4 Q. Not a flat bench?
5 A. No.
6 Q. And there was a console between the individual seats?
7 A. Yes.
8 Q. And was there an emergency break lever sticking up there in
9 the middle of the console?
10 A. It doesn't stick terribly up, it lays to the side.
11 Q. And was there a gear shift lever sticking up in the middle
12 of the console?
13 A. I think so, yeah.
14 Q. So the kissing began after you were there for about 10
15 minutes and that was something you consented to?
16 A. Yes.
17 Q. You expected?
18 A. Yeah.
19 Q. Wanted to do?
20 A. Yeah.
21 Q. And then apparently Cougar placed his hands on your body?
22 A. Yes.
23 Q. And you placed your hands on his body?
24 A. Yes.
25 Q. And you were affectionately feeling each other?

1 A. Yes.

2 Q. And that was consensual?

3 A. Yes.

4 Q. How long did that go on?

5 A. A few more minutes. Like a natural progression.

6 Q. Five minutes?

7 A. Yeah, five, 10, yeah.

8 Q. More? And at that point were you fully clothed?

9 A. Yeah. I think at the beginning we both were. And then

10 during that time that we were touching each other and

11 making out, and kissing, we disrobed partly.

12 Q. Okay. Well let's talk about partly and your clothing.

13 A. Okay.

14 Q. After kissing and touching each other on top of the

15 clothing?

16 A. Um hmm.

17 Q. You removed what items of your clothing?

18 A. My shorts were off. And I think my sweatshirt was off as

19 well. And I don't recall if my underwear was still on and

20 just moved to the side or if it was off completely.

21 Q. Okay. So how did your shorts come off?

22 A. There was a button and a zipper. Just --

23 Q. And did you unbutton and unzip your shorts?

24 A. I don't remember that. Probably a combination of both of

25 us.

1 Q. You didn't object to that?
2 A. No.
3 Q. And then did your shorts come down your legs and off your
4 feet so they were completely off?
5 A. Yes.
6 Q. And did you move them down?
7 A. Probably at some point.
8 Q. You didn't object to that?
9 A. No.
10 Q. And you don't recall whether you were barefoot or whether
11 you had on shoes or sandals?
12 A. I obviously had shoes.
13 Q. Shoes?
14 A. Like some footwear. But I don't remember --
15 Q. I mean --
16 A. -- if I had to remove them or not to get my shorts off, if
17 that was --
18 Q. Okay. So there was some kind of shoes but they were
19 nothing that you recall?
20 THE COURT: You have to wait until the question is
21 done.
22 Counsel, will you ask the question again.
23 MR. DeGRASSE:
24 Q. I'll restate or go in a slightly different direction. You
25 removed your shorts?

1 A. Yes.

2 Q. And that was all voluntary?

3 A. Yes.

4 Q. No objection?

5 A. No.

6 Q. The question was: Did they come off over your shoes or
7 were your shoes removed, too?

8 A. I don't remember that.

9 Q. Now, let's talk about your sweatshirt; that was removed?

10 A. I am assuming so, yeah.

11 Q. Well, you know, this is not a place to assume.

12 A. Then, yes.

13 Q. Okay. And did you take your sweatshirt off in the usual
14 way, like pulling it over your head and pulling your arms
15 out of the sleeves?

16 A. Yes.

17 Q. Okay. You didn't object to doing that?

18 A. No.

19 Q. Now, you were wearing underpants?

20 A. Yes.

21 Q. Underneath the shorts?

22 A. Um hmm.

23 Q. And did they come off?

24 A. I don't remember that.

25 Q. They might have come off?

1 A. Yes.

2 Q. And would you have removed them?

3 A. If I, if they were removed it would have been a joint
4 effort like everything else.

5 Q. Cooperative?

6 A. Yes.

7 Q. No objection from you?

8 A. No.

9 Q. Completely voluntary?

10 A. Yes.

11 Q. Would they have come off over your feet?

12 A. If they were then, yes.

13 Q. You are just a little vague about where the panties ended
14 up; is that it?

15 A. They were either on me and shifted to the side or they were
16 completely off. I don't remember that.

17 Q. Now, when all this disrobing by you is being done you were
18 in the front seat of the little Toyota on the passenger
19 side, correct.

20 A. Yes.

21 Q. While this disrobing was being done where was Cougar
22 Henderson?

23 A. I think for awhile we sat facing each other in the car. He
24 was still in the driver's seat and I was still in the
25 passenger seat, and during that time we were on both sides.

1 Sometimes both on one side, sometimes separated.

2 Q. So you were at least initially making out over the console?

3 A. Yes.

4 Q. And at some point are you telling us that you moved across

5 the console to the driver's side?

6 A. At some point.

7 Q. What point would that be?

8 A. Probably just in the beginning.

9 Q. Before?

10 A. Kissing.

11 Q. You had all your clothes off or after?

12 A. I don't remember that.

13 Q. Could be both?

14 A. Sure.

15 Q. Now, Cougar was wearing this button-down collared shirt and

16 a pair of khaki trousers. Do you know what he was wearing

17 in terms of shoes?

18 A. I think he had just come from work so I would assume nice

19 shoes.

20 Q. Real shoes, not sandals or flip flops?

21 A. Yes.

22 Q. And I assume the khaki pants were pegged?

23 A. Were what?

24 Q. Pegged. That's an old-fashioned term that people as old as

25 I am probably know. But it has to do with the fact that

1 men's trousers can be straight cut, or pegged, which means
2 they are narrower as they go toward the ankle and that
3 seems to be the fashion for young men today. Do you recall
4 that?

5 A. I know what you are talking about. But I don't remember if
6 his pants were straight cut or tapered, no.

7 Q. Okay. But you certainly would agree that they couldn't
8 have been removed without his removing his shoes?

9 A. He didn't take off his pants.

10 Q. Oh, he didn't take off his?

11 A. No.

12 Q. All right. Did he take off his shirt?

13 A. His shirt was unbuttoned.

14 Q. Uh huh. So he unbuttoned the front buttons?

15 A. Um hmm. I think I did.

16 Q. You did that. Okay. And when his shirt was unbuttoned
17 where were you in the car at that time?

18 A. Can you rephrase that question?

19 Q. Sure. After you finished unbuttoning Cougar's shirt?

20 A. Yes.

21 Q. Were you in the passenger seat?

22 A. Yes, for a part of that time.

23 Q. And he was in the driver's seat?

24 A. For probably part of that time. There was a time when we
25 were both on the passenger seat as well.

1 Q. Now, you, as I recall, you are five feet, nine inches tall?
2 A. About.
3 Q. And you were the same height in September of 2013?
4 A. Probably.
5 Q. And Cougar Henderson is six feet one?
6 A. Okay.
7 Q. And that was his height then?
8 A. Okay.
9 Q. You don't dispute that?
10 A. No.
11 Q. How exactly did Cougar Henderson get from the driver's seat
12 over the console to the passenger seat?
13 A. He climbed over.
14 Q. He didn't get out of the car and come in the passenger
15 door?
16 A. No.
17 Q. He climbed over?
18 A. Yes.
19 Q. And how many times did he do that?
20 A. At least once, maybe twice.
21 Q. And you climbed over the console to the driver's side where
22 he was?
23 A. At least once.
24 Q. So you were kind of migrating from the passenger seat to
25 the driver's seat?

1 A. Yes.

2 Q. And back?

3 A. Um hmm.

4 Q. And he was doing the same thing?

5 A. Yes.

6 Q. Now, you were touching each other after your clothes were
7 removed; is that so?

8 A. Um hmm, yes.

9 Q. And are you also saying, I'm just wanting to make it very
10 clear here, that in addition to touching and kissing,
11 Cougar Henderson's fingers penetrated your vagina?

12 A. Yes.

13 Q. And you didn't object to that?

14 A. No.

15 Q. That was consensual?

16 A. Yes.

17 Q. And when did that first happen on that night?

18 A. After we had taken our clothes off and been touching each
19 other for awhile, then he began to manually stimulate me.

20 Q. Can you give us some idea in terms of time as to when this
21 happened?

22 A. I have no clue; 15, 20 minutes into this exchange.

23 Q. And so his fingers were in your vagina manually stimulating
24 you and that was quite voluntary on your part?

25 A. Yes.

1 Q. You were enjoying it?

2 A. Yes.

3 Q. And this manual stimulation was happening with you in the
4 driver's seat or the passenger seat?

5 A. Passenger seat.

6 Q. Okay. Did it ever happen in the driver's seat?

7 A. I don't think so, no.

8 Q. You, it could have, you are just not sure?

9 A. I don't believe so, because I think that the time that he
10 began to manually stimulate me and then withdrew his penis
11 were very close in proximity and we were in the passenger
12 side seat for that exchange.

13 Q. And while the manual stimulation was going on where was
14 Cougar? I understand you were in the passenger seat.

15 A. Um hmm.

16 Q. Seated in the usual position, facing forward?

17 A. Yes. We were reclined. And I think he had one knee on one
18 side of me and was kneeling over me.

19 Q. Okay. And how long did that go on where you were in the
20 passenger seat reclined and Cougar was kneeling over you?

21 A. A few minutes.

22 Q. And he was stimulating your vagina manually?

23 A. Yes.

24 Q. And that was okay?

25 A. Yes.

1 Q. In terms of the positions of your legs where were your legs
2 relative to Cougar's?

3 A. Like his leg, my leg, his leg, my leg. We were opposites
4 in the seat and he was kneeling over me; that or he had one
5 leg extended backward. I don't remember exactly where his
6 legs were but we were both vertically in the passenger side
7 seat.

8 Q. Were you sitting up as this was going on?

9 A. No. We were laying -- I was laying back. I was reclined
10 in the seat.

11 Q. Okay. And he was, was he astride you?

12 A. Can you use a different word to describe --

13 Q. Sure. Obviously, your legs were spread to allow him to
14 manually stimulate you?

15 A. Enough for that to happen.

16 Q. Okay. Were his legs inside yours or outside yours?

17 A. At least I'm assuming one leg was inside. I don't remember
18 exactly where his legs were or if he was leaning up against
19 that center console.

20 Q. And so how long did that go on when he was somewhat in the
21 passenger seat and leaning up against the center console
22 and stimulating you vaginally?

23 A. A few minutes.

24 Q. His pants were on?

25 A. Yes.

1 Q. His shirt was open and unbuttoned?
2 A. Yes.
3 Q. And you testified about how the seat reclined?
4 A. Yes.
5 Q. Had the reclining move of the seat happened before what you
6 have just been describing in terms of vaginal stimulation?
7 A. Yes. That was one of the first things that he did.
8 Q. Okay. And can you tell us how much of a reclining position
9 the seat was in?
10 A. Almost horizontal.
11 Q. And are you telling us you remember that very well?
12 A. Yes. I remember the very fluid motion in which we began
13 kissing and then he reached over my body and depressed the
14 seat. I remember it shocking me.
15 Q. Okay. But it didn't interrupt your sexual activity?
16 A. No.
17 Q. And are you telling me that that seat was actually flat
18 like that (indicating)?
19 A. No, I said --
20 Q. A bed?
21 A. I said almost horizontal. There was a slight angle.
22 Q. Okay. So you were actually not in a fully prone position,
23 you were seated like this (indicating)?
24 A. The front of the seat stays flat.
25 Q. Right.

1 A. And the back can't recline 100% because the back seats --
2 it was slightly lifted.

3 Q. So the seat was in the form of a chair that was in a
4 reclining position?

5 A. Yes.

6 Q. And at what point did, based on your story here, Cougar's
7 penis become exposed?

8 A. He reached for his belt, and opened his belt, unbuttoned
9 his pants and unzipped his pants, and I think, I don't
10 remember what kind of underwear he was wearing, if it was a
11 loose fabric that he could just pull it through or if he
12 pushed it down over. But his penis, he exposed himself
13 completely. I did not reach down and touch him.

14 Q. Did you help him unbutton his pants?

15 A. No.

16 Q. Or remove his belt?

17 A. No.

18 Q. And where was he as he was doing this? He wasn't lying on
19 top of you, was he?

20 A. Not lying, but in a kneeling, bent over position.

21 Q. So he was kneeling in front of you?

22 A. Yes. On the --

23 Q. And --

24 A. -- seat of the chair.

25 THE COURT: Let the witness finish.

1 MR. DeGRASSE: Sorry.

2 A. Kneeling on the base of the chair. The seat of the chair.

3 MR. DeGRASSE:

4 Q. All right. So Cougar's knees were on the bench of the

5 seat?

6 A. At least one knee. I can't imagine that someone would stay

7 stable with two knees up like that.

8 Q. I'm not sure I understand what stable and two knees up like

9 that -- what do you mean?

10 A. I'm saying both of his knees on the chair and both of his

11 feet were lifted up. I can't imagine he would keep his

12 balance. I'm assuming there was one leg up. I remember

13 him being over me when he unbuttoned himself. Enough space

14 between us for him to maneuver and for me to see what's

15 happening.

16 Q. Okay. So he is there, unbuttoning his pants, unzipping his

17 pants?

18 A. Yes.

19 Q. And he didn't remove his pants?

20 A. No. He did not ever take them off completely.

21 Q. How far did he remove them if you can say?

22 A. They unbuttoned and opened wide enough for him to have

23 enough range of motion.

24 Q. Okay. And was he wearing undershorts?

25 A. I believe so, yeah.

1 Q. What became of them?

2 A. They were still on.

3 Q. So he didn't remove those at all?

4 A. No.

5 Q. And then he inserted his penis in your vagina?

6 A. Yes. He started by advancing towards me with it. He had
7 one hand on his penis and was pressing and rubbing it up
8 against my vulva and my inner thighs. At that point I
9 began to protest.

10 Q. Okay.

11 A. And then after that he began to insert it multiple times
12 all the while, while I am protesting.

13 Q. By protesting you are saying that he was inserting his
14 penis and you were saying don't do that?

15 A. Saying, "No. Stop. I don't want to do this."

16 Q. Okay. And were you concerned about that because he had no
17 condom?

18 A. That, and I wasn't comfortable with having sex that night.
19 I had no intention of having sex. I was fine with
20 foreplay, and touching, and kissing. I had no intention of
21 having sex that night. And there was no ask for a consent
22 or talk about protection at all.

23 Q. And had you expressed these views to him before that night?

24 A. Not prior. But with enough time before he touched me with
25 his penis.

1 Q. Would you have recognized the front passenger seat of the
2 Toyota if you saw it?

3 A. The seat or the car?

4 Q. Both let's say.

5 A. Most likely.

6 Q. Okay. And you went to Walla Walla Clinic you said?

7 A. The Women's Clinic, yes.

8 Q. The Women's Clinic yes, all right. And you simply went
9 there to determine whether you were pregnant or not?

10 A. Yes.

11 Q. And you were sometime after that or about that time
12 diagnosed with Graves Disease?

13 MR. HOLCE: Objection. Evidence beyond the scope of
14 Direct.

15 THE COURT: Sustained.

16 A. No. That was the following.

17 THE COURT: Once I say "sustained" counsel asks another
18 question.

19 THE WITNESS: So sorry.

20 MR. DeGRASSE:

21 Q. Are you taking any medication now?

22 A. Yeah.

23 Q. What are you taking?

24 MR. HOLCE: Objection, relevance, beyond the scope of
25 Direct.

1 MR. DeGRASSE: Goes to the weight.

2 THE COURT: Excuse me, counsel, we're going to take our
3 afternoon recess -- excuse me, recess for the evening at
4 this point. I do have a 4:00 matter that I need to hear.

5 I need to caution the jury that during this recess and
6 every other recess don't discuss the case among yourselves
7 or with anyone else, including family and friends. Do not
8 allow anybody to discuss this case with you or within your
9 hearing. Do not read any newspaper or other accounts,
10 watch any televised account, listen to any radio program or
11 consult any outside sources about this case or its general
12 subject matter. Specifically, that includes all social
13 networking, and internet resources. You must keep your
14 mind open and free of outside information. Only in this
15 way will you be able to decide the case fairly based on the
16 evidence and my instructions on the law.

17 I'll ask counsel and the parties to remain in the
18 courtroom. We'll take care of this and any other matters
19 that we need to start smoothly in the morning.

20 So with that, you are excused. Again, take your
21 notebooks with you and find your own niche in the jury room
22 for them. They will be left undisturbed. Have a good
23 evening.

24

25 (The following was heard out

1 of the presence of the jury:)

2 THE COURT: Okay. Thank you. You can be seated. All
3 right. So there was a question about -- and you were some
4 time after that or about that time diagnosed with Graves
5 Disease, objection, beyond the scope, Court sustained it.
6 I made a comment to the witness.

7 MR. DeGRASSE: I asked her whether she was taking any
8 medication.

9 THE COURT: And there was objection to that. All
10 right. Where is this going? You were asking if she was
11 taking medication for apparently the Graves Disease?

12 MR. DeGRASSE: I'm interested in whatever medication
13 she might be taking for anything, because depending on what
14 the medication is it could effect her ability to testify or
15 recall. That's sort of a stock question. The Graves
16 Disease matter is also relevant because the very symptoms
17 her mother describes her suffering from at the time of the
18 incident in question are totally consistent with text book
19 Graves Disease symptoms.

20 THE COURT: Are you going to have medical testimony?

21 MR. DeGRASSE: No. I don't think I need it.

22 THE COURT: I'm not going to allow that unless there is
23 some indication --

24 MR. DeGRASSE: It is brought up by her mother -- sorry
25 to interrupt -- it is brought up by her mother in her

1 mother's statement.

2 THE COURT: All right. Mr. Holce?

3 MR. HOLCE: Again, it goes beyond the scope of Direct.
4 And I didn't see the relevance of any kind of diagnosis.
5 Not familiar with Graves Disease, but again, I don't see
6 the relevance. If there is any medication that Ms. Janis
7 is taking now I suppose we could voir dire her about that
8 now. If there is relevant testimony then that could be
9 redressed tomorrow on the record in front of the jury. But
10 at this point I don't see whether she is on any medication
11 doesn't effect her memory, how that would be relevant to
12 the jury.

13 THE COURT: All right.

14 Well, let's do some voir dire at this point. In fact,
15 I'm going to ask you a couple questions.

16

17

VOIR DIRE

18

BY THE COURT:

19 Q. Are you, were you taking any medication at the time.

20 A. No.

21 Q. Are you taking any medications today?

22 A. Yes.

23 Q. What kind of medications are you taking?

24 A. A thyroid supplement.

25 Q. What kind of medication is it?

1 A. Levothyroxine, L E V O T H Y R O X I N E.

2 Q. Do you find that it has any side affects?

3 A. No.

4 THE COURT: Okay. All right. Any other questions by
5 other counsel follow-up to that?

6

7

VOIR DIRE

8 MR. DeGRASSE:

9 Q. [REDACTED], what's the Levothyroxine taken for?

10 A. A thyroid condition that I have. I don't have a working
11 thyroid any more so it's a natural supplement that the
12 thyroid naturally produces that I take because mine doesn't
13 work.

14 Q. And this is the consequence of Graves Disease?

15 A. Yes. I suffer from Graves Disease and then eventually
16 radiated my thyroid so it is no longer functioning because
17 it was over-active before.

18 Q. And that diagnosis according to your mother was some time
19 in the spring of 2014?

20 A. April of 2014.

21 Q. And among other things you were suffering from anxiety and
22 depression and voices in your head and cognitive
23 difficulties?

24 A. Yes.

25 Q. That had been going on according to your mother from

1 sometime around the incident in question?

2 A. Yeah, definitely.

3 MR. DeGRASSE: That's the point, Your Honor. The
4 connection between all this talk about what happened can be
5 explained by the Graves Disease, which is admitted. We
6 don't have to prove it. It's now under control. I'm not
7 attacking her ability to testify today but it certainly
8 goes to the credibility of this witness to recall and the
9 State's case that all these odd things about her
10 psychosomatic difficulties, her physical problems and
11 mental problems not explained by what allegedly was done by
12 the defendant, but explained by her disease.

13 THE COURT: If there was any testimony contemplated
14 that would bridge that huge gap, I would allow it. But I
15 don't see that happening. So my ruling is going to remain
16 the same. The objection is sustained.

17 All right. Is there anything we need -- well, it's
18 4:00 right now. Is there anything else we need to talk
19 about before tomorrow morning?

20 MR. HOLCE: Not that I can think of, Your Honor.

21 MR. DeGRASSE: I can't think of anything.

22 THE COURT: You can step down. See you here tomorrow
23 morning at 9:30.

24

25 C O U R T I N R E C E S S F O R T H E D A Y .

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MAY 30, 2018
P R O C E E D I N G S

(The following was heard in
the presence of the jury:)

THE COURT: Good morning.

MR. HOLCE: I'll re-recall [REDACTED].

THE COURT: Yes, go ahead.

[REDACTED], having been previously sworn
resumed the stand and
testified further as follows:

THE COURT: I've sustained the objection to the
previous question. Mr. deGrasse, you may continue.

CROSS-EXAMINATION (CONTINUED)

BY MR. DEGRASSE:

Q. [REDACTED], I want to go back to the beginning for just a
moment. Was it your testimony that the date of this was
September 21, 2013?

A. To my best knowledge.

Q. That was a Saturday night, was it not?

1 A. I believe so.

2 Q. And what is your date of birth?

3 A. October 1, 1996.

4 Q. So when this evening occurred with Cougar you were just
5 about 17?

6 A. I was 16. I would be 17 in a week or two, yeah.

7 Q. Okay. And I think you said that you had had a prior
8 experience with Cougar Henderson?

9 A. Yeah, a few nights previous to that.

10 Q. Where was that?

11 A. In his car.

12 Q. And it would have been before September 21st?

13 A. Yes.

14 Q. What happened?

15 A. Kissing, touching, but nothing under the clothes.

16 Q. All voluntary and consensual?

17 A. Yes.

18 Q. Now, I want to go back to this night when you were in the
19 car, and that's the basis for your complaint here. You
20 said at a certain point after Cougar had inserted his penis
21 in your vagina you raised an elbow?

22 A. Um hmm.

23 Q. Or your forearm?

24 A. Yes.

25 Q. And did he then stop penetrating you?

1 A. Eventually. I had to use force to lift him off of me and
2 give him a real physical notice and eventually, yes, he
3 stopped.

4 Q. And how long did that take?

5 A. A few seconds.

6 Q. A few seconds, okay.

7 A. A good shove.

8 Q. So you just kind of pushed him off after he had penetrated
9 you?

10 A. Multiple times, yes.

11 Q. Okay. Now, I want to go back just maybe a few seconds or
12 minutes to the period of time before he placed his penis
13 inside you.

14 A. Okay.

15 Q. Okay? Before he did that did he use any physical force
16 against you to cause you to submit to sexual intercourse?

17 A. Can you rephrase that question in a way --

18 Q. Yeah. Before, before Cougar Henderson placed his penis in
19 your vagina the first time, did he use any physical force
20 against you to cause you to submit to sexual intercourse?

21 A. Okay. He was over me. There was a looming physical
22 presence over me. I had nowhere to go. And before he
23 inserted it in me he was pressing it up against me and
24 pressuring me. Physically I attempted to scoot back away
25 from that and he persisted. So, yes, before the first

1 insertion he was physically pressuring me.

2 Q. He was on top of you?

3 A. Yes.

4 Q. And he had been on top of you for some time, correct?

5 A. Yes.

6 Q. And he had been digitally stimulating your vagina for some

7 time?

8 A. Yes.

9 Q. And that was all consensual?

10 A. Yes.

11 Q. Apart from his being on top of you did he use any physical

12 force to cause you to submit to sexual intercourse?

13 A. Like holding me down?

14 Q. Yeah, or hitting you?

15 A. No, he never hit me.

16 Q. Did he use any other physical force or any weapon of any

17 kind?

18 A. Weapons, no. I would say that the physical presence of him

19 leaning over me, one arm between me and the door, and the

20 car seat behind me, and his hand on his penis shoving it

21 into me, I would call that a physical force.

22 Q. Okay. But that was all that happened before this event,

23 the sexual intercourse, in terms of physical force?

24 A. Yes.

25 Q. Okay. Did he at any time threaten you?

1 A. No.

2 Q. Did he at any time threaten anyone else?

3 A. Anyone else?

4 Q. Well, the law says that one of the ways sexual intercourse
5 or rape by forcible compulsion occurs is if the perpetrator
6 threatens harm to someone else, that is --

7 A. Oh.

8 Q. -- if you don't submit to sexual intercourse I'm going to
9 kill your mother.

10 A. No, he never did that.

11 Q. Okay. So he didn't threaten you?

12 A. Not verbally.

13 Q. He didn't threaten anyone else?

14 A. No, not verbally.

15 Q. He didn't threaten to kidnap you?

16 A. No.

17 Q. He didn't threaten to kidnap anyone else?

18 A. No.

19 Q. And I think you said that he never ejaculated?

20 A. No.

21 Q. He never ejaculated, or, no, you didn't say that?

22 A. No, he never ejaculated.

23 Q. On that night of September 21st as you recall it, did you
24 say you met at Howard Tietan park at 8:00 in the evening?

25 A. Sometime around that time, yes.

1 Q. And why did you meet at how Howard Tietan Park?
2 A. It was a meeting spot; empty parking lot, close to where I
3 lived at the time. It was a place we agreed on.
4 Q. Did you in the course of that evening discuss the WA-HI
5 homecoming dance?
6 A. Not that I remember.
7 Q. Did you ask Cougar Henderson to take you to the WA-HI
8 homecoming dance?
9 A. No. He was graduated by that point.
10 Q. Did you have your cell phone with you that night?
11 A. I think so, yeah.
12 Q. I'm sorry, what?
13 A. Yes.
14 Q. It was fully operational I take it?
15 A. Yes.
16 CLERK: Defendants identification 3 is marked.
17 MR. DeGRASSE:
18 Q. And after that evening did your parents take your cell
19 phone away?
20 A. Yes.
21 Q. Did you then have communication with Cougar Henderson about
22 that?
23 A. Yes.
24 Q. And I'm putting in front of you a document that's been
25 marked for purposes of identification as defendants Exhibit

1 3. Do you recognize that?

2 A. Yes.

3 Q. That's a Facebook message between you and Cougar?

4 A. Yes.

5 Q. And the first line is: "My phone got taken away."

6 A. Yes.

7 MR. HOLCE: Your Honor, I'll object. I believe this is
8 their -- if there is an attempt, there has been no attempt
9 to admit this document. There is a foundational issue
10 because Ms. Janis is not the custodial -- it's hearsay. It
11 is not a document.

12 THE COURT: Well, it hasn't been offered yet. Have you
13 offered it?

14 MR. DeGRASSE: No, I haven't. I'm about to and I'm
15 trying to get her to identify it as her communication as a
16 matter of foundation.

17 THE COURT: Go ahead.

18 MR. DeGRASSE:

19 Q. So you communicate with Cougar by saying, "My phone got
20 taken away," correct?

21 A. Yes.

22 Q. And he responds by saying, "By whom? What of it?"

23 Is that correct?

24 MR. HOLCE: The State objects on the grounds of
25 hearsay. The defendant is trying to introduce his own

1 statements through a third party who is not the party
2 opponent.

3 THE COURT: Overruled.

4 MR. dEGRASSE: You may answer.

5 A. Yes, he says that, yes, he says that.

6 Q. And you reply: "Ha, ha. My parents, and it's cuz I
7 ignored one of their four phone calls last night. Oh,
8 well, it was worth it."

9 That's your language to him, correct?

10 A. Yes.

11 Q. And your remarks, "Oh, well, it was worth it," were
12 referring to the night you have been describing here today,
13 correct?

14 A. I'm assuming so.

15 Q. Wouldn't have been any other night, would it?

16 A. I don't believe so. Even though the date is four days past
17 the event and I mentioned last night.

18 Q. Yes. And we'll talk about that date some time later, but
19 you are referring to the events with Cougar, because when
20 you say, "cause it was worth it."

21 A. I am assuming so. I don't remember these messages, but,
22 yes.

23 We'll offer, Your Honor.

24 MR. HOLCE: Again, the State will move that there is
25 not adequate foundation, because [REDACTED] isn't a

1 Q. Did you know if he had semen on his fingers or penis?
2 A. I don't.
3 Q. Was that a consideration you had that night?
4 A. Yes.
5 Q. Is the defendant bigger than you physically?
6 A. Yes.
7 Q. Did you feel like you were being held down at all?
8 A. A little bit. He had his arm beside me and at a lot of
9 points he was very close to me physically, sometimes
10 putting his body weight on me.
11 Q. That document that counsel has given you, down at the
12 bottom is there a message that purports to be from the
13 defendant?
14 A. Yes.
15 Q. What does it say?
16 A. It says: "Please hear me."
17 Next three words: "I forgive you."
18 And there is more but it's cut off.
19 Q. So this document that the defense wanted to present to you,
20 did it have the complete conversation then?
21 A. No.
22 Q. How did the conversation continue?
23 A. I believe he forgave me and said something like; we're
24 cool.
25 Q. And then what did you say?

1 A. I don't remember.

2 Q. Would it help if I showed you? Did you prepare a printout
3 of the Facebook conversation?

4 A. Yes. I printed that.

5 MR. HOLCE: May I approach?

6 THE COURT: Yes.

7 MR. HOLCE:

8 Q. Looking at the third page, just read that to yourself and
9 see if it refreshes your recollection.

10 What's the first thing that you said?

11 A. I said that I wanted to forgive him too, and I wanted to
12 reach out but I was scared that he was going to reject me.

13 THE COURT: Let's stand and stretch. All right.

14 Please be seated. Mr. Holce, you may continue.

15 MR. HOLCE: Thank you, Your Honor.

16 Q. You said you forgive him too?

17 A. Yes. I said that I wanted to forgive him.

18 MR. HOLCE: Okay. I have nothing further, thank you.

19 THE COURT: Anything further, Mr. deGrasse?

20 MR. DEGRASSE: I do.

21

22 RE-CROSS EXAMINATION

23 BY MR. DEGRASSE:

24 Q. You said a moment ago that you did not know whether Cougar
25 Henderson had semen on his fingers on this night in

1 September?

2 A. Yes. I didn't know if he did or did not, if he had

3 ejaculated previously in the evening.

4 Q. But yet he was putting his fingers in your vagina quite

5 voluntarily and with your consent, was he not?

6 A. Yes.

7 Q. You weren't troubled then I take it?

8 A. No. That qualm arrived after the fact when I was concerned

9 about pregnancy, when I was late for my period.

10 Q. Back to the Facebook messages, the message about parents

11 taking the telephone away?

12 A. Yeah, my cell phone.

13 Q. Your reply was: "Because it was worth it."

14 A. Sure.

15 Q. That was September 25, 2013?

16 A. Yes.

17 Q. And that is a complete message, is it not?

18 A. Yes.

19 Q. The next message is September 26, 2013, where you say:

20 "Hey, how are you," correct?

21 A. Yes.

22 Q. And the next message is April 17, 2014.

23 A. Yes.

24 Q. Where you say: "Hey there," and he replies, "Hi, ██████

25 ██████," is that so?

1 A. Yes.

2 Q. And then you go on to say the words about, "I'm just going
3 to be truthful and up front, I miss you and I feel awful."
4 You say that to him?

5 A. Yes.

6 Q. And that's also on April 17, 2014?

7 A. Yes.

8 Q. And he replies: "Please hear my next three words: I
9 forgive you."

10 A. Yes.

11 Q. And he said that to you on April 17, 2014?

12 A. Yes.

13 Q. And you replied: "I forgive you, too."

14 A. Yes.

15 Q. And again, that was April 17, 2014?

16 A. Yes, I believe so.

17 MR. DEGRASSE: I have nothing further, Your Honor.

18 THE COURT: Mr. Holce, anything further?

19

20 REDIRECT EXAMINATION

21 BY MR. HOLCE:

22 Q. I believe yesterday we talked about what was the cause for
23 the delay in you coming forward and making a statement; do
24 you remember that?

25 A. Yes.

1 MR. dEGRASSE: Objection. Asked and answered. Beyond
2 the scope of Recross.
3 THE COURT: I'll sustain.
4 MR. HOLCE:
5 Q. Had you come to terms with what had happened that night by
6 three days later, four days later?
7 A. No.
8 Q. Had you come to terms with it by that April?
9 A. No.
10 MR. HOLCE: Nothing further. Thank you.
11 MR. dEGRASSE: I have nothing further.
12 THE COURT: May this witness be excused?
13 MR. HOLCE: Yes, Your Honor.
14 THE COURT: Mr. deGrasse?
15 MR. dEGRASSE: It's conceivable that she would need to
16 be recalled. I would assume she will be available. I
17 don't need her to be shackled to the courtroom or tethered
18 here.
19 THE COURT: Unless someone has intent presently to call
20 her you are excused. You are free to go. You are free to
21 stay if you choose.
22 I meant to indicate earlier, if there is anybody in the
23 audience who needs a hearing assistance device you are
24 welcome to raise your hand and we do have a couple extra,
25 maybe one more. All right.

Appendix

PLAINTIFF'S EXHIBIT No. 1
(REDACTED REPORT FROM WOMEN'S CLINIC)

Women's Clinic of Walla Walla

320 W. Willow
Walla Walla, WA 99362
(509) 525-5010

Patient:



Age/Sex/DOB:



EMRN: 157371

OMRN: 157371

Home:



Work:

Results

Lab Accession # 1342428
Ordering Provider: Reese, Cynthia B
Performing Location:

Collected: 10/28/2013 2:59:00PM
Resulted: 10/28/2013 4:49:00PM
Verified By: Reese, Cynthia B B
Auto Verify: N

HCG, Qual.

Stage: Final

Test

Result

Units

Flag Reference Range

QUALITATIVE HCG

Negative

Negative

Appendix

DEFENDANT'S PROPOSED JURY INSTRUCTION
RE: FORCIBLE COMPULSION (CP 27)

Instruction No. _____

Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact.

State v. Ritola, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent.

-v-

COUGAR RAY HENDERSON

Appellant.

No. 363058

PROOF OF SERVICE
[Amended BRIEF OF APPELLANT]

Under penalty of perjury, pursuant to the Laws of the State of Washington, RCW 9A.72.085, the undersigned states that copies of the Amended Brief of Appellant were served on James L. Nagle, counsel for the respondent, and Cougar Ray Henderson, appellant, by posting copies of the same on the 16th day of May, 2019, first class, postage prepaid addressed to:

James L. Nagle
Walla Walla Co Prosecuting Attorney
240 West Alder Street, Suite 201
Walla Walla, WA 99362

Cougar Ray Henderson, DOC #408376
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 16th day of May, 2019.


Tracy L. Peterson