

FILED
Court of Appeals
Division III
State of Washington
4/2/2019 4:01 PM

36305-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

COUGAR RAY HENDERSON, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 4242
Pasco, Washington 99302
(509) 545-3543

TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT</u>	1
II. <u>RELIEF REQUESTED</u>	1
III. <u>ISSUES</u>	1
IV. <u>STATEMENT OF THE CASE</u>	2
V. <u>ARGUMENT</u>	8
A. <u>There Is Sufficient Evidence For The Element Of Forcible Compulsion</u>	8
B. <u>The Court Did Not Abuse Its Discretion In Excluding Inquiry Into The Victim's Diagnosis Of Graves' Disease</u>	16
C. <u>The Admission Of The Patient Record Was Harmless Beyond A Reasonable Doubt</u>	18
D. <u>The Court Did Not Err In Instructing The Jury Consistent With The WPIC</u>	20
VI. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

State Cases

Page No.

<i>State v. Darden</i> , 145 Wash.2d 612, 41 P.3d 1189 (2002).....	17
<i>State v. Garcia</i> , 179 Wash.2d 828, 318 P.3d 266 (2014).....	17
<i>State v. Hatch</i> , 165 Wn. App. 212, 267 P.3d 473 (2011).....	19
<i>State v. Horn</i> , 3 Wn. App.2d 302, 415 P.3d 1225 (2018).....	17
<i>State v. Lamb</i> , 175 Wash.2d 121, 285 P.3d 27 (2012).....	17
<i>State v. Lee</i> , 188 Wn.2d 473, 396 P.3d 316 (2017)	17
<i>State v. McKnight</i> , 54 Wn. App. 521, 774 P.2d 532 (1989).....	11, 13, 21
<i>State v. N.B.</i> , -- Wn. App. --, -- P.3d --, 2019 WL 1066474 (Wash. Ct. App. Mar. 7, 2019)	16
<i>State v. Reed</i> , 166 W.Va. 558, 276 S.E.2d 313 (1981).....	12
<i>State v. Ritola</i> , 63 Wn. App. 252, 817 P.2d 1390 (1991).....	7, 20, 21, 22
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	9
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987)	21
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	9
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997)	22

Other Authorities

WPIC 45.03..... 7

United States Supreme Court Case

Page No.

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....9

Statutes and Rules

ER 401 18
ER 801 18
ER 901 18
RCW 5.45.020..... 19
RCW 9A.36.041 21
RCW 9A.44.010 10, 20
RCW 9A.44.100 21
RCW 9.94A.835 21
WPIC 45.03..... 7

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is there sufficient evidence that the rape was accomplished by forcible compulsion where the evidence is that the victim verbally objected and then strenuously resisted for several seconds while trapped underneath the defendant sustaining bruises across her neck and chest, finally wedging her elbow between them and then forcing him off her?
2. Did the court abuse its discretion in excluding evidence of the victim's diagnosis of hyperthyroidism where the Defendant offered no evidence which would indicate the condition had any relevance to her ability to perceive or recall?
3. Was the admission of the victim's lab report reversible error where three witnesses attested, without objection, to the

information contained in the report?

4. Did the exclusion of a non-standard jury instruction prevent the Defendant from arguing his theory of the case despite the record which demonstrates that both attorneys adopted this definition in their closing arguments?

IV. STATEMENT OF THE CASE

The Defendant Cougar Henderson appeals from a jury verdict of rape in the second degree. CP 60, 171-200.

The 18 year old Defendant met with 16 year old E.J. one evening at a park. RP 127, 168, 232. She was in high school, and he had just gotten off work. RP 127-28. She joined him in his car for a drive through the country. RP 128.

Eventually, the Defendant pulled over on the shoulder of a country back road and they chatted and then began kissing. RP 128. He startled her by suddenly pulling the lever on her seat so that it was fully reclined and then climbing on top of her over the center console. RP 129-30, 153, 155. He was "really intense aggressive." RP 130. She did not object to the sexual touching, but when he attempted to put his penis in her vagina, she objected clearly, saying, "No. Please,

I don't want to do this right now. Please, stop." RP 129-30, 160. She was a virgin. RP 175. She tried to scoot away from him, but there was no "space I could go when he is coming at me." RP 130.

He has his, I guess his left arm over me, and he was blocking the door. He was physically on top of me.

RP 131. And in any event, she was in the middle of the countryside after dark. RP 132.

Despite her continued verbal warnings, he kept pressing into her, penetrating her multiple times until she managed to get her elbow between them and "eventually," after a few seconds of pushing, force him off her and back into his own seat. RP 130-32, 169.

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

RP 131.

The next day, E.J. had her senior photo taken. RP 127. She had use makeup to cover "a lot of hickeys and bruises" that were "all over" her neck and chest. RP 127, 130, 181. A few weeks later, when E.J. missed her period she confided what had happened with the Defendant to her mother and closest friends. RP 132-34. The Defendant and E.J. shared the same circle of friends. RP 139. But

after “he did a lot of damage control,” denying any sexual contact at all, few believed E.J.. RP 139-40.

In the fall, E.J. was in a high school performance of *Flowers for Algernon*.¹ RP 139, 187. Although he had already graduated, the Defendant attended some of the rehearsals to stare at her. RP 139, 189. Eventually the drama director instructed him to leave and not return. RP 139, 189-90. But then he attended the performances sitting in the front row of risers which completely surrounded the stage and actors on all sides – again making prolonged eye contact while leaning forward. RP 140, 190-91.

E.J. became anxious all the time. RP 139, 191. She isolated herself, had trouble sleeping, and began to experience difficulty in school. RP 183-84. Depressed, she gained a lot of weight for a while. RP 140. “At the time it took me a lot to be able to interpret and unpack it for what it really was.” RP 141. Three and a half years later, she finally reported the rape to police. RP 141, 197.

The prosecutor offered into evidence E.J.’s medical record which she had obtained from the clinic and provided to police. RP 133-34. The lab result showed that E.J. had her blood drawn for a

pregnancy test a month after the assault. RP 134. Defense counsel objected to the exhibit as hearsay and as incomplete. RP 135. "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 137. The objection was overruled. RP 137.

In cross examination, the defense asked E.J. whether she had been diagnosed with Graves' disease and was taking medication. RP 161. It was a topic he had previously raised in jury selection without objection.

MR. DeGRASSE: ...A couple of technical questions: Does anyone have any familiarity with Graves' Disease? Anybody know what Graves -- it's a form of hyperthyroid -- Mr. Schwitzgoebel, do you know what this thyroid disease is?

JUROR NO. 40: Graves' Disease is a thyroid disease determined by a test called TSH.

MR. DeGRASSE: And do you know that the symptoms include; psychiatric matters like anxiety, depression --

JUROR NO. 40: I really don't know. No, I don't, okay? But at this point I'll believe you.

MR. DeGRASSE: I'm not -- I want you to believe me,

¹ The well-known book has been censored in some schools for its discussion of the main character's sexual awakening.

but this isn't a test. I'm just trying to find out what you know, that's all. Anyone else have any familiarity with hyperthyroidism, or a form known as Graves' Disease? Ms. Spencer, I thought you would.

JUROR NO. 4: Same information; overactive thyroid, diagnosed by blood test, TSH, that can cause an imbalance in the endocrine system. Yes, you can have some anxiety, depression.

MR. DeGRASSE: Cognitive problems?

JUROR NO. 4: Limited, yes.

RP 104. However, at trial, the prosecutor objected. RP 161. A discussion occurred outside the presence of the jury.

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

THE COURT: Are you going to have medical testimony?

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

RP 163.

Out of the presence of the jury, E.J. testified that she had been diagnosed with Graves' disease in April of 2014 after reporting symptoms of anxiety, depression, cognitive difficulties, and hearing

voices. RP 165-66. She was taking a thyroid supplement and had not experienced any side effects from the medication. RP 164-65.

Counsel argued that this testimony suggested “psychosomatic difficulties,” “physical problems and mental problems,” and was relevant to her ability to recall. RP 166.

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

RP 166.

The State proposed the following jury instruction.

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

CP 40 (citing WPIC 45.03). The Defendant proposed a different jury instruction:

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

CP 27 (citing *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991)); RP 286-90. The court decided to proceed with the WPIC instruction.

I think that's discussed in the forcible compulsion

instruction and comment section. There it basically repeats this same statement that is included here, but then it says: "Under some circumstances the resistance by the victim required to show forcible compulsion need not be physical resistance. Indeed it is a fact-sensitive determination based on the totality of the circumstances, including the victim's words and conduct."

So I'm not going to give that instruction.

RP 287-90.

The Defendant testified that he did not have sex with the victim on that night or ever. RP 235, 249-50. *But see* RP 268 (explaining that "the one other time I had sex in a car," it was in the back seat). He testified that after their romantic encounter, he rejected her invitation to the homecoming dance – suggesting that this motivated her to file a police report three and a half years later. RP 254-56. The jury did not believe him. CP 60.

Following the verdict in this case, the Defendant pled guilty to two counts regarding sexual assaults on two other victims. CP 19-21; 75-83.

V. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE FOR THE ELEMENT OF FORCIBLE COMPULSION.

The Defendant claims the conviction is unsupported by

sufficient evidence of the element of forcible compulsion.

The standard of review is highly deferential to the fact finder. “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The element is defined in the 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). In this case, the State did not allege the Defendant threatened the victim. RP 10, 170-71, 322. The allegation was that the rape was accomplished with physical force which overcame the victim's resistance. RP 129-32, 169-70, 322.

The Defendant claims there is "no evidence" that he exerted force to overcome her resistance to penetration. Brief of Appellant (BOA at 22). He argues that as soon as the victim resisted, he complied. BOA at 25-26. That is not the evidence.

E.J. testified that the repeated penetration occurred over her verbal objection and physical resistance. She tried to get away, resisting by scooting away from him, but the Defendant blocked the door, had his arm over her, and was physically on top of her. He was intensely aggressive and left bruises all over her neck and chest. He penetrated her several times despite her resistance. He did not stop penetrating her until she managed to wedge her elbow between them which gave her the leverage to push him off her, but only after he had penetrated her several times. "Eventually he withdrew." RP 131. "Eventually. I had to use force to lift him off of me and give him a real physical notice and eventually, yes, he stopped" after several

seconds. RP 169.

The Defendant notes that the facts in the instant case are different from those in *State v. McKnight*, 54 Wn. App. 521, 774 P.2d 532 (1989). BOA at 22. Those distinctions are not meaningful. It is not relevant how long the parties had known each other. Forcible compulsion is possible between parties with a sexual history, e.g. between husband and wife. It is not relevant that E.J. consented to a greater degree of sexual touching. Consent can be limited or withdrawn. And in this case, consent was not an issue. The Defendant testified that there was no sex at all.

The similarities between McKnight and the facts of this case are significant. The defendant McKnight was convicted of rape in the second degree and challenged the sufficiency of evidence for forcible compulsion. *State v. McKnight*, 54 Wn. App. at 522. The couple were of a similar age, and, like the parties here, they were engaged in mutual kissing. *Id.* Like the parties here, the defendant reclined the victim without her consent and lay on top of her. *State v. McKnight*, 54 Wn. App. at 522-23 (slowly pushed her down on the couch). When the defendant went further than the victim was willing, she told him to stop and that it hurt, but he ignored her. *McKnight*, 54 Wn.

App. at 523. The court of appeals confirmed the conviction. It did not require that the victim fight off the defendant. Her speech was sufficient resistance.

We decline to hold that forcible compulsion requires, in all cases, a showing that the victim offered physical resistance. The recent trend, in recognition of the fact that a victim's resistance increases the likelihood of the attacker's use of violence, has been either to dispense with the resistance requirement altogether, allowing forcible compulsion to be established solely on a showing of force, *State v. Mackor*, 11 Conn.App. 316, 527 A.2d 710, 714–15 (1987); *People v. Barnes*, 42 Cal.3d 284, 228 Cal.Rptr. 228, 721 P.2d 110, 117 (1986), or to allow the resistance requirement of forcible compulsion to include resistance manifested by other than physical means. *People v. Dozier*, 85 A.D.2d 846, 447 N.Y.S.2d 35, 36 (1981) (Main, J., dissenting) (under statutory revision defining forcible compulsion to require only "so much resistance as is *reasonable* under the circumstances" resistance is not confined to physical resistance, but includes escaping or crying out, if, under the circumstances, physical resistance would increase the likelihood of violence by the perpetrator); *State v. Reed*, 166 W.Va. 558, 276 S.E.2d 313, 317 (1981) (under statutory definition of forcible compulsion as "force that overcomes such earnest resistance as might reasonably be expected under the circumstances ... 'resistance' includes physical resistance or any clear communication of the victim's lack of consent.").

We find no rational basis for requiring resistance to be manifest in all cases by physical means, and in fact, are persuaded that public policy considerations militate against such a requirement. *Barnes*, 721 P.2d at 118–20.

State v. McKnight, 54 Wn. App. at 525.

Reasonable minds can differ as to whether the acts of slowly pushing C to a prone position and then removing her clothes in response to the victim's requests that the advances stop manifest a degree of force greater than that which is inherent in the act of intercourse. A reasonable juror could, however, infer from the evidence that these were acts of force over and above what is necessary to achieve intercourse and that these acts were employed to overcome C's resistance. The evidence, when taken as a whole and viewed in a light most favorable to the prosecution, establishes that the act of intercourse was accomplished by the use of force.

State v. McKnight, 54 Wn. App. at 528. The court was persuaded by the parties' size differential, the isolated location, the victim's sexual inexperience, and her youth. *Id.* at 526-27.

All are facts present here. In addition, E.J. cried out and physically resisted by scooting away and pushing the Defendant. For her efforts, E.J. was covered in bruises.

Insofar as the Defendant claims that any conclusion is necessarily speculative or conjectural, he disregards the standard of review which permits an interpretation of inferences.

The Defendant claims that his argument is "detached from any issue of ... credibility of witnesses." BOA at 27. But in fact he attacks the victim's credibility. He argues that her testimony was equivocal

and conjectural. BOA at 23-25.

The victim did not express either concession or ambivalence. In fact, she beautifully expressed why rape victims delay disclosure and what motivated her to come forward.

- Q. Did you tell the police that immediately after this night?
- A. Not immediately.
- Q. And why not?
- A. At the time it took me a lot to be able to interpret and unpack it for what it really was. There was a lot of time when I discussed the event but used words like, "oh, you know it wasn't consensual" or, "oh, that was messy" or "I didn't realize what it was" until I was able to be able to look back on it from a better place.
- Q. Are you in a better place now?
- A. I would say so, yeah.
- Q. When did you come forward to make a statement?
- A. It was April of 2017.
- Q. What led you to come forward ultimately?
- A. There was a Facebook post.
- Q. So, what I mean is, do you have some kind of vendetta against the defendant, or do you – what's your motivation?
- A. No. I wouldn't say that I have a vendetta. I would say my feelings are justified, but I think this is coming from a place more of an accountability rather than vengeance or unnecessary action.
- Q. Has the passage of time affected your memory of that night?
- A. Not really. Little details around the event, but the actual, in the car, it's very clear to me. I haven't lost much of that at all.
- Q. And you were able to talk about this fairly matter

of factually; why is that?

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

Q. Do you want to see the defendant punished?

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

RP 141-42. See also RP 196-97 (detective explaining delayed disclosure).

The Defendant argues that the victim was herself hesitant to testify to physical force. BOA at 24. This is not the evidence. The victim repeatedly stressed that the rape was accomplished through force. In cross-examination, responding to the question of whether the defendant used “any physical force against you to cause you to submit to sexual intercourse,” she responded:

Physically I attempted to scoot back away from that and he persisted. So, yes, before the first insertion he was physically pressuring me.

RP 169. “I had to use physical force to push him into the front seat of the car, the driver’s seat.” RP 131.

The Defendant argues that the victim’s hesitance is apparent from her use of the subjunctive tense here. BOA at 24-25(citing RP 170, II. 20-24). This mischaracterizes the record. Her use of the word

“would” is only feminine speech pattern. In fact, the victim’s language shows no reservation as to her belief. The Defendant did not need to use a weapon to compel sex forcibly.

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.

RP 170, ll. 16-21.

These arguments all address the victim’s credibility. But credibility determinations are the province of the fact finder. *State v. N.B.*, -- Wn. App. --, -- P.3d --, 2019 WL 1066474, at *3 (Wash. Ct. App. Mar. 7, 2019). The jury convicted, demonstrating they found the victim credible.

On this record, a reasonable jury could find forcible compulsion beyond a reasonable doubt, and it did.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING INQUIRY INTO THE VICTIM’S DIAGNOSIS OF GRAVES’ DISEASE.

The Defendant challenges the trial court’s ruling excluding evidence. A trial court’s evidentiary decisions are reviewed for abuse

of discretion. *State v. Horn*, 3 Wn. App.2d 302, 310, 415 P.3d 1225, 1229 (2018).

We review a limitation of the scope of cross-examination for an abuse of discretion. *State v. Garcia*, 179 Wash.2d 828, 844, 318 P.3d 266 (2014); *State v. Darden*, 145 Wash.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion when its decision is “ ‘manifestly unreasonable or based upon untenable grounds or reasons.’ ” *Garcia*, 179 Wash.2d at 844, 318 P.3d 266 (internal quotation marks omitted) (quoting *State v. Lamb*, 175 Wash.2d 121, 127, 285 P.3d 27 (2012)).

State v. Lee, 188 Wn.2d 473, 486, 396 P.3d 316, 323 (2017).

In cross-examination, the Defendant wanted to suggest that the victim's diagnosis of an overactive thyroid proved “psychosomatic difficulties,” “physical problems and mental problems,” and was relevant to her ability to recall. RP 166. He argues “[t]here was no dispute that she had symptoms that could affect her credibility and her recollection of the events on the night in question.” BOA at 29. But there absolutely was a dispute. And the Defendant could offer no witness to prove his claim.

The Defendant attempted to elicit this information from the victim. He failed. She was only able to offer that four years earlier, she had experienced anxiety and some cognitive deficits, after which

she was prescribed a thyroid supplement and suffered no side effects. There was no evidence that the victim's testimony was compromised by failures to perceive or recall. The fact of her diagnosis did not have a tendency to make the existence of any fact of consequence more or less probable. ER 401. In other words, it was not relevant.

The court did not abuse its discretion in excluding irrelevant testimony.

C. THE ADMISSION OF THE PATIENT RECORD WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Defendant challenges the evidentiary ruling admitting the victim's patient record as unauthenticated hearsay.

A witness with knowledge that a matter is what it is claimed to be may authenticate an exhibit. ER 901(b)(1). The victim E.J. could authenticate her own patient file.

However, authentication does not resolve the hearsay issue. The lab report is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). The matter asserted is that a specimen from the victim was collected on October 28, 2013 for a qualitative HCG test with a negative result. PE 1. This is hearsay.

There is a business records exception to the hearsay rule at RCW 5.45.020. This exception requires that the record's custodian or other qualified witness must testify that it was made in the regular course of business. Because this did not occur, this hearsay exception does not apply. Nor does any other.

An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. *State v. Hatch*, 165 Wn. App. 212, 219, 267 P.3d 473, 477 (2011). In assessing whether the error was harmless, admissible evidence of guilt is weighed against the prejudice caused by the improperly admitted evidence. *Id.*

The Defendant summarily concludes without analysis that the admission of the exhibit prejudiced him. BOA at 32. That is not a tenable conclusion. There is no prejudice. The essential information was already admitted via E.J.'s testimony – without objection. Two more witnesses, E.J.'s mother and the assistant director, would repeat this information – again without objection. All three testified that in October of 2013, the victim went to the Women's Clinic for a pregnancy test, because she missed her period shortly after she alleged sexual contact with the Defendant. RP 132-34, 181-82, 184-

85, 187-89, 192-93. The mother made the decision that E.J. should take the test at the clinic rather than use a home pregnancy test, because over-the-counter tests had provided false negatives in each of her own three pregnancies. RP 182. The evidence of these three witnesses was uncontroverted.

Where the information had already been admitted in testimony, where it would be twice corroborated, and where it was uncontroverted, the admission of the exhibit was harmless beyond a reasonable doubt.

D. THE COURT DID NOT ERR IN INSTRUCTING THE JURY CONSISTENT WITH THE WPIC.

The Defendant challenges the court's refusal to provide an additional jury instruction, on top of the WPIC, defining "forcible compulsion" as more than what is necessary to achieve penetration.

The Legislature has defined "forcible compulsion" as "physical force that overcomes resistance." RCW 9A.44.010(6). The WPIC, which was used in this case, provides this statutory definition.

The courts have noted 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 victim. *State v.*

Ritola, 63 Wn. App. 252, 254–55, 817 P.2d 1390, 1391–92 (1991) (quoting *State v. McKnight*, 54 Wn.App. 521, 527, 774 P.2d 532 (1989)).

The Defendant requested, but did not argue, an additional definition that included language from *Ritola*. RP 287-90. The trial judge noted that this was useful “in the context of the *Ritola* case,” but was less useful under the facts of the instant matter.

Ritola was a juvenile case; there was no discussion of jury instructions. *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987) (juvenile offenders are not entitled to jury trials). The issue was sufficiency of the evidence. *State v. Ritola*, 63 Wn. App. at 253. The juvenile grabbed and squeezed his counselor’s breast and made an inappropriate comment before leaving the room. *Id.* These facts describe a fourth degree assault with sexual motivation, i.e. a gross misdemeanor. RCW 9A.36.041; RCW 9.94A.835. However, *Ritola* was charged with indecent liberties with forcible compulsion, a class A felony. RCW 9A.44.100.

The record in this case does not support a finding of forcible compulsion. It is undisputed that *Ritola* used the force necessary to touch the counselor’s breast, but as noted, that is not enough for forcible compulsion. There is no evidence that the force he used overcame

resistance, for he caught the counselor so much by surprise that she had no time to resist. Nor is there evidence of any threat, either express or implied.

State v. Ritola, 63 Wn. App. at 255. The *Ritola* case did not suggest any rule that is not already included in the statutory definition.

The Defendant argues that without his preferred instruction, he was deprived of his right to have the jury instructed on his theory of the case. BOA at 33 (citing *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997)). This is not possible. In fact, the prosecutor provided the Defendant's instruction in closing argument. "[F]orcible compulsion refers to more than the act of actually pushing the penis into the vagina." RP 306.

The record does not support the Defendant's claims (1) that the State relied on mere penetration as the forcible compulsion or (2) that the Defendant was prevented from arguing that the State had not proven any force more than that which was necessary to achieve penetration.

The prosecutor argued that "lack of consent" coupled with "continued refusals" is a kind of resistance, since the definition does not require that resistance be physical. RP 322. The victim "physically resisted by trying to scoot away." RP 301. The Defendant

overcame that resistance by closing the distance despite the victim pressing her elbow against his face. RP 301. The prosecutor argued that, to find “forcible compulsion,” the jury would need to be convinced that the Defendant used physical force to overcome resistance. RP 304-05. And the victim resisted – verbally and then physically by trying to scoot away. RP 305. Resistance does not require battery. RP 305.

The defense argued that resistance could not be “just backing away” or “putting your arm up in front of a person.” RP 311. He argued that the physical force required for a second degree rape had to be something:

... on the same level as a threat on your life, or a threat to do serious physical injury, or a threat to kidnap you or kidnap someone close to you. That’s Rape by Forcible Compulsion, and that is not what happened here.

RP 311.

The Defendant was not prevented from presenting his theory to the jury. There was no error.

VI. CONCLUSION

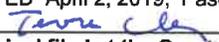
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: April 2, 2019.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Michael E. de Grasse P.O. Box 494 59 South Palouse Street Walla Walla, WA 99362</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 2, 2019, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
--	--

April 02, 2019 - 4:01 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36305-8
Appellate Court Case Title: State of Washington v. Cougar Ray Henderson
Superior Court Case Number: 18-1-00031-6

The following documents have been uploaded:

- 363058_Briefs_20190402155745D3111631_4392.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 363058 BRIEF OF RESPONDENT.pdf

A copy of the uploaded files will be sent to:

- jnagle@co.walla-walla.wa.us
- michael@mdegrasselaw.com

Comments:

Sender Name: Teresa Chen - Email: tchen@co.franklin.wa.us
Address:
PO BOX 4242
PASCO, WA, 99302-4242
Phone: 509-545-3543

Note: The Filing Id is 20190402155745D3111631