67039-5

67039-5

NO. 67039-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

MAX ORTIZ-TRIANA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara A. Mack, Judge

OPENING BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. INTRODUCTION

In the state's prosecution against appellant for first degree rape, appellant asserted the intercourse was *consensual.* In Washington, consent is an affirmative defense to an allegation of rape and must be proved by the defense by a preponderance of the evidence. At the same time, however, *forcible compulsion* is an element of the offense the state must prove beyond a reasonable doubt.

In light of these overlapping burdens of proof, the defense proposed instructions explaining consent is an affirmative defense but also clarifying that evidence of consent – even if falling short of the level required to establish the defense – may still be considered in determining whether a reasonable doubt exists as to the element of forcible compulsion. The court refused to give the instructions, however, reasoning that WPIC 18.25, proposed by the state, was more streamlined and less confusing to jurors. Because the state's instruction did not make it clear the state maintained the burden of proof on forcible compulsion, appellant will argue the court's ruling deprived him of his right to argue his theory of the case.

The court granted the state's request to instruct the jury on the inferior degree offense of second degree rape, of which

appellant was ultimately convicted. Although there was evidence of lack of consent coupled with the absence of forcible compulsion to support a third degree rape instruction, the court refused to give appellant's proposed instructions on that inferior offense. Appellant will argue this ruling also deprived him of his right to argue his theory of the case.

Finally, Ortiz-Triana will argue he was denied his right to a unanimous jury verdict because the state presented evidence of two acts upon which the jury could have relied to convict, and the court failed to instruct the jury it must be unanimous as to which act formed the basis for the charge.

B. ASSIGNMENTS OF ERROR

1. The court's refusal to give the defense proposed instructions on the affirmative defense of consent deprived appellant of his right to argue his theory of the case.

2. The court's refusal to instruct the jury on third degree rape as an inferior degree offense deprived appellant of his right to argue his theory of the case.

3. Appellant was deprived of his right to a unanimous jury verdict.

Issues Pertaining to Assignments of Error

1. Was appellant deprived of his right to argue his theory of the case where the court gave WPIC 18.25 to instruct the jury on the affirmative defense of consent (as proposed by the state) *instead of* the defense proposed instructions on consent, *which would have clarified that the state still bore the burden to prove forcible compulsion*?

2. Was appellant deprived of his right to argue his theory of the case where the court refused to instruct the jury on third degree rape as an inferior degree offense of first degree rape and there was evidence of lack of consent in the absence of forcible compulsion?

3. Was appellant deprived of his right to a unanimous jury verdict where the state presented evidence of two acts that could have formed the basis for the single count charged and the court failed to give a unanimity instruction?

C. STATEMENT OF THE CASE[1]

1. Procedural Facts

Following a jury trial in King County Superior Court, appellant Max Ortiz-Triana was acquitted of first degree rape, as well as third degree child molestation, allegedly committed against M.P. CP 17-18, 82-83. The jury convicted Ortiz-Triana of second degree rape, however, as an inferior degree offense of the rape charge. CP 81.

Ortiz-Triana admitted he engaged in sexual intercourse with M.P., but claimed it was consensual.[2] 6RP 52-54. Ortiz-Triana denied any untoward contact with M.P. when she underage. 6RP 58.

In light of Ortiz-Triana's consent defense, the state proposed – and the court gave (CP 72) – an instruction explaining the defense bore the burden of proving consent by a preponderance of the evidence:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the

[1] This brief refers to the transcripts as follows: 1RP – 1/20/11; 2RP – 1/24/11; 3RP – 1/25/11; 4RP – 1/26/11; 5RP – 1/27/11; 6RP – 1/31/11; 7RP – 2/1/11; 8RP – 2/2/11; and 9RP – 4/8/11 and 4/15/11.

[2] M.P. was born May 19, 1993. 4RP 9, 59. This brief refers to the complainant by her initials, because she was not 18 years old on the date of the alleged rape, although she was of legal age to consent to sexual intercourse. 5RP 7, 22.

> time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

Supp. CP __ (sub. no. 49, State's Supplemental Instructions to the Jury, 1/31/11), WPIC 18.25 (2008).[3]

Although consent is an affirmative defense the defense must prove, the state nonetheless retains the burden to prove *forcible*

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[3] The constitutionality of allocating this burden to the defense has been upheld. As the comment to WPIC 18.25 explains:

> The Supreme Court recognized consent as a valid defense to a charge of rape in State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989). In Camara, the defendant was convicted of second degree rape under RCW 9A.44.050(1)(b), the "forcible compulsion" alternative. Separate instructions were given that defined the terms forcible compulsion and consent for the jury. The defendant argued that consent negates the element of forcible compulsion and therefore the State had the burden of proving the absence of consent beyond a reasonable doubt. The court rejected this argument and held the burden of proving consent could constitutionally be placed upon the defendant.
>
> In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Washington Supreme Court approved an instruction that was essentially worded the same as the pattern instruction above. The court, in its discussion of the instruction refused to overrule Camara, holding that the conceptual overlap between the consent defense and the forcible compulsion element did not relieve the State of its burden of proving forcible compulsion beyond a reasonable doubt.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.25 (3d Ed).

compulsion as an element of first or second degree rape. See Spicer v. Gregoire, 194 F.3d 1006, 1008 (9th Cir. 1999); RCW 9A.44.040; RCW 9A.44.050. Accordingly, in light of the conceptual overlap between consent and "forcible compulsion," the defense proposed the following (instead of WPIC 18.25), to clarify that evidence of consent – even if not rising to the level required to establish an affirmative defense – may still be considered insofar as it establishes reasonable doubt of forcible compulsion:

> Consent is an affirmative defense to the crime of rape and the defense bears the burden of proving consent by a preponderance of the evidence. Even if, however, you do not find consent established by a preponderance of the evidence, you may still consider evidence of consent in determining whether or not the defendant acted with forcible compulsion and if you find that there is sufficient evidence to raise a reasonable doubt as to that element, you must acquit the defendant of the charge of rape in the first degree, or in the alternative rape in the third degree.[4]

CP 53 (citing State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2005));[5] 7RP 10-12. The defense also proposed instructions

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[4] Defense counsel explained during the instructions conference that the reference to "third degree" was the crime discussed in Gregory and counsel "would have edited that to be in compliance" with the court's other instructions, had the court agreed to give the Gregory instruction regarding consent. 7RP 14.

[5] Significantly, the Gregory Court held there was no due process violation in allocating the burden of proving consent to the defense "*so long as* the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a

defining "preponderance of the evidence" and consent. CP 52, 54; 7RP 10.

Noting the defense proposed instructions were "a correct statement of the law," the prosecution deferred to the court as to which consent instructions to give – WPIC 18.25 or the three proposed by the defense. 7RP 12. To the court, WPIC 18.25 and the defense proposed instructions seemed to do "exactly the same thing" insofar as explaining consent. 7RP 13.

Counsel pointed out an important distinction, however:

> MR. SJURSEN [defense counsel]: As to that, it might. But as to my concern, I think the main concern is that [WPIC 18.25] does not explain to the jury that the burden still rests on the State to prove forcible compulsion. That is why I quoted directly from State v. Gregory regarding the jury instruction. Because it doesn't say that.
>
> It says: "If you find the defendant has established the defense, it will be your duty to return a verdict of [not] guilty as to this charge." And what I think it does, it seems to shift or not explain that the burden is still on the State to prove forcible compulsion.

7RP 13. Nonetheless, the court found the state's consent instruction to be more clear and resolved to give it instead of the defense proposed. 7RP 13-14.

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reasonable doubt exists as to the element of forcible compulsion. Gregory, 158 Wn.2d at 803 (emphasis added).

As indicated above, the court granted the state's request to instruct the jury on second degree rape as an inferior degree offense. The defense also proposed instructions on an inferior degree offense -- third degree rape. CP 20-25, 36-37. The court granted the state's request, but denied that of the defense.[6] 7RP 6.

The court sentenced Ortiz-Triana to an indeterminate sentence at the top of the standard range (102 months to life), based on an offender score of zero. CP 111-121. This appeal follows. CP 109-110.

2. Trial Testimony

On June 2, 2010, M.P. was caught drinking at school. 4RP 21, 39-40; 5RP 67. As a consequence, she was facing a 30-day suspension. 4RP 23. It would be M.P.'s second suspension that spring, as she just returned to school after a suspension for fighting. 5RP 67.

School counselor Karen Brown testified M.P. seemed more upset than typical for the circumstances. 4RP 22. M.P. testified she began crying when she found out she would be suspended,

[6] The defense initially proposed to instruct the jury on third degree rape as a *lesser included* offense, but later amended its proposal to instruct on the offense as an *inferior degree offense*. 7RP 3; see State v. Ieremia, 78 Wn. App. 746, 752, 899 P.2d 16 (1995) (third degree rape is an inferior degree offense of second degree rape).

because she did not want to stay home alone. 5RP 71, 73. In response to further questioning, M.P. eventually stated she did not want to stay home because of her mother's boyfriend. 5RP 75. When Brown asked if he "raped" her, M.P. shook her head yes. 5RP 75. 4RP 31; 5RP 18, 63.

M.P. testified that on May 11, 2010, she went to bed around 1:00 a.m. 5RP 22. Although she shared a room with her younger sister, her sister was spending the night at their father's house. 5RP 23-24. M.P. claimed she awoke to find Ortiz-Triana in her bed touching her leg. 5RP 26. Reportedly, M.P. sat up and called for her mother. 5RP 26. Ortiz-Triana said she was at work. 5RP 27.

M.P. alleged that she continued calling for her mother, but Ortiz-Triana said he was going to kill her and pointed a knife toward her neck. 5RP 27, 30-31. M.P. testified the knife was one of her mother's kitchen knives, "short and silver." 5RP 28. Her mother used it frequently to cut potatoes. 5RP 28.

According to M.P., Ortiz-Triana got on top of her and put her legs around him. 5RP 34. M.P. testified Ortiz-Triana pulled her underwear halfway down. 5RP 35. M.P. claimed that when she tried pulling them back up, Ortiz-Triana said, "Where is the knife at, and then he picked it up." 5RP 38. M.P. reportedly said, "okay, I'll

stop." 5RP 38. According to M.P., Ortiz-Triana set the knife by her pillow and engaged in vaginal intercourse with her. 5RP 38-39.

M.P. testified that on "two or three occasions," Ortiz-Triana allowed her to use the bathroom. 5RP 45. M.P. described the details of only two bathroom trips, however. 5RP 36, 40, 45-46. M.P. alleged that on each occasion, Ortiz-Triana accompanied her and took the knife. 5RP 36, 40, 45-46. On each occasion when they returned, M.P. sat on her sister's bed, in a reported attempt to stall the encounter. 5RP 41, 47. M.P. testified that each time, Ortiz-Triana directed to her to get back in bed, which she did. 5RP 41, 47.

M.P. testified that after Ortiz-Triana ejaculated, she asked whether he really intended to kill her. 5RP 48. Ortiz-Triana said no, that he wished he could pay M.P. to be his girlfriend, but not like a prostitute. 5RP 48-50. M.P. reportedly responded, "you are with my mom, and I wouldn't do that." 5RP 50. According to M.P., Ortiz-Triana said, "okay, just one more time." 5RP 54.

M.P. testified that during the next act of intercourse, she "wasn't paying attention to the knife anymore" and "did not know where it was." 5RP 54. According to M.P., she "just kept asking him if we could be done, if we were almost done." 5RP 56.

M.P. claimed Ortiz-Triana responded, "just a couple more minutes" and stopped about 15 minutes later. 5RP 56. M.P. testified it was approximately 4:00 a.m. 5RP 56.

At this point, the prosecutor attempted to hone in on the timing of this second act and the following exchange occurred:

> Q. So this time, this is after you had gone to the bathroom two times?
>
> A. Yes.
>
> Q. Was there another time?
>
> A. I think it was only twice. But we got up one more time because I said I was thirsty. So we went downstairs into the kitchen. And he had the knife with him the whole time. And we got two water bottles. I got myself one and then he got him on[e]. And then we went back up into the room.
>
> Q. Were the water bottles from the refrigerator?
>
> A. Yes.
>
> Q. Did you see where the knife was?
>
> A. No.
>
> Q. Did you see it at any point during the time that you walked from your bedroom to go down to the kitchen?
>
> A. It was in his hand.
>
> Q. Do you recall whether or not he ever set the knife down when you were in the kitchen?

A. No, I don't think he did. We were only in there for a second to get something to drink.

. . .

Q. At what point was it that you got up to go downstairs to go to the bathroom?

A. To the bathroom?

Q. I'm sorry. To the kitchen.

A. It had to be like three-something.

Q. So what was it that happened at about 4:00?

A. I'm sorry, what?

Q. What was it that happened at about 4:00? You said about 4:00 it stopped.

A. Yes. And then he got up and put his basketball shorts back on. And I said I had to use the bathroom again. And he told me to hurry up, so I did. And then I got back in my bed.

5RP 59. M.P. testified Ortiz-Triana left thereafter. 5RP 59.

M.P. claimed that Ortiz-Triana touched her inappropriately once before, approximately two years earlier. 5RP 52, 76. The jury acquitted him of this charge, however. CP 83.

Ortiz-Triana testified that during the early morning hours of May 11, 2010, he and M.P.'s mother, Sophie Pfutzner, were texting while Pfutzner was at work. Ortiz-Trirana indicated he wanted to go

Pfutzer's house and wait for her to get off work. 6RP 42-43. After getting the key, Ortiz-Triana went to Pfutzner's house and sat down on a couch by the downstairs bathroom. 6RP 43-45. He was going to relax, but heard footsteps on the stairs and saw M.P. poke her head out from around the corner, looking to see who was there. 6RP 47. M.P. said Ortiz-Triana startled her and asked what he was doing there. 6RP 48. Ortiz-Triana said he was waiting for M.P.'s mother, and M.P. said she was going back to sleep. 6RP 48.

Ortiz-Triana testified he asked M.P. if she wanted to have some fun. 6RP 48. According to Ortiz-Triana, M.P. asked "what kind of entertainment?" 6RP 48. Ortiz-Triana said, "you know." 6RP 48. When he added, "I can give you some money[,]" M.P. reportedly turned around and said, "well, one never knows." 6RP 49. Ortiz-Triana testified he waited a few seconds and then went into M.P.'s bedroom, where the two engaged in consensual sexual intercourse. 6RP 49, 52-54. Ortiz-Triana did not have a knife and he did not threaten or force M.P. to do anything. 6RP 55.

Ortiz-Triana suspected M.P. fabricated the rape allegation because M.P. feared she was pregnant and because she was ashamed she slept with her mother's boyfriend. 6RP 13. M.P. had

told a friend shortly after the incident she feared she was pregnant. 5RP 62-63, 112-113.

D. ARGUMENT

1. THE COURT'S REFUSAL TO GIVE THE DEFENSE PROPOSED INSTRUCTIONS ON CONSENT AND THIRD DEGREE RAPE PREVENTED ORTIZ-TRIANA FROM PRESENTING HIS THEORY OF THE CASE.

The court deprived Ortiz-Triana of his constitutional right to present his theory of the case when it refused to give his proposed instructions on consent and third degree rape. A defendant in a criminal case is "entitled to have the trial court instruct upon his theory of the case if there is evidence to support the theory." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

"Instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury on the

applicable law." State v. McLoyd, 87 Wash.App. 66, 71, 939 P.2d 1255 (1997), aff'd sub nom. by State v. Studd, 137 Wash.2d 533, 973 P.2d 1049 (1999) (citing Flint v. Hart, 82 Wn. App. 209, 223, 917 P.2d 590 (1996)). A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case. State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981).

(i) The Court's Consent Instruction Did Not Adequately Inform the Jury of the Applicable Law.

The Court's consent instruction did not adequately inform jurors of the applicable law governing consent, because it did not make clear the state still bore the burden to prove forcible compulsion, regardless of consent. In the absence of such clarity, jurors could have doubted the state's proof of forcible compulsion yet still convicted Ortiz-Triana of second degree rape based on his failure to prove consent by a preponderance of the evidence. This Court should therefore reverse.

Ortiz-Triana proposed the following instructions on the affirmative defense of consent:

> When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence; or the

> expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.
>
> Consent is an affirmative defense to the crime of rape and the defense bears the burden of proving consent by a preponderance of the evidence. Even if, however, you do not find consent established by a preponderance of the evidence, you may still consider evidence of consent in determining whether or not the defendant acted with forcible compulsion and if you find that here is sufficient evidence to raise a reasonable doubt as to that element, you must acquit the defendant of the charge of rape in the first degree, or in the alternative rape in the third degree.
>
> Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

CP 52-54.

Although the state agreed the defense proposed instructions were a correct statement of the law, the court refused to give them, instead opting for WPIC 18.25, proposed by the state, which provides:

> A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must

> be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

CP 72. The court's decision to give this instruction over those proposed by the defense was in error.

Significantly, the comment to WPIC 18.25 expressly advises:

> The court should use caution if the defendant objects to the use of this instruction. See State v. McSorley, 128 Wn. App. 598, 116 P.3d 431 (2005) (holding that the defendant's "constitutional right to at least broadly control his own defense" prevented the State or the court from compelling the defendant to rely on an affirmative defense to child luring).

Not only did Ortiz-Triana object to giving WPIC 18.25 but he proposed his own consent instructions – which the state conceded were correct, and which clarified the overlapping burdens of proof when the affirmative defense of consent is raised.

In Gregory, the court upheld the constitutionality of allocating the burden to prove consent to the defense, but only:

> So long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the state of its burden to prove forcible compulsion beyond a reasonable doubt.

Gregory, 158 Wn.2d at 803-804.

As defense counsel argued, WPIC 18.25 does not explain to the jury that the burden still rests on the State to prove forcible compulsion or that the jury may consider evidence of consent (even if not rising to a preponderance) insofar as it establishes reasonable doubt of forcible compulsion. 7RP 13. Although defense counsel attempted to argue that – regardless of consent – the state still bore the burden to prove forcible compulsion (7RP 60-61), the jury was instructed "to disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 58. The jury instructions as a whole did not inform the jury of the applicable law and therefore prevented Ortiz-Triana from arguing his theory of the case. See e.g. State v. Buzzell, 148 Wn. App. 592, 600-601, 200 P.3d 287 (2009) (error not to instruct jury on consent as defense to indecent liberties by forcible compulsion).

Nor was the error harmless in this case, as the verdicts of acquittal indicate the jury did not find M.P. entirely credible. CP 82-83; cf. Buzzell, 148 Wn. App. at 601 (failure to instruct on consent harmless because Buzzell argued consent and case turned on

whether the jury believed him). While the state might argue the jury's acquittal on the first degree rape charge could be attributed to the state's proof problems concerning the alleged knife,[7] such proof problems do not explain the jury's acquittal on the third degree molestation charge. If the jury found M.P. entirely credible, it would have convicted on that charge, as well as second degree rape.

Based on the instructions here, it's possible the jury disbelieved the state's proof of forcible compulsion yet still convicted, based on Ortiz-Triana's failure to prove consent. This Court should reverse.

(ii) There Was Evidence to Support Third Degree Rape as an Inferior Degree Offense.

Because there was sufficient evidence to support an inference that the lesser crime was committed, the court erred in failing to instruct the jury on third degree rape. Where a defendant

[7] Police never took custody of the alleged knife. Although police interviewed M.P. and her mother at their home the day of M.P.'s suspension, the officer did not ask M.P. to identify the knife or take any of Pfutzner's knives as evidence. 4RP 43-44, 110; 5RP 97. Nor did the detective when she interviewed Pfutzner and M.P. a few days later. 4RP 111; 6RP 12, 15.

Although the detective took some photos of two suspect knives in December 2010 (5RP 98; 6RP 21, 28), Pfutzner testified neither was the "short paring knife" she saw out on the counter (the one she typically used to cut potatoes) when she returned home from work that morning. 4RP 80-81, 107, 118.

Accordingly, Pfutzner took some pictures of her own, which were admitted at trial. 4RP 3-4, 84, 105-107. However, M.P. testified she did not remember which knife it was; they were all part of a set. 4RP 84, 108; 5RP 31, 120.

is charged with an offense that is divided by inferior degrees of a crime, the jury may find the defendant not guilty of the charged offense, but guilty on any lesser degrees of the crime. RCW 10.61.003; RCW 10.61.006. An instruction on a lesser offense is proper only if there is sufficient evidence to support an inference that the lesser included crime was committed. Buzzell, 148 Wn. App. at 602.

Whether there is sufficient evidence is determined in light of the entire record as viewed most favorably toward the defendant. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000). Once *any* evidence is produced to support the instruction, the defendant has a due process right to have his theory of the case presented under proper instructions. See e.g. State v. Adams, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982) ("[o]nce any self-defense evidence is produced, the defendant has a due process right to have his theory of the case presented under proper instructions....") (emphasis added); Fernandez-Medina, 141 Wn.2d at 455-56 (applying same standard to inferior degree offense instructions).

The state charged Ortiz-Triana with first degree rape, under RCW 9A.44.040:

> (1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
>
> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon[.]

As indicated in the procedural facts, the court granted the state's motion to instruct the jury on second degree rape as an inferior degree offense, under RCW 9A.44.050:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
>
> (a) By forcible compulsion[.]

As also indicated above, the defense sought instructions on third degree rape, under RCW 9A.44.060:

> (1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first of second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:
>
> (a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct[.]

"Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely

given agreement to have sexual intercourse or sexual contact. RCW 9A.44.010(7).

Clearly, rape is an offense that is divided into degrees. See e.g. State v. Ieremia, 78 Wn. App. 746, 899 P.2d 16 (1995) (third degree rape is inferior degree of crime of second degree rape). Accordingly, Ortiz-Triana was entitled to have the jury instructed on the offense if there was any evidence in the record to support it.

In denying the defense request for the instruction, the court reasoned Ortiz-Triana testified the sexual intercourse was consensual and there was accordingly no indication of a lack of consent in his testimony. But the court failed to view the record *in its entirety*, as it must. Contrary to the court's ruling (5RP 5-6), there was evidence of lack of consent (in the absence of forcible compulsion) – although it came from M.P., not Ortiz-Triana.

M.P. testified that after Ortiz-Triana ejaculated, she asked whether he really intended to kill her. 5RP 48. Ortiz-Triana reportedly said no and indicated he wanted M.P. to be his girlfriend. 5RP 48-50. When M.P. said she wasn't interested (5RP 50), Ortiz-Triana said, "Okay, just one more time." 5RP 54. Although M.P. testified Ortiz-Triana engaged in sexual intercourse with her again, there was no allegation he used forcible compulsion. In fact, she

testified she "wasn't paying attention to the knife anymore" and "did not know where it was." 5RP 54.

Nevertheless, if believed, her testimony also establishes she did not consent to the sexual intercourse. Indeed, M.P. testified she "just kept asking him if we could be done, if we were almost done." 5RP 56. Yet, Ortiz-Triana continued for another 15 minutes, according to M.P.'s testimony. 5RP 56.

Based on M.P.'s testimony, a reasonable juror could have found M.P. did not consent, but that Ortiz-Triana did not commit the rape by forcible compulsion, either. The court therefore erred in failing to instruct the jury on this viable defense theory.

2. ORTIZ-TRIANA WAS DENIED HIS RIGHT TO A UNANIMOUS JURY VERDICT.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction or the court must instruct the jury to agree on a specific criminal act. Coleman, 159 Wn.2d at 511. These precautions assure that the unanimous verdict is based on

the same act proved beyond a reasonable doubt. Coleman, 159 Wn.2d at 511-12.

A fairly recent decision by Division Two is illustrative. State v. York, 152 Wn. App. 92, 216 P.3d 436 (2009). Richard York was convicted of four counts of second degree child rape. The first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she spent the night at Cindy York's house "like, every Friday night" and that York would have sex with her "[m]ost of the time." York, 216 P.3d at 437 (citation to record omitted).

In closing argument, the prosecutor supported count four by stating that:

> [S.B.] talked about a pattern ... she said it happened a lot.... It's not anything you can hang a number on. And she said it happened all the time or some of the time or none of the time. RP at 430.

York, 216 P.3d at 437.

The Court of Appeals reversed York's conviction, reasoning:

> Here, the evidence supporting count four was S.B.'s testimony that she spent the night at Cindy's house once a week for about a year and that York had sex with her on most of those occasions. This

> evidence presented the jury with multiple acts of like misconduct, any one of which could form the basis of count four. See Coleman, 159 Wash.2d at 511, 150 P.3d 1126. Because the State did not specify an act for count four, the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts S.B. described, supported the count four conviction beyond a reasonable doubt.

Id.

Similarly here, M.P. testified to two acts of "like misconduct, any one of which" could have formed the basis for the rape charge. First, she described an act of sexual intercourse that was completed. This act was followed by a conversation between M.P. and Ortiz-Triana during which he reportedly told her he wished she would be his girlfriend, an idea she rejected. Ortiz-Triana reportedly decided "just one more time" as a result, and reportedly forced sexual intercourse with M.P. a second time.

During closing argument, the prosecutor did not elect which act the jury should rely on to convict. 7RP 20-30. Rather, the prosecutor argued amorphously that the jury should find Ortiz-Triana raped M.P. at knifepoint. 7RP 20-23. Nor did the court instruct the jury it must be unanimous as to which of the acts Ortiz-Triana committed. CP 53-68. The court's failure to so instruct the jury violated Ortiz-Triana's right to a unanimous jury verdict.

In response, the state may argue no unanimity instruction was required on grounds Ortiz-Triana's acts constituted one continuing course of conduct. See e.g. State v. Knutz, 161 Wn. App. 395, 408, 253 P.3d 437 (2011) (no unanimity instruction required where defendant's conduct constitutes a continuous course of conduct). This potential argument should be rejected, however, because M.P.'s testimony showed the first alleged rape was completed before the second, and the two acts were separated by conversation.

In the sentencing context, courts have held similar circumstances preclude such acts from constituting the same criminal conduct. See e.g. State v. Granthan, 84 Wn. App. 854, 932 P.2d 657 (1997) (two separate rapes committed by defendant were not "same criminal conduct" for sentencing purposes, although rapes were committed against same victim at same place and occurred relatively close in time, as defendant committed rapes by two different methods, and defendant formed new criminal intent when he committed second rape, in view of evidence that first rape was completed before second was commenced, that, between rapes, defendant threatened victim not to tell and victim begged defendant to stop and take her home, and that defendant had to

use new physical force to obtain sufficient compliance to accomplish second rape).

If an intermission, such as the one described here, prevents the two acts from constituting the same criminal conduct for sentencing purposes, it stands to reason that the acts are thus separate and should require unanimity where either could form the basis of one count charged.

In response, the state may also argue that the prosecutor's amorphous argument in closing in fact constituted an election, because M.P. only described the knife being used during the first act. This potential argument should also be rejected.

At the outset, it should be noted that a prosecutor's election in closing is not in and of itself sufficient to insure unanimity. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (closing argument insufficient to constitute "clear election" where evidence and jury instructions allowed jury to rely on either victim for robbery count). And contrary to the state's potential argument, the prosecutor's closing argument here did not foreclose the possibility jurors relied on the second encounter to convict.

Initially, M.P. testified she did not know where the knife was during the second incident and was no longer paying attention to it.

Nonetheless, when the prosecutor asked questions about the timing of the second act, M.P. testified about a trip to the kitchen for water during which Ortiz-Triana accompanied her with a knife. M.P.'s testimony did not make clear whether this trip occurred during the first or second incident. Accordingly, the prosecutor's argument that Ortiz-Triana raped M.P. by threat of a knife did not foreclose the possibility that the jury convicted based on the second act.

And significantly, just as it may have found with the first act, the jury could have found the knife – although not a deadly weapon, i.e. capable of causing death or substantial bodily harm – constituted forcible compulsion, i.e. or a threat, express or implied, that places a person in fear of death *or physical injury to herself.* Cf. 9A.04.110(6) (deadly weapon) and RCW 9A.44.010(7) (forcible compulsion).

Constitutional error is presumed prejudicial and the state bears the burden to prove that it was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The state cannot do so here. Although some jurors may have believed the knife on the trip to the kitchen constituted forcible compulsion during the second act, some jurors may have

found the knife trip actually occurred during the first encounter, and the state therefore failed to prove forcible compulsion for the second act. Consequently, it is possible some jurors relied on the second act to convict while other relied on the first. Because the instructions allowed jurors to convict even if they disagreed as to which act he committed, Ortiz-Triana was prejudiced. This Court should reverse his conviction.

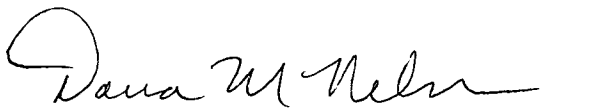
E. CONCLUSION

For the reasons stated above, this Court should reverse Ortiz-Triana's conviction and remand for a new trial.

Dated this 31st day of October, 2011

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67039-5-I
	)	
MAX ORTIZ-TRIANA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAX ORTIX-TIANA
DOC NO. 346883
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2011.

X Patrick Mayovsky

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STATE OF WASHINGTON
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