

State Supreme Court does an injustice to rape victims

By Joanne Lisosky, Contributing writer

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Dear Washington Supreme Court:

Six of you – Barbara Madsen, Mary Fairhurst, Debra Stephens, Charles Wiggins, Sheryl Gordon McCloud, and Justice Pro-Tem Teresa Kulik – opined last month about whose responsibility it was to prove consent in rape cases.

You said that requiring a rape defendant to prove the victim consented was a violation of the defendant's due process. So, with the stroke of your pens, you sent our state's rape laws back more than 25 years when the victim was the focus of the rape trial and not the defendant. Shame on you.

The U.S. Justice Department reports that sexual assault is the least reported, least indicted and least convicted crime in the United States. Non-consensual sexual assault has reached such epidemic proportions on college campuses that the president and U.S. Centers for Disease Control have stepped in with a task force to examine and prevent these crimes.

One in five young women will endure sexual assault as part of her campus experience, and fewer than 5 percent will report this crime. On campuses, two-thirds of sexual assault victims know their assailants – a fact that makes the victim's work of proving non-consent that much more difficult.

Your decision virtually wiped out the Washington law that mandated some protection for the victim in sexual assault cases. The Legislature changed the law in 1975 to focus on the defendant's motives and not the non-consent of the victim. Then in the 1980s and 2000s, the State Supreme Court reaffirmed that the defendant has to prove consent by the victim through a "preponderance of evidence."

Now, as a result of your decision, the victim has to prove consent did not exist.

Forcing the victim to prove non-consent assumes the court can demonstrate what consent looks like. How does one express approval? Will consent be considered granted when the half-awake victim opens her eyes? When she passes out? When she doesn't fight back? When she stops screaming?

Your decision has made it the victim's job in to prove she did not give consent to be assaulted – focusing on the victim's actions rather than the actions of the attacker.

Even a fifth-grader understands the U.S. fundamental right that a defendant is innocent until proven guilty. But this same fifth-grader also knows that victims of other violent crimes like murder or other assaults do not have to prove they consented to the crime.

Justice Stephens suggested that her decision was somewhat based on her concern about wrongful convictions of defendants. She needn't be concerned. Statistics suggest that the myth of false reporting occurs in about 2 to 3 percent of cases – ostensibly matching the levels of false reporting of other crimes. Now, thanks to her decision, sexual assault cases will focus more on the victim and not the defendant. This will likely result in less reporting, thus fewer convictions.

Forced sex is an abhorrent, criminal act. And that victim frozen in fear should have the full protection of the state. Your decision would likely take a different turn if you had sat and held the hand of a young person who has just been attacked by someone she thought was her friend.

Those of us who have endured this experience with a young college-aged person appreciate the three dissenting opinions of your colleagues – Justices Susan Owens, Charles Johnson and Steven González – who wrote: “The majority (six justices) overlooks the harm that its holding will cause the victims of rape, who will now face a trial centered around their conduct.”

Had you held that young person's hand, you might understand why asking her if she had chosen the right words or physical gestures to prove “non-consent” is simply adding another assault to the one she just experienced. The shame should not be on her.

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