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Court of Appeals No. 36721-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

RICHY DESHUN CARTER,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-027819
The Honorable Lisa Worswick, Presiding Judge**

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98417
email: slarnold2002@yahoo.com
(253)759-5940**

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in giving the third degree rape jury instruction.
2. The State presented insufficient evidence to convict Mr. Carter of third degree rape.

II. ISSUES PRESENTED

1. Was it error for the trial court to give the third degree rape jury instruction where the evidence did not support giving the instruction? (Assignment of Error No. 1)
2. Did the State introduce sufficient evidence to convict Mr. Carter of third degree rape where the evidence did not support the conclusion that the sexual contact between Ms. Failey and Mr. Carter was unforced but nonconsensual? (Assignment of Error No. 2)

III. STATEMENT OF THE CASE

Factual and procedural background

On January 30, 2004, Sarah Failey went to a birthday party with her two friends Jamie Whittaker and Stephanie Fincham. RP 125-126, 539-542. Beer and hard liquor was being served at the party and Ms. Failey remembered drinking a couple beers. RP 542-543. Ms. Failey, Ms. Whittaker, and Ms. Fincham brought a fifth of Captain Morgan hard alcohol to the party and were all drinking. RP 127-128, 330-331, 542-543. At the party, Ms. Whittaker became “drunk, but not totally intoxicated.” RP 128. Ms. Whittaker and other people were also smoking pot at the party. RP 543\

At the party, Ms. Failey got a phone call from her ex-boyfriend, Nate Harland. RP 544-545. Mr. Harland was celebrating his 21st birthday with his twin brother at a bar called the Chalet. RP 544-545. Ms. Failey, Ms. Whittaker, and Ms. Fincham left the party and went to the Chalet. RP 129, 332, 545.

At the Chalet, Ms. Fincham and Ms. Whittaker went into the Chalet but Ms. Failey did not because Ms. Failey was not old enough to enter the bar. RP 130, 546. Ms. Fincham and Ms. Whittaker went inside the bar to get Mr. Harland to go outside and talk to Ms. Failey. RP 130-131, 332-333, 546. Ms. Fincham and Ms. Whittaker were inside the Chalet for quite a while. RP 546. Ms. Failey had to use the restroom so she called Ms. Ms. Fincham and Ms. Whittaker on her phone. RP 546. Ms. Whittaker and Ms. Fincham told Ms. Failey to come inside the bar. RP 547. Ms. Whittaker and Ms. Fincham helped Ms. Failey sneak into the bar through the back door by the restrooms. RP 547.

Ms. Failey used the restroom then went and spoke with Mr. Harland and some of Mr. Harland's friends. RP 548. Ms. Fincham and Ms. Whittaker were at the bar talking with Richy Carter, Jerry McClurkin, Harold Wright, and Daryl Wright. RP 549. Ms. Failey went over to the bar and began talking to the men. RP 553. Mr. Carter lived in Ms. Failey's neighborhood when she was growing up. RP 540. Mr. Carter

played basketball with Ms. Failey's brother and Ms. Failey used to go to barbecues at Mr. Carter's house. RP 540-541. Ms. Failey felt comfortable with the men and did not have any concerns for her safety at that time. RP 554.

The women and the men left the bar around closing time. RP 555. Prior to leaving the bar, Mr. McClurkin and Mr. Carter asked the women if they would like to go to Mr. McClurkin's home. RP 556-557. Ms. Failey expected that it would be a party. RP 557. Nobody threatened the women to go to Mr. McClurkin's home. RP 233. The group went to a gas station where the men purchased beer. RP 163, 557. The women then followed the men to Mr. McClurkin's house. RP 163, 560. Ms. Failey had no concerns for her safety at the time the group arrived at Mr. McClurkin's home. RP 561. Ms. Failey knew that there would be alcohol at Mr. McClurkin's home and that it would be a party. RP 695. Ms. Failey and her friends went to Mr. McClurkin's home because they wanted to party. RP 695-696.

Once at Mr. McClurkin's home, Mr. McClurkin took everyone on a tour of his home to show it off. RP 562. Upstairs, there was a big open area that had exercise equipment which Ms. Failey got on and played around on. RP 571. Eventually, everyone went to the kitchen and began drinking beer and tequila as loud music played. RP 561, 565. Ms. Failey

drank beer and shots of tequila for an hour until she was not very sober. RP 566-567. Ms. Failey testified that she was “pretty drunk”, and that, because of her alcohol consumption, she didn’t “really remember everything that night.” RP 567. Ms. Failey continued to drink most of the time she was in the house. RP 569. Ms. Failey drank shots of hard alcohol. RP 351.

Ms. Failey began to dance to the music that was playing. RP 568. At some point in the evening, Ms. Failey went upstairs at the same time as Harold Wright and Ms. Fincham. RP 186. Ms. Failey and Ms. Fincham came back downstairs and talked with Ms. Whittaker on the porch. RP 188. Ms. Failey and Ms. Fincham left the porch and went back upstairs. RP 188-189.

At some point, Ms. Fincham and Daryl Wright went upstairs into a bedroom. RP 570, 572. Daryl Wright and Ms. Fincham “made out”, but when Daryl Wright tried to take Ms. Fincham’s pants off and go further, Ms. Fincham did not want to. RP 366. Ms. Fincham testified that, after she told Daryl Wright she did not want to have sex, she went downstairs. RP 367. Ms. Fincham testified that she did not know where Ms. Failey was at the time Daryl Wright tried to have sex with her and she went back downstairs. RP 367.

Ms. Fincham testified that at some point that night she was outside

with Ms. Whittaker smoking a cigarette when Ms. Failey came downstairs wearing only her bra and pants. RP 388, 390. Ms. Fincham testified that Ms. Whittaker gave Ms. Failey a coat. RP 434. Ms. Whittaker testified that, because of her alcohol consumption, she doesn't remember everything that happened that night. RP 216-217.

Ms. Failey testified that she went looking for Ms. Fincham. RP 572. Ms. Failey testified that she went into the bedroom where Ms. Fincham was with Daryl Wright and saw Daryl Wright "hitting on" Ms. Fincham. RP 572-573. Ms. Failey testified that Ms. Fincham appeared uncomfortable. RP 573-574. Ms. Failey testified that when she entered the room, Daryl Wright went into the bathroom adjoining the bedroom. RP 574. Ms. Failey testified that Ms. Fincham told Ms. Failey that she wanted to leave. RP 574.

At the time Ms. Fincham wanted to leave, Ms. Whittaker was on the patio behind the house smoking cigarettes and marijuana. RP 168-169, 574, 1818. Harold Wright was also on the patio with Ms. Whittaker. RP 574.

Ms. Failey testified that when Ms. Fincham told Ms. Failey that she wanted to leave, Ms. Fincham and Ms. Failey went looking for their shoes. RP 575. Both Ms. Fincham and Ms. Failey were "pretty drunk" at that time. RP 575. Ms. Failey testified that she and Ms. Fincham went

into another bedroom to look for their shoes. RP 575. It was really dark in the room, but Ms. Failey testified that she remembered seeing a bed in the room. RP 575-576. Ms. Fincham asked Ms. Failey if a pair of shoes in the room were Ms. Failey's shoes. RP 577. Ms. Failey testified that she was pulled into the room as Ms. Whittaker was pulled out of the room. RP 577.

Ms. Failey testified that her clothes were taken off and that she was held down on her back on the bed. RP 578, 585. Ms. Failey didn't remember how she got to the bed. RP 587-588. Ms. Failey testified that someone was on her left side holding her shoulder. RP 578-579, 588. Ms. Failey testified that it felt like someone was leaning over her and that she couldn't move or get away. RP 588. There was nothing holding Ms. Failey down besides the weight of the person holding her shoulder. RP 588. Ms. Failey later told a detective that she tried to push the person off of her but was unsuccessful. RP 645-646.

Ms. Failey could not see who was in the room with her and could not feel their clothing. RP 579. Ms. Failey testified that she didn't remember what she was doing as her clothing was being taken off but that she did not scream. RP 585. Ms. Failey did remember being in the room and saying "stop" and "this isn't right," but does not remember how loudly she spoke those words. RP 585. Ms. Failey also remembered that the

music downstairs was “pretty loud” and she could hear it while she was upstairs. RP 579-580.

Ms. Failey felt a man’s hands and penis touching her vagina. RP 589-590. Ms. Failey doesn’t know how long it lasted, but the penis did penetrate her vagina. RP 590. Ms. Failey remembered that it felt like two different men put their penises inside her. RP 590.

Ms. Failey remembered saying “stop” and “this isn’t right” and the men telling her, “it’s okay. Everything is okay.” RP 590-591. Ms. Failey did not recognize the voice that spoke to her, but it was a deep male voice speaking in a regular tone. RP 591.

Ms. Failey remembered the door to the bedroom opening about two inches. RP 593-594. Ms. Failey told defense counsel in an interview that Ms. Fincham opened the door and the men saw her which made the men stop raping her. RP 648.

Ms. Fincham testified that she went back upstairs one time and that she did not know where Ms. Failey was when she went back upstairs. RP 368. Ms. Fincham testified that she tried to open the door to the bedroom but that it felt like something was holding the door shut. RP 371-372. The door shut like someone had shut it. RP 372. Ms. Fincham told defense counsel in an interview that when she opened the bedroom door she saw Ms. Failey and another man. RP 421, 425. Ms. Fincham did not

know what was going on in the room and it could have been consensual. RP 480.

Ms. Failey testified that the men let her go and she got off the bed and began crying and trying to find her clothes. RP 595. Ms. Failey testified at trial that she was drunk while this happened but that she knew it was not consensual. RP 660-661.

Ms. Failey testified that she exited the bedroom and ran straight out the front door to her car while crying. RP 600. Ms. Failey testified that she started her car and sat in it and waited for Ms. Whittaker and Ms. Fincham to come out of the house. RP 609. Ms. Failey testified that when she got in the car she was hysterical, scared, and didn't know what to do. RP 609.

Ms. Whittaker testified that when Ms. Failey came downstairs for the second time and immediately prior to the women leaving, Ms. Whittaker was in the kitchen and Ms. Failey came down the stairs and said, "We got to go. We got to go." and then exited the home. RP 189-191. Ms. Whittaker testified that Ms. Failey then went out to her car. RP 190-191. Ms. Whittaker testified that Ms. Failey was crying and yelling. RP 191. In the car, Ms. Failey was screaming, "They raped me. They raped me." RP 195. On cross-examination, Ms. Whittaker changed her testimony and testified that, when Ms. Failey came downstairs and said

“We got to go,” Ms. Failey did not appear to be angry or upset. RP 259-260.

Ms. Fincham testified that Ms. Failey came downstairs shortly after Ms. Fincham tried to open the bedroom door. RP 373. Ms. Fincham testified that Ms. Failey came downstairs and pulled Ms. Fincham into a bathroom. RP 373. Ms. Fincham testified that Ms. Failey was “freaked out” and shaking and told Ms. Fincham, “We have to go. We have to leave now. I’ve been raped. We need to leave.” RP 373. Ms. Fincham also testified that once the women were in the car Ms. Failey said she was raped. RP 376.

As Ms. Failey drove away, Mr. Carter knocked on the window of the car next to Ms. Whittaker and asked what was wrong and why the women were leaving and why Ms. Failey was crying. RP 611, 1648. Mr. Carter asked this in a normal tone of voice. RP 611.

As Ms. Failey drove away, she hit a curb and got a flat tire. RP 209-210, 612-614. Ms. Failey testified that she was pretty drunk at that time. RP 615. Ms. Whittaker and Ms. Fincham used their cell phone to get in contact with Kevin Petersen and his cousin, DJ. RP 212-213, 616. Ms. Failey did not call the police or her parents because she was scared she would get in trouble because she was underage but was drunk and driving. RP 615-616. Ms. Failey did not want to tell her mother what had

happened because her mother knew the men at the party. RP 616. Ms. Whittaker offered to call her father but Ms. Failey told her not to. RP 617. Ms. Whittaker did not know why the police were not called, but did not remember any discussion about calling the police. RP 212, 262-263.

Ms. Failey had Mr. Petersen and D.J. drive her to her brother's house so she could "hang out there until the morning and figure it out in the morning." RP 617. Ms. Fincham told Ms. Failey's brother what had happened. RP 618.

Ms. Failey stayed at her brother's house for about half an hour and then went to the home of Mr. Petersen and D.J. RP 618. At Mr. Petersen's house, Ms. Failey smoked cigarettes and cried and eventually decided she didn't want to stay there anymore, but she didn't know where to go, what to do, or who to tell. RP 619.

While at Mr. Petersen's house, Ms. Failey noticed that her pants were on inside out and that the crotch of her pants was really bloody. RP 619-621. Ms. Failey was restless at Mr. Petersen's house, so she called her friend Angie who came and picked her up. RP 214, 621. Angie took Ms. Failey to Angie's house. RP 214, 622. Ms. Failey told Angie what had happened. RP 622.

Angie told Ms. Failey to lay down and rest. RP 622-623. Angie wanted to call Ms. Failey's mother, but Ms. Failey told her not to. RP

623. Ms. Failey laid on Angie's couch until the police arrived later that afternoon. RP 623. One officer responded to Angie's home. RP 653. Ms. Failey wrote a statement for the officer. RP 653.

After Ms. Failey wrote her statement, the officer sent Ms. Failey to St. Clare hospital in Lakewood. RP 656. The nurses at St. Clare hospital sent Ms. Failey to Tacoma General Hospital. RP 657. Ms. Failey and her mother went to Tacoma General Hospital where Ms. Failey was questioned and examined. RP 657-658. The staff at Tacoma General collected samples from underneath Ms. Failey's fingernails and took swabs from Ms. Failey's mouth, chest, and vagina. RP 658-659. Ms. Failey also gave the examiner her clothes. RP 659.

Ms. Failey was also given a physical exam. RP 883. No injuries to Ms. Failey were found during the examination and Ms. Failey did not complain of any pain. RP 884. Ms. Failey did have a small amount of vaginal bleeding but did not have any injuries to her genital area. RP 890, 894. The bleeding could have been related to Ms. Failey's menstrual cycle. RP 906.

Ms. Failey told Christine Schlatter, the sexual assault nurse who examined her (RP 869, 879), that she had seen Daryl Wright trying to fit a condom over his penis to get Ms. Fincham to have sex with him. RP 908. Ms. Fincham testified that she did not remember Daryl Wright removing

his clothes and she did not remember seeing any “intimate portions” of his body. RP 366-367.

Ms Schlatter testified that the physical findings of the exam were consistent with consensual sex. RP 912-913.

Ms. Failey gave a written statement to Deputy Parfitt wherein she stated that at one point she went outside and saw Harold Wright kissing Ms. Whittaker. RP 825. At trial, Ms. Whittaker testified that Harold Wright attempted to kiss her, but that she stopped him before he succeeded. RP 226.

Det. Raymond Shaviri obtained a DNA swab from Mr. Carter on October 19, 2005. RP 975-977.

Semen was detected on the swabs taken from Ms. Failey’s vagina. RP 1015-1023. The DNA profile of the semen from Ms. Failey’s vagina matched Mr. Carter’s DNA profile. RP 1034.

On June 21, 2006, Mr. Carter was charged with one count of second degree rape. CP 3.

At trial, Daryl Wright testified. RP 1065. Daryl Wright testified that he, Harold Wright, Richy Carter and Jerry McClurkin met at the Chalet on the evening of January 30, 2004. RP 1067. While the men were sitting at the bar, Sarah Failey, Jamie Whittaker, and Stefanie Fincham approached the men and began talking with them. RP 1068-1069. Daryl

Wright spoke with Ms. Fincham and eventually invited her and the other women to go to Jerry McClurkin's house to hang out and get to know one another. RP 1071. Ms. Fincham spoke with her friends and they agreed to go to Mr. McClurkin's house. RP 1071.

At Mr. McClurkin's house, Daryl Wright and Ms. Fincham continued talking. RP 1073. Daryl Wright testified that the other women were talking to Mr. Carter and Harold Wright. RP 1075. Daryl Wright testified that music was turned on and Ms. Failey began to dance provocatively wearing only her bra. RP 1075. Ms. Failey was running around the house and shaking her breasts. RP 1075-1076. Ms. Failey went without her shirt for most of the evening. RP 1090.

Daryl Wright and Ms. Fincham began kissing and then went upstairs to a bedroom. RP 1074-1075. Daryl Wright and Ms. Fincham went into a bedroom and had sexual intercourse. RP 1081-1082. Daryl Wright used a condom. RP 1082.

Daryl Wright testified that Ms. Failey never walked in on he and Ms. Fincham having sex and that Ms. Failey never saw his penis. RP 1127.

A short time after Ms. Fincham and Daryl Wright had intercourse, Mr. McClurkin knocked on the bedroom door and Daryl Wright answered it. RP 1084-1085. Mr. McClurkin was there with Ms. Failey. RP 1085.

Mr. McClurkin and Ms. Failey came into the bedroom and everybody talked for awhile. RP 1085-1086. Eventually, Ms. Fincham left the bedroom. RP 1086. Daryl Wright left the bedroom and saw Mr. Carter on the landing upstairs. RP 1086.

Daryl Wright went into the restroom upstairs and when he came out the bedroom door was closed and he saw nobody else upstairs. RP 1087. Ms. Fincham gave Daryl Wright her phone number. RP 1094.

Mr. McClurkin and Mr. Carter also testified at trial. RP 1155, 1565. Mr. McClurkin and Mr. Carter testified that on January 30, 2004, they got together with Harold Wright and went to the Chalet. RP 1157-1158, 1566-1567, 1569-1570. At the Chalet, the men met Daryl Wright. RP 1158-1159. While the men were in the bar, Ms. Failey, Ms. Whittaker, and Ms. Fincham approached them. RP 1162-1165, 1577-1581. Ms. Failey began talking to Mr. Carter. RP 1583. Ms. Failey was bubbly and flirtatious. RP 1584. Ms. Failey was wearing tight jeans and a top that showed a lot of cleavage. RP 1584-1585. The women stayed with the men the whole time that they were at the bar. RP 1165-1166.

The men and women stayed at the bar until it closed. RP 1166, 1589. Ms. Failey looked visibly "buzzed" when she left the bar. RP 1167-1168. The group decided to go back to Mr. McClurkin's residence. RP 1168.

Mr. Carter followed Ms. Failey's car to a gas station where Harold Wright purchased beer. RP 1594-1595.

Once at Mr. McClurkin's residence, Mr. McClurkin gave the group a tour of his home. RP 1176-1177. After the tour, Ms. Failey played on Mr. McClurkin's exercise equipment and then the group gathered in the kitchen and drank alcohol. RP 1182, 1606-1607. Mr. Carter sat down on a couch and watched T.V. RP 1607-1608. Mr. McClurkin turned on his stereo. RP 1183.

Sometime later, Ms. Failey began dancing. RP 1185, 1609-1610. Mr. Carter got up and went in the kitchen and Ms. Failey began talking to Mr. Carter, being flirtatious and bubbly. RP 1611. Ms. Failey began "grinding" with Mr. Carter while looking at his face and smiling and giggling. RP 1612-1613. Mr. Carter walked away and Ms. Failey approached Mr. McClurkin. RP 1613.

Ms. Failey began dancing provocatively or "grinding" on Mr. McClurkin. RP 1185-1186, 1613. Ms. Failey then began kissing Mr. McClurkin. RP 1187. Eventually, Mr. McClurkin went upstairs to a bedroom with Ms. Failey. RP 1188. Mr. McClurkin and Ms. Failey went into the bedroom, closed the door, and continued to "make out." RP 1192. Mr. McClurkin and Ms. Failey removed Ms. Failey's sweatshirt and tank tops that she was wearing. RP 1193. Ms. Failey allowed Mr. McClurkin

to take her clothes off of her and assisted him. RP 1194. Ms. Failey was wearing her jeans and a bra and she and Mr. McClurkin continued to make out. RP 1194-1195.

Ms. Failey abruptly stopped making out with Mr. McClurkin and said she wanted to go check on her friends. RP 1196. Ms. Failey exited the bedroom and Mr. McClurkin followed her downstairs. RP 1196. Ms. Failey went onto the porch and smoked a cigarette with Ms. Whittaker. RP 1197. Ms. Failey then came back into the house and began "dirty dancing" again. RP 1198. Eventually, Ms. Failey and Mr. McClurkin went back upstairs into a bedroom and continued making out. RP 1199-1200. Mr. McClurkin and Ms. Failey eventually moved to a bedroom with a bed. RP 1201.

As Mr. McClurkin and Ms. Failey walked to the other bedroom, they saw Daryl Wright and Ms. Fincham leaving a bedroom. RP 1201-1202. Mr. McClurkin and Ms. Fincham went into the bedroom with the bed. RP 1202. Mr. McClurkin and Ms. Failey sat on the bed and continued to make out. RP 1204.

Mr. Carter saw Daryl Wright and Ms. Fincham come downstairs. RP 1617. Neither appeared to be in distress. RP 1616-1617. Mr. Carter then went upstairs to use the restroom. RP 1617. When he went upstairs, Mr. Carter heard people giggling and laughing in a bedroom. RP 1617-

1618.

Mr. McClurkin and Ms. Failey had made out for three to five minutes when there was a knock on the door and Mr. Carter came into the room and jokingly asked, "Hey, what are you guys doing in here?" RP 1205, 1618.

Mr. Carter testified that he went back downstairs, grabbed a beer, sat on the couch and then saw Mr. McClurkin and Ms. Failey come downstairs. RP 1619-1620. Ms. Failey began "grinding" on Mr. McClurkin and Mr. Carter. RP 1621-1622. Ms. Failey was wearing only her brassiere and was rubbing up against Mr. Carter acting flirtatious and moving her body in a sexual manner. RP 1622-1623. Ms. Failey put her breasts in Mr. Carter's face and another man's face and appeared to be having a good time. RP 1624. Ms. Failey went over to Mr. McClurkin and continued dancing until she and Mr. McClurkin went back upstairs. RP 1625-1626. Mr. Carter testified that he then went upstairs to look for Ms. Failey. RP 1626. Mr. Carter testified that he knocked on a bedroom door, said "Sarah," looked in and saw Ms. Failey and Mr. McClurkin sitting on a bed. RP 1628. Mr. Carter testified that he walked over to Ms. Failey who grabbed his waist. RP 1629. Mr. Carter then leaned over Ms. Failey and she kissed him and he began to kiss her back. RP 1629.

Mr. McClurkin testified that after Mr. Carter knocked on the door

and asked what Mr. McClurkin and Ms. Failey were doing, Mr. Carter touched Ms. Failey's shoulder, touched her breast, and then kissed her. RP 1206. Ms. Failey did not resist Mr. Carter's kiss and she and Mr. Carter began to make out. RP 1207. Mr. McClurkin left the room and went downstairs. RP 1208, 1210-1211, 1630. As Mr. McClurkin went downstairs, he passed Daryl Wright going upstairs. RP 1227.

Mr. Carter sat on the bed next to Ms. Failey and she began kissing him. RP 1630. Ms. Failey then got onto Mr. Carter's lap and kept kissing him. RP 1630. Mr. Carter then laid Ms. Failey on her side on the bed. RP 1630. Ms. Failey touched Mr. Carter's groin area as they kissed. RP 1631. Mr. Carter rubbed Ms. Failey's breast area and then her crotch area and Ms. Failey responded by moving her hips as Mr. Carter rubbed her crotch. RP 1631-1632.

Ms. Failey appeared to be enjoying it and did not tell Mr. Carter to stop. RP 1632. Ms. Failey grabbed Mr. Carter's crotch. RP 1632. Mr. Carter responded by putting his hand down Ms. Failey's pants and continuing to rub her vagina. RP 1632-1633. Ms. Failey tried to get her hand down Mr. Carter's pants. RP 1633. Ms. Failey then helped Mr. Carter take her pants off and then took her boots off. RP 1633-1634. Mr. Carter unzipped his pants and Ms. Failey began playing with his genitalia. RP 1634. Mr. Carter and Ms. Failey then had sexual intercourse. RP

1634-1636. When Mr. Carter and Ms. Failey finished having sex, Ms. Failey pulled her pants up and began giggling and laughing. RP 1637. Mr. Carter then left the room and went downstairs. RP 1637-1638.

Mr. McClurkin went into the kitchen and began cleaning up. RP 1227. Mr. Carter then came downstairs followed five minutes later by Daryl Wright. RP 1230. Ms. Failey then came downstairs fully dressed. RP 1231. Daryl did not appear to be distressed or anxious about anything. RP 1231. Ms. Failey was not crying and did not appear to be distressed or anxious. RP 1231-1232. Ms. Failey continued dancing when she came downstairs. RP 1639-1640. Mr. McClurkin observed that Ms. Failey had been "bubbly" all evening and was just as "bubbly" when she came downstairs as she had been when she went upstairs. RP 1232.

Mr. McClurkin saw Ms. Fincham give her telephone number to Daryl Wright and Ms. Whittaker gave her telephone number to Mr. McClurkin. RP 1233-1234, 1641-1642. Then everyone began to leave the house. RP 1234. Ms. Failey and Ms. Fincham walked out the front door and everybody seemed fine and did not seem to be mad or angry. RP 1235-1236.

Over Mr. Carter's objection, the jury was given a third degree rape instruction. RP 1888-1893, CP 167-193.

The jury found Mr. Carter not guilty of second degree rape but

guilty of third degree rape. RP 2044, CP 269.

Notice of Appeal was timely filed on August 31, 2007. CP 354-355.

IV. ARGUMENT

1. The trial court erred in giving the third degree rape jury instruction.

The court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

A trial court's decision on what instructions to give is reviewed de novo. *State v. Brightman*, 112 Wn.App. 260, 264, 48 P.3d 363 (2002), *reversed on other grounds*, 155 Wn.2d 506, 122 P.3d 150 (2005).

- A. It was error to instruct the jury on third degree rape since third degree rape is not a lesser included offense of second degree rape.

An instruction on a lesser included offense is warranted when two conditions are met: “[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

“A lesser included offense instruction is proper only if each element of the lesser offense is necessarily included in the charged offense and there is sufficient evidence to support the inference that the lesser crime was committed.” *State v. Charles*, 126 Wn.2d 353, 355, 894 P.2d 558.

If it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime. *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993).

Mr. Carter was charged with violating RCW 9A.44.050(1)(a). CP 3. Under RCW 9A.44.050(1)(a), “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...by forcible compulsion.”

Under RCW 9A.44.060,

A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator...[w]here 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.

The elements of third degree rape are not necessarily the elements of second degree rape. Third degree rape requires (1) that the victim not be

married to the perpetrator and (2) that the victim clearly express a lack of consent by words or conduct. Second degree rape as charged in this case requires only that the rape be complete by forcible compulsion.

Because second degree rape can be committed without committing third degree rape, third degree rape cannot be a lesser included offense of second degree rape under the *Workman* test. See *State v. Ieremia*, 78 Wn.App. 746, 750-754, 899 P.2d 16 (1995), review denied 128 Wash.2d 1009, 910 P.2d 481 (1996).

B. Third degree rape is a lesser degree of second degree rape.

“Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.” RCW 10.61.003.

“In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006.

Although a defendant may, under RCW 10.61.003, be convicted of a lesser degree of a crime than the one charged, a lesser degree offense instruction is improper unless there is evidence that he or she committed only the lesser degree offense. It is not sufficient that the jury might simply disbelieve the State’s evidence supporting the charged crime. Rather, the evidence must support an inference that the defendant committed the lesser offense

instead of the greater one. [A defendant] is entitled to lesser degree instructions only if [his or her] jur[y] could have concluded that [he or she] committed third degree instead of second degree rape.

State v. Jeremia, 78 Wn.App 746, 754-755, 899 P.2d 16 (1995), review denied 128 Wash.2d 1009, 910 P.2d 481 (1996). (Internal citations omitted) (emphasis in original).

Rape is a crime that is divided into degrees (*see* RCWs 9A.44.050 and 9A.44.060 *supra*), therefore, upon an indictment for second degree rape, a jury may find the defendant guilty of second or third degree rape, but only if the evidence supports an inference that the defendant committed third degree rape instead of second degree rape.

- C. It was error to instruct the jury on third degree rape where the facts presented to the jury did not support an inference that only third degree rape had been committed.

As stated above, “[i]t is not sufficient that the jury might simply disbelieve the State’s evidence supporting the charged crime. Rather, the evidence must support an inference that the defendant committed the lesser offense *instead of the greater one.*” *Jeremia*, 78 Wn.App 746, 754-755, 899 P.2d 16. (Internal citations omitted) (emphasis in original).

The case of *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995) is instructive when considering the facts of this case. In *Charles*, the State charged Charles with second degree rape, alleging that he engaged in

sexual intercourse by forcible compulsion. The victim testified that Charles forced her to the ground and made her have sex with him. Charles claimed the intercourse was consensual. The Supreme Court held Charles was not entitled to an instruction on third degree rape because there was no evidence that the intercourse was nonconsensual but unforced. The court reasoned that, if the jury believed the victim's testimony, Charles was guilty of second degree rape. If, however, the jury believed Charles' testimony, he was not guilty of any degree of rape. The Washington Supreme Court concluded that, in order to find Charles guilty of third degree rape, "the jury would have to disbelieve both Charles' claim of consent and the victim's testimony that the act was forcible." *Charles*, 126 Wn.2d at 356, 894 P.2d 558. As there was no "affirmative evidence that the intercourse...was unforced but still nonconsensual[,]...the trial court properly refused to instruct the jury on third degree rape." *Charles*, 126 Wn.2d at 356, 894 P.2d 558.

Other than the facts that it was the State that requested the third degree rape instruction and that the trial court gave the third degree rape instruction, the facts of this case are almost identical to those of *Charles*. Ms. Failey testified that Mr. Carter and another man forced her onto the bed and made her have sex with them. Mr. Carter, however, testified that the sex was consensual. The evidence before the jury supported two

possible scenarios: (1) Ms. Failey's scenario where the sex was forced and nonconsensual or (2) Mr. Carter's scenario where the sex was unforced and consensual.

Like the facts in *Charles*, the facts of this case did not include any affirmative evidence that the sex was unforced but still nonconsensual. The trial court in this case erred in giving the third degree jury instruction.

D. The erroneous jury instruction was improper and prejudicial.

"Trial court error on jury instructions is not a ground for reversal unless it is prejudicial. An error is prejudicial if it affects the outcome of the trial." *Stiley v. Block*, 130 Wn.2d 486, 498-499, 925 P.2d 194 (1996).

The erroneous jury instruction on third degree rape affected the outcome of Mr. Carter's trial in that Mr. Carter was convicted of third degree rape. CP 269. The jury specifically found that Mr. Carter was not guilty of second degree rape. RP 2044, CP 269. Had the jury been properly instructed, Mr. Carter would not have been convicted of any crime and would have simply been found not guilty. Here, as stated above, the facts of the case did not support instructing the jury on third degree rape. Mr. Carter was prejudiced by the improper jury instruction in that he was convicted of the crime described in the improperly given jury instruction.

2. The State presented insufficient evidence to convict Mr. Carter of third degree rape.

When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn. App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

As stated above, to convict a defendant of third degree rape as a lesser degree of second degree rape, the evidence must be sufficient to establish that the rape was both nonconsensual and unforced. Here, the jury was not presented with any evidence to support that conclusion. If the jury believed the State's witnesses, the jury could have found that the rape was both forced and nonconsensual. If the jury believed Mr. Carter and the other defense witnesses, the jury could have found that the sexual intercourse was consensual and unforced. The jury was not presented with any evidence to support a conclusion that the sexual contact was unforced but still nonconsensual.

The State presented insufficient evidence to establish that Mr. Carter committed third degree rape.

V. CONCLUSION

The trial court erred in giving the third degree rape instruction and Mr. Carter was prejudiced by the giving of the third degree rape instruction. Further, the State presented insufficient evidence to convict Mr. Carter of third degree rape.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The jury found Mr. Carter not guilty of second degree rape and the State presented insufficient evidence to establish that Mr. Carter committed third degree rape. This court should vacate Mr. Carter’s conviction and dismiss the case with prejudice.

DATED this 26th day of March, 2008.

Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on March 26, 2008, I delivered in person to Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave.S., Tacoma, Tacoma, WA. 98402, and by U.S. mail to the appellant, Richy D. Carter, 2501 187th Street East, Tacoma, WA. 98445, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on March 26, 2008.


Norma Kinter

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