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I. STATEMENT OF FACTS

The State accepts the Appellant's statement of the case with the following additions:

The nurse who examined A.F. at the hospital testified that A.F. told her that the defendant "really forcefully he stuck his hands down my pants, and he took off my shoes and pants." (4 RP 179-80). She further testified that A.F. told her that "I pushed with my hands and my feet, but he was a big, big boy." (4 RP 181). The nurse also testified that A.F. said, "he turned me over and put it not in the right place." (4 RP 181).

II. RESPONSE TO ASSIGNMENT OF ERROR

Appellant alleges that the trial court abused its discretion in denying defense's request to instruct the jury on Rape in the Third Degree. The State submits that controlling case law establishes that when a victim testifies as to forcible rape and a defendant's statements attempt to establish consent, an instruction on Rape in the Third degree is not appropriate.

A trial court's decision not to give a requested jury instruction is reviewed for abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

Appellant alleges that Rape in the Third degree should have been instructed under RCW 10.61.003. There is a difference between a lesser degree offense and a lesser included offense. *See State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995). A criminal defendant may be entitled to an instruction either as a lesser included offense, or under RCW 10.61.003 wherein a defendant charged with an offense that is divided into degrees may be found not guilty of the charged degree and guilty of any inferior degree.

A defendant who is charged with an offense that has inferior degrees, may, request a jury instruction of a lesser degree of the same offense under RCW 10.61.003; however, a lesser degree offense instruction is only proper if there is evidence that he or she committed only the lesser degree offense. *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579, *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990).

A defendant is entitled to an instruction on a lesser included offense if (1) each of the elements of the lesser offense are elements of the offense charged; and (2) the evidence must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Where a defendant 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, .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.” *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990).

The Washington State Supreme Court has considered this same issue in *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995). In *Charles*, the defendant was convicted of Rape in the Second Degree by forcible compulsion. At trial the victim testified the defendant forcibly raped her, and defendant testified to that what occurred between himself and the victim was consensual. *State v. Charles*, 126 Wn.2d 353, 354-55, 894 P.2d 558 (1995). Defense proposed an instruction on Rape in the Third Degree as a lesser included offense. The trial court did not give this proposed instruction. *Id.* at 355. The Supreme Court found there was no error in refusing to give the Rape in the Third Degree instruction as there was no affirmative evidence that established the elements of Rape in the Third Degree. *Id.* at 355-56.

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 an inference that the lesser crime was committed.” *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990). The Court has held that some evidence must be presented which

affirmatively establishes the theory of the lesser included offense before any such lesser instruction will be given. *Id.* at 363; *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

In *Charles*, the court was faced with the same decision and extremely similar facts as we have in the present case. In the case at hand, the victim establishes sufficient evidence, where if believed, the jury could find there was forcible compulsion. The victim testified that defendant “pushed me backwards;” (3 RP 79), that “my knees are up to my chest, and my feet are on his trying to push away, but I couldn’t;” (3 RP 81), and that he “flips me,” (3 RP 82), “I’m on my back and flips me over, and I’m on my front.” (3 RP 81). And further, the nurse from the Sexual Assault exam testified that the victim told her that, “she said in quotes I pushed with my hands and my feet, but he was a big, big boy, end quotes.” As the victim testified, she tried to resist, she tried to push him, and the force the defendant used to have intercourse with the victim overcame that resistance, and further the victim testified she was flipped over, twice, against her will. The nurse and doctor testified that the victim had bruises, scratch marks and vaginal and anal tearing.

The only evidence to the contrary that was presented by defense was one witness that testified that the victim told her it was consensual at one point, (4 RP 345-51), and the statements made by the defendant to the

police officers that he and the victim had consensual sex. (4 RP 224-49).

There was no evidence presented to support a Rape in the Third Degree.

The Court in *Charles* went through this same evaluation and determined 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. But there is no affirmative evidence that the intercourse here was unforced but still nonconsensual. Thus, the trial court properly refused to instruct the jury on Third Degree Rape.” *Charles*, 126 Wn.2d at 356.

The trial court here went through this same consideration. It considered the Court’s holding in *Charles* and found the facts here to be similar to those and found the Supreme Court’s decision in *Charles* to be binding. The trial court stated:

“having read *Charles* and also the most recent case that came down yesterday, it would seem to again follow that same basic philosophy, there’s no question that the—there was force used as to one of the rapes, which would be the anal intercourse. Based on her version there was force used to turn her and to place her in a position where rape occurred. According to his version she willingly turned over, so we—under consent, it’s a clear situation. It’s one or the other that the jury is going to be required to believe. I’m denying the lesser included.”

-(5 RP 365-66.)

The trial court's refusal to give the Rape in the Third Degree instruction is also consistent with *State v. Buzzell*, 148 Wn. App. 592, 200 P.3d 287 (2009), a Division One case where the defendant, charged with indecent liberties by forcible compulsion, requested a Rape in the Third Degree instruction and the court denied this request. In *Buzzell*, the victim testified that the defendant forcibly had sexual contact with her, and the defendant's version was that they had consensual sexual contact. Division One held that the *Workman* test was not met in *Buzzell* because it is possible for the defendant to have committed the greater offense without committing the proposed lesser offense of Rape in the Third Degree. *Buzzell*, 148 Wn. App. at 604. Third Degree Rape requires both that the victim not be married to the perpetrator and that the victim clearly express a lack of consent by words or conduct. RCW 9A.44.060. To commit the crime of Indecent Liberties one does not also have to commit the crime of Rape in the Third Degree and therefore it does not meet the first prong of the *Workman* test. The second prong of the *Workman* test is that the evidence supports an inference that the lesser crime was committed. Division One applied the holding in *State v. Charles*, and found that the evidence supported either that Buzzell used forcible compulsion or that the victim consented. None of the facts support an instruction on Rape in the

Third Degree. Division One held that the trial court in *Buzzell* did not err in refusing to give the instruction on Rape in the Third Degree.

Another case that has discussed this issue is *State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995), a Division One case wherein the defendant requested a Rape in the Third degree instruction and the trial court refused to so instruct the jury. *Ieremia* discusses the difference between a lesser included offense and a lesser degree offense. The Court finds that Rape in the Third Degree is not a lesser included offense of Second Degree Rape because all the elements of the lesser crime are not necessary elements of the greater. *State v. Ieremia*, 78 Wn. App. 746, 748, 899 P.2d 16 (1995). However, Rape in the Third degree is an inferior degree of the crime of Second Degree Rape. *Id.* An inferior degree instruction would have been necessary had there been affirmative evidence that the defendant was guilty only of the less serious degree of the crime. *Id.*

Most recently, Division Two addressed this issue in *State v. Wright*, 152 Wn. App. 64, 214 P.3d 968 (2009). In the consolidated cases of defendants Wright and Carter, the State had requested a jury instruction on Third Degree Rape as a lesser degree of the original charge of Rape in the Second Degree. In *Wright*, the court considered prior cases that have held that in order to instruct on an inferior degree offense, the evidence

must support an inference that *only* the lesser crime was committed. *State v. Wright*, 152 Wn. App. 64, 70, 214 P.3d 968 (2009) (citing *State v. Ieremia*, 78 Wn. App. 746, 754-55, 899 P.2d 16 (1995)). The Court in *Wright* held that a trial court “may not instruct on Third Degree Rape as an inferior degree offense to Second Degree Rape when the defendant contends that the intercourse was consensual and the victim testifies that the intercourse was forced.” *Id.* at 72 (citing *State v. Charles*, 126 Wn.2d 353, 355-56, 894 P.2d 558 (1995); *Ieremia*, 78 Wn. App. at 756). The *Wright* court found that arguments that *Charles* and *Ieremia* are distinguishable from the present case were not persuasive and held that the trial court erred in giving a Rape in the Third Degree instruction. *Wright*, 152 Wn. App. at 72.

Further, the victim testified overwhelmingly to sufficient evidence to support forcible compulsion based on the testimony discussed above. See *State v. McKnight*, 54 Wn. App. 521, 522-23, 774 P.2d 532 (1989) (finding that evidence sufficient for a Rape in the Second Degree conviction when the defendant slowly pushed the victim to a prone position and removed her clothes despite her request to stop). There was no affirmative evidence either through the victim or the defendant that non-forcible, non-consensual intercourse occurred. There was no factual basis to instruct the jury on Rape in the Third Degree and the trial court

did not err in refusing to give such an instruction, and the trial court certainly did not abuse its discretion in denying defense's request.

III. CONCLUSION

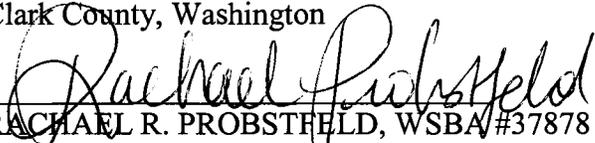
The trial court should be affirmed in all respects.

DATED this 14 day of January, 2010.

Respectfully submitted:

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