

**FILED**

NO. 291693-III

SEP 27 2011

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

---

THE STATE OF WASHINGTON, Respondent

v.

ROOSEVELT MILLER, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-00934-5

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

TERRY J. BLOOR, Chief Deputy  
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## STATEMENT OF FACTS

The defendant has sex with 16-year-old Tiffanie Tracy:

In September 2009, the defendant, age 55, dob: 12-08-53, asked Tiffanie Tracy, dob: 10-02-92 to be his girlfriend. (CP 240; RP 04/06/10, 111, 117). The girlfriend status quickly escalated to oral sex. (RP 04/06/10, 119-20).

Tiffany Tracy is developmentally delayed:

Ms. Tracy, although chronologically 16 years old, was developmentally delayed. She was in a "life skills" program with the Kennewick School District, a program for the most severely disabled students. (RP 04/06/10, 137). Her teacher believed that Tiffanie socially is equivalent to a four to five year old. (RP 04/06/10, 167). Her step-mother stated that Tiffanie's playmates are four-year olds. (RP 04/06/10, 180).

School Psychologist, Cheryl Garvey, did two evaluations on Tiffanie's adaptive behavior, one

on January 28, 2009, and one on March 25, 2010.

(RP 04/06/10, 137, 149). The following are

Tiffanie's age levels:

	<u>Jan. 28, 2009</u>	<u>March 25, 2010</u>
<u>Communication Skills</u>		
Receptive:	4 yrs, 6 mo.	6 yrs, 3 mo.
Expressive:	5 yrs, 9 mo.	6 yrs, 10 mo.
Written:	8 yrs, 6 mo.	7 yrs, 0 mo.
<u>Daily Living Skills</u>		
Personal:	5 yrs, 7 mo.	5 yrs, 2 mo.
Academic:	8 yrs, 5 mo.	6 yrs, 11 mo.
School & Community:	5 yrs, 0 mo.	3 yrs, 0 mo.
<u>Socialization</u>		
Interpersonal:	3 yrs, 6 mo.	3 yrs, 0 mo.
Play & Leisure:	5 yrs, 10 mo.	3 yrs, 0 mo.
Coping:	5 yrs, 6 mo.	3 yrs, 8 mo.

(RP 04/06/10, 141-42, 144, 146, 148-49).

Ms. Garvey estimated that Tiffanie Tracy functioned like a seven to eight year old. (RP 04/06/10, 150).

Tiffany Tracy had no knowledge about how pregnancy occurred or about sexually transmitted diseases, much less about the emotional consequences of sex:

Ms. Tracy did not know where babies come from, did not know how pregnancies occurred, was

not aware of sexually transmitted diseases, had never had any sex education classes, and did not receive any information about sex from her parents. (RP 04/06/10, 122, 129, 151).

There was also testimony that Tiffanie could not deal with the emotional aspects of a sexual relationship. School Psychologist Garvey stated she could not imagine Tiffanie with a boyfriend. (RP 04/06/10, 157-8). Donna Tracy stated that Tiffanie greets people by playing tag, and relies on her parents to tell her what clothes to wear. (RP 04/06/10, 180-81). Mr. Rannow confirmed that Tiffanie interacts with others by playing tag. (RP 04/06/10, 166). He also observed that when Tiffanie is around non-disabled peers, she does not act their age and does not pick up on social cues. (RP 04/06/10, 167).

The defendant confesses, "God sent me a virgin."

Detective Christopher Littrell interviewed the defendant. (RP 04/06/10, 185). The defendant

initially denied having any sexual contact with Ms. Tracy. (CP 260). He then admitted touching her breast, then admitted touching her vagina, then admitted penetrating her with his finger, then admitted having oral sex with her. (CP 273-75, 279).

He admitted that Tiffanie was not capable of making decisions regarding sex. (CP 282). However, he succumbed to temptation because he had "never been with a virgin" and he "wanted to try one thing in my life . . . a virgin." (CP 271, 294). "God sent her for me to check out." (CP 294). "I asked for a virgin and there she was." (CP 295).

The charge and conviction:

The defendant was charged with Rape in the Second Degree, RCW 9A.44.050(1)(b), alleging that he had sexual intercourse with Tiffanie Tracy, who was not capable of consent by reason of being mentally incapacitated. (CP 1). This appeal follows his conviction. (CP 333).

**ARGUMENT**

**1. THE DEFENDANT PLEAD GUILTY IN OREGON TO  
A CRIME THE EQUIVALENT TO RAPE IN THE  
SECOND DEGREE UNDER RCW  
9A.44.050 (1) (A) .**

The defendant was charged in Umatilla County, Oregon with Sodomy in the First Degree, specifically, "That on or about September 19, 1986, in Umatilla County, State of Oregon, the defendant did knowingly and unlawfully by forcible compulsion engage in deviate sexual intercourse with Debra Lee Prock." (CP 13, 343).

This is the same crime as Rape in the second degree by forcible compulsion under RCW 9A.44.050 (1) (a):

(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.

Further, the definition of "forcible compulsion" is exactly the same in Washington, RCW 9A.44.010(6), as in Oregon, ORS 163.305(2). (App. A, C).

**2. THERE WAS NOTHING ABOUT THE PROSECUTOR'S CLOSING ARGUMENT REQUIRING REVERSAL OF THE CONVICTION.**

**A. The argument is proper: "Send a message to the defendant" is different then "send a message to the community."**

By the nature of the verdict, the jury sends the defendant a message. If the verdict is guilty, the message to the defendant is that his conduct crossed the line into a criminal act. In this case, the message to the defendant is that he cannot engage in sex with a girl whose mental incapacity prevents her from understanding the nature or consequences of intercourse. The jury's message to the defendant is that he cannot engage in sexual intercourse with such a girl, even if she is 16 year old. He cannot engage in sex with such a girl, even if he believes that "God sent me a virgin."

The prosecutor requested that the jury send the defendant the message that his conduct was not acceptable. "Ladies and gentlemen, this was

a kid; this was a child. He took advantage of her. You need to send a message to the defendant saying, 'We're going to hold you accountable. You can't do that.' That's why you should find him guilty." (RP 04/07/10, 271).

This is essentially the same argument which was approved in *State v. Greer*, 62 Wn. App. 779, 786, 815 P.2d 295 (1991). The prosecutor in *Greer* argued, "[As jurors] [y]ou decide whether or not [the defendants] will be held to account for what they did . . . . I'd ask you to send a clear message out from this box into this community that these two defendants are accountable. I'd ask that you find the defendants, Greer and Barrie, guilty as charged. Thank you." *Id.* at 786.

It would have been error to suggest that the jury has a duty other than to apply the facts to the law and find the defendant guilty or not guilty. *State v. McNallie*, 64 Wn. App. 101, 111 823 P.2d 1122 (1992). A prosecutor cannot tell

the jury to act as the conscience of the community, to suggest that the jury verdict will reflect on the society in general or that the verdict will send a message to possible victims as a class. See *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991) (prosecutor's closing remarks "in effect told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby 'declaring open season on children.'" held improper.), review denied, 118 Wn.2d 1013 (1992); *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (improper to argue that the jury send a message to society about the general problem of child sexual abuse, "[D]o not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf."), review denied, 114 Wn.2d 1011 (1990).

That is not what occurred here. The prosecutor's argument was limited to requesting that the jury tell the defendant his behavior was criminal.

**B. In any event, since the defendant failed to object, he must demonstrate that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."**

The above test is well recognized and set out. *E.g., State v. Dixon* 150 Wn. App. 46, 54, 207 P.3d 459 (2009). The defendant cannot demonstrate either prong of the test.

**1) *The remark was not flagrant or ill-intentioned.***

The defendant has not cited any case holding that the prosecutor is banned from asking jurors to send a message to the defendant that his conduct constitutes a crime. Even if the Court expands earlier holdings and finds that "send a message to the community" is the same as "send a

message to the defendant," the prosecutor's closing argument was approved when it was made.

**2) *There was no "enduring and resulting prejudice."***

The defendant admitted that Tiffany Tracy did not have the mental ability to decide to have sex. Her school teacher and step-mother also agreed. A psychological examination showed Ms. Tracey had the interpersonal skills of a three-year-old.

The facts against the defendant were so strong that the defense attorney or the prosecutor probably could not have done or said anything to alter the verdict.

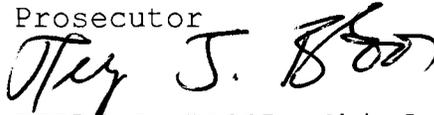
**CONCLUSION**

The convictions should be affirmed.

**RESPECTFULLY SUBMITTED** this 26th day of  
September 2011.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor". The signature is written in a cursive style with a large, stylized initial "T".

**TERRY J. BLOOR**, Chief Deputy  
Prosecuting Attorney,  
Bar No. 9044  
OFC ID NO. 91004

# **APPENDIX A**

**RCW 9A.44.010**

RCW 9A.44.010  
Definitions.

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "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.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors;  
or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1)(c) or (e) and 9A.44.100(1)(c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed,

certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

[2007 c 20 § 3; 2005 c 262 § 1; 2001 c 251 § 28. Prior: 1997 c 392 § 513; 1997 c 112 § 37; 1994 c 271 § 302; 1993 c 477 § 1; 1988 c 146 § 3; 1988 c 145 § 1; 1981 c 123 § 1; 1975 1st ex.s. c 14 § 1. Formerly RCW 9.79.140.]

Notes:

**Effective date -- 2007 c 20:** See note following RCW 9A.44.050.

**Severability -- 2001 c 251:** See RCW 18.225.900.

**Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392:** See notes following RCW 74.39A.009.

**Intent -- 1994 c 271:** "The legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse and further reaffirms its condemnation of child sexual abuse that takes the form of causing one child to engage in sexual contact with another child for the sexual gratification of the one causing such

activities to take place." [1994 c 271 § 301.]

**Purpose -- Severability -- 1994 c 271:** See notes following RCW 9A.28.020.

**Severability -- Effective dates -- 1988 c 146:** See notes following RCW 9A.44.050.

**Effective date -- 1988 c 145:** "This act shall take effect July 1, 1988." [1988 c 145 § 26.]

**Savings -- Application -- 1988 c 145:** "This act shall not have the effect of terminating or in any way modifying any liability, civil or criminal, which is already in existence on July 1, 1988, and shall apply only to offenses committed on or after July 1, 1988." [1988 c 145 § 25.]

# **APPENDIX B**

**RCW 9A.44.050**

RCW 9A.44.050  
Rape in the second degree.

(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;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

[2007 c 20 § 1; 1997 c 392 § 514; 1993 c 477 § 2; 1990 c 3 § 901; 1988 c 146 § 1; 1983 c 118 § 2; 1979 ex.s. c 244 § 2; 1975 1st ex.s. c 14 § 5. Formerly RCW 9.79.180.]

Notes:

**Effective date -- 2007 c 20:** "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 10, 2007]." [2007 c 20 § 4.]

**Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392:** See notes following RCW 74.39A.009.

**Index, part headings not law -- Severability -- Effective dates -- Application -- 1990 c 3:** See RCW 18.155.900 through 18.155.902.

**Severability -- 1988 c 146:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1988 c 146 § 5.]

**Effective dates -- 1988 c 146:** "Section 4 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 21, 1988]. The remainder of this act shall take effect July 1, 1988." [1988 c 146 § 6.]

# **APPENDIX C**

**ORS 163.305**

## OREGON REVISED STATUTES

### Chapter 163 — Offenses Against Persons

2009 EDITION

#### SEXUAL OFFENSES

**163.305 Definitions.** As used in chapter 743, Oregon Laws 1971, unless the context requires otherwise:

(1) “Deviate sexual intercourse” means sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another.

(2) “Forcible compulsion” means to compel by:

(a) Physical force; or

(b) A threat, express or implied, that places a person in fear of immediate or future death or physical injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.

(3) “Mentally defective” means that a person suffers from a mental disease or defect that renders the person incapable of appraising the nature of the conduct of the person.

(4) “Mentally incapacitated” means that a person is rendered incapable of appraising or controlling the conduct of the person at the time of the alleged offense.

(5) “Physically helpless” means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) “Sexual contact” means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

(7) “Sexual intercourse” has its ordinary meaning and occurs upon any penetration, however slight; emission is not required. [1971 c.743 §104; 1975 c.461 §1; 1977 c.844 §1; 1979 c.744 §7; 1983 c.500 §1; 1999 c.949 §1; 2009 c.770 §1]

**Note:** Legislative Counsel has substituted “chapter 743, Oregon Laws 1971,” for the words “this Act” in section 104, chapter 743, Oregon Laws 1971, compiled as 163.305. Specific ORS references have not been substituted, pursuant to 173.160. These sections may be determined by referring to the 1971 Comparative Section Table located in Volume 20 of ORS.

# **APPENDIX D**

**ORS 163.405**

OREGON REVISED STATUTES

Chapter 163 — Offenses Against Persons

2009 EDITION

**163.405 Sodomy in the first degree.** (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:

(a) The victim is subjected to forcible compulsion by the actor;

(b) The victim is under 12 years of age;

(c) The victim is under 16 years of age and is the actor's brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor's spouse; or

(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

(2) Sodomy in the first degree is a Class A felony. [1971 c.743 §114; 1989 c.359 §4]

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the Brief of Respondent as follows:

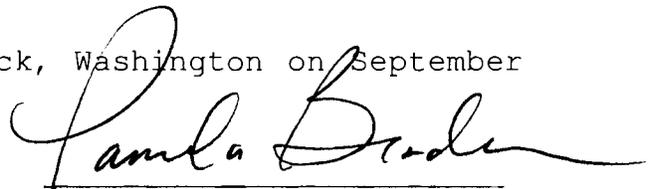
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Signed at Kennewick, Washington on September  
26, 2011.



Pamela Bradshaw  
Legal Assistant