

SEP 08 2011

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

NO. 29693-8

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

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STATE OF WASHINGTON,

Respondent,

v.

RYAN HIGGINS,

Appellant.

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FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John Antosz, Judge

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BRIEF OF APPELLANT

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LENELL NUSSBAUM  
Attorney for Ryan Higgins

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Seattle, WA 98121  
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TABLE OF CONTENTS

A.	<u>ASSIGNMENTS OF ERROR</u> . . . . .	1
	<u>Issues Pertaining to Assignments of Error</u> . . . . .	1
B.	<u>STATEMENT OF THE CASE</u> . . . . .	2
	1. <u>Undisputed Facts</u> . . . . .	2
	2. <u>Disputed Facts</u> . . . . .	6
	a. <u>Nicole's perceptions</u> . . . . .	6
	b. <u>Ryan's perceptions</u> . . . . .	8
	c. <u>Other witnesses</u> . . . . .	9
	3. <u>Procedural Facts</u> . . . . .	13
C.	<u>ARGUMENT</u> . . . . .	17
	1. DUE PROCESS REQUIRES THE COURT TO INSTRUCT THE JURY THAT IT MUST DETERMINE WHETHER LACK OF CONSENT WAS "CLEARLY EXPRESSED" FROM THE PERSPECTIVE OF THE PERSON RECEIVING THE COMMUNICATION. . . . .	17
	a. <u>Due Process Vagueness and Ambiguity</u> . . . . .	17
	b. <u>Elements of Rape in the Third Degree</u> . . . . .	21
	2. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE AND EMPHASIZED THAT THE JURY SHOULD PAY SPECIAL ATTENTION TO EVIDENCE THAT WAS PARTICULARLY DAMAGING TO THE DEFENSE. . . . .	31
D.	<u>CONCLUSION</u> . . . . .	35

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Seattle v. Drew,  
70 Wn.2d 405, 423 P.2d 522 (1967) . . . . . 18

City of Seattle v. Rice,  
93 Wn.2d 728, 612 P.2d 792 (1980) . . . . . 18

City of Spokane v. Douglass,  
115 Wn.2d 171, 795 P.2d 693 (1990) . . . . . 17

Risley v. Moberg,  
69 Wn.2d 560, 419 P.2d 151 (1966) . . . . . 32

State v. Alger,  
31 Wn. App. 244, 640 P.2d 44 (1982) . . . . . 31

State v. Bash,  
130 Wn.2d 594, 926 P.2d 978 (1996) . . . . . 20

State v. Becker,  
132 Wn.2d 54, 935 P.2d 1321 (1997) . . . . . 31

State v. Ciskie,  
110 Wn.2d 263, 751 P.2d 1165 (1988) . . . . . 22, 26

State v. Deer,  
158 Wn. App. 854, 244 P.3d 965 (2010),  
review granted, 171 Wn.2d 1012 (2011) . . . . . 21

State v. Eaton,  
168 Wn.2d 476, 229 P.3d 704 (2010) . . . . . 20

State v. Eisner,  
95 Wn.2d 458, 626 P.2d 10 (1981) . . . . . 32

State v. Elmore,  
54 Wn. App. 54, 771 P.2d 1192 (1989) . . . . . 22

State v. Guzman,  
119 Wn. App. 176, 79 P.3d 990 (2003),  
review denied, 151 Wn.2d 1036 (2004) . . . . . 23

State v. J.M.,  
144 Wn.2d 472, 38 P.3d 720 (2001) . . . . . 19

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

State v. Jackman,  
156 Wn.2d 736, 132 P.3d 136 (2006) . . . . . 32

State v. Lampshire,  
74 Wn.2d 888, 447 P.2d 727 (1968) . . . . . 32-35

State v. Lane,  
125 Wn.2d 825, 889 P.2d 929 (1995) . . . . . 32

State v. Levy,  
156 Wn.2d 709, 132 P.3d 1076 (2006) . . . . . 32

State v. Painter,  
27 Wn. App. 708, 620 P.2d 1001 (1980),  
review denied, 95 Wn.2d 1008 (1981) . . . . . 31

State v. Schaler,  
169 Wn.2d 274, 236 P.3d 858 (2010) . . . . . 29

State v. Stevens,  
158 Wn.2d 304, 143 P.3d 817 (2006) . . . . . 22, 23

State v. Weisberg,  
65 Wn. App. 721, 829 P.2d 252 (1992) . . . . . 24-26, 28

State v. Williams,  
171 Wn.2d 474, 251 P.3d 877 (2011) . . . . . 18

OTHER JURISDICTIONS

Connally v. Gen. Constr. Co.,  
269 U.S. 385, 46 S. Ct. 126,  
70 L. Ed. 322 (1926) . . . . . 17

In re Winship,  
397 U.S. 358, 90 S. Ct. 1068,  
25 L. Ed. 2d 368 (1970) . . . . . 20

Lanzetta v. New Jersey,  
306 U.S. 451, 59 S. Ct. 618,  
83 L. Ed. 888 (1939) . . . . . 17

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)

Morissette v. United States,  
342 U.S. 246, 72 S. Ct. 240,  
96 L. Ed. 288 (1952) . . . . . 20

Papachristou v. City of Jacksonville,  
405 U.S. 156, 92 S. Ct. 839,  
31 L. Ed. 2d 110 (1972) . . . . . 17

United States v. Harriss,  
347 U.S. 612, 74 S. Ct. 808,  
98 L. Ed. 989 (1954) . . . . . 17

United States v. Lanier,  
520 U.S. 259, 117 S. Ct. 1219,  
137 L. Ed. 2d 432 (1997) . . . . . 20

STATUTES AND OTHER AUTHORITIES

Anderson, Michelle J., "Negotiating Sex,"  
78 S. CAL. L. REV. 1401 (2005) . . . . . 30

BLACK'S LAW DICTIONARY (9th ed. 2009) . . . . . 21

Constitution, art. I, § 3 . . . . . 17

Constitution, art. IV, § 16 . . . . . 31

Edwards, Daphne, "Acquaintance Rape & the 'Force'  
Element: When 'No' is Not Enough,"  
26 GOLDEN GATE U.L. REV. 241 (1996) . . . . . 24

RCW 9A.44.010 . . . . . 23

RCW 9A.44.060 . . . . . 1, 21, 23, 24

United States Constitution, amend. 14 . . . . . 17

A. ASSIGNMENTS OF ERROR

1. RCW 9A.44.060, defining rape in the third degree, is unconstitutionally vague and ambiguous as applied to the facts of this case because it fails to define whether "clearly expressed" means as perceived by the person making the expression or the person expected to understand it.

2. Appellant assigns error to jury instruction No. 8, CP 15, quoted in full below.

3. Appellant assigns error to the court's failure to instruct the jury it must find lack of consent was "clearly expressed" as reasonably perceived by the defendant.

4. The trial court erred and commented on the evidence by emphasizing certain testimony for the jury.

5. The trial court erred by failing to grant a mistrial for its comment on the evidence.

Issues Pertaining to Assignments of Error

1. Is the term "clearly expressed" in RCW 9A.44.060 unconstitutionally vague or ambiguous as applied to the facts in this case?

2. In a prosecution for rape in the third degree, RCW 9A.44.060, must the "lack of consent"

be "clearly expressed" so that a reasonable person would perceive it?

3. If two people with a previous consensual sexual relationship agree to share a tent and air mattress camping, and one makes an overture to sexual intercourse with the other, the other moves her body under his body as he climbs on top, but then says "no" but does not say it loudly enough for him to hear it or for a reasonable person to hear it, has she "clearly expressed" her lack of consent?

4. Does due process require the court to instruct the jury that it must determine whether a lack of consent was "clearly expressed" based on the reasonable perception of the defendant?

5. Did the trial court unconstitutionally comment on the evidence by telling the jury on two occasions it must "pay attention" to certain of the State's evidence when it made no such emphasis for the defense evidence?

B. STATEMENT OF THE CASE

1. Undisputed Facts

Nicole Nuckols and Ryan Higgins, then both age 19, had lived together from April through December,

2009. Throughout those months, they spent every night together. They had regular sexual relations with each other. Approximately equal in size, sometimes they wrestled around while having intercourse. RPII 62-64, 113-14, 204-05; RPIII 55.<sup>1</sup>

Their sexual relations were always consensual. If Nicole didn't want sex, she would say "no" or "not tonight." Ryan always accepted it and went to sleep. She recalled one time he realized she didn't want to have sex when he did, and he shoved her away from him in the bed. But then he rubbed her back to make her feel better. RPII 144, 224.

When Nicole and Ryan sometimes had arguments, Ryan always resolved the matter by taking the blame. He would say, "Okay, I'm sorry, you're right, I was wrong." RPII 207.

Ryan and Nicole broke up in early January, 2010. Nicole moved out of his house. RPII 62. In mid-February, they started going out together for coffee, dinner, or a movie. RPII 207.

In March, they reconnected sexually. They both missed each other. They thought of getting back together, but Nicole planned to go away to

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<sup>1</sup> RPI = 11/10/2010; RPII = 11/12/2010; RPIII = 11/15/2010.

school and Ryan was thinking of enlisting in the Navy. They decided not to make it "official" just then. They had sexual intercourse at Ryan's house in March and April, 2010. RPII 63-64, 115, 207-08.

On the weekend of April 16-17, Nicole and Ryan went camping with a group of friends. Sarah rode in Ryan's car. Nicole followed Ryan with Bree in her car. Esia, Todd, Brian and Ben met them at the campsite. RPII 118-19.

The campers cooked hot dogs, steaks and hamburgers. Everyone but Esia was drinking that night. Nicole was the first to go to bed. She climbed into Ryan's tent. It was a small tent with barely enough room for the two of them on his air mattress. RPII 66-68, 117, 155-57, 164, 176-77, 209-10.

Nicole awoke when Ryan came into the tent, but went back to sleep. RPII 68-69. Ryan woke her later. As Ryan moved on top of Nicole, she scooted herself beneath him. Ryan pulled down Nicole's pants and they had sexual intercourse. RPII 82, 215-17.

Before going camping, Ryan and Nicole had agreed to share the tent. They had not discussed

whether they would have sex while there. RPII 115, 208.

Esia slept in the back of his pick-up truck right next to Ryan's and Nicole's tent. The door and windows of the canopy were open. In the morning, Esia was the first up, about 7:00-8:00.<sup>1</sup> No one else was up or about. He packed and left in about a half-hour. He didn't see Nicole. RPII 176-79, 213-14.

Bree and Todd shared a tent close to Nicole's and Ryan's. Bree lay down about 4:00 or 5:00 a.m., but remained awake for about an hour, until the sun was up. She didn't sleep well because of the hard ground. She was up again about 8:00 or 9:00 a.m. Nicole, Ben, and another guy were already up. RPII 157-59, 171-72.

Ben slept on the back of his flatbed truck with no tent or cover. He was in direct line of sight of Ryan's and Nicole's tent. He retired about 4:00 a.m., but did not sleep for a while, until it was starting to get light. He got up about 9:00-10:00. RPII 190-92.

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<sup>1</sup> There was no cell phone reception at the campground, so no one knew exactly what time it was. RPII 214.

Nicole got up about 7:00-8:00. Nobody else was up. RPII 126. Later she drove Sarah and Bree into town. They freshened up at a gas station, Nicole bought a comb to comb her hair, they bought some snacks, then returned to the campsite. RPII 127-28, 159-60. The guys had also driven into town separately to get something to eat. RPII 218.

Back at camp, Nicole sat with the others around the campfire until about noon. Then she packed up, gave Bree her things from her car, and told Ryan she was leaving. She left about four hours after she got up. RPII 127-30.

2. Disputed Facts

Nicole and Ryan had different perceptions of what occurred in their tent.

a. Nicole's perceptions

Nicole testified Bree and one of the guys placed Ryan into their tent, waking her at the time. RPII 68-69. She thought the tent had only one door, and that she was sleeping next to it. RPII 81.

Nicole testified she awoke again when Ryan was rubbing on her upper chest. She asked him to move over and she moved closer to the tent's door. She

said Ryan came closer, tugged on her shorts and asked, "Do you want to?" or "Can we?" Nicole said no, she was sleeping. Ryan said okay and left her alone. RPII 68-70, 81-82.

Sometime later, Nicole felt Ryan climbing on top of her. She testified she "scoted under him." She thought he was trying to get out the tent door on her side of the tent to go to the bathroom. RPII 82.

Instead, Ryan, on top of her, pulled down her shorts and underwear. Then he took off his underwear. Nicole testified she said, "What are you doing? Stop." "You're drunk." She said Ryan responded, "Oh, well, you're drunk too." RPII 82-83, 125.

She testified she said "stop" or "please" five or six times. Ryan never acknowledged what she said. She tried to scoot to the door and get Ryan off of her. Instead he put his penis in her vagina. She said "stop" or "please" a couple of times. She did not scream, yell out, scratch, kick or bite Ryan. They struggled for 5-6 minutes, until she finally shoved him off. She grabbed her pants and underwear, left the tent and went to her

car. She spent the rest of the night, a couple of hours, in the car. She came out before anyone else was up. RPII 82-85, 125-26.

No one saw Nicole get into her car or get out of it that morning. RPII 126-27, 180, 185.

She testified she told the girls she and Ryan had a "shaky" night, that he was "trying to have sex" and it bothered her.<sup>2</sup> She did not say they had sex, much less that he raped her. RPII 86-87.

b. Ryan's perceptions

Ryan testified he went into the tent 1-2 hours after Nicole. He entered through the door on his side of the tent.<sup>3</sup> He walked there on his own. RPII 215, 220.

Ryan cuddled up next to Nicole. Her back was to him. He put his arm around her and over her. He caressed her. She responded to his caresses, so he moved on top her of. He took his own pants off, then took her pants off, and they had sex. RPII 215.

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<sup>2</sup> Bree did not confirm any such comment. RPII 159-61.

<sup>3</sup> The tent had two doors, one on each long side. RPII 210-12.

Nicole did not say no. She did not kick him. She did not try to pull her pants back on. They had intercourse 4-6 minutes, until he lost his erection. They did not make noise or talk. "We weren't very vocal in our sexual adventures." They did not talk after having sex. Ryan rolled over and went to sleep. RPII 215-17.

Ryan did not hear Nicole leave the tent. When he awoke, the sun was up, and all the girls were gone to town. RPII 218.

c. Other witnesses

None of the other campers heard any conversation, any voices, anyone saying "no" or "stop," or any suggestion of a struggle from Nicole's and Ryan's tent at any time during the night or early morning. RPII 158-59.

Bree testified she was so close she would have heard Nicole if she had said "no" in the tent. RPII 172. Esia slept closest to Ryan's and Nicole's tent, less than ten feet away. He knew he would have heard any conversation from the tent, because he could hear people talking from across the campground. He heard no conversation. RPII 178-79, 212-13. Ben testified Ryan went to bed

before he did. He heard no one say "no" or "stop" in the tent. RPII 191.

Nicole did not tell Sarah or Bree during the drive into town that Ryan had raped her. They were all hungover. When asked, Nicole said she was fine. RPII 159-60. She left her cell phone in the tent. She did not ask to borrow anyone else's. She did not go to the police while they were in town. RPII 129.

Nicole did not accuse Ryan of raping her or say anything about their encounter while she was at the camp. Although she said she was leaving, she didn't say why. Ryan didn't ask her. He assumed she had to work. RPII 88, 131, 219-20.

Although Nicole said she was "distraught" at the camp that morning, no one else perceived her as upset or disturbed in any way. RPII 161, 191-92, 200, 220.

d. Later that day

After Nicole got home, she talked to her friend Callie. Nicole had been seeing Callie's brother, Kai, during the last few weeks. Ryan hadn't asked Nicole to stop seeing Kai when they started seeing each other again. Callie was

unhappy that Nicole was getting back together with Ryan. Callie told Nicole she should call the police. RPII 137-40.

Nicole sent text messages to Ryan, who responded by text. Nicole texted Ryan that she never wanted to see him again. Ryan responded as he always had when she was unhappy and they argued: he accepted blame and tried everything to defuse the situation. RPII 100, 223.

There were back-and-forth texts between the two of them. Nicole saved the texts from Ryan, although all but one of her texts were deleted.

The State presented the texts from Ryan:

i'm an asshole. i know what you mean. i was out of control and i feel really bad about it. i don't know if its a good idea for us to hang out when i'm stupid drunk. i do stupid shit and fuck up.. i feel -- i really feel bad. i don't want to hurt you so I think its a good idea if we dont hang out when i'm drinking hardm im so sorry. "F" me. you can do better and you know it.

RPII 103.

I know im taking a l-o-m-g drive. i feel like total shit. we'll see where i end up.

RPII 103-04.

cuz i d-n-o where im goin or when im comin back.

thats why im taking a long drive. im crying right now. i don't want to hurt you and i did. so "F" me. i'm so sorry you can do better and go for it.

me too but im tired of hurting you. im headed for spokane, i hate myself right now. alot. i d-n-o if im gonna go home.

so what. im thinkin montana. got a 5th of whiskey and my debit card. cya later.

i love you and always will. im sorry i hurt you so much.

you know me. drunk and out of control. about to hit moses lake.

me too. im tired of hurting you. i cant control myself and its bad. its been fun. have a good life.

trust me i do. I just want you to be happy and if that means never seeing you again so be it. im trouble and i dont want that for you.

Nicole's final text was preserved: "You basically raped me ryan. how do you think i feel right now."

He responded:

I know. i feel like total shit. i get out of control when im drunk and do very stupid shit. I understand -- where i m coming from. i 'F'd' up hardcore and ill deal with the consequences whatever it may be. i just want you to be happy and its not with me so "F" me and do better.

RPII 104-05; Exhs. 1, 7.

When Ryan read Nicole's last text saying you "basically" raped me, he understood she was unhappy about having had sex, but believed she meant he did

something short of raping her. RPII 223-24. His responses were very emotional because he was distraught that they were breaking up again. RPII 54.

That evening, Nicole called the police and went to the hospital for a rape examination. RPII 106.

The police later interviewed Ryan. He cooperated in every way. He gave them a recorded and a written statement. He denied raping Nicole. He denied that she had said "no" to him. RPII 57. He consistently told them the intercourse was consensual. RPII 185, 200.

The police did not interview the other people camping with Nicole and Ryan that night. RPII 59.

### 3. Procedural Facts

The State charged Ryan Higgins with one count of rape in the third degree. CP 3-4.

During trial, the prosecutor and a police officer read into the record from transcripts of the police interview with Mr. Higgins. The transcripts were marked as an exhibit, but not admitted into evidence. As the prosecutor began her questioning, the court interrupted to say:

THE COURT: Before you ask that I **need to make something clear with the jury**. This is an exhibit that will not be admitted and will not go back with you to the jury room. So I've told you before testimony will rarely, if ever, be repeated for you, **so you need to be paying attention**, you shouldn't rely on the fact that because this is an exhibit that you can refer back to it. This will be the same as any other testimony and **you need to pay attention to it** like any other testimony. It will not be an admitted exhibit that will go back with you to the jury.

RPII 40 (emphases added).

The defense moved for a mistrial based on the court's comments to the jury. Counsel argued it was a comment on the evidence. The court denied the mistrial, but gave a curative instruction:

Earlier I tried to be of some assistance to you and advised you that testimony will rarely, if ever, be repeated for you in referring to parts of a transcript that were testified to. I want to make it very clear that by saying that I did not mean to comment on the weight or value that you should give to that particular evidence. As I've indicated to you before, that's your job to decide what weight or value, if any, is to be given to any evidence including that. My job is only to decide upon the admissibility of evidence. It's your duty to weigh or evaluate the evidence.

RPII 80.

The prosecutor later questioned Ms. Nuckols, reading again from a record that was marked but not

admitted as an exhibit. The court again sua sponte addressed the jury:

Well, you can go ahead and ask questions about 1 and 7, and then I'll instruct the jury about the fact that those exhibits are not going back with them either and **they need to pay close attention to that** because testimony will rarely, if ever, be repeated.

By saying "**pay close attention**" I do not mean closer attention to this than any other evidence. That would be commenting on the evidence. But I'm just letting you know that these are also exhibits that will not be going back to you. The State Constitution prohibits the trial judge from commenting on the evidence.

RPII 101 (emphases added). The prosecutor then displayed to the jury a placard with the greatly enlarged text messages Mr. Higgins had sent to Ms. Nuckols. Exh. 7; RPII 102. The prosecutor read the text of those messages for the jury as she questioned the witness. RPII 103-04.

The court instructed the jury in Instruction No. 8:

To convict the defendant of the crime of rape in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 17, 2010, the defendant engaged in sexual intercourse with Nicole E. Nuckols;
- (2) That Nicole E. Nuckols was not married to the defendant and

that she was not in a state registered relationship with the defendant;

(3) That Nicole E. Nuckols did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 15. The court gave no instruction defining "clearly expressed" or that this element should be determined from the defendant's perspective. CP 5-18. The court also instructed as follows:

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 13.

The jury found Ryan Higgins guilty as charged.

CP 19.

C. ARGUMENT

1. DUE PROCESS REQUIRES THE COURT TO INSTRUCT THE JURY THAT IT MUST DETERMINE WHETHER LACK OF CONSENT WAS "CLEARLY EXPRESSED" FROM THE PERSPECTIVE OF THE PERSON RECEIVING THE COMMUNICATION.

- a. Due Process Vagueness and Ambiguity

Due process requires statutes to provide fair notice of the conduct they proscribe. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).<sup>4</sup> To this end, the language of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

To be consistent with due process, a penal statute or ordinance must contain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the enactment. . . . Further, an ordinance that restricts such freedom must contain standards that are reasonable and that do not permit arbitrary enforcement.

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<sup>4</sup> See also United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939); City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990); U.S. Const., amend. 14; Const. art. I, § 3.

State v. Williams, 171 Wn.2d 474, 479, 251 P.3d 877 (2011), quoting City of Seattle v. Drew, 70 Wn.2d 405, 408, 423 P.2d 522 (1967).

A key goal of due process is to give citizens clear notice of what is legal and what is not. The law must present sufficient clarity for a person of regular understanding to know whether they are acting legally or illegally.

In City of Seattle v. Rice, 93 Wn.2d 728, 731, 612 P.2d 792 (1980), the Supreme Court held unconstitutional a municipal ordinance defining criminal trespass as entering or remaining on premises open to the public if the person "defies a *lawful order* not to enter or remain, personally communicated to him by the owner of the premises or some other authorized person." Id., 93 Wn.2d at 730-31 (court's emphasis). The defendant had entered the Seattle Municipal Building when a police officer ordered him to leave. The Court held the term "lawful order" required answers to too many questions to make it sufficiently specific.

Although the issue in Rice was whether "lawful order" was unconstitutionally vague, the ordinance

also required someone to "personally communicate" to the person that he should not enter or remain on the premises. If a police officer testified she'd ordered the defendant to leave, but the defendant, acting reasonably, had not heard or perceived the order, that lack of notice would be a defense to the crime.

In the same way, the "fair notice" required for rape in the third degree is a "clearly expressed" lack of consent. If the lack of consent is not "clearly expressed" so the defendant reasonably perceives it, the State has failed to prove that element of the crime. If the court does not instruct the jury to determine "clearly expressed" from the defendant's perspective, it has denied the defendant due process.

"Whether a statute is ambiguous depends upon whether it is fairly susceptible to more than one reasonable interpretation." State v. J.M., 144 Wn.2d 472, 487 n.25, 38 P.3d 720 (2001).

Here the term "clearly expressed" could be interpreted from Nicole's perception, or it could turn on Ryan's perception. In conversational usage, either interpretation is reasonable.

But when a criminal statute is ambiguous, the court is compelled to construe it. When the court construes a criminal statute, it must apply the rule of lenity, which strictly and narrowly construes ambiguous statutes in favor of the defendant. United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Thus this Court must interpret the term "clearly expressed" as determined from the defendant's perspective.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. United States, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952); State v. Bash, 130 Wn.2d 594, 606, 926 P.2d 978 (1996).

Due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Every crime consists of two components: (1) an actus reus and (2) a mens rea. State v.

Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). The "actus reus" is "[t]he wrongful deed that comprises the physical components of a crime," while the "mens rea" is "[t]he state of mind that the prosecution ... must prove that a defendant had when committing a crime." BLACK'S LAW DICTIONARY 41, 1075 (9th ed. 2009).

Although the "legislature has the authority to create a crime without a mens rea element," ... even such "strict liability" crimes require "a certain minimal mental element ... in order to establish the actus reus itself." State v. Deer, 158 Wn. App. 854, 862, 244 P.3d 965 (2010), review granted, 171 Wn.2d 1012 (2011).

b. Elements of Rape in the Third Degree

RCW 9A.44.060 defines rape in the third degree:

(1) 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:

(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, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

Both State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988), and State v. Elmore, 54 Wn. App. 54, 771 P.2d 1192 (1989), held that intent and knowledge are not required for rape in the third degree. Ciskie, however, involved repeated incidents of extreme violence, weapons, and threats. In Elmore, the defendant met a mentally retarded man on a bus, took him to a park bathroom, and performed anal sex on him against his protests. Police responded to the scene. In neither case could the defendants have erroneously perceived consent.

In State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006), although the Court agreed in general that intent is not an essential element of child molestation, the specific facts of the case emphasized that intent is necessary to prove the element of sexual contact.

In Stevens, the State presented a photograph showing the defendant's hand on a girl's breast. The defendant said he had not intended to touch the

girl's breast. He was intoxicated, and as they took the photograph, he set out to pretend to touch her breast as a joke for the photo. By accident, he actually made contact, but had not intended to. The Court held the crime required an intent to touch for purposes of sexual motivation. As a result, to accurately convey the law to the jury, the court was required to provide a "voluntary intoxication" instruction. Stevens, 158 Wn.2d at 312.

The facts of this case similarly require a careful analysis of the elements of RCW 9A.44.060(1)(a), and particularly the term "clearly expressed."

Notice that the victim failed to indicate agreement is not the same as notice that the victim must also have clearly expressed her lack of consent by words or conduct.

State v. Guzman, 119 Wn. App. 176, 185, 79 P.3d 990 (2003), review denied, 151 Wn.2d 1036 (2004). The Guzman court reversed a conviction where the charging document alleged that "the victim did not consent as defined in RCW 9A.44.010," but failed to allege that the lack of consent was "clearly expressed by the victim's words or conduct."

The Legislature enacted RCW 9A.44.060 as part of a reform of rape statutes in 1975. The goal was to recognize and punish rape that occurs without forcible compulsion and without requiring the victim to physically resist. Edwards, Daphne, "Acquaintance Rape & the 'Force' Element: When 'No' is Not Enough," 26 GOLDEN GATE U.L. REV. 241, 289-90 (1996). However, without requiring physical force or resistance, the statute still required some sort of notice to the defendant that he was committing a crime: lack of consent "**clearly expressed**" by words or conduct.

Thus in State v. Weisberg, 65 Wn. App. 721, 829 P.2d 252 (1992), the court reversed a conviction for rape in the second degree because the evidence was insufficient to support forcible compulsion. The defendant, a 54-year-old clothing salesman, enticed a mentally retarded female neighbor to his apartment by promising her clothes as a birthday gift. In the apartment, he told the victim to take off her clothes; when she didn't respond he took them off for her; she put her clothes back on; he told her to lie down on the bed, but she said she didn't want to; he told her

to "go ahead and lay on the bed anyway." He then had sex with her and immediately told her not to tell anyone what he did. The court held the evidence was insufficient to support forcible compulsion, but sufficient for rape in the third degree.

The Weisberg court explicitly held that the complaining witness's subjective perception alone was not sufficient to show forcible compulsion.

During oral argument the State acknowledged that its entire case of rape in the second degree was predicated on the exchange between P.C. and Weisberg in which she expressed reservations about lying down on the bed and he told her to "go ahead and lay down on the bed anyway." Although P.C. testified that she did as the defendant asked because she was frightened, a finding of forcible compulsion **cannot be based solely on the victim's subjective reaction** to particular conduct. There also must be a "threat" -- a communication of an intention to cause bodily harm. ... Thus, there must be some evidence from which the jury could infer that **not only did P.C. perceive a threat**, but also that Weisberg in some way **communicated** his intention to inflict physical injury in order to coerce compliance.

Weisberg, 65 Wn. App. at 725-26 (emphases added).

The communication between two people is critical to any allegation of rape in the third degree. The Weisberg court acknowledged that one

person may perceive something different than another intended to communicate in any given exchange. Criminal liability is not based solely on the subjective perception of the complaining witness.

In Weisberg, there was no issue that P.C. communicated her lack of consent -- both by saying she didn't want to, and by putting her clothes back on after Weisberg removed them. There also was no issue that Weisberg perceived her communication -- he responded verbally to counter her communication.

In contrast, in this case we have two people whose relationship for a long time had included consensual sexual intercourse. Within their relationship, Ryan repeatedly had demonstrated his respect for Nicole's clear expressions that she did not wish to have sex. This history is significant, not because it creates "consent," but because it provides context for their communications. Contrast: Ciskie, supra (history of prior violent relationship and sexual encounters relevant to victim's reasonable fear of defendant, reluctance to leave him despite repeated rapes).

On the night in question, Nicole and Ryan agreed they would share a tent and an air mattress. However, they had not explicitly discussed in advance whether they would have sex.

The crux of this case turns on actions and words once Ryan entered the tent. Nicole testified when she felt him moving to get on top of her, she "scoted under him." She mistakenly perceived he was trying to get out of the tent. But from her conduct, and their prior experiences together, Ryan reasonably believed she was responding and physically consenting to his wish to have sex.

Nicole testified she said "no" and "stop" several times. She also testified that Ryan did not acknowledge her words. Ryan did not say he heard her and thought she meant something other than she said. He testified she did not say "no" or "stop." Other people nearby did not hear any conversation or words coming from the tent. These people's perceptions strongly support Ryan's perception, that if she said anything she did not say it clearly enough for someone to perceive it.

Just as forcible compulsion cannot be based on a person's subjective fear, genuine though it may

be, Weisberg, supra, "lack of consent" cannot be based on a person's subjective belief that she said "no" if she did not "clearly express" it sufficiently for her partner to perceive it. Whether it was "clearly expressed" must be based on Ryan's perception, not on Nicole's subjective intent or perception.

Due process does not require the state to prove Ryan "intended" to rape Nicole. It does, however, require that there be some sort of notice to him that what he is doing is wrong. That notice must be sufficient that a reasonable person in his position, knowing all that he knows, would have perceived and understood Nicole's lack of consent.<sup>5</sup>

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<sup>5</sup> The Court might consider the standard analogous to self-defense, as it evolved to cases involving people with ongoing close relationships. To determine self-defense, the jury must consider events from the perspective of the defendant, knowing all that he knows about the other person. Thus individuals with a prior relationship might perceive a threat communicated when another person would not. The jury must be instructed to view the evidence from the defendant's position, knowing all that he knows, and then determine whether his actions were "reasonable." Even a mistaken, but good-faith and reasonable, belief of the threat will support self-defense. State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984); State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993).

Harassment is another crime in which communication and the defendant's reasonable perceptions are key. In State v. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010), the defendant called a crisis line for help and later was hospitalized. Throughout his contacts, he made remarks about killing his two neighbors. The crisis clinic staff member contacted the neighbors to alert them. The neighbors were fearful once they learned of the remarks.

The Court reversed his conviction because the jury instructions did not limit the jury's consideration to a "true threat," i.e., that the defendant reasonably could foresee that someone would be frightened by his stated intent to kill another, made in the context of calling for help.

Reversal is required because the jury was not asked to decide whether a reasonable person in Schaler's position would foresee that his statements or acts would be interpreted as a serious expression of intent to carry out the threat, and the evidence was ambiguous on the point.

Schaler, 169 Wn.2d at 290.

Here the instructions did not adequately inform the jury that it must measure "clearly expressed" by Ryan's perceptions, based on what a

reasonable person, knowing all that he knew, would have perceived. The evidence was ambiguous on the point: Nicole perceived she expressed her lack of consent verbally and clearly; Ryan and the other campers did not hear any such words. In addition, Nicole's conduct was scooting herself underneath Ryan as he climbed on top -- thus communicating by conduct her consent.

Alas, sexual penetration does not always happen ideally. The law cannot and should not criminalize all less than ideal penetration.

Anderson, Michelle J., "Negotiating Sex," 78 S. CAL. L. REV. 1401, 1423 (2005).

Without proper instructions, the jury could have believed Ryan did not hear Nicole say "no," and still have found him guilty because she testified she said it. If she believed she "clearly expressed" her lack of consent, even if no one else could perceive it, under these instructions, the jury would have been required to return a verdict of guilty. CP 15.

Due process requires the jury to consider whether a person's lack of consent is "clearly expressed" so as to be reasonably perceived by the recipient of that communication. These

instructions did not make that requirement clear to the jury. The conviction must be reversed.

2. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE AND EMPHASIZED THAT THE JURY SHOULD PAY SPECIAL ATTENTION TO EVIDENCE THAT WAS PARTICULARLY DAMAGING TO THE DEFENSE.

Washington Constitution, article IV, section 16, provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The Court of Appeals has observed:

[This provision] of our constitution prohibits a comment on the evidence if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial. ... The determination of a prohibited comment depends upon the facts and circumstances of each case.

State v. Painter, 27 Wn. App. 708, 713-14, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981); State v. Alger, 31 Wn. App. 244, 640 P.2d 44 (1982).

Any instruction or comment which conveys to the jury what is apparently the court's opinion as to the weight or sufficiency of evidence is a comment within the scope of the constitutional prohibition. See State v. Becker, 132 Wn.2d 54,

64, 935 P.2d 1321 (1997); State v. Jackman, 156 Wn.2d 736, 742-44, 132 P.3d 136 (2006); State v. Levy, 156 Wn.2d 709, 718-23, 132 P.3d 1076 (2006); State v. Lane, 125 Wn.2d 825, 835-39, 889 P.2d 929 (1995); State v. Eisner, 95 Wn.2d 458, 460-63, 626 P.2d 10 (1981); Risley v. Moberg, 69 Wn.2d 560, 561-65, 419 P.2d 151 (1966).

Whether or not the instruction was intended as a comment or inadvertently implied is irrelevant. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

Since a comment on the evidence violates a constitutional prohibition, it may be raised for the first time on appeal. Lampshire, 74 Wn.2d at 893. In this case, however, the defense objected and moved for a mistrial based on the court's first instance of commenting on the evidence -- when the police were testifying to Ryan's statements. The court denied the mistrial and gave an instruction to the jury. Nonetheless, the court again drew attention in the same manner to additional evidence -- this time Ryan's text messages -- by giving a similar "curative" instruction.

Notably, the court gave no such caution regarding other exhibits that the jury similarly would not have in the jury room during deliberations. See, e.g., Ex. 11 (diagram of the campground and where people were located); RPII 211-12. It gave its emphatic instructions during the testimony of a detective and the complaining witness. It did not give any such emphasis to the testimony of defense witnesses.

In Lampshire, the State charged Ms. Lampshire, age 22, with having carnal knowledge with three teenaged boys. The prosecutor objected to the materiality of the defendant's testimony. The judge stated, in the presence of the jury:

Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel.

Id., 74 Wn.2d at 891. Ms. Lampshire had testified regarding her daughter's bowel condition as well as to a visit to her mother she'd made with her sister Betsy. The Supreme Court held the court's comment was prejudicial error.

We are satisfied that the remark of the trial judge was made inadvertently in ruling on the motion. Nevertheless, **the remark implicitly conveyed to the jury his personal opinion concerning the worth**

**of the defendant's testimony.** Consequently the burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears from the record that no prejudice could have resulted from the court's comment. ...

In the instant case the record affirmatively shows that **the court's comment was prejudicial, since it undermined the credibility of the defendant's testimony, and there is an absence of any showing to the contrary.** Therefore, we hold that prejudicial error has been committed.

The state argues that the trial court was merely giving its reasons for a ruling on the evidence, and that, if the remark was error, the error was cured by the court's subsequent oral instruction to the jury to disregard comments of court and counsel. **We disagree.** Under the facts here, the damage was done when the remark was made and it was not capable of being cured by a subsequent instruction to disregard.

Lampshire, 74 Wn.2d at 730-31 (emphases added).

Here the judge's remarks implicitly conveyed to the jury his personal opinion concerning the value of the State's evidence. He drew the jury's attention especially to two areas. As in Lampshire, the burden then rests on the State to show that no prejudice resulted to the defendant.

In Lampshire, as here, there was no physical or medical evidence. The verdict necessarily hinged upon the jury's belief of witnesses' testimony. When the Lampshire court's comment

diminished the value of the defendant's testimony, it impermissibly put its thumb on the scale in favor of the State.

In this case, the court intentionally told the jury it "need[ed] to pay attention" to certain of the State's evidence: police testimony of what Ryan said to them, and the text messages he sent to Nicole. These comments emphasized this evidence over and above the other evidence presented. The court thus put its thumb on the scale in favor of the State.

The court's effort to "correct" its comments merely added to its emphasis. As in Lampshire, the court's subsequent oral instructions to disregard the court's comments did not cure the error. "The damage was done when the remark was made and it was not capable of being cured by a subsequent instruction to disregard." Lampshire, 74 Wn.2d at 731.

For this reason, this Court should reverse the conviction and order a new trial.

D. CONCLUSION

The trial court's instructions did not require the jury to determine the element of "lack of

consent clearly expressed" from the defendant's perspective. The statute and the instruction given are ambiguous at best. Due process requires clarification of this element for the jury. Because the court did not give explicit instructions on this element, the conviction must be reversed and remanded for a new trial.

The trial court twice emphasized for the jury that it must "pay attention" to specific evidence the State presented. Although the court did not "intend" to make unconstitutional comments on the evidence, it nonetheless conveyed to the jury its belief that this particular evidence required its special attention. It made no such reference to any of the defense evidence. This unconstitutional comment on the evidence requires this Court to reverse the conviction.

DATED this 6<sup>th</sup> day of September, 2011.

Respectfully submitted,



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

STATE OF WASHINGTON, )  
 ) COA NO. 28668-1-III  
 )  
 ) Plaintiff, )  
 )  
 ) vs. )  
 ) DECLARATION OF SERVICE  
 )  
 ) RYAN HIGGINS, )  
 )  
 )  
 ) Appellant. )

ALEXANDRA FAST declares:

On this date I filed the original and a copy of this document in the Court of Appeals, Division Three, of the State of Washington, by depositing the same, postage prepaid, in the United States Mail, address to:

Ms. Renee S. Townsley, Clerk  
Court of Appeals, Div. III  
500 N. Cedar  
Spokane, WA 99201

On this date I caused a copy of this document to be served on the following entities by depositing them in the in the United States Mail Service, postage prepaid, addressed as follows:

Ms. Carole Louise Highland and Mr. D. Angus Lee  
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Mr. Ryan Higgins  
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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct.

9/6/2011 - SEATTLE - WA  
DATE AND PLACE

  
ALEXANDRA FAST