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COA NO. 63737-1-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

LINDY DEER,

Appellant.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court accept review of one issue from the Court of Appeals' decision as set forth in Section B.

B. COURT OF APPEALS OPINION

Under RAP 13.4(b), the State seeks review of one issue decided in the published Court of Appeals opinion in State v. Deer, No. 63737-1-I (filed 12/13/10). The issue is whether the State has the burden of proving beyond a reasonable doubt that the defendant's acts of sexual intercourse with a child were "volitional." The Court of Appeals' opinion is attached as Appendix A, and is hereinafter cited as "Slip Op."

C. ISSUE PRESENTED FOR REVIEW

This Court has held that rape of a child is a strict liability offense. State v. Chhom, 128 Wn.2d 739, 741-43, 911 P.2d 1014 (1996). In accordance with this well-settled principle, the Court of Appeals has previously held that there is no requirement for the State to prove a defendant's capacity to knowingly commit the act of intercourse constituting the crime of rape of a child. State v.

Abbott, 45 Wn. App. 330, 331-34, 726 P.2d 988 (1986), rev. denied, 107 Wn.2d 1027 (1987).

In this case, however, the Court of Appeals decided that when a defendant claims that she was asleep when she had sexual intercourse with a child, the State assumes the burden of proving beyond a reasonable doubt that the act of sexual intercourse was "volitional." Accordingly, the Court of Appeals also held that the trial court erred in instructing the jury that the defendant had the burden to establish a lack of knowledge by a preponderance of the evidence. Slip Op., at 6-10.

The Court of Appeals' decision is inconsistent with the well-settled principle that rape of a child is a strict liability offense because it creates an implied element of "volition." Slip Op., at 9. Therefore, the Court of Appeals' decision conflicts with this Court's precedent and contravenes legislative intent. The State asks this Court to grant review under RAP 13.4(b)(1), (2), and (4).

D. STATEMENT OF THE CASE

The State charged the defendant, Lindy Deer (dob 6/7/54), with three counts of rape of a child in the third degree for having sexual intercourse on multiple occasions with R.R. (dob 6/11/91)

between September 2006 and June 2007. CP 1-7; RP (2/5/09) 2-3; RP (2/11/09-II) 58-59.

R.R. is the great-nephew of Valerie Cox, for whom Deer worked as an administrative assistant. RP (2/10/09-II) 63-64, 66-67. R.R. moved from his home in Iowa to Auburn, Washington, where he attended the Auburn Adventist Academy, a private religious boarding school. RP (2/10/09-II) 4-9. While R.R. was attending the Academy, Deer checked him out of school for overnight stays at her home at least ten times, and Deer and R.R. had sexual intercourse during several of these visits. RP (2/10/09-II) 45-47, 50-51, 61; RP (2/11/09-I) 37-40, 46-51, 58-60, 69, 92-95; RP (2/11/09-II) 23, 34. Deer also had sexual intercourse with R.R. on at least one occasion at Valerie Cox's house. RP (2/11/09-I) 61-66. Deer was arrested after R.R. disclosed these incidents to his student advisor and to the boys' dean at the school. RP (2/10/09-I) 6-7; RP (2/10/09-II) 42-43, 62; RP (2/11/09-I) 73-76.

In defense of these charges, Deer claimed that she was asleep during some of the incidents of sexual intercourse with R.R., and she claimed that during the other incidents, R.R. had forced her to have sexual intercourse without her consent. Accordingly, Deer's defense counsel initially proposed inserting the word

"willfully" into the elements of the crime as set forth in the "to convict" instructions. The trial court rejected this suggestion because the crime of rape of a child does not require proof of any mental state on the part of the defendant. Instead, the trial court asked defense counsel to draft a separate instruction. RP (2/5/09) 29-33.

Defense counsel then proposed an instruction stating that the jury should acquit if the defense presented evidence sufficient to raise a reasonable doubt as to whether the acts of intercourse were "volitional," and the State agreed to this instruction.¹ RP (2/11/09-II) 76-84. The trial court again rejected Deer's proposed instruction, and crafted its own instruction stating that the defendant had the burden of proving by a preponderance of the evidence that she lacked knowledge or did not consent to the acts of sexual intercourse with R.R. CP 24.

¹ The Court of Appeals' opinion incorrectly states that "Deer and the State proposed a jury instruction that would have required the State to prove beyond a reasonable doubt that she committed a 'volitional' act." Slip Op., at 4. The error in the court's opinion, and in the Brief of Respondent, is due to the fact that the defendant's proposed instruction was not filed for the record for some reason, and undersigned counsel for the State initially misread the verbatim report of proceedings. Upon closer inspection, however, the transcript is clear that the instruction Deer proposed would have required the defense to produce sufficient evidence to raise a reasonable doubt as to whether the acts of sexual intercourse were "volitional." RP (2/11/09-II) 78.

At the conclusion of the trial, the jury convicted Deer of three counts of third-degree child rape as charged. CP 29-31. The trial court imposed 46 months on each count -- the low end of the standard range -- to be served concurrently. CP 42-51.

Deer raised two claims of error on appeal: 1) that the trial court erred in allowing the State to amend the information to correct erroneous charging language after the State had rested its case; and 2) that the trial court erred in instructing the jury that Deer had the burden of showing by a preponderance of the evidence that she lacked knowledge of some of the acts of sexual intercourse. The State conceded error as to the first issue, and agreed that the charges must be dismissed without prejudice. Slip Op., at 4-6. As to the second issue, however, it is the State's position that the Court of Appeals erred in holding that the State bears the burden of proving a "volitional" act of sexual intercourse beyond a reasonable doubt because Deer contended that she was sleeping when some of the acts in question occurred.

E. ARGUMENT

1. THE COURT OF APPEALS ERRED IN HOLDING THAT "VOLITION" IS AN IMPLIED ELEMENT OF THE STRICT LIABILITY OFFENSE OF RAPE OF A CHILD.

As noted above, it is well-settled that the crime of rape of a child (and its predecessor, statutory rape) is a strict liability offense. Chhom, 128 Wn.2d at 741-43; State v. Swagerty, 60 Wn. App. 830, 833, 810 P.2d 1 (1991); Abbott, 45 Wn. App. at 331-34. The only necessary elements of this crime are 1) sexual intercourse, 2) the perpetrator and the victim are not married, 3) the victim's age, and 4) the age difference between the perpetrator and the victim. See Chhom, 128 Wn.2d at 743. Therefore, as the Court of Appeals has previously held, there is no requirement for the State to prove that the defendant had the capacity to knowingly commit the act of intercourse itself:

Were we to hold that the State must prove that an accused had the mental capacity or ability to know that he was in fact performing the acts [of sexual intercourse] specified, we would be converting a defense burden into a prosecutorial burden. In the absence of a statutory mandate to that effect we refuse to find such a transposition of burdens by implication.

Abbott, 45 Wn. App. at 333.

In accordance with these principles, the trial court instructed the jury in this case as follows:

It is a defense to the charge of Rape of a Child in the Third Degree that the child had intercourse with the defendant without the knowledge or consent² of the defendant.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this act.

CP 24. This instruction allowed the defendant to argue her theory of the case to the jury (i.e., that she was either asleep or did not consent when the acts of sexual intercourse occurred), but did not create additional elements for the State to prove that do not exist in the statute. In sum, the trial court's instruction is a correct statement of the law.

Nonetheless, the Court of Appeals held that the trial court should have instructed the jury that the State had the burden of proving beyond a reasonable doubt that the acts of sexual

² On appeal, Deer did not assign error to the trial court's ruling that lack of consent (or duress, as the Court of Appeals termed it) is an affirmative defense that the defendant must establish by a preponderance of the evidence. See Slip Op., at 9.

intercourse that Deer claimed had occurred while she was sleeping were "volitional." In reaching this conclusion, the Court of Appeals relied primarily on this Court's decision in State v. Eaton, 168 Wn.2d 476, 229 P.3d 704 (2010).³ Eaton is not on point.

In Eaton, the defendant was convicted of possession of methamphetamine with a sentencing enhancement for possessing the methamphetamine in a jail. The defendant possessed the methamphetamine in a jail because he had been arrested for DUI, and the drugs were discovered during the booking process. Eaton, 168 Wn.2d at 479-80. The issue presented in Eaton was purely an issue of statutory construction, i.e., whether the sentencing enhancement statute should be interpreted in a manner requiring proof that the defendant placed himself in the prohibited "zone" through volitional action. Id. at 480-86. In a 5-4 decision, this Court

³ The court also relied upon State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971), which held that the defendant had produced insufficient evidence to present the defense of unconsciousness to the jury. In dicta, the Utter court observed that unconsciousness "not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." Id. at 142. However, nowhere in Utter did the court address the issue of which party should bear the burden of proof when sufficient evidence is presented to raise unconsciousness as a defense. Moreover, given that the Utter court noted that unconsciousness is similar to insanity in some respects, these dicta seem to support the State's position that the defendant should bear the burden of proof. See RCW 10.77.030(2) (burden of proving insanity lies with the defendant).

held that volitional action was an implied element of the enhancement. Id. But unlike the sentencing enhancement statute at issue in Eaton, which had not been previously interpreted by this Court, the child rape statute has already been interpreted as a strict liability offense.

Under the Court of Appeals' logic, all strict liability crimes must now have an implied volitional element. In reaching this conclusion, the Court of Appeals drew a distinction between mens rea and actus reas in cases where, as here, the defendant claims to have been sleeping or unconscious. Based on this mens rea/actus reas distinction, the court held that "volition" is an implied element of even a strict liability crime. Slip Op. at 8-9. But this distinction is an artificial one, as the following example illustrates.

Possession of a controlled substance, like child rape, is a strict liability offense, and unwitting possession is an affirmative defense that the defendant must prove by a preponderance of the evidence. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Therefore, a defendant who claims that he put on his roommate's pants not knowing that there was a baggie of cocaine in the pocket has the burden of proving that defense by a

preponderance of the evidence. On the other hand, based on the Court of Appeals' reasoning, if the same defendant were to claim that he was sleepwalking when he put on his roommate's pants with the cocaine in the pocket, the State would then bear the burden of showing beyond a reasonable doubt that the defendant's possession of cocaine was "volitional." This result is absurd, contravenes legislative intent, and conflicts with this Court's existing precedent. In sum, as is true of possession of a controlled substance, a defendant charged with child rape should bear the burden of showing by a preponderance of the evidence that she had sexual intercourse unwittingly.

This Court has never squarely addressed the issue of which party bears the burden of proof in cases where the defendant claims to have been sleeping or unconscious when the acts constituting the crime occurred. Moreover, there is a split of out-of-state authority on this issue. See, e.g., Fulcher v. State, 633 P.2d 142, 147 (Wyo. 1981) (holding that "unconsciousness or automatism" is an affirmative defense that must be proved by the defendant); State v. Caddell, 287 N.C. 266, 284-91, 215 S.E.2d 348 (1975) (holding that the defendant bears the burden of establishing lack of consciousness as an affirmative defense); State v. Lara, 902

P.2d 1337, 1339 (Ariz. 1995) (holding that the State must prove that the defendant performed a voluntary act); State v. Baird, 604 N.E.2d 1170, 1176 (Ind. 1992) (holding in accordance with state statute that the State must prove that the defendant acted voluntarily). Because there is no definitive authority directly on point in Washington, this Court should accept review under RAP 13.4(b)(4). In addition, because the Court of Appeals held that volition is an implied element, even for strict liability offenses, serious questions arise as to whether volition must then be alleged in the charging document or included in the "to convict" instructions in every case. Such questions should also be addressed by this Court.

As a final point, it is important to emphasize that the State is not arguing that unconsciousness cannot be a defense to the crime of child rape. Rather, the State contends that the burden of proving such a defense should lie with the defendant, who is in the best position to offer evidence in this regard. Stated in the converse, the State should not bear the burden of proving volition beyond a reasonable doubt when a defendant charged with child rape provides some evidence, no matter how ludicrous, that she was

asleep when she had sexual intercourse with a minor on multiple occasions.

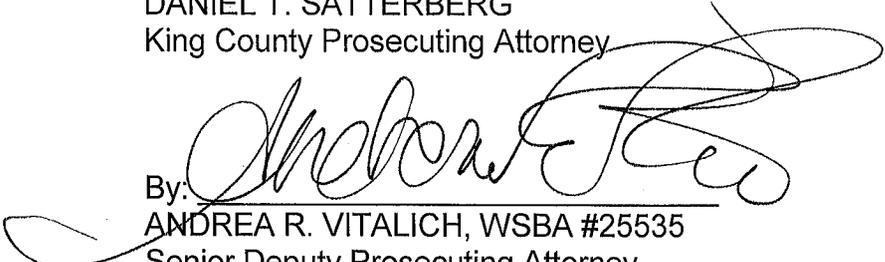
F. **CONCLUSION**

The Court of Appeals erred in holding that the State must prove an implied element of "volition" for rape of a child, a strict liability offense. The State asks this Court to grant review in accordance with RAP 13.4(b)(1), (2), and (4).

DATED this 5th day of January, 2011.

Respectfully submitted,

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent;

v.

LINDY E. DEER,

Appellant.

DIVISION ONE

No. 63737-1-1

PUBLISHED OPINION

FILED: December 13, 2010

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STATE OF WASHINGTON
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DWYER, C.J. — Except in limited circumstances, a criminal charge may not be amended after the State has rested its case. Here, the trial court permitted the State, after resting its case, to amend the information charging Lindy Deer with rape of a child in the third degree. Neither circumstance in which such an amendment is permitted was extant. Accordingly, we reverse and remand with instructions to dismiss the case without prejudice.

Because the issue is likely to recur if the State refiles the charges, we choose to address Deer's contention that the jury instructions given by the trial court relieved the State of its burden of proving beyond a reasonable doubt all elements of the crimes charged, including the implied element of a volitional act. We conclude that the instructions given did, indeed, suffer from this deficiency.

1

In the spring of 2006, just before his fifteenth birthday, R.R. visited family in Washington. He decided to stay to attend boarding school that fall. At the

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time, Lindy Deer worked as an administrative assistant for R.R.'s great aunt, Valerie Cox, through whom Deer and R.R. met. Deer was 52 years old.

Deer told Cox that she felt "motherly" toward R.R. and that she enjoyed doing things for him because she did not have children of her own. Deer at times took R.R. shopping for clothes and other essentials. Deer was also approved to check R.R. out of the boarding school for overnight visits.

During the summer of 2006, R.R. helped Deer with chores at her home, including helping her to move into a new home and to prepare for a housewarming party. R.R. testified that, on one occasion, while he was doing yard work for Deer, Deer told him that he should have "kissing lessons." Report of Proceedings (RP) (Feb. 11, 2009, Vol. 1) at 25. He further testified that he and Deer kissed multiple times that day. According to R.R.'s testimony, Deer told R.R. that she would "be okay with" having a sexual relationship with him "if it wasn't wrong in the eyes of society." RP (Feb. 11, 2009, Vol. 1) at 39.

Multiple sexual encounters occurred between Deer and R.R. from the fall of 2006 through the spring of 2007. On the first occasion, R.R. was staying the night at Deer's home. That night, R.R. left the couch, where he was planning to sleep, and got into bed with Deer, who appeared to be sleeping. R.R. placed Deer's hand on his penis. R.R. testified that Deer grabbed his penis and pulled him closer. He further testified that she inserted his penis into her vagina and started moving up and down and moaning. Deer testified at trial that she was asleep during the incident.

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Another sexual encounter occurred between Deer and R.R. in November 2006. On that occasion, Deer was comforting R.R., whose girlfriend had just broken up with him. Deer and R.R. were lying on the couch and kissing. Deer then performed oral sex on R.R. Deer testified at trial that she did not willingly participate in the oral sex. R.R. testified that he again got into bed and had sexual intercourse with Deer that night.

According to R.R.'s testimony, at least two additional sexual encounters occurred between Deer and R.R. as to which Deer does not contend that she was asleep. On one occasion, R.R. went into the bathroom where Deer was changing her clothes. The two kissed, took off their clothes, and went into Deer's bedroom, where they had sexual intercourse. Deer testified that this intercourse was forced by R.R. R.R. testified that another incident occurred at Cox's home, where Deer and R.R. had sexual intercourse in Cox's laundry room.

Deer was initially charged by information with one count of rape of a child in the third degree. The State later amended the information to add two additional counts of the same crime. Subsequently, the State amended the information again to conform the charging period to R.R.'s testimony. Both the first and second amended information contained erroneous charging language, alleging that Deer had "sexual contact" with R.R. rather than "sexual intercourse," while still identifying the crime charged as rape of a child in the third degree.¹ Thus, while the State intended to charge Deer with rape of a child in the third

¹ The first and second amended information also stated a birth date for R.R. (06/11/89) that would have made him 17 years old at the time of the incidents, although both documents correctly alleged that he was 15 years old when the incidents occurred.

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degree, the information instead listed the elements of child molestation in the third degree. Over the objection of defense counsel, and after the State rested its case, the trial court permitted the State to correct the error by again amending the information.

Due to Deer's contention that she was asleep during at least one of the sexual encounters, Deer and the State proposed a jury instruction that would have required the State to prove beyond a reasonable doubt that she committed a "volitional" act. In a pretrial hearing, the trial court informed the parties that, in the event that it decided to give this instruction, the "volitional argument" would apply only to the allegations of sexual encounters as to which Deer contended that she was asleep. The trial court later determined not to give the proposed instruction and instead gave the jury an instruction stating:

It is a defense to the charge of Rape of a Child in the Third Degree that the child had intercourse with the defendant without the knowledge or consent of the defendant.

The defendant has the burden of proving this defense by a preponderance of the evidence.

Clerk's Papers (CP) at 24.

The jury found Deer guilty of three counts of rape of a child in the third degree.

Deer appeals.

II

Deer first contends that the trial court erred by allowing the State to amend a constitutionally defective information after the State rested its case. The State concedes that this ruling was erroneous. We agree.

"A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense." State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). The first and second amended information in this case failed to set forth the essential elements of the crime charged—rape of a child in the third degree.² Although both charging documents cited to the statute defining the crime of rape of a child in the third degree, RCW 9A.44.079, the documents listed the elements of child molestation in the third degree.³ See State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995) (noting that "[m]erely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense apprises the defendant of all of the essential elements of the crime"). Thus, the charging documents erroneously included the element of "sexual contact" and failed to include the element of "sexual intercourse" that is essential to a rape charge.⁴

² "A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.079(1).

³ "A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.089(1).

⁴ Neither of the two exceptions set forth in the Pelkey decision—that the amendment is to a lesser degree of the same charge or to a lesser included offense—applies in this case. See Pelkey, 109 Wn.2d at 491. Rape of a child in the third degree is not a lesser included offense of child molestation, as rape of a child in the third degree requires "sexual intercourse," RCW 9A.44.079, and child molestation in the third degree does not, RCW 9A.44.089. See State v. Peterson, 133 Wn.2d 885, 890, 948 P.2d 381 (1997) (noting that a lesser included offense exists "when all of the elements of the lesser offense are necessary elements of the greater offense. Put another way, if it is possible to commit the greater offense without having committed the lesser offense, the latter is not an included crime") (quoting Pelkey, 109 Wn.2d at 488). Similarly, the Inferior degree crime exception does not apply.

Because “[t]he proper remedy [in such a case] is dismissal without prejudice to the State refiling the information,” Vangerpen, 125 Wn.2d at 793 (quoting State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992)), we reverse the trial court’s judgment and remand with instructions to dismiss the case without prejudice.

III

Deer further contends that her right to due process was violated where the trial court instructed the jury that, in order to defend against the charges, Deer had the burden of proving by a preponderance of the evidence that the sexual intercourse occurred without her knowledge or consent. Because this issue is likely to recur if the State refiles the charges against Deer, we address it here.

The due process clause of the Fourteenth Amendment to the United States Constitution 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,” Eaton, 168 Wn.2d at 481 (quoting State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004)), even such “strict liability” crimes require “a certain minimal

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mental element . . . in order to establish the actus reus itself." State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971)). "This is the element of volition." Utter, 4 Wn. App. at 139. See also BLACK'S, *supra*, at 1710 (defining "volition" as "[t]he act of making a choice or determining something"). "An 'act' committed while one is unconscious is in reality no act at all. It is merely a physical event or occurrence for which there can be no criminal liability." Utter, 4 Wn. App. at 143.

Our Supreme Court has recently explained why the imposition of criminal liability requires a volitional act:

Fundamental to our notion of an ordered society is that people are punished only for their own conduct. Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law. We punish people for what they do, not for what others do to them. We do not punish those who do not have the capacity to choose. Where the individual has not voluntarily acted, punishment will not deter the consequences.

As these principles suggest, although an individual need not possess a culpable mental state in order to commit a crime, there is "a certain minimal mental element required in order to establish the actus reus itself." Movement must be willed; a spasm is not an act. It is this volitional aspect of a person's actions that renders her morally responsible and her actions potentially deterrable. To punish an individual for an involuntary act would run counter to the principle that "a person cannot be morally responsible for an outcome unless the outcome is a consequence of that person's action." It would create what Simester has called "situational liability," penalizing a defendant for a situation she simply finds herself in. "Unless there is a requirement of voluntariness, situational offenses are at odds with the deepest presuppositions of the criminal law." As Holmes tells us, the "reason for requiring an act is, that an act implies a choice, and that it is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise." "[T]he choice [to act] must be made with a chance of contemplating the consequence complained of, or else it has no bearing on responsibility for that consequence." A person cannot be answerable for a state of affairs unless she could have done something to avoid it.

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Eaton, 168 Wn.2d at 481-83 (internal citations omitted).⁵ Stated differently, “[a]n act must be a willed movement or the omission of a possible and legally-required performance.” Utter, 4 Wn. App. at 140 (quoting R. PERKINS, CRIMINAL LAW 660 (1957)). “Criminal responsibility must be judged at the level of the conscious.” Utter, 4 Wn. App. at 141 (quoting State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193 (1965)). This is consistent with our legislature’s pronouncement that the provisions of our criminal code must be interpreted “[t]o safeguard conduct that is without culpability from condemnation as criminal.” RCW 9A.04.020(1)(b).

Here, the trial court rejected the proposed jury instruction, which would have required the State to prove beyond a reasonable doubt that Deer committed a volitional act. Instead, the trial court instructed the jury that Deer had the burden of proving her defense—“that the child had intercourse with the defendant without the knowledge or consent of the defendant”—by a preponderance of the evidence. CP at 24. Although the State is correct that rape of a child is a strict liability crime, see State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996), the “minimal mental element” of volition—as part of the actus reas—must be proved even for those crimes without a mens rea requirement. Thus, the State

⁵ In Eaton, our Supreme Court held that a statute permitting sentence enhancements encompassed a volitional element that the State must prove beyond a reasonable doubt. In doing so, the court explained the distinction between intent and volition:

The State appears to be under the misapprehension that requiring volition is the same as requiring intent. But nothing in our opinion should be read as requiring that the State prove a defendant intended to be in the enhancement zone or even that she knew she was in the enhancement zone. The State must simply demonstrate that the defendant took some voluntary action that placed him in the zone.

168 Wn.2d at 485-86 n.5. Here, the State similarly fails to recognize that “[t]here is a distinction between volition and intent.” City of Seattle v. Hill, 72 Wn.2d 786, 796 n.1, 435 P.2d 692 (1967).

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bears the burden of proving beyond a reasonable doubt that the defendant committed a volitional act. With regard to those sexual encounters as to which Deer contends she was asleep, the trial court erred by relieving the State of that burden.⁶

We note the distinction, however, between Deer's contention that she was asleep during at least one of the sexual encounters at issue and her contention that she did not consent to other sexual encounters. As to those sexual encounters to which Deer contends she did not consent, the applicable defense is not that no volitional act was committed but, rather, that she did not agree to the commission of the act. See BLACK'S, *supra*, at 346 (defining "consent" as "[a]greement, approval, or permission as to some act or purpose"). Because consent of the alleged perpetrator is not an element of the crime of rape of a child, due process does not require the State to prove that the defendant consented to the sexual encounters for which she is charged. Accordingly, an instruction on duress—an affirmative defense that the defendant must prove by a preponderance of the evidence, see State v. Riker, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994)—may be appropriate in such a case.

Due process requires the State to prove beyond a reasonable doubt all elements of a crime, including that the defendant committed a volitional act.

⁶ The State argues that our Supreme Court's decisions in State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981), and State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004), are inconsistent with a requirement that the State prove beyond a reasonable doubt that a defendant committed a volitional act. However, in those cases, the court held that the possession of controlled substances statute did not have a mens rea element, see Bradshaw, 152 Wn.2d at 539-40—actus reas was not at issue. We will not recharacterize our Supreme Court's own pronounced basis for its decisions, particularly given that its more recent holding in Eaton is directly on point here.

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Should the State refile charges against Deer and the case proceed to trial, it will be the testimony adduced at that trial that will inform the trial court's discretion in determining proper instructions to the jury.⁷

Reversed and remanded with instructions to dismiss without prejudice.

Dwyer, C. J.

We concur:

Schindler, J.

Engel, J.

⁷ Deer contends in a statement of additional grounds that the trial court violated her Fifth Amendment privilege against self-incrimination by ruling that she would have to testify regarding her lack-of-consent defense in order for the "hue and cry" testimony of other witnesses to be permitted. A defendant who must testify in order to present a defense is not compelled to testify in violation of the Fifth Amendment. See Williams v. Florida, 399 U.S. 78, 83-84, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970) ("The defendant in a criminal trial is frequently forced to testify himself . . . in an effort to reduce the risk of conviction. . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.") Thus, Deer was not compelled to testify in contravention of the Fifth Amendment by virtue of her decision to present a defense that required her own testimony.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Petition for Review, in STATE V. LINDY DEER, Cause No. 63737-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

1/5/11
Date

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