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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

MIGUEL ANGEL ALBARRAN, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01301-1

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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ISSUES PRESENTED

I. **The Court of Appeals erred in holding that rape in the second degree by sexual intercourse with a person who is incapable of consent by mental incapacity or physical helplessness (found in RCW 9A.44.050(1)(b)) is concurrent with the crime of rape of a child (in all three degrees).**

II. **RCW 9.94A.837(1), which provides for a special allegation when the crime of rape in the second degree is committed against a victim who is under fifteen years of age, applies to rape in the second degree when committed by any of its alternative means, not just forcible compulsion.**

STATEMENT OF THE CASE

A. FACTUAL SUMMARY

Miguel Albarran raped thirteen year-old T.P. as she slept in her bed, after sneaking into her bedroom in the early morning of April 1, 2013. RP 245-249. Albarran was in a dating relationship with T.P.'s mother, Denise Domke, and Albarran lived with Domke and T.P. RP 243.

On March 31, 2013, which was Easter Sunday, Albarran joined Ms. Domke and T.P. at Domke's parents' home for Easter dinner. RP 245-46. That evening T.P. was permitted to stay up later than usual because she was on Spring Break from school. RP 248. The next morning, Ms. Domke awoke for work at 7:15 a.m. and made a pot of coffee, which was her normal routine. RP 249. Her normal custom was to get up, make a

pot of coffee, occasionally have a cigarette, select her work clothes, then take her things into her bathroom and get ready in there. RP 247. She would brush her teeth and get dressed in the bathroom. RP 247. On a normal day, she would then check on T.P. and make sure she was getting ready for school. RP 247. Albarran normally went to work at nine or ten in the morning. RP 247. Ms. Domke always showered before anyone else because it took her longer to get ready for her day. RP 248. On this particular morning, Ms. Domke had brought her clothes into the bathroom to get dressed, as was her custom, but after her shower she realized that she'd forgotten her hosiery in the dryer so she left her room to retrieve her tights. RP 249-50.

As she walked by T.P.'s room, which was adjacent to her own, she looked inside T.P.'s open door and saw Albarran in T.P.'s room. RP 249-50. T.P. sleeps "like a rock," and was asleep on her bed when Ms. Domke looked in. RP 250-51. Albarran, however, was partially on T.P.'s bed. RP 251. He had his left leg down on the floor and his right leg up on the bed. RP 250. His left hand was down by his side. RP 251. Albarran's face was in T.P.'s vaginal area. RP 251. Upon seeing this, Ms. Domke began yelling, "What the f*ck are you doing?" RP 251. Albarran sat up quickly and fled the room. RP 251. Ms. Domke shut the door and continued to yell "What the hell are you doing?" RP 251. Albarran replied "I'm covering

her up. I'm just covering her up." RP 251. Ms. Domke got dressed and retrieved her phone, all the while saying, "What did you do? Why would you hurt my baby?" RP 251-52. Albarran continued to claim he was just covering her up and was "just looking." RP 252. He also pleaded with Ms. Domke not to call the police, saying he wouldn't be able to see his kids anymore. RP 252. Ms. Domke disregarded his pleas and took her phone into T.P.'s room, where she called 911. RP 252.

There, T.P. was crying. RP 252. Ms. Domke asked her what happened, but T.P. didn't know. RP 252. She was merely aware of Albarran and Ms. Domke fighting. RP 252. Ms. Domke asked T.P. if her underwear were wet, based on where she had seen Albarran's face. RP 252. T.P. replied that they were, but that she didn't know what happened because she was sleeping. RP 253.

T.P. recalled that she fell asleep the night before while watching a movie. RP 57. It wasn't a school night, so she got to stay up late. RP 57. She woke up to her mom yelling, "What's happening?" RP 57. Albarran was also there, saying, "I'm just covering her." RP 58. T.P. recalled Albarran asking Ms. Domke not to call the police, fearing his kids would be taken away. RP 63. Ms. Domke told Albarran to get out of T.P.'s room. RP 58. T.P.'s underwear was wet in the crotch area. RP 59. That was unusual for her. RP 59. The area also felt "tickly." RP 59. When the police

came to her house she went into her room and changed her underwear, giving the pair she had been wearing to the police. RP 60.

Officer Rey Reynolds of the Vancouver Police Department responded to the 911 call. RP 120. When he arrived, he observed Ms. Domke holding a young teenage girl, and they were both crying. RP 121. Ms. Domke told Reynolds that she was walking by T.P.'s room and saw her boyfriend with his head between T.P.'s legs. RP 125. She said that T.P. was asleep. RP 126. T.P. was extremely upset during the discussion with Reynolds. RP 126.

Subsequent testing revealed Albarran's DNA, from both saliva and semen, in the crotch area of T.P.'s underwear, and Albarran's saliva was found on T.P.'s inner left thigh. RP 192-212.

Albarran was convicted of rape in the second degree, rape of a child in the second degree, attempted rape of a child in the second degree, and child molestation in the second degree. CP 31-34. He was also found to have committed the rape in the second degree against a person under the age of 15. CP 37. The court entered judgment only on the rape in the second degree conviction. CP 48-61. The other convictions were vacated and dismissed. Albarran filed a timely appeal.

B. DECISION BELOW

The Court of Appeals reversed Albarran's conviction for rape in the second degree, holding that RCW 9A.44.050(1)(b) is a statute that is concurrent with rape of a child (in any degree), under RCWs 9A.44.073, .076, and .079. The Court held that RCW 9A.44.050(1)(b) is the general statute. The Court, relying entirely on this Court's opinion in *State v. Hughes*, 166 Wn.2d 675, 684, 212 P.3d 558 (2009), held that a child is incapable of consent, and is thereby mentally incapacitated as a matter of law. Thus, the Court held, rape in the second degree under RCW 9A.44.050(1)(b) is always committed when a defendant commits rape of a child. Stated another way, the Court believed that the State could prove rape in the second degree under RCW 9A.44.050(1)(b) by showing nothing more than a defendant having sexual intercourse with a child—irrespective of whether that child was mentally incapacitated or physically helpless. The Court of Appeals also stated, in footnote 9, that its decision does not conflict with the express language of RCW 9.94A.837 (allowing for the imposition of a twenty-five years minimum sentence when rape in the second degree, by any means of commission, is committed against a child under the age of fifteen) because the State retains the option of charging this special allegation when rape in the second degree is committed by forcible compulsion. The Court of Appeals effectively

added the language "by forcible compulsion" after the words "rape in the second degree" to the first sentence of RCW 9.94A.837. For the reasons set forth below, this Court should hold that the Court of Appeals erred and should reverse the decision below, and reinstate Albarran's conviction for rape in the second degree.

ARGUMENT

I. The Court of Appeals erred in holding that rape in the second degree by sexual intercourse with a person who is incapable of consent by mental incapacity or physical helplessness (found in RCW 9A.44.050(1)(b)) is concurrent with the crime of rape of a child (in all three degrees).

In holding that Albarran may only be convicted of rape of a child in the second degree where he raped a mentally incapacitated and physically helpless thirteen-year-old, the Court of Appeals misapplied the concurrent/specific statute rule. Under this rule of statutory construction, the general statute must be violated every time the specific statute is violated. *State v. Wright*, 183 Wn.App. 719, 731, 334 P.3d 22 (2014).

RCW 9A.44.050 provides:

> (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.

RCW 9A.44.076 provides:

> (1) A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
>
> (2) Rape of a child in the second degree is a class A felony.

Albarran contends, and the Court of Appeals agreed, that any time one violates RCW 9A.44.076 he also violates RCW 9A.44.050(1)(b) (rape in the second degree when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated). The Court of Appeals held that RCW 9A.44.076, defining rape of a child in the second degree, and RCW 9A.44.079, defining rape of a child in the third degree[1], are specific statutes that must be charged in any situation in which a prosecutor might also be able to charge rape in the second degree under RCW 9A.44.050(1)(b). The Court held that minors under the age of sixteen are mentally incapacitated as a matter of law, preventing the State from prosecuting, on a charge of rape in the second degree, a defendant

[1] Although this case involved a charge of rape of a child in the second degree, the Court's ruling applies equally to a prosecution for rape of a child in the third degree. The analysis is identical.

who rapes a child under the age of sixteen when that child is asleep or severely intoxicated.

In so holding, the Court of Appeals overlooked the fact that children are not mentally incapacitated as a matter of law. As the State argued below in its opening brief and its motion to reconsider, children may consent to sex with one another so long as the age of one party does not exceed a certain distance from the age of the other. That is, a fifteen year-old boy may have sex with a thirteen year-old girl without any legal consequence. See RCW 9A.44.076.

For rape of a child in the second degree, the victim must be less than fourteen years old and older than twelve years old (and not married to the perpetrator), while the perpetrator must be at least thirty-six months older than the victim. Accordingly, if the perpetrator is only thirty months older than the victim at the time of sexual intercourse, then the child is not deemed incapable of consent and no crime has occurred. Stated another way, the legislature has not declared all children under the age of fourteen incapable of giving consent. Indeed, the rape of a child statute is not concerned at all with consent. Rather, it is a status offense. The legislature, concerned with the protection of vulnerable children who might succumb to influence by an adult, and concerned with the inherent imbalance of power between children and adults, has decided that we will not tolerate

sexual intercourse between children who are under the age of fourteen but older than twelve, and perpetrators who are at least thirty-six months older than they are. The legislature thought it to be bad public policy to allow sex between such parties. But the legislature has not said, categorically, that a child falling between the ages of twelve and fourteen is incapable of consenting to sex. He or she is only incapable, legally, if the other party is a certain number of months older than he or she. Thus, children falling between the ages of twelve and fourteen are not "mentally incapacitated" under RCW 9A.44.010(4). Additionally, the State cannot show that a victim is "physically helpless" by merely showing that she is less than fourteen years old but over the age of twelve. Notably, "physically helpless" and "mentally incapacitated" are not alternative means of committing rape in the second degree. *State v. Al-Hamdani*, 109 Wn.App. 599, 36 P.3d 1103 (2001).

In the Court of Appeals' analysis, as well as in Albarran's briefing below, no mention is made of the actual definition of mental incapacity. The definition states: "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, influence of a substance, or from some other cause. RCW 9A.44.010. Albarran cited no authority—statutory or

otherwise—which holds that a child falling within a certain age category is deemed, as a matter of law, incapable of understanding the nature or consequences of the act of sexual intercourse. It is obvious that children can understand the nature of sexual intercourse, particularly when they have been subjected to it.

Under the Court of Appeal's reasoning, an eighteen year-old perpetrator who has intercourse with a sleeping or severely intoxicated fifteen year-old must be prosecuted for rape in the second degree under RCW 9A.44.050(1)(b). Indeed, rape in the second degree would be the *only charge* available to the State because the difference in age between the parties is not great enough to charge rape of a child. In contrast, a thirty year-old perpetrator who has sex with a sleeping or severely intoxicated fifteen year-old may only be prosecuted for rape of a child in the third degree. The eighteen year-old perpetrator, in other words, would be liable for rape in the second degree, whereas the thirty year-old perpetrator would only be liable for rape of a child in the third degree.[2] This is an absurd result that the legislature could not possibly have intended.

[2] The eighteen year-old perpetrator would serve a minimum sentence of twenty-five years, whereas the thirty year-old perpetrator would serve a standard range sentence of 12+ to 14 months in prison.

In interpreting a statute, the reviewing court must construe a statute so as to effectuate legislative intent. *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996). The reviewing court must avoid unlikely, absurd, or strained consequences. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). "The court must give effect to legislative intent determined 'within the context of the entire statute.'" *Whatcom Cty.*, at 546, citing *Elgin,* at 556, *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). In holding that a person may only be convicted of rape of a child when he rapes a physiologically incapacitated person who falls within a certain age category, and for which his age exceeds an acceptable range of difference, the Court of Appeals reached an absurd, unlikely, and strained result that the legislature could not have intended.

In reaching this holding, this Court erroneously relied on *State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009). *Hughes* was a double jeopardy case, and it relied heavily on the now disapproved *State v. Birgen*, 33 Wn.App. 1, 651 P.2d 240 (1982) (disapproval recognized in *State v. Smith*, 177 Wn.2d 533, 549, 303 P.3d 1047 (2013)). At issue in *Hughes* was whether the legislature intended separate punishments for both rape in the second degree by mental incapacity and rape of a child in the second degree. *Hughes* at 684. *Hughes* did not address the question of

whether the statutes were concurrent, which would prevent the prosecutor from *even charging* the general statute crime. *Hughes* did not hold, as Albarran and the Court of Appeals below claimed, that rape in the second degree is committed every time rape of a child in the second degree is committed. *Hughes* did not hold that a child falling between the ages of twelve and fourteen years old is "mentally incapacitated" as defined by RCW 9A.44.010(4). Indeed, a careful reading of *Hughes* demonstrates that the *Hughes* Court drew a distinction between age and mental incapacity:

> Regardless of whether nonconsent is proved by the age of the victim and the age differential between the victim and the perpetrator, or by the mental incapacity or physical helpless of the victim, both statutes protect individuals who are unable to consent by reason of their status.

Hughes, at 684. A child is "unable to consent by reason of [his or her] status" when he or she has intercourse with a person who is at least thirty-six months older than he or she (for rape of a child in the second degree) or forty-eight months older than he or she (for rape of a child in the third degree). Rape of a child is a status offense, whereas rape in the second degree is based on a physiological inability, whether transitory or chronic, to consent—irrespective of status. It is nonsense to suggest that the State could charge and obtain a conviction for rape in the second degree when the State's evidence shows nothing more than a defendant having had

intercourse with a thirteen year-old while being at least thirty-six months older than the victim. To prove rape in the second degree, the state must prove physical helplessness or mental incapacity as defined by the statute. Moreover, there is an obvious public policy purpose is treating the rape of an incapacitated or physically helpless child more seriously than the non-forcible rape of a conscious, aware, and physically capable child. A child who is not mentally incapacitated or physically helpless can, at least in theory and perhaps in practice, fight back. He or she can run, hide, hit, or scream. An unconscious or physically helpless child can do none of those things even if she or he were so inclined.

In addition to the Court of Appeals' erroneous reliance on *Hughes*, *supra,* the decision below conflicts with *Hughes*. First, as argued above, *Hughes* did not hold that rape of a child and rape in the second degree are concurrent statutes, and that the State would be *precluded* from charging a perpetrator such as Albarran with rape in the second degree where the perpetrator rapes an unconscious child. Indeed, *Hughes* instructed the Court of Appeals, on remand, to impose the judgment on the more serious (measured by duration of sentence) of the two crimes in accordance with settled principles of double jeopardy. *Hughes* at 686, Fn. 13. In Albarran's case, the more serious offense, as measured by duration of sentence, is rape in the second degree—the conviction that the Court of Appeals

reversed and dismissed. This holding thereby conflicts with *Hughes*. If this Court meant to say, in *Hughes*, that rape of a child in the second degree and rape in the second degree are concurrent statutes, with rape in the second degree being the more specific statute, it would have remanded to the trial court with instructions to sentence Hughes for rape of a child in the second degree and to vacate the conviction for rape in the second degree.

That the legislature did not intend this result is further demonstrated by its inclusion of rape in the second degree in the exclusive list of crimes for which a special allegation may be filed when the victim was under the age of fifteen. See RCW 9.94A.837(1). Under Albarran's argument and the Court of Appeals' holding, this special allegation could never be imposed upon a conviction of rape in the second degree under RCW 9A.44.050(b), which is contrary to the plain language of the RCW 9.94A.837 and, therefore, a result the legislature did not intend.

RCW 9.94A.837 states:

> (1) In a prosecution for rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, the prosecuting attorney shall file a special allegation that the victim of the offense was under fifteen years of age at the time of the offense whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a

> reasonable and objective fact finder that the victim was under fifteen years of age at the time of the offense, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.
>
> (2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the victim was under fifteen years of age at the time of the offense. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the victim was under the age of fifteen at the time of the offense. If no jury is had, the court shall make a finding of fact as to whether the victim was under the age of fifteen at the time of the offense.
>
> (3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

Notably, the legislature limited the application of this special allegation to indecent liberties by forcible compulsion (despite there being seven alternative means by which indecent liberties may be committed, including when the victim is mentally incapacitated or physically helpless[3]) while not limiting its application to rape in the second degree in any way. The legislature was aware of the specific means by which these two crimes may be committed and make a specific choice not to limit application of this statute to rape in the second degree by forcible

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[3] See RCW 9A.44.100.

compulsion. The Court of Appeals was unmoved by this argument, dismissing it in footnote 9 with a quotation from Albarran's brief. The Court held that because the special allegation could still be applied to rape in the second degree by forcible compulsion, there is no evidence to suggest that the legislature intended the special allegation to apply to any other means of committing rape in the second degree. In reaching the result in this case, the Court of Appeals necessarily concluded that the legislature *intended* to similarly limit the application of the special allegation to rape in the second degree only when accomplished by forcible compulsion but merely *forgot* to put in the limiting language. This flies in the face of proper statutory construction. It is a canon of statutory construction that appellate courts interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354, 357 (2010).

> "[T]he legislature is presumed to know the statutory scheme." *Bishop v. City of Spokane,* 142 Wn.App. 165, 171, 173 P.3d 318 (2007). "'Where the Legislature omits language from a statute, intentionally or inadvertently, **this court will not read into the statute the language that it believes was omitted.**'" *Manary v. Anderson,* 176 Wn.2d 342, 357, 292 P.3d 96 (2013) (quoting *State v. Moses,* 145 Wn.2d 370, 374, 37 P.3d 1216 (2002)).

Payseno v. Kitsap Cty., 186 Wn.App. 465, 472-73, 346 P.3d 784, 788 (2015) (emphasis added).

It is also notable that in RCW 9.94A.838(1), which pertains to the special allegation to be filed when a victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the legislature prescribed that the penalty was applicable to the crime of rape in the second degree only when accomplished by forcible compulsion. It is obvious, then, that the limitations on the special allegations found in RCW 9.94A. 836, .837, and .838 were the product of conscious choice and reflection by the legislature. Why would the legislature want a harsher punishment for an eighteen year-old who has sex with an unconscious fifteen year-old than it would for a thirty year-old man like Mr. Albarran who has sex with an unconscious thirteen year-old? Why would the legislature want lesser justice for a victim of rape whose rapist was thirty years-old than for a victim whose rapist was eighteen? The decision of the Court of Appeals is wrong and should be reversed. Albarran's conviction for rape in the second degree, as well as his sentence for that crime, should be reinstated.

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II. RCW 9.94A.837(1), which provides for a special allegation when the crime of rape in the second degree is committed against a victim who is under fifteen years of age, applies to rape in the second degree when committed by any of its alternative means, not just forcible compulsion.

The Court of Appeals held that RCW 9.94A.837, which provides for a special allegation to be filed when rape in the second degree is committed against a child who is under fifteen years of age, was not intended to apply to rape in the second degree when the rape was committed under RCW 9A.44.050(1)(b). For the reasons set forth in part I, above, this holding is incorrect. Under this holding, an eighteen year-old perpetrator who rapes an unconscious fifteen year-old (who cannot be charged with rape of a child due to the closeness of age and can only be charged with rape in the second degree) cannot be liable for the special allegation under RCW 9.94A.837 because RCW 9.94.837, according to the Court of Appeals, cannot apply to rape in the second degree when charged under RCW 9A.44.050(1)(b). This, again, is an absurdity that could not have been intended by the legislature. The Court of Appeals engaged in statutory construction, and applied a limiting construction, to an unambiguous statute that Albarran did not even challenge through an assignment of error. This was error, and the limiting construction applied to RCW 9.94A.837 by the court is facially unreasonable.

For the foregoing reasons, the State asks this Court to reverse the decision of the Court of Appeals reversing Albarran's conviction for rape in the second degree.

CONCLUSION

This Court should reverse the decision of the Court of Appeals, which reversed Albarran's conviction for rape in the second degree, and reinstate his conviction.

DATED this 1st day of July, 2016.

Respectfully submitted:

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Subject: #92775-8, State v. Miguel Albarran

Dear Clerk:

Attached please find the Supplemental Brief of Petitioner in the above matter. Please accept this document for filing. A copy is being served on counsel for Respondent via this email message. If you have any questions, please contact me.

Sincerely,

Jennifer Casey
Legal Assistant
Clark County Prosecutor's Office
PO Box 5000
Vancouver, WA 98661
360-397-2261, ext. 4476

Please note, I work a job-share schedule: Wednesday afternoons, Thursdays, and Fridays. Please copy my job-share partner, Pamela.Bradshaw@clark.wa.gov, on any reply so that she may take any necessary actions in my absence. Thank you!

This e-mail and related attachments and any response may be subject to public disclosure under state law.