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No. 98067-5

No. 35901-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

LELAND KNAPP IV,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 17-1-00008-0

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The court correctly instructed the jury on the issue of consent and the evidence of forcible compulsion was so overwhelming the defendant would have been convicted even if the defendant's instruction had been given.
- B. The State has no objection to striking the filing fee and DNA fee.

II. STATEMENT OF FACTS

A. The victim's statement of events

On February 7, 2016, which was Super Bowl Sunday, the defendant came unexpectedly to B.S.'s residence. RP at 614-15. B.S. was then 33-years-old and had known the defendant since high school. RP at 613-14. She had been his manager at a Jack in the Box in 2000 and described their relationship as a friendship. RP at 614, 627. She said that they had never had sex previously. RP at 625.

Although it was not unusual for him to visit, on this date things were not normal. RP at 615-16, 627. The defendant started speaking to her in vulgar, sexual terms. RP at 615. He leaned in to kiss her and she told him, "No." RP at 616. He left after this rebuff. *Id.* However, he returned on the pretense that he forgot a bandana at the residence. *Id.*, *See Ex. 5.*

B.S. let the defendant in her residence again, but this time he immediately threw her to the ground and started pulling down her pants.

RP at 616-17. She tried scream, but he gagged her with the bandana. RP at 619. When she struggled, he tried to bind her hands or wrists with the bandana. RP at 620.

She continued to struggle on the floor, but she was not able to get away. RP at 621. He threw her glasses somewhere, pulled down her underwear and raped her. *Id.*

She stated he was “really quick” and got off her. RP at 625. They both pulled up their pants and B.S. found her glasses. *Id.* The defendant told her that she would be his first or his sixteenth rape, she would never know. RP at 626. He left on foot. *Id.*

B.S. stated she was in shock and telephoned her mother. *Id.* Michelle Hammers, B.S.’s mother, confirmed she received a telephone call from B.S. saying that she had just been raped. RP at 588, 607. She stated that B.S. was crying and upset on the phone, which is out of the ordinary. RP at 588. She told B.S. to call the police and sped to her house. RP at 607. B.S. was still crying and upset when Ms. Hammers arrived at her house. RP at 608.

B. The physical evidence confirming the rape: DNA, injuries to B.S. and signs of a struggle at the residence.

B.S. stated that her coffee table was pushed forward toward the TV, that her rug was messed up, and that coffee was spilled during the

struggle. RP at 623-24. Exhibit 1 shows where the rape occurred and Exhibit 4 shows the coffee stain. *See* Exs. 1, 4; RP at 623.

B.S. was taken to Trios Hospital, where she was seen by Crissa Flink, a Sexual Assault Nurse Examiner (SANE). RP at 515-16. Nurse Flink found there was bruising to the prepuce, which is the clitoral head and also a tear to the posterior fourchette. RP at 533. In fairness, she also testified that these injuries could have been caused by consensual sex. RP at 540. However, the defendant did not claim that they had rough, dominating, or controlling sex. RP 643-44.

Finally, the bandana was examined by Alison Walker, a DNA scientist with the Washington State Patrol Crime Laboratory. RP at 546, 550. She found a match of B.S.'s saliva on the bandana, with the odds against a random match at 1 in 40,000,000,000,000,000. RP at 577. Likewise, Ms. Walker found a DNA match of B.S.'s skin cells on the bandana with the odds against a random match at 1 in 4,000,000,000,000,000,000. RP at 579.

Although the defendant admitted to having sex with B.S., Ms. Walker also determined that the perineal swabs from B.S.'s exam by the SANE nurse matched a mixture of B.S. and the defendant with the odds of a random match at 1 in 470,000,000,000. RP at 568. This is probably less

significant than the findings of B.S.'s saliva and skin cells on the bandana because the defendant admitted to having sex with her. RP at 644.

C. The defendant testifies, and the wheels may have gone off roadway.

The defendant began with a direct statement that he did not force B.S. to have sex with him. RP at 637. From there things appear to have gone awry. Here are some highlights of his testimony.

In explanation of why he went to B.S.'s house, the defendant said he went to invite her to a birthday party, or to pay back a debt, or to tell her he had cancer, which he does not really have, or to say hello to a friend. RP at 638, 660. When asked about the inconsistencies, he stated, "Two different people. From there to them. No. From then to here." RP at 661.

The defendant admitted he was high on methamphetamine. RP at 639. He also used alcohol that day; alcohol together with methamphetamine affected his judgment. RP at 650. In fact, he stated his consumption of methamphetamine and alcohol were to the point that he was incoherent. RP at 648.

The defendant said that B.S. noticed he was high, requested methamphetamine from him, and offered sex in exchange for the drug. RP at 639, 642-43. He did not want to have sex with her or give her

methamphetamine. RP at 649. Nevertheless, he “caved in” and had sex with her even though he did not have any methamphetamine. RP at 642, 644. When he did not provide her with methamphetamine, the defendant said B.S. became irate and said she would call the police and report she had been raped. RP at 644.

He did not believe she was serious about calling the police. RP at 645. When he was arrested by law enforcement officers, he thought it was for a warrant for a legal financial obligation. RP at 645-46. No officer had told him he was under arrest for rape or discussed allegations of rape with him. RP at 650. Nevertheless, he told Officer Sagan that “It’s her word against mine.” RP at 487, 647. He testified he deduced that B.S. had called the police about the rape. *Id.*

The defendant had stated in the first trial that he had been goaded into saying, “It’s her word against mine,” when a police officer asked, “Why did you rape her?” RP at 312. The prosecutor asked about this and the following exchange then occurred:

Q: You stated before that an officer . . . said that
[“Why did you rape her?”] to you?

A: Yes.

Q: And that’s not your statement today though.
Today you are saying that that was never said to
you?

A: No, I didn’t say it was never said to me. I just—I
just—it’s been quite a while.

Q: It's been awhile, but ten minutes ago you were asked a direct question from your attorney and you responded that no officers spoke to you about this. So, which is it?

A: (No response.)

Q: Mr. Knapp?

A: It is how you say it is.

RP at 659.

The prosecutor also asked about the defendant's prior testimony that B.S. came on to him prior to any discussion about sex for drugs. RP at 305, 663. The defendant declined to answer, but after reviewing his prior testimony, said that he left her residence the first time because he did not want to give B.S. a reason to have sex with him. RP at 663-65.

There was no attempt by the defendant to explain how B.S.'s saliva or skin cells got on his bandana.

D. Issues on jury instructions.

The defendant proposed an instruction on consent that would require the jury to find both that the sexual intercourse was by forcible compulsion and that it was without B.S.'s consent. CP 411-12. The Court instructed the jury on consent consistent with WPIC 18.25, that "evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." CP 430.

The defendant was found guilty of Rape in the Second Degree. CP 435.

III. ISSUES

- A. Did the jury instructions relieve the State of proving that the defendant engaged in sexual intercourse by forcible compulsion with B.S.?
1. What is the standard on review?
 2. Was the jury instruction that evidence of consent can be considered in determining if the defendant used forcible compulsion a correct statement of the law?
 - a. Did *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) hold that the prosecution must disprove the victim consented *and* prove the defendant used forcible compulsion, or was the holding that the prosecution must prove a lack of consent as part of its proof of forcible compulsion?
 - b. Given the immediate reporting by B.S., the signs of a struggle at her residence, the DNA evidence, and the defendant's testimony, would the outcome of the trial have differed if the jury was instructed that the State must disprove consent?
- B. Should the filing fee and DNA fee be stricken?

IV. ARGUMENT

A. The jury instructions did not relieve the State from proving that the defendant used forcible compulsion to have sexual intercourse with B.S.

1. Standard on Review

The standard on review regarding jury instructions is well established. It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove beyond a reasonable doubt every essential element of a criminal offense. A challenged jury instruction is analyzed by considering the instructions as a whole and reading the challenged portions in context. An alleged error in jury instructions is reviewed de novo. *State v. Atkins*, 156 Wn. App. 799, 807, 236 P.3d 897 (2010).

2. The trial court correctly instructed the jury.

a. *W.R.* held that consent was part of the element of forcible compulsion and did not hold that the prosecution was required both to disprove the victim consented and prove the defendant used forcible compulsion.

The key case on this issue is *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). The *W.R.* Court stated the issue as: “When the State charges the defendant under a rape statute that includes ‘forcible compulsion’ as a necessary element of the crime, does due process forbid requiring a criminal defendant to prove consent by a preponderance of the

evidence?” *Id.* at 761. The Court answered this in the affirmative: requiring the defendant to prove the victim consented is a due process violation. *Id.* at 765.

The *W.R.* Court reached this conclusion by examining the definition of “forcible compulsion” which is “physical force *which overcomes resistance*, or a threat...*that places a person in fear of death or physical injury* to herself or himself or another person” RCW 9A.44.010 (6).” *Id.* If the victim has consented, then there is no resistance to overcome or fear of death or physical injury. *Id.*; *See App. A.*

The Court held that consent necessarily negated forcible compulsion. *Id.* at 767. Therefore, requiring the defendant to prove the victim consented would also require the defendant to negate forcible compulsion. *Id.* at 769.

However, the Court also was clear that consent should be viewed as a factor in determining whether the defendant used forcible compulsion. There is no need to instruct the jury on both forcible compulsion and consent. The *W.R.* Court stated this four times:

“Therefore, once a defendant asserts a consent defense and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion.” *Id.* at 763.

“Recognizing that the State’s burden to prove forcible compulsion encompasses the concept of nonconsent is consistent with rape reform laws.” *Id.* at 767.

“Washington and modern statutory and decisional law do not treat force and nonconsent as separate formal elements.” *Id.* citing Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 Wash. L. Rev. 543, 550 (1980).

“Because the focus is on forcible compulsion, jury instructions need only require the State to prove the elements of the crime. It is not necessary to add a new instruction on consent simply because evidence of consent is produced.” *W.R.*, 181 Wn.2d at 767 n.3.

The defendant characterizes the last quote, from footnote no. 3, as dicta. Br. of Appellant at 11. But, the footnote was only one statement. The Court in *W.R.* made three other statements that consent is a part of forcible compulsion and that they are not separate elements.

Further, footnote no. 3 and the other three statements in *W.R.* are not dicta. Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum and need not be followed. *State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992). *W.R.* evolved around the interplay of the defense of consent and the element of forcible compulsion, whether consent necessarily

negates forcible compulsion and whether a defendant can forcibly compel intercourse with a victim who has consented. Footnote no. 3 and the other three comments on this issue directly relate to the issue before the court. Footnote no. 3 and the other three comments in *W.R.* are not dicta.

b. The Washington State Supreme Court Committee on Jury Instructions properly revised WPIC 18.25 in light of *W.R.*

The former WPIC 18.25 is attached as Appendix D. It provided that if the defendant proved by a preponderance that the sexual intercourse was consensual, the defendant should be found not guilty. In light of *W.R.*, this instruction was revised to read: “Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse.” *See* App. E. The trial court herein adopted this instruction. CP 430; *See* App. F.

This is a correct statement of the holding in *W.R.* The court in *W.R.* stated repeatedly that evidence of consent could be used to determine if the prosecution had proven forcible compulsion beyond a reasonable doubt.

The case of *State v. Ortiz-Triana*, 193 Wn. App. 769, 373 P.3d 335 (2016) is helpful. That case involved a charge of Rape in the Second Degree and a defense of consent. The case was apparently tried before

WPIC 18.25 was amended. *See* App. D. The defense proposed an instruction which stated:

Consent is an affirmative defense to the crime of rape and the defense bears the burden of proving consent by a preponderance of the evidence. *Even if, however, you do not find consent established by a preponderance of the evidence, you may still consider evidence of consent in determining whether or not the defendant acted with forcible compulsion and if you find that there is sufficient evidence to raise a reasonable doubt as to that element, you must acquit the defendant of the charge of rape in the first degree.*

Ortiz-Triana, 193 Wn. App. at 779-80.

The court held that the above italicized portion was consistent with the decision in *W.R. Id.* at 780.

The defendant argues that “the jury could have believed both that [B.S.] consented to the intercourse and that the intercourse was physically rough and controlling and still reached a verdict of guilty” Br. of Appellant at 12. With all due respect to the defendant, this is not an accurate statement of the elements of the crime. Second Degree Rape occurs not if the intercourse is physically rough and controlling, but if the defendant engaged in intercourse by use of forcible compulsion. That is, did the defendant by force overcome the victim’s resistance to intercourse? If the jury believed B.S. consented to sex with the defendant, but she found the sex not to her liking because it was rough and

controlling, he would have been found not guilty because she did not resist having sex with him.

- c. **In any event, the defendant's proposed jury instruction is not accurate and is against public policy by requiring proof that the victim of a sexual assault acted in a certain manner.**

The defendant's proposed jury instruction imposes an additional element in the definition of "forcible compulsion" requiring the State to prove a lack of consent. CP 411; *See* App. B. The trial court would have disregarded the legislature's definition of "forcible compulsion" under RCW 9A.44.010 (6) if this instruction was given.

The defendant also proposed to instruct the jury that "consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating a freely given agreement to have sexual intercourse." CP 412; *See* App. C. To disprove consent there must be words or conduct clearly expressing a lack of consent. *State v. Higgins*, 168 Wn. App. 845, 854, 278 P.3d 693 (2012). The victim's silence alone would not be sufficient to prove she did not consent.

In other words, the State would have to prove that the victim of a forcible rape said "no" loudly enough and fervently enough to convince a jury beyond a reasonable doubt that he or she did not consent. In this case, the State's evidence was that the defendant took B.S. by surprise and

threw her to the ground without warning. RP at 617. He immediately started pulling down her pants, he tried to bind her hands, and gag her. RP at 618-20. He pinned her down and threw her glasses away. RP at 621. That meets the definition of “forcible compulsion”.

But if the defendant’s instructions were given, it would not be sufficient to convict. The State would also have to prove that while she was being thrown to the ground and pinned down, B.S. managed to say, “No—stop” and say it without doubt or question. *Higgins*, 168 Wn. App. at 854.

B.S. testified that she screamed for help when she heard her neighbors outside her residence. RP at 631. She was questioned about why her neighbors did not hear her, and the defendant in closing argument implied she did not scream loud enough. *Id.*, RP at 717.

These are exactly the type of questions and arguments the court in *W.R.* wanted to avoid. *W.R.* noted there was progress in shifting the focus of rape prosecutions away from the victim’s conduct and onto the defendant’s and said its holding would not reverse that progress. *State v. W.R.*, 181 Wn.2d 757, 767, 336 P.3d 1134 (2014).

The defendant’s proposed instruction on forcible compulsion would require B.S. to speak, maybe even to scream loud enough for her neighbors to hear. A person who is sexually attacked may be in shock and

may not have the wherewithal to speak, yell or scream. To require a person who is being attacked to speak or scream is not consistent with the legislature's definition of forcible compulsion in RCW 9A.44.010 (6) and is not consistent with the public policy the *W.R.* court envisaged.

3. Given all the facts and the arguments the defendant made in closing without objection, it is at least arguable that the jury would have convicted the defendant even if the defendant's proposed instruction was given.

Reversal is ordinarily the proper remedy for an instructional error unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Ortiz-Triana*, 193 Wn. App. 769, 781, 373 P.3d 335 (2016). It is at least arguable that even with the defendant's proposed instructions he would have been convicted. This case was not close and was not a "he said-she said".

DNA evidence helps to confirm that the defendant attempted to gag and bind B.S. with his bandana. RP at 577-78. The furniture in B.S.'s residence was pushed around, and coffee was spilled because of the rape. RP at 623-24. B.S. immediately and emotionally reported the rape. RP at 588.

The defendant knew he was being arrested for rape before any police officer told him that was the charge. RP at 487. The defendant admitted being high on methamphetamine and alcohol to the point of

incoherence and said this affected his judgment. RP at 648, 650. He contradicted his previous testimony, gave a number of reasons for stopping at the victim's house, and had to be prompted twice to answer questions on cross-examination. RP at 638, 659-60, 663.

The defendant argued his theory of the case at closing without objections, even though the trial court did not give his proposed instructions. "Leland does not have to prove consent. This is all on the State." RP at 711. "The State cannot prove forcible compulsion because the State cannot foreclose the reasonable possibility that there was consent." RP at 712.

The jury could also evaluate the defendant's argument that B.S. was bigger than him. B.S. testified she is not very strong. RP at 625. The jury could evaluate whether B.S. could have been overpowered by the defendant by looking at her when she testified and viewing the following photo taken of her on the day of the alleged rape. *See Ex. 8.*

The jury was correctly instructed. But the evidence against the defendant was overwhelming and clearly the jury believed B.S. did not consent to intercourse and the defendant used force to overcome her resistance.

B. The \$200 filing fee and the \$100 DNA fee should be stricken.

This is not a criticism of the trial court. The legislature changed the law on these issues after the defendant was sentenced.

V. CONCLUSION

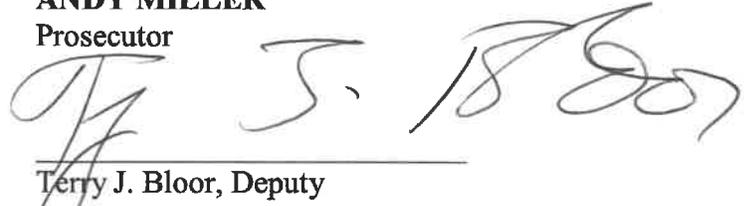
With due respect to the defendant, he is misreading the repeated statements in *State v. W.R.* that evidence of consent can be considered in determining whether the defendant used forcible compulsion. But, lack of consent is not an additional element that the State must disprove.

Every rape victim may not have the opportunity or wherewithal to say, yell or scream, “Don’t, stop, no”. The legislature’s definition of “forcible compulsion” does not require proof of a lack of consent. WPIC 18.25, amended after *W.R.*, does not require proof of absence of consent. The public policy of focusing on the conduct of the perpetrator rather than the victim is also against questions about whether a rape victim yelled loudly enough.

The jury was correctly instructed, and the conviction should be affirmed.

RESPECTFULLY SUBMITTED on February 5, 2019.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "T. J. Bloor", is written over a horizontal line. The signature is stylized and cursive.

Terry J. Bloor, Deputy
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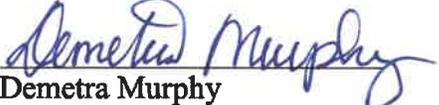
CERTIFICATE OF SERVICE

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

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was made to the following
parties: andrea@2arrows.net

Signed at Kennewick, Washington on February 5, 2019.


Demetra Murphy
Appellate Secretary

APPENDICES

- A. RCW 9A.44.010 (6): Definition of forcible compulsion.
- B. Defendant's proposed jury instructions on Forcible Compulsion
- C. Defendant's proposed jury instruction on Consent
- D. Former WPIC 18.25, pre-*State v. W.R.*
- E. Current WPIC 18.25, post-*State v. W.R.*
- F. Court's jury instruction on Consent

Appendix A

RCW 9A.44.010 (6): Definition of forcible compulsion.

RCW 9A.44.010**Definitions.**

As used in this chapter:

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

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

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

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

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

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

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

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

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES:

***Reviser's note:** RCW 70.96A.020 was alphabetized pursuant to RCW 1.08.015 (2)(k), changing subsection (4) to subsection (5), effective April 1, 2016. RCW 70.96A.020 was amended by 2016 sp.s. c 29 § 101, changing subsection (5) to subsection (6); and subsequently repealed by 2016 sp.s. c 29 § 301, effective April 1, 2018.

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

Severability—2001 c 251: See RCW 18.225.900.

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

Intent—1994 c 271: "The legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse and further reaffirms its condemnation of child sexual abuse that takes the form of causing one child to engage in sexual contact with another child for the sexual gratification of the one causing such activities to take place." [1994 c 271 § 301.]

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

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

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

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

Appendix B

Defendant's proposed jury instructions on Forcible Compulsion

Instruction No. _____

Forcible compulsion exists when both of the following elements are present:

- (1) a person has not consented to sexual intercourse,
- (2) that person has been subjected to physical force that overcomes resistance, or a threat, express or implied, that places the person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

If after your deliberations you find beyond a reasonable doubt that both elements 1 and 2 exist, you are satisfied beyond a reasonable doubt that the State has proven the element of forcible compulsion. If, on the other hand, you have a reasonable doubt as to the existence of element 1 or 2 or as to both elements 1 and 2, then the State has not proven the element of forcible compulsion, and it will be your duty to render a verdict of not guilty.

Appendix C

Defendant's proposed jury instruction on Consent

Instruction No. _____

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating a freely given agreement to have sexual intercourse. The Defendant has no burden to prove that sexual intercourse was consensual. It is the State's burden to prove the absence of consent beyond a reasonable doubt.

Appendix D

Former WPIC 18.25, pre-*State v. W.R.*

WPIC 18.25

**CONSENT—FIRST OR SECOND DEGREE RAPE OR
INDECENT LIBERTIES—DEFENSE**

A person is not guilty of [rape] [indecent liberties] if the [sexual intercourse] [sexual contact] is consensual. Consent means that at the time of the act of [sexual intercourse] [sexual contact] there are actual words or conduct indicating freely given agreement to have [sexual intercourse] [sexual contact].

The defendant has the burden of proving that the [sexual intercourse] [sexual contact] was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of 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 charge].

NOTE ON USE

Use this instruction with WPIC 40.02, Rape—First Degree—Elements if the evidence warrants such an instruction.

Use this instruction with WPIC 41.02, Rape—Second Degree—Elements, only if it is alleged that the sexual intercourse occurred by forcible compulsion and the evidence warrants such an instruction.

Use this instruction with WPIC 49.02, Indecent Liberties—Elements, only if it is alleged that the sexual contact occurred by forcible compulsion and the evidence warrants such an instruction.

Use the term “sexual intercourse” with a second degree rape defense, and the term “sexual contact” with an indecent liberties charge.

COMMENT

RCW 9A.44.010(7).

The Supreme Court recognized consent as a valid defense to a charge of rape in *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989). In *Camara*, the defendant was convicted of second degree rape under RCW 9A.44.050(1)(b), the “forcible compulsion” alternative. Separate instructions were given that defined the terms forcible compulsion and consent for the jury. The defendant argued that consent negates the el-

ement of forcible compulsion and therefore the State had the burden of proving the absence of consent beyond a reasonable doubt. The court rejected this argument and held the burden of proving consent could constitutionally be placed upon the defendant.

In *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Washington Supreme Court approved an instruction that was essentially worded the same as the pattern instruction above. The court, in its discussion of the instruction, refused to overrule *Camara*, holding that the conceptual overlap between the consent defense and the forcible compulsion element did not relieve the State of its burden of proving forcible compulsion beyond a reasonable doubt.

In *Camara*, the court did not address the situation in which the incapacity to consent or the lack of consent is an element of the offense charged. See RCW 9A.44.050(1)(b) (second degree rape) and RCW 9A.44.060(1)(a) (third degree rape). With such offenses, the committee believes that it would be constitutional error to instruct regarding the consent defense because the State would be relieved of proving one of the elements of the crime. Nevertheless, the Court of Appeals in *State v. Lough*, 70 Wn.App. 302, 326 n. 16, 853 P.2d 920 (1993), affirmed at 125 Wn.2d 847, 889 P.2d 487 (1995), approved placing the burden upon the defendant to prove consent in an indecent liberties case when the allegation was that the victim was incapable of consent by reason of being physically helpless. The court did note, however, that a defendant's consent defense is legally and logically superfluous when the State's sole theory is that the victim was legally incapable of giving consent. *State v. Lough*, 70 Wn.App. at 329.

The court should use caution if the defendant objects to the use of this instruction. See *State v. McSorley*, 128 Wn.App. 598, 116 P.3d 431 (2005) (holding that the defendant's "constitutional right to at least broadly control his own defense" prevented the State or the court from compelling the defendant to rely on an affirmative defense to child luring).

[Current as of July 2008.]

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Appendix E

Current WPIC 18.25, post-*State v. W.R.*

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WPIC 18.25 Consent—First or Second Degree Rape or Indecent Liberties—Defense

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 October 2016 Update

Washington State Supreme Court Committee on Jury Instructions

Part IV. Defenses

WPIC CHAPTER 18. Miscellaneous Defenses

WPIC 18.25 Consent—First or Second Degree Rape or Indecent Liberties—Defense

Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have [sexual intercourse] [sexual contact].

NOTE ON USE

Do not use prior versions of this instruction. See discussion in Comment.

Do not use WPIC 45.04 (Consent—Definition) with this instruction.

Use this instruction with WPIC 40.02 (Rape—First Degree—Elements) if the evidence warrants such an instruction.

Use this instruction with WPIC 41.02 (Rape—Second Degree—Elements), only if it is alleged that the sexual intercourse occurred by forcible compulsion and the evidence warrants such an instruction.

Use this instruction with WPIC 49.02 (Indecent Liberties—Elements) only if it is alleged that the sexual contact occurred by forcible compulsion and the evidence warrants such an instruction.

Use the term "sexual intercourse" with a second degree rape defense, and the term "sexual contact" with an indecent liberties charge.

COMMENT

In light of the Supreme Court's decision in *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), the former version of this instruction has been withdrawn and it should not be used.

The defense of consent negates the element of forcible compulsion. *State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014). Thus, RCW 9A.44.010(7), which places the burden of proving consent upon the defendant, is unconstitutional. In so holding, the court explicitly overruled two earlier cases, *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), and *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), which had held to the contrary.

Under no circumstances should this instruction be given unless requested, or expressly agreed to, by the defense. A defendant's constitutional right to control his or her defense prohibits the giving of instructions concerning defenses over the defendant's objections. *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013).
[Current as of December 2015.]

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Appendix F

Court's jury instruction on Consent

INSTRUCTION NO. 10

Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse.

BENTON COUNTY PROSECUTOR'S OFFICE

February 05, 2019 - 9:29 AM

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