CHAPTER 3
Defenses to Sexual Offenses

By
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I. Introduction

This chapter covers the application of defenses to sexual offenses in Washington State; rules when instructing juries on the burden of proving an affirmative defense; certain defenses permitted in sexual offense trials; impermissible defenses to sexual offense charges; and statutes of limitations applicable to sexual offenses.

II. The Burden of Proof as to Defenses

A. Determining Who Has the Burden of Proof

The Washington Supreme Court uses a two-prong inquiry, known as the *McCullum/Acosta* test, to determine whether the burden of proof for a defense lies with the state or the defendant. Under the first prong, a court will analyze the relevant criminal statute and inquire "[o]n whom did the Legislature intend that the burden of proof should lie?"[1] Legislative silence on this matter is a strong indication to courts that the Legislature did not intend for a defendant to have the burden.[2] When the Legislature is clear that a defendant bears the burden of proving a defense, the burden will lie with the defendant unless proof of the defense could negate an element of the offense.[3]

The second prong of the inquiry is constitutional and arises from the U.S. Supreme Court decision in *In re Winship*,[4] which requires the State to prove every element of a crime beyond a reasonable doubt. Washington courts will determine whether one or more elements of the defense negate one or more elements of the offense.[5] If the court so finds, the State bears the burden of proving the inapplicability of the defense beyond a reasonable doubt.[6] Shifting the burden of proof to the defendant in such circumstances would unconstitutionally require the defendant to disprove an element of the offense.[7] Conversely, a defendant will be required to prove a defense by a preponderance of the evidence if the defense *does not* negate an element of the crime.[8]

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[1] *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989)
[2] *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984)
[3] Id. at 615
[4] 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368, (1970)
[5] See *State v. McCullum*, 98 Wn.2d 484, 494-96, 656 P.2d 1064 (1983)
[6] Id.
[7] *State v. Lively*, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996)
[8] See *State v. Riker*, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)

B. Instructing Juries on the Burden of Proof Applicable to Defenses

1. When the burden is on the state

When the state bears the burden of proving the inapplicability or absence of a defense, two modes of so instructing juries have been approved. In the first mode the court may explain the state's burden of proof with respect to an applicable defense in the instruction defining the defense.[9] If this mode is used it is good practice for the court to include a reference in the "to convict instruction" to the defense burden of proof instruction. For example, if the applicable defense is justification, the "to convict" instruction should provide: "…that a guilty verdict should be returned if the jury finds that each element has been proved beyond a reasonable doubt 'and that the acts were not justified as defined elsewhere in (or "as defined in Instruction No. ___ of") these instructions.'"[10] In the second mode courts may "include the burden of proof on the defense as an additional item in the standard 'to convict' instruction."[11]

2. When the burden is on the defendant

When the defendant must prove an affirmative defense, the burden of proof is a preponderance of the evidence standard.[12] The Washington Pattern Jury Instructions incorporate that standard.[13]

III. Defenses in Sexual Offense Trials

A. Alibi

1. No due process right to alibi defense

Whether single or multiple incidents of sexual offenses are charged, a defendant has no due process right to a reasonable opportunity to raise an alibi defense.[14] Though defendants cannot use a child's inability to recall dates to escape a trial, he or she can use the long time frame to attack the credibility of the child witness.[15] The court noted further:

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[9] *State v. Hoffman*, 116 Wn.2d 51, 109, 804 P.2d 577 (1991) (holding that the Court perceived "no error in this instructional mode")
[10] Pt. IV Intro, 11 *Wash. Prac. Pattern Jury Instr. Crim.* (3d ed. 2008) http://weblinks.westlaw.com/result/default.aspx?cite=UU%28Ief9e89e9e10d11daade1ae871d9b2cbe%29&db=130417&findtype=l&fn=_top&pbc=DA010192&rlt=CLID_FQRLT7940143314142&rp=%2FSearch%2Fdefault%2Ewl&rs=WEBL13%2E01&service=Find&spa=wcrji-1000&sr=TC&vr=2%2E0
[11] Id. (citing *State v. Fondren*, 41 Wn. App. 17, 701 P.2d 810 (1985))
[12] See *State v. Riker*, 123 Wn.2d at 366-69
[13] 11 *Wash Prac. Pattern Jury Instr. Crim.* supra
[14] *State v. Cozza*, 71 Wn. App. 252, 259, 858 P.2d 270 (1993)
[15] Id.

> …if Mr. Cozza had had a constitutional right to a reasonable opportunity to raise an alibi defense, it would be difficult to find that he was not prejudiced by the long time frame. Washington case law has approved 1 to 3–month time frames when sexual charges are brought and the victims are young and unable to establish calendar dates. *State v. Jordan*, 6 Wn.2d 719, 721, 108 P.2d 657 (1940) (60–day time frame adequate in charge of carnal knowledge of mentally deficient 15–year–old).[16]

2. Burden of proof

When the state makes out a case that would sustain a guilty verdict and the defendant offers alibi evidence, the burden is upon the defendant to make out his or her alibi defense, but it is not incumbent upon the defendant to prove an alibi beyond a reasonable doubt.[17]

3. Jury instructions

Deciding whether to instruct a jury on an alibi defense requires caution by the court in view of the somewhat confusing and inconsistent case law on the subject. The Washington Committee on Jury Instructions recommends that no instruction be given on the alibi defense, citing the decisions in *State v. Adams*[18] and *State v. Kubicek*,[19] in which

> the court found the challenged alibi instructions to be proper and in accordance with the law, but it concluded that no alibi instructions should be given in the future when requested by either the prosecution or the accused. The court stated in *Adams* that a set of general instructions adequately covers the law governing the trial and gives both parties ample scope to present their respective views as to alibi evidence without risking the introduction of possibly confusing judicial comments on the subject.[20]

The comment also advises, relying upon *State v. Pitts*,[21] that though "not [an] inflexible" rule, "When the evidence focuses on the commission of a crime on a specific date and the defendant asserts an alibi, the instruction defining the elements of the crime

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[16] Id. at 260, n.4
[17] *State v. Adams*, 5 Wn. App. 366, 367, 487 P.2d 218 (1971), affd. 81 Wn.2d 468, 503 P.2d 111 (1972)
[18] Id. at 367
[19] 81 Wn.2d 497, 502 P.2d 1190 (1972)
[20] Comment, 11 *Wash. Prac. Pattern Jury Instr. Crim*., WPIC 18.15 (3rd ed.) http://weblinks.westlaw.com/result/default.aspx?cite=UU%28Iefa05ea9e10d11daade1ae871d9b2cbe%29&db=130417&findtype=l&fn=_top&pbc=DA010192&rlt=CLID_FQRLT85347403814142&rp=%2FSearch%2Fdefault%2Ewl&rs=WEBL13%2E01&service=Find&spa=wcrji-1000&sr=TC&vr=2%2E0
[21] 62 Wn.2d 294, 382 P.2d 508 (1963)

should not contain the usual reference to an act "on or about" a certain date. The jury should be instructed that the State must prove that the act occurred on a specific date."[22]

A comment by the 6th Circuit Court of Appeals also illuminates the dangers with respect to assertion of an alibi defense and the court's responsibilities. "The defense can easily backfire, resulting in a conviction because the jury didn't believe the alibi rather than because the Government has satisfied the jury of the defendant's guilt beyond a reasonable doubt, and it is the trial judge's responsibility to avoid this possibility."[23]

B. Consent

1. Statutory language regarding consent

In Washington, "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."[24]

When "consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless."[25]

> 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 to second degree rape, 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.[26]

"It is an affirmative defense to prosecution under RCW 9A.44.160 [Custodial Sexual Misconduct in the First Degree] or RCW 9A.44.170 [Custodial Sexual Misconduct in the Second Degree], to be proven by the defendant by a preponderance of the evidence, that the act of sexual intercourse or sexual contact resulted from forcible compulsion by the other person."[27]

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[22] 11 *Wash. Prac. Pattern Jury Instr. Crim.*, supra
[23] *United States v. Robinson*, 602 F.2d 760, 762 (6th Cir. 1979), cert. denied, 444 U.S. 878, 100 S. Ct. 165, 62 L. Ed. 2d 107 (1979)
[24] RCW 9A.44.010(7) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.010
[25] RCW 9A.44.030(1) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.030
[26] RCW 9A.44.050(d) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.050
[27] RCW 9A.44.180 http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.180

2. Case Law on consent defense

Consent is a common defense to charges of rape or indecent liberties, when the charges are based on forcible compulsion.[28] The defendant bears the burden of proving consent, even though that defense, at least in part, negates the element of forcible compulsion.[29] A jury may be instructed that the defendant bears the burden of proving consent by a preponderance of the evidence.[30]

Consent is not a defense to a charge of rape of a child,[31] incest[32] or child molestation.[33]

A victim's consent to consensual sex is not a defense to the offense of exposure to or transmission of HIV with intent to inflict great bodily harm.[34]

3. Evidence of past sexual behavior

Washington's rape shield law (RCW 9A.44.020) permits a defendant to present evidence of the victim's past sexual behavior only "on the issue of consent to the offense" and only in two situations: (1) "when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense."[35] (2) With respect to charges of rape, attempted rape or assault with the intent to commit rape, the rape shield law provides:

> …evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards … is admissible on the issue of consent only pursuant to the following procedure:
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> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
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> (b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

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[28] *State v. Buzzell*, 148 Wn. App. 592, 600, 200 P.3d 287 (2009)
[29] *State v. Camara*, 113 Wn.2d 631, at 638
[30] *State v. Gregory*, 158 Wn.2d 759, 801–04, 147 P.3d 1201 (2006)
[31] *State v. Birgen*, 33 Wn. App. 1, 9–10, 651 P.2d 240 (1982)
[32] *State v. Nugent*, 20 Wash.522, 523-24, 56 Pac. 25 (1899)
[33] *State v. Moss*, 6 Wn.2d 629, 631-32, 108 P.2d 633 (1940)
[34] *State v. Whitfield*, 132 Wn. App. 878, 899, 134 P.3d 1203 (2006)
[35] See RCW 9A.44.020(2) http://apps.leg.wa.gov/rcw/default.aspx?cite=9A.44.020

> (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
> (d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.[36]

4. Jury instructions related to consent

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

> 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].

C. Double Jeopardy

1. Constitutional and statutory protections

Article I, section 9 of the Washington State Constitution provides, in relevant part, that "[n]o person shall be…twice put in jeopardy for the same offense." This protection is also enshrined in the Double Jeopardy Clause of the Fifth Amendment of the U. S.

[36] See RCW 9A.44.020(3)

Constitution. Statutorily, RCW 10.43.020.applies the protection to include offenses and lesser degrees of the offense charged: "When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein."

2. Convictions of multiple violations of the same statute

When a defendant is convicted of violating the same statute multiple times, "the proper inquiry…is what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute….When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime."[37]

However, in *State v. Smith*,[38] the court found that convictions for first degree rape and second degree child rape, although arising out of one act of sexual intercourse with the same victim, were not "legally comparable offenses because of unique elements in each offense" and held that in situations such as these the "legislature did not intend to prohibit multiple convictions arising from a single sexual act."[39]

Additionally, the Washington Supreme Court determined in *State v. Tili*[40] that two separate digital penetrations of a victim's anus and vagina followed by penile penetration of the victim's vagina, "constitute three separate units of prosecution...[and therefore the defendant's] three first-degree rape convictions do not violate double jeopardy." Quoting the Wisconsin Supreme Court, the Court clarified:

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual offense on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed.
> *Harrell v. State*, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979).[41]

The Court also held that the unit of prosecution for rape is "sexual intercourse" with another individual.[42]

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[37] *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83-84, 75 S. Ct. 620, 99 L. Ed. 905 (1955))
[38] 165 Wn. App. 296, 321, 266 P.3d 250 (2011) review granted, 173 Wn.2d 1034, 277 P.3d 669 (2012)
[39] Id. at 324
[40] 139 Wn.2d 107, 119, 985 P.2d 365 (1999), affd. 148 Wn.2d 350, 60 P.3d 1192 (2003)
[41] Id. at 119
[42] Id.

3. Conviction or acquittal of sexual offense in another county

RCW 10.43.030 provides: "Whenever, upon the trial of any person for a crime, it shall appear that the defendant has already been acquitted or convicted upon the merits, of the same crime, in a court having jurisdiction of such offense in another county of this state, such former acquittal or conviction is a sufficient defense." Division III of the Washington Court of Appeals clarified, in *State v. Gary J.E.*, [43] that the dismissal of a child rape charge in one county did not permit the defendant to raise a double jeopardy defense to bar prosecution for another child rape charge in another county, which the evidence indicated was an entirely separate incident from the one originally charged.

4. Foreign conviction or acquittal

Under the doctrine of dual sovereignty, separate sovereigns may successively punish a defendant for the same crime without offending constitutional double jeopardy protections as long each sovereign punishes the defendant only once.[44] However, Washington's double jeopardy clause extends double jeopardy protections beyond those afforded under the dual sovereignty doctrine.[45] RCW 10.43.040 provides:

> Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, in a judicial proceeding conducted under the criminal laws of such state or country, founded upon the act or omission with respect to which he or she is upon trial, such former acquittal or conviction is a sufficient defense. Nothing in this section affects or prevents a prosecution in a court of this state of any person who has received administrative or nonjudicial punishment, civilian or military, in another state or country based upon the same act or omission.

The United States military qualifies as the equivalent of another state or country for the purposes of Washington's double jeopardy statute.[46] However, the statute does not shield tribal members from Washington prosecutions where their actions violate the laws of both sovereigns.[47]

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[43] 99 Wn. App. 258, 263-64, 991 P.2d 1220 (2000)
[44] *State v. Ivie*, 136 Wn.2d 173, 178, 961 P.2d 941 (1998) (citing *State v. Kenney,* 83 Wn. 441, 443, 145 P. 450 (1915))
[45] Id. (citing *State v. Caliguri*, 99 Wn.2d 501, 511, 664 P.2d 466 (1983))
[46] Id. at 177
[47] *State v. Moses*, 145 Wn.2d 370, 378-379, 37 P.3d. 1216 (2002)

Washington courts have not analyzed, in the context of sexual offenses, the application of a foreign conviction or acquittal defense when the elements of a crime charged in a foreign jurisdiction are not the same as the elements of a crime charged in Washington. However, a comparative analysis by the Washington Court of Appeals of theft charges would seem to be applicable. In *State v. Mathers*[48] the court found that a defendant convicted of first-degree theft in Oregon could be prosecuted in Washington for second degree theft because the two offenses were not the same "in fact." The Oregon statute under which the defendant was convicted included the element that the item stolen was a firearm as well as the other elements of theft. In contrast, Washington's statute required intent to deprive but did not require that the stolen item be a firearm.

The double jeopardy clause of the Fifth Amendment of the U.S. Constitution clearly prohibits retrial of a defendant who has been acquitted of the crime charged. *State v. Hennings*[49] That protection is extended to other degrees of the crime of which a defendant was acquitted by RCW 10.43.050, which provides, in part: "Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he or she cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof." This extension, however, does not apply to lesser-included offenses.[50]

Note, however, that RCW 10.43.050 also provides: "No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense."

D. Duress

RCW 9A.16.060 provides:

> (1) In any prosecution for a crime, it is a defense that:
> (a) The actor participated in the crime under compulsion by another who by threat or use of force created an apprehension in the mind of the actor that in case of refusal he or she or another would be liable to immediate death or immediate grievous bodily injury; and
> (b) That such apprehension was reasonable upon the part of the actor; and
> (c) That the actor would not have participated in the crime except for the duress involved.
> (2) The defense of duress is not available if the crime charged is murder, manslaughter, or homicide by abuse.

[48] 77 Wn. App. 487, 493, 891 P.2d 738 (1995) (citing *In re Cook*, 114 Wn.2d 802, 816, 792 P.2d 506 (1990))
[49] 100 Wn.2d 379, 670 P.2d 25 (1983) (citing *United States v. DiFrancesco*, 449 U.S. 117, 129–30, 101 S. Ct. 426, 66 L.Ed.2d 328 (1980))
[50] See *State v. Padilla*, 84 Wn. App. 523, 525-26, 928 P.2d 1141 (1997)

(3) The defense of duress is not available if the actor intentionally or recklessly places himself or herself in a situation in which it is probable that he or she will be subject to duress.
(4) The defense of duress is not established solely by a showing that a married person acted on the command of his or her spouse.

Washington's duress statute does not require that it be actually possible for the perceived harm to be immediate; rather, the defense requires reasonable apprehension of immediate death or grievous bodily injury, and thus the appropriate inquiry is the reasonableness of the defendant's belief.[51]

E. Entrapment

Regarding the defense of entrapment, RCW 9A.16.070 provides:

(1) In any prosecution for a crime, it is a defense that:
(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

F. Insanity

RCW 9A.12.010 provides:

To establish the defense of insanity, it must be shown that:
(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
(a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or
(b) He or she was unable to tell right from wrong with reference to the particular act charged.
(2) The defense of insanity must be established by a preponderance of the evidence.

[51] *State v. Williams*, 132 Wn.2d 248, 937 P.2d 1052 (1997) (holding that trial court improperly excluded instruction on the duress defense where defendant's husband inflicting abuse was out at sea and not in her immediate physical vicinity); see also *State v. Loven*, 81 Wn. App. 1053, (1996) (not reported in P.3d)

In *Greene v. Lambert* [52] the Ninth Circuit Court of Appeals noted that "Under Washington law, [the insanity and diminished capacity defenses] require that a defendant connect the claimed mental illness with the defendant's capacity to understand the nature and quality of the acts committed, or with the defendant's ability to tell right from wrong." The court ruled that in a prosecution for sexual assault, the defendant's constitutional right to present a defense was impermissibly infringed upon a when evidence of the defendant's multiple personality disorder from which he was allegedly suffering at the time he sexually assaulted the psychiatric nurse who was treating him was excluded. [53]

Consistent with the ruling in *Greene*, supra, a defendant accused of first-degree rape of a child was held to have the right to plead insanity on the basis that a "mental disease or defect caused him to be unable to perceive the nature and quality of the act charged."[54]

G. Reasonable Belief of Victim's Age

RCW 9A.44.030(2) and (3) provide:

> (2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.
> (3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:
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> (a) For a defendant charged with rape of a child in the first degree, that the victim was at least twelve, or was less than twenty-four months younger than the defendant;
> (b) For a defendant charged with rape of a child in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;
> (c) For a defendant charged with rape of a child in the third degree, that the victim was at least sixteen, or was less than forty-eight months younger than the defendant;
> (d) For a defendant charged with sexual misconduct with a minor in the first degree, that the victim was at least

[52] 288 F.3d 1081, 1089 (9th Cir. 2002) (citing *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987))
[53] Id. at 1091-92
[54] *State v. Swagerty*, 60 Wn. App. 830, 834, 810 P.2d 1 (1991)

> eighteen, or was less than sixty months younger than the defendant;
> (e) For a defendant charged with child molestation in the first degree, that the victim was at least twelve, or was less than thirty-six months younger than the defendant;
> (f) For a defendant charged with child molestation in the second degree, that the victim was at least fourteen, or was less than thirty-six months younger than the defendant;
> (g) For a defendant charged with child molestation in the third degree, that the victim was at least sixteen, or was less than thirty-six months younger than the defendant;
> (h) For a defendant charged with sexual misconduct with a minor in the second degree, that the victim was at least eighteen, or was less than sixty months younger than the defendant.
> (emphasis added)

Reasonable belief of a victim's age may not be based on inferences arising from the victim's general behavior, appearance, or demeanor.[55] If a victim gives a false age that is nevertheless younger than the age of consent, only a partial defense is recognized: the crime will be treated as if the victim's declarations were true.[56]

A statutory rape defendant's reasonable mistake as to the victim's age is not a complete defense if the defendant believed the victim was less than 16 at the time the crime was committed.[57] It is no defense to prosecution for the crime of statutory rape that the victim subsequently married the defendant.[58]

IV. Defenses in a Sexual Exploitation of a Minor Case

A. Reasonable Belief of Age or Attempt to Determine Age

RCW 9.68A.110 (2) and (3) provide:

> (2) In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.080, it is not a defense that the defendant did not know the age of the child depicted in the visual or printed matter. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense the defendant was not in possession of any facts on the basis of which he or she should reasonably have known that the person depicted was a minor.

[55] *State v. Bennett*, 36 Wn. App. 176, 181–82, 672 P.2d 772 (1983)
[56] See *State v. Dodd*, 53 Wn. App. 178, 180-81, 765 P.2d 1337 (1989)
[57] Id. at 180; see also *State v. Heidari*, 125 Wn. App. 1009 (2005) (not reported in P.3d)
[58] *State v. Falsetta*, 43 Wash. 159, 86 Pac. 168 (1906)

> (3) In a prosecution under RCW 9.68A.040, 9.68A.090, 9.68A.100, 9.68A.101, or 9.68A.102, it is not a defense that the defendant did not know the alleged victim's age. It is a defense, which the defendant must prove by a preponderance of the evidence, that at the time of the offense, the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

B. Unwitting Possession

In a prosecution under chapter 9.68A RCW, evidence that the defendant did not know he or she was in possession of the contraband or that he or she did not know the nature of the contraband possessed may support the defense of unwitting possession.[59]

C. Special Circumstances

1. Participating or assisting in the investigation of a sex crime against a minor

RCW 9.68A.110 (4) provides:

> In a prosecution under RCW 9.68A.050, 9.68A.060, 9.68A.070, or 9.68A.075, it shall be an affirmative defense that the defendant was a law enforcement officer or a person specifically authorized, in writing, to assist a law enforcement officer and acting at the direction of a law enforcement officer in the process of conducting an official investigation of a sex-related crime against a minor, or that the defendant was providing individual case treatment as a recognized medical facility or as a psychiatrist or psychologist licensed under Title 18 RCW. Nothing in chapter 227, Laws of 2010 is intended to in any way affect or diminish the immunity afforded an electronic communication service provider, remote computing service provider, or domain name registrar acting in the performance of its reporting or preservation responsibilities under 18 U.S.C. Secs. 2258a, 2258b, or 2258c.

[59] *State v. Garbaccio*, 151 Wn. App. 716, n. 5, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027, 230 P.3d 1060

2. Academic Research

RCW 9.68A.110 (6) provides:

> In a prosecution under RCW 9.68A.070 or 9.68A.075, it shall be an affirmative defense that:
>
> (a) The defendant was employed at or conducting research in partnership or in cooperation with any institution of higher education as defined in RCW 28B.07.020 or 28B.10.016, and:
>
> (i) He or she was engaged in a research activity;
>
> (ii) The research activity was specifically approved prior to the possession or viewing activity being conducted in writing by a person, or other such entity vested with the authority to grant such approval by the institution of higher education; and
>
> (iii) Viewing or possessing the visual or printed matter is an essential component of the authorized research; or
>
> (b) The defendant was an employee of the Washington state legislature engaged in research at the request of a member of the legislature and:
>
> (i) The request for research is made prior to the possession or viewing activity being conducted in writing by a member of the legislature;
>
> (ii) The research is directly related to a legislative activity; and
>
> (iii) Viewing or possessing the visual or printed matter is an essential component of the requested research and legislative activity.
>
> Nothing in this section authorizes otherwise unlawful viewing or possession of visual or printed matter depicting a minor engaged in sexually explicit conduct.

V. Impermissible Defenses to Sexual Offenses

A. Impossibility

RCW 9A.28.020 (2) provides: "If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission."

1. Attempted sexual assault

In *State v. Townsend* [60] the court held that the defendant took a substantial step toward rape of a 13–year–old child when he met an adult male detective posing as a 13–year–old girl in an on-line chat room, because impossibility is not a defense to criminal attempt. In *State v. Johnson,*[61] the court again confirmed that impossibility is not a defense if the intended victim was fictitious and the crime was impossible to complete noting that "our legislature has rejected both factual and legal impossibility as a defense to criminal attempt....We similarly reject Johnson's attempt to raise an impossibility defense here."[62]

2. Attempted possession of child pornography

"If a person attempts to obtain actual child pornography but the crime is not completed because the individual does not in fact receive the images sought or receives images that turn out to be images that are not of actual minors, the individual can nevertheless be convicted of the attempt crime because factual impossibility is not a defense." *State v. Luther*[63]

B. Intoxication

RCW 9A.16.090 provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

The court, in *State v. Gallegos,*[64]held: "[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state."

A defendant accused of attempted second-degree rape could not raise the defense of voluntary intoxication because "there was no evidence presented that the drinking impaired …[the defendant's] ability to acquire the intent to engage in

[60] 147 Wn.2d 666, 57 P.3d 255 (2002)
[61] 173 Wn.2d 895, 900-901, 270 P.3d 591 (2012)
[62] Id.
[63] 157 Wn. 2d 63, 73-74, 134 P.3d 205 (2006)
[64] 65 Wn. App. 230, 238, 828 P.2d 37 (1992) (citing *State v. Simmons*, 30 Wn. App. 432, 435, 635 P.2d 745 (1981))

sexual intercourse with T.G. by forcible compulsion."[65] Similarly, a defendant accused of first-degree rape of a child could not plead voluntary intoxication because "the legislature's definition of statutory rape did not require proof of specific intent or any other mental state…."[66]

C. Involvement in Law Enforcement Activities in Sexual Exploitation of a Minor Cases

RCW 9.68A.110 (1) provides:

> In a prosecution under RCW 9.68A.040 [Sexual exploitation of a minor—Elements of crime—penalty], it is not a defense that the defendant was involved in activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses. Law enforcement and prosecution agencies shall not employ minors to aid in the investigation of a violation of RCW 9.68A.090 or 9.68A.100 through 9.68A.102, except for the purpose of facilitating an investigation where the minor is also the alleged victim and the:
>
> (a) Investigation is authorized pursuant to RCW 9.73.230(1)(b)(ii) or 9.73.210(1)(b); or
>
> (b) Minor's aid in the investigation involves only telephone or electronic communication with the defendant.

VI. Statute of Limitations

The following pertinent parts of RCW 9A.04.080 prescribe limitations periods for certain sexual offenses:

> (1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.
>
> ….
>
> (b) The following offenses shall not be prosecuted more than ten years after their commission:
>
> ….
>
> (iii) (A) Violations of RCW 9A.44.040 [rape in the first degree] or RCW 9A.44.050 [rape in the second degree] if the rape is reported to a law enforcement agency within one year of its commission; except that if the victim is under fourteen years of age when the rape is committed and the rape is reported to a law enforcement agency within one year of its commission,

[65] Id. at 239

[66] *State v. Swagerty*, 60 Wn. App. 830, 833, 810 P.2d 1 (1991)

the violation may be prosecuted up to the victim's twenty-eighth birthday.

(B) If a violation of RCW 9A.44.040 [rape in the first degree] or RCW 9A.44.050 [rape in the second degree] is not reported within one year, the rape may not be prosecuted: (I) More than three years after its commission if the violation was committed against a victim fourteen years of age or older; or (II) more than three years after the victim's eighteenth birthday or more than seven years after the rape's commission, whichever is later, if the violation was committed against a victim under fourteen years of age.

(c) Violations of the following statutes may be prosecuted up to the victim's twenty-eighth birthday: RCW 9A.44.073, [rape of a child in the first degree] RCW 9A.44.076, [rape of a child in the second degree] RCW 9A.44.083, [child molestation in the first degree] RCW 9A.44.086 [child molestation in the second degree] *RCW 9A.44.070, [statutory rape in the first degree] RCW 9A.44.080, [statutory rape in the second degree] RCW 9A.44.100(1)(b), [indecent liberties with a person incapable of consent] RCW 9A.44.079 [rape of a child in the third degree] RCW 9A.44.089, [child molestation in the third degree] or RCW 9A.64.020 [incest]...

(2)The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

(3) In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later.

If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

(crime names added)