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Court of Appeals  
Division III  
State of Washington

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

LUIS ALBERTO DUENAS BARRETO

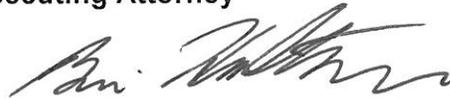
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT  
Prosecuting Attorney



by: Brian Hultgren, #34277  
Deputy Prosecuting Attorney

1016 North Fourth Avenue  
Pasco, WA 99301  
Phone: (509) 545-3543

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A. COUNTERSTATEMENT OF THE ISSUES

1. DID THE APPELLANT PROVIDE SUFFICIENT EVIDENCE TO PUT THE ISSUE OF CONSENT IN CONTROVERSY, SUCH THAT THE STATE HAD THE BURDEN OF PROVING LACK OF CONSENT BEYOND A REASONABLE DOUBT.
2. IN ANY EVENT, IF THE COURT DID ERR, WAS THE ERROR HARMLESS BECAUSE THE EVIDENCE AGAINST THE APPELLANT WAS OVERWHELMINGLY IN FAVOR OF A GUILTY VERDICT ON BOTH COUNTS.
3. WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTION FOR ATTEMPTED RAPE IN THE SECOND DEGREE.

B. RESPONSE TO STATEMENT OF THE CASE

The victim, N. A., met the Appellant, Luis Duenas-Barreto, between August and September of 2012. RP 111. The Appellant agreed to fix the victim's car. RP 112. He worked on the car for around two months and made no progress on fixing it. During this time period the Appellant repeatedly asked the victim out, but she refused him. RP 113.

On approximately November 4, 2012, the Appellant came into the victim's home and began asking her out again. RP 114, 123. This time, when the victim told him no, the Appellant grabbed her and kissed her. The victim hit him in response. RP 69, 115.

Initially, the Appellant backed off, but then he came back and grabbed the victim. He threw her on the bed, pinned her arms down with one hand, and took her pants off with the other. She told him to stop. RP 115. The Appellant then used his hand to force her legs apart and raped her. RP 115-16. A bruise in the shape of a handprint was left on the victim's leg and she later took a picture of it. RP 119.

Following the rape, the Appellant told the victim if she reported the rape she would be found hung. Based on this, the victim did not report the rape out of fear. RP 118. She did tell her best friend, Veronica, several days later. RP 118, 195-97. Veronica came over, observed the victim upset, and saw a bruise on her leg. RP 198.

On February 9, 2012, the Appellant sent a text message to the victim:

I want to apologize for being so a fool. There is no forgiveness. I deserve it. I understand you. You really didn't like it. Or otherwise you will be with me. I consider myself lost. Good bye forever. I ask God for you to be happy.

RP 122.

About a week or two after the incident, the Appellant returned to the home of the victim. He grabbed the victim and

threw her down to the living room floor. At that time she began to scream and he left her alone. On December 1, 2012, the Appellant texted the victim again. After confirming the victim was at home with her boyfriend, the Appellant told her to tell her boyfriend about their encounter, otherwise he would. He also told her it did not "hurt" like it did with him and that she was a "slut". The victim took this to mean the Appellant acknowledged that he had hurt her during the previous incident. RP 124-25. The next day he sent another text stating, "he has you very humiliated right, little bitch." RP 126. "I left you all fucked, didn't I, little bitch? They are waiting for you when you come out. The whole town is going to find out that I fucked you." RP 132.

The victim became pregnant around November 25, 2012. Even though the children were not his, the Appellant found out about the pregnancy and threatened to take the children away from the victim. The victim became frightened that the Appellant would follow through with his threat and take her children. RP 128. On July 25, 2013, the Appellant texted the victim and told her he would leave her alone, "until I don't fuck you through in the place that I want." RP 131-32. Around this same time period the victim became desperate because she feared for her unborn children.

She called her friend Veronica and they went in together to report the rape. RP 128, 195-97.

Officer Adrian Alaniz took her statement. He observed she appeared upset and had trouble relaying what had occurred. RP 179. Approximately two days later, the Appellant texted the victim again, stating "I feel that I want to go and take them away, get them out, out of your belly, to bring what's mine. They belong to me, not to you. I made them." RP 130.

Following the report of the rape, Detective Jesse Romero was assigned to the case. RP 51. Detective Romero prepared a photo lineup, which included the Appellant, he took that lineup to the victim's address in Pasco, Washington. RP 54-55. She identified the Appellant as the person who had raped her. Detective Romero took photographs of the text messages the Appellant had been sending the victim. RP 57-58.

At that time, the Detective arranged for the victim to text the Appellant so that he would come to the scene. RP 60. Once he arrived, Detective Romero confronted him. The Appellant immediately blurted out that he was not harassing anybody; he just needed to speak with the victim. RP 63.

Later, the Detective conducted an interview with the Appellant. The Appellant initially denied having any kind of sexual relationship with the victim. RP 67-68. When the Detective told the Appellant that he believed there was more to the relationship, the Appellant began to cry. He admitted to having sex with the victim on at least one occasion. RP 69. He conceded that he had asked the victim out on multiple occasions and she had repeatedly refused. RP 67-68. He also conceded the victim had struck him when he tried to kiss her. RP 69. The Appellant appeared to deny the rape, but his statement was ambiguous. (RP 70-71).

On August 22, 2013, an Information was filed in Franklin County Superior Court alleging one Count of Rape in the Second Degree. CP 158. That Information was amended on December 6, 2013 to include an additional count of Attempted Rape in the Second Degree. CP 120-21. The case proceeded to jury trial.

On December 9, 2013, at 1:30 P.M., instructions were read, both parties made closing arguments, and the case went to the jury for deliberations. RP 213-246. The instructions included WPIC 41.02, which defined the elements of Rape in the Second Degree. CP 84. That instruction required the State to prove three elements beyond a reasonable doubt:

- (1) That on or about November 1<sup>st</sup> to November 9<sup>th</sup>, 2012 the defendant engaged in sexual intercourse with Nancy Tellez;
- (2) That the sexual intercourse occurred by forcible compulsion; and
- (3) That this act occurred in the State of Washington.

CP 84. Instruction number fourteen defined forcible compulsion:

[f]orcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a 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.

CP 89.

In addition to the standard instructions for Rape in the Second Degree, the instruction was given for the defense of consent:

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

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

CP 90, WPIC 18.25.

The same afternoon, the jury returned verdicts of guilty to both counts. CP 70-71. The Appellant now appeals.

C. RESPONSE TO ARGUMENT

1. **THE APPELLANT FAILED TO PROVIDE SUFFICIENT EVIDENCE TO PUT THE ISSUE OF CONSENT IN CONTROVERSY, THEREFORE, HIS DUE PROCESS RIGHTS WERE NOT IMPLICATED BY THE COURT'S INSTRUCTION ON CONSENT.**

The Appellant selected both a general denial defense and a defense of consent. CP 146-148. During the trial, as evidence mounted against the Appellant in the realm of consent, he chose to rely mainly on general denial. Although the parties and the court left the consent instruction in, the instruction was not mentioned during closing by either party. The main issue in the case was whether the jury found the victim credible, not whether there was consent on the day in question. Simply put, if the victim was believed, no reasonable person could believe the Appellant had her consent or that he had not used forcible compulsion to commit the rape.

When the Supreme Court ruled that consent necessarily negates forcible compulsion, they specifically included the requirement that the defendant must assert the defense of consent, and then provide sufficient evidence to support the defense before

a consent instruction can cause error. *State v. W.R., Jr.*, 181 Wash.2d 757, 763, 336 P.3d 1134 (2014). The standard for determining whether a defendant provided sufficient evidence of consent to raise the issue is whether their evidence creates reasonable doubt as to the victim's consent. *Id.* at 768.

Under this perspective, the question becomes whether the Appellant, as part of his defense, raised a reasonable doubt as to whether he had consensual sex in lieu of using forcible compulsion to overcome the victim's resistance. Taking a view of a trial as a whole (and also looking at the specific statement by the Appellant in evidence) shows that the Appellant asserted consent prior to trial, but relied on arguing the credibility of the victim and general denial, thus, failing to raise sufficient evidence of consent to implicate the due process clause under W.R.'s holding.

In the pretrial proceedings leading up to the trial, the Appellant, on the omnibus application, checked both consent and general denial. CP 147. By doing this, the Appellant chose not to concede any specific elements of the crime. This is a legitimate trial strategy. Given the long time period that took place between the rape and the report to police, the Appellant did not wish to actually admit to any specific element of the crime. By utilizing a general

denial of the crime, the Appellant could attempt to cast doubt on everything the victim was alleging, not just the consensual nature of the sex. Such a defense does not rely on the specific defense of consent; it simply puts forcible compulsion into dispute along with all the other elements of the crime.

The Appellant chose to exercise his right to remain silent and not testify at the trial. In doing so, the Appellant chose not to testify about his specific state of mind at the time of the incident. He never gave testimony as to why he thought the sex was consensual. Therefore, the only evidence as to his version of events became his statement to Detective Romero at the time of his arrest. In that statement he initially denied having a sexual relationship with the victim. He simply said that he had pursued her romantically but they were friends. (RP 67-68). He also admitted that the victim had slapped him in the face when he had kissed her. (RP 70).

When pressed, the Appellant admitted he had sex with the victim on at least one occasion. (RP 69-70). He seemed to deny the rape, but did not specify why he thought what occurred was not rape. On appeal, the Appellant asks the Court to imply that he is specifically arguing consent. But at no point during his statement to

Detective Romero, does the Appellant ever say the victim wanted to engage in sex with him. In fact, as the case progresses, it becomes clear that the Appellant may not even view forcible compulsion and consent in the same manner as the general public or the jurors. The timeline of events occurring from the time the rape took place, and the time the victim reported to rape, paint a clear picture of the Appellant's attitude toward the victim. They show the Appellant viewed the victim as property, which he had claimed by raping her. Even though he conceded that she did not like it and that he hurt her, it did not change his view of her obligation to him. In this context, consent does not enter into the equation.

The Appellant's closing argument confirms his focus on general denial. The first thing the Appellant brings up in closing argument is a lack of evidence. (RP 239). This argument is applied to forcible compulsion: "[b]ut in terms of evidence to determine what actually happened -- was there forcible compulsion used -- something is lacking." (RP 239-40). The Appellant then goes on to suggest it could merely be a case of assault, not rape. He states "What you have is maybe physical evidence of some other assaultive behavior, but not rape." (RP 242). He comes back

to the delay in the report, repeatedly pointing out this delay should raise a reasonable doubt that a rape occurred. (RP 243-44). What is notably missing from this closing argument is a claim that the victim consented to having sex with the defendant because they had some sort of relationship or attraction.

The defendant in *State v. W.R., Jr.* was in a very different position. 181 Wash.2d 75, 336 P.3d 1134 (2014). In that case, W.R. actually testified that the victim "...had a crush on him and that the two had engaged in sexual intercourse on a prior occasion in July 2010." *Id.* at 760. W.R.'s direct testimony concedes all elements of the charge except for forcible compulsion. This put the consent issues squarely in opposition to the element of forcible compulsion. Because of this, the Court held that consent negated the forcible compulsion element of the crime and shifted the burden of proof. *Id.* at 763. The Supreme Court was confident the consent instruction had negated the element because the trial judge made a point of stating that W.R. had failed to prove the defense of consent by a preponderance of the evidence. *Id.* at 761.

The *W.R.* Court pointed out

In Michigan, the prosecution must disprove consent beyond a reasonable doubt wherever the defendant produces sufficient evidence to put the issue in

controversy. See *People v. Thompson*, 117 Mich.App. 522, 324 N.W.2d 22, 24-25 (1982). The same rule must apply in Washington.

W.R. at 766. In this case the State never had to disprove consent. The Appellant never took the stand and claimed his defense of consent. His main argument focused on lack of evidence. The Court is not faced with a decision in this case where the jury really had to consider whether the Appellant proved anything. Neither attorney argued that the Appellant had to prove anything. Neither attorney mentions the consent instruction. The State specifically brought the instruction with the correct burden of proof, in regards to forcible compulsion, to the attention of the jury. RP 237. The burden of proof was never shifted or negated; therefore, the Appellant did not encounter a due process violation.

**2. IN ANY EVENT, ANY ERROR WHICH OCCURRED WAS HARMLESS BECAUSE THE EVIDENCE AGAINST THE APPELLANT WAS OVERWHELMINGLY IN FAVOR OF A GUILTY VERDICT ON BOTH COUNTS.**

It is well established constitutional errors can be found “so insignificant as to be harmless.” *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). In *Rose v. Clark*, the Court was faced with an instruction shifting the burden of proof, as is alleged in this case. 478 U.S. 570, 574, 106 S.Ct. 3101 (1986). In that case, even

though the Tennessee Murder in the Second Degree statute included a specific element of malice, the court instructed the jury to presume that malice:

[a]ll homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable... doubt that a killing has occurred, than it is presumed that the killing was done maliciously. But this presumption may be rebutted by either direct or circumstantial evidence, or by both, regardless of whether the same be offered by the Defendant, or exists in the evidence of the State.

*Id.* The Court acknowledged that this shifted the burden, but found that shifting the burden in that manner did rise to a level “so basic to a fair trial” that it could never be harmless. *Id.* at 580. The Court remanded the case for harmless error analysis, specifically pointing out that

[h]armless error cases to not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that “Chapman mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.”

*Rose v. Clark*, 478 U.S. at 583, citing *United States v. Hasting*, 461 U.S. 499, 509, n.7, 103 S.Ct. 1974, 1981, n.7 (1982).

In some sexual assault cases the level of proof can be troublesome because it is merely one person’s word against

another's. Rarely does a sexual predator of any kind choose to commit heinous acts in the presence of others. But the current case against the Appellant was never one person's word against another's. The State relied on the victim's statement, along with corroborating evidence in the form of photographs, text messages, and the Appellant's own incuplatory statements, to show the jury the nature of the incidents that occurred between the Appellant and the victim. Once the jury could see the manner in which the Appellant abused and intimidated the victim, the victim's claim of rape was credible beyond a reasonable doubt.

- a. **BECAUSE THE APPELLANT FAILED TO OBJECT TO THE INSTRUCTION IN QUESTION, HE MUST AFFIRMATIVELY SHOW PREJUDICE.**

In some instances, when an error of constitutional magnitude is established, the burden shifts to the State. That is not the case in this instance:

[o]rdinarily constitutional errors are presumed and the burden is on the State to show the error is harmless beyond a reasonable doubt. But where the defendant fails to preserve a constitutional issue by objecting, the burden shifts under the clear parameters of RAP 2.5 and the defendant must affirmatively show prejudice.

*State v. Paumier*, 176 Wash.2d 29, 53, 288 P.3d 1126 (2012) (citations omitted). The purpose behind this shift under RAP 2.5 is grounded in “fundamental fairness and judicial economy.” *Id.* at 52. “A trial court should be given the opportunity to respond to and correct mistakes at the time they are made to avoid necessary retrials and appeals.” *Id.* at 53.

The Appellant’s trial counsel accepted the State’s instructions without objection. When he did so, he shifted the burden on the issue of harmless error analysis. The State would undoubtedly have been happy to remove the consent defense instruction (especially as it had become unnecessary) and the trial court could have corrected the mistake. Instead, it was left without objection and the trial court had no opportunity to evaluate whether the instruction regarding consent could have any negative consequences for the Appellant.

**b. IN ANY EVENT, REGARDLESS OF THE STANDARD APPLIED, THE ERROR WAS HARMLESS BECAUSE THERE WAS OVERWHELMING EVIDENCE OF THE APPELLANT’S GUILT.**

The large and varied amount of evidence against the Appellant established overwhelming evidence of his guilt, making

any error harmless. In cases such as this, the purpose of the harmless error doctrine is appropriately applied:

harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, *United States v. Nobles*, 422 U.S. 225, 230 [95 S.Ct. 2160, 2166, 45 L.Ed.2d 141] (1975), and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) (Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.). *Delaware v. Van Arsdell*, supra 475 U.S. at 673, 681, 106 S.Ct., at 1436.

*Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101 (1986). Because of the large amount of clear evidence on the issue of forcible compulsion and the rape itself, the "factual question" of the Appellant's guilt is answered convincingly.

The State began the trial with the testimony of Detective Romero. That testimony included his post-*Miranda* conversation with the Appellant. That conversation included several pieces of significant testimony which the jury could not ignore. The first piece of information was the Appellant initially denying a sexual relationship with the victim. Such a denial would not have made sense if the Appellant had been in a consensual sexual relationship

with the victim. The only reason to deny a sexual relationship with the victim was if the Appellant felt he had done something wrong.

This evidence of consciousness of guilt was prevalent throughout the Appellant's statement to Detective Romero. His first statement, upon seeing law enforcement, was to offer up the claim that he had not been harassing anyone. At that point, he claimed he had a platonic relationship with the victim. When the detective told the Appellant he did not believe his statement about the two of them having a platonic relationship, the Appellant broke down crying, before admitting it was true. Such a reaction cannot be explained by two adults engaging in a consensual sexual relationship.

In addition to consciousness of guilt, the Appellant also conceded a number of specific facts which spoke to the victim's credibility. He said he had repeatedly pursued the victim even though she refused to go out with him. He admitted she had slapped him in the face when he tried to kiss her. Based on this evidence, before the victim even took the stand, the jury had strong evidence against the credibility of the Appellant in favor of the victim.

When the victim did testify, she told the jury she had been raped by the Appellant and that he had come back and attempted to rape her on a second occasion. The victim's testimony was corroborated by text messages sent from the Appellant. In the first message he apologized for mistreating her and said there was no forgiveness for what he had done. This language, being used mere days after the rape occurred is a clear admission of guilt. If the Appellant had not used force in the sexual encounter he would have nothing for which to apologize. The use of force was further strengthened by the introduction of a photograph of a bruise in the shape of a hand on the victim's leg. The victim's friend Veronica confirmed the picture and also offered testimony which confirmed the victim's credibility and her reasons for delaying the report to police.

The victim also testified to a series of abusive text messages. In the messages the Appellant refers to how he hurt her and humiliated her. In the context of the rape allegation, these texts are admissions of guilt. Perhaps more importantly, they confirm the victim's descriptions about the type of dynamic that existed between them at the time of the incidents. The Appellant

was not simply an admirer; he was an abusive stalker seeking to exert power over the victim. This testimony was not disputed.

The tone of the text messages gave the jury a clear idea as to why the victim had been afraid to report the crime to police. The pattern of behavior left the jury with no doubt as to the true nature of the relationship, or lack thereof. In this context, a sexual encounter between the victim and the Appellant only made sense as an assault designed to control her and lay claim to her. A consensual sexual encounter runs completely contrary to every piece of evidence offered in the case. Given this climate, the wording of the consent instruction could have no effect on the outcome of the trial.

The State's arguments during the trial also confirm that the focus was never on shifting the burden of forcible compulsion to the Appellant. In *W.R.*, "[t]he defense and prosecution both relied on an incorrect understanding of the law when they fashioned and presented their arguments surrounding consent." *W.R.*, 181 Wash.2d at 770. That did not occur in the Appellant's trial. The conflict of consent versus forcible compulsion was not a major issue. Neither lawyer focused on the instruction. At no time in the State's closing argument did they argue that the Appellant had any

burden, preponderance or otherwise, to prove consent. RP 226-39, 246. The only standard mentioned is the standard of beyond a reasonable doubt. RP 231. Both attorneys focused on the issue of evidence and credibility, essentially leaving the case in the realm of general denial.

Division Two pointed out that a constitutional error can be mitigated if not deliberately used in an improper fashion by the State. *State v. Johnson*, 42 Wash.App. 425, 431, 712 P.2d 301 (1985). In *Johnson* an officer testified (over the defendant's objection) that he had asked the defendant to discuss the case and the defendant said he did not wish to discuss it. *Id.* at 427. Although it was error for the State to mention the defendant's refusal to give a statement to police, the court pointed out that due process was not violated because the prosecutor did not take that evidence and use it unfairly: "[i]t is only *when the prosecutor unfairly uses evidence* of post arrest silence against a defendant that his due process rights to a fair trial are violated." *Id.* at 431 (emphasis added). Although the State mentions that sexual intercourse is not disputed in passing during closing argument, the State never argues that it implicates the burden of proof or forces the Appellant to prove consent. RP 237.

The emphasis of the State's case is credibility of the victim on the issue of forcible compulsion. When it came time to argue about the element of forcible compulsion, the State never mentioned the Appellant had any burden in relation to proving consent or lack of forcible compulsion:

...So that leaves us with forcible compulsion. Physical force that overcomes resistance or a threat, expressed or implied, that places a person in fear of death or physical injury to one's self or another person or a fear of being kidnapped, et cetera, et cetera. Really important part there is force that overcomes physical resistance. Nancy told you that she kicked and yelled and fought and she told you that he was too strong for her. And he held her down, pinned her arms above her head and raped her.

RP 237-38. The jury clearly felt that the Appellant had sexual intercourse with the victim by forcible compulsion, to find this, the jurors necessarily determined that the victim did not consent.

**3. THE STATE PROVIDED AMPLE EVIDENCE TO SUPPORT THE CONVICTION FOR ATTEMPTED RAPE IN THE SECOND DEGREE.**

The undisputed testimony of the victim establishes the crime of Attempted Rape in the Second Degree beyond a reasonable doubt. In addition to that testimony, the circumstantial evidence surrounding that incident confirms the charge. The attempted rape is consistent with the threatening and abusive text messages which

the Appellant sent the victim. They show a pattern of attempting to control and possess the victim by use of threats and force. This evidence is important when evaluating the intentions of the Appellant in regards to a crime which is based on what the Appellant attempted to do, and not what he accomplished.

When considering claims of insufficiency of the evidence, the Court grants substantial deference to the trier of fact:

[t]he standard for determining whether a conviction rests on insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.

*In re Martinez*, 171 Wash.2d 354, 364, 256 P.3d 277 (2011). (citations omitted). Circumstantial evidence and direct evidence are equally reliable when making such determinations. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The trier of fact makes credibility determinations that the Appellate Court does not review on appeal. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

To prove the Appellant guilty of Attempted Rape in the Second Degree, the State need to prove the Appellant took a substantial step toward committing the crime. "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 87. Given that the elements of the crime involve attempt, the jury is necessary dealing with whether rational inference can be drawn from the Appellant's actions such that they can find that a particular action is a substantial step towards a crime that did not ultimately occur. Keeping in mind that credibility is not the purview of the reviewing court, one must accept the testimony by the victim that the Appellant did enter her house for a second time and throw her to the floor in the same manner he had thrown her down on the bed just a week or two before.

The Appellant argues that "[t]he only evidence in the record on the attempted second rape is the testimony of the Ms. Ariaz, that she was grabbed by force and thrown on the living room by Mr. Barreto." Brief of the Appellant at 7. This assertion ignores all the other evidence produced in the trial which is both relevant and telling on the issue of what the Appellant's intentions were when he threw the victim on the floor of her home.

The first piece of evidence is that the actual rape which had occurred a week or two prior to the attempted rape. This is clear evidence of the motivation for why the Appellant came into the home and threw the victim to the floor. The jury is not wildly speculating about what will occur, it is making a rational inference that if he threw her down and raped her before he could intend to do it a second time. The Rules of Evidence approve of such logic as they allow evidence of prior bad acts to be admitted to show intent. ER 404(b). The fact that the prior bad act in this case actually occurred against the same victim makes it even more convincing.

The Court has rejected the contention that there must be specific overt acts involving penetration in order to prove an attempted rape. *State v. Kroll*, 87 Wash.2d 829, 842, 558 P.2d 173 (1976). A jury may utilize circumstantial evidence to infer the intent of a rapist. *Id.* In addition to the previous rape, the case involved other pieces of circumstantial evidence which allowed the jury to make a rationale inference about the intent of the victim.

An example of the circumstantial evidence, leading to the logical conclusion the actions were an attempted rape are the text messages sent by the Appellant, both before and after the

attempted rape. In those texts the Appellant demonstrates that he believes forcing sex on the victim confers him some sort of power and ownership over her. It gives him the ability to control her and humiliate her into being with him. This attitude is consistent with wanting to appear at the victim's home, not just to assault her or harass her, but to actually force sex upon her to regain possession of her.

When the Appellant came to the home of the victim and threw her down he took a substantial step towards rape. More than mere preparation to commit a crime is needed to support a conviction. *State v. Workman*, 90 Wash.2d 443, 449, 584 P.2d 382 (1978). In this case the Appellant did not merely sit home and continue to text and harass the victim. He took the physical steps of going to her home and laying hands on her. Although he ultimately abandoned the plan when she reacted by screaming, he still took a substantial step to carrying out the crime. The jury's return of a guilty verdict demonstrates their understanding and acceptance of the abusive nature of the relationship between the Appellant and the victim.

#### **D. CONCLUSION**

Based on the evidence presented, the jury made the decision to find the victim credible. This decision resulted verdicts of guilty against the Appellant. The specific wording of the consent defense instruction did not play a role in the outcome of the trial and should not be grounds to reverse the Appellant's convictions.

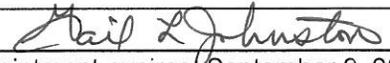
Based on the foregoing, the State respectfully requests that the Franklin County Superior Court convictions for Luis Duenas-Barreto be affirmed.

Dated this 3rd day of September, 2015.

Respectfully submitted,  
 SHAWN P. SANT  
 Prosecuting Attorney

By: 

Brian V. Hultgren,  
 WSBA #34277  
 Deputy Prosecuting Attorney

Affidavit of Service	Kenneth Kato  khkato@comcast.net	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  Dated 3rd, September 2015, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 3rd day of September, 2015  Notary Public and for the State of Washington residing at Pasco My appointment expires September 9, 2018		