IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JONATHAN GARTH GILGER, Appellant.	No. 39250-0-II UNPUBLISHED OPINION

Hunt, J. — Jonathan Garth Gilger appeals his jury conviction for second degree rape. He argues that the trial court erred in denying his request for a jury instruction on the lesser included offense of third degree rape. We affirm.

FACTS

I. Underlying Offense

On Saturday night August 2, 2008, 17-year-old AF[1] met acquaintance 17-year-old

[1] We use the minor victim's initials to preserve her confidentiality.

Jonathan Gilger at a McDonald's restaurant in Hazel Dell,[2] Clark County. Gilger's uncle[3] drove them to Gilger's residence, parked the car, and walked inside a nearby camper. AF and Gilger approached Gilger's residence and spoke and smoked cigarettes with Ronald Smith, whom AF had known to live in the house with Gilger and others. AF and Gilger then walked to the camper, Gilger entered alone and returned with a bottle of whiskey.

Gilger and AF then entered Gilger's residence, and walked to the kitchen, where Gilger mixed the whiskey with soda in large cups. AF and Gilger went to Gilger's "very small" bedroom, and Gilger shut the door. I Report of Proceedings (Feb. 9, 2009) (RP) at 71. AF sat on the edge of the bed, near an open window, smoking a cigarette. Gilger stood, drinking and talking. A movie was playing on the television. At some point during this time, Smith appeared outside Gilger's bedroom window, spoke with him for approximately five minutes, and walked away from the window.

Gilger closed the window, shut the blinds, turned off the lights, sat next to AF on the bed, wrapped his arms around her, and"[t]r[ied] to kiss" her. I RP (Feb. 9, 2009) at 71. AF did not

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[2] The court reporter transcribed AF's testimony as "[a] McDonald's in Hazeldale." I Report of Proceedings (Feb. 9, 2009) (RP) at 52. We have searched both the Washington's Office of Financial Management's Detailed Demographic Profiles website (based on Census 2000 data) and the United States Census Bureau's website but cannot find a city, town, or census-designated place called "Hazeldale" within the State of Washington.
See http://www.ofm.wa.gov/pop/census2000/dp58/default.asp (last visited Aug, 16, 2010); http://quickfacts.census.gov/cgi-bin/qfd/lookup?state=53000 (last visited Aug. 16, 2010). A location called "Hazel Dell," however, does exist in Clark County. This court finds that AF was actually referring to Hazel Dell, Clark County in her testimony.

[3] Because Gilger's uncle, Doug Smith, shares the same last name with another witness (no relation), Ronald Smith, this court refers to Doug Smith as "Gilger's uncle" and Ronald Smith as "Smith." This court intends no disrespect.

kiss Gilger back and told him that she had a boyfriend. Gilger told her that she did not have a boyfriend. After AF "said no" numerous times, Gilger stood up, began to remove AF's shoes, pulled her pants down from her hips, causing her underpants to "slide" with her pants, put on a condom, stood at the edge of the bed, "pushed" AF "backwards" to a prone position on her back on the bed and began having vaginal intercourse with her. I RP (Feb. 9, 2009) at 75, 77, 79. AF continued to tell him "no" and "stop," and pushed Gilger with her feet without any effect. I RP (Feb. 9, 2009) at 82. In August 2008, AF was five feet tall and weighed 112 pounds; AF stated that the "the only way" to describe Gilger is that "he is big. Big." I RP (Feb. 9, 2009) at 81.

Gilger then "flip[ped]" AF over on her stomach and began to have anal intercourse with her, as AF cried and continued to tell Gilger to stop. I RP (Feb. 9, 2009) at 82. Gilger told AF to stop crying, AF repeated her plea to stop, and Gilger told her he would stop if she ceased crying. Gilger momentarily stopped having anal intercourse with AF, but then he manipulated her legs, thighs, and hips to "flip[ ]" her onto her back, spread her legs, and again began vaginal intercourse. I RP (Feb. 9, 2009) at 91. When AF told Gilger she would urinate on his bed if he did not stop, Gilger let AF get up and go to the bathroom. AF got up from the bed, walked into to the bathroom, locked the door behind her, and noticed she was bleeding from her anus, which she wiped with some tissue paper.

About five minutes later, Gilger knocked on the bathroom door and told AF she needed to leave because his mother did not want Gilger to have "very many people" at the residence. I RP (Feb. 9, 2009) at 98. AF left the bathroom, went back to Gilger's room, put her clothes back on, exited onto the back patio, sat down next to Smith, and smoked a cigarette. AF did not tell Smith

what had happened. Gilger, Gilger's uncle, Ronald Smith, and AF then drove back to the same McDonald's where AF exited the car and went across the street to an apartment complex. At this point, AF had been with Gilger for "a couple hours," during which time, AF had consumed "about half" of the cup of alcohol that Gilger had served her. I RP (Feb. 9, 2009) at 101, 127.

At an apartment complex, AF told her friend Allen Barrett what had occurred at Gilger's residence. Barrett called the police. An ambulance took AF to the Legacy Salmon Creek Emergency Department where she met sexual assault nurse Kelly Brady. Brady evaluated AF's medical condition, attempted to calm her, and interviewed AF about her medical history, including AF's description of the earlier events. Dr. Shawn Van Deusen, M.D., then spoke with AF, who again recounted her medical history and the events of that night. Dr. Van Deusen completed an external exam of AF, but did not conduct an internal exam because of AF's "injuries and the pain involved." II RP at 267. In Dr. Van Deusen's presence, Brady took photographs of various parts of AF's body. These photographs depicted: contusions on AF's left calf (both Dr. Van Deusen and Brady testified that these contusions were consistent with fingerprint marks); abrasions on her left inner thigh, left medial knee, buttocks, inner labia minora and the posterior fourchette, lacerations on her rectum, and bruising around her anus.

During this time, Clark County Deputy Sheriff Brian Kessel responded to a report of an alleged rape and met Barrett at a nearby Chevron gas station. Kessel then drove to the Legacy Salmon Creek Emergency Department and interviewed AF. Kessel observed that AF was crying, shaking, and needed several minutes to regain her composure before continuing the interview. After interviewing AF, Kessel drove to Gilger's residence, asked Gilger to accompany him to a

separate location to conduct an interview, read Gilger his *Miranda* rights,[4] and took Gilger uncuffed in his patrol car to the Department of Corrections office. Meanwhile, Detective Kevin Harper spoke with AF at the Legacy Salmon Creek Emergency Department and observed her crying and shaking.

At the office, Kessel and trainee officer Chris Lukay began interviewing Gilger, who had waived his rights. After Harper joined them a few minutes later, the three interviewed Gilger for approximately one hour and forty-five minutes, paused, and then resumed for another thirty minutes with a tape recorder.

Gilger gave several inconsistent versions of the preceding night's events, later admitting that he had lied because he was embarrassed and afraid of incriminating himself. He claimed that: (1) AF had accused him of rape because she was upset that he did not want her to stay at his residence; and (2) he believed AF was "mad" because he and their mutual friend Amanda Nelson were involved in a romantic relationship and AF "wanted to be with" Gilger. II RP at 250.

II. Procedure

The State charged Gilger with second degree rape by forcible compulsion under RCW 9A.44.050(1)(a). The Juvenile Department of Clark County Superior Court declined to exercise jurisdiction over Gilger because he was less than a month shy of his eighteenth birthday, he had prior experience with the juvenile justice system, and the charged offense was a serious one.

At trial, the State's witnesses testified to the facts recounted above. Gilger's uncle testified for the defense that: (1) on the way back to McDonald's after the alleged rape occurred, the

[4] *See Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"mood [in the car] was light," "everything seemed normal," and Gilger, Ronald Smith, and AF were "joking back and forth"; and (2) after exiting the car, AF told Gilger she would call him the following day. II RP at 325. Ronald Smith similarly testified that, during the ride back to McDonald's, "[e]verybody was happy" and "[t]here was no negativity." II RP at 340.

Amanda Nelson testified that, a few days after August 2, AF had called and told her (Nelson) that she (AF) had engaged in consensual intercourse with Gilger. A week later, AF called Nelson and told her that Gilger had "forced" her (AF) to have intercourse, and that AF said she had changed her story because she was afraid of losing Nelson as a friend. II RP at 346. Gilger did not testify.

Defense counsel requested an inferior third degree rape instruction. The trial court denied the request, stating:

> All right [sic]. Having read *Charles* [*State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995)] and also the most recent case that came down yesterday[5], it would seem to again follow that same basic philosophy, there's no question that the—there was force[ ] used as to one of the rapes, which would be the anal intercourse. Based on her version there was force used to turn her and to place her in a position where rape occurred. According to his version she willing turned over, so we—under consent, so it's a clear situation. It's one or the other that the jury is going to be required to believe. I'm denying the lesser [instruction].

III RP at 365-66 (emphasis added).

The jury found Gilger guilty of second degree rape as charged. He appeals.

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[5] The trial court was likely referring to *State v. Brewer*, 148 Wn. App. 666, 205 P.3d 900 (2009). *Brewer* was decided on February 10, 2009 and held that convictions for manufacturing a controlled substance under RCW 69.50.401(1) and possession of precursor chemicals with intent to manufacture a controlled substance under RCW 69.50.440(1) did not merge. *Brewer*, 148 Wn. App. at 676.

ANALYSIS

Gilger argues that the trial court abused its discretion in denying his request for a jury instruction on the inferior degree[6] offense of third degree rape. More specifically, he contends that the following facts required a third degree rape jury instruction: (1) he never threatened AF; (2) his larger physical size alone did not imply that he was going to injure AF physically; (3) AF never screamed, or hit or scratched Gilger during the rape; (4) he did not hold AF down while he took off her shoes; and (5) AF did not get up from the bed while he was putting on a condom.

The State counters that there was insufficient evidence to support giving the requested inferior degree instruction. We agree with the State.

I. Standard of Review

We review for abuse of discretion a trial court's decision to give an instruction that rests on a factual determination. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). When determining whether the evidence was sufficient to support giving an instruction, we view the evidence in the light most favorable to the party requesting the instruction, here, Gilger. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)). A trial court abuses

[6] Although the State properly distinguishes between a lesser included offense and an inferior degree offense, *see*, *e.g.*, Br. of Resp't at 2, the State confuses the term "inferior degree" with "lesser degree." Gilger also makes the same error. *See*, *e.g.*, Br. of Appellant at 6 (using "lesser degree" and "inferior degree" interchangeably). This court notes, for the sake of clarity, that the proper term is inferior degree offense, not lesser degree offense. *See* RCW 10.61.003.

its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)). We find no such abuse here.

A jury instruction on an inferior degree offense is appropriate when: (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense[7]; and (3) there is evidence that the defendant committed *only* the inferior offense. *State v. Breitung*, 155 Wn. App. 606, 613-14, 230 P.3d 614 (2010) (emphasis added) (citing *Fernandez-Medina*, 141 Wn.2d at 454). In other words, the evidence must be sufficient to "permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Fernandez-Medina*, 141 Wn.2d at 456 (internal quotation marks omitted) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

This evidence must be affirmative; it is not enough that the jury might disbelieve the evidence pointing to the defendant's guilt. *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). But because the evidence must demonstrate that *only* the inferior degree offense was committed, when the evidence is consistent with *both* the inferior and superior degree offenses, a trial court may refuse to instruct the jury on the inferior degree offense. *See State v. Gamble*, 168 Wn.2d 161, 181-82, 225 P.3d 973 (2010).

II. Degrees of Rape

[7] The first two prongs of this analysis are not at issue here.

RCW 9A.44.050(1)(a) defines "second degree rape" as follows:

> A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion.

"Forcible compulsion" means that "the force exerted" was "directed at overcoming the victim's resistance" and was "more than that which is normally required to achieve penetration." *State v. Wright*, 152 Wn. App. 64, 71, 214 P.3d 968 (2009), *review denied*, 168 Wn.2d 1017 (2010) (internal quotation marks omitted) (quoting *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). Forcible compulsion does not require "in all cases, a showing that the victim offered physical resistance." *McKnight*, 54 Wn. App. at 525.

Third degree rape is an inferior degree offense of second degree rape. *State v. Ieremia*, 78 Wn. App. 746, 753, 899 P.2d 16 (1995). RCW 9A.44.060(1)(a) defines "third degree rape" as follows:

> A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator . . . where the victim did not consent as defined in RCW 9A.44.010(7)[[8]], to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct.

Under *Gamble* and *Fernandez-Medina*, Gilger was entitled to a third degree rape instruction only if the facts he presented were consistent exclusively with nonconsensual rape lacking forcible compulsion. Such was not the case here, however. On the contrary, Gilger's

[8] Under RCW 9A.44.010(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."

proffered facts merely suggested an absence of a physical struggle, which does not equate with the absence of forcible compulsion. *See McKnight*, 54 Wn. App. at 525 ("We decline to hold that forcible compulsion requires, in all cases, a showing that the victim offered physical resistance.") As Division One of our court has made clear, victims forego physical resistance to sexual assaults when they fear that they "will receive greater injuries than if no resistance were offered." *McKnight*, 54 Wn. App. at 526 (citing *People v. Barnes*, 42 Cal. 3d 284, 298, 721 P.2d 110, 228 Cal. Rptr. 228 (1986)). As Division One explains, forcible compulsion may be found in the presence of other forms of non-physical resistance that are "reasonable under the circumstances," given the physical size differences between the victim and perpetrator, the victim's perception of the futility of a physical struggle, and the victim's sense of intimidation and fear. *McKnight*, 54 Wn. App. at 527.

Here, Gilger's proffered facts are consistent with AF's non-physical resistance, based on the imbalance of physical size and strength between them, as well as on AF's belief that any physical struggle would have been both futile and dangerous to her. For example, when defense counsel asked why she did not scream, AF answered:

> For fear that something would happen. For fear if I did scream or try and defend myself by physically defending myself, hitting, scratching, so on that he would do the same back to me. If I hit him, he would do the same back to me. And I mean it wouldn't take much. I'm not a very big person.

II RP at 153-54. AF also testified that (1) she felt too intimidated to get up and to leave Gilger's residence, (2) she did not attempt to get off the bed while Gilger put a condom on because he was "right in front of [her]" and for "fear of [Gilger's] grabbing onto"[9] her, (3) in August 2008, she

[9] I RP (Feb. 9, 2009) at 131.

was five feet tall and weighed 112 pounds and "the only way" to describe Gilger was, "[H]e is big. Big"[10]; (4) although Gilger neither verbally nor physically threatened her and she did not believe his size alone indicated he would injure her; she believed he would retaliate if she struggled physically and, therefore, she abstained from a physical contest with him. As in *McKnight,* this absence of a physical struggle does not, as Gigler argues, necessarily imply an absence of forcible compulsion.[11] *McKnight*, 54 Wn. App. at 525.

Gilger's evidence was consistent with both nonconsensual rape lacking forcible compulsion (third degree) and nonconsensual rape with force used to overcome the victim's non-physical resistance (second degree). Because the evidence presented was consistent with both the inferior and superior degree offenses, Gilger was not entitled to a jury instruction on the inferior degree offense. *See Gamble*, 168 Wn.2d at 182. We hold, therefore, that the trial court did not err in refusing to give Gilger's requested inferior degree instruction.

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[10] I RP (Feb. 9, 2009) at 81.

[11] We agree with Gilger that this case differs from *Charles*, 126 Wn.2d at 353, which the trial court cited in refusing to instruct the jury on third degree rape. These distinctions, however, do not persuade us that the trial court abused its discretion in refusing the requested instruction.

On the contrary, the distinctions support the trial court's refusal of the instruction. The State charged Charles with second degree rape. *Charles*, 126 Wn.2d at 354. His only defense was that the sexual intercourse was consensual. *Charles*, 126 Wn.2d at 355-56. He requested an instruction that the rape was in the third degree because it was nonconsensual yet lacked forcible compulsion. *Charles*, 126 Wn.2d at 355. The Supreme Court affirmed the trial court's denial of this requested instruction, holding that because the State presented evidence consistent with only second degree rape and the defense presented evidence consistent with only consensual intercourse, there was no evidence of nonconsensual rape without forcible consent (third degree rape) and, therefore, Charles was not entitled to a third degree rape jury instruction. *Charles,* 126 Wn.2d at 356. Here, in contrast, Gilger attempted, but failed, to present evidence that only third degree rape occurred.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, PJ.

We concur:

Quinn-Brintnall, J.

Van Deren, J.