## KANSAS CRIMINAL CODE
## PART I. GENERAL PROVISIONS
## ARTICLE 32. PRINCIPLES OF CRIMINAL LIABILITY

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### 21-3201. Criminal intent.

(a) Except as otherwise provided, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was intentional or reckless. Proof of intentional conduct shall be required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a reckless manner.

(b) Intentional conduct is conduct that is purposeful and willful and not accidental. As used in this code, the terms "knowing," "willful," "purposeful," and "on purpose" are included within the term "intentional."

(c) Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton negligence" and "wantonness" are included within the term "recklessness" as used in this code.

History: L. 1969, ch. 180, s 21-3201; L. 1992, ch. 298, s 2; L. 1993, ch. 291, s 17; July 1.

## PART II. PROHIBITED CONDUCT
## ARTICLE 35. SEX OFFENSES

### 21-3502. (a) Rape is:

(1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

(A) When the victim is overcome by force or fear;

(B) when the victim is unconscious or physically powerless; or

(C) when the victim is incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender;

(2) sexual intercourse with a child who is under 14 years of age;

(3) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a medically or therapeutically necessary procedure; or

(4) sexual intercourse with a victim when the victim's consent was obtained through a knowing misrepresentation made by the offender that the sexual intercourse was a legally required procedure within the scope of the offender's authority.

(b) It shall be a defense to a prosecution of rape under subsection (a)(2) that the child was married to the accused at the time of the offense.

(c) Rape as described in subsection (a)(1) or (2) is a severity level 1, person felony. Rape as described in subsection (a)(3) or (4) is a severity level 2, person felony.

History: L. 1969, ch. 180, s 21-3502; L. 1978, ch. 120, s 1; L. 1983, ch. 109, s 2; L. 1993, ch. 253, s 1; L. 1993, ch. 253, s 2; July 1; .L. 1996, ch. 258, s 3.

**STATE of Kansas, Appellee,**
**v.**
**Joseph Christopher ESHER, Appellant.**
Court of Appeals of Kansas.
922 P.2d 1123
Aug. 16, 1996.

ROYSE, Judge:

* * *

General criminal intent is described in K.S.A. 21-3201(a): "Except as otherwise provided, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was intentional or reckless. Proof of intentional conduct shall be required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a reckless manner." See State v. Gobin, 216 Kan. 278, 280, 531 P.2d 16 (1975).

Specific intent is distinguished from general intent where "in addition to the intent required by K.S.A. 21-3201, the statute defining the crime in question identifies or requires a further particular intent which must accompany the prohibited acts." Sterling, 235 Kan. 526, Syl. P 1, 680 P.2d 301; see State v. Bruce, 255 Kan. 388, 394, 874 P.2d 1165 (1994).

Crimes which require proof of a specific intent include: . . .

Crimes which do not require proof of a specific intent include: . . . rape, K.S.A. 21-3502 (no requirement that defendant's specific intent to commit rape be shown), State v. Cantrell, 234 Kan. 426, 434, 673 P.2d 1147 (1983) . . . .

**STATE of Kansas, Appellee,**
**v.**
**Joseph William CANTRELL, Appellant.**
Supreme Court of Kansas.
234 Kan. 426, 673 P.2d 1147
Dec. 2, 1983.

HOLMES, Justice:

Joseph William Cantrell appeals from his conviction by a jury of one count of rape. K.S.A. 21-3502. The appellant raises several points of alleged error in the trial court proceedings and also asserts there was insufficient evidence to support the conviction. After carefully considering all points we affirm the conviction.

The first point to be considered is whether there was sufficient evidence to support the conviction. Appellant did not deny that he had sexual intercourse with the victim, Mrs. B., on the night of April 26, 1982. Mrs. B., a divorcee and a resident of Colorado had been visiting a friend, Jackie Larson, in Kansas City, Missouri. On Sunday, April 26, 1982, they went shopping in the Plaza area of Kansas City and late in the afternoon started visiting various restaurants and bars. Early in the evening they met John Mullane, an acquaintance of Miss Larson, at the Bristol Bar and Grill. Mullane introduced the two ladies to several people including Joseph Cantrell. Mrs. B. had some conversation with Cantrell at that time although he left the bar shortly thereafter. Later in the evening Mrs. B., Jackie

Larson and John Mullane left the Bristol to go to Plaza III, another bar in the area. On the way they encountered Joseph Cantrell who was walking to his car to go home. Jackie Larson asked him to join them and he did. The group stayed at Plaza III until closing time which was around 11:45 p.m. and then decided to go to the Clarette Club in Johnson County, Kansas, to continue their evening of drinking and dancing. It was decided that Mrs. B. would ride with Cantrell and Larson would ride with Mullane, and they would then meet at the Johnson County club.

On the way to the Clarette Club, Cantrell pulled off onto a side street where the alleged rape took place in the front seat of his El Camino truck. Appellant contends the sexual intercourse was consensual while Mrs. B. contends it was rape. It would serve no useful purpose to detail the two versions of the event. Suffice it to say Mrs. B. testified that she resisted and struggled with the defendant; that she was crying; and that she begged the defendant to stop, although she admitted that he made no threats, did not strike her, had no weapon and did not curse her or raise his voice. Her clothes were not ripped or torn and she suffered no bruises or other evidence of trauma. She made no attempt to scream, honk the horn or leave the vehicle. Upon completion of the act, the two proceeded on to the Clarette Club where they joined John Mullane and Jackie Larson. Mrs. B. told Jackie Larson that she had been raped by defendant. Mrs. B., Larson and Mullane then left the club and Mrs. B. and Larson returned to Larson's home at which time they contacted the police.

K.S.A. 21-3502 (amended L.1983, ch. 109, s 2) provided: "(1) Rape is the act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances: (a) When a woman's resistance is overcome by force or fear; (b) When the woman is unconscious or physically powerless to resist; or (c) When the woman is incapable of giving her consent because of mental deficiency or disease, which condition was known by the man or was reasonably apparent to him; or (d) When the woman's resistance is prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature. (2) Rape is a class B felony." (Emphasis added.) In the instant case the charging instrument stated "when her resistance was overcome by force and fear" rather than force or fear. As a result the trial court instructed the jury that they must find the victim's resistance was overcome by both "force and fear."

In considering the sufficiency of the evidence, the standard of review on appeal is: Does the evidence when viewed in the light most favorable to the prosecution convince the appellate court that a rational factfinder could have found the defendant guilty beyond a reasonable doubt? State v. Matlock, 233 Kan. 1, 660 P.2d 945 (1983). In State v. Sanders, 227 Kan. 892, 610 P.2d 633 (1980), we held: "The testimony of the prosecutrix need not be corroborated to sustain a conviction for rape in this state; there may be a conviction on the uncorroborated evidence of the prosecutrix if it is believed by the jury." Syl. P 2. While the evidence in this case is not strong on the element of overcoming the resistance of the victim, we have concluded that the testimony of Mrs. B. was sufficient to meet the test set forth in Matlock. Her testimony that she physically resisted the defendant is clear and the jury could have concluded from her actions that her resistance was also overcome by fear. See State v. Hacker, 197 Kan. 712, 421 P.2d 40 (1966), cert. denied, 386 U.S. 967, 87 S.Ct. 1050, 18 L.Ed.2d 119 (1967). The jury had the opportunity to view the witnesses and to hear the evidence and evidently believed the testimony of Mrs. B. rather than that of the defendant.

Appellant's final contention is that the trial court erred in failing to instruct on the requisite felonious intent under K.S.A. 21-3502. We note at the outset that defendant lodged no objections to the instructions and unless the instructions given were clearly erroneous appellant may not now claim error. K.S.A. 22-3414(3); State v. Jones, 233 Kan. 112, 115, 660 P.2d 948 (1983).

The instructions submitted to the jury included the following: "Instruction No. 10. In order for the defendant to be guilty of the crime charged the State must prove beyond a reasonable doubt that his conduct was intentional. Intentional means willful and purposeful and not accidental. "Intent, or lack of intent, is to be determined or inferred from all of the evidence in the case. "Instruction No. 11. The defendant is charged with the crime of rape. The defendant pleads not guilty. "To establish this charge each of the following claims must be proved. 1. That the defendant had sexual intercourse with [Mrs. B.]; 2. That [Mrs. B.] was not the defendant's wife; 3. That the act of sexual intercourse was committed without the consent of [Mrs. B.] under circumstances when her resistance was overcome by force and fear; and 4. That this act occurred on or about the 26th day of April, 1982, in Johnson County, Kansas." . . .

Appellant contends these instructions are clearly erroneous, asserting rape is a specific intent crime, relying on State v. Gonzales, 217 Kan. 159, 161, 535 P.2d 988 (1975), and the following quote from State v. Hampton, 215 Kan. 907, 529 P.2d 127 (1974): "Either the use of force or the use of overbearing fear is a necessary ingredient of the offense of rape. The sexual act must be committed against the will and without the consent of the woman; her resistance must be overcome. Thus it is that the intent with which a marauding male approaches a member of the opposite sex in seeking sexual gratification becomes important. Is it his intent to satisfy his lust at any cost, that is, against the lady's will and by overcoming her resistance, or is it simply to find an accommodating partner? If the first be his intent, and the sexual act is accomplished by destroying resistance, the statute has been violated. On the other hand, if it be his intent merely to cajole the lady into acquiescence, and he is successful, intercourse is on a mutually enjoyable basis, and rape, it is not." 215 Kan. at 909, 529 P.2d 127. In Gonzales the defendant was charged with rape and one of the questions before the court was the admission of evidence of other similar offenses under K.S.A. 60-455. The evidence was admitted for the limited purpose of showing intent, motive and plan of operation. The majority of this court, in reliance upon Hampton concluded the other crimes evidence was admissible. Justice Prager, in his dissent, stated: "A defendant's specific intent is not a genuine issue in a rape case. Other crimes evidence offered to prove intent, where intent is not substantially in issue, amounts to no more than showing the defendant's disposition or inclination for bad conduct. This is clearly impermissible under the statute and our case law. (State v. Cross, 216 Kan. 511, 532 P.2d 1357.) In the present case evidence of the defendant's prior odious sexual conduct had no bearing on the matters in issue. In a rape case the burden is on the state to prove that the female victim was overcome by force and subjected to sexual intercourse without her consent. It is her intent and state of mind which is of supreme importance. If the defendant voluntarily committed the act of forcible sexual intercourse his specific intent is immaterial. Defendant's prior offenses have no probative value on the question of the victim's consent." 217 Kan. at 162, 535 P.2d 988.

. . . Thus it appears that on occasion the court has indicated that rape is a specific intent crime.

K.S.A. 21-3201(1) states: "Except as provided by sections 21-3202, 21-3204, and 21-3405, a criminal intent is an essential element of every crime defined by this code. Criminal intent may be established by proof that the conduct of the accused person was willful or wanton. Proof of willful conduct shall be required to establish criminal intent, unless the statute defining the crime expressly provides that the prohibited act is criminal if done in a wanton manner."

The distinction between a general intent crime and a crime of specific intent is whether, in addition to K.S.A. 21-3201, the statute defining the crime in question identifies a further particular intent which must accompany the prohibited acts. In the context of theft this distinction was made in State v. Gobin, 216 Kan. 278, 531 P.2d 16 (1975), where we said: "We note that in addition to the general criminal intent mentioned in K.S.A.1973 Supp. 21-3201(2), the acts of theft proscribed by

21-3701 must be done with intent to deprive the owner permanently of the possession, use or benefit of particular property. "To 'deprive permanently' as defined in the general definitions section of the code means: 'Take from the owner the possession, use or benefit of his property, without an intent to restore the same; ...' (K.S.A.1973 Supp. 21-3110[6][a].) So it becomes apparent from the foregoing that the specific intent which must be established under the present charge of theft is an intent to take from the owner the possession, use or benefit of his property ($50.00 worth of swine) without an intent to restore the same." (Emphasis added.) 216 Kan. at 280, 531 P.2d 16.

In State v. Clingerman, 213 Kan. 525, 516 P.2d 1022 (1973), involving a conviction of first-degree robbery, the court stated: "The elements of intent required for various statutory crimes vary according to the particular crime. Where intent is a required element of the crime it must be included in the charge and in the instructions of the court covering the separate elements of that particular crime. (State v. Carr, 151 Kan. 36, Syl. P 5, 98 P.2d 393.)" 213 Kan. at 530, 516 P.2d 1022.

In State v. Cruitt, 200 Kan. 372, 436 P.2d 870 (1968), a prosecution for blackmail under K.S.A. 21-2412 (repealed 1970), the court stated the rule as follows: "We agree with the defendant that where the Legislature expressly refers to intent and makes it an essential element of a statutory offense, such intent must be alleged in the information .... "On the other hand, it has been repeatedly held that the Legislature has the power to forbid the doing of an act and make its commission criminal, without regard to the intent or knowledge of the doer. (Cites omitted.) And where an act is made a crime by statute, without any express reference to intent, this court has held that it is not necessary to allege such intent, or any intent, but simply to allege the commission of the act in the language of the statute, and the intent will be presumed. (Cites omitted.)" 200 Kan. at 374-375, 436 P.2d 870.

Rape as defined in K.S.A. 21-3502 does not require as one of the statutory elements of the offense, a specific intent on the part of the defendant to commit rape and therefore there is no necessity to instruct on such a specific intent. We conclude that Justice Prager's comments in his dissent in Gonzales correctly state the law on this question. Language to the contrary in Hampton and Carr is hereby overruled. Having concluded that rape is not a crime of specific intent, the instructions given were not clearly erroneous and appellant's point lacks merit.

Appellant's final contention is that if rape is not a specific intent crime requiring an instruction on that intent, then K.S.A. 21- 3502 is unconstitutionally vague. In State v. Huffman, 228 Kan. 186, 612 P.2d 630 (1980), we set forth some principles to be followed in such a challenge. We held: "This court adheres to the proposition that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. Moreover, it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done." Syl. P 1. "The test to determine whether a criminal statute is unconstitutionally vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." Syl. P 5. Appellant argues that without requiring instructions that defendant was aware of the victim's resistance and intended to engage in intercourse despite that resistance, men of ordinary intelligence might well differ as to the meaning and application of the acts prohibited by K.S.A. 21-3502. We disagree. The statute is clear, readily understandable by persons of common intelligence and as such was constitutional.

The judgment is affirmed.

**STATE of Kansas, Appellee,**
**v.**
**Donald Richard BORTHWICK, Appellant.**
Supreme Court of Kansas.
255 Kan. 899, 880 P.2d 1261
Sept. 16, 1994.

DAVIS, Justice:

The defendant, Donald Borthwick, appeals his conviction of one count of rape, in violation of K.S.A. 21-3502(1)(a). The Court of Appeals affirmed his conviction in an unpublished opinion filed December 17, 1993. 865 P.2d 1087. We granted the defendant's petition for review . . . . Finding no reversible error, we affirm.

The victim, J.C., had been a student in the defendant's wife's learning disabilities classroom. J.C. has spastic hemiplegia cerebral palsy and lives with her mother. J.C. is four-feet, nine or ten inches tall and weighs about 88 pounds. She cannot walk without assistance; she cannot stand without support. At home, she moves about the house by crawling. J.C. was, at the time, 21 years old.

After J.C. graduated from high school she and Mrs. Borthwick remained friends. They occasionally would go out to dinner or for ice cream together. The defendant usually accompanied them on these outings because Mrs. Borthwick needed help getting J.C. in and out of the car. At the time charges were filed, the defendant was 71 years old.

On August 12, 1991, J.C. called the defendant's home because she and Mrs. Borthwick had made tentative plans to go out to dinner together. When the defendant told her that Mrs. Borthwick was at a meeting and would be unable to go out to dinner, J.C. invited the defendant over to watch movies. He agreed and brought some ice cream with him.

After the defendant arrived at J.C.'s home, he sat on the floor behind her. He rubbed her back, lifted her shirt and bra, and started "chewing" on her breast. She asked him to stop but he did not. He also nibbled on her ear. She asked him to stop but he did not. The defendant then laid J.C. down on the floor on her back, lifted her legs, pulled down her shorts and underpants, and put his fingers in her vagina. As J.C. testified at trial about the penetration, the prosecuting attorney asked J.C. if she had asked the defendant to stop. J.C. replied: "I asked him to think about it and to think about his wife and to think about what he was doing and then I asked him to stop." She also testified that she tried to keep her legs together, "but they always come apart." J.C. testified that she was afraid and felt powerless to stop what was happening.

After the defendant stopped, he went into the bathroom to wash his hands. J.C. testified that they then ate ice cream together. J.C. testified that while they were in the kitchen she tried to use the phone to call her mother, but the defendant took it out of her hand and told her that was "not a good idea. Let's not tell your mom." When J.C. asked why she could not tell her mother, the defendant replied: " 'Cause if your mom finds out that I was here, then your mom would have a lot of questions and I don't want to run into your mom or anybody else." Before the defendant left, he told J.C.: "You better not say anything 'cause I'll get in trouble with my wife." He also asked J.C. not to report him and to make sure that nobody knew he was there. He took his ice cream with him when he left so that J.C.'s mother would not know that anyone had been at the house while she was gone.

J.C. testified that she did not give the defendant permission to do any of the things he did to her and that she was afraid of him while he did these things. At trial, the defendant denied that he

touched J.C., other than to give her a hug when he first arrived.

Sufficiency of the evidence

The defendant refers the court to J.C.'s testimony on cross-examination to support his claim that, even if her testimony is believed, there was not sufficient evidence to support the jury's verdict. In response to defense counsel's questions, J.C. testified that as the defendant was putting his fingers in her vagina she did not tell him to stop but only told him to "think about it." She testified that the defendant did not force her in any fashion and that he did not threaten her. She also testified that she did not give him any indication, verbal or otherwise, that she was afraid, other than her attempts to keep her legs together.

The defendant also notes that J.C. did not report the incident to anyone until several days later when she told her mother what had happened. He also contends that J.C.'s physician's testimony supports his claim that the evidence was insufficient to support his conviction. Dr. Bossmeyer examined J.C. nine days after the incident. He found no bruising or lacerations on J.C.'s external genitalia and no physical indications of force or struggle. He testified that J.C.'s hymen was intact.

K.S.A. 21-3502 defines rape: "(1) Rape is sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances: (a) When the victim is overcome by force or fear; (b) when the victim is unconscious or physically powerless; (c) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or (d) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of such substance with knowledge of its nature."

K.S.A. 21-3501(1) defines "sexual intercourse" for purposes of rape to include: "any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however, slight, is sufficient to constitute sexual intercourse. 'Sexual intercourse' does not include penetration of the female sex organ by a finger or object in the course of the performance of: (a) Generally recognized health care practices; or (b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto."

The defendant was charged and convicted by jury trial under 21- 3502(1)(a); that is, the jury concluded that J.C. was overcome by force or fear. In a 2-1 decision by the Court of Appeals affirming the conviction, Judge M. Kay Royse dissented, concluding as a matter of law that the evidence was insufficient to establish that J.C. was overcome by force or fear. "When the sufficiency of the evidence is challenged in a criminal case, the standard of review on appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt." State v. McDonald, 250 Kan. 73, Syl. P 7, 824 P.2d 941 (1992). Accord State v. Harkness, 252 Kan. 510, Syl. P 10, 847 P.2d 1191 (1993).

Although Dr. Bossmeyer testified that he found no physical evidence of rape, we must view his testimony in context and in the light most favorable to the prosecution. Dr. Bossmeyer examined J.C. nine days after the assault; in all of the rape examinations he had conducted he found bruising in only one. He testified that the presence of lacerations depends on the size of the object used to penetrate the vagina. In this case, the defendant was charged with digital penetration. Finally, he testified that some women can have intercourse with no trauma to the hymen. Dr. Bossmeyer's testimony is not

conclusive.

The State called Dr. Lassiter as its witness. He testified that in the rape examinations he conducted he rarely saw bruising or lacerations unless the assault was particularly violent or perpetrated by multiple offenders. In light of the medical testimony and the nature of the assault, the lack of physical evidence is not determinative.

More importantly, we have held that the "testimony of the prosecutrix alone can be sufficient to sustain a rape conviction without further corroboration as long as the evidence is clear and convincing and is not so incredible and improbable as to defy belief." *State v. Cooper, 252 Kan. 340, 347, 845 P.2d 631 (1993). This basic principle must be viewed in the light of another important principle: "The function of weighing the evidence and passing on credibility belongs to the jury, not to us. A verdict secured on substantial competent evidence will not be disturbed on appellate review. [Citation omitted.]" Cooper, 252 Kan. at 347, 845 P.2d 631. Thus, we afford considerable deference to the jury with respect to witness credibility and weight of the evidence. If the jury believes an alleged rape victim's uncorroborated testimony and that evidence is sufficient to sustain the conviction, we will find that testimony sufficient to support a conviction unless it is "so incredible and improbable as to defy belief."

The defendant argues that this case is controlled by State v. Matlock, 233 Kan. 1, 660 P.2d 945 (1983), the only recent case in which we overturned a rape conviction because the evidence was insufficient as a matter of law to sustain the jury verdict. In Matlock, we concluded that the "uncontradicted facts cast so much doubt upon the credibility of the prosecutrix that no rational factfinder could have believed her testimony and found the defendant guilty beyond a reasonable doubt." 233 Kan. at 5-6, 660 P.2d 945. The prosecutrix in Matlock claimed that her stepfather raped her in her bedroom while several other people were present in the house.

The defendant claims that the court looked to five factors in reversing the jury verdict in Matlock. He claims this case is comparable to Matlock on four of those five factors, thus requiring reversal. In fact, we looked to 14 factors, not 5, that completely undermined the complainant's credibility in Matlock. 233 Kan. at 4-5, 660 P.2d 945. The 5 factors appellant discusses comprise only 1 of those 14. That one factor is corroborative evidence, which is not necessary unless the victim's testimony is so incredible as to defy belief. Cooper, 252 Kan. at 347, 845 P.2d 631.

In Matlock, we noted the following uncontroverted facts that cast doubt on the complainant's credibility: (1) The alleged rape occurred on an old creaky bed in a room between the victim's two sisters' bedrooms; (2) the bed was close enough to the wall that it would bang on the wall whenever someone moved around on it, but no one heard the assault; (3) the complainant did not cry out; (4) she did not clean herself after the attack; (5) she wore the same underwear the next day; (6) she testified that she cried for three hours afterwards, but no one in the house heard her; (7) she later denied having had sexual relations with anyone; (8) she told no one until 15 months later; (9) she continued to demonstrate friendly feelings toward the assailant (her stepfather), including choosing to move to Tulsa with the family when she could have stayed in Leavenworth; (10) she outwardly showed affection "[h]ugging, talking to him friendly as ever"; (11) she accompanied him alone on long trips after the alleged rape; (12) she admitted that she wanted to remain the decision maker as she was while her stepfather was in prison and had threatened to send him back to prison; (13) she admitted "that lying had been a part of her life for a long time"; and (14) the corroborative factors usually found in rape cases were not present: (a) no outcry, (b) no sign of a struggle, (c) no complaint at the earliest opportunity, (d) no reasonable opportunity to commit forcible rape (others in house, noisy bed, etc.) and (e) no evidence of sperm on her body, clothing, or bed, and no physical examination. 233 Kan. at 4-5, 660 P.2d 945. The court also noted there was no evidence, other than

the complainant's testimony, that was inconsistent with the defendant's innocence. 233 Kan. at 5, 660 P.2d 945.

Unlike the circumstances in Matlock, J.C. and the defendant were alone in the house, so there were no other witnesses who could have seen or heard any of the events or J.C.'s behavior immediately afterward. Although J.C. did not report the incident immediately, she did tell her mother about it within five days and then reported it to the police with the aid of her family. There was no evidence that J.C. remained friendly with the defendant or his wife after the incident. Unlike the victim in Matlock, there was no evidence that J.C. had ever threatened the defendant or that she had any motive to fabricate her story. There was no evidence that J.C. had a tendency to tell lies.

Four of the five factors we considered in Matlock with respect to corroborative evidence often found in rape cases were not present in the case at bar: No outcry, no sign of a struggle, no complaint at the earliest opportunity, no evidence of sperm on the body, and no (prompt) physical examination. There was, however, ample opportunity to commit the crime because the defendant and J.C. were alone in the home.

The existence of five corroborative factors, however, is not controlling in the present case. First, corroborative evidence is not necessary to sustain a rape conviction as long as the evidence is clear and convincing and is not so incredible and improbable as to defy belief. Cooper, 252 Kan. at 347, 845 P.2d 631. In Matlock, numerous uncontested facts made the complainant's testimony unbelievable. Such is not the case here. A jury reasonably could believe J.C.'s testimony. She had no motive to lie and no history of untruthfulness. J.C. was alone with the defendant; thus, an outcry likely would not have helped her because no one else was in the house to hear her. No sperm was detected in the present case because the defendant did not penetrate J.C.'s vagina with his penis or even remove his clothes. Although J.C. did not report the incident at the earliest opportunity, she did report it within 5 days, in contrast to the 15-month delay in Matlock. Some delay is understandable, for the defendant was married to one of J.C.'s good friends and disclosure of the events could hurt Mrs. Borthwick and ruin that friendship. Given the disparity in physical size and ability between J.C. and the defendant, it is not unreasonable that there was no physical evidence of a struggle. Matlock does not require reversal here.

We find State v. Hammon, 245 Kan. 450, 781 P.2d 1063 (1989), to be more comparable to the instant case than is Matlock. In Hammon, the victim (F.M.) was 71 years old. Hammon drove a bus that provided transportation services for people with disabilities, and F.M. rode that bus daily. F.M. claimed that Hammon raped her on two separate occasions. Like J.C., F.M. was alone in the house with her assailant during the rapes. Hammon argued there was insufficient evidence to support his conviction because there was no physical evidence of the rape and no immediate complaint. In Hammon, like the present case, the court was not faced with uncontradicted facts that cast doubt on the complainant's credibility as in Matlock. We affirmed Hammon's conviction.

The absence of corroborating evidence or the presence of conflicting evidence does not by itself render a complainant's testimony "so incredible as to defy belief." Even in the face of evidence seemingly contradicting a rape victim's testimony, this court has held her testimony sufficient to support a conviction. In State v. Sanders, 227 Kan. 892, 610 P.2d 633 (1980), the victim testified she had been beaten, yet she had no bruises the following day. The court found that her testimony was "inconsistent in many ways with that of other witnesses." 227 Kan. at 895- 96, 610 P.2d 633. The court concluded, however: "[T]he crucial issue--whether the act was accomplished by mutual consent or against the victim's will by force and fear--had to be determined by the jury on the basis of the testimony of the prosecutrix and the defendant. The jury found her testimony believable and rejected defendant's version. The function of this court is not to weigh the evidence, but to determine whether

upon the evidence introduced a rational factfinder could have found guilt beyond a reasonable doubt. We conclude that the evidence was sufficient." 227 Kan. at 896, 610 P.2d 633.

Similarly, in Cooper, the victim testified about an assault in which she was beaten, knocked unconscious, and raped vaginally and anally. Although there was corroborative evidence in the form of bruises, cuts, and scratches, the medical examination revealed no physical sign of injury to the vagina or rectum, and the rape kit tests revealed no sperm or seminal material. We found the evidence sufficient to sustain the conviction.

There are no facts of record here that would render J.C.'s testimony "so incredible as to defy belief." The key question is whether J.C.'s testimony, if believed, is sufficient to support a rape conviction. Judge Royse noted in her dissent that although J.C. told the defendant to stop, "nothing in the record permits an inference that this statement was made in connection with the acts which give rise to this conviction." We disagree and find that J.C.'s testimony on direct does permit such an inference. In the context of her testimony about the defendant placing his fingers in her vagina, the State's attorney asked J.C. if she asked the defendant to stop. J.C. testified: "I asked him to think about it and to think about his wife and to think about what he was doing and then I asked him to stop." There is evidence from which the jury could find that J.C. asked the defendant to stop at the time he placed his fingers in her vagina.

Viewing the record as a whole, however, we also note that J.C.'s testimony on that particular issue was not consistent. Even if we were to find, as Judge Royse did, that the record did not support a finding that J.C. asked the defendant to stop putting his fingers in her vagina, such a finding would not require reversal. The record as a whole supports a conclusion that J.C. conveyed to the defendant that his advances were not welcome. She was alone in a house with a man who was married to one of her good friends. When he touched J.C.'s breast, she told him to stop and he did not. When he nibbled on her ear, she told him to stop and he did not. She testified on direct that when he laid her down, took off her pants, and began to touch her genitalia, she told him to stop. On cross-examination, she testified that she tried to get him to stop by keeping her legs together and telling the defendant to think about his wife and to think about what he was doing. Even though her testimony was inconsistent in some respects, J.C. told the defendant in various ways that she did not desire his conduct to continue. Viewing the record in the light most favorable to the prosecution, we find that a rational factfinder reasonably could conclude that the act was not accomplished with mutual consent.

The defendant next contends that even if J.C.'s testimony is believed, there was not sufficient evidence that J.C. was overcome by force or fear. In support of his contention, the defendant cites several cases in which this court has found sufficient force or fear existed and contends that because such conditions do not exist in the present case, J.C. was not overcome by force or fear. Cooper, 252 Kan. 340, 845 P.2d 631 (physical evidence of a struggle); State v. Lile, 237 Kan. 210, 699 P.2d 456 (1985) (the defendant threatened the victim with a gun); State v. Cantrell, 234 Kan. 426, 673 P.2d 1147 (1983) (the victim physically struggled with the defendant, cried, and begged); Sanders, 227 Kan. at 895, 610 P.2d 633 (the defendant struck the victim repeatedly, twisted her arm, forced her into the bedroom and threatened to beat and kill her); State v. Hampton, 215 Kan. 907, 908, 529 P.2d 127 (1974) (the defendant threw the victim to the floor, choked her, and held a sharp object to her throat); State v. Lora, 213 Kan. 184, 186, 515 P.2d 1086 (1973) (the defendant threw the victim to the ground, stomped and kicked her, and tied her up). The defendant's argument is not persuasive. This court's conclusion that the evidence of force or fear was sufficient in the above-cited cases does not mean that a rape victim must endure such violence to sustain a finding that she was overcome by force or fear.

Other recent cases make clear that such violent assaults and life-threatening actions are not necessary to sustain a "force or fear" rape conviction. In Hammon, 245 Kan. 450, 781 P.2d 1063, F.M. rode the bus daily with the defendant and had befriended him. In May, F.M. let the defendant come to her house to use the bathroom. "She testified that when he came out of the bathroom, he grabbed her, forced her into the bedroom, tore off her clothing, and threw her on the bed in spite of her protestations." 245 Kan. at 451, 781 P.2d 1063. He undressed from the waist down and penetrated her vagina. The victim told no one of the incident and continued to ride the bus. Witnesses testified that F.M. continued to sit near the defendant and talk to him with no apparent fear. In July, he again asked to use her bathroom and F.M. agreed. When he came out of the bathroom, he forced her to touch his penis while he reached his hand down her jeans and put his fingers in her vagina. After he left, she told a family friend what had happened, and he urged her to report it to the police.

On appeal, this court rejected Hammon's contention that the evidence was insufficient to support his rape conviction under K.S.A. 21-3502(1)(a): "The argument of insufficient force is without merit--F.M. testified that Hammon forced himself on her without her consent during both incidents. This is sufficient to prove the elements of rape." 245 Kan. at 456, 781 P.2d 1063.

In Cantrell, 234 Kan. 426, 673 P.2d 1147, the victim and the defendant were acquainted, and the rape occurred in an automobile: "Mrs. B. testified that she resisted and struggled with the defendant; that she was crying; and that she begged the defendant to stop although she admitted that he made no threats, did not strike her, had no weapon and did not curse her or raise his voice. Her clothes were not ripped or torn and she suffered no bruises or other evidence of trauma. She made no attempt to scream, honk the horn or leave the vehicle." 234 Kan. at 428, 673 P.2d 1147. We found the evidence sufficient that she was overcome by force or fear: "While the evidence in this case is not strong on the element of overcoming the resistance of the victim, we have concluded that the testimony of Mrs. B. was sufficient to meet the test set forth in Matlock. Her testimony that she physically resisted the defendant is clear and the jury could have concluded from her actions that her resistance was also overcome by fear. See State v. Hacker, 197 Kan. 712, 421 P.2d 40 (1966), cert. denied 386 U.S. 967, 87 S.Ct. 1050, 18 L.Ed.2d 119 (1967). The jury had the opportunity to view the witnesses and to hear the evidence and evidently believed the testimony of Mrs. B. rather than that of the defendant." 234 Kan. at 429, 673 P.2d 1147.

The legislature did not intend to require victims to endure the kind of additional degree of physical violence described in the cases on which the defendant relies in order to support a rape conviction. The legislature required only that a victim be overcome by force or fear; she need not endure a beating or be threatened with a deadly weapon in order to satisfy that requirement.

In order to determine whether a rational factfinder could have found beyond a reasonable doubt that a victim of rape has been overcome by force or fear, we consider the record as a whole. Each case must be decided on its unique facts in arriving at this determination. Viewing J.C.'s testimony in the light most favorable to the prosecution, we conclude that a rational factfinder could have found beyond a reasonable doubt that she was overcome by force or fear. J.C. was alone in the house with the defendant, and before the defendant penetrated her vagina with his fingers, he touched her body in other places despite her requests that he stop. She testified that she asked him to stop when he was placing his fingers in her vagina and he did not. J.C. testified that she tried to keep defendant from touching her by trying to keep her legs together, "but they came apart." J.C. testified that she was afraid throughout the incident and that she felt powerless to stop what was happening. The jury believed that J.C. was overcome by force or fear. We find nothing in the record that so undermines J.C.'s credibility that we find it necessary to second-guess the jury.

The defendant urges the court to look to J.C.'s testimony that he did not force or threaten her

to support his contention that she was not overcome by force or fear. Our task, however, is to view the evidence in the light most favorable to the prosecution and determine whether a reasonable factfinder could conclude that J.C. was overcome by force or fear.

J.C. testified that she was afraid, that she did not consent to the sexual intercourse, that she felt powerless to do anything to stop the assault, that she told the defendant to stop, and that he nevertheless continued. Under the circumstances of this case, a reasonable factfinder could have found J.C. was overcome by fear. Although when asked on cross-examination whether the defendant forced or threatened her, J.C. testified that he did not, she also testified that she felt powerless to stop what was happening. She also testified that she told the defendant to stop what he was doing, but that he nevertheless continued.

Finally, the defendant cites a recent opinion of the Pennsylvania Supreme Court to support his contention that there was insufficient evidence of force of fear to sustain his rape conviction. In Com. v. Berkowitz, --- Pa. ----, 641 A.2d 1161 (1994), the Pennsylvania Supreme Court concluded that the evidence was insufficient that a defendant engaged in nonconsensual sexual intercourse with another "by forcible compulsion." In Berkowitz, a female college student was assaulted in a dormitory room. Berkowitz sat on the floor beside the victim, lifted her shirt and bra, and fondled her breasts. After he unsuccessfully tried to put his penis in her mouth, they both stood, and he locked the door, pushed her onto the bed, removed her undergarments, and penetrated her vagina with his penis. As in the case before us, the victim repeatedly said "no" throughout the incident.

An opinion from another jurisdiction is not controlling authority in this court. Moreover, we find Berkowitz distinguishable in many important respects. We discuss those distinctions here because they afford an opportunity to clarify the law of this state as it pertains to the crime of rape.

The Pennsylvania legislature defined rape differently than did our legislature. The pertinent portions of the Pennsylvania statute under which Berkowitz was charged required the State to prove that the intercourse occurred "by forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution." Berkowitz, --- Pa. at ----, 641 A.2d at 1163. The Pennsylvania legislature did not permit a rape conviction when a victim is overcome by fear, except to the extent that it is fear induced "by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution." Fear in and of itself is inherently subjective. Unless otherwise limited in the statutory definition as it is in Pennsylvania, a finding that a particular victim is overcome by fear does not require proof that it is fear induced by threat of force that would prevent resistance by a reasonable person. What renders one person immobilized by fear may not frighten another at all. The reasonableness of a victim's claim that she was overcome by fear necessarily enters into the factfinder's determination about whether the victim is telling the truth. There is then an important difference between nonconsensual intercourse with a victim overcome by fear (Kansas) and sexual intercourse "by forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" (Pennsylvania).

Moreover, it appears that the Pennsylvania Supreme Court has determined that under Pennsylvania law, even when there is lack of consent, some psychological coercion or physical force in addition to the sexual intercourse is necessary to sustain a rape conviction. In Berkowitz, the court determined that the nonconsensual intercourse that occurred amounted only to "indecent assault," which the legislature defined as "indecent contact with another ... without the consent of the other person." The court based its conclusion on the legislature's omission of the "forcible compulsion" requirement from the indecent assault statute and the omission of the explicit lack of consent requirement from the rape statute.

Although our sexual battery statute also omits the "force or fear" requirement, we do not believe that the nonconsensual intercourse that occurred here was merely sexual battery. In part, this determination arises from our conclusions about the nature of the force or fear required to establish the crime of rape. As we discussed above, fear is inherently subjective. Under Kansas law, when a victim testifies that she was overcome by fear, and her testimony is not "so incredible as to defy belief," Cooper, 252 Kan. at 347, 845 P.2d 631, there is sufficient evidence to present the ultimate determination to the factfinder. The reasonableness of a particular victim's fear may affect the jury's assessment of the victim's credibility in arriving at its verdict. The "force" required to sustain a rape conviction in this state does not require that a rape victim resist to the point of becoming the victim of other crimes such as battery or aggravated assault. K.S.A. 21-3502 does not require the State to prove that a rape victim told the offender she did not consent, physically resisted the offender, and then endured sexual intercourse against her will. It does not require that a victim be physically overcome by force in the form of a beating or physical restraint. It requires only a finding that she did not give her consent and that the victim was overcome by force or fear to facilitate the sexual intercourse.

Viewed in a light most favorable to the prosecution, the evidence is sufficient that J.C. did not consent to the defendant's digital intercourse and that she was overcome by force or fear. Under these circumstances, we conclude that a rational factfinder could have concluded beyond a reasonable doubt that the sexual intercourse was nonconsensual and that the victim was overcome by force or fear.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

ALLEGRUCCI, Justice, dissenting:

I cannot accept the majority's conclusion that the evidence is sufficient for a rational factfinder to find beyond a reasonable doubt that J.C. was overcome by force and fear.

Unquestionably, J.C.'s testimony was conflicting as to whether she asked the defendant to stop or ever said "no" to the defendant. What she testified to on direct examination she contradicted on cross-examination. Nevertheless, I agree with the majority that the evidence, taken as a whole, was sufficient to support a finding that she did not consent to the sexual intercourse. However, pursuant to K.S.A. 21-3502, the State must also prove that J.C. was overcome by force or fear. Nonconsensual sexual intercourse is not rape unless it is done under one of the four circumstances set out in K.S.A. 21-3502.

As stated by the Pennsylvania Supreme Court in Com. v. Berkowitz, 537 Pa. 143, 641 A.2d 1161, 1164 (1994): "As to the complainant's testimony that she stated 'no' throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force. In Commonwealth v. Mlinarich, 518 Pa. 247, 542 A.2d 1335 (1988) (plurality opinion), this Court sustained the reversal of a defendant's conviction of rape where the alleged victim, a minor, repeatedly stated that she did not want to engage in sexual intercourse, but offered no physical resistance and was compelled to engage in sexual intercourse under threat of being recommitted to a juvenile detention center. The Opinion in Support of Affirmance acknowledged that physical force, a threat of force, or psychological coercion may be sufficient to support the element of 'forcible compulsion,' if found to be enough to 'prevent resistance by a person of reasonable resolution.' However, under the facts of Mlinarich, neither physical force, the threat of physical force, nor psychological coercion were found to have been proven, and this Court held that the conviction was properly reversed by the Superior Court. Accordingly, the ruling in Mlinarich

implicitly dictates that where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement under 18 Pa.C.S. s 3121 is not met."

I agree with the majority that "violent assaults and life-threatening actions are not necessary to sustain a 'force or fear' rape conviction." However, more than the unsupported conclusory statement of the victim is required.

J.C. testified on cross-examination: "Q. And it's true that you felt some discomfort when this happened is what you've told us; is that correct? "A. Yes. "Q. And even then you did not tell Mr. Borthwick to stop, did you? "A. I told him to think about it. "Q. Right. But you did not tell him to stop, did you? "A. No. "Q. And you did not tell him no, did you? "A. No. "Q. As a matter of fact, I've asked you before and it's true, that Mr. Borthwick did not force you in any fashion, did he? "A. No. .... "Q. At no time did Mr. Borthwick threaten you, did he? "A. No. "Q. At no time did you tell Mr. Borthwick you were afraid; isn't that correct? "A. No. "Q. That's not correct or-- "A. I said, 'Yes, it's correct,' but you don't tell anybody that you're afraid of 'um. " Q. Okay. As a matter of fact, you've testified that there was nothing you did that would give Mr. Borthwick the indication that you were afraid; isn't that correct? "A. That's correct. .... "Q. At no time did he apply force to you to make you do something out of force; isn't that correct? "A. That's correct. "Q. And you did nothing to show Mr. Borthwick or indicate to Mr. Borthwick that you were afraid of him; isn't that correct? "A. I put my legs together."

On redirect examination, the following questions were asked by the State's prosecutor and answered by J.C.: "Q. Okay. But you never used the word no; is that correct? "A. That's correct. "Q. You stated that the defendant didn't force you in any way to do--for him to do these things to you. "A. Yes. "Q. Okay. You also said though that you held your legs together. What was the reason that you tried to hold your legs together? "A. 'Cause he was trying to put his fingers inside of me. "Q. And what did you think holding or trying to hold your legs together would do? "A. Try and stop him. .... "A. I was afraid of him, yes. "Q. What was it that you were afraid of? "A. Well, he didn't--he didn't put his--he didn't put all of his sentences together and there was pieces and that wasn't exactly put together in my mind. "Q. Okay. How did that frighten you? "A. Well, he didn't tell me the truth and I didn't think it was fair of him not to tell me the truth. "Q. You stated in your cross-examination testimony that you don't tell anyone you're afraid of them. Can you explain that? "A. Well, if somebody's bigger than you are and you're smaller, which I am, you don't tell anybody that you're afraid of them 'cause they might hurt you."

Finally, on recross-examination, J.C. testified: "Q. Okay. When Mr. Borthwick, according to your testimony, was putting his fingers inside you, he wasn't pinning you down, was he? "A. No. "Q. He didn't have his body weight on top of you, did he? "A. No. "Q. No, he had nothing to force you at that point, had he? "A. No. "Q. Okay. Furthermore, Mr. Borthwick wasn't threatening you in any fashion, was he? "A. No. "Q. Nothing he was doing caused you--let me rephrase that. He did not say something to you that caused you to be afraid, did he? "A. No. "Q. He didn't say, 'I'm going to kill you if you tell anybody about this,' correct? "A. No. "Q. He didn't say, 'You'll go to jail because of this,' correct? "A. No. "Q. The only thing Mr. Borthwick ever said to you was, according to your testimony, is that he would be in trouble, correct? "A. Yes. "Q. Now, he didn't say anything to you to cause you to be afraid of him, did he? "A. No. "Q. The only thing that you're upset about or you're afraid of is the fact that it might hurt, correct? "A. Yes. "Q. And that your mother would be upset, correct? "A. Yes, there's no doubt in my mind. .... "Q. But Mr. Borthwick didn't threaten you, did he? "A. No. "Q. And Mr. Borthwick did not apply force to you, did he? "A. No. "Q. So it was nothing that Mr. Borthwick did by what he said that caused you fear; isn't that right? "A. I was afraid of him. You don't say it out loud. You can think it. You don't tell anybody that you're afraid of him."

The majority finds this conclusory testimony of J.C. sufficient for a reasonable factfinder to find beyond a reasonable doubt that J.C. was overcome by force or fear. The majority states: "J.C. was alone in the house with the defendant, and before the defendant penetrated her vagina with his fingers, he touched her body in other places despite her requests that he stop.... [S]he tried to keep defendant from touching her by trying to keep her legs together, 'but they came apart.' J.C. testified that she was afraid throughout the incident and that she felt powerless to stop what was happening.... .... "J.C. testified that she was afraid, that she did not consent to the sexual intercourse, that she felt powerless to do anything to stop the assault, that she told the defendant to stop, and that he nevertheless continued."

The fact that J.C. tried to keep her legs together is not evidence that the defendant used force. J.C. is a 21-year-old with cerebral palsy. She testified she could not walk or stand unaided. Obviously, she has limited use of, or strength in, her legs. She did not testify that the defendant forced her legs apart. The fact that J.C. tried to keep her legs together tends to support that she did not consent but not that force was used. This is particularly true in light of her testimony that the defendant did nothing to force her to have sexual intercourse. It should be noted that the State did not charge the defendant under K.S.A. 21-3502(b), which proscribes nonconsensual sexual intercourse when the victim is physically powerless. The State makes no allegation or argument that J.C. was rendered powerless due to her physical condition.

The majority attempts, in my view unsuccessfully, to distinguish Berkowitz from the present case, stating: "Fear in and of itself is inherently subjective. Unless otherwise limited in the statutory definition as it is in Pennsylvania, a finding that a particular victim is overcome by fear does not require proof that it is fear induced by threat of force that would prevent resistance by a reasonable person. What renders one person immobilized by fear may not frighten another at all. The reasonableness of a victim's claim that she was overcome by fear necessarily enters into the factfinder's determination about whether the victim is telling the truth."

In the recent case of People v. Iniguez, 7 Cal. 4th 847, 30 Cal.Rptr.2d 258, 872 P.2d 1183 (1994), the California Supreme Court reversed the Court of Appeal's decision which vacated the defendant's rape conviction because the evidence of force or fear was insufficient to support the conviction. In finding the evidence of fear sufficient to support the verdict, the court noted that the relevant rape statute had been amended to eliminate the resistance requirement and the requirement that threat of immediate bodily harm be accompanied by an apparent power to inflict the harm. The court, however, noted: "In [People v. ] Barnes [42 Cal.3d 284, 228 Cal.Rptr. 228, 721 P.2d 110], we then addressed the question of the role of force or fear of immediate and unlawful bodily injury in the absence of a resistance requirement. We stated that '[a]lthough resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction under section 261, subdivision (2).' (Barnes, supra, 42 Cal.3d at p. 304 [228 Cal.Rptr. 228, 721 P.2d 110].) 'Additionally, the complainant's conduct must be measured against the degree of force manifested or in light of whether her fears were genuine and reasonably grounded.' (Ibid.) 'In some circumstances, even a complainant's unreasonable fear of immediate and unlawful bodily injury may suffice to sustain a conviction under section 261, subdivision (2), if the accused knowingly takes advantage of that fear in order to accomplish sexual intercourse.' " 7 Cal. 4th at 856, 30 Cal.Rptr.2d 258, 872 P.2d 1183. The court further stated: "Thus, the element of fear of immediate and unlawful bodily injury has two components, one subjective and one objective. The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will. In order to satisfy this component, the extent or seriousness of the injury feared is immaterial. [Citations omitted.] "In addition, the prosecution must satisfy the

objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." 7 Cal. 4th at 856-57, 30 Cal.Rptr.2d 258, 872 P.2d 1183.

The court then applied these principles to the evidence and concluded that there was substantial evidence that the victim's fear of immediate and unlawful bodily injury was reasonable. The court relied on the following evidence: "Defendant, who weighed twice as much as [the victim], accosted her while she slept in the home of a close friend, thus violating the victim's enhanced level of security and privacy. (Cf. People v. Jackson (1992) 6 Cal.App. 4th 1185, 1190 [8 Cal.Rptr.2d 239 'A person inside a private residence, whether it be their own or that of an acquaintance, feels a sense of privacy and security not felt when outside or in a semipublic structure ... providing the (attacker) with the advantages of shock and surprise which may incapacitate the victim(s).'] ) "Defendant, who was naked, then removed [the victim's] pants, fondled her buttocks, and inserted his penis into her vagina for approximately one minute, without warning, without her consent, and without a reasonable belief of consent. Any man or woman awakening to find him or herself in this situation could reasonably react with fear of immediate and unlawful bodily injury. Sudden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear." 7 Cal. 4th at 858, 30 Cal.Rptr.2d 258, 872 P.2d 1183. " '[S]he knew that the man had been drinking. She hadn't met him before; he was a complete stranger to her. When she realized what was going on, she said she panicked, she froze. She was afraid that if she said or did anything, his reaction could be of a violent nature.' " 7 Cal. 4th at 852, 30 Cal.Rptr.2d 258, 872 P.2d 1183 (quoting trial testimony). "In addition, immediately after the attack, [the victim] was so distraught her friend Pam could barely understand her. [The victim] hid in the bushes outside the house waiting for Pam to pick her up because she was terrified defendant would find her; she subsequently asked Pam if the word 'rape' was written on her forehead, and had to be dissuaded from bathing prior to going to the hospital. [Citation omitted.]" 7 Cal. 4th at 857-58, 30 Cal.Rptr.2d 258, 872 P.2d 1183. This evidence is in stark contrast to the evidence in the present case, particularly as to whether J.C. was overcome by fear.

Here, the majority totally ignores the objective component to the element of fear. What rendered J.C. to be immobilized by fear? That the defendant "didn't put all of his sentences together" and "he didn't tell ... the truth." J.C. testified the defendant never threatened, coerced, or used force. How can a "reasonable factfinder" find her fear to be "reasonable"? Although J.C. testified she was afraid, her fear was not of what would happen to her if she did not submit to the defendant. She testified on cross-examination that "the only thing" she was afraid of was that "it might hurt," "that [her] mother would be upset," and what defendant's wife would think.

A majority of this court, citing State v. Cooper, 252 Kan. 340, 347, 845 P.2d 631 (1993), holds: "Under Kansas law, when a victim testifies that she was overcome by fear, and her testimony is not 'so incredible as to defy belief,' there is sufficient evidence to present the ultimate determination to the factfinder." In Cooper, we merely noted this rule was of a common-law origin and had not been modified. It had no application in Cooper since we found the victim's testimony was corroborated by "physical evidence, witness testimony, and by Cooper's own statements." 252 Kan. at 347, 845 P.2d 631. Nevertheless, it does provide an example of a victim's testimony which would alone sustain a rape conviction. The victim testified that Cooper beat her, threatened her, held her against her will, sat on her, tied her up, and choked her. I agree that the testimony of a victim alone can be sufficient to support a rape conviction, provided, however, that the testimony recites a factual basis to reasonably conclude that the victim was overcome by fear. Although the majority fails to define fear in the context of K.S.A. 21-3502, it does essentially redefine rape as nonconsensual sexual intercourse. If nonconsensual sexual intercourse, other than under the circumstances set out in K.S.A. 21-3502, is to be made a felony offense, it must be done by the legislature and not this court.

Simply stated, the majority holds that the State need not prove beyond a reasonable doubt that the victim is overcome by force or fear but, rather, a conclusory statement from the victim to that effect is sufficient. Absent the legislature's amending K.S.A. 21-3502, I cannot accept that to be the law in this state. I agree with Judge Kay Royse that the evidence is not sufficient to establish that J.C. was overcome by force or fear.

ABBOTT, J., joins the foregoing dissenting opinion.