STATEMENT OF VICKI VIX

My name is Victoria Vix. I am twenty six years old, single and a CPA/financial planner. Earlier tonight I went to a Halloween party at an acquaintance's house. I really didn't want to go because when I go to parties with my friend Susan, she tends to get drunk and leave with some guy, and I need to get a ride home or take a cab. Susan really wanted me to go and promised it wouldn't happen, so at the last minute I agreed to go. Of course, because I wasn't planning to go, I didn't have a costume, so Susan lent me one. It was a french maid costume - a little skimpy for my taste but it wasn't too bad and I figured everyone would be dressed up and nobody would really notice.

Once I got to the party I was glad I had come. There were very interesting people there, including a number of up and coming sports personalities. I'm always looking for clients, and I thought I might meet some prospects. I was not looking for an after party date or encounter - I just ended a serious relationship two months ago and I'm not interested in romance or sexual encounters. I met some interesting people and was having a pretty good time until an acquaintance came over and told me that Susan had gotten tipsy and left with some guy. Needless to say, I was angry and upset.

About that time, this large, somewhat attractive guy I'd never seen before joined the group of people with whom I was talking. He didn't say much until most of the others left. I knew he had heard that I didn't have a ride home, and I wasn't real surprised when he offered to drive me. I tried to be nice and thank him for his offer, but I also told him I'd take a cab. He said that would be a waste of money and that he didn't mind, so I agreed. He wasn't really coming on to me, and I had no reason to think I was in any danger.

He drove me home, and when we arrived, he acted like a real gentleman. He opened the car door for me and offered to walk me in. I declined, but he asked to use the phone (his beeper had gone off while we were in the car), and after he had driven me two miles home, I thought that was the least I could do. I waited in the living room while he called, since I didn't want to listen to his conversation. When he got off the phone, he came into the living room and began coming on to me. I told him I wasn't interested in anything and asked him to go. He kept telling me to loosen up, and I started getting nervous. I mean, this guy is maybe 6'5" and probably over 250 pounds, and there's no way I could resist him if he pushed himself on me.

I must have asked him to leave three or four times, but he kept getting more insistent, telling me I wanted him as much as he wanted me. He then started talking as if I had no choice - he said "I'm a big, strong guy. I'm real hot. I get what I want and I want you. I'm gonna give you the time of your life and you are going to enjoy it." The more I backed away, the stronger he came on. I murmured "No, stop" but he ignored me and told me it's better if I don't fight. He then pulled off my clothes and fondled and kissed me. He was rough and I was afraid of him.

After awhile he was very aroused and began to remove my underwear. I knew he was going to force himself on me, and I was more worried about AIDS than anything else. So, I asked him begged him, really - to wear a condom. Although he didn't want to stop, I guess he had some compassion for me and let me get one that I happened to have from when I was involved in a sexual relationship with my then-fiance. He put on the condom, pushed me back down on the couch and had sex with me. A few minutes after he "came", his beeper went off. He made a phone call, got dressed and said he hoped to see me again some time. He then left.

I immediately began to sob, but thought enough to go to the window and get his license number. I knew his name was Roger, and that he was a World League football player, but I didn't know his last name. After taking a shower, I called my sister and began sobbing. She came over and had

me call the police. I was taken to the hospital for an examination. They said I had some minor

bruises, but it was "inconclusive" as to whether they were more consistent with "normal" rough sex or forced intercourse. Of course there was no semen since he wore the condom, which he flushed.

I still can't believe that I was raped. I'm a very conservative person when it comes to dating and sex, and I never, never have sex on the first date. In fact, I've only had sex with a few other men, and always in a serious relationship. I didn't do anything to come on to him, and I can't believe that just because I was wearing that stupid costume that he thought I was out for sex. I also can't believe that I didn't think to call anyone for help from my bedroom phone - but I really don't think at that point that it would have made any difference.

STATEMENT OF ROGER RAPIER

My name is Roger Rapier. I play World League football; I work out; I've got a great body. Women tend to be attracted to me immediately, and professional women especially, although often they fight it. But I'm a good guy - I care about ladies. I can't believe someone would charge me with rape.

I was at a Halloween party last night. There were lots of jocks and lots of business and professional people. Most people were in costume; some weren't. I noticed this real attractive chick earlier in the evening, wearing a french maid costume, but she was always very involved talking to other people. As it got late, the crowd around her dwindled, and I made my way over to her. I was part of a group of four or five people just making small talk when someone who was obviously a friend of hers came over and whispered to her, some of it soft, some of it fairly loud. I overheard that her ride had left with some guy. She appeared upset about it. Several of the people around her left and we continued talking. Eventually I indicated that I was leaving and asked if she needed a ride. She said she'd call a cab, but I said that was silly and that I'd be happy to take her home. She was still down but started to seem kind of flirty. She asked if I was sure it wouldn't be a problem, and I said "No problem."

We left in my car and drove toward her house. She gave me the address and directions. As we drove, we talked - small talk mostly. She was still a bit flirty, although she did have an "edge" - she still seemed a little upset about what her friend had told her. She was impressed that I play ball, and she asked about the team and what I do. When we arrived at her house, I got out and opened the car door for her, the usual stuff. I like to treat women like ladies. Anyway, I walked her to the door, and we stood outside for a while. I asked "Do you want me to walk you in?" and she said it wasn't necessary. I said I'd like to, since I had to make a phone call anyway. She said OK. We went inside, and she showed me to the phone in the kitchen. I made a brief call to my answering service, had no important messages, and returned to the living room where she was standing near the couch.

I went over to her, thinking we might "get it on." I said something like "You're beautiful, you foxy lady." She said something like "Please don't start anything. I appreciate the ride, but that's all I want right now.' I've heard that before, so I said "Loosen up, honey. You know you want me, and I want you." She said something like "Please go," but I could tell she didn't really mean it. I figured she's one of those chicks who doesn't want to be seen as loose or easy - she wants it but can't let it look like she does - so you have to press a little bit. So I said "Honey, we both want it - I'll make sure you get it good. I'm a big strong guy, and I'm real hot. I know what I want, and I know what you really want, and I'm gonna give you the time of your life and your gonna love it."

She began to back away a little and meekly said "stop, please don't." I said "Come on honey, relax and enjoy it, don't fight it - it's better if you don't fight it." She didn't say anything after that, so I came up close to her, edged her onto the couch, and began kissing her and groping at her. I pulled off the top of her costume and began playing with her breasts. I know I can be a little rough, but she didn't resist or fight me and I thought she was enjoying it - she didn't actively participate, but many of these professional women can't loosen up the first time, so I didn't think anything was wrong. I pulled off the skimpy bottom of her costume and was getting ready to enter her when she really pulled back and said "If you're going to do this, at least wear a condom so I don't get AIDS or something." I said "Come on, honey, I don't want to stop." But she was insistent, almost crying, saying I needed a condom. Well, this was new to me, but I could understand her worrying about getting AIDS. Hey, I mean even Magic Johnson has AIDS, so I guess she could figure a stud like me might have it too. But I don't carry them around, so I said "I don't have any, and I don't want to give you up." She said "I'll get one," and she went into her bedroom and got one. I put it on, eased her back on the couch and we

had sex.

I was shocked when you guys came to the house this morning and took me down to the station. I mean, I didn't rape her. She didn't seriously object. True, she wasn't very responsive, but neither are many of the women I date. Many of these hotshot women really don't know how to loosen up, and some don't want to show that they are enjoying you. But she never said stop once we started, except to get the condom, and I never threatened her or forced her to have sex. I just can't get over that now she's crying rape. I don't know whether she's just crazy or a vindictive bitch. But I'm telling you, it wasn't rape!

MISSOURI REVISED STATUTES
CHAPTER 566 - SEXUAL OFFENSES
SELECTED STATUTES

Chapter 566 and chapter 568 definitions.

566.010. As used in chapters 566 and 568, RSMo:

(1) "Deviate sexual intercourse" means any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person;

(2) "Sexual conduct" means sexual intercourse, deviate sexual intercourse or sexual contact;

(3) "Sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person;

(4) "Sexual intercourse" means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.

(L. 1977 S.B. 60, A.L. 1987 H.B. 341, A.L. 1991 H.B. 566, A.L. 1994 S.B. 693)
Effective 1-1-95

Mistake as to incapacity or age.

566.020. 1. Whenever in this chapter the criminality of conduct depends upon a victim's being incapacitated, no crime is committed if the actor reasonably believed that the victim was not incapacitated and reasonably believed that the victim consented to the act. The defendant shall have the burden of injecting the issue of belief as to capacity and consent.

2. Whenever in this chapter the criminality of conduct depends upon a child being thirteen years of age or younger, it is no defense that the defendant believed the child to be older.

3. Whenever in this chapter the criminality of conduct depends upon a child being under seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older.

(L. 1977 S.B. 60, A.L. 1994 S.B. 693)
Effective 1-1-95

Marriage to victim, at time of offense, affirmative defense, for certain crimes.

566.023. It shall be an affirmative defense to prosecutions under sections 566.032, 566.034, 566.040, 566.062, 566.064, 566.068, 566.070, and 566.090 that the defendant was married to the victim at the time of the offense.

(L. 1994 S.B. 693)

Forcible rape and attempted forcible rape, penalties.

566.030. 1. A person commits the crime of forcible rape if he has sexual intercourse with another person by the use of forcible compulsion.

2. Forcible rape or an attempt to commit forcible rape is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

(L. 1977 S.B. 60, A.L. 1980 H.B. 1138, et al., A.L. 1990 H.B. 1370, et al., A.L. 1993 S.B. 180, A.L. 1994 S.B. 693)
Effective 1-1-95

Statutory rape, first degree, penalties.

566.032. 1. A person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years old.

2. Statutory rape in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.

(L. 1994 S.B. 693)

Statutory rape, second degree, penalty.

566.034. 1. A person commits the crime of statutory rape in the second degree if being twenty-one years of age or older, he has sexual intercourse with another person who is less than seventeen years of age.

2. Statutory rape in the second degree is a class C felony.

(L. 1994 S.B. 693)

Sexual assault, penalties.

566.040. 1. A person commits the crime of sexual assault if he has sexual intercourse with another person knowing that he does so without that person's consent.

2. Sexual assault is a class C felony.

(L. 1977 S.B. 60, A.L. 1994 S.B. 693) Effective 1-1-95

CHAPTER 556 - DEFINITIONS
SELECTED PROVISIONS

Code definitions.

556.061. In this code, unless the context requires a different definition, the following shall apply:

(5) "Consent": Consent or lack of consent may be expressed or implied. Assent does not constitute consent if:

(a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such
mental incapacity is manifest or known to the actor; or

(b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known
by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute
the offense; or

(c) It is induced by force, duress or deception;

(9) "Dangerous instrument" means any instrument, article or substance, which, under the circumstances in which it is used,
is readily capable of causing death or other serious physical injury;

(10) "Deadly weapon" means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of
producing death or serious physical injury, may be discharged, or a switchblade knife, dagger, billy, blackjack or metal
knuckles;

(12) "Forcible compulsion" means either:

(a) Physical force that overcomes reasonable resistance; or

(b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person;

(13) "Incapacitated" means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated" with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct or unable to communicate unwillingness to an act, after consenting to the act;

STATE v. DEE
Missouri Court of Appeals, Eastern Division
752 S.W.2d 942 (1988)

KELLY, Judge.

Ronald Dee appeals from the judgment entered after a jury's finding him guilty on two counts of sodomy and three counts of forcible rape. The trial court sentenced him to a term of imprisonment of fifteen years on count one for forcible rape . . . [and eight years on counts three and four for rape].

Appellant's first point challenges the sufficiency of the evidence to sustain his convictions. . . . Our review is limited to determining whether there was sufficient evidence from which reasonable persons could have found appellant guilty. State v. Jones, 738 S.W.2d 513 (Mo.App.1987). Further, uncorroborated testimony of a rape victim will ordinarily sustain a rape conviction. State v. Fogle, 743 S.W.2d 468, 469- 70[4] (Mo.App.1987).

Viewed in the light most favorable to the verdict, the evidence established the following account.

During dissolution proceedings between V.B. and B.B. initiated in 1983, evidence surfaced of his sexual abuse of two-year old C.B., one of V.B.'s children. V.B. called the abuse hotline on September 15, 1984, to report the child abuse. Division of Family Services ("DFS") placed the child under its protective custody and entrusted V.B. with continued physical custody of her daughter. In November 1984, DFS assigned appellant to be V.B.'s caseworker. Appellant's duties included regular visits to her home to monitor the situation.

At about ten or eleven o'clock on the morning of October 29, 1985, after V.B. had returned from taking her children to daycare, appellant arrived at her house. He had scheduled the meeting with her to process some paperwork in connection with her children's attendance at the daycare center.

When he arrived, she was in the children's bedroom weatherproofing the windows. He watched her briefly from the bedroom door. As she finished her task and was turning around, he grabbed her arm and turned her around. She asked him to leave her alone. He then backed her against the wall, unbuttoned her clothes and pushed her down to the floor. She testified that he had hold of her left side and that she could not fight him off with her right side because of a mild stroke she had suffered. He told her that the decision whether her children would remain in her custody or be transferred to her ex- husband depended on him and that she should cooperate if she wanted to maintain custody of them. He then took off her clothes and raped her. With his knees across her arms, he forced her to engage in fellatio. After dressing, he reminded her before he left that he would take her children away if she told anyone.

V.B. admitted she offered no physical resistence to appellant's sexual attack. She explained that a mild stroke had left her right side debilitated. She also took medication for seizures. She further testified that he was so much bigger and stronger than she and she feared he would strike her, although he never told her he would strike her.

On December 30, 1985, while her children were in daycare, appellant again raped her in her bedroom during another one of his visits to her home. Again, he did not strike her, but reiterated his threat that the custody of her children was in his hands. Frightened by the memory of the earlier rape, she offered no protest when appellant ordered her to go into the bedroom and disrobe. She did not struggle or cry out when appellant pushed her down on the bed and perpetrated the rape. He again reminded her to keep her mouth shut when he left.

Following the first two rapes, V.B. began making arrangements to move to St. Charles where she would be in a different district with a new caseworker. When she called him in February 1986 to inform him she was moving, he stopped by her home unannounced on February 28, 1986. He had also visited her two or three times a month between December 30 and February 28 for routine home visits, each without any sexual incident.

On his visit of February 28, he asked to see the baby's room, which she had recently redecorated. Once in the room, he ordered her to take off her clothes. After she disrobed, he again raped her. He straddled himself across her chest and forced her to orally sodomize him and then left.

She told no one of the sexual attacks. In early April 1986, she required hospitalization because she was suffering from seizures. She had seizures before the initial October 1985 attack; however, since then, the seizures had increased. The doctor attributed them to stress.

After leaving the hospital in April, she finally told her best friend Cathy Opfer of appellant's sexual attacks. Ms. Opfer had just recently returned to St. Louis from living in California and had moved in temporarily with her family to V.B.'s home. Ms. Opfer advised her to report the episodes immediately.

The following morning, V.B. telephoned the police. She spoke with Detective Reinhardt and told him that appellant intended to come by her home that day around three o'clock. Before appellant arrived, the detective and two other officers went to her home. Detective Reinhardt fitted V.B. with a body microphone. Then he hid in the closet of the children's bedroom; the other two officers waited outside in a car.

When appellant arrived, he sat first on the couch and then on a chair, closer to V.B. She told him she was leaving and that, before she left, she wanted to know why he had raped her and she wanted an apology. He replied that she knew the answer and the answer was in her mind. After she asked him numerous times to apologize, she then demanded a direct answer to the question why he had raped her in October 1985. He replied that if he had done it, forced her onto the floor and removed her pants and underwear, she had enjoyed it and he did not consider that rape.

. . . During [a] taped interview, appellant admitted having sexual relations with V.B. . . . At trial, appellant denied that he had ever sexually molested V.B. Based on the foregoing evidence, the jury found appellant guilty as charged.

Appellant was convicted of three counts of forcible rape under s 566.030 RSMo 1986 and two counts of sodomy in violation of s 566.060 RSMo 1986. "A person commits the crime of forcible rape if he has sexual intercourse with another to whom he is not married without that person's consent *by the use of forcible compulsion*. " s 566.030.1 RSMo 1986 (emphasis ours). "A person commits the crime of sodomy if he has deviate sexual intercourse with another person to whom he is not married, without that person's consent *by the use of forcible compulsion*. " s 566.060.1 RSMo 1986 (emphasis ours). "Forcible compulsion" means either (a) physical force that overcomes reasonable resistance, or (b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person. s 556.061(12) RSMo 1986. The gravamen of appellant's complaint is that no evidence of forcible compulsion exists to support his convictions.

The rule is well established in Missouri that one may be guilty of rape even though the woman offers no physical resistence if she submits through fear of personal violence. State v. Koonce, 731 S.W.2d 431, 439 (Mo.App.1987). . . .

In Koonce, a witness mentioned that the victim, an Army Reserve member, "looked like she could

handle anything." We trenchantly observed that, although a woman may be a member of the Army Reserve, she need not use combat methods to resist to the utmost. Id. Resistance never comes into play where a threat (constructive force) is employed. Id.

Here, appellant pinned V.B. down as he raped her the first time. He kept a grip on her with one hand while he undressed her. She tried to pull away and told him to leave her alone. We believe that these actions, in conjunction with his threats implying his ability to take her children away from her, are sufficient evidence of forcible compulsion, both physical force that overcomes reasonable resistance and a threat of "kidnapping" of another person. That he had his knees across her arms when he forced her to sodomize him is sufficient evidence of forcible compulsion in connection with the October sodomy.

The second and third rapes, with the attendant act of sodomy on the third rape, were also accomplished by forcible compulsion. At the second rape, he pushed her down on the bed. With both the second and third rape, he reiterated his threat concerning the custody of her children. He straddled her to hold her down during the sodomy following the third rape. V.B. testified that the memory of the pain of the first incident filled her with fear with the second and third sexual episodes. We are satisfied that appellant's actions implied a threat of serious physical injury to satisfy the element of forcible compulsion for the rape of December and the rape and sodomy in February.

Appellant emphasizes that V.B. did not scream, bite or fend off appellant. It has been said that the law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury. State v. R.D.G., 733 S.W.2d 824, 827 [3] (Mo.App.1987). In R.D.G., the victim was the seventeen year old stepdaughter of her twenty-five year old assailant. The court held that, where the victim tried to stop defendant but was unsuccessful because defendant was "holding her arms tight", there was a sufficient showing of resistance, in the circumstances, to establish forcible compulsion. Id. [4]. This conclusion was reached despite testimony by victim, when asked if she screamed, that she did not do so because "[i]t wouldn't have done any good." Id. at 826. We believe R.D.G. to be persuasive authority for our conclusion that V.B. could reasonably have expected appellant to use such force as was necessary to accomplish his purpose, although he did not actually strike her. This force, coupled with his express threat that he would change her children's custody, satisfies the requisite element of forcible compulsion on all the charges. Appellant's first point is denied.

STATE v. SHIRLEY
Missouri Court of Appeals, Southern District
731 S.W.2d 49 (1987)

HOGAN, Judge.

A jury has found defendant Joe Mack Shirley guilty of forcible rape in violation of s 566.030, RSMo Supp.1983, and kidnapping, in violation of § 565.110, RSMo 1978. Defendant's punishment has been fixed at five (5) years' imprisonment on each count. The trial court ordered that the terms be served consecutively. Defendant appeals, contending that the evidence is not sufficient to support the judgments of conviction and that certain evidence was erroneously received. We affirm.

In determining the sufficiency of the evidence to support the judgment of conviction, this court must accept as true all evidence favorable to the verdict, together with all reasonable inferences to be drawn therefrom, and reject all evidence and inferences to the contrary. . . .

So taken, the evidence is: On New Year's Eve, the victim, a woman 24 years of age, attended several parties in Springfield. She consumed some alcohol. She left the last celebration she attended about 2 to 3 a.m. As she drove north on National Avenue in south Springfield, she noticed an automobile "kind of pacing me alongside." The victim turned east on Grand Avenue, and the other vehicle started following her closely. Finally the other vehicle struck the victim's car when she stopped at a controlled intersection. Somewhat frightened, the prosecutrix rolled her window down and addressed the defendant, who was driving the other vehicle. The defendant was carrying a club. He opened the door of the victim's car and ordered her to get out. The defendant then took his victim by the arm and forced her into his car. The prosecutrix got in the defendant's car; defendant then "backed up and took off." Defendant drove to a rural area near the intersection of Route D and Farm Road 144 in Greene County. As defendant was driving away from the intersection, the prosecutrix asked him what he wanted; the defendant instructed her to disrobe.

The roads were covered with ice and snow, and as the defendant came to the place where the assault occurred, he went in the ditch and became stuck in the snow. The defendant became very angry because he could not get out of the ditch, so angry, according to the prosecutrix, that he broke the "stick" off the "stick shift." The victim had disrobed. The defendant pulled his trousers down and started to force the victim to perform an oral sexual act. The victim begged the defendant not to make her "do that." The defendant then ordered the prosecutrix to "get on top of [him]." She did so and the defendant did "penetrate in front." The defendant then attempted to "penetrate in the rear" but was unsuccessful. The victim was then allowed to dress.

The defendant and the victim then made an effort to get the defendant's car out of the ditch. A farmer who lived nearby heard the noise of a "car stuck in the ditch." This farmer, Charles Webb, testified that he got in his truck and helped the defendant out of the ditch. The victim made no outcry and did not ask for help.

Apparently the defendant's vehicle was operative despite the broken stick shift, for he drove the victim back to the intersection where he had accosted her. The victim's vehicle was gone. At her request, the defendant drove the victim to a telephone so she could call the police department about her car. The prosecutrix called the police department. She was told there was no report on her car and she did not report the rape. Defendant then drove to a service station where he bought gasoline.

Thereafter, the defendant took his victim to her sister's residence. As he was leaving, the victim was able to obtain the number of his license plate. The victim then reported the assault.

The defendant argues that the State failed to prove forcible rape because it did not prove penetration, lack of consent, or forcible compulsion. The victim was a mature woman; she testified directly to penetration. On this issue, the uncorroborated testimony of the prosecutrix is sufficient. Willis v. State, 630 S.W.2d 229, 234[11] (Mo.App.1982). The fact that a physician, upon examination, could find no evidence of trauma nor any sperm cells in the victim's vagina does not invalidate the conviction. State v. Edgar, 710 S.W.2d 2, 3-4[1][4] (Mo.App.1985); State v. Salkil, 659 S.W.2d 330, 333[1-4] (Mo.App.1983); State v. Mazzeri, 578 S.W.2d 355, 356[3, 4] (Mo.App.1979). As far as lack of consent and forcible compulsion are concerned, the victim testified she did not consent but submitted because she was put in fear. Sexual intercourse which is not resisted because of fear is not consensual. State v. Hannett, 713 S.W.2d 267, 271[1, 2] (Mo.App.1986); State v. Salkil, 659 S.W.2d at 333[5-7]. Here, the defendant had literally tracked his victim a considerable distance very late on a cold night; he pulled her from her vehicle into his, forcing her to abandon her car at an intersection where it was later found by police officers. When the victim's automobile was found, the engine was still running, the headlights were on, and the passenger door was open. The defendant drove to a relatively remote area, indicating that he intended to have carnal knowledge of the prosecutrix. Defendant had a club of some order. The evidence was sufficient to establish "forcible compulsion" as that term was defined by s 556.061(11), RSMo Supp.1983.

STATE v. JONES
Missouri Court of Appeals, Western District.
809 S.W.2d 37 (1991)

Before SHANGLER, P.J., and KENNEDY and FENNER, JJ.

PER CURIAM.

After a jury trial, James D. Jones was found guilty of forcible rape in violation of s 566.030, RSMo 1986 (repealed 1990). The trial court accepted the jury's recommended punishment and imposed a sentence of five years' imprisonment. Appellant now challenges the sufficiency of the evidence.

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To convict of forcible rape under s 566.030.1, RSMo 1986 (repealed 1990), the state was required to prove beyond a reasonable doubt that appellant had sexual intercourse with another person to whom he was not married, without that person's consent by the use of forcible compulsion. In examining the sufficiency of the evidence, we view all evidence and inferences in the light most favorable to the verdict, and disregard all contrary evidence and inferences. State v. Brigman, 784 S.W.2d 217, 219 (Mo.App. 1989).

Mindful of the elements of proof and the standard of appellate review, we recount the evidence underlying appellant's conviction of forcible rape.

Appellant and the fifteen-year-old female victim first met at a high school dance on September 8, 1989. Throughout the night, appellant made sexual advances toward the victim. At the dance, appellant pinned the victim against a wall and fondled her by moving his hands up and down her back side. After the dance, in the parking lot of a fast food restaurant, appellant pulled the victim into some bushes, tried to kiss her, and placed his hands inside her pants. Each time the victim resisted by telling appellant to stop and by pushing him away.

After her encounter with appellant in the parking lot, the victim returned to a group of friends in a car. They rode around town, then stopped at appellant's house. Not wanting to go inside, the victim protested to the driver of the car. When the driver reassured her that he would return shortly, the victim reluctantly went inside appellant's house with her girlfriend, Tiffany.

Appellant escorted the two girls to a basement bedroom. Tiffany lay down on a blanket on the floor and the victim sat down beside her. With the lights out and the bedroom door locked, appellant pulled the victim by the shoulders onto a bed. He forced her down on the bed, removed her pants and rolled on top of her. Tiffany, who was dozing, heard the victim say, "No, don't do that," "Don't unbutton my shirt," "Stop it," "Just stop," "Stop, don't do that," and "I don't want to do this." The victim resisted the removal of her pants by trying to hold them up. She also tried to free herself by pushing appellant off her, but he put more weight on her. Appellant then performed sexual intercourse on the victim.

Hearing someone tap on a window, appellant stopped, dressed, and went upstairs. When he returned to the basement bedroom, the victim had dressed. Appellant again pulled the victim on the bed and began removing her clothing. This time Tiffany intervened, argued with appellant, and insisted that they leave.

The girls left appellant's house and walked to a convenience store where the police picked them up. The police took the victim to the hospital. The examining physician found recent bruising, swelling, and redness in the genital area. The doctor reported that the bruises were "clearly sign[s] of distinct resistance," and were positively not caused by normal intercourse.

Appellant contends that the state failed to prove any forcible compulsion . . . . Appellant maintains that the victim's testimony regarding her fear of him insufficiently established the element of forcible compulsion. Arguing that the victim's testimony was so inconsistent as to require corroboration, appellant points out conflicts between her testimony and other evidence supporting his defense of consensual intercourse. In support, he stresses evidence that the victim went inside appellant's house, even though she was afraid of him; that she knew that others were present in the house, but did not scream or seek help; that appellant made no threats of physical injury and displayed no weapons. Appellant further contends that no evidence showed that he was not married to the victim.

A rape conviction can be supported by the victim's uncorroborated testimony. State v. Bryant, 756 S.W.2d 594, 597 (Mo.App.1988). Corroboration is not required unless the victim's testimony is so contradictory or in conflict with the physical facts, surrounding circumstances, and common experience to render its validity doubtful. State v. Daniel, 767 S.W.2d 592, 593 (Mo.App.1989). Conflicts between the victim's testimony and that of other witnesses fail to trigger the application of the corroboration rule. Id. "Forcible compulsion," an essential element of forcible rape, may be proved by evidence of either (a) physical force that overcomes reasonable resistance, or (b) a threat, express or implied, that places a person in reasonable fear of death, serious physical injury, or kidnapping. Bryant, 756 S.W.2d at 597.

Contrary to appellant's argument, the victim's testimony was not so inherently inconsistent as to require corroboration. Throughout her testimony, the victim stated that she was afraid of appellant because of his sexual advances toward her and because of his reputed membership in a street gang. She explained that her fear of appellant prevented her from seeking immediate help and from knowing how to handle the predicament. On the issue of forcible compulsion, the victim consistently stated that appellant forced her to have intercourse against her will. Her testimony of her resistance by telling appellant to stop and by trying to push him away, and of being overpowered by appellant sufficiently established forcible compulsion. Although not required, Tiffany's testimony regarding the victim's statements and the medical evidence of the victim's injuries further buttressed the proof of forcible compulsion.

We affirm appellant's conviction and sentence . . . .

STATE v. KOONCE
Missouri Court of Appeals, Eastern District
731 S.W.2d 431 (1987)

SIMEONE, Senior Judge.

I

Appellant, Tony Koonce was charged, tried by a jury, convicted and sentenced for two counts of forcible rape, forcible sodomy, and attempted forcible sodomy pursuant to ss 566.030, 566.060, R.S.Mo.1986. He was sentenced by the court, as a persistent sexual offender to thirty years on each [count]. He appeals. We affirm. . . .

II

On appellate review, we review the facts in the light most favorable to the state. In determining whether the state made a submissible case to withstand a motion for judgment of acquittal, the appellate court accepts as true all the evidence favorable to the state, including all favorable inferences therefrom. All evidence and inferences to the contrary are to be disregarded. State v. Manning, 612 S.W.2d 823, 825 (Mo.App.1981). Furthermore, the determination of the credibility of the witnesses is within the peculiar province of the jury. State v. Williams, 652 S.W.2d 102, 111 (Mo. banc 1983).

Viewing the evidence in the light most favorable to the state the jury could reasonably find the following.

The victim, Robin Triplett, a 19-year old woman met the appellant, Tony Koonce, on February 6, 1985 at Forest Park Community College during a typing class.

The events which give rise to this criminal case occurred on Friday, February 8, 1985. But the story begins two days earlier. Tandelaya Malcom Wiley, a relative of Robin's, was then a student at Forest Park Community College.

The prosecutrix, Robin Triplett was the principal witness for the state. She testified that on February 6, she went to the Forest Park Community College at about 6:00 p.m. to get her cousin from class, "because she had to take me home." Robin wanted to enroll in school. Appellant was in the typing classroom and Tandelaya introduced them. While in the classroom, appellant came over to her, engaged in some conversation, and asked her name and requested her telephone number. She told him that "we couldn't get anything going [but] we could be friends." After the parties went their separate ways, that evening appellant called her about 10:00 p.m. He told her about some books she could use and they spoke for about thirty minutes. He asked her to go out with him. She refused.

The next afternoon appellant called again. He desired her to come to his home and tried to get her "to go out with him." He called later that evening three separate times. She told him she was "taking up nursing classes" and "was in the Army Reserves." In the last conversation she indicated that she was going to take a bus to the college the next morning. The next morning, Friday, appellant called and asked if he could take her to school. It was "drizzling" so she said "yes." He came to the house and picked her up. Appellant, however, drove to his residence, rather than the college. Robin realized he was going the wrong way and asked about it. Appellant replied he wanted her to meet his mother. They went to appellant's residence where he lived with his mother. They went in the apartment and he introduced her to his mother. He invited her upstairs to his bedroom. She sat on a stool and he showed her some books. She told him she had to get to school. He tried "to hug me" but she pushed his arms away. They left. He took her to the college to enroll. When they left the

college, "Tony drove her." She first went to cash her government check. Appellant took her to "like a pawn shop" where he knew a man who would cash the check because Robin did not have an ID card. Then she went to get some shoe polish to polish her boots, and after she bought the polish, the two drove but in the car--she noticed that he was not taking her home. Again they went to appellant's house. When they arrived, appellant's mother was there. He went up the steps and told Robin to come too. But for the time being she stayed in the living room. Koonce again asked her to come upstairs. The mother said, "It's okay, baby. You can go up." She then went upstairs to appellant's room. She sat on a stool next to the bed. She was looking through some books. Appellant was rearranging his clothes. After he took a phone call and turned on music "real loud", "he came over and started trying to touch me and feel me and stuff." Robin told him "to stop." Then appellant "picked me up off the stool like and pushed me over to the bed and asked me if I thought I was tough or something." Then "he smashed my face down to the bed and started trying to pull my pants off and he couldn't get them off because I had on some boots and when he stood up to pull his pants down, I tried to run and he caught me and said if I did it again, that he was going to try and put me to sleep." When he pulled his pants down he was wearing a condom. Again, she tried to run and she was screaming. "When he was holding me down ... he told me if I did it again, he was going to [not try] put me to sleep." He raped her. She "was crying"; he put "his hand over [her] mouth." After the rape, "he made me turn over and he tried to put his penis in my behind." After the rape, "he made me turn over" and attempted sodomy per anum. He called her a "slut and a tramp." After these occurrences he made her "wash up," in the bathroom. Appellant said, "he's been through all this before and he knows what he's doing. I'm not going to have any evidence on him." After Robin "washed up," he took her back to the room and said, "he was going to call some of his friends over to finish the job." He made three calls. When she returned from the bathroom, he took a picture of Robin. Then he forced her to commit fellatio. After that, "he raped me again." Robin testified that she did not consent. She "washed up" again and they went downstairs and left the residence. Appellant took her home. It was then about 1:30 p.m.

When she arrived at her home, Robin called Tandelaya, according to Tandelaya about 1:30 p.m. Taydelaya testified Robin was hysterical, upset and crying and told her "Tony raped me." Robin called her mother at work and told her what happened. Her father came, then the police--Officer Robert Nowicki and Officer Sandra Stevens--and later her mother. Tandelaya also came to Robin's house. While they were all there, appellant called on the phone, Robin's father answered and "cursed and threatened" appellant. Robin "talked" to Detective Sandra Stevens. Later Robin and Stevens went to appellant's residence and identified appellant. He was arrested.

III

The thrust of appellant's first point is that the trial court erred in refusing to give his offered instructions on the defense of mistake of a reasonable belief that Robin had consented to the sexual acts. He contends that the court's refusal to give MAI-CR 2d 2.37.1.2 and other offered instructions dealing with a defense of mistake as to consent was error because there was evidence that the prosecutrix voluntarily accompanied appellant to his bedrom on two occasions and spent several hours with him without making any resistance or outcry or attempt to escape thus showing that there was evidence that appellant mistakenly believed that she consented to the sex acts. Appellant offered Instruction E, based on MAI-CR 2d 2.37.1.2 which would have informed the jury that if it found that defendant believed Robin consented or whether defendant acted recklessly[2] with regard to her

[2]Recklessly is defined in section 562.016.4, R.S.Mo. as "when he consciously disregards a substantial and unjustifiable risk that ... a result will follow and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise ..." Rape and sodomy can be committed "recklessly." State v. Dighera, 617 S.W.2d 524, 533 (Mo.App.1981)--that is done with an awareness of the risk and a conscious disregard of that risk.

consent, and if he believed she consented or had a reasonable doubt as to whether he was reckless as to consent then it must find defendant not guilty.

The court gave the MAI-CR 2d 20.02.1, the rape instruction without the fourth paragraph thereof relating to belief as to consent. The court refused to give the offered instructions as to a mistaken belief of consent because "there was no evidence of consent."

The burden of injecting the issue of mistaken belief of consent of the prosecutrix is upon the appellant. State v. Williams, 696 S.W.2d 809, 812 (Mo.App.1985); State v. Butler, 665 S.W.2d 41, 45 (Mo.App.1984). Before such instructions are required to be given this special negative defense must be "supported by enough evidence arising during the whole case to raise a reasonable doubt of defendant's guilt." State v. Stiers, 610 S.W.2d 83, 84 (Mo.App.1980), quoted in Williams, 696 S.W.2d at 813. The defendant's burden is not met "by statements of the defense which self-serve, but nothing more." Butler, 665 S.W.2d at 45; Williams, 696 S.W.2d at 812.

The broad issue of mistaken belief of consent as to when an instruction of the special negative defense is to be given based upon MAI-CR 2.37.1.2 has been thoroughly and analytically discussed in State v. Williams, 696 S.W.2d 809 (Mo.App.1985). Expounding on State v. Beishir, 646 S.W.2d 74, 79 (Mo. banc 1983), the Western District held in Williams that "[t]he only sensible basis for an instruction upon mistaken belief as to consent and as to its being a viable special negative defense is if the belief is a reasonable belief." Williams, 696 S.W.2d at 813; State v. Lint, 657 S.W.2d 722, 727 (Mo.App.1983).

This view of the question of mistaken belief as to consent of a victim in rape cases has been the subject of numerous decisions in other jurisdictions. Usually the issue arises regarding a mistaken belief as to the age of the victim. See 65 Am.Jur.2d, Rape, s 36 (1972); Annot., 8 A.L.R.3d 1100; see Richardson, Sexual Offenses Under the Proposed Criminal Code, 38 Mo.L.Rev. 371, 388 (1973); Cf. People v. Hernandez, 61 Cal.2d 529, 39 Cal.Rptr. 361, 393 P.2d 673, 8 A.L.R.3d 1092 (1964). When the issue arises as to a mistaken belief of consent, it is axiomatic that such belief must be a reasonable and honest one. United States v. Short, 4 USCMA 437, 16 CMR 11 (1954)-- American soldier "propositioning" a Japanese woman who could not speak English; United States v. Carr, 18 M.J. 297 (CMA 1984); See R.M. Perkins, Criminal Law 940 (2d ed. 1969).

The evidence in the case at bar does not require a mistaken belief of consent instruction. The court did not err in concluding that there was no evidence of consent. The fact that Robin went to defendant's room, that she did so without resistance and spent some time with him does not amount to consent nor a reasonable and honest belief that she consented to the acts committed by appellant. Robin testified that she did not encourage the appellant or consent. She testified she tried to run away and that she was crying and screaming and that appellant put his hand over her mouth and told her that if she struggled again, "he was going to put [her] to sleep." The evidence does not support an inference of a reasonable and honest belief that she consented to the sexual acts.

Under the circumstances there was no error on the part of the trial court in refusing to give offered Instruction E or others relating to a mistaken belief of consent.

This point is denied.

STATE v. KILMARTIN
Missouri Court of Appeals, Western District
904 S.W.2d 370 (1995)

Before SPINDEN, P.J., and ULRICH and SMART, JJ.

SPINDEN, Presiding Judge.

[Kilmartin was convicted of forcible sodomy and sentenced to life in prison.] . . . His complaint is that the state did not present sufficient evidence from which the jury could have found "forcible compulsion." . . .

The instruction defined "forcible compulsion" according to § 556.061(12)(a): "[p]hysical force that overcomes reasonable resistance[.]" Kilmartin contends:

> [T]here was no evidence of any actual physical force used against [M.J.S]. In fact, [Kilmartin] expressly repudiated any intention of using force against [M.J.S]. A mere statement that force could be used does not constitute "physical force that overcomes reasonable resistance", as required by Section 556.061(12) to establish "forcible compulsion."

Kilmartin asserts that because the state did not establish forcible compulsion, the trial court erred in (1) overruling his motions for judgment of acquittal at the close of the state's evidence and at the close of all of the evidence; (2) submitting the count to the jury; (3) accepting the jury's verdict of guilty on the count; and (4) sentencing Kilmartin to life in prison on the count.

The incident for which Kilmartin was charged occurred while Kilmartin was alone in his house with 11-year-old M.J.S. lifting weights. M.J.S. had met Kilmartin at a skating rink where Kilmartin was a "disc jockey" and "floor guard." Kilmartin, who was 30-years-old at the time of trial, fostered a friendship with M.J.S. by taking him to movies, letting him into the skating rink without paying, letting him use speed skates without charging him, buying him food, and having him spend the night at his house once or twice when other boys M.J.S.' age were there. M.J.S. considered Kilmartin to be his friend.

On Sunday evening, on March 17, 1991, Kilmartin called M.J.S. and asked whether he wanted to go skating. M.J.S. agreed. His parents were napping, so he did not ask their permission, but they had forbidden his returning to Kilmartin's house. M.J.S. walked down the street from his house and waited for Kilmartin to pick him up. When Kilmartin arrived, he told M.J.S. that he was hungry and suggested going to a shopping mall to get food. The mall was closed when they arrived. Although the skating rink was still open, Kilmartin suggested going to his house to learn karate instead of skating.

Alone at Kilmartin's house, Kilmartin showed M.J.S. some karate moves, and they later began lifting weights. As they worked with the weights, Kilmartin asked M.J.S. whether he wanted "a penis massage." M.J.S. answered, "No." He later asked again, and M.J.S. again said no. Kilmartin moved behind M.J.S. as M.J.S. sat on a weight bench. Kilmartin grabbed him and, while holding M.J.S., said, "I could force you, but I'm not that kind of guy." This frightened M.J.S., but Kilmartin asked again once or twice. Kilmartin asked still again, and M.J.S. finally relented.

Kilmartin told him to go to the bedroom and to lie on the bed. As M.J.S. laid on the bed, Kilmartin stood beside it and told the boy to pull down his pants. M.J.S. did not comply until Kilmartin told him a second time. M.J.S. was still frightened when he pulled down his pants and closed his eyes. Kilmartin massaged M.J.S.'s penis for 20 to 30 seconds.

M.J.S.' mother interrupted the episode by driving her car into Kilmartin's driveway. When he heard the car, Kilmartin stopped. He and M.J.S. went out to the car. M.J.S. got in and left with his mother.

His mother said nothing to Kilmartin.

M.J.S.' parents were angry that he had gone to Kilmartin's house. M.J.S. did not volunteer any information about the incident until, back home, M.J.S.' father asked him what had happened. M.J.S. told him of Kilmartin's "penis massage," and his father called the police.

This was sufficient for the jury to find physical force which would overcome reasonable resistance. Kilmartin acknowledges that M.J.S. testified that he was "scared," but argues that Kilmartin did not exert "actual physical force." He is wrong.

"Physical force" is "[f]orce applied to the body[.]" BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). Kilmartin's holding M.J.S. and grabbing him was force applied to M.J.S.' body.

The totality of the circumstances determines whether this was physical force which would overcome reasonable resistance. Reasonableness is that which is "suitable under the circumstances." BLACK'S at 1265. Such circumstances in this context would include the ages of the victim and the accused; the atmosphere and setting of the incident; the extent to which the accused was in a position of authority, domination and control over the victim; and whether the victim was under duress. "[T]he law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury." State v. R--- D--- G---, 733 S.W.2d 824, 827 (Mo.App.1987).

Under the circumstances of this case, Kilmartin's physical force was sufficient to overcome an 11-year-old boy's reasonable resistance. Kilmartin, while exerting his physical force, threatened further force in no uncertain terms. He repeatedly asked for M.J.S.' consent, to the point that coupled with the threat, it became demanding. They were alone in Kilmartin's house where Kilmartin controlled and dominated and where M.J.S. would likely feel trapped. Although he put the boy under duress by frightening him, he persisted until M.J.S. succumbed.

Kilmartin did not use a weapon or twist M.J.S.' arm, but he exerted force which was every bit as overpowering as a gun. Kilmartin reinforced his physical force--grabbing the boy and holding him--with many psychological factors intended to instill fear and wear down the boy's resistance. Kilmartin calculatedly increased his pressure on the boy: first coaxing him with favors and requests before resorting to threats and physical force. It became apparent to M.J.S. that resistance would be unsuccessful, and he succumbed to Kilmartin's overwhelming tactics. Kilmartin intended his physical force to subdue any notion of resistance. Although this case is near the outer limits as to what constitutes forcible compulsion, we conclude that the jury's verdict was reasonable and supported by sufficient evidence. No one looking at this situation with any amount of objectivity could conclude, as Kilmartin asserts, that M.J.S.' consented.

Kilmartin cites us to State v. Daleske, 866 S.W.2d 476, 478 (Mo.App.1993), in which the court suggested in dicta that a perpetrator's using his hands to guide a girl's mouth to his penis was not physical force. The state in that case, however, had not submitted the definition in § 556.061(12)(a), used in this case, but had used the alternative definition in § 566.061(12)(b). [FN3] Because the Daleske court's holding did not concern § 556.061(12)(a), it made its suggestion in passing and did not consider whether the totality of the circumstances would render the force exerted to be sufficient. We do not find any guidance in Daleske.