

State v. Flynn
329 P.3d 429 (Kan. 2014)

The opinion of the court was delivered by MORITZ, J.

[Defendant was convicted of one count of rape, and the jury acquitted on five other charges, including aggravated kidnapping and two counts of rape. Defendant appealed, arguing that the trial court should have given an instruction under *State v. Bunyard*, 133 P.3d 14 (Kan. 2006), that “sex can cease to become consensual if the consent is withdrawn after penetration and the intercourse continues either by force or fear, however, the defendant is allowed a ‘reasonable time’ in which to act upon the withdrawal of consent.” The Court of Appeals agreed and overturned the conviction. On appeal to the Kansas Supreme Court, the state argued that *Bunyard* was incorrectly decided in giving a defendant a “reasonable time” in which to act after consent is withdrawn and communicated to the defendant.]

We disapprove *Bunyard*’s “reasonable time” holding because it is contrary to the plain language of the rape statute and without legal support.

The State does not question *Bunyard*’s holding that “a person may be convicted of rape if consent is withdrawn after the initial penetration but intercourse is continued by the use of force or fear.” Instead, the State urges us to disapprove *Bunyard*’s conclusion that “the defendant should be entitled to a reasonable time in which to act after consent is withdrawn and communicated to the defendant.” We agree with the State that this portion of *Bunyard* must be disapproved.

Simply stated, *Bunyard*’s conclusion that a defendant should be entitled to a “reasonable time” to discontinue intercourse with a nonconsenting partner is contrary to the plain language of the rape statute, is inconsistent with *Bunyard*’s own interpretation of the rape statute as encompassing the crime of post-penetration rape, and is not supported by the authorities the *Bunyard* panel considered or relied upon to reach its conclusion. We therefore disapprove *Bunyard*’s holding on this point.

But as *Bunyard* recognized, Kansas’ rape statute “proscribes all nonconsensual intercourse that is accomplished by force or fear, not just the initial penetration. Thus, a person may be convicted of rape if consent is withdrawn after the initial penetration but intercourse is continued by the use of force or fear.” That portion of our holding in *Bunyard* is consistent with the plain language of K.S.A. 21–3502(a)(1)(A), and we reaffirm it today.

Our modification of *Bunyard*’s holding means that when a party presents evidence demonstrating the victim initially consented to sexual intercourse but later withdrew consent, the critical issue for the jury is whether the defendant continued the intercourse through compulsion despite the victim’s withdrawal of consent. It is the continuation of nonconsensual intercourse by compulsion that makes the offender’s act rape, not the offender’s failure to immediately respond to the victim’s withdrawal of consent.

We reaffirm *Bunyard*'s conclusion that the rape elements instruction does not adequately state the law in post-penetration rape cases arising from acts committed before July 1, 2011.

Thus, despite our disapproval of *Bunyard*'s "reasonable time to withdraw" language and its definition of "reasonable time," we reaffirm its conclusion that when evidence is presented involving post-penetration withdrawal of consent, the trial court must do more than simply instruct the jury on the statutory elements of rape. Instead, in such cases, in addition to the rape elements instruction, the trial court must instruct the jury that rape may occur even though consent was given to the initial penetration, but only if the consent is withdrawn, that withdrawal is communicated to the defendant, and the sexual intercourse continues when the victim is overcome by force or fear.

We note, however, that because the legislature amended the rape statute in 2012, our decision requiring an additional jury instruction is limited to those cases in which the rape is alleged to have occurred before July 1, 2011. In amending the rape statute, the legislature provided that effective July 1, 2011: "[I]t shall not be a defense that the offender did not know or have a reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A.2013 Supp. 21-5503(e). Because Flynn was convicted of rape for an offense that occurred in 2007 and the controlling statute, K.S.A. 21-3502(a)(1)(A) (2007), did not contain the language now found in K.S.A.2013 Supp. 21-5503(e), we leave for another day whether a modified *Bunyard* instruction would remain appropriate in cases arising under K.S.A.2013 Supp. 21-5503(a)(1)(A) for offenses committed after July 1, 2011.

Under the facts of this case, we are not firmly convinced the district court's failure to instruct the jury on the issue of withdrawn consent was harmless. * * *

As we have just concluded, a modified *Bunyard* instruction must be given when the jury has heard evidence from any source regarding a post-penetration withdrawal of consent. Thus, a modified *Bunyard* instruction is unique in that if it is factually appropriate, it is necessarily legally appropriate. And, like the panel majority, we conclude the instruction was factually appropriate in this case.

Here, A.S. testified she never consented to intercourse with Flynn. But Flynn testified A.S. initially consented but withdrew her consent after penetration. Because the jury heard evidence of both consensual intercourse and withdrawn consent, we conclude a modified *Bunyard* instruction was factually, and consequently, legally appropriate. * * *

Accordingly, we affirm the Court of Appeals decision, reverse Flynn's rape conviction, and remand for a new trial with a supplemental instruction based on *Bunyard* as modified by this opinion