

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1995 Term

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No. 22580

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STATE OF WEST VIRGINIA,  
Plaintiff Below, Appellee

v.

DEE HOTTINGER,  
Defendant Below, Appellant

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Appeal from the Circuit Court of Pendleton County  
Honorable Donald H. Cookman, Judge  
Criminal Action No. 94-F-4

AFFIRMED

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Submitted: May 16, 1995  
Filed: July 14, 1995

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This Opinion was delivered PER CURIAM.

JUSTICE BROTHERTON AND JUSTICE RECHT did not participate.  
JUDGE FOX and RETIRED JUSTICE MILLER sitting by temporary assignment.  
JUSTICE CLECKLEY concurs, in part, and dissents, in part, and  
reserves the right to file a separate opinion.

## SYLLABUS BY THE COURT

1. "'The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with his position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.' Syl. pt. 3, State v. Boyd, 160 W. Va. 234, 233 S.E.2d 710 (1977). Syl. pt. 1, State v. Critzer, 167 W. Va. 655, 280 S.E.2d 288 (1981).

2. "'An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.' Syllabus, State v. Moose, 110 W. Va. 476, 158 S.E. 715 (1931). Syl. pt. 2, State v. Critzer, 167 W. Va. 655, 280 S.E.2d 288 (1981).

3. "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or

result in manifest injustice." Syl. pt. 1, State v. Dunn, 162 W. Va. 63, 246 S.E.2d 245 (1978).

4. "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978).

5. "'The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.'" Syllabus Point 1, State v. Louk, 169 W. Va. 24, 285 S.E.2d 432 (1981)." Syl. pt. 1, State v. Neider, 170 W. Va. 662, 295 S.E.2d 902 (1982).

Per Curiam:

The appellant, Dee Hottinger, appeals his jury conviction in the Circuit Court of Pendleton County of sexual assault in the second degree and sexual assault in the third degree. The appellant was sentenced to serve not less than ten nor more than twenty-five years in prison and fined \$1000.00 for his conviction of sexual assault in the second degree. The appellant was also sentenced to serve not less than one nor more than five years in prison and fined \$1000.00 for his conviction of sexual assault in the third degree, with both sentences running concurrently.

The appellant raises four assignments of error which are as follows: (1) error was committed in the prosecutor's opening statement and closing argument; (2) the evidence was insufficient to support a jury finding of forcible compulsion pursuant to W. Va. Code, 61-8B-4 [1991], which outlines the elements of second degree sexual assault; (3) the evidence was insufficient to support a third degree sexual assault conviction pursuant to W. Va. Code, 61-8B-5 [1984]; and (4) the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. For the reasons set forth below, we affirm the appellant's conviction.

There was conflicting evidence presented at trial. The victim, M.A., was fifteen years old when the sexual assault occurred.

According to M.A., in the late summer of 1993 the appellant, who was then forty-nine years old, came by her family's house one evening and asked to have sex with M.A.'s mother. After the appellant left the house, M.A.'s mother informed her boyfriend, George Miller, that she would not comply. Miller then told M.A. that she would, instead, have to have sex with the appellant for money. M.A. asserts that she told Miller that she did not want to have sex with the appellant.

However, M.A. states that because she feared being physically harmed by Miller, she got into the car with Miller and went to the appellant's house.

When Miller and M.A. arrived at the appellant's house, the appellant came outside to the car. Miller asked the appellant if he wanted sex for some beer money. The appellant said yes. Thus, while Miller remained in the car, M.A. went into the house and into the bedroom where she began disrobing. According to M.A., the appellant became rough and ripped off her bra, thereafter engaging in sexual intercourse with her.

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Since this case involves sensitive matters, we follow our traditional practice and use only the last initial of the juvenile involved in this case. See State v. Michael S., 188 W. Va. 229, 230 n. 1, 423 S.E.2d 632, 633 n. 1 (1992) (citation omitted).

The appellant admits to having sexual intercourse with M.A., but denies being rough with her. The appellant also denies that he went to M.A.'s family home and asked to have sex with M.A.'s mother. The appellant states that Miller and M.A. just showed up outside his house and asked whether or not he wanted to have sex with M.A. for beer money. Moreover, the appellant states that he thought M.A. was about eighteen-years old. The appellant also asserts that he did not know that Miller was forcing M.A. to have sex with him.

## II

The appellant argues that the prosecutor's remarks during the opening statement and closing argument constituted error. We are mindful that

'[t]he prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.' Syl. pt. 3, State v. Boyd, 160 W. Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 1, State v. Critzer, 167 W. Va. 655, 280 S.E.2d 288 (1981).

The appellant specifically complains about two statements made by the prosecutor during his opening statement. The first statement made by the prosecutor was that

[t]he evidence in this case against [the appellant] will show that George Miller made it well known that people could have sexual intercourse with [M.A.]; as a matter of fact, he would brag; he would say things like this girl has a figure that she has because of me.

He would also say to people--and one of the selling points to people to get her to have sexual intercourse, and one of the things he would tell his buddies and these guys who were paying her or whatever, was that she's only fifteen; that was a selling point for George Miller.

Although the appellant does not explain in his brief why the above statement was error, at the June 10, 1994 hearing on his motion for a new trial, the appellant argued that the above statement was objectionable because it referred to other defendants and to facts not in evidence.

We acknowledge that in syllabus point 2 of Critzer, supra, this Court held the following in reference to a prosecutor's statements in closing argument:

'An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.'

Syllabus, State v. Moose, 110 W. Va. 476, 158 S.E.2d 715 (1931).



However, this Court has held that "[a] judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 1, State v. Dunn, 162 W. Va. 63, 246 S.E.2d 245 (1978) (This Court also stated that improper remarks made by a prosecutor in a closing argument would not warrant reversal if the defendant was not prejudiced and if manifest injustice did not occur). See also State v. Stewart, 187 W. Va. 422, 426-28, 419 S.E.2d 683, 687-89 (1992) (This Court applied the above test set forth in Dunn, supra, to comments made by a prosecutor during closing argument).

The prosecutor explained in the record that he thought that evidence would be introduced at trial to support the above statements and was surprised when M.A.'s testimony revealed that Miller had not made those comments to the appellant in her presence.

Although the prosecutor should not refer to material facts which will not be introduced at trial during an opening statement, it is less likely to warrant reversal than if the prosecutor argues facts which he knows have not been introduced into evidence during closing argument.

Moreover, as the above statement by the prosecuting attorney reveals, he prefaced his remark with the following: "The evidence in this case [against the appellant] will show . . . ."

Additionally, at the beginning of his opening statement, the prosecutor informed the jury that

as the Judge indicates, what I will tell you is not evidence in this case. The evidence in the case will come from the witness stand, because I'm not under oath . . . . The purpose of an opening statement is simply to tell you what we believe the evidence will show in this case.

Thus, while it is clear that the prosecutor misstated what evidence would be introduced at trial, the appellant has failed to show that it clearly prejudiced him or resulted in manifest injustice given the fact that the prosecutor expressly informed the jury that his opening statement was not evidence. Cf. State v. Barker, 168 W. Va. 1, 281 S.E.2d 142 (1981) (Statements by prosecuting attorney during closing were deplorable and may have been improper because they were not based on evidence; however, they did not warrant reversal because they did not clearly prejudice the accused or result in manifest injustice).

The appellant also complains about the following statement made by the prosecutor during his opening statement after he had described the two charges against the appellant: "That's the two offenses that this man is guilty of." The appellant asserts that the prosecutor impermissibly gave his opinion on appellant's guilt.

Indeed, this Court in syllabus point 3 of Critzer, supra, has stated that "[i]t is improper for a prosecutor in this State to '[a]ssert his personal opinion as to the . . . guilt or innocence of the accused[.]'" (citation omitted). However, as the State points out, the prosecutor went on to say that

[t]he Judge instructed you that it's the burden upon the State to prove this matter beyond a reasonable doubt. Ladies and gentlemen of the jury, when you hear this evidence, you will find proof beyond a reasonable doubt that this man committed both of the offenses for which he's charged.

Thus, although we do not condone the prosecutor's statement that he had described the two offenses the appellant was guilty of, the statement which followed clearly informed the jury that it was their duty to determine whether or not the appellant was guilty of the two offenses he was charged with committing. Therefore, the appellant has failed to show that the prosecutor's statement clearly prejudiced him or resulted in manifest injustice.

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We point out that the appellant did not properly preserve this error below. After the prosecutor made the statement above, the appellant's trial attorney told the trial judge that he would like to place an objection on the record.

The trial judge asked the appellant's trial attorney whether he wanted to place the objection on the record at that time; however, the appellant's trial counsel declined to do so stating that he preferred to give his opening statement. Our review of the record discloses that the appellant's trial attorney did not later place an objection on the record regarding the above statement. Moreover, in that we find that the above statement by the prosecutor was not an error requiring reversal, the plain error doctrine is not

See State v. Buck, 170 W. Va. 428, 294 S.E.2d 281 (1982) (Prosecutor's remark that it was his personal belief that the defendant was trying to kill the victim, while not condoned, was not reversible error since it did not clearly prejudice the accused or result in manifest injustice). Compare Critzer, supra (Prosecuting attorney's statements during closing argument injected his personal opinion as to the guilt of the defendant, as to the credibility of witnesses and argued facts not in evidence, thereby requiring reversal because prejudicial to defendant and denied him a fair trial).

The appellant also complains about several remarks made by the prosecutor during his closing argument. However, we will address only two remarks because the appellant failed to object below to any of the other remarks which he now complains of on appeal:

"In order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them." State v. Coulter, 169 W. Va. 526, 530, 288 S.E.2d 819, 821 (1982) (citing State v. Lewis, 133 W. Va. 584, 57 S.E.2d 513 (1949)).

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implicated. See syl. pt. 7, State v. Miller, No. 22571, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 18, 1995).

We recognize that we could address the appellant's contentions

The first objection from the appellant came after the prosecuting attorney started talking about money being exchanged for the sexual activity between M.A. and the appellant. The appellant pointed out that prostitution had not been charged. The trial judge, after the appellant's objection, made the following statement to the jury:

The jury will remember that you will base your decision on the evidence that you've heard, not on the argument of counsel; however, each of the attorneys are permitted to argue the law and the evidence and any reasonable inferences therefrom, but it is not evidence, and you would base your decision only on the evidence.

On the second occasion the appellant objected to the following statement: "I'm confident on behalf of the State of West

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pursuant to the plain error doctrine even though the appellant failed to object to the comments when they were made. In syllabus point 7 of State v. Miller, No. 22571, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 18, 1995) this Court held that in order "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." See also syl. pt. 4, in relevant part, State v. England, 180 W. Va. 342, 376 S.E.2d 548 (1988) (The plain error "doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.")

However, in that our review of the prosecutor's closing argument fails to disclose that the comments seriously affected the fairness, integrity, or public reputation of the judicial proceeding, the plain error doctrine is not implicated. See Miller, supra.

Virginia that the kids in this community are going to be protected from incidents like this in the future, and that you will find [the appellant] guilty[.]" The trial judge instructed the jury to disregard the above remark by the State.

In light of the trial judge's actions regarding the above two remarks made by the prosecutor during his closing argument, the appellant has failed to show how the remarks clearly prejudiced him or resulted in manifest injustice. Accordingly, we hold the remarks by the prosecutor during his opening statement and closing argument do not require reversal.

### III

The appellant asserts that the evidence was insufficient to support a jury finding of forcible compulsion pursuant to W. Va. Code, 61-8B-4 [1991], which outlines the elements of second degree sexual assault.

W. Va. Code, 61-8B-4(a)(1) [1991] states, in relevant part: "A person is guilty of sexual assault in the second degree when: (1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion[.]" Furthermore, W. Va. Code, 61-8B-1(1)(c) [1986] defines "forcible compulsion" as, inter alia, "[f]ear by a child under sixteen years of age caused

by intimidation, expressed or implied, by another person four years older than the victim."

In the case before us, the State stipulated that the appellant did not forcibly compel M.A. to have sexual intercourse.

Instead, the State indicated, without objection from the appellant, that the forcible compulsion came from Miller and that the appellant was aware that Miller, who was four years older than M.A., intimidated M.A., who was younger than sixteen years old, into having sexual relations with the appellant against her will. The appellant argues

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The appellant did not object to the following instruction given by the trial judge:

Forcible compulsion is defined as fear by a child under 16 years of age caused by intimidation, expressed or implied, by another person four years older than the victim and of which the Defendant had knowledge.

Before [the appellant] can be convicted of Sexual Assault in the Second Degree, the State must over come the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt

UNDER COUNT ONE OF THE INDICTMENT THAT:

1. The [appellant]
2. in Pendleton County, West Virginia
3. did engage in sexual intercourse
4. with [M.A.]
5. without her consent
6. and the lack of consent was the  
result of forcible compulsion  
known to the Defendant.

that the evidence does not support a jury finding that the appellant knew M.A. was being forced or intimidated by Miller into having sexual relations with him.

We are mindful of the following:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution.

To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

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Furthermore, the appellant does not assert in this appeal that forcible compulsion cannot be found to arise from one other than the one committing the sexual assault pursuant to W. Va. Code, 61-8B-4 [1991]. Therefore, we will not address whether or not the forcible compulsion necessary for conviction of second degree sexual assault pursuant to W. Va. Code, 61-8B-4(a)(1) [1991] must be proven to have come from the appellant. See syl. pt. 3, Higginbotham v. City of Charleston, 157 W. Va. 724, 204 S.E.2d 1 (1974), overruled on other grounds, O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977) ("Assignments of error that are not argued in the appellant's brief may be deemed by this Court to be waived.")

We note, however, that at least one court has recognized that a defendant may be guilty of rape even if the victim submits because of fear from one other than the defendant if the defendant has knowledge that the victim is submitting because of such fear. See State v. Pierson, 610 S.W.2d 86 (Mo. Ct. App. 1980) and State v. Gray, 497 S.W.2d 545 (Mo. Ct. App. 1973).



Syl. pt. 1, State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978).

See also syl. pt. 10, State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992).

When examining the evidence in the light most favorable to the prosecution, the evidence indicates that the jury could find that the appellant knew that M.A. was being forced by Miller into having sexual relations with him. M.A. testified that her mother started living with Miller when M.A. was two years old. The appellant asserts that he first met M.A. approximately two years previously when she would have been thirteen years old. However, M.A. testified that the appellant had been to her house approximately twice a month over a three- or four-year period at which time M.A. would have been approximately eleven to fifteen years old. Moreover, the appellant testified that he had known Miller off and on over a ten-year period. Thus, the jury could logically infer that the appellant knew M.A., knew how old she was and knew that Miller was like a stepfather to her.

Additionally, as we previously stated, M.A. testified that before Miller took her to the appellant's house, the appellant had stopped by her house and asked Miller if he could have sex with M.A.'s mother. After the appellant left the house, M.A.'s mother informed Miller that she would not comply, and Miller informed M.A. that she, instead, would have to have sexual relations with the appellant.

M.A. concedes that the appellant was not at her house when Miller demanded that she have sexual relations with the appellant. However, the appellant obviously knew something was amiss because he testified that he found it strange that Miller and M.A. showed up at his house and asked him if he wanted sex for some beer money.

When viewing the evidence in the light most favorable to the prosecution, it is clear that the jury could reasonably infer that the appellant knew that a girl who is younger than sixteen years old would not willingly allow someone who is like a stepfather to pander her sexual services in exchange for beer money. Thus, in that the jury could infer that the appellant knew that M.A., a child less than sixteen years of age, was being intimidated by Miller, who was four years older than M.A., into having sexual relations with him, it is clear that the jury could have found that there was sufficient evidence of forcible compulsion to support a finding of guilt of sexual assault in the second degree pursuant to W. Va. Code, 61-8B-4(a) (1) [1991] and 61-8B-1(1) (c) [1986].

Accordingly, when viewing the evidence in the light most favorable to the State the appellant has failed to convince us that the evidence was "manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, Starkey, supra.

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We acknowledge that Justice Cleckley has criticized the use of Starkey, supra, as "the appellate standard for reviewing an

#### IV

The appellant argues that the evidence was insufficient to support a conviction of third degree sexual assault. W. Va. Code, 61-8B-5(a) (2) [1984] outlines the elements of sexual assault in the third degree: "A person is guilty of sexual assault in the third degree when: . . . (2) Such person, being sixteen years old or more, engages in sexual intercourse or sexual intrusion with another person who is less than sixteen years old and who is at least four years younger than the defendant."

The evidence at trial reveals that the appellant was forty-nine years old and M.A. was fifteen years old when the sexual assault occurred. The appellant asserts that he has an affirmative defense pursuant to W. Va. Code, 61-8B-12(a) [1984] since he did not know M.A.'s age when the incident occurred nor was he reckless

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insufficiency of the evidence assignment of error." State v. Phalen, \_\_\_ W. Va. \_\_\_, 452 S.E.2d 70, 74 (1994) (Cleckley, J., concurring). Justice Cleckley states that the manifest injustice standard is too high of an evidentiary standard and should be replaced by the following: "[O]n appeal of a criminal conviction, this Court must consider the evidence in the light most favorable to the prosecution and ask whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at \_\_\_, 452 S.E.2d at 75.

If we were to apply the standard of review suggested by Justice Cleckley, we would reach the same result in the case before us. When viewing the evidence in a light most favorable to the prosecution, a rational finder of fact could have found, beyond a reasonable doubt, that the appellant committed second degree sexual assault.

in failing to discover that information. The appellant bases his argument on M.A.'s appearance and on the fact that he had heard that M.A. was getting married.

The jury was instructed on the affirmative defense pursuant to W. Va. Code, 61-8B-12(a) [1984], and the jury saw M.A. in person along with a picture taken of her around the time M.A. and the appellant engaged in sexual intercourse. Therefore, the jury could rationally find that the appellant, who was more than four years older than M.A. knew that M.A. was younger than sixteen years old. Thus, pursuant to Starkey, supra, when viewing the evidence in a light most favorable to the prosecution, the appellant has failed to demonstrate that "the evidence was manifestly inadequate and that consequent injustice has been done."

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W. Va. Code, 61-8B-12(a) [1984] states, in relevant part:

In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, . . . it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

As we indicated in n. 4, supra, Justice Cleckley criticizes the use of Starkey, supra as the standard of review in a sufficiency of the evidence assignment of error. However, even if we were to apply the standard of review recommended by Justice Cleckley, we would

The appellant asserts that the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. In syllabus point 1 of State v. Neider, 170 W. Va. 662, 295 S.E.2d 902 (1982) this Court held:

'The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.'  
Syllabus Point 1, State v. Louk, 169 W. Va. 24, 285 S.E.2d 432 (1981).

The offense of fornication is not defined in W. Va. Code, 61-8-3 [1923] which makes it a crime. According to the State, the appellant offered the following definition of fornication in his instruction which was refused: "[Fornication is the] unlawful sexual intercourse between two unmarried persons."

Clearly, based upon the above definition, fornication is not a lesser included offense of second degree or third degree sexual assault. Second degree sexual assault involves forcible compulsion

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reach the same result in the case before us: When viewing the evidence in a light most favorable to the prosecution, a rational finder of fact could have found, beyond a reasonable doubt, that the appellant committed third degree sexual assault. See n. 4, supra.

whereas fornication does not. The portion of the third degree sexual assault statute which is applicable to the appellant mandates that the victim must be less than sixteen years old, whereas fornication does not have to involve a victim who is less than sixteen years old. Accordingly, this issue is without merit.

VI

In that the appellant raises no assignment of error requiring reversal, we affirm his conviction of second and third degree sexual assault.

Affirmed.