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Court of Appeals No. 38801-8-III
Chelan County Superior Court No. 18-1-00395-04

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Petitioner

v.

Blake Alexander Badgley, Respondent

PETITION FOR REVIEW

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I. Identity of Petitioner

The State of Washington (as petitioner) petitions this Court for discretionary review of the Court of Appeals decision as designated in part II of this petition.

II. Decision Below

The State seeks discretionary review of the Court of Appeals decision in this case that was filed July 27, 2023. Specifically, the State seeks review of the lead opinion by Judge Fearing. No motion for reconsideration was filed.

III. Issues Presented for Review

- A. Does the Double Jeopardy Clause prohibit retrying a second-degree rape charge (involving capacity to consent) where the jury acquitted Badgley of third-degree rape (involving clearly expressing a lack of consent)?

B. Pursuant to RAP 2.4 and RAP 2.5(a), did the Court of Appeals err in raising two issues in the decision that were not raised by either party or briefed: (1) whether the State was unethical in filing the charge of third-degree rape and (2) whether the doctrine of judicial estoppel applied?

IV. Statement of the Case

On August 10, 2021, the State charged Badgley with one count of second-degree rape and one count of third-degree rape. CP 135. Trial commenced on September 7, 2021, and on September 22, 2021, the jury found Badgley not guilty of third-degree rape, and the court declared a mistrial on the second-degree rape based on the jury's inability to reach a verdict. CP 237.

Prior to closing argument, the court instructed the jury that for second-degree rape, the jury had to find S.S. "was incapable of consent by reason of being physically helpless," CP 212, and that "a person is physically helpless when the person is unconscious or for any other reason is physically unable to

communicate unwillingness to an act.” CP 214; *see also* RCW 9A.44.050(1)(b). For third-degree rape, the court instructed that the jury had to find that S.S. “did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct.” CP 216; *see also* RCW 9A.44.060(1)(a) (2018)¹.

Subsequent to the trial, Badgley filed a motion to dismiss the second-degree rape charge based on a double jeopardy argument. CP 281. The court denied Badgley’s motion, concluding that because “the acquittal cannot show that the jury necessarily decided the issue of the alleged victim’s capacity to consent the Motion to Dismiss is denied.” CP 283. The court further expounded on this conclusion by noting the fundamental difference between second-degree rape (capacity to consent) and third-degree rape (lack of consent).

¹ Subsequent to this incident, RCW 9A.44.060 was amended to remove the “clear expression of lack of consent” prong of the consent element.

Badgley appealed the trial court's decision denying the motion to dismiss the second-degree rape charge. In its majority opinion, the Court of Appeals reversed the trial court's decision and dismissed the second-degree rape. Judge Lawrence-Berrey signed in concurrence, but only as to the result. Opinion at 28.

In support of its holding, Judge Fearing concluded that "collateral estoppel, as incorporated by the double jeopardy clause, precludes the State from continuing its prosecution for second degree rape." Opinion at 9. The court further reasoned that "Badgley's jury necessarily found that [S.S.] was not asleep, but rather was sufficiently conscious to be able to express a lack of consent for purposes of third-degree rape." Opinion at 21.

The court rejected the State's argument that, due to the disparate nature of the two charges, nothing about the second-degree rape could be deduced from the acquittal on the third-degree rape. In rejecting this argument, the court relied on the reasoning that "we must review the evidence in light of the arguments asserted by the parties during trial."

Finally, the court raised two new issues in its opinion: (1) the court strongly implied that the doctrine of judicial estoppel would apply and (2) concluded that the trial prosecutor had violated her ethical obligations by filing the charge. Opinion at 24. Neither of these issues were raised by either party.

Judge Staab wrote a dissenting opinion that concluded Badgley had not met his burden of showing that the acquittal necessarily decided the “identical” issue that will be required to prove second-degree rape. Dissent at 1. Judge Staab first noted that “Each crime requires proof of different facts.” Dissent at 2. She then elaborated that Badgley’s argument was based on a false premise:

The jury had to decide not only if Jane was sleeping, but whether sleeping was conduct that clearly expressed lack of consent. One interpretation of the jury’s acquittal and failure to reach a verdict is that they could not agree on whether Jane was sleeping, but did agree that even if she was sleeping, this did not clearly express a lack of consent. In other words, the jury could have rejected the State’s theory and reached its verdict without finding that Jane was awake. Because this scenario is reasonably possible (and legally sound), Badgley

cannot show that his acquittal on the third degree rape charge necessarily resolved whether Jane was awake or whether she was physically helpless. For this reason, collateral estoppel does not preclude the State from retrying the charge of second degree rape.

Dissent at 3 (footnote omitted).

In addition to dissenting with the majority on the issue of collateral estoppel, Judge Staab dissented on two additional points raised in the majority opinion. First, Judge Staab dissented with the majority opinion on the issue of judicial estoppel both procedurally (not raised by the parties) and substantively. Dissent at 5 (citing RAP 2.5(a)). Second, Judge Staab dissented with the majority with respect to its conclusion that the State had violated an ethical standard, noting that the State had simply made a concession on appeal and that Judge Fearing's conclusion regarding the prosecutor's ethics would "dissuade prosecutors from making valid concessions in the future." Dissent at 5.

On August 17, 2023, Badgley filed a motion to publish the opinion, arguing that the “issues addressed in the Decision are of substantial public interest.” This petition followed.

V. Argument: Grounds for Discretionary Review

The State seeks discretionary review under RAP 13.4. A petition for review will only be accepted by the Supreme Court if (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, (2) the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals, (3) a significant question of law under the Constitution of the State of Washington or the United States is involved, or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

In the present case, and as detailed below, review is proper because (1) the Court of Appeals’ decision is in conflict with a decision of the Supreme Court, (2) the Court of Appeals’ decision presents a significant question of law under the United

States Constitution, and (3) the decision involves an issue of substantial public interest.

A. The decision conflicts with prior Washington Supreme Court cases related to collateral estoppel in the double jeopardy context.

In Washington, collateral estoppel applies in a criminal context only where four questions are answered affirmatively:

Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine work an injustice on the party against whom the doctrine is to be applied?

State v. Eggleston, 164 Wn.2d 61, 72, 187 P.3d 233 (2007) (quoting *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). The defendant has the burden to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding. *Eggleston* at 72.

1. The decision conflicts with *Eggleston* and *Ashe* because it did not consider whether the jury could have grounded its verdict upon a different issue, as argued by the State.

“Where ‘a rational jury **could have** grounded its [general] verdict upon an issue other than that which the defendant seeks to foreclose from consideration,’ collateral estoppel will not preclude its relitigation.” *Eggleston* at 32 (quoting *Ashe*, 397 U.S. at 444) (emphasis added).

In *Eggleston*, the court expounded upon what these other considerations could be in the context of an acquittal where the relevant fact—for double jeopardy purposes—was whether the defendant had knowledge that the victim was a police officer. *Eggleston* at 73. It reasoned that “a rational jury could have grounded its ‘not guilty’ verdict on a number of factors other than Eggleston’s knowledge that Bananola was a police officer, including that Eggleston lacked premeditation. Thus collateral estoppel did not preclude the State from relitigating whether

Eggleston knew Bananola was a police officer in the third trial.”

Id.

In the decision in the present case, Judge Fearing concludes that “Badgley’s jury necessarily found that Jane was not asleep”; however, the decision fails to consider the State’s argument on appeal that there were a myriad of other, equally or more likely, factual issues the jury could have used to reach its verdict.

For example, the jury could have simply disagreed with the State’s tenuous argument at trial that sleep constituted a clear expression of lack of consent for purposes of third-degree rape. The jury could have concluded that the alleged victim’s overt interest in sexual activity earlier in the evening raised a reasonable doubt as to a clear expression of lack of consent. The jury could have concluded that the victim failed to clearly express a lack of consent after waking (and while the sex was ongoing). Any one of these findings lead to an acquittal on the

third-degree rape while obviating the need to address the issue of whether Jane was sleeping.

Ultimately, the jury could have acquitted without ever needing to reach the factual issue of whether the alleged victim was asleep, and this would be consistent with the non-guilty verdict on the third-degree rape and an inability to reach a verdict on the second-degree rape (where the question of whether the victim was asleep when the sex was initiated is the only factual issue in dispute). The decision's failure to consider these alternatives is inconsistent with this Court's prior holdings.

2. The decision conflicts with *Eggleston* and *Ashe* because it arbitrarily restricts consideration of the issues to what the State argued at trial.

In the decision, Judge Fearing implies that the court will not entertain the State's request to consider alternative issues the jury could have relied upon for its verdict: "Under double jeopardy jurisprudence, we must review the evidence in light of the arguments asserted by the parties during trial. The State

never argued this hypothetical to the jury or to the trial court.” Opinion at 21. However, there is no authority for this arbitrary restriction on the court’s consideration, and the jury is presumed to follow the instruction that counsel’s arguments are not evidence. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). Rather as discussed supra and required by *Eggleston* and *Ashe*, the court must consider whether a rational jury could have grounded its general verdict upon a different issue and the burden is on the defendant to prove otherwise. *Eggleston* at 73.

In addition to a lack of legal authority supporting the arbitrary restriction on what the jury considered, the decision fails to provide any rationality or other reasoning why this restriction should be imposed.

3. The decision conflicts with *Eggleston* and *Ashe* because its conclusion that the jury “necessarily found that Jane was not asleep” is neither based on realism and rationality nor does it consider all the surrounding circumstances.

Equally as concerning as the decision's failure to consider other grounds that the jury could have relied on for its verdict is the decision's conclusion that the jury necessarily found that the alleged victim was not sleeping. Contrary to *Eggleston* and *Ashe*, this conclusion fails to consider the surrounding circumstances and fails to examine the issue with realism and rationality. *Eggleston* at 73.

Because second-degree rape involved capacity to consent, and the third-degree rape involved clearly expressing a lack of consent, the two charges are almost mutually exclusive with each other.

As mentioned previously, a realistic and rational view of the case is that there was a plethora of evidence tending to negate Badgley's guilt with respect to the third-degree rape. In contrast, the singular issue on the second-degree rape was whether Jane was asleep. The jury's acquittal on the third-degree rape and inability to reach a verdict on the second-degree rape is rational: they were unable to decide the issue of sleep but had a large

amount of evidence supporting the finding Jane did not clearly express a lack of consent.

B. Judge Fearing’s decision to raise two new issues sua sponte (judicial estoppel and prosecutorial ethics) involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 2.4 states that the appellate court will, “at the instance of the appellant,” review the trial court’s decision. RAP 2.5(a) permits certain errors to be raised by the first time on appeal. Absent the exceptions in RAP 2.5(a), the Rules of Appellate Procedure do not expressly give the appellate court the ability to raise new issues sua sponte. The cases that have addressed an appellate court’s ability to raise an issue sua sponte appear limited to the exceptions in RAP 2.5(a). *See Jevne v. The Pass*, 3 Wn. App. 2d 561, 566, 416 P.3d 1257 (2018) (“[a]n appellate court can even raise the issue [of standing] sua sponte”) (citing *In re Recall of West*, 156 Wn.2d 244, 248, 126 P.3d 798 (2006)).

However there are a number of public policy reasons why the court should be prohibited from raising new issues sua sponte during oral argument. First, raising a new issue during oral argument deprives both parties of having adequate time to brief the issue or effectively argue it. This absence of briefing is harmful to the court's ability to reach the right result. Second, raising a new issue during oral argument deprives a person of their procedural due process rights. Although in the present case the conclusions reached regarding the new issues were not harmful to Badgley, this may not always be the case. However in contrast, the court negatively affected the public's perception of the State and prosecutor by concluding it violated an ethical duty; critically, the State had no ability to address or respond to this conclusion. This has the effect of creating doubts about the entire criminal justice system, and should not be raised sua sponte without prior notice to the parties.

VI. Conclusion

Based on the foregoing argument and authorities, the State respectfully requests this Court to grant discretionary review in this case. The Court of Appeals opinion fundamentally ignores this Court's prior case law as well as that of the U.S. Supreme Court regarding collateral estoppel in the context of double jeopardy. The court also improperly raised new issues sua sponte without giving either party adequate time to respond to them, and this is a broader concern of important public interest that should be addressed by this Court.

Number of words contained in this document, excluding the parts of the document exempted from the word count pursuant to RAP 18.17: 2592.

DATED this 25th day of August, 2023.

Respectfully submitted,



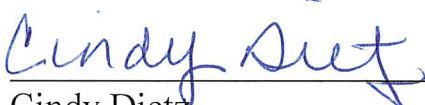
Ryan Valaas, WSBA # 40695
Chief Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 25th day of August 2023, I caused the original PETITION FOR REVIEW to be filed via electronic transmission with the Court of Appeals, Division III, and a true and correct copy of the same to be served on the following in the manner indicated below:

Jeremy M. Burke	() U.S. Mail, postage prepaid
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Signed at Wenatchee, Washington, this 25th day of August, 2023.


Cindy Dietz

APPENDIX

Unpublished Opinion

Court of Appeals No. 38801-8-III

Filed July 27, 2023

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 38801-8-III
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
BLAKE ALEXANDER BADGLEY,)	
)	
Petitioner.)	

FEARING, C.J. —

Under the Double Jeopardy Clause, the government may not take a mulligan. *United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007).

The elements of second degree rape include the victim being physically helpless or otherwise unable to consent to sexual intercourse. The elements of third degree rape include the victim clearly expressing a lack of consent. The State charged appellant Blake Badgley with both degrees of rape after he engaged in sexual intercourse with Jane, a pseudonym. When arguing that Badgley committed both crimes, the State asserted that Jane’s alcohol-induced sleep qualified as an inability to consent and constituted a clear expression of lack of consent to intercourse. Badgley defended both charges in contending that Jane was awake and consented. The jury acquitted Badgley of the crime of third degree rape. The jury deadlocked on the charge of second degree rape.

This appeal asks whether, based on the concepts of double jeopardy and collateral estoppel, must the charge of second degree rape now be dismissed with prejudice? The State argues it does not because the jury, when acquitting Blake Badgley of third degree rape, could have found that Jane was awake, but never said “no,” such that she did not clearly express a lack of consent. We reject the State’s contention because the State never forwarded such an argument before the trial court and actually argued to the judge and jury that Jane during the entire sexual encounter. We answer the issue on appeal in the affirmative because collateral estoppel, in the context of the double jeopardy clause, precludes the State from asserting an argument forwarded to convict of one crime, which argument the jury previously rejected for purposes of another crime.

FACTS

This prosecution arises from the alleged rape of Jane, by appellant Blake Badgley in June 2018. Badgley was then twenty years old, and Jane was nineteen years of age. Badgley admits to sexual intercourse but contends Jane consented by her earlier comments and her conduct.

A mutual friend of Blake Badgley and Jane hosted back-to-back parties in Monitor. The first party occurred either on the night of June 15 or 16, 2018. The second party convened on the night of June 17 and continued into the morning hours of June 18. Badgley and Jane attended both parties.

During the second party, Jane consumed one or more drinks laced with vodka. We do not know the total quantity of alcohol imbibed by Jane. While in her drunken state, Jane undressed herself and ran around the house naked. She told males at the party that she wished to engage in sex. She declared: “‘I need some dick.’” Report of Proceedings (RP) at 318. She attempted to grab the genitals of Blake Badgley and other males.

Jane retired to bed in a bedroom located in the party house around 3:00 a.m. on June 18. She returned, however, to the living room shortly thereafter while wearing only underwear. She announced again that she “‘need[ed] some dick.’” RP at 331. Some party attendees shepherded Jane back to bed.

During trial, Jane testified that her last clear memory, from the events of June 17-18, entailed going inside the party house to play Mario Kart after being in an outside hot tub. She later awoke in the night with someone on top of her. She felt someone penetrating her vagina. The male ejaculated on her stomach, after which he commented: “‘Stay where you’re at. I’m going to get something to clean up.’” RP at 81. She fell asleep once again. She awoke a second time completely naked with Blake Badgley next to her in the bed.

During trial Jane averred that, when she asked Blake Badgley if they had sex, he replied: “‘Yeah. But I couldn’t tell if you were into it because you kept snoring.’” RP at

92. She denied ever telling Badgley that she desired sex with him. She repudiated “being physical” with Badgley. RP at 106.

After Jane reported rape, Chelan County Sheriff Deputy Paul Nelson interviewed Blake Badgley. Badgley did not testify at trial. During trial, the State played the recording of the interview.

During the law enforcement interview, Blake Badgley commented that, on the night of the June 17 party, he remained awake with other young men in the living room after Jane retired to a bedroom. He eventually went to the bedroom because of the uncomfortably small dimensions of the living room couch. Badgley first commented that Jane was awake when he entered the bedroom. He later corrected himself and remarked that she awoke when he rolled her over in the bed to create room for himself. Badgley then fell asleep for two hours and Jane returned to sleep for the same amount of time.

During the interview, Deputy Paul Nelson inquired about sexual intercourse:

NELSON And then sometime at around five in the morning, you wake up and did you wake her up again?

BADGLEY Yeah.

NELSON How did you do that?

BADGLEY I’m not sure. Uh, waited until I could see her eyes were open, you know?

NELSON Um huh.

BADGLEY And then I started talking to her.

NELSON And what did she say, and what did you say to her?

BADGLEY Like, “Are you good?” and stuff and I just started asking her questions like that. From what I could tell she was fine.

NELSON What do you, well, did you ever ask her if she wanted to have sex?

BADGLEY Not, not, no, not directly.

NELSON So, what did you say to indicate that that's what you were trying to do?

BADGLEY I don't know, just body language, I guess.

NELSON Well, what did she say to you that made you think that she was willing to have sex with you at that time?

BADGLEY Um, I don't know "sleep with me" and grabbed me earlier.

NELSON So, she was coming on to you a few hours earlier?

BADGLEY Yeah

NELSON And a whole bunch of other people?

BADGLEY Yeah

NELSON So, after she'd been asleep for a couple hours, you felt that that was enough of a green-light for you to go in and have sex with her?

BADGLEY Yeah. I wanted to make sure she was sober and see if that was alright with her.

Exhibit 8, Transcript (Ex. 8) at 19-20.

NELSON Ok. And was she awake [immediately before intercourse]?

BADGLEY Yeah. I saw the whites of her eyes again.

NELSON And what did you say to her?

BADGLEY I said "Are you ok, like hello." She's like "hi."

NELSON Um huh. So, I guess what I'm getting at is how did you ask her if she wanted to have sex?

BADGLEY Well, I mean, I just kind of figured the fact that she wanted to go ahead and grab my dick, as a clue.

....

NELSON Ok. Well, what did she say while you were having sex?

BADGLEY Really, like nothing. Moaning, that's about it.

NELSON Ok. And did you recall her being, falling asleep while you were having sex?

BADGLEY No. Not that I know of.

....

Ex. 8 at 16-17.

NELSON Ok. Do you remember hearing her snoring at all while

you were having sex?

BADGLEY No. That didn't happen.

NELSON Uh, ok. And in the morning did you tell her that she had been snoring?

BADGLEY I didn't hear her snore at all.

Ex. 8 at 25.

PROCEDURE

The State of Washington charged Blake Badgley with one count of rape in the second degree and one count of rape in the third degree. The State alleged the same act of intercourse as the basis of each crime. At trial, Badgley conceded he engaged in sexual intercourse with Jane during the early morning hours of July 18, 2018. The parties contested at trial whether Jane was awake at the time of the sexual intercourse.

RCW 9A.44.050 governs the crime of rape in the second degree and declares, in part:

(1) A person is guilty of rape in the second degree when . . . the person engages in sexual intercourse with another person:

. . . .

(b) When *the victim is incapable of consent by reason of being physically helpless* or mentally incapacitated.

(Emphasis added.) RCW 9A.44.060, which controls the crime of rape in the third degree, read in relevant part in 2018:

(1) A person is guilty of rape in the third degree when . . . such person engages in sexual intercourse with another person:

(a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and *such lack of consent was clearly expressed by the victim's words or conduct.*

(Emphasis added.)

At the conclusion of the State's case, Blake Badgley moved to dismiss both counts of rape. As to second degree rape, Badgley contended that no evidence supported a finding that Jane was physically unable to express consent, an element of the crime. As to the third degree rape charge, Badgley maintained that the undisputed facts established that Jane never clearly expressed her lack of consent to sex, an element of the crime.

In opposition to Blake Badgley's halftime motion to dismiss, the State's attorney asserted that, because Jane fell "asleep," she was physically helpless to consent to intercourse for purposes of second degree rape. The State conceded that it needed to demonstrate beyond a reasonable doubt that Jane clearly expressed a lack of consent by word or conduct to convict Badgley of third degree rape. The State argued that the act of sleeping clearly expressed the lack of consent. The prosecuting attorney intoned:

Similarly as to Count II [third degree rape], her lack of consent has to be expressed clearly through words or conduct. If her conduct is not indicating that she wants to have sex with him, then it's her lack of consent is being express. He had told Detective Nelson he took her consent based on her behavior two to three hours prior when she was drunk and acting out. That is not a sufficient basis for consent at the time of the act. And that is the requirement that she has to be actively consenting at the time of the act. She was not and, therefore, there is sufficient evidence for both cases—for counts to go to the jury.

RP at 686-87.

The superior court denied Blake Badgley's motion to dismiss. The court

remarked: “there is clearly enough evidence for [both counts] to go to the jury.” RP at 687.

During closing statement, the State argued to the jury:

[Jane] didn’t consent. Her lack of consent was clearly expressed by her inability to act. Both of these same things can be true. She can be both physically helpless and not be consenting at the same time. She was both incapable of consent and unable to consent.

RP at 774.

The jury acquitted Blake Badgley of rape in the third degree. The trial court declared a mistrial on the count of rape in the second degree because of a jury deadlock on that charge.

Blake Badgley thereafter filed a motion to dismiss the second degree rape charge. He argued that collateral estoppel, as incorporated into the double jeopardy clause, barred the State from retrying him on second degree rape. According to Badgley, the jury’s acquittal on third degree rape decided the question of whether Jane was asleep such that she was incapable of giving consent by reason of being physically helpless. Since the State argued that sleeping functioned as the message of a lack of consent, the jury must have found that Jane was awake during intercourse and thus capable of giving consent.

The trial court denied Blake Badgley’s motion to dismiss. In an order denying the motion, the superior court entered the following findings of fact:

7. That the State argued that [Jane] was sleeping at the time of sexual intercourse.

8. That the State argued that because [Jane] was sleeping, she was incapable of consenting to sexual intercourse by reason of being physically helpless for the purposes of Rape in the Second Degree.

9. That the State also argued that [Jane's] sleeping was conduct that clearly expressed her lack of consent for the purposes of Rape in the Third Degree.

Clerk's Papers at 282.

LAW AND ANALYSIS

On appeal, Blake Badgley repeats the same argument forwarded below after acquittal on third degree rape. We agree that collateral estoppel, as incorporated by the double jeopardy clause, precludes the State from continuing its prosecution for second degree rape. In so ruling, we note that the State argues on appeal positions contrary to those stances it advanced before the trial court, in response to the motion to dismiss at the close of the State's evidence, and positions argued to the jury during closing.

We emphasize that the trial court found that the State argued that Jane's sleeping meant both that she was physically helpless to consent and that she clearly expressed a lack of consent. The trial transcript readily confirms these findings of fact. The State never argued, before the trial court or the jury, that Jane was awake but never expressed a lack of consent.

Article I, section 9, of the Washington State Constitution and the Fifth Amendment to the United States Constitution prohibit the State from trying a defendant for the same offense twice. *State v. Heaven*, 127 Wn. App. 156, 161, 110 P.3d 835

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(2005). Therefore, collateral estoppel's applicability in a particular case is no longer a matter to be left for state court determination under the broad bounds of fundamental fairness. *Ashe v. Swenson*, 397 U.S. 436, 442-43, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). For this reason, we rely principally on federal decisions. The Washington Supreme Court has not expanded the scope of our state constitution's double jeopardy clause beyond federal protection. *State v. Eggleston*, 164 Wn.2d 61, 71, 187 P.3d 233 (2008); *State v. Heaven*, 127 Wn. App. 156, 161 (2005).

Double jeopardy entails the right of an accused to be free of repeated prosecutions in which the government retries him until it obtains a guilty verdict. *United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007). The double jeopardy clause demands that the government present its strongest case at the first trial. *United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007). The guarantee recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek. *Currier v. Virginia*, ___ U.S. ___, 138 S. Ct. 2144, 2149, 201 L. Ed. 2d 650 (2018).

The doctrine of collateral estoppel, known in modern terminology as issue preclusion, prevents a person from relitigating an issue in order to prevent legal harassment and the overuse or abuse of judicial resources. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 336, 125 S. Ct. 2491, 162 L. Ed. 2d 315

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(2005); *Allen v. McCurry*, 449 U.S. 90, 94-95, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

Since the goals of collateral estoppel overlap with the policies behind the double jeopardy clause, the federal constitution's guaranty against double jeopardy incorporates the common law doctrine of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 442 (1970); *State v. Eggleston*, 129 Wn. App. 418, 426-27, 118 P.3d 959 (2005), *as amended* (Sept. 30, 2005), *aff'd*, 164 Wn.2d 61, 187 P.3d 233 (2008). The doctrine, although created in civil litigation, extends to criminal law. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). We do not know if the bar of collateral estoppel is coextensive with the bar of double jeopardy. For purposes of this appeal, the two concepts merge.

Collateral estoppel and double jeopardy not only preclude prosecution of the same crime after a final judgment, but protect against a series of prosecutions involving the same fundamental issues, in which the government presents additional arguments and evidence at each iteration. *United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007). One adjudged not guilty may not be held to answer more than once for conduct that the jury has decided he did not commit regardless of whether the State pleads a different crime. *United States v. Castillo-Basa*, 483 F.3d 890, 896 (9th Cir. 2007). A criminal defendant may assert a defense of collateral estoppel when the defendant faces relitigation of an issue already determined at a previous proceeding. *State v. Heaven*, 127 Wn. App. 156, 162 (2005).

A reviewing court must evaluate the trial record of a prosecution in order to discern what issues a jury previously resolved. Relatedly, courts should not apply the rule of collateral estoppel in criminal cases with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970); *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003).

Collateral estoppel looms as a constitutional fact that a court must decide through an examination of the entire record. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). When a previous judgment of acquittal was based on a general verdict, as is usually the case, the court should examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration in a second proceeding. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The reviewing court must view all the circumstances of the proceedings. *Sealfon v. United States*, 332 U.S. 575, 579, 68 S. Ct. 237, 92 L. Ed. 180 (1948). The court should consider the arguments asserted in light of the evidence. *United States v. Castillo-Basa*, 483 F.3d 890, 896 (9th Cir. 2007). If the accused can show that an issue of fact essential for the proof of an offense for which the defendant is later prosecuted was necessarily decided in a prior proceeding, that determination will be binding on the later prosecution. *Wilkinson v. Gingrich*, 806 F.3d 511, 516-17 (9th Cir. 2015).

Three principles principally impact this appeal. First, separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition of double jeopardy. *Brown v. Ohio*, 432 U.S. 161, 164, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *United States v. Castillo-Basa*, 483 F.3d 890, 896 (9th Cir. 2007). Second, double jeopardy protects the accused from attempts to relitigate the facts underlying an earlier acquittal, not simply the same charges. *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *Ashe v. Swenson*, 397 U.S. 436 (1970); *In re Personal Restraint of Moi*, 184 Wn.2d 575, 579, 360 P.3d 811 (2015). Third, a factfinder's determination that the government failed to carry its burden on an issue in the first proceeding has a preclusive effect in a subsequent proceeding raising the same issue, provided that both proceedings are governed by the same standard of proof. *Evans v. Michigan*, 568 U.S. 313, 318-19, 133 S. Ct. 1069, 185 L. Ed. 2d 124 (2013); *Wilkinson v. Gingrich*, 806 F.3d 511, 518 (9th Cir. 2015); *United States v. Castillo-Basa*, 483 F.3d 890, 902 (9th Cir. 2007).

Federal courts implement a three-step process when applying collateral estoppel in the context of double jeopardy (1) identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine, (2) an examination of the record of the prior case to decide whether the issue was litigated in the first case, and (3) an examination of the record of the prior proceeding to ascertain whether the issue was

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necessarily decided in the first case. *United States v. Castillo-Basa*, 483 F.3d 890, 897 (9th Cir. 2007). Washington courts ask four questions, all which must be answered affirmatively (1) was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) was there a final judgment on the merits? (3) was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? and (4) will the application of the doctrine work an injustice on the party against whom the doctrine is to be applied? *State v. Eggleston*, 164 Wn.2d 61, 71-72 (2008); *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003). Both tests require dismissal of the second degree rape charge.

We outline five federal decisions and two Washington decisions for enlightenment on whether double jeopardy precludes the State from retrying Blake Badgley for second degree rape. We start with two United States Supreme Court decisions.

From two centuries ago comes *Ex parte Nielsen*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889). Hans Nielsen dwelled with two wives. The United States charged him with a statute applying to Utah territory that prohibited a man from cohabitating with more than one woman at a time. Nielsen pled guilty to the charge and completed his sentence. Thereafter, the government charged Nielsen with adultery based on sexual intercourse with one of the same two women. Without analyzing double jeopardy or collateral estoppel, the United States Supreme Court dismissed the charge of adultery. The Supreme Court reasoned that cohabitation, the subject of the first crime, assumed

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sexual intercourse. Since sexual intercourse was an element of adultery, the United States could not proceed with the second charge.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the United States Supreme Court introduced the doctrine of collateral estoppel and the double jeopardy clause to each other. The United States charged Bob Ashe as one of multiple individuals involved in a robbery at a poker party. The trial court instructed the jury that, even if it found that Ashe did not personally rob the victim, he was guilty of robbery if the jury found he participated in it. The jury acquitted Ashe, and the State subsequently charged and convicted him with robbing a different victim at the poker party. The Supreme Court concluded that Ashe's acquittal in the first trial foreclosed the second trial because the acquittal verdict necessarily meant that the jury was unable to conclude beyond a reasonable doubt that Ashe was one of the bandits. Collateral estoppel and double jeopardy rendered impermissible a second trial because, to convict Ashe in the second trial, the second jury would have to reach a directly contrary conclusion. By its general verdict of not guilty, the first jury had decided the ultimate fact that Ashe was not one of the robbers.

Wilkinson v. Gingrich, 806 F.3d 511 (9th Cir. 2015) entailed perjury charges after an acquittal. A traffic court judge acquitted James Wilkinson on charges of speeding based on a conclusion that Wilkinson was not the driver of the speeding car. Thereafter, police developed new evidence establishing Wilkinson as the driver. The State

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prosecuted Wilkinson for perjury. Based on double jeopardy, the Ninth Circuit reversed the perjury conviction and dismissed the charge. The perjury charge stemmed from Wilkinson allegedly lying, during the first trial, that he was not the driver. The traffic court judge had already ruled that the State had not demonstrated Wilkinson to be the driver. It did not matter that the traffic court judge did not affirmatively find someone else to be the driver as long as the judge concluded that the State had not met its burden of proof.

United States v. Castillo-Basa, 483 F.3d 890 (9th Cir. 2007) also involved a prosecution for perjury. The government charged Buenaventura Castillo-Basa with illegal entry into the United States. An element of the crime required that the government show that an immigration judge had deported the accused after an earlier hearing before the judge. During the criminal trial, Castillo-Basa testified that the government never afforded him a hearing before an immigration judge. The government presented no records to the contrary. A jury acquitted Castillo-Basa of the charge. After the acquittal, the government located records of a hearing before an immigration judge and prosecuted Castillo-Basa for perjury based on his testimony to the contrary. The appeals court summarily dismissed the prosecution since the only factual issue during the first trial entailed whether Castillo-Basa underwent a deportation hearing before a judge. The acquittal necessarily meant that the jury concluded that the government had failed to

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carry its burden of proving such a hearing. In other words, Castillo-Basa's testimony was not false. He could not later be charged with perjury.

United States v. Romero, 114 F.3d 141 (9th Cir. 1997) closely parallels Blake Badgley's appeal in that collateral estoppel precluded a retrial on a charge, on which the jury deadlocked. The government charged Enzo Romero with the importation of marijuana and possession of marijuana with intent to distribute. Romero agreed that he drove a car from Mexico into the United States and the car contained marijuana. Romero claimed he drove the car at the request of a woman he met two days earlier and that he did not know the car contained marijuana. The jury acquitted Romero by general verdict of the possession with intent to distribute count. The jury deadlocked on the importation count. Romero thereafter sought to dismiss the importation charge on the basis that collateral estoppel barred retrial. The appellate court agreed. The Ninth Circuit noted that courts should apply collateral estoppel with realism and rationality. Despite the general verdict, the jury had acquitted Romero with intent to deliver, which included an element of knowing possession. Therefore, the government could not thereafter proceed with the prosecution of a crime that included an element of knowing possession of marijuana. Importation of marijuana was such a crime.

The government argued in *United States v. Romero* that application of collateral estoppel was irrational under the circumstances of the prosecution. Since knowing possession of marijuana constituted an element of both crimes, the jury must not have

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found Enzo Romero lacked knowledge or else it would have acquitted him of the importation charge. In response, the appeals court noted that the only contested fact at trial was whether Romero knew the car to contain marijuana. The court reasoned that employing suspicion as to the reason for acquittal on one charge, but not the other, would preclude the final settlement of questions of fact. The possibility that the jury acted irrationally would negate the collateral estoppel of all verdicts and conflict with the ruling in *Ashe v. Swenson*.

We move to Washington decisions. In *In re Personal Restraint of Moi*, 184 Wn.2d 575 (2015), the Washington Supreme Court followed the teachings of the United States Supreme Court in *Ashe v. Swenson*. The State charged Matthew Moi with the murder of Keith McGowan and unlawful possession of the firearm that killed McGowan. No physical evidence tied Moi to the gun that killed McGowan. The jury acquitted Moi on the unlawful possession charge and deadlocked on the murder charge. On retrial, the State convicted Moi with murder, while arguing that Moi possessed a gun. Presumably, the State could not convict Moi with murder without showing that Moi fired the bullet from the gun that forensic evidence established killed McGowan.

In a personal restraint petition, Matthew Moi contended that double jeopardy precluded him from being tried for murder with a gun he had been acquitted of possessing. The Supreme Court agreed. The jury had previously decided the ultimate fact of whether Moi possessed the gun that killed Keith McGowan. The State agreed that

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Moi satisfied the first three elements of collateral estoppel under Washington law, but not the fourth element. The State argued that collateral estoppel would work an injustice because Moi had sought severance of the counts. The Supreme Court rejected the contention in part because the trial court had denied the motion to sever.

We contrast the Washington Supreme Court decision in *State v. Eggleston*, 164 Wn.2d 61 (2008). Sheriff deputies raided the home of Brian Eggleston. A fire fight ensued. Eggleston shot and killed Pierce County Sheriff Deputy John Bananola. The State charged Eggleston with aggravated first degree murder. One element of aggravated first degree murder is knowing the victim to be a law enforcement officer. The jury acquitted Eggleston on the first degree murder charge, but found Eggleston guilty of second degree murder. In a special verdict form, the jury found that Eggleston had not knowingly killed a police officer. Nevertheless, the trial court had instructed the jury not to complete the special verdict form unless it convicted Eggleston of first degree murder. The trial court considered the special verdict superfluous.

After reversal of the conviction on appeal, the State tried Brian Eggleston again on the second degree murder charge. During retrial, the State argued again that Eggleston knowingly shot a law enforcement officer. Although not an element of second degree murder, any knowledge impacted Eggleston's assertion of self-defense. After the jury found Eggleston guilty of second degree murder, the sentencing court imposed an exceptional sentence on finding that Eggleston knew the victim to be a police officer. On

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appeal, Eggleston argued that the first jury's special verdict form precluded the State from relitigating his knowledge or lack thereof of John Bananola's status as an officer. The Supreme Court disagreed because the first jury did not need to decide Eggleston's knowledge.

We return to the prosecution of Blake Badgley. We agree that the elements of second degree rape and third degree rape do not correspond. Being physically unable to consent to sexual penetration does not necessarily or always equate to expressing, by words or conduct, a lack of consent. But collateral estoppel does not require that the two crimes share all of the same elements. If the jury necessarily resolved a fact when contemplating whether the accused committed one crime and that fact means acquittal of a second crime, double jeopardy bars the prosecution for the second crime.

Blake Badgley agreed that he sexually penetrated Jane. The only disputed factual question for resolution by the jury was whether Jane slept at the time of intercourse. The State contended that Jane could not consent because of her slumber and that she clearly expressed a lack of consent because of that same slumber. Stated differently, the State asserted no argument other than the act of sleeping satisfied the element of physical inability to consent, for purposes of second degree rape, and the clear expression of a lack of consent, for purposes of third degree rape. During oral argument before this court, the State conceded that it only argued, during trial, that Jane clearly expressed a lack of

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consent through her sleeping. During trial, the State never distinguished between any status of sleep needed to convict for third degree rape as opposed to second degree rape.

Just as in *Ashe v. Swenson*, Blake Badgley's first jury found that the State had failed to prove a fact fatal to convict on one crime and that finding precludes conviction on a second crime where the absence of proof is also fatal. Badgley's jury necessarily found that Jane was not asleep, but rather was sufficiently conscious to be able to express a lack of consent for purposes of third degree rape. No later jury can contradict this finding by ruling that Jane was sufficiently asleep to be unable to consent. When reviewing the record as a whole, particularly the State's argument to convict Badgley of third degree rape, we conclude the jury necessarily found Jane to be sufficiently alert to express whether or not she desired intercourse.

The State argues that, in making the decision to acquit Blake Badgley, the jury possibly concluded that (1) the State failed to meet its burden of establishing that Jane either (i) did not consent to the sexual intercourse with Badgley or (ii) such lack of consent was clearly expressed by words or conduct, but the jury was unable to reach unanimity on whether (2) the sexual intercourse occurred when Jane was incapable of consent by reason of being physically helpless. The State argues these two results can be consistent. Nevertheless, under double jeopardy jurisprudence, we must review the evidence in light of the arguments asserted by the parties during trial. The State never argued this hypothetical to the jury or to the trial court. Instead, the State consistently

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tried the case on the theory that Jane was asleep and her sleep both precluded her from consent and constituted a clear expression of lack of consent.

The dissenting author writes that the majority fails to cite a decision that stands for the proposition that the State is precluded from presenting an argument in a second trial that a jury already rejected. We assume the dissent distinguishes between, on the one hand, arguments presented by the State based on underlying facts and, on the other hand, the underlying facts. To answer the dissent's contention, we repeat earlier portions of this opinion. The reviewing court must view all the circumstances of the proceedings. *Sealfon v. United States*, 332 U.S. 575, 579 (1948). Collateral estoppel protects against "a series of prosecutions, involving the same fundamental issues, in which it presents additional arguments." *United States v. Castillo-Basa*, 483 F.3d 890, 893 (9th Cir. 2007). The court, when determining a question of collateral estoppel, should consider "the evidence and the arguments before" the jury. *United States v. Castillo-Basa*, 483 F.3d 890, 901 (9th Cir. 2007). The court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970) (quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 38-39 (1960)). The dissent cites no case law to the contrary.

We also deem it fair and consistent with rationality to preclude the State from asserting an argument forwarded to convict the accused of a second crime when the jury

already rejected the same argument by the State to convict the accused of another crime. The State does not now forward any theory to convict Blake Badgley of second degree rape other than that Jane was incapable of consenting to sex because she was asleep.

On appeal, Blake Badgley does not assert judicial estoppel so we do not rest our decision on this doctrine. Nevertheless, judicial estoppel dovetails with our double jeopardy analysis and bolsters dismissal of the second degree rape claim.

In an effort to defeat double jeopardy, the State performs an about-face as to its positions as to sufficiency of evidence for the charge of third degree rape and the extent of Jane's sleep. The State writes:

First, the evidence is nearly nonexistent that [Jane] “clearly expressed by words or conduct” that she did not consent to sexual intercourse with Badgley. On the contrary, the evidence was that [Jane] was seeking sexual activity earlier that night, including with Badgley. . . . Second, there was no evidence that [Jane] ever clearly expressed her lack of consent to Badgley during the sex even though she was awake for the last part of it.

Br. of Respondent at 8. After the State's completion of its case at trial, Blake Badgley sought to dismiss the third degree rape charge on the ground that the evidence did not support a jury finding that Jane clearly expressed a lack of consent. The State responded that her sleep clearly expressed a lack of consent. Based on this argument, the trial court denied the motion to dismiss.

Contrary to its respondent's brief, the State, during trial, never conceded that Jane was awake during any portion of the intercourse. The trial court found, as part of its

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order denying the posttrial motion to dismiss, that the State argued that Jane was sleeping at the time of sexual intercourse. The trial court did not suggest that the State conceded that Jane was awake at any time during the intercourse.

The State's current concession amounts to an acknowledgement that it lacked evidence to charge Blake Badgley with third degree rape because no evidence established a clear expression of lack of consent. This concession demonstrates a violation of the ethical standards of prosecuting attorneys. Standard 3–4.3 of the American Bar Association Standards Minimum Requirements for Filing and Maintaining Criminal Charges (4th ed. 2017) on the prosecution function reads:

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

This court cited a previous version of the rule in *State v. Knapstad*, 41 Wn. App. 781, 785-86, 706 P.2d 238 (1985), *aff'd*, 107 Wn.2d 346, 729 P.2d 48 (1986).

The dissent laments that the majority identifies unethical conduct of the State. The dissent worries that the majority's mention of the conduct will preclude the State from any concessions in the future. But the dissent fails to recognize that we do not condemn

all concessions of the State. We should, however, recognize when the State concedes that it lacked evidence to prosecute an accused for a crime charged.

The State further writes:

How can the State prove (1) [Jane] clearly expressed (i.e., made known) her lack of consent and simultaneously prove (2) she was unconscious or for any other reason physically unable to communicate an unwillingness to act? If one of these is true, the other is not.

Br. of Respondent at 9. The State argued to the jury during summation:

[Jane] didn't consent. Her lack of consent was clearly expressed by her inability to act. Both of these same things can be true. She can be both physically helpless and not be consenting at the same time. She was both incapable of consent and unable to consent.

RP at 774. The trial court found that the State argued that both Jane's sleep rendered her incapable of consenting by reason of being physically helpless for the purpose of second degree rape and that Jane's sleep was conduct that clearly expressed her lack of consent for purposes of third degree rape.

Also, the State now posits that "sleeping doesn't convey a clear expression of lack of consent." Br. of Respondent at 10. On that same page, the State adds: "The only way for [Jane] to clearly express a lack of consent to sex would be wake her up first-thereby giving her the conscious and volitional ability to clearly express it." Br. of Respondent at 10-11. Later the State adds: "[S]leeping/unconscious[ness] . . . alone does not indicate any expression of consent, clear or otherwise, for purposes of proving third degree rape." Br. of Respondent at 11. The State may mean to write "lack of consent," rather than

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“expression of consent.” Regardless, during trial, the State repeatedly argued to the contrary. We also repeat that, in its brief, the State now takes the position, contrary to its position at trial, that Jane was awake for part of the intercourse.

Finally, the State writes: “[T]he only thing [Jane] expressed that night was that she was interested in sexual activity.” Br. of Respondent at 10. During trial, the State repeatedly denied that Jane ever expressed interest in sex with Blake Badgley.

After having lost on the question controlling both charges, the State seeks to send Blake Badgley through the gauntlet again by contradicting its arguments and positions during trial. Judicial estoppel precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007); *In re Committed Intimate Relationship of Amburgey & Volk*, 8 Wn. App. 2d 779, 788, 440 P.3d 1069 (2019). The doctrine applies when a party adopts a legal position that conflicts with an earlier position taken either in the same or related litigation. *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 201-02 (Colo. 1999). A party may not assert a theory on appeal different from that presented on the trial level. *Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P.2d 886 (1969).

During oral argument before this court, the State’s attorney agreed that the State is now arguing a different theory on appeal from that argued at trial. The State’s attorney

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characterized its trial argument as “completely illogical.” Washington Court of appeals oral argument, *State v. Badgley*, No. 38801-8-III (Apr. 27, 2023), 15:45 to 15:55.

Courts apply judicial estoppel to protect the integrity of the courts and to minimize inconsistency, duplicity, and waste of time. *In re Committed Intimate Relationship of Amburgey & Volk*, 8 Wn. App. 779, 788 (2019). Courts apply the doctrine to prevent a litigant from playing fast and loose with the court. *Miller v. Campbell*, 137 Wn. App. 762, 771, 155 P.3d 154 (2007), *remanded*, 164 Wn.2d 529, 192 P.3d 352 (2008); *Drain v. Betz Laboratories, Inc.*, 69 Cal. App. 4th 950, 955, 81 Cal. Rptr. 2d 864 (1999).

Blake Badgley’s trial court adopted the State’s trial position that sleeping can be a clear expression of lack of consent and also disable a person from consenting. One factor a court considers in applying judicial estoppel is whether the party’s prior inconsistent position was accepted by the first court. *Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014).

The dissent contends that we fail to identify any advantage gained by the State as a result of arguing at trial a theory the opposite of which the State now forwards. But the State defeated a motion to dismiss based on its inconsistent position.

CONCLUSION

We remand this prosecution to the superior court with directions to dismiss with prejudice the charge of second degree rape against Blake Badgley.

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

Fearing, J.
Fearing, C.J.

I concur in result only:

Lawrence Berrey, J.
Lawrence-Berrey, J.

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STAAB, J. (dissenting) — I disagree with the majority opinion and would find that collateral estoppel does not prevent the State from retrying the second degree rape charge. Despite Badgley’s attempts to narrow the scope of the jury’s fact-finding province, Badgley cannot meet his burden of showing that the verdict of acquittal necessarily decided the “identical” issue that will be required to prove second degree rape.

“Third degree rape is not a lesser included offense of second degree rape; rather, it is an inferior degree offense.” *State v. Wright*, 152 Wn. App. 64, 71, 214 P.3d 968 (2009). Here, the jury was instructed that to convict Badgley of second degree rape, the State needed to prove that Jane¹ “was incapable of consent by reason of being physically helpless.” Rep. of Proc. (RP) at 757, former RCW 9A.44.050(1)(b) (2007). “A person is physically helpless when a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.” RP at 759. A person who is sleeping is considered physically unable to communicate unwillingness to an act. *State v. Mohamed*, 175 Wn. App. 45, 58-59, 301 P.3d 504 (2013).

On the other hand, third degree rape is specifically limited to circumstances “not constituting rape in the . . . second degree.” Former RCW 9A.44.060(1) (2013). To

¹ We are using a pseudonym to refer to the victim who we will refer to as “Jane.”

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prove third degree rape, the State was required to show that Jane did not consent to sexual intercourse, and clearly expressed her lack of consent through words or conduct. RP at 758-59, former RCW 9A.44.060(1)(a).

At trial, the State argued that Jane’s state of being asleep was conduct that clearly expressed a lack of consent. The State’s trial theory on third degree rape was legally incorrect. Third degree rape contemplates a lack of consent by a person who is capable of consenting. Compare former RCW 9A.44.060 with former RCW 9A.44.050(b); *State v. Morales*, No. 79893-6-I, slip op. at 2 (Wash. Ct. App. July 27, 2020) (unpublished), <https://www.courts.wa.gov/opinions/pdf/798936.pdf>, *State v. Pitts*, noted at 167 Wn. App. 1031, slip op. at 2 (2012), see *State v. VanVlack*, 53 Wn. App. 86, 89, 765 P.2d 349 (1988) (The statutory definition of consent is similar to the ordinary definition of consent: “‘compliance or approval esp. of what is done or proposed by another . . . capable, deliberate, and voluntary agreement to or concurrence in some act or purpose implying physical and mental power and free action.’ *Webster's Third New International Dictionary* 482 (1981).”).

Second degree rape, as charged here, required the State to prove that Jane was incapable of consent. Each crime requires proof of different facts. The trial court recognized this distinction when it concluded that second degree rape is about capacity not consent.

Badgley's argument is premised on the mistaken assertion that sleeping is clearly conduct that expresses a lack of consent. He claims that sleeping was the only conduct that could have expressed lack of consent, and whether Jane was asleep or awake was the only issue for the jury to decide. Since the jury acquitted him of third degree rape, it must have concluded that Jane was awake. His argument fails because his premise is false.

The jury had to decide not only if Jane was sleeping, but whether sleeping was conduct that clearly expressed lack of consent. One interpretation of the jury's acquittal and failure to reach a verdict is that they could not agree on whether Jane was sleeping, but did agree that even if she was sleeping, this did not clearly express a lack of consent.² In other words, the jury could have rejected the State's theory and reached its verdict without finding that Jane was awake. Because this scenario is reasonably possible (and legally sound), Badgley cannot show that his acquittal on the third degree rape charge necessarily resolved whether Jane was awake or whether she was physically helpless. For this reason, collateral estoppel does not preclude the State from retrying the charge of second degree rape.

² Badgley's theory at trial was that Jane was awake. While Badgley did not argue that sleep could not constitute conduct that clearly expressed lack of consent, he did not concede or stipulate to this element either. Thus, the jury was required to determine if the State met its burden of proving this element.

Badgley points out that collateral estoppel is not to be applied in a hyper technical fashion, but with realism and rationality. I agree. However, in order to prevail on his claim of collateral estoppel, Badgley must still demonstrate that the jury necessarily decided the “identical” issue in the first trial that would be raised in the second trial. *State v. Eggleston*, 164 Wn.2d 61, 71-72, 187 P.3d 233 (2008). He does not need to show that the elements of the two crimes were the same, but he does need to show that the identical factual issue was necessarily decided. The jury’s verdict did not necessarily decide that Jane was awake, much less that she had the capacity to consent. It is not hyper technical to point out that second and third degree rape are two different crimes with different elements that require proof of different facts.

The majority suggests that our determination of which facts were necessarily decided by the jury is constrained by the arguments of counsel. See majority opinion at 21-22. In other words, since the State’s only argument on third degree rape was that sleep constituted conduct clearly expressing lack of consent, the jury was bound to accept this argument. The majority opinion does not cite any authority for this position. The jury was instructed that the lawyer’s statements are not evidence. The jury was free to disagree with the State’s argument and conclude that sleeping is not conduct that clearly expresses a lack of consent. Nor is our review limited to the arguments of counsel presented at trial. Instead, in deciding whether collateral estoppel applies, we are directed to examine all the circumstances of the case, including the “pleadings, evidence, charge,

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and other relevant matter.” *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970).

On appeal, the State—represented by a different attorney—now acknowledges that the act of sleeping does not clearly express lack of consent. This is not an inconsistent position; it is a concession. The majority contends that the State’s concession is unethical because prosecutors should not file or maintain charges without probable cause. The majority’s position is unfortunate. The State made a legal argument that it now concedes was in error. Nevertheless, there was probable cause for the charge to go forward and the trial court denied Badgley’s motion to dismiss. Conceding a legal error is not unethical. By finding such, we dissuade prosecutors from making valid concessions in the future.

The majority opinion also concludes that judicial estoppel should prevent the State from making a contrary argument. Initially it should be noted that the State is not taking a contrary argument; it is making a concession. Moreover, the parties do not raise judicial estoppel in their briefs and we should not consider it on appeal. RAP 2.5(a).

Even when judicial estoppel is raised, its application is restrained to the narrowest of circumstances, “so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.” 28 AM. JUR. 2D *Estoppel and Waiver* § 69 (2021).

Judicial estoppel prevents a party from taking a position inconsistent with an earlier position to gain an unfair advantage. *In re Committed Intimate Relationship of*

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Amburgey and Volk, 8 Wn. App. 2d 779, 440 P.3d 1069 (2019). Here, the majority fails to identify the advantage gained by the State's concession. The jury acquitted Badgley of the third degree rape charge, possibly because it did not agree with the State's erroneous position. While the State's argument pertaining to the evidence of third degree rape was incorrect, the State has consistently maintained that sleeping constitutes physical helplessness for purposes of second degree rape; a legally correct position. The trial judge denied Badgley's post-trial motion to dismiss the second degree rape charge not because the court was misled by the State's incorrect argument, but because the court correctly concluded that third degree rape deals with consent while second degree rape deals with capacity to consent.

Since I would conclude that a rational jury could have grounded its verdict on an issue other than that which Badgley seeks to foreclose, I would find that collateral estoppel does not prevent a retrial on the charge of second degree rape.



StaaH, J.

CHELAN COUNTY PROSECUTING ATTORNEY

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