92819-3

Supreme Court No. _____
Court of Appeals No. 32543-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES E. FURR,

Defendant/Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed January 21, 2016, affirming his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW.

1. Was Mr. Furr's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of second degree rape--that the alleged victim was incapable of consent due to her mental incapacity?

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

IV. STATEMENT OF THE CASE.

James Furr was charged and convicted of second degree rape on the sole basis that the alleged victim, Rita Evans, was incapable of consent

due to mental incapacity. CP 14, 34. Prior to the incident Mr. Furr had been staying at his brother's house for approximately two months. Shortly thereafter, his brother introduced Mr. Furr to Ms. Evans who lived next door with her parents. RP 175-77. The brother and his wife had known Ms. Evans for over eight years, and interacted with her on a regular basis. She was a frequent visitor at their house, took care of their pets and even had a key to their house. RP 178. She also interacted with Mr. Furr on a number of occasions, having coffee and smoking cigarettes with him on the front porch. RP 108-09, 213-14, 244, 423-24.

The brother, who was 55 years old, and his wife thought of Ms. Evans as a daughter and part of their family. They felt Ms. Evans had the mentality of a 12-year-old and they were quite protective of her. RP 177-79, 227-28. The brother communicated these feelings to Mr. Furr. RP 179.

On the day of the incident, Mr. Furr, his brother and Ms. Evans were sitting on the couch at his brother's house watching football on television and drinking alcohol. RP 180-83. At some point, Mr. Furr and Ms. Evans went outside on the back deck to smoke cigarettes. A short time later his brother heard a noise on the back deck, looked outside and saw Mr. Furr and Ms. Evans engaging in sexual intercourse. 185-88. The

brother and his wife became very upset, yelled at Mr. Furr and ordered him out of the house. RP 189-97. Mr. Furr eventually admitted having consensual sex with Ms. Evans. RP 206-08.

Ms. Evans, who was 33 years old, testified she has lived in Cle Elum since 1994 and graduated from Cle Elum high school. RP 89-90. She said she also lived in Renton and Mountlake Terrace for a time after graduation. RP 91. She testified she worked as a courtesy clerk at Safeway from 2000 until 2003. She has also worked as a waitress and is currently a housekeeper at a local motel. RP 91, 107. She said she currently lives with her father and his girlfriend but makes her own day-to-day decisions. RP 106.

Ms. Evans testified she not only understand the mechanics of sexual intercourse (penis and vagina) but also knows what being in love means and associates sexual intercourse with love. RP 103-04. She said she was in love with the father of her child when she got pregnant in high school. She said she got pregnant because of unprotected sex. RP 102-05. When asked what "unprotected sex" means, she stated it meant using a condom. When asked about other reasons why people use condoms, she stated, "for STDs." When asked what STD's means she said, "Sexually transmitted diseases." When asked what are some examples of sexually

transmitted diseases, she responded, "Herpes, AIDS, gonorrhea." RP 105. Ms. Evans also testified "sexually assaulted" means "I didn't give my okay." RP 106.

Dr. Paul Connor, a clinical psychologist and neuropsychologist, testifying as an expert witness for the State, said Ms. Evans suffers form fetal alcohol spectrum disorder (FASD). RP 332-36. He described his interaction with her as that of a pre-teenager, said her IQ was 65, and that she was very suggestible. RP 349, 351, 359. However, Dr. Connor also testified Ms. Evans was capable of forming emotional bonds with other people and her strength in verbal expression might lead other people to overestimate her actual abilities. CP 370-74. He also stated he could not say that Ms. Evans was unable to consent to sexual intercourse. RP 384.

Mr. Furr testified at first he thought Ms. Evans was shy and child-like, but after several conversations with her he thought she was a normal adult. Mr. Furr stated he thought Ms. Evans was more intelligent than he, due to her knowledge of history, the internet and other facts. RP 426-30, 451-53.

The sentencing court ordered Mr. Furr to pay at least $100 per month toward his legal financial obligations upon his release. CP 33.

The sentencing court imposed discretionary costs of $1150 and mandatory costs of $800[1], for a total Legal Financial Obligation (LFO) of $1950. CP 51-52. The Judgment and Sentence contained the following language:

> ¶ 2.5 Legal Financial Obligations/Restitution. (RCW 9.94A760) The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 49.

The Court did not inquire further into Mr. Furr's financial resources and the nature of the burden payment of LFOs would impose, other than ordering him to pay $100 per month toward his legal financial obligations beginning one month after his release. CP 52; RP 593-94.

This appeal followed. CP 45.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP

[1] $500 Victim Assessment, $200 criminal filing and $100 DNA fee. CP 51-52.

13.4(b)(1) and (2)) and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

1. Mr. Furr's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of second degree rape--that the alleged victim was incapable of consent due to her mental incapacity.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial

evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

RCW 9A.44.050 provides in pertinent part:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, 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 . . .

RCW 9A.44.010(4) provides:

> "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

The key to a proper interpretation of RCW 9A.44.010(4) is a sufficiently broad interpretation of the word "understand". Evidence showing that a victim has a superficial understanding of the act of sexual intercourse does not by itself render RCW 9A.44.010(4) inapplicable. *State v. Ortega-Martinez*, 124 Wash. 2d 702, 711, 881 P.2d 231 (1994). A finding that a person is mentally incapacitated for the purposes of RCW

9A.44.010(4) is appropriate where the jury finds the victim had a condition that prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse. *Id.*

A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse. *Id.* at 712; *See* RCW 9A.44.010(1) (broadly defining the physical acts considered to be sexual intercourse). It also includes, however, an understanding of a wide range of other particulars. For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death. *Id.* While the law does not require an alleged victim to understand any or all of these particulars before a defendant can be considered insulated from liability under RCW 9A.44.050(1)(b) for having had sexual intercourse with a mentally incapacitated individual, all of the above are elements of a meaningful understanding of the nature and consequences of sexual intercourse and are important for a trier-of-fact to bear in mind when it is evaluating

whether a person had a condition which prevented him or her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse. *Id.*

In *State v. Summers*, the defendant was convicted of second degree rape of a 44-year-old, mentally-ill woman. The victim met the defendant on a public street. After talking to the victim and telling her to follow him, the defendant took her inside a private apartment and proceeded to have sexual intercourse with her. Although the victim knew a baby was a result of a man "put[ting] a wiener in you", she spoke in fragmented and confusing sentences, had no knowledge of sexually transmitted diseases, thought a penis was a tail, and did not know how to read. *State v. Summers,* 70 Wn. App. 424, 426-27, 853 P.2d 953 (1993), *review denied,* 122 Wn.2d 1026, 866 P.2d 40 (1993). Holding the jury had sufficient evidence from which to conclude the victim did not understand the nature or consequences of sexual intercourse, the Court of Appeals affirmed the defendant's conviction. It wrote: "The evidence showed that [the victim] had a basic understanding of the mechanical act of sexual intercourse, but this should not be equated with an understanding of its nature and consequences." *Summers,* 70 Wn. App. at 431, 853 P.2d 953.

Conversely, in the present case Ms. Evans testified she not only understand the mechanics of sexual intercourse (penis and vagina) but also knows what being in love means and associates sexual intercourse with love. RP 103-04. She said she was in love with the father of her child when she got pregnant in high school. She said she got pregnant because of unprotected sex. RP 102-05. When asked what "unprotected sex" meant, she stated it meant using a condom. When asked what other reasons people use condoms, she stated, "For STDs." When asked what STD's means she said, "Sexually transmitted diseases." When asked what are some examples of sexually transmitted diseases, she responded, "Herpes, AIDS, gonorrhea." RP 105. Ms. Evans also testified "sexually assaulted" means "I didn't give my okay." RP 106. Clearly, by her own testimony Ms. Evans does not have a condition that prevented her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse.

Moreover, this fact was later confirmed through the testimony of the State's expert, Dr. Connor, who stated he could not say that Ms. Evans was unable to consent to sexual intercourse. RP 384.

In assessing whether the State has met its burden of showing that a victim had a condition which prevented him or her from understanding the

nature or consequences of sexual intercourse at the time of an incident, the jury may evaluate, in addition to that person's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. *Ortega-Martinez*, 124 Wash. 2d at 714, 711, 881 P.2d 231. It may also take into consideration a victim's IQ, mental age, ability to understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation. *Id.*

In *Ortega-Martinez*, the case-worker testified the 30-year-old victim had an IQ in the 40s and estimated her mental age to be between the ages of five and nine. *Id.* A police officer with experience in child abuse cases testified her mental age seemed close to that of a 4- or 5-year old. *Id.* He also testified she was unable to tell him where she had gotten off the bus. *Id.* at 715. The victim herself testified she could not read. *Id.* She exhibited to the jury the skills of a child whose answers were often nonresponsive. *Id.* When the prosecutor asked her for clarification concerning her comment that there "was something in the coffee", she stated, "There was something underneath the blanket". *Id.* When he asked if she had ever seen Ortega-Martinez before that night, she replied, "When I leave for him". *Id.* When she was asked how long she stayed in

the truck, she replied "It was raining". *Id.* In response to a question "Where did you go after you went over the railroad tracks?", she testified "I saw the green barn and red barn". *Id.*

By contrast, Ms. Evans had much higher mental capabilities than the victim in *Ortega-Martinez*. Ms. Evans' testimony was similar to that of a witness with normal mental faculties. She testified she was 33 years old, had lived in Cle Elum since 1994 and had graduated from Cle Elum high school. RP 89-90. She said she also lived in Renton and Mountlake Terrace for a time after graduation. RP 91. She testified she worked as a courtesy clerk at Safeway from 2000 until 2003. She has also worked as a waitress and is currently a housekeeper at a local motel. RP 91, 107. She said she currently lives with her father and his girlfriend but makes her own day-to-day decisions. RP 106.

Taking into consideration her testimony, her ability to understand fundamental, nonsexual concepts, and mental faculties in general, the State did not meet its burden of proving Ms. Evans lacked the capability to consent because of her mental incapacity.

Furthermore, Mr. Furr proved by a preponderance of the evidence that at the time of the offense he reasonably believed the victim was not mentally incapacitated. RCW 9A.44.030(1) provides:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

Mr. Furr testified at first he thought Ms. Evans was shy and child-like, but after several conversations with her he thought she was a normal adult. Mr. Furr stated he thought Ms. Evans was more intelligent than he, due to her knowledge of history, the internet and other facts. RP 426-30, 451-53. Dr. Connor testified Ms. Evans was capable of forming emotional bonds with other people and her strength in verbal expression might lead other people to overestimate her actual abilities. CP 370-74. Dr. Connor's testimony reaffirms that it was reasonable for Mr. Furr to believe that Ms. Evans was not mentally incapacitated. Therefore, the evidence was insufficient to sustain the conviction.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs.

There is insufficient evidence to support the trial court's finding that Mr. Furr has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the

state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an

individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015). "This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id.* The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id.*

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915-16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement the the trial court has "considered" Mr. Furr's present or future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin,* 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Furr's financial resources and the potential burden of imposing LFOs on him. The Court imposed discretionary costs of $1150 and ordered him to pay $100 per month toward his legal financial obligations beginning one month after his release. CP 52; RP 593-94.

Since the boilerplate finding that Mr. Furr has the present or future ability to pay LFOs is simply not supported by the record, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Furr 's current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted February 12, 2016,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 12, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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January 21, 2016

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CASE # 325431
State of Washington v. James E. Furr
KITTITAS COUNTY SUPERIOR COURT No. 141000072

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure
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FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 32543-1-III
v.	)	
JAMES FURR, Appellant.	)	UNPUBLISHED OPINION

FEARING, J. — James Furr claims insufficient evidence supported his conviction for second degree rape. We disagree and affirm his conviction. Furr also contends that the trial court erroneously failed to conduct an inquiry as to his ability to pay legal financial obligations. We exercise our discretion and decline to review this second assignment of error.

FACTS

Victim Rita Evans was born in 1980 and, starting in first grade, required special education services. In 1999, Evans gave birth to a son. At six months old, her son was placed in the care of Evans' older brother. After taking classes within the special

education program, Evans graduated from high school in 2000. In 2001, a physician diagnosed Evans with fetal alcohol syndrome. Despite her mental disability, Evans worked in jobs as a server, preparation cook, dishwasher, courtesy clerk, and housecleaner. In 2014, Evans, age 33, lived with her father and step-mother in Cle Elum.

Beginning in 2006, John and Diane Furr resided in the house adjacent to Rita Evans and her parents. Diane earlier met Evans when Evans worked as a courtesy clerk at the grocery store where Diane shopped. John and Diane Furr became friends with Evans, and the couple treated Evans like a daughter.

In November 2013, defendant James Furr left prison in Pennsylvania and arrived in Cle Elum to live with his brother John. Within a week of his advent, James met Rita Evans. John Furr declared to his brother: "She's [Evans is] a 34-year-old woman with the mentality of a 12-year-old, [so] don't mess with her." Report of Proceedings (RP) at 179.

On January 11, 2014, Rita Evans visited the Furrs' residence. James and John Furr watched a Seahawks football game while Evans painted Diane Furr's nails. Diane departed the home to shop, and Evans soon joined John and James on the couch. James went to the store, purchased alcohol, and returned home where the three imbibed. During a commercial break, James Furr exited to the back deck to smoke a cigarette. He invited Evans, who also smoked, to join him, and she accepted. John Furr continued watching the football contest until he heard a loud thump on the deck. John went to the kitchen

window, peered outside to the deck, and saw James and Evans engaged in sexual intercourse. John stormed onto the deck and confronted James. The three reentered the home, where John continued to berate James while Evans curled up on a couch. Diane Furr returned home twenty minutes later. Diane confronted James, who denied any sexual activity. Diane removed James from the home.

Diane Furr comforted a hushed Rita Evans and questioned her about the incident. Evans said: "Jimmy assaulted me," which prompted John Furr to call Evans' parents. RP at 201. Rod Evans and Janice Barnhart, Evans' father and step-mother, arrived and called 9-1-1. Police escorted Evans to Kittitas Valley Community Hospital for a sexual assault examination. The exam detected James Furr's seminal fluid around Evans' vagina and anus.

PROCEDURE

The State of Washington charged James Furr with second degree rape. During the jury trial, the State presented evidence that Rita Evans lacked the ability to consent because of her mental incapacity. The jury heard testimony from Evans, John Furr, Diane Furr, Janice Barnhart, the nurse who performed the sexual assault examination at Kittitas Valley Community Hospital, the police officer who responded to the 9-1-1 call, the DNA (deoxyribonucleic acid) forensic lab technician, and Dr. Paul Connor, a clinical psychologist. James Furr testified on his own behalf as the sole defense witness.

The questioning of Rita Evans by the prosecution regarding the nature of sex

included these colloquies:

> Q Rita, do you know what sex is?
> A Yes.
> Q What is sex?
> (Inaudible) body parts sex involves?
> A Vagina and penis.
> Q When—when do people have sex?
> Do you know, Rita?
> A I don't (inaudible).

RP at 92-93.

> Q . . . [W]hat is sex, basically? Can you just sum it up for me?
> A Intercourse.
> Q Intercourse. And what does that mean?
> A Vagina and penis.
> Q Okay. The—Something happens between them, right?
> A Uh-huh.
> Q Okay. Do you mind telling us exactly what happens?—you think that's a difficult—?
> A Yeah.
> Q Okay. Let me ask you this, Rita. Do you know, though, do you know—exactly what sex is?
> A Yes.
> Q Okay. You know.
> What do you think about—You have been in love, then. You were in love with David?
> A Yes.
> Q And, do you think that there's any—any connection between being in love with someone and having sex?
> A Yes.
> Q Yes. Do you think that's—that's good?
> A If it's the right person.
> . . . .
> Q . . . Who [sic] do women become pregnant?
> A It's usually unprotected sex.
> Q Uh-huh. And what do you mean by protected or unprotected?
> A Protected is using a condom. Unprotected isn't using a condom.
> . . . .

> Q . . . What are STDs?
> A Sexually—transmitted diseases.
> Q And what are some examples of those? What are sexually transmitted diseases?
> A Herpes, AIDS, gonorrhea—
> . . . .
> Q . . . You told us a couple times that—that you were sexually assaulted. Can you tell me what you meant by that?
> A I didn't give my okay.

RP at 103-06.

Janice Barnhart, John Furr, and Diane Furr each testified regarding Rita Evans' mental faculties. The three witnesses concurred that Evans is suggestible and had the mental capacity of a youth. Officer Kirk Bland, who responded on the night of the incident, and Connie Johnson, the nurse who performed the sexual assault examination, respectively testified that, during each's short interaction with Evans, he or she concluded Evans experienced mental disabilities.

Dr. Paul Connor testified as an expert on fetal alcohol spectrum disorder and gave the results of an evaluation of Evans. As part of the testing, Connor reviewed Evans' prior medical history, personally examined Evans, and interviewed family regarding Evans' daily functioning. Dr. Connor opined that Evans had an IQ (intelligence quotient) of 65, a mental age of seven years and seven months, and impairments consistent with fetal alcohol spectrum disorder.

On cross-examination, Dr. Paul Connor testified:

> Q Okay.
> Of course she is mechanically able to have sex; we know that.

> Is she able to consent to sex?
> A Again, that wasn't a question that was asked of me.
> Q Okay.
> Can you necessarily say that she's not able to consent to sex?
> A I can say that her levels of impairment in these areas that we talked about of her problem-solving, her decision-making, her suggestibility and her understanding of emotional content make her very prone to being victimized, and to—to the victimization and being taken advantage of by others.

RP at 383-84.

The jury found James Furr guilty of second degree rape, and the trial court sentenced him to one hundred months' confinement. The court also ordered $2,705.89 in legal financial obligations with payments to commence one month after release from incarceration. The obligations consisted of a $500.00 victim assessment, $200.00 court costs, $1,000.00 defense costs, $100.00 crime lab fee, $100 DNA collection fee, $50.00 booking fee, and $755.89 in restitution.

During the sentencing hearing, James Furr and the trial court engaged in the following colloquy before the court imposed financial obligations:

> THE COURT: . . .
> And financial obligations total $2,705.81 [sic]. And that shall be paid at $100 per month commencing one month after you are released from incarceration.
> I don't know what your (inaudible) will be at that point. (Inaudible)
> DEFENDANT: I'm—if I'm too old or too weak and my (inaudible) I don't have to pay it, right? I can just go on and—hopefully I—I mean, if I'm unable to work at that time—'cause, I mean, I'm 54, and—like—said—haven't had a physical in twenty-some years, so—know what's going on inside of my body,—
> THE COURT: Right.
> DEFENDANT:—but—(inaudible) work at that time.

It's—
THE COURT: All right. Well,—
DEFENDANT:—don't have to worry about going back to jail again, do I?
THE COURT: Right now there's no reason to think that there's anything—
DEFENDANT: Yes. You're right, Ma'am.
THE COURT:—body, and we will cross that bridge when you come to it. Right now you are able-bodied and strong and—and intelligent, and—
DEFENDANT: I don't know about intelligent,—strong—
THE COURT: When you are released from incarceration then—certainly see what your employment—

RP at 594.

LAW AND ANALYSIS

On appeal, James Furr contends that the evidence did not support a conviction for second degree rape for two distinct reasons. First, the evidence indisputably showed that the victim had capacity to consent to sex. Second, the evidence conclusively established that Furr believed the victim capable of granting consent. Furr also argues that, assuming we affirm his conviction, the prosecution must be remanded for another sentencing hearing because the trial court failed to engage in an individual inquiry as to whether he possessed the current or future ability to pay legal financial obligations.

Victim Mental Capacity

James Furr challenges the sufficiency of the evidence for his conviction for second degree rape. Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d

628 (1980). Both direct and indirect evidence may support the jury's verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This court draws all reasonable inferences in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Only the trier of fact weighs the evidence and judges the credibility of witnesses. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

RCW 9A.44.050 establishes the crime of second degree rape. The statute reads, in part:

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, 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.

We must determine if the evidence permitted the jury to conclude that Rita Evans lacked the mental capacity to consent to sexual intercourse.

Mental incapacity is "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4). "Understanding" should be broadly interpreted. *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994). A superficial understanding of the act of sexual intercourse does not by itself render RCW 9A.44.010(4) inapplicable. *Ortega-Martinez*, 124 Wn.2d at 711.

A meaningful understanding of the nature and consequences of sexual intercourse

requires an understanding of the physical mechanics, but may also include understanding the development of emotional intimacy between sexual partners, the potential disruption of established relationships, the possibility of pregnancy, and the specter of disease and even death. *Ortega-Martinez*, 124 Wn.2d at 711-12; *State v. Summers*, 70 Wn. App. 424, 432, 853 P.2d 953 (1993). These elements are important for a trier of fact to bear in mind during "prosecutions involving the mentally disabled because such individuals may have a condition which permits them to have a knowledge of the basic mechanics of sexual intercourse, but no real understanding of either the encompassing nature of sexual intercourse or the consequences which may follow." *Ortega-Martinez*, 124 Wn.2d at 712.

In assessing whether the State has met its burden to prove charges of second degree rape, the jury may evaluate, in addition to the victim's testimony regarding his or her understanding, other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand. *Ortega-Martinez*, 124 Wn.2d at 714. The jury may also consider the victim's IQ, mental age, and ability to understand fundamental nonsexual concepts. *Ortega-Martinez*, 124 Wn.2d at 714.

In *State v. Ortega-Martinez*, 124 Wn.2d 702 (1994), the jury convicted Alejandro Ortega-Martinez for second degree rape under RCW 9A.44.050. The victim was a thirty-year-old woman with an IQ in the 40s. She was married but lived in a housing program for individuals with mental disabilities. Ortega-Martinez approached the victim while

she waited at a bus stop, he took her to his pickup truck, threatened to kill her if she did not remove her clothes, and forced her to have sexual intercourse. The victim, a doctor, and the victim's case manager all testified at trial.

The testimony in *Ortega-Martinez* established that the victim possessed a mental age between five and nine years old and a limited understanding of the correlation between sex and disease. The victim could not read, used childish words for sexual organs, and uttered nonresponsive answers during trial. Our Supreme Court held that the State presented sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that the victim had a condition rendering her unable to consent to sexual intercourse at the time of the incident.

In *State v. Summers*, 70 Wn. App. 424 (1993), John Summers argued insufficient evidence supported his conviction for second degree rape, since evidence failed to show the victim could not consent due to mental incapacity. The victim was a 44-year-old women that lived in a group care facility for the mentally ill. Summers invited her into an apartment where she had sexual intercourse with Summers. The victim testified that she lacked knowledge of sexually transmitted diseases except for AIDS (acquired immune deficiency syndrome), which occurs "[w]hen a man puts a wiener in you and you get it from them." *State v. Summers*, 70 Wn. App. at 431. She also testified: "[w]hen a man puts a wiener in you and the sperm comes inside of you and you have the baby . . . [and it] [c]omes out of like your stomach or something like that." *State v.*

Summers, 70 Wn. App. at 431. The victim never attended sex education classes and believed her period was "[w]here your sick time comes." *State v. Summers*, 70 Wn. App. at 432. She spoke in fragmented and confusing sentences, thought a penis was a tail, and could not read or tell time. She possessed a basic understanding of the mechanical act of sexual intercourse and understood sex as something a husband and wife perform in order to beget a baby. This court held that the testimony, when viewed in a light most favorable to the State, allowed a rational trier of fact to conclude beyond a reasonable doubt that the victim was mentally incapacitated.

James Furr's prosecution presents a closer case. Rita Evans' testimony showed she possessed a broader understanding of the nature of sex than the victims in *State v. Summers* and *State v. Ortega-Martinez*. Evans was more articulate than the other victims. Nevertheless, providing a correct technical answer does not necessarily substantiate a meaningful understanding of the nature and consequences of sex. Although more coherent than other victims, Evans' answers remained short and sometimes incomplete.

Despite the stronger evidence favoring James Furr, we conclude the State presented sufficient evidence for a rational jury to find Rita Evans mentally incapacitated as defined under RCW 9A.44.010(4). When hearing and observing Evans, the jury encountered an opportunity to evaluate her mental capacity. Witnesses confirmed Evans' suggestibility and described her as possessing the mental capacity of a youth. Expert

clinical psychologist Paul Connor averred that Evans had an IQ of sixty-five, a mental age of seven years and seven months, and impairments consistent with fetal alcohol spectrum disorder.

James Furr contends that Dr. Paul Connor testified that he could not state whether Rita Evans could consent to sex. We disagree. Connor rendered no such denial. Connor instead stated he had not been asked to address the question. He added that Evans' impairments rendered her prone to victimization.

Knowledge of Low Mental Capacity

James Furr next argues that no rational jury could conclude that he believed Rita Evans to be mentally incapacitated. RCW 9A.44.030(1) declares:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

When a defendant must establish a defense by a preponderance of the evidence, the appropriate standard of review is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 17, 921 P.2d 1035 (1996). No Washington decision addresses whether sufficient evidence supported a trier of fact's rejection of the defense for second degree rape.

We also reject James Furr's contention that no reasonable jury could find that he

held knowledge of Rita Evans' mental disability. The State presented evidence of Furr's actual knowledge. John Furr testified that he informed James that Evans possessed the mentality of a twelve-year-old. The brother ordered James: "[d]on't mess with her." RP at 179. A reasonable jury could have found that James failed to prove his defense by a preponderance of the evidence.

Legal Financial Obligations

By relying on the recent Supreme Court decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), James Furr requests discretionary review of the legal financial obligations imposed by the trial court. *Blazina* requires that a trial court enter an individualized finding, on the record, of a defendant's current or future ability to pay obligations before assessing discretionary costs.

In the event a defendant failed to object to the imposition of legal financial obligations before the trial court, *State v. Blazina* affords this court discretion in determining whether to review a challenge to the obligations on appeal. The author of the opinion wishes to review the imposition of discretionary financial obligations because of the high sum imposed. The author also notes that, although James Furr did not directly object to the obligations, he questioned his ability to pay. A majority has voted to decline review of the legal financial obligations.

CONCLUSION

We affirm James Furr's conviction for second degree rape and his sentence.

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.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.