

NO. 45913-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER SAVAGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda C.J. Lee, Judge

BRIEF OF APPELLANT

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INTRODUCTION

The State charged eighteen-year old Tyler Savage with aggravated first degree murder, claiming he killed K.D., a sixteen-year old girl, by strangling her with her shirt and bra during the course of a forcible rape, and then hid her body. The State also alleged K.D. was particularly vulnerable because cognitive deficiencies caused her to function at the level of a ten to twelve-year old.

Savage, who knew K.D. before her death, denied being aware of her cognitive deficiencies, and initially denied knowing what happened to her, although he admitted being with her the day she went missing. After repeated contacts with the law enforcement Savage eventually told them that he and K.D. had been exploring the neighborhood and eventually ended up sitting and talking in a grass field. When K.D. got up to leave, Savage did not want her to go so he choked her with his arm until he realized she was dead. In an attempt to make it look like something else had happened, Savage removed her clothes, tied her shirt and bra around her neck and inserted his fingers into her vagina before tossing her body into nearby blackberry bushes.

Savage recanted his confession at trial, stating he made it up because he did not think the truth was believable. Savage claimed the truth was that when they were talking in the grass field, K.D. invited

Savage to have sex with her. When Savage agreed, K.D. asked him to tie something around her neck while they had sex.¹ Although Savage expressed concern, K.D. assured him it was safe and that she had done it before, so he complied by tying her bra and shirt around her neck.

Savage recalled K.D. smiling at him as he tied the clothes around her neck, and then kissing her briefly before noticing she was no longer moving. He assumed she was dead. Scared, Savage removed the rest of her clothes, inserted his fingers in her vagina and then tossed her body into some nearby blackberry bushes and fled.

A jury convicted Savage as charged and the court imposed a life sentence without the possibility of parole. Savage appeals.

A. ASSIGNMENTS OF ERROR

1. The trial court deprived Savage of his right to present a defense when it erroneously excluded evidence of K.D.'s internet history, which revealed she regularly visited pornography sites, including ones depicting outdoor sex, bondage and choking.

¹ Presumably this was for purposes of "erotic asphyxiation," which Wikipedia defines as "the intentional restriction of oxygen to the brain for the purposes of sexual arousal." http://en.wikipedia.org/wiki/Erotic_asphyxiation (as of 1/20/15)

2. The trial court erred in refusing to instruct the jury that to find Savage committed the predicate rape, the State had to prove K.D. was alive at the time of penetration.

3. Savage was denied effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. The State's theory at trial was that Savage knowingly took advantage of K.D.'s cognitive deficits to lure her into a secluded place to rape and kill her. Did the trial court err by excluding evidence that K.D. regularly viewed pornographic sites, including those depicting outdoor sex, bondage and choking, when this evidence supported Savage's claim that K.D. instigated the sexual contact and when it rebutted the State's assertion that K.D. was a particularly vulnerable victim due to her child-like nature when it came to sex and where such evidence is not excluded under RCW 9A.44.020 (aka "Rape Shield" statute)?

2. The charge of first degree aggravated murder was premised on Savage having killed K.D. in the course of committing a forcible rape. Under the circumstances of this case, did the trial court err in refusing to instruct the jury that to find Savage guilty as charged, it had to conclude K.D. was alive at the time Savage penetrated her to constitute the predicate rape because, if it occurred after she was dead, it would only

constitute the crime of sexually violating human remains,² a Class C felony that does not qualify as a predicate offense to aggravate the murder charge?³

3. If the trial court did not error by failing to instruct the jury that it had to find K.D. was alive at the time Savage penetrated her to constitute the predicate rape because defense counsel failed to propose the proper instruction, then was Savage denied his right to effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

In August 2010, the Pierce County prosecutor charged appellant Tyler Savage (d.o.b. 7/28/92), with aggravated first degree murder for the death of his friend, K.D., a sixteen-year old girl (d.o.b. 3/15/94). CP 1-2; RP⁴ 1147. The prosecutor claimed that on August 17, 2010, Savage lured K.D. to a secluded field, and when she tried to leave he strangled her to death, then removed her clothes, touched her breasts, inserted his fingers into her vagina and then tossed her body into nearby blackberry bushes.

² This offense is codified at RCW 9A.44.105.

³ This appears to be an issue of first impression in Washington.

⁴ There are eighteen consecutively paginated volumes of verbatim report of proceedings collectively referred to as "RP."

CP 3-4. The prosecutor filed an amended information in April 2011 adding allegations that the offense was sexually motivated and that K.D. was a particularly vulnerable victim. CP 5.

A jury found Savage guilty as charged. CP 345, 349-50. On January 17, 2014, the court imposed a life sentence without the possibility of parole. CP 375-86; RP 2066-67. Savage appeals. CP 389-401.

2. Substantive Facts

a. Facts leading to Savage's arrest

When Cecil Daily returned home from work on August 17, 2010, he learned his daughter, K.D., had not returned at 3 pm when she was suppose to, was not at her friend Tamara's house where she was suppose to have been, and did not answer calls to her cell phone. RP 1144. Daily called police to report her missing. RP 1144-45.

A search for K.D. was instigated on August 18, 2010, and continued without success into August 23, 2010. RP 1262-76. Meanwhile, Pierce County Sheriff detectives learned several people claimed they saw K.D. bike riding midday on August 17th with Savage walking alongside. RP 1184, 1199-1200, 1204-06, 1208-10, 1212-14.

Detectives contacted Savage on August 18th to see what he knew. RP 1328-29, 1454. Savage admitted he had been with K.D. briefly on the

17th, stating he ran into her on his way from the store, but that they only walked for a couple of minute before parting ways. RP 1330-31; 1455-56.

Unable to locate K.D. by August 23rd, detectives decided to seek Savage's assistance, as he was still the last person known to have been with her. RP 1464-65. Savage agreed to show them where he and K.D. had gone on the 17th. RP 1466. Afterwards, Savage agreed to accompany them to headquarter to provide a statement. RP 1474-75.

In that statement, Savage repeated his claim that he met K.D. while returning from the store and she asked him to show her where he lived, and that she left him at a street on the way to Savage's that she said she was not allowed to cross. Ex. 75 at 4-5, 8-10. After the recorded interview, Savage revealed that on August 17th, he and K.D. had agreed over Facebook to meet that day because K.D. wanted Savage to show her where he lived. RP 1487-88. Savage said after showing her where his home was in relation to the street she could not cross he went on his way, unaware whether K.D. was continuing to follow him. RP 1486-90.

After the interview Savage agreed to help locate areas where someone might have dumped a body. RP 1491. The detective arranged for search dogs to look for K.D. in the areas Savage suggested, but nothing turned up. RP 1493.

At one point while the dogs were searching, one of the detectives confronted Savage, stating they knew K.D. was dead and that Savage had killed her. RP 1573-74. Savage started crying and nodding his head affirmatively. Savage then led them to her body. RP 1574, 1578-79.

K.D.'s dead body was found naked with her bike on top of her in blackberry bushes with a shirt and bra tied around her neck. RP 1579. When asked what happened, Savage explained that he and K.D. had been sitting in the field for 15-20 minutes. When K.D. wanted to leave, Savage said he choked her to death and did not know why. RP 1580-81. Savage was then informed he was under arrest and transported back to headquarters to provide another statement. RP 1581-82.

In a second recorded statement, Savage reiterated that he choked K.D. to death when she got up to leave. Ex. 84 at 8-9. He explained further that once he realized she was dead he panicked and decided to try to make her death look like a rape, so he removed the rest of her clothes, tied the shirt and bra around her neck, touched her breasts and eventually inserted two fingers into her vagina before hiding her, her clothes and her bike into the blackberry bushes. Ex. 84. at 10, 33-36

b. Savage's trial testimony

Savage recanted his confession at trial. Savage met K.D. a few years before her death. RP 1755. They became Facebook friends. RP

1756. Savage was aware of a limp in K.D.'s gait, but was unaware of any cognitive deficits she might have. RP 1757; see also Ex. 84 at 27 (Savage agrees K.D. seemed like a normal sixteen year old teenager). Savage denied any romantic interest in K.D., but admitted learning a few weeks before her death that K.D. had a crush on him. RP 1758-59.

Savage recalled communicating with K.D. through Facebook on the morning of August 17th. RP 1760. Savage accepted K.D.'s invitation to meet up after his stepfather came home. Savage's stepfather returned at about 2 pm and Savage and K.D. met up shortly thereafter. RP 1761-62. Savage complied with K.D.'s request to see where he lived. RP 1762-63.

After they saw Savage's house they went to a grassy field to hang out. RP 1766-68. While in the field K.D. asked Savage if he wanted to have sex with her. Savage thought she was joking at first, but when she said she was serious, he agreed. RP 1768. She then directed him to tie something around her neck. When he balked, she assured Savage it was safe and that she had done it before. K.D. removed her shirt and bra and Savage tied them around her neck as she had directed. RP 1769. K.D. smiled at him and they began kissing as they lay in the field and Savage touched her body, to which she seemed to respond accordingly. RP 1769-70. At one point, however, she became motionless. Savage shook her but she did not respond. She was not breathing. RP 1770.

Thinking no one would believe what had actually happened, Savage panicked. In his panicked state, Savage removed the rest of K.D.'s clothes, put his fingers into her vagina and then hid her and her belongings in the nearby blackberry bushes and left. RP 1770-72.

Savage testified he lied in his statements to police because he did not think they would believe the truth. RP 1773-75. Savage denied ever intending to rape, kill or cause K.D. any harm. He also asserted that he believed K.D. was dead when he stuck his fingers in her vagina. RP 1775.

c. The prosecution's theory of the case

The prosecution sought to prove Savage committed the charged crime with sexual motivation and that K.D. was a particularly vulnerable victim to the crime. In an effort to show K.D. was a particularly vulnerable victim, the prosecution introduced evidence about K.D.'s physical and cognitive deficits. For example, over defense objection the prosecution elicited testimony from K.D.'s father that she was born with fetal alcohol syndrome and clubbed feet (which required several surgeries to repair), had been in special education classes since she was three, regularly participated in Special Olympics, and was functioning only at a 5th grade level at the time of her death. RP 1147-48, 1152, 1154-55, 1157-58.

The prosecution was also allowed to present in rebuttal over defense objection the testimony of Teresa Lockey, one of K.D.'s former special education teachers. RP 1876-93. Lockey testified that K.D.'s physical and cognitive deficits were obvious to those she interacted with. RP 1878.

The prosecution emphasized the testimony of Daily and Lockey in closing argument. RP 1929-30, 2025-26. The prosecution argued Savage's claim that K.D. asked him to choke her while they had sex was "worse fiction" than the book *50 Shades of Grey*.⁵ RP 1995. The prosecution implied several times that Savage's claim that K.D. insisted on having "kinky sex" with him was preposterous and lacked "emotional truth," "medical truth" and "physical truth." RP 1995, 2002-04, 2010. In some of his final remarks to the jury, the prosecutor claimed;

There really isn't a lot of plausible dispute to her vulnerability. . . . We know she was the living definition of a vulnerable victim. . . . She was a vulnerable girl who had a crush on a guy who killed her. He exploited that vulnerability. He got her alone. Didn't want anyone to know about it, and that's why she never left there alive.

RP 2025-26

⁵ E.L. James, *50 Shades of Grey* (Vintage 2012).

d. Excluded defense evidence

Anticipating the prosecution would portray K.D. as a sexually naïve ten to eleven-year-old child in the body of a sixteen-year-old teenager, the defense moved pretrial to introduce thirteen video clips found in her internet browser history⁶ from the few days preceding her death. CP 178-223. These clips, which were culled from approximately 550 pornographic web sites she visited between July 7, 2010, and August 16, 2010, indicate K.D. had an interest in outdoor and/or public acts of sex that involved bondage, choking and vaginal insertions. CP 182, 193-219.

Savage argued the evidence is relevant to whether K.D. consented to her encounter with Savage. Savage noted the acts depicted in the proposed video clip evidence were similar to his encounter with K.D. and lent support to his claim that she consented to being asphyxiated for purposes of enhanced consensual sex. Savage claimed the evidence was also relevant to refuting the prosecution's claim that K.D. was a particularly vulnerable victim because it shows she was not as sexually naïve as the prosecution claimed. CP 184-192; RP 790-809.

⁶ K.D. lived with her father and grandmother, both of whom had their own computers. RP 1142, 1167. K.D.'s father testified he never used K.D.'s computer except to fix problems with it when they arose. RP 1168.

The trial court repeatedly rejected the defense attempts to have the video clip evidence deemed admissible. RP 820-25,⁷ 1047,⁸ 1190-93,⁹ 1349,¹⁰ 1812.¹¹ The court stated its analysis would be different if there was evidence K.D. had previously engaged in actual asphyxiation/bondage sex, but that merely viewing depiction of it did not constitute conduct indicating she was more likely to consensually engage in such conduct with Savage. RP 821-22.

e. Denied defense proposed jury instructions

The defense proposed the following two instructions in support of its contention the jury had to conclude K.D. was alive and Savage knew it when he penetrated her vagina with his fingers in order to find the

⁷ Initial ruling denying the defense motion.

⁸ Ruling denying defense request to introduce evidence that law enforcement failed to investigate the pornography found on K.D.'s computer.

⁹ Court denies defense claim that the prosecution opened the door to the pornography evidence when it asked K.D.'s father what it was like "raising an 11-year-old girl in a 16-year-old's body?" RP 1175.

¹⁰ Court denies defense's second request to introduce the evidence to show how sloppy the investigation was.

¹¹ Court denies defense renewed motion to introduce pornography evidence based on the prosecution's opening the door by asking Savage in an incredulous tone, "So you're saying this 16-year old developmentally disabled girl with the capacity of an 11-year-old wanted to have super kinky sex with you?" RP 1777.

predicate rape necessary for guilty verdict on the aggravated murder charge;

A person commits the crime of rape in the first degree when he engages in sexual intercourse with another living person, knowing the other person is living, by forcible compulsion when he kidnaps the individual or inflicts serious physical injury.

CP 75.

A person is no longer living when an individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain including the brain stem.

CP 77.

The court refused to give either instruction. It concluded that whether Savage knew K.D. was dead or alive at the time he penetrated her was irrelevant to whether his conduct constituted a first degree rape. RP 1742-43, 1912-13. Similarly, the court noted there was no "living" element listed in the first degree rape statute, and so it refused to instruct the jury it had to find K.D. was alive at the time of penetration to constitute a rape. RP 1913.

C. ARGUMENTS

1. THE COURT DEPRIVED SAVAGE OF HIS RIGHT TO PRESENT A DEFENSE.

Excluding evidence of the sex videos K.D. was viewing in the days before she died was error. It unfairly prevented the defense from rebutting the prosecution's evidence, which tended to portray K.D. as a naïve young child in a teenager's body. Because the evidence was relevant, crucial to the defense theory and, under the circumstances, admissible under the Rape Shield statute, the trial court erred in refusing to admit it at trial. This Court should reverse and remand for a new trial.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Wittenbarger, 124

Wn.2d 467, 474, 880 P.2d 517 (1994); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

"[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." [State v. Darden, 145 Wn.2d [612], 622, [41 P.3d 1189 (2002)]. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. We must remember that "the integrity of the truth finding process and [a] defendant's right to a fair trial" are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id., at 16.

Jones, 168 Wn.2d at 720.

The defense theory was that K.D. died by accidental asphyxiation from the shirt and bra she convinced Savage to tie around her neck. Evidence of K.D.'s recent interest in outdoor sex involving choking and bondage was relevant because it corroborated Savage's claim that it was K.D. who instigated being strangled and rebuts the notion that she is sexually naïve or otherwise particularly vulnerable.

The evidence should not have been excluded under RCW 9A.44.020, Washington's rape shield statute. The statute provides,

Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection(3) of this section....

RCW 9A.44.020(2).

The purpose of the statute is "to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of a victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent." State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984).

The statute, however, "was not intended to establish a blanket exclusion of evidence which is relevant to other issues which may arise in prosecutions for rape." Carver, 37 Wn. App. at 124, 678 P.2d 842 (citing

State v. Simmons, 59 Wn.2d 381, 368 P.2d 378 (1962)). As such, it provides that past sexual behavior may be admitted if (1) it is relevant to the issue of the victim's consent, (2) its probative value is not substantially outweighed by a substantial danger of undue prejudice, and (3) its exclusion would result in denial of substantial justice to the defendant. RCW 9A.44.020(3)(d). In Carver, the court held that evidence that neither prejudices the victim nor discourages prosecution generally does not fall within the scope of the statutory prohibition. Carver, 37 Wn. App. at 126.

The proffered video clip evidence revealed K.D.'s interests in choking and bondage sex in the days just before her death. This interest constitutes "sexual behavior," which refers to how people "experience and express their sexuality."¹² By watching the choking and bondage videos, K.D. was vicariously experiencing what was being portrayed, and was thereby expressing an interest in that type of sexual activity. Thus, it constitutes "past sexual behavior." But it is relevant to whether K.D. consented to engaging in sex with Savage in a manner that led to her accidental death because it makes Savage's claim that K.D. told him to strangle her beforehand more probable than without that evidence.

¹²See https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Human_sexual_behavior.html (defining "human sexual behavior" as how "people experience and express their sexuality").

Unfortunately, the trial court was unable to recognize the relevance, insisting that evidence K.D. had previously "engaged in sexual intercourse involving bondage and asphyxiation" would be relevant, but not evidence that she repeatedly viewed internet videos of the practice shortly before her death. RP 821. The court's oral decision reveals it did not consider K.D.'s viewing of pornography to constitute "past sexual behavior" because it did not involve her actual participation in such activities. RP 821-23. This was error that severely prejudices Savage's ability to present his defense.

In order to effectively present Savage's version of events it was necessary to provide some support for his trial testimony, particularly in light of his previous conflicting confession. The only evidence available to the defense to support the claim that K.D. instigated and orchestrated what resulted in a horrible accident and her death, was her internet history revealing a recent interest in outdoor choking and bondage sex.

This evidence could lead a reasonable juror to conclude a number of significant things relevant to Savage's guilt or innocence. First, it creates reasonable doubt as to whether Savage intentionally killed K.D., much less with premeditation, because it supports finding K.D. consented to the tying of ligatures around her neck for purposes of sexually satisfying her rather than for purposes of carrying out a plan to kill her.

Second, it creates reasonable doubt about whether K.D. was as sexually naïve as the prosecution tried to make her out to be. As such, a finding of particular vulnerability would be less likely.

Finally, the pornography evidence supported Savage's claim he was only negligent in causing K.D.'s death because he panicked and hid her body instead of removing the ligature and seeking help. RP 1965.

Ultimately, the jury's verdict turned on whether and to what extent the jury believed Savage's trial testimony. This Court cannot determine the jury would necessarily have reached the same result if it had heard evidence about K.D.'s interest in erotic asphyxiation, bondage and outdoor sex, as it provided strong support for Savage's version of events. "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004) (quoting, State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)); see also State v. Romero, 113 Wn. App. 779, 795, 54 P.3d 1255 (2002) (constitutional error not harmless beyond a reasonable doubt where verdict ultimately turned on the testimony of one eyewitness and the case came down to a credibility contest). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment

regarding the believability of the prosecution's accusation and Savage's defense. Davis, 415 U. S. at 317. Savage had the right to present evidence that might influence the determination of guilt. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In sum, the court improperly excluded evidence of K.D.'s viewing of pornography involving outdoor bondage and choking sex under either the rape shield statute or a finding the evidence was not relevant. The evidence was not offered to assassinate K.D.'s moral character or cause embarrassment to anyone based on her prior sexual behavior. The evidence had little potential to cause undue or unfair prejudice by confusing or misleading the jury or by causing the jury to base its decision on an emotional response rather than reason. See ER 403 (evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....”); see also Lockwood v. AC & S, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (unfair prejudice is caused by evidence that is more likely to arouse an emotional response than a rational decision by the jury).

To the contrary, the evidence was extremely relevant to both the defense theory and the issues of intent, premeditation and particular vulnerability. The improper exclusion this evidence violated Savage's constitutional rights to present a defense. Its exclusion requires reversal

unless the State demonstrates the error was harmless beyond a reasonable doubt. Kilgore, 107 Wn. App. at 178. It cannot do so on these facts. Thus, Savage's judgment and sentence should be reversed.

2. THE COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT TO CONSTITUTE A RAPE, K.D. HAD TO BE ALIVE AT THE TIME OF PENETRATION.

A defendant is entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support it. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3.

“It is a fundamental precept of criminal law that the prosecution must prove every element of the crime charged beyond a reasonable doubt.” State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) (citing RCW 9A.04.100(1)); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). It is reversible error to instruct the jury in a manner that relieves the prosecution of this burden. Brown, 147 Wn.2d at 339.

a. The standard of review is de novo

A trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883

(1998). When an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. See Fernandez-Medina, 141 Wn.2d at 454 (test to be employed includes legal and factual components); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

De novo review is appropriate here because the court refused to instruct the jury it had to find K.D. was alive at the time of penetration to constitute the predicate rape for the aggravated murder charge. Although the court seemed to recognize mid trial that penetration of a dead body is not a rape (RP 1742-43), it still refused to instruct the jury of that because no "alive" element is listed in the relevant rape statutes.¹³ RP 1913. This was error because only a living person can be the victim of a rape in Washington, and whether K.D. was alive or dead at the time of penetration was contested at trial.

b. Only a living person can be raped

It appears no Washington case has previously addressed whether sexual intercourse with a corpse constitutes rape. This Court should

¹³ First degree murder constitutes "aggravated first degree murder" when committed during the course of a first or second degree rape. RCW 10.95.020(11)(b). RCW 9A.44.040 & .050, are the statutes for first and second degree rape, respectively. Neither includes the words 'live,' 'alive' or 'living.'

conclude it does not in light of the language of the relevant statutes and the existence of a specific statute criminalizing sexual intercourse with a corpse.

California adheres to the rule advocated by *Savage*, which is that only a living person can be raped, and when the issue is contested, a jury must be instructed that to convict it must find the victim was alive at the time of penetration, even though there is no 'living victim' element listed in the relevant statutes. See e.g., *People v. Booker*, 119 Cal.Rptr.3d 722, 245 P.3d 366, 398 (2011); *People v. Sellers*, 203 Cal.App.3d 1042, 1050, 250 Cal.Rptr. 345 (1988). The *Seller* court explained;

We conclude, as a matter of law, that the crime of rape as defined in Penal Code section 261 requires a live victim. Penal Code section 261 defines rape as “an act of sexual intercourse accomplished with a *person* not the spouse of the perpetrator” (emphasis added) under certain described circumstances. The circumstances charged in this case were those set forth in Penal Code section 261, subdivision (2): “Where it [the act of sexual intercourse] is accomplished against a *person's will* by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.” (Emphasis added.) Rape must be accomplished with a person, not a dead body. It must be accomplished against a person's will. A dead body cannot consent to or protest a rape, nor can it be in fear of immediate and unlawful bodily injury. Penal Code section 263 provides, “[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape....” A dead body has no feelings of outrage.

203 Cal.App.3d at 1050 (footnote omitted, emphasis in original).

Similar to the rape statutes at issue in Seller, Washington's first and second degree rape statutes begin with "A person is guilty of rape in the [first/second] degree when such person engages in sexual intercourse with another person . . ." RCW 9A.44.040(1) & b.050(1) (emphasis added). As California courts have done, this Court should conclude the references to "person" in the rape statutes pertains only to living human beings. The existence in Washington of the specific crime of engaging in sexual intercourse with a corpse, "Sexually Violating Human Remains," a Class C felony, lends support to this interpretation. RCW 9A.44.105.

Moreover, there are numerous ways of committing both first and second degree rape, all of which at least implicitly require the victim to be alive. For example, both first and second degree rape may be committed by "forcible compulsion." RCW 9A.44.040(1) & .050(1)(a).

"Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6). It is axiomatic that to resist, one must be alive, just as one must be alive to fear. The same is true for other alternative ways of committing first or second degree rape, such as threatening a victim with a deadly weapon, rendering them unconscious, being a health care provider raping a patient during treatment or "[w]hen the victim is a frail elder or

vulnerable adult." RCW 9A.44.040 & .050. All of these implicitly indicate the victim is alive because one must be so in order to receive a threat, be rendered unconscious or be deemed frail or vulnerable.

This Court should conclude that in Washington, a rape can only be committed against a "person" and the term "person" as used in Chapter 9A.44 RCW refers only to living human beings.

- c. Whether K.D. was alive at the time of penetration was contested.

The testimony of Pierce County Medical Examiner Dr. Thomas Clark and Savage provided an ample basis for jurors to conclude there was reasonable doubt as to whether K.D. was alive when Savage stuck his fingers in her vagina.

Clark, was the prosecution's final witness in its case-in-chief. RP 1650-96. Clark testify about the results of the autopsy performed on K.D. by associate medical examiner Dr. Jacqueline Morhaim. RP 1656, 1680. Clark relied on Morhaim's autopsy report and photographs to support his testimony, although he was also present during the autopsy. RP1656-57, 1680.

According to Clark, K.D.'s body was in a state of decomposition by the time it was examined. RP 1664. She was bloated, there was "skin slippage" and sloughing, she had maggots around her eyes and forehead

and there was discoloration, which according to Clark, can interfere with determining whether a particular anomaly is an actual injury or merely decomposition in progress. RP 1664. Clark testified that K.D. died from asphyxiation caused by the shirt and bra ligatures tied around her neck. RP 1663, 1689-90.

When asked whether stoppage of the heart constitutes "dead," Clark admitted it was a "complicated question because dead usually means brain dead. It doesn't usually mean heart dead." RP 1688. Clark also noted that "[b]rain death" usually precedes "heart death." Id.

Clark noted Morhaim identified several lacerations on the exterior of K.D.'s body. Clark admitted it was difficult to determine whether they occurred before or after death in light of the degree of decomposition. RP 1666. Similarly, Clark noted what he believed to be a "scraping type of injury that was made with a blunt object," such as fingers, to K.D. vaginal wall. RP 1670. Clark opined that this type of injury is rare in the context of consensual intercourse. RP 1672.

Clark initially stated he thought it more likely than not that the injury to K.D.'s vaginal wall occurred before she was dead. RP 1675. Clark reached this conclusion on the "prominent red discoloration, which . . . indicates to me that there was a reaction of the body to [the] injury at the time the scraping occurred. I don't think there would be this much red

coloration if the injuries had occurred following loss of blood pressure, but that is not a certainty." RP 1675-76 (emphasis added).

Subsequently, Clark acknowledged that at the time the abrasion occurred to K.D.'s vaginal wall, she could have been "brain dead" but still have a heartbeat, and could therefore "be considered alive or dead" at the time that injury occurred. RP 1694-95. Ultimately, Clark admitted it could not be determined where K.D. was on the continuum from fully conscious to completely dead when the vaginal wall abrasion occurred. RP 1695.

Savage testified he panicked when K.D. stopped responding to his touch and instead lay motionless, not breathing. RP 1770-71. He did not, however, check for a pulse. RP 1771. He testified that he thought she was dead after she went motionless, which was before he put his fingers into her vagina. RP 1775, 1802.

This evidence would allow a reasonable juror to conclude the prosecution failed to establish K.D. was alive at the time of penetration. The level of decomposition made it difficult to determine what was an injury and what was mere decomposing, and thus a juror could conclude the abrasion was just as likely caused after death as before. Uncertainty as to what constitutes "dead" meant a reasonable juror could conclude that even if the redness of the vaginal abrasion proved K.D.'s heart was still

pumping at the time of infliction, the motionlessness testified to by Savage precluded finding she was not "brain dead" at the time. Likewise, Clark's expressed lack of certainty as to whether she was dead or alive is sufficient for a reasonable juror to conclude the prosecution failed to meet its burden.

- d. Failure to instruct the jury it had to find K.D. was alive at the time of penetration requires reversal.

Savage proposed one instruction defining the crime of first degree rape that informed the jury it had to find K.D. was alive at the time of penetration in order to conclude he committed the predicate rape. CP 75. The same proposed instruction also required that the jury find he knew K.D. was alive at the time of penetration. He proposed another that defined dead as either the "(1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain including the brain stem. CP 77.¹⁴

The court rejected both instructions. It concluded that whether Savage knew K.D. was dead or alive at the time he penetrated her was irrelevant to whether his conduct constituted a first degree rape. RP 1742-

¹⁴ Savage's counsel also proposed a "to-convict" instruction for first degree rape that incorporated the element that K.D. be alive, and also an element that Savage knew she was alive. CP 76. This was superfluous because rape was not charged as a separate crime. See CP5 (amended information charging only a single crime; aggravated first degree murder).

43, 1912-13. Similarly, the court noted there was no "living" element listed in the first degree rape statute, and so it refused to instruct the jury it had to find K.D. was alive at the time of penetration to constitute a rape. RP 1913.

Savage does not dispute on appeal the trial court's decision not to instruct the jury that Savage had to *know* K.D. was alive at the time of penetration. As the court correctly noted, rape is a strict liability crime for which there is no mens rea element. RP 1903; see State v. Chhom, 128 Wash.2d 739, 742 n.4, 911 P.2d 1014 (1996), disapproved of on other grounds, State v. Johnson, 173 Wn.2d 895, 899, 270 P.3d 591 (2012).

But the trial court did err in concluding the jury need not be instructed that K.D. had to be alive at the time of penetration in order to constitute the predicate rape to aggravate the murder charge. As discussed above, that the victim is living is an implied element of rape for which the jury should be so instructed when the issue is contested at trial. This Court should therefore reverse Savage's judgment and sentence.

3. FAILURE TO PROPOSE A LAWFUL JURY INSTRUCTION CRITICAL TO THE DEFENSE DEPRIVED SAVAGE OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Admittedly, the instruction proposed by Savage's counsel defining the crime of first degree rape was legally incorrect because it erroneously

included a mens rea element. The State may argue defense counsel's failure to propose a legally correct instruction constitutes a waiver of that issue for appeal. Assuming, arguendo, this Court agrees, then Savage was deprived of his constitutional right to effective assistance of counsel and reversal is still required.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Here, although counsel proposed an instruction that correctly indicates the jury had to find K.D. was alive at the time of penetration to constitute the predicate rape, it also erroneously included a nonexistent mens rea element. To the extent counsel had such a duty to propose a legally correct instruction in this regard, counsel's failure constitutes deficient performance.

Savage was prejudiced by counsel's deficient performance because there is a reasonable probability that but for counsel's failure the court would have instructed the jury it had to find K.D. was alive at the of penetration to constitute rape and, had it done so, there is a reasonable probability Savage would not have been convicted of first degree aggravated murder. Savage's judgment and sentence should therefore be reversed. Thomas, 109 Wn.2d at 229.


D. CONCLUSION

For the reasons stated, this Court should reverse Savage's judgment and sentence and remand for a new trial.

DATED this 27th day of January 2015.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 45913-2-II
)	
TYLER SAVAGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JANUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYLER SAVAGE
DOC NO. 371072
WASHINGTON STATE PENITENIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 9936

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JANUARY 2015.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 29, 2015 - 1:43 PM

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