SUPREME COURT NO. 93339-1

NO. 73962-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER SAVAGE,

Petitioner.

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

The Honorable Linda C.J., Lee, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER & INTRODUCTION

Petitioner Tyler Savage asks this Court to review the court of appeals decision referred to in section B, which affirmed his conviction for the aggravated first degree murder of K.D., a 16-year old girl. The prosecution claimed Savage strangled K.D. during the course of a forcible rape, and then hid her body. Savage initially denied involvement, but later confessed that he and K.D. had been in a grass field talking, but when she got up to leave he choked her to death, and then tried to make it look like something else by removing her clothes, tying her shirt and bra around her neck, inserting his fingers in her vagina and then hiding her body.

Savage recanted at trial, claiming instead that K.D. invited him to have sex with her and asked him to tie something around her neck[1] and assured him it was safe and she had done it before, so he tied her bra and shirt around her neck, as she smiled at him. They then kissed briefly before he noticed she was no longer moving. He assumed she was dead. Scared, Savage removed her clothes, inserted his fingers in her vagina and then hid her body in blackberry bushes.

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[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)

B. COURT OF APPEALS DECISION

Savage seeks review of the court of appeals decision in State v. Tyler Savage, No. 73962-0-I, 2016 WL 1566871 (Wash. Ct. App. Apr. 18, 2016). A copy of the decision is attached as Appendix A. The copy of the order denying Savage's motion to reconsider on May 31, 2016, is attached as Appendix B.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the decision raises significant questions of law under the due process provisions of the state and federal constitutions regarding the right to have the jury properly instructed. RAP 13.4(b)(3).

D. ISSUES PRESENTED FOR REVIEW

The charge of first degree aggravated murder was premised on Savage killing K.D. in the course of a forcible rape. Was Savage deprived of his due process right to present a defense and for a properly instructed jury because the trial court refused to instruct the jury that to find Savage guilty as charged, it had to conclude K.D. was alive at the time of penetration to constitute the predicate rape, because if it found she was dead at the time of penetration, then it was not a rape, but instead would

only constitute sexually violating human remains,[2] a Class C felony that does not qualify as a predicate offense for aggravate murder?[3]

E. STATEMENT OF THE CASE

1. Procedural Facts

Savage (d.o.b. 7/28/92), was charged with the aggravated first degree murder of his friend, K.D., a sixteen-year old girl (d.o.b. 3/15/94). CP 1-2; RP[4] 1147. The prosecutor claimed Savage lured K.D. to a field and strangled her to death, then removed her clothes, touched her breasts, inserted his fingers into her vagina and then hid her body in blackberry bushes. CP 3-4. The prosecutor also alleged sexual motivation and that K.D. was a particularly vulnerable victim. CP 5.

A jury convicted Savage as charged and he was sentenced to life without parole. CP 345, 349-50, 375-86; RP 2066-67. His judgment and sentence was affirmed on appeal. Appendix A.

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[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."

2. Substantive Facts

Cecil Daily returned home on August 17, 2010, to learn his daughter K.D. had not returned home at 3 pm as directed, was not at her friend's house where she was suppose to have been, and did not answer her cell phone, so he report her missing. RP 1144-45. A search began the following day, and continued without success into August 23, 2010. RP 1262-76. Meanwhile, detectives learned K.D. had been seen on August 17th riding a bike while Savage walking alongside, which Savage later admitted when confronted by the detectives on August 18th, but claimed they eventually parted ways. RP 1184, 1199-1200, 1204-06, 1208-10, 1212-14, 1328-29, 1454, 1330-31; 1455-56.

On August 23rd, 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 body was found unclothed 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 he and K.D. had been sitting in the field, and that when K.D. wanted to leave, Savage choked her

to death, but did not know why. RP 1580-81. Savage was arrested and asked to provide a statement. RP 1581-82.

In a recorded statement, Savage admitted choking K.D. to death when she tried to leave. Ex. 84 at 8-9. He explained that once he realized she was dead he panicked and tried to make her death look like a rape by removing her clothes, tying her shirt and bra around her neck, touching her breasts and inserting two fingers into her vagina before hiding her, her clothes and her bike into blackberry bushes. Ex. 84. at 10, 33-36

Savage recanted at trial. He explained instead that he 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 had. 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 she 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 agreed to meet up with her after his stepfather came home at about 2 pm, which they did. RP 1761-62. Savage showed K.D. where he lived as she had asked. RP 1762-63.

After they saw Savage's house they went to hang out in a field. RP 1766-68. K.D. eventually invited Savage 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 told him to tie something around her neck. When he balked, she assured him it was safe and that she had done it before. K.D. removed her shirt and bra and had Savage tie them around her neck. RP 1769. K.D. smiled at Savage 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. K.D. eventually, however, became motionless. Savage shook her but she did not respond. She was not breathing. RP 1770.

Thinking no one would believe what happened, Savage panicked. He removed K.D.'s clothes, put his fingers into her vagina and then hid her and her belongings in blackberry bushes and left. RP 1770-72.

Savage said he lied 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.

The defense proposed two instructions to support its position that the jury had to conclude K.D. was alive and Savage knew it when he

penetrated her in order to find the predicate rape. One required that the victim be alive during the rape and that the defendant knew it, and the other directed that a person is no longer alive if there is "(1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain including the brain stem." CP 75, 77.

The court refused both instructions, concluding that whether Savage knew K.D. was dead or alive at the time of penetration 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 refused to instruct the jury it had to find K.D. was alive at the time of penetration to constitute a rape. RP 1913.

On appeal, Savage challenged the trial court's failure to instruct the jury that to find he committed the predicate rape, it had to find K.D. was alive at the time of penetration, arguing that as charged and tried it was a necessary element for the jury to find Savage guilty of aggravated first degree murder. Brief of Appellant (BOA) at 3, 21-29. The court of appeal rejected this claim, reasoning that the jury did not have to find Savage

actually committed first degree rape, only that he was attempting to when he caused K.D.'s death. 2016 WL 1566871 at 5.

In his motion to reconsider, Savage noted the court's conclusion the prosecution only had to prove Savage was *attempting* to rape K.D. in order to prove the aggravator was incorrect because it overlooks how the crime was charged and how the jury was instructed, and misapprehends the law with regard to what must be proved for a valid aggravated first degree murder conviction. Motion to Reconsider (MTR) at 2. This argument was rejected without explanation. Appendix B.

F. ARGUMENTS

REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS WRONGLY ASSUMED THE STATE ONLY HAD TO PROVE AN ATTEMPTED RAPE AS THE PREDICATE OFFENSE FOR AGGRAVATED FIRST DEGREE MURDER.

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.[5] 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 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;

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[5] 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.'

> 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. As charged and tried K.D. had to be alive at the time of penetration for that act to constitute the predicate rape for an aggravated first degree murder conviction.

The prosecution charged Savage as follows:

> That TYLER WOLFEGANG SAVAGE, in the State of Washington, during the period between the 17th day of August, 2010 and the 23rd day of August, 2010, did unlawfully and feloniously, with premeditated intent to cause the death of another person, [K.D.], thereby causing the death of [K.D.], a human being, who died on or about the 17th day of August, 2010, and that aggravated circumstances exist, to-wit: that the murder was committed in the course of, in furtherance of, or in immediate flight from the crime of Rape in the First Degree . . .

CP 5.

The jury was instructed that to find Savage guilty of premeditated first degree murder it had to find beyond a reasonable doubt:

> (1) That during the period between August 17, 2010 and August 23, 2010, the defendant acted with intent to cause the death of [K.D.];
>
> (2) That the intent to cause death was premeditated;
>
> (3) That [K.D.] died as a result of the defendant's acts; and
>
> (4) That any of these acts occurred in the State of Washington.

CP 319 (Instruction 10)

The jury was instructed that to find the premeditated murder was committed with aggravating circumstances, it had to find beyond a reasonable doubt that "The murder was committed in the course of, in furtherance of, or in immediate flight from rape in the first degree." CP 334 (Instruction 23)

There is absolutely nothing in the court's instructions to the jury indicating the aggravating circumstance is satisfied if Savage only *attempted* to rape K.D. See CP 307-44 (neither the word "attempt" nor any of its derivatives is contained in the court's instructions to the jury). As such, the court of appeal misapprehended the facts when it held a finding Savage was merely *attempting* to rape K.D. when he caused her death was sufficient to constitute the aggravator, because an attempted rape was never included as part of the charge or the associated instructions.

This factual misapprehension likely stems from the court's misapprehension of the relevant law. In concluding an attempted rape was all the State had to prove, the court cites and relies almost exclusively on this Court's decision in State v. Golladay, 78 Wn.2d 121, 131, 470 P.2d 191, 198 (1970) overruled by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976). 2016 WL 1566871 at 5. The court of appeals interpreted

Golladay as authority for the proposition that a mere attempt to commit the alleged predicate offense for an aggravated murder conviction is always sufficient. Golladay stands for no such proposition.

Golladay was convicted of committing murder "during the commission of, or in withdrawing from the scene of, a larceny[.]" 78 Wn.2d at 129. Golladay killed a female hitchhiker in a remote location by inflicting repeated blunt-force trauma to the back of her head. Id. at 122-23. He then drove away with her purse and other personal belongings in his car, only to crash on an embankment, which drew the attention of passersby, who witnessed Golladay dispose of the purse and other items in a nearby field in an attempt to conceal his involvement in the killing. Id. at 124-25.

By repeatedly striking the victim in the head and killing her, Golladay had certainly committed murder. And by taking and disposing of the victim's purse and other personal items thereafter, Golladay had also committed larceny. Id. at 130. This was not sufficient, however. Holding that "the causal connection between the commission of the collateral crime and the death must be clearly established," the Supreme Court found that, beyond speculation, there was nothing to establish the larceny was already in progress when the homicide occurred; therefore, there was an

insufficient legal relationship between the two crimes because "the killing did not occur while in the commission of, or in withdrawing from the scene of, a larceny as required by [Washington law]." Id. 129-130. The evidence must clearly establish such a relationship. Id.

Missing from Golladay is any consideration or analysis regarding whether a mere attempted larceny would have been sufficient to support the charged aggravator. Thus, Golladay, does not support the court of appeals' erroneous conclusion that a mere *attempt* to commit the predicate offense for an aggravated murder conviction is always sufficient, even though it was not charged that way and even though the jury was never instructed an attempt was sufficient.

Savage was entitled to have the jury fully instructed on the defense theory of the case for which there was supporting evidence. Fernandez-Medina, 141 Wn.2d at 461. There was evidence to support finding K.D. was not alive when penetration of her vagina occurred, as the medical examiner admitted penetration could have occurred either before or after death. RP 1675-76, 1694-95. The failure to adequately instruct the jury on Savage's theory of the case violated his due process rights. Koch, 157 Wn. App. at 33; U. S. Const. amend. XIV; Const. art I, § 3.

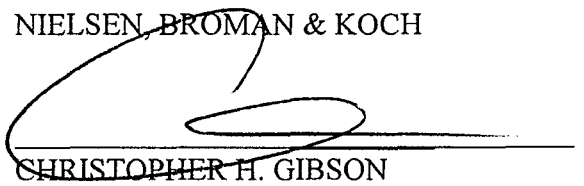
G. CONCLUSION

The court of appeals decision raises significant questions of law under the state and federal due process clauses because it affirms an aggravated murder conviction and consequent life sentence, despite the jury never being informed it had to find K.D. was alive at the time of vaginal penetration to constitute the predicate rape for an aggravated murder conviction. Review is therefore warranted under RAP 13.4(b)(3).

DATED this 22nd day of June 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 73962-0-I
v.	)	DIVISION ONE
TYLER SAVAGE, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: April 18, 2016

SPEARMAN, J. — Tyler Savage was convicted by a jury of first degree murder for killing sixteen-year-old K.D. The jury also found, as an aggravating circumstance, that the crime was committed in the course of, in furtherance of, or in immediate flight from rape in the first degree. Savage argues that he was deprived of his right to present a defense when the trial court excluded evidence of sexually explicit video clips that K.D. allegedly viewed during the days before her death. He also argues that the trial court erred in failing to instruct the jury that they had to find that K.D. was alive at the time the rape occurred in order to find the aggravating circumstance existed. We find no error and affirm.

FACTS

On the afternoon of August 17, 2010, sixteen year old K.D. was riding her bike to a friend's house when she encountered Tyler Savage. K.D. had been diagnosed with

fetal alcohol syndrome and it was estimated that her cognitive functioning was somewhere between a third and fifth grade level. She participated in special education classes at school, with a number of accommodations and enjoyed competing in the Special Olympics. K.D. had undergone a number of corrective surgeries on her feet. She walked with a contorted step and often wore a leg brace. Savage, who was 18 years old, was a casual acquaintance of K.D. He had dated a friend of hers who told him that K.D. had a crush on him.

Later that day, around 4:00 p.m., K.D.'s father, Cecil Daily, arrived home. When he saw that K.D. had not returned home at the expected time of 3:00 p.m., he called her cell phone and her friends but was unable to reach her or learn her whereabouts. Daily called the police and reported her as missing. The next day the police commenced a search.

On August 18, 2010, detectives contacted Savage after learning that witnesses had seen him with K.D. the day before. Savage admitted that he met K.D., but said they parted ways upon reaching a street that she was not supposed to cross. Savage spoke with the detectives two more times and a few days later, he agreed to help find K.D.

On August 23, 2010, a detective confronted Savage and told him they knew K.D. was dead and that Savage had killed her. Savage then led the detectives to a vacant lot where K.D.'s body was found in some blackberry bushes. Her clothes had been removed and a shirt and bra had been tied around her neck. Savage explained that he and K.D. had been sitting in the field, and when K.D. got up to leave, he came from behind and choked her to death with his arm. He stated that he took off her clothes, tied

the shirt and bra around her neck, touching her breasts and inserting two fingers into her vagina before hiding her in the bushes.

Savage was arrested and charged with one count of aggravated first-degree murder. The State alleged that Savage murdered K.D. with premeditated intent and in the course of, in furtherance of, or in immediate flight from the crime of rape in the first degree. The State also charged Savage with the aggravating factors that he knew K.D. was particularly vulnerable or incapable of resistance and that the crime was committed with sexual motivation. See RCW 9.94A.535(3)(b) and (f), respectively. The State introduced evidence of K.D.'s diagnosis and her cognitive and physical limitations, along with witness testimony that her limitations were readily apparent.

Savage's testimony at trial differed from the statements he had given during police interviews. At trial, he testified that he and K.D. had arranged to meet that day via Facebook. They met and went to the vacant lot, and K.D. asked Savage if he wanted to have sex with her. Savage thought she was joking at first, but ultimately agreed. Savage testified that K.D. directed him to tie something around her neck. Over his protests, she assured him that it was safe and that she had done it before. He testified that K.D. removed her shirt and bra and Savage tied them around her neck. They began kissing and touching and at one point, K.D. became motionless. Savage testified that at that point she was not breathing and did not respond when he shook her. Savage claimed he panicked and tried to make it look as though she had been raped. Thinking she was dead, he took off the rest of her clothes and penetrated her with his fingers. He testified that he lied before because he did not think anyone would believe the truth.

Before trial, Savage moved to introduce thirteen sexually explicit video clips that were found in the internet browser history on K.D.'s computer. The clips were selected from approximately 550 sexually explicit videos that had been viewed on K.D.'s computer during the month before her death. Savage also offered evidence that K.D. was the only person using the computer. The clips offered by Savage depicted scenes involving outdoor or public sex, bondage, and asphyxiation. He argued that the presence of the videos in the browser history showed that K.D. had an interest in engaging in these types of acts. He contended the evidence supported his theory that K.D.'s death was an accident resulting from consensual sex acts, including erotic asphyxiation. He also claimed the videos rebutted the allegations of premeditation and that K.D. was particularly vulnerable. He further argued that the evidence was not barred by Washington's rape shield statute, citing the exception in RCW 9A.44.020(3). That section permits the admission of evidence of the victim's past sexual behavior if, among other things, it is relevant to the issue of consent.

The trial court found the evidence was barred by the rape shield statute and denied the motion. It reasoned that while evidence of a previous history of engaging in similar sexual activity might be relevant, the logical nexus between merely viewing pornography and engaging in acts similar to those viewed was tenuous at best. The court stated it was struggling "to find a bridge" from "viewing pornography to actual engagement," and "just d[id]n't find it." Verbatim Report of Proceedings (VRP) (11/07/13) at 822-23. The court also ruled that while viewing pornography was "sexual behavior" under the rape shield statute, there was insufficient similarity between the

behavior of "[v]iewing versus doing" to escape the statute's general bar to the admission of such evidence. Id. at 825.

At trial, Savage proposed instructions advising the jury that in order to find he had committed the predicate crime of rape, the State had to prove that when he committed the acts constituting rape, that (1) K.D. was alive, and (2) that he knew it. The trial court refused to give either instruction. The jury found Savage guilty of aggravated first-degree murder as charged. The jury also found that K.D. was particularly vulnerable or incapable of resistance at the time of the offense and that the crime was sexually motivated. On January 17, 2014, Savage was sentenced to life without parole. He appeals.

DISCUSSION

Savage first argues that the trial court erred when it refused his request to admit into evidence thirteen of the video clips found in the internet browser history on K.D.'s computer. He claims the evidence was admissible under the rape shield statute, RCW 9A.44.020(3), and that its exclusion violated his right to present a defense under the sixth and fourteenth amendments to the United States Constitution and article 1, § 22 of the Washington State Constitution.

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This includes the right to offer testimony and examine witnesses. Id. But because the right only applies to relevant evidence, a

defendant must show that the evidence sought to be admitted is "'of at least minimal relevance.'" Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)). We review de novo an alleged violation of a defendant's right to present a defense. Id.

Under RCW 9A.44.020(2), "[e]vidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, 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...." Subsection (3)(d) provides a procedure by which the court may admit such evidence if it finds the evidence:

> is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant.

One purpose of the statute is 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. Hudlow, 99 Wn.2d 1, 16-17, 659 P.2d 514 (1983). The statute was not intended, however, to establish a blanket exclusion of evidence relevant to other issues that may arise in prosecutions for rape. State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842 (1984). Evidence of prior sexual conduct may be relevant and admissible if it is "demonstrated that the evidence will make it more probable or less probable that [the alleged victim] consented to sexual activity on this

occasion." Hudlow, 99 Wn.2d at 17. The admissibility of such evidence is within the sound discretion of the trial court. Id.

Savage argues that the video clips are relevant to his defense because they support his theory that K.D. consented to acts of erotic asphyxiation and sexual intercourse. He cites Carver in support, but the case is inapposite. In Carver, the defendant was charged with indecent liberties and statutory rape of his stepdaughters. He sought to introduce evidence that the stepdaughters had experienced similar sexual abuse by their grandfather and a friend, to "rebut the inference that the only way two young girls would have knowledge of such sexual matters was because the defendant had sexually abused them as charged." 37 Wn. App. at 123. The trial court excluded the evidence.

On appeal, we reversed holding that the trial court erred in analyzing the evidence under the rape shield statute because it concerned "prior sexual abuse, not misconduct, of a victim." Id. Stated differently, because being a victim of sexual abuse is not "sexual behavior," the admission of such evidence is not controlled by the rape shield statute. Here, however, it is uncontested that the evidence sought to be admitted, K.D.'s alleged viewing of sexually explicit video clips, was sexual behavior. Thus, its admission is necessarily limited to the confines of the rape shield statute.

A more analogous case is State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007). There, the defendant sought to introduce a draft e-mail from the victim's computer as evidence that she would have consented to violence and rape. The e-mail had been written by the victim around the time that she had met the defendant, but it was neither

addressed to nor sent to him. Id. at 642. According to the offer of proof, the draft stated that she would "'enjoy'" being raped and that she wanted a boyfriend who would "'choke her'" and "'beat her.'" Id. The Supreme Court found that the e-mail was not probative of consent because it was neither addressed to nor sent to the defendant, and it "described only the potential prior sexual misconduct or potential sexual mores, rendering the admission of the e-mail violative of the rape shield statute." Id. at 649.

Here, as in Posey, the trial court found that the video clips were neither relevant nor probative of consent because there was no evidence that K.D. had actually engaged in the depicted activities. The trial court's ruling differentiated between actual sexual conduct versus evidence of interest; "[s]howing an ongoing interest is a far cry from engaging in a particular kind of sexual activity." VRP (11-07/12) at 822. The court stated that it "need[ed] some evidence that [K.D.] was actually engaged in this activity as a past sexual conduct. You know, there has been no evidence presented that the defendant watched the pornography with the victim. There is no evidence that the defendant had access to this pornography on the victim's computer. There's no evidence that the victim had engaged in sexual activity that involved bondage and asphyxiation with the defendant or with anyone else." Id. at 823.

We agree with the trial court's conclusions. Because there was no evidence that K.D. had ever engaged in the activities depicted in the video clips, even if she had viewed them, that does not make it more or less probable that she consented to intercourse with Savage or that she initiated her own strangulation. The evidence

excluded by the trial court was irrelevant and its exclusion did not deprive Savage of his constitutional right to present a defense.[1]

Savage next contends that the trial court violated his due process rights when it refused to instruct the jury that the State had to prove that K.D. was alive at the time of penetration. Br. of Appellant at 21-22. Savage proposed the following instructions:

> 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 other person or inflicts serious personal injury. CP at 275.
>
> To convict the defendant of the crime of rape in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about August 17, 2010, the defendant engaged in sexual intercourse with [K.D];
> (2) That [K.D.] was living at the time;
> (3) That the defendant knew [K.D.] was living.... CP at 276.
>
> 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 at 277.

The trial court rejected these instructions, finding that "the term 'living' is not in the statute," but recognized that rape in the first degree requires that the victim be alive. VRP (12/16/13) at 1903. The court also rejected the insertion of a *mens rea* element because "[t]he rape statute does not include a *mens rea* element requiring that the

[1] We also reject Savage's argument that the video clips are relevant because they "create[] reasonable doubt about whether K.D. was as sexually naïve as the prosecution tried to make her out to be." Br. of Appellant at 19. The argument fails because the State's basis for arguing that K.D. was particularly vulnerable was based on her physical and cognitive limitations, not on evidence of her lack of sexual experience.

defendant know that the victim was living... whether he thought K.D. was dead or alive at the time of the act is not an issue." Id. Savage's trial counsel then objected to the court's failure to give some instruction that defined "death" and/or included statements on "whether or not the victim was alive or that the defendant knew she was alive." VRP (12/16/13) at 1908.

On appeal, Savage assigns error only to the trial court's failure to instruct the jury that K.D. had to be alive at the time of penetration. He concedes that the portion of the proposed instruction related to *mens rea* was legally incorrect and that trial counsel did not propose an alternate instruction.[2]

We review jury instructions de novo for errors of law. Anfinson v. FedEx Ground Package System, Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). As to the aggravating circumstance, the jury was instructed that the State's burden was to establish beyond a reasonable doubt that the "murder was committed in the course of, in furtherance of, or in immediate flight from rape in the first degree." CP at 334. Thus, the State was not required to prove that Savage committed the crime of first degree rape but only that the murder had occurred during an attempt to commit or flee from the crime. State v. Golladay, 78 Wn.2d 121, 131, 470 P.2d 191 (1970) (overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976)); State v. Diebold, 152 Wash.

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[2] In light of Savage's concession that his proposed instruction "was legally incorrect," the State argues that he failed to preserve for appellate review his challenge to the court's failure to give the instruction. Br. of Appellant at 29-30. In general, "[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made." State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976). But here, the record shows that his proposed instruction included the "living" language, the trial court rejected that specific language separately from *mens rea* component, and Savage verbally objected to the trial court's rejection. Under these circumstances, the claimed error is sufficiently preserved for our review. Accordingly, we need not address Savage's claim that his lawyer was ineffective for failing to propose a "legally correct" instruction. Br. of Appellant at 29-31.

68, 72, 277 P. 394 (1929)). See also State v. Hacheney, 160 Wn.2d 503, 514, 158 P.3d 1152 (2007). As the court explained in Golladay:

> As to when a homicide may be said to have been committed in the course of the perpetration of another crime, the rule is ....
>
> 'It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the Res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.'

Savage contends only that the jury should have been instructed that the State bore the burden of proving that K.D. was alive at the time of penetration. He does not contend that the evidence was insufficient to establish that K.D.'s death occurred during the course of or in furtherance of his attempt to commit the crime of first degree rape. And because that was all the State was required to prove in order to establish the aggravating circumstance, whether K.D. was alive when Savage completed the crime is irrelevant.

Savage cites no Washington authority in support of his argument to the contrary. Instead, he relies primarily on People v. Sellers, 203 Cal.App.3d 1042, 250 Cal.Rptr. 345 (1988), but the case is inapposite. In Sellers, the defendant was convicted of the completed crimes of murder and rape, in addition to a special circumstance allegation that the murder was committed while the defendant was engaged in committing rape. The trial court refused to instruct the jury that it "could not find rape or the special

circumstance of murder during the commission of rape if the jury believed the victim was dead at the time sexual intercourse occurred." Id. at 1050. On appeal, the court reversed. It concluded that because the penal code defined the completed crime of rape as "'an act of sexual intercourse accomplished with a person,'" the victim must necessarily be alive when the crime is committed. Id. (quoting California Penal Code section 261). But the court also stated that "'[w]hen a conviction of first degree murder is based on a theory of killing during an attempted rape, it is irrelevant whether the victim was already dead at the time of penetration.'" Id. at 1053, (quoting People v. Booker, 69 Cal.App.3d 654, 666, 138 Cal.Rptr. 347 (1977)). Sellers, is of no help in this case because Savage was neither charged with nor convicted of the crime of rape. Thus, the State bore no burden to prove that K.D. was alive when Savage completed the crime and the trial court correctly refused to instruct the jury thereon. There was no error.

Affirm.

Spearman, J.

WE CONCUR:

Becker, J.

Appendix B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TYLER SAVAGE, Appellant.	)	No. 73962-0-I ORDER DENYING APPELLANT'S MOTION TO RECONSIDER

Appellant Tyler Savage filed a motion to reconsider the opinion in the above matter filed on April 18, 2016. A majority of the panel has determined the motion to reconsider should be denied.

NOW therefore, IT IS HEREBY ORDERED that the appellant's motion to reconsider is denied.

DATED this 31st day of May, 2016.

Spearman, J.
Presiding Judge

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NIELSEN, BROMAN & KOCH, PLLC

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Transmittal Letter

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Court of Appeals Case Number: 73962-0

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