No. 96431-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM LUMPKINS, Appellant.	No. 48341-6-II (consolidated)
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner.	No. 49778-6-II
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner.	No. 49937-1-II

MOTION FOR DISCRETIONARY REVIEW

William Lumpkins #386626
Appellant / Petitioner, Pro Se
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TABLE OF CONTENT

A. IDENTITY OF PETITIONER

WILLIAM W. LUMPKINS, the Appellant/Petitioner, Pro Se, asks this Honorable Court to accept review of the decision designated in PART B of this Motion.

B. DECISION

The Appellant seeks review of the Court of Appeals, Division II "UNPUBLISHED OPINION," in regards to the Appellant's consolidated appeal, where the Honorable Sutton, with the Acting Chief Judge Lee, and Judge Worswick, had affirmed the Appellant's first degree rape conviction, but remanded to the Sentencing Court to vacate his second degree assault with sexual motivation conviction and remanded for resentencing. See "UNPUBLISHED OPINION," filed 09/18/2018.

The Appellant argues that (1) the initial charging of the Appellant in district court was error and that the district court did not have subject matter jurisdiction due to the seriousness of the criminal charge; (2) that the victim's alleged testimony and physical evidence presented does not support a finding of first degree rape; (3) that the victim's alleged identification of the Appellant was not met and was tainted by misconduct perpetrated by the Aberdeen Police Department; (4) that during the search warrant that was conducted of the Appellant's residence that clothing items beyond the scope of the search warrant were seized and

Should have been suppressed due to being beyond the scope of the search warrant, because it was never identified by the victim; (5) that the DNA evidence as pertaining to "10A defendant's underware, should have been suppressed and had invaded the province of the jury panel; and (6) that the Appellant's alibi witnesses showed that the Appellant was home at the time that the alleged crime to S.S. was comitted.

C. ISSUES PRESENTED FOR REVIEW

ISSUE ONE: The proper jurisdiction was the Superior Court and it was error and prejudical to the Appellant to initially charge the Appellant in district court due to the seriousness of the charges.

ISSUE TWO: The evidence, both testimonial and physical, that was presented by the State through the alleged victim, S.S., and the State's expert witness, Miriam Thompson, who was the registered nurse, failed to support the alleged charge of rape in the first degree.

ISSUE THREE: The alleged victim's, S.S.'s, identification of the Appellant was not met and was tainted by misconduct perpetrated by the Aberdeen Police Department.

ISSUE FOUR: That during the Search Warrant that was conducted of the Appellant's residence that clothing items beyond the scope of the search warrant were seized and should have been suppressed due to being

beyond the scope of the search warrant, because it was never identified by the victim.

ISSUE FIVE: That the DNA evidence as pertaining to #10A defendant's underware, should have been suppressed and had invaded the province of the jury panel.

ISSUE SIX: That the Appellant's alibi witnesses showed that the Appellant was home at the time that the alleged crime to S.S. was committed.

D. STATEMENT OF THE CASE

On February 19th and 20th, 2015, the Appellant was at his home in Aberdeen, Washington playing a video game called "Call of Duty." Appellant, Cristina Brookhouser, and Rikki Brookhouser were in the same room at the time. Appellant even shared a Facebook conversation with Helena Burns a few minutes before the crime against S.S. was alleged to have occurred. Three alibi witnesses placed the Appellant in his home at the time of the alleged crime against S.S.

On February 20, 2015, at the approximate time of 3:00 a.m., there was a report called in to the Aberdeen Police Department that the reporting party could hear a woman screaming. See "ABERDEEN POLICE INCIDENT REPORT" (hereafter Incident Report), at page 1 (Sub Number 72)

Officer Terence was the first to arrive on the scene and was backed up by Corporal King and contacted S.S. who Officer Terence, knew from prior contacts, who was coming out of the utility room that was part of the Harvard apartments. S.S.'s circumstances according to Officer Terence's Incident Report, was that S.S.'s pants "were" around her knees" and that S.S. was "pulling her underpants up." That "S.S. had a bloody lip, soiled clothing, and was crying." Officer Terence reported that "S.S. stated that she was "choked out" by an unknown black male, and raped in the utility room." (citing Incident Report at page 1).

The "Incident Report," written by Officer Terence went on to report that S.S. stated that she had been walking and that around Market Street near the new Timber Gym that she had come in contact with a black male who asked if she wanted to smoke some weed. That the black male had led her to the utility room, that during their walk there that the black male had allegedly told her that he was 37 years old, that he was from Illinois, and that he used to live at the Harvard apartments. That the utility room was a good place to smoke a bowl. See Incident Report at page 1 (Sub Number 72).

As S.S. went into the utility room and set her backpack down that S.S. reported the following had occurred:

"Suspect attacked her from behind, wrapping his left arm around her neck choking her. [S.S.] stated she tried to pull him off her but she was choked unconscious. [S.S.] stated when she woke up, the [utility] room was black and the suspect was gone. [S.S.] stated her pants and underpants were around her ankles and she felt like she just had sex[1]. [S.S.] stated she screamed for help and about 10 minutes later the police arrived."

(citing "Incident Report," at page 2 (Sub Number 73)).

"[S.S.] described the suspect as a black male, 5'08 thin to medium build, about 37 years old. with sideburns and short hair.

[S.S.] stated the suspect was last seen wearing a dark blue lined beanie, possible ENTY brand ... a black hooded sweatshirt under a dark blue crew neck sweatshirt with dark gray stripe going across the chest, connecting to the arms."

[1] Although in Corporal King's "ABERDEEN POLICE FOLLOW-UP REPORT" [S.S.] stated she wasn't sure but it felt like she had been raped."

[S.S.] stated the suspect was also wearing black skinny jeans and black classic Converse brand shoes."
(citing "Incident Report," at Page 2) (Sub Number 73).

A search by Corporal King of the location found "a condom wrapper" located on the ground of the utility room which "was the same brand as the condoms found inside a small purse inside [S.S.]'s purse. [S.S.] when asked about the condom by Corporal King stated that her belongings didn't appear disturbed and [S.S.] didn't know how the condom wrapper got there."
(See "Incident Report," at Page 3) (Sub Number 74)(citing in part).

S.S. was transported to the Grays Harbor Community Hospital where she was seen by Miriam Thompson, R.N. (hereafter Ms. Thompson), who obtained a personal history from S.S., See Psychosocial Evaluation, Page 2 and S.S.'s consent for the Sexual Assault examination. See Patient Information, Page 2. Ms. Thompson then documented S.S injuries which included that S.S. stated that she had throat pain and difficulty swallowing, that S.S. had tenderness to the back of her neck, lower back, calf, and chest. See Current Medical History, Review of Systems, at Page 3, See also Past Medical History/Exam, General, at Page 4. Ms. Thompson observed redness and tenderness on S.S.'s neck, See Tramogram/Labs, at Page 5, and that S.S. had dried blood from an injury to her lip. See Tramogram/Labs, at Page 5.

Ms. Thompson also conducted a physical examination of

S.S. where she took swabs of S.S.'s body and documented injuries to S.S. which included that the posterior fourchette had a superficial linear laceration and a triangular shaped abrasion. See Medical History/Exam, Pelvic/Genital Exam, at Page 4, See also Tramagram/Labs, at Page 5.

Detective Weiss contacted Detective Cox, who was another Officer from the Aberdeen Police Department and Detective Cox advised Detective Weiss that a suspect had been identified from an unrelated case involving the Appellant. That this was based upon the Appellant was from Illinois, that the Appellant only lived a short distance from where S.S. was attacked, and the Aberdeen Police Department retained the Appellant's Illinois ID Card which it had seized during a prior search of the Appellant's residence. See "AFFIDAVIT FOR EVIDENCE WARRANT," at Page 6 (Sub Number 52). (APPENDIX A)

Detective Weiss created a photo lineup utilizing the Appellant's illegally seized Illinois I.D. Card picture, that was several years old, included as one of the pictures. Then Detective Weiss recontacted S.S. at the Grays Harbor Community Hospital and conducted the Photo Montage with S.S.. Detective Weiss stated that "S.S. pointed out picture #2, which was that of [Appellant]." (citing in part from "AFFIDAVIT FOR EVIDENCE WARRANT," at Page 6).

Detective Weiss also collected the Sexual Assault Kit collected from S.S. and the clothing that S.S. had been wearing during the

which is a fork shaped fold of skin at the bottom of the enterance to the Vagina.

assault. See Aberdeen Police Department "MASTER EVIDENCE RECORD," dated 2/20/2015, Page 1 of 1 (Items #20A and #21A, respectively).

A search warrant was sought in the Superior Court and was granted by the Honorable Judge David L. Edwards to conduct a search of the Appellant's residence. See "SEARCH WARRANT," and "AFFIDAVIT FOR SEARCH WARRANT," dated 2/20/2015. (APPENDIX A).

At the time of the Aberdeen Police Department conducting the search warrant on 2/20/2015, the Appellant was arrested. See CrR 3.2(d)(1).

E. PROCEDURAL HISTORY

On 2/21/2015, in Grays Harbor District Court, a "DETERMINATION OF PROBABLE CAUSE," was issued which alleged that the Appellant had committed a felony of Rape in the First Degree against S.S. "on or about February 20, 2015[.]" See RCW 9A.44.040(1)(c); See also "DETERMINATION OF PROBABLE CAUSE."

On 2/24/2015, the Appellants criminal complaint preliminary hearing was held in district court.

On 3/24/2015, the State dismissed the district court case.

On 3/25/2015, the State by way of "INFORMATION," in the Grays Harbor Superior Court charged the Appellant with COUNT 1 - Rape in the First Degree, RCW 9A44.040(1)(c) and COUNT 2 - Assault in the Second Degree, RCW 9A36.021(1)(a)(g), with Sexual Motivation, RCW 9.94A.835, RCW 9.94A.030. See "INFORMATION," at Pages 1 and 2.

On 3/30/2015, the Appellant was arraigned in Superior Court

On 4/13/2015, the Omnibus Hearing was continued to 4/20/2015.

On 4/20/2015, the Appellant waived the Omnibus Hearing til 4/24/2015, due to waiting for the discovery and/or to interview alleged victim.

On 4/24/2015, the Omnibus Hearing and 3.5 Hearing were held and it was agreed that the witnesses to be interviewed by 4/28/2015.

On 4/30/2015, the Court denied the Appellant's "NOTION FOR RELEASE."

On 5/4/2015, the Pre-Trial Conference Continued til 5/11/2015.

On 5/11/2015, a Material Witness Warrant for the alleged victim, S.S. was requested and granted.

On 5/12/2015, the State sought a continuance of the May 27, 2015 trial date due to Detective Weiss and Detective Cox were unavailable for the scheduled trial date.

On 5/15/2015, the Appellant received notice that S.S. was in custody.

On 5/16/2015, the State sought a continuence.

On 5/18/2015, the Trial Court granted a continuance til 7/7/2015.

On 6/24/2015, the Pre-Trial Conference was held.

On 6/25/2015, the Appellant filed an "AFFIDAVIT OF PREJUDICE" against the Trial Court.

On 6/25/2015, the Appellant's defense counsel sought a continuance.

On 7/29/2015, the Appellant's defense counsel filed a "MOTION TO DISMISS BECAUSE SS WAS NOT RAPED; MOTION TO SUPPRESS EVIDENCE SEIZED UNDER CR36; MOTION TO SUPPRESS THE PHOTO MONTAGE; MOTION TO

DISMISS BECAUSE OF CREDIBLE ALIBI WITNESSES; AND MOTION TO DISMISS FOR VIOLATION OF THE CHAIN OF CUSTODY; DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED," (hereafter MOTION TO DISMISS). See G.H. Clerk's (Sub Number 49).

On 8/6/2015, the Appellant's "MOTION TO DISMISS," was heard by the Honorable Judge David L. Edwards and was denied.

On 10/1/2015, the Appellant's defense counsel filed a "MOTION TO DISMISS UNDER CrR 8.3 BECAUSE THE STATE KNOWS AND THE EVIDENCE SHOWS THAT S.S. WAS NOT RAPED; DEFENDANT'S DUE PROCESS RIGHTS WERE VIOLATED."

On 10/7/2015, the State filed its "STATE'S TRIAL MEMORANDUM", and "STATE'S RESPONSE TO DEFENSE MOTION."

On 10/14/2015, the Appellant's defense counsel filed the Appellant's "TRIAL BRIEF."

On 10/15/2015, the Appellant's jury trial proceeding commenced with the prospective jury panel and the selection of the jury panel in the Appellant's case. In the Appellant's jury panel, which was an all white jury, there was no person of color, thereby violating the right to a jury panel of his peers. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The Appellant's jury trial proceedings began and on 10/16/2015, the jury panel returned guilty verdicts for both counts and also found the special verdict finding of sexual motivation.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Standard of Review

To justify review, a Court of Appeals decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another Court of Appeals, (b)(2), present a significant question of law under the constitution, (b)(3), or involve an issue of substantial public interest that should be determined by the Supreme Court. (b)(4).

ISSUE ONE: The proper jurisdiction was the Superior Court and it was error and prejudicial to the Appellant to initially charge the Appellant in district court due to the seriousness of the charges.

The jurisdiction of a Court over the subject matter has been said to be essential, necessary, indispensible, and an elementary prerequisite to the exercise of judicial power. C.J.S. "Courts," § 2337 et. seq.. A Court cannot proceed with a trial or make a judgment without such jurisdiction existing.

> "It is elementary that jurisdiction of the Court over the subject matter of the action is the most critical aspect of the court's authority to act. Without it the Courts lacks any power to proceed; therefore, a defendant based upon this lack cannot be waived and may be asserted at any time." See Matter of Green, 313 S.E.2d 193 (N.C. App. 1984).

Subject Matter Jurisdiction cannot be conferred by waiver or consent, and may be raised at any time. See Rodriguez v. State,

441 So.2d 1129 (Fla App 1983). The Subject Matter Jurisdiction of a criminal case is related to the cause of action in general, and more specifically to the alleged crime or offense which creates the action. In re Pers. Restraint of Dalluge 772(2004).

The Subject Matter Jurisdiction of a criminal offense is the crime itself. See State v. Franks, 105Wn.App 950, 22 P.3d 269 (2001); State v. Buchanan, 138 Wn. 2d 186, 978 P.2d 1070, cert. denied, 528 U.S. 1154, 120 S.Ct. 1158, 145 L Ed.2d 1070(1999). Subject Matter in its broadest sense means the cause, the object. The thing of dispute. See Stillwell v. Markham, 10 P.2d 15, 16, 135 Kan. 206(1932). Also see (CR 12; Defenses and Objections); State v. Barnes, 146 Wn.2d 74 (2002).

> "A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate."

(citing Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 886 P.2d 189 (1994).

> "The focus must be on the words "type of controversy". If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction."

Robert J. Martineau, Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse, 1988 B.Y.U. L. Rev. 1, 28.; Franks, 105 Wn. App at 954, 22 P.3d 269.(citing Marley v. Dep't of Labor & Indu., Supra.)

"In order to acquire complete jurisdiction so as to be authorized to hear and determine a cause or proceeding, the court necessarily must have jurisdiction of the parties ... and of the subject matter involved."

State v. Werner, 129 Wn.2d 485, 493, 918 P.2d 916 (1996)(quoting State ex rel. N.Y. Cas. Co. v. Superior Court, 31 Wn.2d 834, 839, 199 P.2d 581 (1948)).

"The state constitution grants subject matter jurisdiction over felonies to the superior courts."

Franks, 105 Wn App at 954, 22 P.2d 269.

An indictment or complaint in a criminal case is the main means by which a court obtains Subject Matter Jurisdiction, and is "the jurisdictional instrument upon which the Petitioner stands trial." (citing from State v. Chatman, 671 P.2d 531, 538 (Kan. 1983)). The complaint is the foundation of the jurisdiction of the magistrate or court. Thus, if these charging instruments are invalid there is a lack of Subject Matter Jurisdiction. See Honomichl v. State, 333 N.W.2d 797, 798 (S.D. 1983); Ex Parte Carlson, 186 N.W. 722, 725, 176 Wis. 538 (1922).

Without a valid complaint any judgment or sentence rendered is "void abinito." Ralph v. Police Court of El Cerrito, 190 P.2d 632, 634, 84 Cal. App. 2d 257 (1948).

"Generally, a valid judgment consists of three jurisdictional elements: jurisdiction of subject matter, jurisdiction of person, and power or authority to render a particular judgment."

(citing State v. Werner, 129 Wn2d 485, 918 P.2d 916 (1996)).

Pursuant to RCW 3.66.060 pertaining to criminal jurisdiction it provides that:

"The district court shall have jurisdiction: (1) Concurrent with the superior court of all misdemeanor and gross misdemeanors committed in their respective counties and all violations of city ordinances."

(citing RCW 3.66.060 in part)

But the provisions of RCW 3.66.060 and its concurrent jurisdiction with the superior court has limitations as the statute states:

"It shall in no event impose a greater punishment than a fine of five thousand dollars, or imprisonment for one year in the county or city jail as the case may be, or both such fine and imprisonment, unless otherwise expressly provided by statute."

(citing from RCW 3.66.060).

The Appellant argues that there are cases where the State has initially charged a defendant in district court but then dismissed the district court case to subsequently file in the Superior Court. See State v. McCarter, 173 Wn App. 912, 295 P.3d 1210 (2013) and State v. Powers, 124 Wn. App. 92, 99 P.3d 1262 (2004). But when the incidents occurred in those cases the defendants were only facing charges that the proper jurisdiction was district court.

It was only after further investigating that the State determined that each defendant had criminal histories that supported the charging of a felony, so the State had dismissed the district court cases to subsequently file in the superior court.

In the Appellant's case, this is not what occurred, as the State at no time filed any charges that were of an inferior degree that the district court had venue and jurisdiction over. The "SEARCH WARRANTS" were also sought in the Grays Harbor Superior Court and not the district court. See "SEARCH WARRANT," and "AFFIDAVIT FOR SEARCH WARRANT," dated 2/20/2015, (APPENDIX A).

The State had committed misconduct and had prejudiced the Appellant's ability to defend against the alleged charges by its jumping back and forth between the two courts and not initially prosecuting the Appellant's case directly in the Grays Harbor Superior Court.

There was no practical and reasonable reason why the State had initially charged the Appellant in the Grays Harbor District Court and let it remain in that court until it finally dismissed the district court case and then filed a subsequent prosecution in the superior court. The only reason was to deny the Appellant his Fifth, Sixth, Eighth, and Fourteenth Amendments rights to adequately defend his case, pursuant to the United States Constitution.

ISSUE TWO: The evidence both testimonial and physical, that was presented by the State through the alleged victim, S.S., and the State's expert witness, Miriam Thompson, who was the registered nurse, failed to support the alleged charge of rape in the first degree.

The Appellant argues that his article I, §3, §9, §14, §15, §21, §22, and §30 rights to the Washington Constitution and his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated when the alleged victim's, S.S.'s, testimony and the physical finding by the State's expert witness, Miriam Thompson, failed to substantiate the charge of rape in the first degree.

That Officer Terence "Incident Report," that S.S. through a statement that ... [s]he felt like she just had sex[1]" and Corporal King's "Follow-up Report," that through a statement that ... [s]he wasn't sure but it felt like she had been raped[2]" (citing from "Incident Report," at page 2 and "Follow-up Report," at page 1), and the expert testimony of Miriam Thompson, that S.S. never told her that she had been raped. See Interview with Miriam Thompson, RN Nurse, Page 58, lines 4-9, Page 59, lines 5-19, Page 61, lines 8-12. Additionally, the physical evidence shows that there was no penile/vaginal penetration of S.S.. Interview with Miriam Thompson, RN Nurse, Page 37, lines 12-18, Page 38, lines 20-24. See Medical History/Exam, Pelvic/Genital Exam, at page 4, See also Tramagram/Labs, at page 5.

Pursuant to the dissenting opinion by Charles K. Wiggins in the case of State v. Deer, 175 Wn. 2d 725 (2011) the court

states:

"... RCW 9A.44.050(1)(b) defines "second degree rape" to include having sexual intercourse "[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated...." The state of being "[p]hysically helpless" is defined to include being "unconscious." RCW 9A.44.010(5)."

See also State v. Mohamed, 175 Wn.App. 45 (2013).

In the case of State v. Weaville, 162 Wn App. 801 (2011), the court held:

"Penetration, an element of rape in the second degree, is not defined within chapter 9A.44 RCW. Nevertheless, mere contact between sex organs of two individuals does not constitute penetration." A jury instruction defining "penetration" in this manner is erroneous. Here, the supplemental instruction given to the jury contained such an incorrect statement of law."

See United States v. Mc Donald, 592 F.3d 808, 813, 814 (7th Cir 2010).

Appellant asserts his "actual innocence", to these charges and that there was no way he had committed them as he was at his residence at the time. That the police in an effort to frame him for this crime have committed misconduct and altered the evidence in the Appellant's case.

ISSUE THREE: The alleged victim's, S.S.'s, identification of the Appellant was not met and was tainted by misconduct perpetrated by the Aberdeen Police Department.

Appellant argues that his article I, §3, §7, §14, §15, §21, §22, and §30 rights to the Washington Constitution and his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated when the Aberdeen Police Department during a prior search of the Appellants residence on November 2014 had seized the Appellant's Illinois Identification Card, regarding an unrelated case, which was beyond the scope of that search warrant and had retained it. See "MOTION TO DISMISS," at pages 8, 9. See Mapp v. Ohio, 367 U.S. 643 and Wong Sun v. United States, 371 U.S. 471 (1963).

The Aberdeen Police Department never explained the unlawful seizure of the Appellant's Illinois Identification Card or why they had retained it. See U.S. v. Holzman, 871 F.2d 1496 (9th Cir. 1989); Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927); Andresen v. Maryland, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976).

Appellant argues that the use of the Appellant's Illinois Identification Card picture as one of the photos for the photo montage that Detective Weiss had used in S.S.'s identification process was tainted due to the photo was almost two years old and did not represent how he looked at the time of this alleged incident. That due to the illegal seizure there was taint.

ISSUE FOUR: That during the Search Warrant that was conducted of the Appellant's residence that clothing items beyond the scope of the search warrant were seized and should have been suppressed due to being beyond the scope of the search warrant, because it was never identified by the victim.

Appellant argues that his article I, §3, §7, §14, §15, §21, §22, and §30 rights to the Washington Constitution and his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated when the Aberdeen Police Department had seized items of the Appellant's clothing that was beyond the scope of the search warrant. See "SEARCH WARRANT," and "AFFIDAVIT FOR SEARCH WARRANT," dated 2/20/2015 (APPENDIX A). See also Aberdeen Police Department Master Evidence Record of 314 W. 5th Street, #7 (Items #1A through #6A) Page 1 of 1 (APPENDIX A); Appellant's "TRIAL BRIEF," at page 4.

Contrary to the State's assertion that the items of Appellant's clothing matched that of what S.S. had described as being worn by the suspect, the Appellant argues that they don't and so the seizure was illegal, therefore should not have been admitted as evidence. Additionally at the time of the raid the Appellant was nude so the Appellant's clothing items should have had a hightened constitutional protection. See the case of State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2012) ("Time of Arrest" Rule) See also Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

"The warrant must be supported by an affidavit that particularly identifies the place to be searched and the items to be seized."

(citing from State v. Thein, 138 Wn2d 133, 140, 977 P.2d 582 (1999).

As what was presented in the Appellant's prior "MOTION TO DISMISS," it was presented that the Appellant was nude and that the Appellant's wife Christina Brookhourser, had thrown Appellant a pair of gym shorts (Item #9A) and the Appellant had put on a tank top (Item #8A) and the pair of shoes (Item #7A). See Aberdeen Police Department Master Evidence Record of [Appellant's] Person, Page 1 of 2 (Items #7A through #10A). Appellant argues that the Black and Blue Underware (Item #10A) were not seized off his person but were illegally seized from his residence and were beyond the scope of the "SEARCH WARRANT;" and that the Aberdeen Police Department has shown their propensity to illegally seize items beyond a search warrant, such as the illegal seizure of the Appellant's Illinois ID Card, that was done on a prior search of the Appellant's residence. So contrary to the State's assertion that United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), that the strip search of the Appellant, that the Appellant had a diminished expectation of privacy is not applicable. See State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003); Brett v. United States, 412 F.2d 401, 406 (5th Cir. 1969).

ISSUE FIVE: That the DNA evidence as pertaining to Item #10A Appellant's underware, should have been suppressed and had invaded the province of the jury panel.

Appellant argues that his article I, §3, §7, §14, §15, §21, §22, and §30 rights to the Washington Constitution and his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated when the Trial Court denied the suppression of evidence in regards to the DNA trace evidence on the Appellant's Black and Blue Underware, (Item# 10A), on the basis that it was not an item listed on the "SEARCH WARRANTS", and the State failed to request an additional Search warrant in connection with an item that the alleged victim, S.S., had it identified as an item of clothing that the alleged subject was wearing during S.S.'s attack. See the "SEARCH WARRANTS", and "AFFIDAVIT FOR EVIDENCE WARRANTS", dated 2/20/2015.; Aberdeen Police Department Master Evidence Records, dated 2/20/2015.

Contrary to the State's assertion that the Appellant was wearing them and so the Appellant at the time of arrest had no expectation of privacy in regards to the property that jail personnel seize upon a criminal defendant's arrival after a lawful arrest, is the Appellant's claim that the Black and Blue Underware (Item# 10A) were seized by the Aberdeen Police Department during the search of the Appellant's residence. See United States v. Edwards, 415 U.S. 800, 807-08, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974); State v. Byrd, 178 Wn.2d 611,

The evidence presented shows that the Aberdeen Police Department had their cross hairs on the Appellant due to prior contact with him. That during a prior lawful search that one of the Aberdeen Police Officers had stolen the Appellant's Illinois Identification Card, that they retained it in order to utilize it later on.

That Detective Weiss, who maintained all the evidence in regards to the Appellant and the alleged victim, S.S., had the time, opportunity and means to have tampered with the evidence in order to plant the DNA evidence on the Appellant's Black and Blue Underwore (Item # 10A). That all it would have taken was Detective Weiss to have taken one of the swabs from S.S.'s sexual assault kit collected by the Grays Harbor Community Hospital to plant it in the fly area of the Black and Blue Underwore. See Aberdeen Police Department Master Evidence Record(s) (Item # 10A and # 20 A)

No DNA evidence of the alleged victim, S.S., was found on the Appellant's person and the only evidence was the trace evidence DNA was on an item of clothing that was never tied to the scene of the alleged crime, was never sought for lawfully through a search warrant, where the seizure of is in question and where the evidence should have been suppressed as fruits of the poisionous tree but wasn't because the judge that had signed the "SEARCH WARRANTS", was also the Trial Court judge., showing definite actual prejudice towards Appellant.

"We generally review the validity of a search warrant for abuse of discretion, giving great deference to the issuing judge or magistrate."

(citing State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008))

"However, in reviewing a trial court's determination of probable cause at a suppression hearing, we review the trial court's conclusion de novo."

(citing State v. Dunn, 186 WnApp. 889, 896, 348 P.3d 791, rev. denied, 184 Wn.2d 1004 (2015))

Pursuant to the case of State v. Johnson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003), the Court stated:

"However, "the [reviewing] court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police."

Anguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 LEd.2d 723 (1964); Spinelli v. United States 393 U.S. 410, 89 S.Ct. 584, 21 LEd.2d 637 (1969).

Additionally, the States expert testimony from Jeremy Sanderson, in regards to the statistical statement that:

"It is 1.9 billion times more likely that the observed DNA profile occurred as a result of a mixture of these two than it having originated from the [Appellant] and an unrelated individual selected at random from the U.S. population."

See Appellant's "TRIAL BRIEF," at page 7. See also State v. Couthron, 120 Wn.2d 874 (1993); State v. Buckner, 125 Wn.2d 915, 890 P.2d 460 (1995).

Mr. Sanderson did indicate that there was another test that could be performed called the Y-STR. See Interview Statements of Jeremy Sanderson, at Page 28, lines 1-2; See also Appellant's "TRIAL Brief," at page 8.

Pursuant to the case of State v. Starbuck, 189 Wn. App. 740 (2015), it states:

> "" Y-STR" is a type of DNA testing specific to the Y chromosome, which is only present in males. Although the test is considered reliable, it is less discriminating and cannot narrow the identification to a particular individual male.

The State had continued its case in order to conduct this type of testing but their expert Laura E. Kelly, who had conducted the testing was unavailable for trial and so wasn't called as one of the State's witnesses and due to the defense counsel's improper service of a subpoena the defense was denied a continuance to secure Laura E Kelly's testimony for the defense.

Therefore, the testimony of Mr. Sanderson had invaded the province of the jury panel as the Appellant was not able to present the testimony from Laura E. Kelly to refute the State's evidence.

ISSUE SIX: That the Appellant's alibi witnesses showed that the Appellant was home at the time that the alleged crime to S.S. was committed.

Appellant argues that he was denied his right pursuant to the Washington Constitution and the United States Constitution to present the alibi witnesses to show that he was home at the time that S.S was attacted. The defense counsel expended much effort to locating the Appellant's alibi witnesses but failed to secure any documents beyond the saving of the game/program. Thereby failing to secure actual affidavits from the people thereby providing the Appellant ineffective assistance of counsel.

G. CONCLUSION

The Appellant is actually innocent and did not commit this crime. The Appellant prays that the truth will prevail and that the reviewing court will see that a great injustice has been perpetrated on the Appellant. The Appellant seeks a reversal of his convictions.

Dated this 23 day of November, 2018.

William Lumpkins

WILLIAM LUMPKINS #386626
Appellant/Petitioner, Pro Se
Stafford Creek Corrections Center
191 Constantine Way H6B654
Aberdeen, WA 98520

GRAYS HARBOR COUNTY SUPERIOR COURT

STATE OF WASHINGTON)
) ss. **SEARCH WARRANT**
GRAYS HARBOR COUNTY)

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

WHEREAS, upon the sworn affidavit made before me it appears there is probable cause to believe that evidence of a crime to wit: rape first degree, or contraband, the fruits of crime, or things otherwise criminally possessed or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, are under the control of, or in the possession of some person or persons and are concealed in, on, or about certain premises, vehicles, or persons within Grays Harbor County, Washington, hereinafter designated and described:

YOU ARE COMMANDED TO:

1. Search such premises specifically described as follows:

    1. **314 West 5th Street #7, which is located in the City of Aberdeen, County of Grays Harbor. This is a tan/grey colored apartment complex with small pebble/stone siding and white trim. Apartment #7 is located on the northeast side of the complex with the #7 clearly attached to the left side of the door frame.**

PROPERTY

2. Seize the following property, but not limited to:

    1. **Indicia of dominion or identifying information to the occupants of the residence.**
    2. **Black or Dark Navy sweatshirt with grey stripe that extends from the arms across the chest.**
    3. **Black or Dark Navy beanie with stripes.**

GU

4. **Black or Dark Navy Jeans or Pants.**

5. **Black or Dark Navy Converse style shoes.**

6. **Condom from a Lifestyles Condom wrapper.**

3. Safely keep the property seized and make a return of such warrant to the undersigned judge within five days following execution of the warrant, with a particular statement of all property seized. A copy of this warrant shall be given to the person from whom or whose premises the property is taken, together with a receipt for such property. If no such person is present, a copy of this warrant and receipt may be posted at the place where the property is found.

This warrant to be served within ten (10) days of issuance. A Return of Service will be filed with the Clerk of the Court within three days from service.

DATED this 20th day of February 2015.

JUDGE

ABERDEEN POLICE DEPARTMENT

MASTER EVIDENCE RECORD

TO BE COMPLETED BY THE INVESTIGATING OFFICER

SR# 15-A03141 | Citation # | Page 1 of 1

AP#

(X) EVIDENCE ( ) FOUND PROPERTY
( ) SAFEKEEPING

OFFENSE: RAPE

OFFENSE DATE: 2-20-15

OFFENSE ADDRESS OR LOCATION: 314 W 5TH ST #7

VICTIM'S NAME: (Last, First, MI)

SUSPECT'S NAME: (Last, First, MI) LUMPKINS, WILLIAM

Item #	DESCRIBE EACH ITEM IN DETAIL. USE A SEPARATE ITEM # FOR EACH PIECE OF EVIDENCE. CONTINUE TO THE NEXT BOX IF YOU NEED MORE ROOM.	SERIAL AND MODEL NUMBERS	WHERE SEIZED	DATE AND TIME SEIZED	EVID. PROC.: TYPE, INITIALS AND DATE WHEN REQUESTED OR COMPLETED.	PROPERTY OWNER'S NAME
1 A	INDICIA OF DOMINION AND CONTROL	SER# MOD#	314 W 5TH ST #7	DATE: 2-20-15 TIME: 1645	TYPE: INITIALS: DATE:	
2 A (65)	GREY / TORQUOISE NIKE HIGH TOPS SIZE 8.5	SER# MOD#	UPSTAIRS BEDROOM (BED)	DATE: ~~1645~~ 2-20-15 TIME: 1650	TYPE: INITIALS: DATE:	
3 A	GREY SWEATSHIRT LONG SLEEVE W/ HOOD	SER# MOD#	UPSTAIRS BEDROOM (BED)	DATE: 2-20-15 TIME: 1651	TYPE: INITIALS: DATE:	
4 A	BLUE JEANS W/BELT	SER# MOD#	" " FLOOR NEXT TO BED	DATE: 2-20-15 TIME: 1652	TYPE: INITIALS: DATE:	
5 A	BLUE / GRY SWEATSHIRT	SER# MOD#	" " FLOOR NEXT TO BED	DATE: 2-20-15 TIME: 1653	TYPE: INITIALS: DATE:	
6 A	GRY T-SHIRT	SER# MOD#	" " FLOOR NEXT TO BED.	DATE: 2-20-15 TIME: 1654	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	

OFFICER'S SIGNATURE: [signature] — 11 —

GRAYS HARBOR COUNTY SUPERIOR COURT

STATE OF WASHINGTON)
) ss. **AFFIDAVIT FOR SEARCH WARRANT**
GRAYS HARBOR COUNTY)

COMES NOW Jeff W Weiss, who being first duly sworn, upon oath, complains, deposes and says:

My name is Jeff W Weiss, I have been a Police Officer for over 18 years. I am currently employed as a Detective with the Aberdeen Police Department. I have conducted numerous criminal investigations; including but not limited to assaults, robbery, narcotics, homicide, burglary, theft, kidnapping, rape and forgery investigations as a Detective and Patrol Officer. I have been closely involved in numerous search and arrest warrant services, which have resulted in the recovery of evidence leading to successful prosecutions.

I have probable cause to believe and in fact do believe that evidence of crimes to wit: rape first degree, or contraband, the fruits of a crime or things otherwise criminally possessed or other things by means of which a crime has been committed or reasonably appears about to be committed, particularly described as follows:

A. **Evidence of fiber or dried fluids on the body of William W. Lumpkins DOB: 06-21-81 to be taken by way of combings or swabs.**
B. **Small samples of bodily hair from William W. Lumpkins to include but not limited to samples from the scalp and pubic region.**
C. **Buccal swabs from the mouth/cheek region of William W. Lumpkins.**

The above items are under the control of, or in the possession of some person or persons and are concealed in a certain residence located in the city of Aberdeen, county of Grays Harbor, Washington, described as follows, to-wit:

1. **The person of William W. Lumpkins DOB: 06-21-81. He is currently incarcerated in the Aberdeen Police Department Jail in the City of Aberdeen, Grays Harbor County.**

That my belief is based upon the facts and circumstances as set forth in the numbered attachments hereto, which are incorporated herein by this reference.

On 02-20-15 at 0308 hrs, Officer David Tarrence and Corporal Darin King were dispatched to a possible assault in progress at 208 N M Street. Upon investigating the assault complaint, Officer Tarrence and Corporal King were advised by the victim S.S. that she was assaulted and raped at the location. The following is an excerpt of Officer David Tarrences and Corporal Kings report.

Report of Officer David Tarrence:

On 2/20/2015 at about 0308 hours, I responded to an assault complaint at 208 N M Street in Aberdeen. Dispatch advised the RP could hear a woman screaming. Corporal King responded to assist.

Upon arrival, we contacted S.S, a subject I know from previous contacts, coming out of the utility room of the apartment complex. S.S had her pants down around her knees and was pulling her underpants up. S.S had a bloodied lip, soiled clothing, and was crying. S.S stated she was choked out by an unknown black male and raped in the utility room.

AFD responded to the location and transported S.S. to GHCH. I responded to GHCH and Corporal King processed the scene. I took 7 photographs of the scene. See Corporal King's follow up report for further details.

I re-contacted S.S. stated she left the Trave-Lure to go to the Harvard apartments. S.S. stated around Market Street near the new Timber Gym, she met a guy who asked if she wanted to smoke some weed. S.S. stated he led her to the utility room. S.S. stated the suspect told her he used to live at the apartment complex and the utility room was a good place to smoke a bowl. S.S stated the suspect told her he was 37 years old and he came there from Illinois. S.S. stated she went into the utility room and set her backpack down: S.S. stated the suspect attacked her from behind, wrapping his left arm around her neck choking her. S.S. stated she tried to pull him off of her but she was choked unconscious.

S.S. stated when she woke up, the room was black and the suspect was gone. S.S. stated her pants and underpants were around her ankles and she felt like she just had sex. S.S. stated she screamed for help and about 10 minutes later the police arrived.

S.S. described the suspect as a black male, 5'08 thin to medium build, about 37 years old with sideburns and short hair. S.S. stated the suspect was last seen wearing a dark blue lined beanie, possibly ENTY brand. S.S. stated the suspect was wearing a black hooded sweatshirt under a dark blue crew neck sweatshirt with a dark gray stripe going across the chest, connecting to the arms. S.S. stated the suspect was also wearing black skinny jeans and black classic Converse brand shoes.

Corporal King called me and advised a condom wrapper he located on the ground in the utility room was the same brand as the condoms found inside a small purse inside S.S.'s purse. I asked S.S. about the condom and she stated she did not think the suspect went through her belongings because they did not appear disturbed. S.S. stated she did not know how the condom wrapper got there. S.S. provided a written statement.

I took 6 photographs of S.S.'s injuries and later downloaded them to the APD hard drive. S.S. signed a medical release form for the incident. S.S. advised she would remain at the hospital until a

sexual assault kit could be completed. S.S. stated after being discharged, she would go immediately to APD to contact a detective.

Report of Corporal Darrin King:

On 02/20/15 at 0310 hours Aberdeen units were advised of an unknown problem at 208 N. M Street in an unknown apartment. A female was reportably screaming. Officer Tarrence and I arrived on scene at 0311 hours. I exited my patrol vehicle and observed the door in the driveway area just south of the front entrance that faces west was open and the light was on.

As I approached it I could hear a female voice yelling. I observed a crying female I know from prior contacts, S.S., emerge from the open door. S.S. had blood coming from the left side of her mouth. She was visibly shaking and could hardly speak to me. Her pants were pushed down below her knees as she shuffled toward me in a dazed look. Her left eye was very bloodshot. Underneath her pants she had compression shorts or long johns that she was pulling up. She kept complaining about one of her arms hurting her. She was bleeding from her mouth and had scratches on her chest.

S.S. stated the guy had left but he was about her size and black. I asked her what happened. She stated she was walking near the location when the black male approached her and asked her if she wanted to go to his house and smoke some "weed" with him. S.S. stated she agreed to go with him. She stated they got to the address and he told her to go into the utility room. She stated she walked in first and set her bags down and he attacked her from behind by choking her until she was unconscious.

I asked her what happened next. She stated she wasn't sure but it felt like she had been raped. She stated when she woke up she was in pain so she started yelling for help. I called for AFD to respond to attend to her injuries and transport her to the ER.

I looked inside the utility room and observed some clothing and a purse. S.S. stated all the items were hers and nothing inside the room belonged to the suspect. I observed blood near her purse and she stated it was her blood from when she woke up and noticed her mouth was bleeding. I also observed an empty

Lime Green Lifestyle single condom wrapper on the ground and also near the water heater was an uncapped and unlabeled RX bottle.

Officer Tarrence photographed the items. I called on-call Detective Weiss and briefed him on the investigation. AFD arrived and immediately transported S.S. to the ER. I collected the evidence and Officer Tarrence followed S.S. to the ER to take photos of her and obtain a written statement and obtain a Medical Records Release.

I took the items seized to APD and prior to placing them into evidence I inventoried them. I located several syringes and a meth-pipe, all that I properly disposed of prior to packaging. I also located a small purple purse inside S.S. larger purse. In the smaller purse were three unopened and single use Lifestyle Condoms that were the same colored packaging as the one I observed on the ground. See MER for further details.

I spoke via phone to Officer Tarrence at the ER. Officer Tarrence stated S.S. gave him a good written statement and completed a Medical Release. The sexual assault team had not yet arrived at the hospital and S.S. was wanting to know where her items from the location were. Officer Tarrence advised her once the sexual assault kit had been completed she could check the status of her items at APD. She agreed to contact the department to see if anything could be released. Officer Tarrence confirmed with the hospital that S.S. clothing be seized while she was being seen. Officer Tarrence then cleared the scene and Sgt. Lampky and Lt. Chastain were advised of the status.

I contacted the victim S.S. at Grays Harbor Community Hospital ER #1. S.S. provided me with the same clothing description provided to Officer Tarrence and Corporal King. I asked S.S. if she had any communication with the suspect. S.S. stated that the male said he was from Illinois. While talking with S.S., Detective Cox called and advised that he had a black male suspect from another case that said he was from Illinois. I advised S.S. that I would come back at a later time since she appeared to be dozing in and out.

I contacted Detective Cox at APD. Cox advised that he had identified a suspect from an unrelated case as William Lumpkins. Detective Cox advised that Lumpkins was from Illinois and only lived a short distance from 208 N M Street at 314 W 5th Street #7. I verified in and APD data that Lumpkins still lists the same address as currently as 01-10-15 from another contact by APD.

I created a photo line-up with Lumpkins picture included. I completed the Photographic Line-up instructions and re-contacted the victim S.S. at Grays Harbor Community Hospital ER #1. I read the instructions to S.S. I then showed S.S. the photographic line-up. I told S.S. to slowly look at the pictures. S.S. pointed out picture #2, which was that of William Lumpkins. I obtained a written statement from S.S. reference the photographic line-up.

While in the emergency room, I collected the sexual assault kit for S.S. I secured the sexual assault into an APD evidence transfer locker.

I contacted the apartment landlord Rusty Sagen via phone at (702-755-8052). Sagen confirmed that William Lumpkins is the current renter of 314 W. 5th Street #7. Sagen dropped off a key to the residence at APD.

Based on my observations I am requesting a search warrant to process the person of William W. Lumpkins DOB: 06-21-81 for any DNA evidence of the victim S.S.

I have read the foregoing, know its contents and believe that the same to be true.

SUBSCRIBED AND SWORN: This 20th day of February, 2015.

_____
AFFIANT

_____
JUDGE

Issuance of Warrant Approved:
Katie Svoboda
Prosecuting Attorney
For Grays Harbor County

BY: Reviewed by Erin Jany
Deputy Prosecuting Attorney

ABERDEEN POLICE DEPARTMENT

MASTER EVIDENCE RECORD SUPPLEMENTAL

TO BE COMPLETED BY THE INVESTIGATING OFFICER

SR# 15-A03141 | Page 1 of 1

AP# | Citation #

Item #	DESCRIBE EACH ITEM IN DETAIL. USE A SEPARATE ITEM # FOR EACH PIECE OF EVIDENCE. CONTINUE TO THE NEXT BOX IF YOU NEED MORE ROOM.	SERIAL AND MODEL NUMBERS	WHERE SEIZED	DATE AND TIME SEIZED	EVID. PROC.: TYPE, INITIALS AND DATE WHEN REQUESTED OR COMPLETED.	PROPERTY OWNER'S NAME
22 A	US CURRENCY	SER# MOD#	LF PANTS POCKET OF ITEM 4A	DATE: 3-10-15 TIME: 0800	TYPE: INITIALS: DATE:	
23 A	GREEN VEGETABLE MATTER (MARIJUANA)	SER# MOD#	LF PANTS POCKET OF ITEM 4A	DATE: 3-10-15 TIME: 0800	TYPE: INITIALS: DATE:	
24 (69)	2 - LIGHTERS 1 - KEY	SER# MOD#	LF PANTS POCKET OF ITEM 4A	DATE: 3-10-15 TIME: 0800	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	

OFFICER'S SIGNATURE:

ABERDEEN POLICE DEPARTMENT

MASTER EVIDENCE RECORD

TO BE COMPLETED BY THE INVESTIGATING OFFICER

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AP# | (X) EVIDENCE ( ) FOUND PROPERTY ( ) SAFEKEEPING

OFFENSE: RAPE 1 OFFENSE DATE: 2-20-15	OFFENSE ADDRESS OR LOCATION:	VICTIM'S NAME: (Last, First, MI)	SUSPECT'S NAME: (Last, First, MI) LUMPKINS, WILLIAM

Item #	DESCRIBE EACH ITEM IN DETAIL. USE A SEPARATE ITEM # FOR EACH PIECE OF EVIDENCE. CONTINUE TO THE NEXT BOX IF YOU NEED MORE ROOM.	SERIAL AND MODEL NUMBERS	WHERE SEIZED	DATE AND TIME SEIZED	EVID. PROC.: TYPE, INITIALS AND DATE WHEN REQUESTED OR COMPLETED.	PROPERTY OWNER'S NAME
7A	GRY NIKE AIR MAX SHOES	SER# MOD#	WILLIAM LUMPKINS PERSON	DATE: 2-20-15 TIME: 1741	TYPE: INITIALS: DATE:	WILLIAM LUMPKINS
8A	GRY TANK TOP	SER# MOD#	"	DATE: 2-20-15 TIME: 1741	TYPE: INITIALS: DATE:	"
9A (99)	WHT/GRY/BLUE SHORTS	SER# MOD#	"	DATE: 2-20-15 TIME: 1742	TYPE: INITIALS: DATE:	"
10A	BLK+BLU UNDERWEAR	SER# MOD#	"	DATE: 2-20-15 TIME: 1742	TYPE: INITIALS: DATE:	"
11A	PUBIC HAIR COMBINGS	SER# MOD#	"	DATE: 2-20-15 TIME: 1747	TYPE: INITIALS: DATE:	
12A	PULLED PUBIC HAIRS	SER# MOD#	"	DATE: 2-20-15 TIME: 1749	TYPE: INITIALS: DATE:	
13A	PULLED HAIR HEAD	SER# MOD#	"	DATE: 2-20-15 TIME: 1750	TYPE: INITIALS: DATE:	

OFFICER'S SIGNATURE: [signature] # 2017

ABERDEEN POLICE DEPARTMENT

MASTER EVIDENCE RECORD

TO BE COMPLETED BY THE INVESTIGATING OFFICER

SR# 15-A03141	Citation #	Page 2 of 3
AP#	(X) EVIDENCE ( ) FOUND PROPERTY ( ) SAFEKEEPING	

OFFENSE: RAPE 1	OFFENSE ADDRESS OR LOCATION:	VICTIM'S NAME: (Last, First, MI)	SUSPECT'S NAME: (Last, First, MI)
OFFENSE DATE: 2-20-15			

Item #	DESCRIBE EACH ITEM IN DETAIL. USE A SEPARATE ITEM # FOR EACH PIECE OF EVIDENCE. CONTINUE TO THE NEXT BOX IF YOU NEED MORE ROOM.	SERIAL AND MODEL NUMBERS	WHERE SEIZED	DATE AND TIME SEIZED	EVID. PROC.: TYPE, INITIALS AND DATE WHEN REQUESTED OR COMPLETED.	PROPERTY OWNER'S NAME
14A	KNOWN SALIVA SAMPLE	SER# MOD#	PERSON WILLIAM LUMPKINS	DATE: 2-20-15 TIME: 1751	TYPE: INITIALS: DATE:	
15A (67)	BUCCEL SWAB LEFT	SER# MOD#		DATE: 2-20-15 TIME: 1753	TYPE: INITIALS: DATE:	
16A	BUCCEL SWAB RIGHT	SER# MOD#		DATE: 2-20-15 TIME: 1754	TYPE: INITIALS: DATE:	
17A	CORONA SWAB PENIS	SER# MOD#		DATE: 2-20-15 TIME: 1757	TYPE: INITIALS: DATE:	
18A	SHAFT PENIS	SER# MOD#		DATE: 2-20-15 TIME: 1758	TYPE: INITIALS: DATE:	
19A	SWAB GENITAL AREA	SER# MOD#		DATE: 2-2015 TIME: 1800	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	

OFFICER'S SIGNATURE: [signature] #3011

ABERDEEN POLICE DEPARTMENT

MASTER EVIDENCE RECORD SUPPLEMENTAL

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20 A	SEXUAL ASSAULT KIT FROM GHCH	SER# MOD#	GHCH	DATE: 2-20-15 TIME: 1100	TYPE: INITIALS: DATE:	
21 A	CLOTHING FROM VICTIM @ GHCH	SER# MOD#	GHCH	DATE: 2-20-15 TIME: 1100	TYPE: INITIALS: DATE:	
(89)		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	
		SER# MOD#		DATE: TIME:	TYPE: INITIALS: DATE:	

OFFICER'S SIGNATURE: " " " "

Filed
Washington State
Court of Appeals
Division Two

September 18, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM LUMPKINS, Appellant.	No. 48341-6-II (consolidated) UNPUBLISHED OPINION
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner.	No. 49778-6-II
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner.	No. 49937-1-II

SUTTON, J. — William Lumpkins appeals his convictions for first degree rape and second degree assault with sexual motivation. He argues that the trial court violated his due process right to present a defense when it denied his request for a continuance to present a DNA witness, his trial counsel was ineffective when he failed to subpoena the DNA witness to rebut the State's case, and his second degree assault conviction should have merged with his conviction for first degree rape.

Lumpkins alleges multiple additional errors in his personal restraint petitions (PRPs).[1] He argues that (1) the State improperly charged him with a felony initially in district court and improperly held him without bail, (2) his CrR 3.3 time for trial right was violated, (3) the State did not serve him with its response to his CrR 8.3 motion to dismiss, (4) the prosecutor committed several acts of misconduct, (5) the trial court erred by admitting his identification card, (6) the trial court erred by not allowing him to publish his booking photograph after previously admitting it, (7) the trial court erred by denying his motion for a continuance, (8) the trial court erred by not admitting evidence of the victim's prostitution, (9) the trial court erred by allowing the State to play a police video during closing argument, (10) the trial court acted with racial bias, which violated his due process rights, (11) the police officers' failure to preserve syringe evidence at the crime scene requires reversal, and (12) newly discovered evidence requires reversal or a new trial.

We hold that the trial court did not violate Lumpkins' right to present a defense by denying his motion to continue and his counsel's performance was not ineffective. However, we accept the State's concession that the second degree assault with sexual motivation conviction merges with the conviction for first degree rape. We also find no merit in any of the PRP claims, and we deny the petitions. Thus, we affirm Lumpkins' first degree rape conviction, but we remand to the sentencing court to vacate his second degree assault with sexual motivation conviction and for resentencing.

[1] Lumpkins' trial counsel filed a CrR 7.5 motion to vacate the judgment which was transferred to our court as a PRP. Lumpkins separately filed a pro se PRP.

FACTS

I. EVENTS OF FEBRUARY 20, 2015

In the early morning of February 20, 2015, S.S.[2] was doing laundry away from her home. Around two or three in the morning, S.S. began walking home and ingested some heroin. As she was walking, a middle-aged black man approached her and invited her to smoke marijuana with him. She agreed and the two began to smoke together. The man told her he was from Illinois.

The two walked around, smoked marijuana, and ended up outside of an apartment near a utility shed. The man invited her into the shed, but she refused and continued to smoke outside. The man repeatedly requested that S.S. perform sexual acts with him, but she refused. The man then grabbed S.S. and punched her in the face, causing her to lose consciousness.

When S.S. regained consciousness, she realized that she was in the utility shed, and her pants and underwear were pulled down. She felt as though she just had sex with a man. As she walked out of the shed, police officers arrived. She had a bloody lip and soiled clothing. S.S. told the officer that an unknown black male had raped her. She also mentioned to the officers that her attacker had said he was from Illinois.

She was taken to the hospital where health care workers took swab samples from her body. Also, S.S.'s injuries were documented to include marks on her neck, bleeding on the side of her eye, dried blood on her lips, a cut on her tongue, and lacerations in her genitalia.

[2] The trial court entered a sexual assault protection order to protect the victim's identity, and thus, we use the victim's initials.

II. INVESTIGATION AND CHARGE

While at the hospital, Officer David Tarrence and Detective Jeff Weiss interviewed S.S. and showed her a photo montage. S.S. was immediately able to identify Lumpkins in the montage. She stated that she was "[o]ne-hundred and ten percent" confident that Lumpkins was the man who attacked her. Verbatim Report of Proceedings (VRP) (Oct. 15, 2015) at 131. The officers had his Illinois identification card from a prior investigation.

Lumpkins was arrested on February 20, 2015. A determination of probable cause was signed on February 21 and Lumpkins was booked into jail on February 23. On February, 24, the State filed a preliminary criminal complaint in district court alleging Lumpkins had committed first degree rape against S.S. and the district court conducted a preliminary hearing. The district court read Lumpkins the charge filed against him, appointed Lumpkins counsel, set bail at $100,000, and imposed conditions of release.

On March 24, the State dismissed the district court case and, on the same day, filed a felony information charging Lumpkins with the first degree rape and second degree assault with sexual motivation. On March 30, Lumpkins was arraigned in superior court. The superior court initially set the trial on May 27. The trial was continued several times.

While in jail, staff collected swab samples from Lumpkins including from the "inside surface of the fly area" of his underwear. VRP (Oct. 16, 2015) at 288. Lumpkins' clothing was placed into evidence. Lumpkins' clothing and swab samples, as well as swab samples taken from S.S., were tested for deoxyribonucleic acid (DNA). Samples taken from S.S. showed the presence of semen, but no specific male profile was identified. The sample taken from Lumpkins' underwear was consistent with the known profiles of S.S. and Lumpkins.

III. PRETRIAL MOTIONS

Prior to trial, the prosecutor requested a continuance for additional testing, called Y-STR DNA testing, on the swab taken from S.S.'s genitalia. Y-STR DNA testing is more sensitive and would potentially have the ability to identify whose semen was in S.S's genitalia. Lumpkins agreed to the continuance. The Y-STR testing showed that the swab contained three different men's semen, but no match could be made to any specific individual. A week before trial, the State gave notice that it might call a lab analyst to testify from the Washington State Patrol (WSP) lab to explain the results of the Y-STR testing.

IV. TRIAL

At trial on October 17, S.S. made an in-court identification of Lumpkins and testified that she was confident Lumpkins was the man who attacked her, and that he told her that he was from Illinois. Further, the jury heard evidence that S.S. promptly identified Lumpkins in the photo montage. The officers had Lumpkins' Illinois identification card from a prior unrelated investigation. The State moved to admit Lumpkins' Illinois identification card and the trial court admitted it without objection by Lumpkins. Lumpkins testified that he had never met S.S.

After learning that the State would not be calling the Y-STR witness, defense counsel stated that he was debating whether to call the Y-STR witness. However, defense counsel later told the trial court that he had just been informed that the Y-STR witness would not be available until the following week. The trial court stated that it would not delay the trial until the following week and told defense counsel to either call a witness or rest. Defense counsel then made a motion to continue the trial. Defense counsel explained that he had emailed a subpoena to the Y-STR witness

the previous night. The trial court denied the motion to continue, ruling that emailing a subpoena is not a proper method of service. The defense then rested.

The jury found Lumpkins guilty of first degree rape and second degree assault with sexual motivation. At sentencing, defense counsel argued that the rape and assault convictions should merge. The trial court disagreed and imposed concurrent indeterminate sentences of 184 months to life on the rape conviction and 53 months to life on the assault conviction (including a 24-month statutory enhancement for sexual motivation).

Lumpkins' trial counsel filed a post-trial CrR 7.5 motion to vacate the judgment which was transferred to this court as a PRP. Lumpkins also filed a Pro Se PRP. Lumpkins timely filed a direct appeal, his direct appeal and the two PRPs were consolidated by order of this court.

ANALYSIS

I. RIGHT TO PRESENT A DEFENSE

Lumpkins argues that the trial court violated his due process right to present a defense when it denied his motion for a continuance to present a Y-STR witness to rebut the State's case. We disagree.

The United States Constitution and the Washington State Constitution guarantee a defendant's right to present a defense. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22. We review an alleged denial of the constitutional right to present a defense de novo. *State v. Lizarraga*, 191 Wn. App. 530, 551, 364 P.3d 810 (2015). Criminal defendants have a fundamental, constitutional right to present evidence in his or her defense. *Lizarraga*, 191 Wn. App. at 551-52. However, the defendant's right to present a defense is not absolute. *Lizarraga*, 191 Wn. App. at 553. "'The accused does not have an unfettered right to offer [evidence] that is incompetent,

privileged, or otherwise inadmissible under standard rules of evidence.'" *Lizarraga*, 191 Wn. App. at 553 (alteration in original) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)).

Our Supreme Court has recognized that the "'failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.'" *Downing*, 151 Wn.2d 265, 274, 87 P.3d 1169 (2004) (quoting *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975)). A motion for a continuance will only be overturned if the trial court abused its discretion. *Downing*, 151 Wn.2d at 272. When a denial of a motion to continue allegedly violates constitutional due process rights, a defendant must show that he was prejudiced. *See Downing*, 151 Wn.2d at 274-75.

Here, the Y-STR witness would have testified that there were three different men's semen found inside of S.S's genitalia, but that there was no match that could be made to any specific individual. This evidence from the Y-STR witness would not have rebutted the DNA link between Lumpkins and the victim because the State presented uncontroverted DNA evidence that S.S.'s and Lumpkins' DNA was present in Lumpkins' underwear. The uncontroverted DNA evidence was particularly damaging because Lumpkins testified at trial that he had never met S.S. Further, the jury heard evidence that S.S. promptly identified Lumpkins in the photo montage.

Therefore, Lumpkins has failed to show that the trial court's denial of the motion to continue prejudiced him or that the denial affected the outcome of the trial. Thus, Lumpkins' claim fails.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. LEGAL PRINCIPLES

Lumpkins argues that he received ineffective assistance of counsel because he was prejudiced by his counsel's failure to properly subpoena the Y-STR witness. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, Lumpkins must show that his trial counsel's representation was deficient and his trial counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 687.

The first prong is met by the defendant showing that the performance falls "'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 668). A defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863). The second prong is met if the defendant shows that there is a substantial likelihood that the misconduct affected the verdict. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). A defendant's failure to meet their burden on either prong will be fatal to a claim of ineffective assistance. *Kyllo*, 166 Wn.2d at 862.

B. PREJUDICE

Lumpkins argues that his counsel's performance prejudiced him because "the defense's only hope was to cast doubt on the DNA link. A separate DNA test that did not conclusively link Lumpkins and S.S. was the only way to do so." Br. of Appellant at 18-19. As discussed above, the potential evidence from the Y-STR witness would not have cast doubt on the DNA link between Lumpkins and S.S. Based on the evidence presented at trial, there is no substantial likelihood that the absence of testimony from the Y-STR witness about the Y-STR results would have affected the verdict. Thus, Lumpkins fails to make a sufficient showing on the prejudice prong. Therefore, we hold that his ineffective assistance of counsel claim fails.

III. MERGER OF THE ASSAULT AND RAPE CONVICTIONS

Lumpkins argues that his conviction for second degree assault with sexual motivation should merge with his conviction for first degree rape based on *State v. Williams*.[3] The State concedes that the two convictions should have merged. Br. of Resp. at 15-16. We agree.

The merger doctrine applies when the degree of one offense is raised by conduct that is defined as a crime elsewhere. *State v. Kier*, 164 Wn.2d 798, 801-02, 194 P.3d 212 (2008). Merger requires that we presume that the legislature intended to punish both crimes with a single, greater sentence for the greater offense. *Kier*, 164 Wn.2d at 803-04.

Here, Lumpkins assaulted and caused S.S. to become unconscious before and during the rape. Because the assault was used to effectuate the rape and the assault raised the degree of rape to first degree under RCW 9A.44.040(1)(c), the second degree assault conviction merges with the

[3] 156 Wn. App. 482, 495, 234 P.3d 1174 (2010).

first degree rape conviction. Thus, we remand to the sentencing court to vacate the second degree assault with sexual motivation conviction and for resentencing.

IV. PRP ANALYSIS

A. LEGAL PRINCIPLES

To be entitled to relief in a PRP, the petitioner must establish, by a preponderance of the evidence, either a constitutional violation that resulted in actual and substantial prejudice or a nonconstitutional error that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 676, 327 P.3d 660 (2014). The petitioner must support his claims of error with a statement of facts on which his claim of unlawful restraint is based and must state the evidence available to support his factual allegations. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686, 363 P.3d 577 (2015).

The petitioner may support his allegations with the trial court record, affidavits, or other forms of corroboration. *In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 146, 385 P.3d 135 (2016). Corroborating sources must show that admissible evidence will establish the petitioner's factual allegations. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are insufficient to support a petition. *In re Caldellis*, 187 Wn.2d at 146. It is insufficient for a petitioner to rely on mere speculation, conjecture, or inadmissible hearsay. *In re Rice*, 118 Wn.2d at 886.

B. INITIAL COMPLAINT FILED IN DISTRICT COURT AND BAIL

Lumpkins argues that the State improperly charged him with a felony in district court under CrRLJ 3.2.1 and that he was held without bail. PRP at 3. We disagree.

Under our state constitution, a superior court has exclusive jurisdiction over felonies, including felony trials. WASH. CONST. art IV, § 6. However, RCW 3.66.060 governs the district court's criminal jurisdiction and grants district and superior courts concurrent jurisdiction. *State v. Stock*, 44 Wn. App. 467, 474, 722 P.2d 1330 (1986). A district court has concurrent jurisdiction over preliminary matters involving felonies, including issuing search warrants and arrest warrants, the filing of preliminary felony charges, conducting a preliminary hearing, to include setting bail and conditions of release. CrRLJ 3.2.1; *See State v. Bliss*, 191 Wn. App. 903, 913, 365 P.3d 764 (2015).

Under CrRLJ 3.2.1(f)(1), the State has 72 hours from the defendant's detention to file a complaint, information, or indictment, and Saturdays, Sundays, and holidays are excluded from this time period. Further, the district court may conduct a preliminary hearing to determine whether the defendant should be bound over to the superior court. CrRLJ 3.2.1(g). CrRLJ 3.2.1(g) allows the State to file a felony charge initially in district court so long as the time period from filing the initial complaint in district court and subsequently filing the complaint in superior court does not exceed 30 days.

Here, Lumpkins was initially arrested on Friday, February 20, 2015. The court signed a determination of probable cause on February 21 and Lumpkins was booked into jail on February 23. On February 24, under CrRLJ 3.2.1, the State filed a preliminary criminal complaint against Lumpkins in district court alleging first degree rape of S.S. On February 24, a preliminary hearing was conducted before a district court judge. Because the district court has concurrent jurisdiction over preliminary matters involving felonies under CrRLJ 3.2.1, the State was authorized to initially file the felony charges against Lumpkins in district court. Here, the district court properly

conducted the preliminary hearing under CrRLJ 3.2.1, which included reading the charges against Lumpkins, appointing counsel, setting bail at $100,000, and imposing conditions of release. Thus, the record does not support Lumpkins' arguments that he was improperly charged initially in district court or that he was held without bail following his arraignment.

C. CrR 3.3 TIME FOR TRIAL RIGHT[4]

Lumpkins argues that his time for trial right was violated under CrR 3.3 because he was not brought to trial in superior court within 60 days of his arrest. We disagree.

CrR 3.3 governs the time for trial for a felony charge in superior court. CrR 3.3 requires that a defendant must be brought to trial within either 60 days (if the defendant is in custody) or 90 days (if the defendant is not in custody) from the date of arraignment, and from the date of any continuances. CrR 3.3(b)(1), (2). Under CrRLJ 3.2.1(g)(2), the State had up to 30 days to file felony charges in superior court after Lumpkins' initial appearance in district court on February 24.

On March 24, 2015, the State dismissed the district court case and filed a felony information against Lumpkins in superior court. March 24 is within the 30 day time period under CrRLJ 3.2.1(g)(2). On March 30, Lumpkins was then timely arraigned in superior court. The superior court initially set trial on May 27 which date was within 60 days of Lumpkins' superior court arraignment on March 30. Subsequent continuances were granted without objection and the superior court granted all continuances within the proper time period. Because the superior court

[4] Although Lumpkins characterizes this claim as a "speedy trial" violation, his claim alleges a time for trial violation, which is a non-constitutional error.

initially set trial for May 27 which date was within 60 days of Lumpkins' arraignment on March 30, Lumpkins' time for trial claim fails.

D. LUMPKINS' MOTION TO DISMISS—SERVICE OF THE STATE'S RESPONSE

Lumpkins next claims that the State failed to serve him with a copy of its response to his CrR 8.3 motion. We disagree.

Even if we assume, without deciding, that the State failed to serve Lumpkins with its response to Lumpkins' CrR 8.3 motion, Lumpkins must offer authority to support his allegations and must show that the State's alleged action prejudiced his right to a fair trial. *See State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). Here, Lumpkins fails to cite to any evidence, authority, or argument to support his claim. His conclusory allegations and bald assertions are insufficient. *In re Caldellis*, 187 Wn.2d at 146. Thus, we hold that this claim fails.

E. PROSECUTORIAL MISCONDUCT

Lumpkins next claims that the prosecutor committed multiple acts of misconduct during discovery and at trial in violation of CrR 4.7(a)(1)(v) and *Brady*[5] because (1) his identification card was improperly seized in a prior investigation, (2) he was falsely accused of a crime at that time, and (3) the State never disclosed his identification card during discovery in this case. CrR 7.5 Motion at 3, 5, 7; PRP at 3. These claims fail.

CrR 4.7(a)(1) states that

> [e]xcept as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant . . . :
>
> . . . .

[5]*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

> (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant.

In *Brady,* the United States Supreme Court articulated the government's disclosure obligations in a criminal prosecution: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

There are no facts in the record on appeal to support any of these claims. Thus, Lumpkins' claims fail.

F. CLAIMS RELATING TO ADMISSION OF LUMPKINS' IDENTIFICATION CARD

Lumpkins makes the following argument regarding his identification card evidence:

> The court excluding evidence that would show that Detective Cox stole an identification card from Mr. Lumpkin[s'] apartment when he was in Mr. Lumpkin[s'] apartment in November of 2014 because said identification card was not on the inventory list of the warrant signed by Judge Edwards in 2015 and the state claimed that the ID card was from some other case, then when defense counsel tried to introduce the November 2014 incident it ruled that that evidence with not relevant [sic] to the 2015 proceedings.

PRP at 4. At trial, the State moved to admit the identification card and the trial court admitted the Illinois identification card without objection by Lumpkins. Thus, Lumpkins' claim fails.

G. MOTION TO PUBLISH THE BOOKING PHOTOGRAPH

Lumpkins next argues that the trial court erred by not allowing him to publish his booking photograph to the jury after the court admitted the photograph. We disagree.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009). Here, the trial court admitted the booking

photograph without objection, but denied Lumpkins' later request to publish the photograph and have the jury view the photograph at a specific point in the trial. *See* VRP (Oct. 16, 2015) at 272-73. After closing arguments, the trial court provided the jury with the photograph and other admitted exhibits for review during their deliberations. Lumpkins does not explain how the trial court's ruling, denying his request to publish the booking photograph to the jury, was an abuse of discretion. Thus, this claim fails.

H. MOTION FOR A CONTINUANCE

Lumpkins repeats his argument made in his direct appeal that the trial court erred by denying his motion for a continuance to secure the testimony of the Y-STR witness to rebut the State's case. As explained above, Lumpkins fails to show that the trial court's denial prejudiced him or that the denial affected the outcome of the trial. Therefore, this claim fails.

I. EXCLUSION OF EVIDENCE OF THE VICTIM'S ALLEGED PROSTITUTION

Lumpkins argues that the trial court erred by granting the State's motion in limine to exclude evidence of S.S.'s alleged prostitution. We disagree.

The rape shield statute generally excludes evidence relating to the past sexual behavior of a complaining witness. RCW 9A.44.020(2). The statute is designed to guard against the prejudicial inference that a victim's chastity and veracity are related. *State v. Sheets*, 128 Wn. App. 149, 155, 115 P.3d 1004 (2005). Further, the rape shield statute requires that before evidence of a victim's past sexual behavior may be admitted, counsel must file a pretrial motion detailing an offer of proof and the relevancy of the evidence. RCW 9A.44.020 (3)(a).

There is no evidence that Lumpkins filed a pretrial motion detailing an offer of proof and the relevancy of S.S.'s alleged prostitution. Thus, this claim fails.

J. POLICE VIDEO EVIDENCE DURING CLOSING ARGUMENT

Lumpkins argues that the State committed prosecutorial misconduct when it played the police video during closing argument because he argues that the video was not admitted. We disagree.

Detective Weiss identified the video and the court admitted it without objection. During closing argument, the State played a video taken from the Aberdeen Police Department when it collected Lumpkins' clothing. Because the video was properly admitted, the State did not commit misconduct by playing the video during closing argument. Thus, this claim fails.

K. DUE PROCESS RIGHTS—RACIAL BIAS

Lumpkins claims that his due process right to a fair trial was violated because of the trial court's racial bias. We disagree.

Because Lumpkins alleges a due process violation, he must establish by a preponderance of the evidence that the alleged constitutional error resulted in actual and substantial prejudice. *In re Cross*, 180 Wn.2d at 676. Lumpkins alleges racial bias by the trial court but fails to support his claim with any evidence of specific instances of racial bias by the trial court. Bald assertions and conclusory allegations are insufficient to support a petition. *In re Caldellis*, 187 Wn.2d at 146. Because he relies on bald assertions and conclusory allegations for this claim, this claim fails.

L. SPOLIATION OF EVIDENCE

Lumpkins claims that the officers' failure to preserve the syringe evidence at the crime scene prejudiced him because the syringe evidence would have exonerated him. We disagree.

Lumpkins fails to explain how the syringe evidence would have exonerated him. Bald assertions and conclusory allegations are insufficient to support a petition. *In re Caldellis*, 187 Wn.2d at 146. Thus, this claim fails.

M. NEWLY DISCOVERED EVIDENCE

Lastly, Lumpkins relies on four new declarations to claim that newly discovered evidence would have affected the outcome of the trial. We disagree.

Newly discovered evidence is grounds for relief in a PRP if those facts "in the interest of justice require" that a conviction be reversed or that a new trial be granted. RAP 16.4(c)(3). This standard is the same standard applied to motions for a new trial made on the same grounds. *In re Pers. Restraint of Spencer*, 152 Wn. App. 698, 707, 218 P.3d 924 (2009). Under this standard, a defendant must show that the evidence: "(1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching." *In re Pers. Restraint of Fero*, 190 Wn.2d 1, 15, 409 P.3d 214 (2018).

In his declaration attached to Lumpkins' CrR 7.5 Motion, Oris Hayden declared that he saw S.S. on February 20. Hayden declared that S.S. is a "working girl going out to do a date, to make money." CrR 7.5 Motion, Ex. A at 2. He then stated that he did not encounter a black man when he was traveling that night. When he saw S.S. next, he did not observe any injuries. Lastly, he stated that "[i]f you're a heroin addict, you've spen[t] your money and energy, to get more. So

if you're out trying to get a date to get heroin, why would you stop that focus to go smoke weed with somebody you don't know at a place that you're not familiar with." CrR 7.5 Motion, Ex. A at 2.

In her declaration attached to Lumpkins' CrR 7.5 Motion, Jezika Lynn Imhof-Spencer discussed James Ferris, who she described as a heroin addict and drug dealer who frequents prostitutes. She described Ferris as often seeing S.S. and that he exchanges heroin for sex with prostitutes.

In her declaration attached to Lumpkins' CrR 7.5 Motion, Amanda Nicole Stenek stated that she heard S.S. in August of 2015 tell someone that she had been raped and beaten, but S.S. did not mention Ferris. Stenek also described Ferris as a heroin dealer and addict who frequents prostitutes.

In her declaration attached to Lumpkins' CrR 7.5 Motion, Jennifer Gonzales stated that she saw S.S. around two or three in the morning on the night of the incident. She claimed that nothing was unusual about S.S. and that S.S. never mentioned being raped. Gonzales claimed that S.S. stated that she had to testify in the Lumpkins' trial or go to jail for 30 days, and that S.S. was thrown in jail to make sure that she would testify. Lastly, Gonzales stated that S.S. was not raped that night and had no visible injuries.

Lumpkins fails to show how these four declarations constitute newly discovered evidence that could not have been discovered before trial. Thus, because Lumpkins cannot meet the test for newly discovered evidence, this claim fails.

CONCLUSION

We affirm Lumpkins' first degree rape conviction. However, we remand to the sentencing court to vacate his second degree assault with sexual motivation conviction and for resentencing. We also deny Lumpkins' petitions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Lee, A.C.J.

LEE, A.C.J.

Worswick, J.

WORSWICK, J.

No. 96431-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM LUMPKINS, Appellant.	No. 48341-6-II (consolidated)
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner	No. 49778-6-II
In re the Matter of the Personal Restraint of WILLIAM LUMPKINS, Petitioner	No. 49937-1-II

DECLARATION OF SERVICE BY MAIL

I, WILLIAM LUMPKINS, the Appellant/Petitioner, Pro Se, declare and say that I have served the following documents:

DECLARATION OF SERVICE BY MAIL;
MOTION FOR DISCRETIONARY REVIEW;
APPENDIX

SERVED UPON:

The Supreme Court
State of Washington
Temple of Justice
Attn: Court Clerk
P.O. Box 40929
Olympia, WA 98504-0929

Hon. Derek Byrne, Clerk
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I deposited the above stated documents in the Stafford Creek Corrections Center Legal Mail system, by First Class Mail pre-paid postage under case no. 96431-9

Appellant/Petitioner declares under the penalty of perjury under the laws of the State of Washington that the declarations made in this DECLARATION OF SERVICE BY MAIL are true and correct to the best of his knowledge.

Pursuant to the case of Houston v. Lack, 487 U.S. 266, 275, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), which is referred to as the "MAIL BOX RULE," Appellant/Petitioner timely submits his motions and other pleadings when delivering it to the prison authority for mailing.

Dated this 28 day of November, 2018, in the City of Aberdeen, County of Grays Harbor, State of Washington.

William Lumpkins

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