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Washington State
Supreme Court

No. 98561-8
Court of Appeals No. 51928-3-II
81038-3-I opinion attached

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

BRANDON EUGENE DOCKTER,
Petitioner

PETITION FOR REVIEW

Mr. Brandon E. Dockter
#405580 pro se
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

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A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Pursuant to RAP 13.4, Petitioner Brandon Dockter asks this Court to accept review of the Opinion of the Court of Appeals entered in the Division One. See State v. Dockter, 81038-3-I. [1]

B. OPINION BELOW

The State charged Mr. Dockter with Second Degree Rape and Indecent Liberties by reason of incapacity. With respect to the crimes, the state committed misconduct by misstating the law regarding consent and capacity, thereby shifting the burden of proof to the Defendant. Next, the court erred in providing a jury instruction surrounding the definition of consent, citing WPIC 45.04. Dockter suffered ineffective assistance of counsel where the definition of consent was argued erroneously, pursuant to WPIC 45.04. Lastly, the evidence of mental incapacity was insufficient to support either the Rape of the crime of Indecent Liberties. Following his convictions, Dockter appealed both convictions arguing most notably, that he was denied effective counsel, inter alia, and most notably, that the prosecutor in his trial committed misconduct by "shifting the burden" to him in order to prove capacity.

C. ISSUES PRESENTED

1. Whether the prosecutor committed prejudicial misconduct by misstating the law regarding consent and capacity, thereby

[1] For clarification, Dockter's convictions arose out of Clark County, No. 17-1-00524-0. All prior briefing in this case was filed in the Division Two Court of Appeals, No. 51928-3.

shifting the burden of proof to the Defendant.

2. Whether the Court erred by giving the jury an instruction on the definition of consent, WPIC 45.04.

3. Whether defense counsel rendered ineffective assistance when he proposed and argued the jury instruction defining consent WPIC 45.04.

4. Whether there was sufficient evidence to establish the element of mental incapacity as to the charge of rape in the second degree as well as to the charge of indecent liberties.

D. STATEMENT OF THE CASE

Back on March 17, 2017, Defendant, Mr. Dockter, was invited to hang out at a bar with friends. In fact he was invited by a former high school classmate, Emily Cavagna. RP 170-71. The testimony of Ms. Cavagna would become essential to the eventual trial. It was at the bar, that Dockter would be introduced to the alleged victim Abby Cornell, as well as Sam Harper. RP 167, 169.[2]

The four would end up attending an "after party," before eventually ending up at Ms. Cavagna's home. Harper and A.C. arrived first, followed later by by Cavagna and Dockter. RP 140-41, 174-75. The record supports the facts that only small amounts of marijuana and alcohol were consumed. RP 72, 140, 143, 154. Although there was very limited contact between A.C. and Dockter that evening, they all ended up sleeping in the same

[2] For the purposes of this Petition, Abby Cornell, the victim in this case, will be referred to as "A.C."

king sized bed. RP 137, 178. A.C. was against the far wall, Mr. Harper, Ms. Cavagna, then Dockter furthest away. RP 147. A.C. and Mr. Harper were already asleep as they had arrived before Ms. Cavagna, and Mr. Dockter. RP 178.

Later during the night, Ms. Cavagna awoke to see Mr. Dockter pulling down his pants and noticing a thrusting motion toward A.C.'s location. It was at that time, that Ms. Cavagna noticed that Mr. Harper had left and Mr. Dockter was now positioned inbetween her and A.C. RP 179-80. Ms. Cavagna pulled her blanket up to cover herself and rolled over, pretending to be asleep. RP 180-81. Ms. Cavagna also stated that she heard a "sigh," then silence. RP 181. Approximately one half hour later, A.C. asked for "Emily," as they all got out of bed. It was at that point that A.C. said to Mr. Dockter, "who the fuck are you, and what are you doing? RP 181-84. In anger, Ms. Cavagna, hit Mr. Dockter in the back of his head with a table leg and told him to leave. RP 276.

At trial, A.C. recalled her nipples being touched, and her pants and underwear being down. RP 76. It was her testimony that she believed the sexual contact was Mr. Harper. RP 77. There was testimony that Mr. Harper and A.C. had slept in the same bed before and that A.C. had a crush on him. RP 70, 74, 192. During trial, A.C. described touching of her genitalia, she also described being penetrated with either fingers or a

penis inside her vagina. RP 77-78. A.C. testified that after a time, she "reached back to see who it was." RP 78. A.C. stated that the hair was not long like Mr. Harper and then apparently hearing a man's voice asking "where did [she] want him to finish" A.C. then became angered. It was at that point, that A.C. asked "who the fuck he was," and woke her friend Ms. Cavagna. RP 79-80. Apparently A.C. did not object to the physical contact until she realized it was not Mr. Harper. RP 78-79, 88.

During the trial, Mr. Dockter testified that he woke up with his arm unintentionally around A.C. RP 271-72. A.C. then interlaced her fingers with his and guided his hand between her legs. RP 272. It was at that point that the sexual contact began, with A.C eventually reaching back and touching Dockter's penis. They both pulled down their pants and underwear and began to have vaginal-penile intercourse while in the spooning position. This took place for approximately one half hour. RP 289.

Approximately ten-minutes after being hit on the head with the table leg and leaving , Mr. Dockter sent Ms. Cavagna a text that stated. "Long story short, just to let you know I don't think either one of us knew what was going on until that moment. So thanks for hitting me with the pole. I really appreciated it whether you believe it or not." RP 185-86.

Mr. Dockter was susbequently arrested and charged with I-Count of Rape in the Second Degree, and I-Count of Indecent

Liberties. Mr. Dockter was arrainged on March 17, 2017 and a jury trial ensued on February 7, 2018. Mr. Dockter was found guilty of both charges and sentenced to 78-months in Department of Corrections. Next, Mr. Dockter filed a timely appeal. The basis of Mr. Dockter's appeal involved a plethora of trial issues most notably, challenges to the WIPC 45.04. During the trial, the State proposed this pattern instruction defining consent.

In addition to challenges to consent, the defendant also took issue with the state's definition of mental incapacity. On appeal, Mr. Dockter asked the lower court's to review the conduct and tactical strategy of his defense counsel. Lastly, Mr. Dockter took issue with the prosecutor's trial tactics, when the burden to prove whether or not he presented an affirmative defense to consent. During closing argument's Mr. Dockter objected to misstatement's concerning what his lawful obligation was. The issue here, that Petitioner now brings to this Court is simply this. Where Mr. Dockter gave the jury his "reasonable belief" that A.C. [the victim] was conscious, does the law add an additional requirement that he perform a routine capacity check. Especially here, where A.C. partied with Mr. Dockter, slept in a bed with him and three others, and even her own friend Emily Cavagna, was aware a "rape" was happening, instead rolling over and pretending to be asleep. RP 180-81. Where Mr. Dockter was forced to prove he did achieve consent, the misstatement prejudiced him resulting in guilty verdicts on all charges.

E. ARGUMENT

1. **THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW REGARDING CONSENT AND CAPACITY THERBY SHIFTING STATE'S BURDEN TO THE DEFENDANT IN VIOLATION OF HIS V AND XIV AMENDMENT RIGHT TO DUE PROCESS.**

The right to due process is well settled. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The long held requirement, is that the State bears the burden of proving every element of the crime beyond a reasonable doubt. Arguments by the prosecution that shift or misstate the State's burden to prove the case beyond a reasonable doubt, constitute's misconduct. State v. Lindsay, 180 Wn.2d 423 (2014). See also, State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011).

This court has previously been asked to resolve issues at trial where implications of burden shifting have been at the core. State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006). In the above cited case, this Court held that, "A fair reading of the record leads us to conclude that the trial judge relieved the State of there burden by creating a mandatory presumption of criminal intent, which Cantu was required to rebut. We therefore reverse the Court of Appeals, vacate the conviction, and remand for further proceedings consistent with this opinion."

Here, Dockter faced a similar position, where the prosecutor shifted the burden to him. Simply put, there is no law or jury instruction, that required Dockter to affirmatively check or prove that A.C. [victim] was awake. There is no requirement to perform a capacity check.

In the case at bar, the Court of Appeals findings are flawed and careful review of the rationale relied upon is not only inconsistent with stare decisis caselaw in Washington State, but also assumes the state has met its burden. The following is an excerpt from the Court of Appeals Unpublished Opinion:

> "In his closing argument, Docktor conceded that A.C. was asleep at the time of the encounter. Defense counsel then stated, "[H]onestly all of the testimony is that she probably was asleep at the time," and the State has "probably...proved that [A.C.] wasn't awake and that [Docktor]had sex with her." Sufficient evidence supports a rational trier of fact concluding beyond a reasonable doubt that A.C. was incapable of giving consent to because she was physically helpless.

See (Exhibit A) Unpublished Opinion at 12.

What is clear is that, Defense counsel did not say in the affirmative that A.C. was in fact asleep, or that A.C. remained asleep throughout the duration, [one half hour]. Instead, the Defense allowed for the possibility that whether or not A.C. was asleep was probable. Nevertheless, Docktor was under no legal obligation to prove whether or not in fact A.C. was awake, and therefore able to consent. The facts are simple. Here, the prosecutor misstated the law, Defense sought to object, and was shut down by the trial judge. See Unpublished Opinion at Pg. 6. The following case, explains how this type of scenario is misconduct and how Docktor's due process was affected. See State v. Warren, 165 Wn.2d 17, 26 195 P.3d 140 (2008). It was

in the forementioned case that a "curative instruction" was given after a misstatement of the law was given to the jury. In fact, in Warren, the judge very carefully and thoughtfully set forth a correct statement of the law. Simply put, here the defendant was required by a preponderance of the evidence, to prove at the time of the offense that he "reasonably believed," that the victim was not mentally incapacitated and/or physically helpless. Citing RCW 9A.44.030.

In the instant case, where the error was not cured, if anything, the error was sanctioned, it allowed the prosecutor to continue to misinterpret the law. in Warren, Id. the Supreme Court found that the curative instruction provided sua sponte cured the misstatement. Id at 29. Mr. Docktor however, failed to receive that benefit. Mr. Docktor suffered great prejudice because the burden shifting and misstatment's concerning his legal responsibility, relieved the State of it's burden. Citing State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551. Simply put, the Court of Appeals ruling is flawed and presents a question of law concerning whether or not Mr. Docktor was required to prove physical or mental incapacity within the meaning of RCW 9A.44.050(1)(b), 100(1)(b). Citing RAP 13.4(b)(1) and (3).

The Court of Appeals decision also seems to discount the defendant's explanation of the events in question. In supporting his preponderance of consent evidence standard, Mr. Docktor

gave a very plausible explanation, regarding his decision to have sex with the victim. He stated that he didn't feel like he neded it because it was given by A.C.'s conduct. Moreover, the facts support that the sex occurred for at least one half hour and their mutual friend [Emily Cavagna] witnessed the entire event, choosing to "roll over and pretend to be asleep." These are clearly not the actions consistent with someone witnessing a sexual assault. See (Exhibit A) Unpublished Opinion at Pg.2.

Lastly and probably the most egregious, is the Court of Appeals proposition that Mr. Docktor's objection raised during the State's closing was not based upon burden shifting, but rather "exaggerating the evidence," is clearly flawed. Citing Unpublished Opinion at pg.7. The Court of Appeals, in support of their findings, opines that the prosecutors statements must be viewed in context of the entire record.

In conclusion, Mr. Docktor asks this Court to find this line of reasoning in conflict with other Supreme Court rulings. First off, careful review of the colloquy that takes place during closing supports the fact that once Defense objected, the judge cut him off, allowing the state to continue. Contrary to Warren, supra., Docktor was not ever even allowed to complete, nor convey exactly what his objection was to encompass, nor did the court offer a correct statement of the law or curative instruction. See (Exhibit A) Unpublished Opinion at 6. The lower court's findings that Docktor's objection was based on the prosecutor

"exaggerating" the evidence necessary to meet her burden. This is horribly misplaced, given the facts contained within the record, clearly Dockter is objecting to the misstatement, which in turn, shifts the burden to him. This is not a situation where the defense raises no objection at all. The reasoning presented by the Court of Appeals is flawed. See (Exhibit A) Unpublished Opinion at pg. 6.

In addressing the "context of the entire record," this case involves minimal evidence at best. The facts are clear, other than A.C. [victim], the state offers testimonial statement's from one other person. That person is the victim's friend, Emily Cavagna. To rely upon her testimony, is questionable at best. The facts relied upon by the Court of Appeals state:

> "At some time during the night Ms. Cavagna woke up cold as the blanket had been pulled from her, at which time she saw Mr. Dockter pulling his pants down and begin a thrusting motion toward Ms. Connell's location. RP 179-80. Ms. Cavagna noted that Mr. Harper had left and that Mr. Dockter had taken his place in the bed between her and Ms. Cornell. RP 180. Mr. Harper had left early to go to work and did not wake anyone up on his way out of the home. RP 147,48. Ms. Cavagna re-covered herself with the blanket, rolled over and pretended to be asleep. RP 180-81. AS the thrusting began, Ms. Cavagna heard only a single sigh and then silence. RP 181."

In it's reasoning, the Court of Appeals completely discounts the prosecutor's misstatement of the law, along with the fact that the defense was completely "shut down" by the trial judge. See (Exhibit A) Unpublished Opinion at Pg. 6. Here, when viewed

especially in the entirety of the facts, Dockter should have been afforded similar protections as the trial judge provided in a case out of this Court. State v Warren, 165 Wn.2d at 29.

The Court of Appeals ruling on this issue is flawed, it is in conflict with other cases dealing with this very issue. Based upon the foregoing, this Court should grant review pursuant to RAP 13.4.

2. REVIEW UNDER RAP 13.4 IS WARRANTED WHERE THE COURT OF APPEALS AFFIRMED DOCKTER'S CONVICTIONS UTILIZING AN INAPPROPRIATE CONSENT INSTRUCTION CONFUSING JURORS.

Jury instructions must convey to a trier of fact, that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Relieving the State of such burden, by submitting improper instructions is grounds for reversal. Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly state the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). In the instant case, prior to trial, the Defense sought to provide a defense to consent. Specifically, WPIC 45.04 as an affirmative defense. [3] The record is clear, the State had concerns, however the trial court allowed the instruction.

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[3] Under WPIC 45.04, this instruction came with both Notes On Use and Comments, pursuant to RCW 9A.44.010(7).

That WPIC instruction reads as follows: Citing COMMENTS

> "An instruction on consent is generally not appropriate in prosecutions for first or second degree rape. To prove first degree rape, or second degree rape under RCW 9A. 44.050(1)(a), the State must prove that sexual intercourse occurred by forcible compulsion. In the overwhelming majority of cases, the focus should be on forcible compulsion rather than consent. Except in unusual cases, an instruction on consent may confuse the jurors about the burden of proof, without providing them meaningful guidance. In State v. W.R., Jr, 181 Wn.2d 757, 336 P.3d 1134 (2014), the Supreme Court held that although victim's alleged consent to sexual intercourse negated the [forcible compulsion] element of second degree rape, a separate instruction on consent is not needed "simply because evidence of consent is produced." State v. W.R., Jr., 181 Wn.2d at 767 n.3, 336 P.3d at 1139 n.3."

In reaching it's decision to affirm Dockter's convictions, the Court reasoned that his claims fail, in part based upon Petitioner's reliance of W.R., Jr., supra. Here the Court of Appeals opined as follows:

> "Dockter was not charged with forcible rape. His reliance on W.R. is misplaced."

Citing Pg. 9 (Exhibit A) Unpublished Opinion.

The key language the court ignores is the following:

> "Except in unusual cases, an instruction on consent may confuse the jurors about the burden of proof, without providing them meaningful guidance."

See WPIC 45.04 Instruction COMMENTS.

In the instant case, the State fails to argue at any point, anything "unusual" about this case. Given the facts, the appeals court's finding that reliance upon W.R., supports affirming Dockter's convictions, is just wrong. This reasoning ignores other established caselaw, it ignores the [Comments] on the WPIC 45.04 Instruction and most notably, ignores the real issue. That being, not whether Dockter established consent, but rather, whether or not, the victim had the capacity to consent. Citing VanVlack, supra.

Here, the trial court's decision to utilize this instruction was an abuse of discretion. The instruction was irrelevant and likely confused the jury. The lower court's interpretation of VanVlack is misplaced as it applies to the Petitioner.

> "In VanVlack, the court concluded that it is not necessary to instruct the jury on the definition of "consent" in a prosecution for second degree rape based on incapacity. VanVlack, 53 Wn.App. at 87-88. It reasoned that "[c]apacity to consent, not whether there was consent, is the crucial element of the crime charged."

See (Exhibit A) Unpublished Opinion at pg.9

In light of the Court of Appeals position on this issue in VanVlack, as well as this Court's position that use of this WPIC 45.04 in W.R., clearly there's a problem. Either the Court's rulings are not consistent, or there is a significant question of law that must be resolved. Without assurance that the jury

properly understood the burden of proof, the entire framework of the trial is affected. Contrary to the lower court ruling, the instruction was misleading, citing both VanVlack, and W.R.. This resulted in confusion and affected the jurors ability to assess conduct and consent. Review in this Court is therefore warranted, citing RAP 13.4.

3. THE COURT OF APPEALS RULING THAT DOCKTER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT IS FLAWED. REVIEW IN THIS COURT IS WARRANTED.

The seminal case establishing deficient performance is found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, a criminal defendant must show two things. (1) that counsel's performance fell far below an objective standard of reasonableness; (2) but for counsel's deficient performance, the outcome of the trial would have been different.

Here, the Defense sought to introduce an instruction that was misleading and unnecessary. These actions, directly resulted in an additional burden being placed on Dockter at trial. In an attempt to support Docktor's affirmative defense, counsel's decision to tell the jury the following was extremely damaging and served no helpful purpose:

> ""[H]onestly, all of the testimony is that she probably was asleep at the time,"and the state has probably...proved that A.C. wasn't awake and that [Dockter] had sex with her."

See (Exhibit A) Unpublished Opinion at Pg.12.

Here, the defense knew that this was not a case involving "forcible compulsion." Based upon that, the issue of capacity was at the heart of Dockter's defense. To make the statement's during closing, was an act falling far below an objective standard of reasonableness. This is even more egregious, where the State had already voiced concern about the instructions Defense sought to use in dealing with their burden to prove incapacity. Strickland, Id.

Dockter's counsel "opened the door" to the State's rebuttal argument:

> "Now, Defense just conceded, really as the defendant did, that Abby was not able to give consent during this interaction so think about that. She was asleep. She was not able to give consent.

See RP 348.

Simply put, the above was the resulting prejudice served no legitimate strategic purpose. The Court of Appeals finding that counsel was not deficient is flawed and warrants review.

Invited Error Doctrine

Here the State offers the following case in support of their argument that the defense invited error, in relation to ineffective counsel and the use of WPIC 45.04. Citing State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999). The Court of Appeals reliance upon Studd is misplaced because Studd, deals

with a criminal defendant who proposes an "approved" instruction. Hence, the problem here is provided below with respect to the WPIC 45.04 instruction:

> "An instruction on consent is generally not appropriate in prosecutions for first or second degree rape."

See Comments; RCW 9A.44.010(7).

To opine that reliance upon State v. W.R., 181 Wn.2d at 761. is misplaced, means that one must ignore that, "absent meaningful guidance, [e]xcept in unusual cases, an instruction on consent may confuse the juror's about the burden of proof."

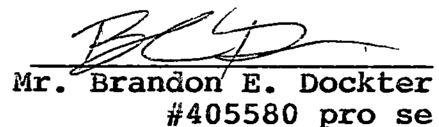
The lower court's finding that Dockter's trial counsel was effective and his argument is without merit is flawed. In addition, the Court of Appeals fails to identify any "invited error" issue. It is at this juncture that the Petitioner, asks this Court to respectfully grant review.

F. CONCLUSION

Petitioner herein, respectfully asks this Court to accept review of the Court of Appeals Unpublished Opinion, affirming his convictions. Petitioner relies upon the authority set forth in RAP 13.4(b)(1)(2) and or (3).

DATED this 11th day of May, 2020.

Respectfully Submitted,



Mr. Brandon E. Dockter
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APPENDIX

E X H I B I T - A

FILED
4/20/2020
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. BRANDON EUGENE DOCKTOR, Appellant.	)	No. 81038-3-I UNPUBLISHED OPINION

BOWMAN, J. — Brandon Eugene Docktor appeals his jury convictions for second degree rape and indecent liberties by reason of incapacity. He argues prosecutorial misconduct, an improper jury instruction, ineffective assistance of counsel, and insufficient evidence warrant reversal. We conclude the record does not support Docktor's claims and affirm.

FACTS

In March 2017, A.C. lived with her friend Emily Cavagna in a small trailer. On the evening of March 7, A.C. and Cavagna planned an outing at a bar. Cavagna invited former high school friend Brandon Docktor to join them. Samuel Harper, A.C.'s friend and romantic interest, also planned to meet them.

At the bar, A.C. met Docktor for the first time. After they were introduced, A.C. had little, if any, additional contact with Docktor. Instead, A.C. spent the

Citations and pin cites are based on the Westlaw online version of the cited material.

evening drinking beer and eating pizza with Harper. Cavagna played pool and hung out with Docktor.

Cavagna, A.C., Harper, and Docktor left the bar to attend an "after-party." After approximately 45 minutes, A.C. and Harper left the party and went back to the trailer. They smoked marijuana together and then went to sleep in the king-size bed normally shared by Cavagna and A.C. A.C. slept on the far side of the bed curled up next to the wall. Harper fell asleep behind her.

Sometime after 3:00 a.m. on March 8, Docktor and Cavagna returned to the trailer. Cavagna allowed Docktor to stay the night but set "boundaries." She told Docktor that "he was just there to sleep." Cavagna and Docktor joined A.C. and Harper in the king-size bed. Neither Harper nor A.C. appeared to wake up when they got in the bed. Cavagna slept next to Harper with Docktor on her other side at the edge of the bed.

Harper woke early that morning and went to work. When he left, the others all remained asleep in the same order on the bed—A.C. next to the wall, Cavagna in the middle, and Docktor on the other end.

Cavagna awoke sometime later and noticed Docktor had moved to the middle of the bed between her and A.C. She saw Docktor pull down his pants and "start thrusting." Cavagna rolled over and "pretended to be asleep." She heard a sound "like a sigh" and then silence. Then Cavagna heard A.C. ask for her in a "scared" tone of voice, followed by A.C. yelling, " 'Who the fuck are you' " at Docktor.

Docktor and Cavagna got out of bed. Cavagna asked Docktor to help her take down the nearby folding table. When he did, she removed the table leg, hit him over the head with it, and "told him to get out." Docktor quickly left the trailer. About 10 minutes later, Docktor texted Cavagna, saying, " 'Long story short just to let you know I don't think either one of us knew what was going on until that moment. So thanks for hitting me with the pole. I really appreciate it whether you believe it or not.' "

The next day, Cavagna called the police to report the incident. A.C. went to the hospital for a sexual-assault examination and recounted the events to the nurse. The State charged Docktor with one count of rape in the second degree and one count of indecent liberties, each count alleging that A.C. was incapable of consent.

At trial, Cavagna and Harper testified about the events detailed above. A.C. testified that she went to sleep "facing the wall" with Harper behind her and no one else in the bed. A.C. remembered having a sexual dream. She woke up still facing the wall with her shirt around her neck and someone lying behind her, touching her nipples. She thought Harper was the one touching her. She then felt the person initiate sexual intercourse. A.C. was "still . . . waking up" and "confused." When she reached back and felt short hair instead of Harper's long hair, she "jumped" away and yelled. A.C. testified she was in "complete shock" and tried to "process what happened."

Docktor's testimony was similar until he described the sexual encounter. Docktor testified he woke up and discovered Harper "was gone." Because he

had been uncomfortable on the edge of the bed, Docktor took the opportunity to move to the middle "to be more comfortable." He woke up and discovered that he had placed his "arm around [A.C.]." According to Docktor, A.C. "grabbed" his hand and "put it in between her legs."

Docktor said he was "curious" about whether A.C. wanted "to do sex stuff" and started rubbing A.C.'s vagina on the outside of her pants. Docktor testified that A.C. eventually reached back and touched his penis. He testified that they both took off their pants and then had sex. When defense counsel asked Docktor if he ever asked A.C. "for permission" to have sex, Docktor said he "did not." Docktor explained:

> I didn't feel like I needed permission because she had grabbed my hand, put it in between her legs, and when I started touching her she had pressed up against me. To me it seemed like that's what she wanted.

According to Docktor, they engaged in sex for about 30 minutes. When they stopped, A.C. looked at Docktor and asked who he was and then told him to get out. Docktor left the trailer "scared," "confused," and "completely in shock."

The jury convicted Docktor as charged. He received a concurrent standard-range sentence. Docktor appeals.

ANALYSIS

<u>Prosecutorial Misconduct</u>

Docktor claims the prosecutor committed misconduct by misstating the law of consent. According to Docktor, the State shifted the burden to him to prove that A.C. had the capacity to consent. We disagree.

To establish prosecutorial misconduct, a defendant must demonstrate that the conduct was both improper and prejudicial in the context of the entirety of the record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). If the defendant objects at trial, he must show that the prosecutor's misconduct resulted in prejudice with a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Arguments that shift or misstate the State's burden to prove guilt beyond a reasonable doubt constitute misconduct. State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014).

The State charged Docktor with second degree rape and indecent liberties without forcible compulsion, alleging A.C. was unable to consent by reason of physical or mental incapacity. See RCW 9A.44.050(1)(b), .100(1)(b). Docktor asserted as an affirmative defense that he "reasonably believed" A.C. was not mentally incapacitated or physically helpless at the time of the offense. Docktor has the burden to prove this defense by a preponderance of the evidence. RCW 9A.44.030(1).

In closing argument, the prosecutor emphasized that the State has the burden of proving each charge beyond a reasonable doubt. She summarized the elements of each charge, discussed the facts, and argued that the State had met its burden.

The prosecutor then turned to Docktor's affirmative defense. She explained that "the defendant has asserted an affirmative defense" and "that's a burden he takes on." The prosecutor told the jury, "If you believe beyond a

reasonable doubt that [A.C.] was asleep when this — was not capable of giving consent . . . , I have met my burden. He then has to prove to you . . . that he reasonably thought she was capable."

The prosecutor went on to discuss the events that occurred on March 7 and 8, 2017, that A.C. was asleep when Docktor arrived at the trailer, and that she did not know he was in the bed. The prosecutor reiterated Docktor's argument that A.C. initiated sexual contact and asked the jury, "[I]s it reasonable that he thought she was awake and able to consent to him when she did that?" The prosecutor argued:

> [Docktor's] version is he does not check at all to see if this woman is awake, conscious, and consenting.
>
> But the law in this state does impose that obligation on people when they have sex. When someone has sex with another person, they have to make sure that that person is awake and conscious and able to consent.
>
> [DEFENSE COUNSEL]: Objection, Your Honor. The instruction says that he has to have a reasonable belief. It doesn't say that he has to go through —
>
> THE COURT: You may continue.
>
> I'll let you take the instructions as provided to you and apply them to the facts as you decide them.
>
> Go ahead.
>
> [PROSECUTOR]: That is an obligation on people when they have sex, which is why there is a law that someone — it is [a] crime to have sex with someone who is incapable of consent.
>
> [A.C.] did not have the opportunity to consent here. She didn't have the chance.

Docktor claims that the prosecutor's remarks are a misstatement of the law and have the effect of shifting the burden of proof to him regarding consent. But "[w]e look at a prosecutor's comments in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury." State v. Scherf, 192 Wn.2d 350, 394, 429 P.3d 776 (2018).

When considered in context, the prosecutor's comments were clearly an attempt to refute Docktor's affirmative defense, for which he bore the burden of proof. Her argument focused on what she believed Docktor must prove to avail himself of that defense. Indeed, Docktor did not object on the ground that the State shifted its burden to him. Rather, he objected based on concern that the prosecutor exaggerated the evidence necessary to meet his burden to receive the benefit of the affirmative defense.

The prosecutor explicitly told the jury throughout closing argument that the State has the burden to prove lack of capacity. Additionally, the jury instructions accurately explained the burdens of proof. The court instructed the jury that the State has the burden of proving each element of the crimes beyond a reasonable doubt. And the court provided proper to-convict instructions for second degree rape and indecent liberties without forcible compulsion. Those instructions established the elements of the crimes that the State was obligated to prove beyond a reasonable doubt. Finally, the court instructed the jury that Docktor had the burden of proving his defense by a preponderance of the evidence. These instructions, taken as a whole, accurately portrayed the burdens of proof. We presume the jury follows the court's instructions. Emery, 174 Wn.2d at 766.

Viewed in the context of the entire record, the prosecutor's statements did not improperly shift the burden of proof. We conclude there was no misconduct.

Jury Instruction

At trial, Docktor requested the court instruct the jury as to the definition of "consent" and proposed the pattern instruction which states, "Consent means that at the time of the act of sexual intercourse or contact, there are actual words

or conduct indicating freely given agreement to have sexual intercourse or contact." See 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 45.04 (4th ed. 2016) (WPIC). The State expressed concern about the instruction but the trial court acquiesced and gave the instruction as requested.

Docktor now claims that the trial court erred by giving the instruction. He argues that a consent instruction is never appropriate in a prosecution for second degree rape. We disagree.

We review alleged jury instruction errors de novo. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." Barnes, 153 Wn.2d at 382. If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

Docktor relies on the comment to WPIC 45.04 and State v. W.R., 181 Wn.2d 757, 767 n.3, 336 P.3d 1134 (2014), to support his claim that the court erred in giving the consent instruction. The comment to WPIC 45.04 states, "An instruction on consent is generally not appropriate in prosecutions for first or second degree rape." The comment cites a footnote from W.R. that states, "It is not necessary to add a new instruction on consent simply because evidence of consent is produced." 181 W.2d at 767 n.3.

W.R. is distinguishable from this case. W.R. pertains to a conviction of rape in the second degree by forcible compulsion. 181 Wn.2d at 761. In cases of forcible rape, the burden to prove force, which necessarily includes lack of consent, is always on the State. An instruction on consent in such a case poses a danger of confusing the jury about the burden of proof. See generally W.R., 181 Wn.2d at 763-67. Docktor was not charged with forcible rape. His reliance on W.R. is misplaced.

Docktor argues that it is also error to instruct a jury on consent in a prosecution for second degree rape of a victim who is incapable of consent. He cites State v. VanVlack, 53 Wn. App. 86, 765 P.2d 349 (1988), in support of his position. In VanVlack, the court concluded that it is not necessary to instruct the jury on the definition of "consent" in a prosecution for second degree rape based on incapacity. VanVlack, 53 Wn. App. At 87-88. It reasoned that "[c]apacity to consent, not whether there was consent, is the crucial element of the crime charged." VanVlack, 53 Wn. App. at 88. Accordingly, the court determined that it was not error for the trial court to refuse to give a consent instruction. VanVlack, 53 Wn. App. at 88-89.

However, VanVlack does not stand for the proposition that a consent instruction is never appropriate in a case alleging rape by reason of incapacity. Rather, the court concluded that it was not error to fail to give the instruction under the circumstances of that case. VanVlack, 53 Wn. App. at 88-89.

Jury instructions must properly inform the jury of the applicable law and allow the parties to argue their theories of the case. See Barnes, 153 Wn.2d at

382. Here, the consent instruction was offered to assist Docktor in arguing his theory of the case—that he reasonably believed A.C. had the capacity to consent and that she did affirmatively consent to the sexual contact through her conduct. The instruction was not misleading and properly informed the jury how to assess whether conduct constitutes consent. We conclude that under the circumstances of this case, the trial court did not abuse its discretion by instructing the jury on the definition of "consent."

Ineffective Assistance of Counsel

Docktor argues he received ineffective assistance of counsel because his attorney proposed the consent instruction that he now contends was error. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate defense counsel's representation fell below an objective standard of reasonableness and the deficient representation resulted in prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Courts engage in a strong presumption of effective representation. McFarland, 127 Wn.2d at 335. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Here, counsel's performance was not deficient. As discussed above, counsel's proposal of the consent instruction was not inconsistent with the law. Additionally, the consent instruction directly related to counsel's trial strategy. Docktor's defense focused on the claim that he reasonably believed that A.C.'s actions indicated consent. Counsel relied on the instruction to argue that A.C.

acted consistently with the definition of "consent." Docktor's claim of ineffective assistance of counsel is without merit.

Sufficiency of the Evidence

Docktor alleges the State failed to present sufficient evidence of A.C.'s mental incapacity at the time of the assault. We conclude the State provided sufficient evidence that A.C. was incapable of consent by reason of being physically helpless.

"Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom. DeVries, 149 Wn.2d at 849. Review for sufficiency of the evidence is highly deferential to the jury's decision, including issues of credibility, persuasiveness, and conflicting testimony. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Under RCW 9A.44.050(1)(b), a person is guilty of rape in the second degree by engaging in sexual intercourse with another person "[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." In State v. Al-Hamdani, 109 Wn. App. 599, 601, 36 P.3d 1103 (2001), we concluded that " 'mental incapacity' and 'physical helplessness' are not alternative means within the second degree rape statute." Rather, "these terms provide an understanding of ways in which the victim is incapable of giving

consent to sexual intercourse." Al-Hamdani, 109 Wn. App. at 601. As a result, the State need only provide sufficient evidence of either mental incapacity or physical helplessness. RCW 9A.44.050(1)(b).[1]

In accordance with RCW 9A.44.010(5), the jury instructions defined "physically helpless" as "when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." This court has equated the state of sleep with physical helplessness. See State v. Mohamed, 175 Wn. App. 45, 58-59, 301 P.3d 504 (2013); State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989).

In his closing argument, Docktor conceded that A.C. was asleep at the time of the encounter. Defense counsel stated, "[H]onestly all of the testimony is that she probably was asleep at the time," and the State has "probably . . . proved that [A.C.] wasn't awake and that [Docktor] had sex with her." Sufficient evidence supports a rational trier of fact concluding beyond a reasonable doubt that A.C. was incapable of giving consent to sexual intercourse because she was physically helpless.

[1] The crime of indecent liberties includes similar language. RCW 9A.44.100(1)(b) provides:

> A person is guilty of indecent liberties when he or she knowingly causes another person to have sexual contact with him or her or another . . . [w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.

Therefore, the use of mental incapacity and physical helplessness as multiple ways of understanding incapacity, rather than as alternative means, should also apply to proof of indecent liberties. See Al-Hamdani, 109 Wn. App. at 601.

We affirm the jury convictions for second degree rape and indecent liberties by reason of incapacity.

Brennan, J.

WE CONCUR:

[signature], J.

Mann, C.J.

CERTIFICATE OF SERVICE

I, Brandon E. Dockter, #405580, Petitioner, pro se, do certify that I have provided a copy of PETITION FOR REVIEW, by placing (1) copy in the U.S. mail, postage pre-paid, addressed to the following party:

Ms. Rachel Rogers
Prosecuting Attorney
Clark Co. Prosecutors Office
P.O. BOX 5000
Vancouver, WA 98666

I swear under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 11th day of May, 2020.

Respectfully Submitted,

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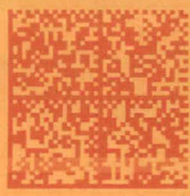

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Tammie Barajas 5/11/20

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