No. 80558-4-1
(Supreme Court No. _)
100205-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISMAEL MOUSSAOUI,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Ismael Moussaoui asks this Court to accept review of an opinion affirming his conviction for rape in the second degree. The Court of Appeals issued the opinion on August 9, 2021. Mr. Moussaoui has attached a copy of the Court of Appeals' opinion to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. The SRA requires the trial court to hold an evidentiary hearing whenever the defendant disputes a fact material to the sentence. If the court refuses to hold a hearing, it must deem the factual dispute resolved against the prosecution. The trial court not only denied Mr. Moussaoui's request for an evidentiary hearing on the facts supporting his proposed exceptional sentence, it also resolved those facts against him and imposed a standard-range sentence. This was in error, requiring this Court's review. RAP 13.4(b)(1)-(4).

2. Article I, section 16 of the Washington constitution forbids a court from commenting on the evidence. This prohibition extends to language in the jury instructions that suggests the State has established a fact bearing on guilt. Here, the to-convict instruction used the complainant's initials rather than her full name, implying she was a victim needing protection. The use of the complainant's initials in the to-convict instruction was a comment on the evidence, and counsel performed deficiently and prejudiced Mr. Moussaoui when he proposed this instruction. RAP 13.4(b)(1)-(4).

C. STATEMENT OF THE CASE

Taylor Coty had dinner at her apartment in Kent with some friends, including Dionna Baker. RP 477, 479, 545–46, 644. Ms. Coty and Ms. Baker drank as much as "three-quarters of the bottle." RP 479, 547–48, RP 646–47. Around 9 or 10 pm, Ms. Coty and Ms. Baker left for Seattle's Capitol Hill neighborhood. 481, 546, 549, 647–48, 649–50.

After drinking at several bars, Ms. Coty was ready to go home. RP 552–53, 651. But Ms. Baker wanted to stay out, and she and Ms. Coty argued. RP 552–53, 651. Ms. Coty tried to summon a ride using Uber or Lyft, but her phone's rideshare apps did not work. RP 553–54.

Mr. Moussaoui encountered Ms. Coty and Ms. Baker shortly afterward. The following facts come from an offer of proof in support of Mr. Moussaoui's request for an exceptional sentence. CP 121–26. Mr. Moussaoui did not testify at trial, and the court did not permit him to testify at sentencing. RP 691; 9/5/19 RP at 517.

Mr. Moussaoui worked as a rideshare driver for Uber and Lyft. CP 121. While Mr. Moussaoui was working, his friend Mohamed Muse called and asked Mr. Moussaoui to pick him up in Capitol Hill. CP 121.

Mr. Moussaoui drove to Mr. Muse's location sometime later and found him with Ms. Coty and Ms. Baker. CP 122. The women said their rideshare apps "were not working" and "they

needed a ride back to Kent." CP 122. Mr. Moussaoui agreed to drive them home. CP 122.

Once in Kent, Mr. Moussaoui asked Ms. Coty and Ms. Baker where they needed to go. CP 122. They provided Ms. Baker's address, which was in Renton. CP 122. When Mr. Moussaoui drove to Renton, he was unable to find Ms. Baker's home. CP 122.

At this time, Mr. Moussaoui noticed Mr. Muse was holding both women's phones and a smart watch belonging to one of them. CP 123. As Ms. Coty and Ms. Baker looked for their phones to verify Ms. Baker's address, Mr. Muse pretended to "find" one of the phones on the floor. CP 123.

Mr. Moussaoui stopped the car and demanded Mr. Muse hand over the remaining phone and smart watch. CP 123. Mr. Muse did so and "walked off." CP 123.

Giving up on Ms. Baker's home, the women directed Mr. Moussaoui to Ms. Coty's apartment in Kent instead. CP 123. Neither Ms. Coty nor Ms. Baker had a key, so he helped Ms.

Coty force open a window. CP 124. He also handed Ms. Coty the phone and watch. CP 124. Ms. Coty paid him cash for the ride and for helping her into the apartment. CP 124.

Ms. Baker was still in the car. CP 124. Ms. Coty said she should come inside, but Ms. Baker said she wanted to return to her own home. CP 124. Ms. Coty went into the apartment. CP 124. She returned and asked Mr. Moussaoui to help bring Ms. Baker into the apartment. CP 125.

As Mr. Moussaoui picked Ms. Baker up, she whispered to him that she wanted him to come to her home with her. CP 125. Mr. Moussaoui "felt she was trying to seduce him." CP 125. He took her back to the car and started driving. CP 125.

After a short time, Ms. Baker reached from the backseat and "started fondling his genitals." CP 125. She asked Mr. Moussaoui to pull over and join her in the backseat, and he did so. CP 125. Ms. Baker "climbed on top of" Mr. Moussaoui, "started kissing him," and removed his pants and her own. CP 125.

Mr. Moussaoui's cell phone, which was in the trunk, started ringing. CP 125. Ms. Baker assumed it was her phone and accused Mr. Moussaoui of trying to steal it. CP 126. He explained he gave her phone to Ms. Coty earlier, but she did not believe him. CP 126. She started to hit Mr. Moussaoui and threatened to take both the phone and his car. CP 126.

Mr. Moussaoui opened the door and asked Ms. Baker to leave the car. CP 126. She refused, and Mr. Moussaoui pulled her out as she continued to hit him. CP 126. Mr. Moussaoui returned to the car and drove away. CP 126.

Again, the above account represents the testimony Mr. Moussaoui would have given had the sentencing court held an evidentiary hearing. CP 121–26. At trial, the only evidence of Mr. Moussaoui's version of events was his statements to police officers shortly after he removed Ms. Baker from the car. RP 231–34, 236–38, 274–77, 279, 281–82, 286–88.

When the officers saw injuries to his face and asked how he got them, Mr. Moussaoui initially claimed to have been in a

fight with a "guy." RP 271, 274. As the officers continued to question him, he told them he gave two women a ride, dropping one of them off at an apartment and the other "in the neighborhood." RP 274–77, 279. He explained one of the women started to kiss him, and they engaged in "romantic kissing and grinding" in the backseat of his car. RP 286. He denied vaginal intercourse. RP 286–87. At some point, the woman became upset and "started hitting and punching him" and trying to take his car. RP 281–82, 287–88.

The officers did not relate any statements about Mr. Muse being in the car or trying to steal Ms. Coty's and Ms. Baker's phones. As the officers reported it, Mr. Moussaoui was on top of Ms. Baker in the backseat of the car, not vice versa. RP 287–88.

The prosecution charged Mr. Moussaoui with second-degree rape by forcible compulsion or inability to consent. CP 9; *see* RCW 9A.44.050(1)(a), (b). The prosecution told the jury in its opening statement the evidence would show Ms. Baker

"woke up in the back seat of that car with the defendant on top of her," that Mr. Moussaoui "got on top of [Ms. Baker] while she was in the back seat of that car, while she was still passed out." RP 200–01. The prosecution also said Mr. Moussaoui tried to force his penis into Ms. Baker, and when she tried to get him to stop, he hit her. RP 207.

In her testimony, Ms. Baker recalled waiting on the curb with Ms. Coty for a ride home. RP 651. After that, her next memory was of someone carrying her toward Ms. Coty's and Ms. McIntosh's apartment. RP 653. The next thing she remembered was being on top of Mr. Moussaoui in the backseat—not that she "woke up" in that position, but that she "lost memory" until that moment. RP 654–55.

At this moment, neither Ms. Baker nor Mr. Moussaoui had pants on. RP 655–56. Ms. Baker recalled telling Mr. Moussaoui to stop, and he shushed her and said "it was okay." RP 656, 662. She did not say that he hit her at this time. Mr. Moussaoui tried to put his penis in her, and she "panicked." RP

660. Her next memory was of being "outside of the car running away." RP 658. She did not remember how she got outside, but Ms. Baker admitted trying to get back into the car so she could use it to "get away." RP 658, 665.

Ms. Coty remembered trying to find Ms. Baker's home first. RP 561. She then recalled some "kind of an upset" during which Mr. Moussaoui stopped the car and talked to someone on the phone. RP 562. After that, Ms. Coty decided to direct Mr. Moussaoui to her apartment in Kent. RP 561–62. She did not remember Mr. Muse being in the car. RP 563. She recalled Ms. Baker was asleep when they arrived at the apartment, and she asked Mr. Moussaoui to carry Ms. Baker inside. RP 565–66. Ms. Coty later noticed Ms. Baker was not in the apartment and the car was no longer outside. RP 567–68. She called the police. RP 568.

After Ms. Baker's testimony, the prosecution moved to amend the information to remove forcible compulsion and allege only inability to consent. RP 694–95; CP 116.

The prosecution and defense counsel each proposed an instruction on the elements of second-degree rape. RP 604–05; CP 106. Both instructions used Ms. Baker's initials rather than her full name. RP 604–05; CP 106. The final instruction submitted to the jury also used Ms. Baker's initials. RP 707; CP 57. The jury found Mr. Moussaoui guilty. CP 64.

Mr. Moussaoui requested a sentence below the standard range. CP 128. He asked for an evidentiary hearing at which he would testify to the account summarized above—that Ms. Baker initiated sexual contact and became upset when she mistakenly thought he had stolen her phone. CP 121–26. Mr. Moussaoui contended this evidence would show Ms. Baker was an "initiator" of or "willing participant" in the incident. CP 120–21 (citing RCW 9.94A.535(1)(a)).

The trial court denied the request for an evidentiary hearing. 9/5/19 RP 517. Despite precluding Mr. Moussaoui from presenting evidence, it went on to find he did not prove a mitigating circumstance by a preponderance of the evidence.

9/5/19 RP 535. The court imposed a standard-range sentence of 96 months to life. 9/5/19 RP 537–38; CP 71.

D. ARGUMENT

1. The court critically misapprehended the Sentencing Reform Act, requiring this Court's review.

The SRA requires trial courts to determine an offender score based on criminal history and look up the offense's seriousness level. RCW 9.94A.010; RCW 9.94A.515; RCW 9.94A.525. With this information, the trial court determines a standard sentence range, and the court selects the sentence "it deems appropriate." RCW 9.94A.530(1). Second-degree rape carries an indeterminate sentence, where the court sets the minimum term and imposes a maximum term of life. RCW 9.94A.507(1)(a)(i), (3); RCW 9A.20.021(1)(a); RCW 9A.44.050(2).

Standard-range sentences are not mandatory. If the court finds "substantial and compelling reasons justifying an exceptional sentence," it may impose a sentence above or below the standard range. RCW 9.94A.535. The SRA lists

circumstances on which a court may base a below-range sentence, although the list is not exclusive. RCW 9.94A.535(1). If the defendant proves one or more of these circumstances by a preponderance of the evidence, the court must consider a sentence below the standard range. *Id.*; *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Ramos*, 187 Wn.2d 420, 434, 387 P.3d 650 (2017).

The SRA requires the court to hold an evidentiary hearing whenever the defendant disputes a fact material to the sentence. *Mail*, 121 Wn.2d at 712. The SRA constrains a sentencing court to rely on facts "admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

"Where the defendant disputes material facts, the court **must** either not consider the fact or grant an evidentiary hearing on the point." *Id.* (emphasis added). These requirements protect the defendant's due process rights by ensuring the sentence is

based on accurate information. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012).

Published opinions addressing a prosecutor's request for a sentence above the standard range illustrate how the right to an evidentiary hearing works in practice. If the defendant disputes the facts the prosecution alleges to establish aggravating circumstances, the court must hold an evidentiary hearing on those facts. *State v. Talley*, 83 Wn. App. 750, 757, 923 P.2d 721 (1996), *aff'd*, 134 Wn.2d 176, 949 P.2d 358 (1998). Otherwise, the court must sentence the defendant as though the factual dispute was resolved against the prosecution. *Id.* at 759–60; *State v. Strauss*, 54 Wn. App. 408, 419–20, 773 P.2d 898 (1989).

The Legislature later amended the SRA to require the prosecution to prove many aggravating circumstances to the jury beyond a reasonable doubt. RCW 9.94A.537; Laws of 2005, ch. 68, §§ 2, 4. However, RCW 9.94A.530 continues to apply to "*any sentence* other than a sentence above the standard

range." RCW 9.94A.530(2) (emphasis added). This provision clarifies that a defendant's right to an evidentiary hearing extends to mitigating facts a defendant alleges in support of a request for a below-range sentence. *Id.*

By arguing one or more mitigating facts exist, the defendant necessarily places those facts in dispute unless the prosecution concedes them. The disputed facts are material to the sentence, as their proof would require the court to consider a below-range sentence. RCW 9.94A.535(1); *McFarland*, 189 Wn.2d at 56. The court therefore must either hold an evidentiary hearing on the facts the defendant advances or resolve the dispute against the prosecution and consider a mitigated sentence. RCW 9.94A.530(2); RCW 9.94A.535(1); *Talley*, 83 Wn. App. at 759–60.

A sentencing court may consider the mitigating circumstance that the complainant was an "initiator" of or "willing participant" in the incident underlying the crime to "a significant degree." RCW 9.94A.535(1)(a). This circumstance

applies "where both the defendant and the victim engaged in the conduct that caused the offense to occur." *State v. Hinds*, 85 Wn. App. 474, 481, 936 P.2d 1135 (1997). There "must be a link" between the complainant's actions and the defendant's blameworthy conduct. *Id.* at 482.

A trial court properly finds a rape victim is an "initiator" or "willing participant" where the victim, not the defendant, initiated sexual intercourse. *See State v. Clemens*, 78 Wn. App. 458, 464–65, 898 P.2d 324 (1995). In *Clemens*, the 14-year-old complainant entered the 18-year-old defendant's bedroom after the defendant had gone to bed, kissed the defendant, and "willingly engaged in sexual intercourse" with him. *Id.* at 460–61. The defendant entered an *Alford* plea to third-degree rape of a child. *Id.* at 461.

At sentencing, the court found the complainant "was an initiator and willing participant in the incident" and imposed a below-range sentence. *Id.* at 461–62. The Court of Appeals found the defendant "did not take any steps to initiate the sexual

contact," which "would not have occurred" if the complainant had "not entered the room . . . and initiated contact by kissing him." *Id.* at 465–66.

Ms. Moussaoui's offer of proof supporting his request for an exceptional sentence paints a similar scenario. If granted an evidentiary hearing, Mr. Moussaoui would testify Ms. Baker whispered to him as he carried her to Ms. McIntosh and Ms. Coty's apartment that she wanted him to come home with her. CP 125. While they were on route, she "started fondling his genitals" and asked him to pull over. CP 125. She then asked Mr. Moussaoui to get into the backseat with her and "climbed on top of him." CP 125.

If believed, this testimony would show Mr. Moussaoui "did not take any steps to initiate the sexual contact," and sexual intercourse "would not have occurred." *See Clemens*, 78 Wn. App. at 465–66. Accordingly, these facts would have permitted the trial court to find Ms. Baker was an "initiator" or "willing participant" as these terms are used in RCW

9.94A.535. *Id.* at 464–65. The trial court erred in denying Mr. Moussaoui's request for an evidentiary hearing. RCW 9.94A.530(2).

The prosecution asserted the jury's guilty verdict precluded a finding Ms. Baker was an initiator or willing participant. CP 133. In convicting Mr. Moussaoui, the jury found Ms. Baker was incapable of consenting to sexual intercourse because of physical helplessness or mental incapacity. CP 133; RCW 9A.44.050(1)(b). If Ms. Baker was unable to consent, so the prosecution argues, she necessarily was unable to be an initiator or willing participant. CP 133.

But *Clemens* forecloses the prosecution's argument. In both cases, the verdict established the complainant was unable to consent—in *Clemens* because she was a minor, here because the jury found her to be. 78 Wn. App. at 467; RCW 9A.44.050(1)(b); CP 57. The Court of Appeals nonetheless held the complainant's inability to consent did not preclude a finding she was an initiator or a willing participant. *Clemens*, 78 Wn.

App. at 467. Such a finding "merely provides some evidence regarding the culpability of the defendant for sentencing purposes; it does not excuse the acts of the defendant." *Id.* at 468.

The prosecution's argument is also inconsistent with the SRA. If a finding the complainant did not or was not able to consent precludes a finding she was an initiator or willing participant, then this mitigating circumstance is categorically unavailable in cases of second- or third-degree rape. RCW 9A.44.050(1)(b); RCW 9A.44.060(1)(a). Nothing in the SRA or chapter 9A.44 RCW suggests the Legislature intended this result.

At most, the jury's verdict establishes Ms. Baker could not—and by necessary implication did not—consent. CP 57. But finding that Ms. Baker initiated the sexual contact is *not* the same as finding she was able to consent. If it were, the complainant's willing participation would be a complete defense, not a mitigating circumstance that permits the trial

court to impose a sentence below the standard range. *Clemens*, 78 Wn. App. at 468.

This Court should accept review. RAP 13.4(b)(1)-(4).

2. This Court should accept review to prevent courts from commenting on the evidence by referring to complainants by their initials, as this suggests to the jury that the court conclusively believes the complainant is a victim warranting protection.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. This clause prohibits a trial court from commenting on the evidence—in other words, from "'conveying to the jury [the court's] personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The court need not expressly state its impressions of the evidence to the jury—"it is sufficient if they are merely implied." *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

"A judicial comment is presumed prejudicial and is only not prejudicial if the record affirmatively shows no prejudice could have resulted." *Levy*, 156 Wn.2d at 725. It is the prosecution's burden to show "the defendant was not prejudiced." *Jackman*, 156 Wn.2d at 743. A comment on the evidence is a "manifest constitutional error" that an appellant may raise for the first time on appeal. *Levy*, 156 Wn.2d at 719–20; RAP 2.5(a)(3).

A to-convict instruction that conveys to the jury that the defendant's guilt has been proved is an improper judicial comment on the evidence. *See Jackman*, 156 Wn.2d at 744. In *Jackman*, the prosecution charged the defendant with a number of offenses requiring proof the victims were minors. *Id.* at 740 & n.3. The to-convict instructions included each victim's birthdate, implying to the jury that the fact of the victims' age was already established. *Id.* at 740–41, 744. Accordingly, this Court held the instructions amounted to judicial comments on the evidence. *Id.* at 744.

As in *Jackman*, the to-convict instruction in this case conveyed to the jury Mr. Moussaoui was guilty of committing an offense against Ms. Baker. Throughout the trial, the parties, witnesses, and the court freely referred to Ms. Baker by her first or last name. *See, e.g.*, RP 711, 740 (prosecution's closing argument). Nevertheless, when the time came to instruct the jury, the trial court modified the pattern version of the to-convict instruction to use Ms. Baker's initials rather than her name. *Compare* CP 57 with WPIC 41.02.

This grant of anonymity necessarily conveyed to the jury that the court believed Ms. Baker was a victim who needed protection. By implying in the to-convict instruction that Ms. Baker's status as a victim in need of protection had been established, the trial court improperly commented on the evidence. *Jackman*, 156 Wn.2d at 744.

Here, reversal is required because proposing the instruction was ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

The Sixth Amendment and article I, section 22 of the Washington State Constitution guarantee not merely the assistance of counsel, but the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Ineffective assistance requires reversal where (1) "defense counsel's conduct . . . fell below an objective standard of reasonableness," and (2) "the deficient performance resulted in prejudice." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Proposing an unconstitutional jury instruction that harms the defendant is deficient performance. *See Kyllo*, 166 Wn.2d at 868–69. In *Kyllo*, defense counsel proposed to instruct the jury the defendant was entitled to act in self-defense if he reasonably believed he was in "danger of great bodily harm." *Id.* at 859–60. This instruction was erroneous—in fact, the defendant could defend himself if he reasonably believed he was "about to be *injured*" to any degree. *Id.* at 863. This improper instruction

"lowered the State's burden of proof," violating the defendant's due process rights. *Id.* at 864.

This Court held that proposing the erroneous self-defense instruction was objectively unreasonable. *Id.* at 868–69. "With proper research," counsel would have learned the correct self-defense standard and proposed an instruction that correctly characterized it. *Id.* at 868. And no "legitimate trial strategy or tactics" could justify a jury instruction that misstated the law and reduced the prosecution's burden of proof. *Id.* at 869; *accord State v. Woods*, 138 Wn. App. 191, 201–02, 156 P.3d 309 (2007); *State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004).

As in *Kyllo*, defense counsel's proposed to-convict instruction violated Mr. Moussaoui's constitutional rights to his disadvantage without conceivable benefit. As explained above, the use of Ms. Baker's initials in the instruction communicated to the jury that the trial court believed Ms. Baker was a victim needing protection. In proposing that the court use Ms. Baker's

initials, defense counsel called on the court to make an improper comment on the evidence in violation of article IV, section 16.

Prejudice results where "there is a reasonable probability" that the outcome would have been different "but for counsel's deficient performance." *Kyllo*, 166 Wn.2d at 862. This is the case where "credibility was central to the State's case" and an improper jury instruction "bolstered" the complainant's credibility. *Eaker*, 113 Wn. App. at 120–21; *see also State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998) (counsel's error was prejudicial where the case for guilt "was not overwhelming" and "credibility was a key issue").

Ms. Baker's testimony was key to proving she could not consent to sexual intercourse with Mr. Moussaoui. RP 654–63. The evidence was equivocal. She could communicate with police and hospital staff shortly after leaving Mr. Moussaoui's car. RP 255, 380, 433–34, 580. The prosecution's expert could draw no conclusions from her blood alcohol content without

knowing her drinking habits. RP 532–33. She had gaps in her memory, which call into doubt her ability to remember what happened. RP 651–54, 658, 663, 668. The prosecution devoted much of its argument to urging the jury to believe Ms. Baker's testimony, apparently recognizing her credibility was key to its case. RP 715–21.

By inviting the court to use Ms. Baker's initials and imply to the jury she was a victim, defense counsel bolstered Ms. Baker's credibility and strengthened the prosecution's case against Mr. Moussaoui. CP 106. Had counsel not prompted the trial court to comment on the evidence, there is a reasonable probability at least one juror would have found Ms. Baker not credible and refused to convict. *Kyllo*, 166 Wn.2d at 870; *Eaker*, 113 Wn. App. at 120–21.

This Court should accept review.

E. CONCLUSION

For the reasons stated in this petition, Mr. Moussaoui respectfully requests that this Court accept review.

In compliance with RAP 18.7(b), counsel certifies the word processing software calculates the number of words in this document, exclusive of the words exempted by the rule, as 4,357 words.

DATED this 8th day of September, 2021.

Respectfully submitted,

/s Sara S. Taboada
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Case #: 805584
State of Washington, Respondent v. Ismael Moussaoui, Appellant
King County Superior Court No. 17-1-05837-4

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "Affirmed, but remanded to the trial court to strike the supervision fees from the judgment and sentence."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Lea Ennis
Court Administrator/Clerk

Hcl

C: Hon. Michael Ryan

FILED
8/9/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ISMAEL DJILALI MOUSSAOUI, Appellant.	No. 80558-4-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Ismael Moussaoui appeals his conviction for rape in the second degree after a jury trial. He contends the trial court improperly denied his request for an evidentiary hearing at sentencing and commented on the evidence by using the victim's initials in the to-convict instruction. Finding no error, we affirm his convictions but remand to strike the community custody supervision fees from the judgment and sentence.

FACTS

Uber driver Ismael Moussaoui was hired to drive D.M.B. and her friend to the friend's apartment. When they arrived, the friend had a hard time waking up an extremely intoxicated D.M.B. Moussaoui agreed to carry D.M.B. into the apartment and started doing so while the friend entered the apartment and ran to her room to get cash to pay Moussaoui. However, Moussaoui instead drove

away with D.M.B. The friend immediately called 911 to report what had happened. Shortly after, police pulled over Moussaoui.

Around the same time, just a few blocks away from the apartment, D.M.B. was laying in the grass, naked from the waist down, with abrasions on her back and arms, and hysterical. A neighbor woke up to sounds of sobbing and crying, saw D.M.B., and called 911. A nurse specializing in sexual assault examined D.M.B. the same day. The nurse testified that during the examination D.M.B. said the Uber driver held her against her will and raped her.

The State charged Moussaoui with rape in the second degree in violation of RCW 9A.44.050(1)(b). The information alleged that Moussaoui engaged in sexual intercourse with D.M.B. under circumstances where D.M.B. was incapable of consenting to sexual intercourse by reason of being mentally incapacitated and physically helpless.

D.M.B. testified at trial. She could not remember everything that happened, but she remembered awaking in the backseat of the Uber car to find Moussaoui also in the backseat underneath her without pants and his genitals exposed. She also did not have any pants or underwear on but could not remember how they came off. She remembered feeling his penis inside her vagina, begging him to please stop, and Moussaoui shushing her and telling her it was okay. She remembers thinking that she needed to get away, that it was not right, and that she did not want to be there. The next thing D.M.B. remembered was running around outside, Moussaoui catching up to her, and hitting her in the back of the head.

Police testified that Moussaoui, who did not testify at trial, told police that he engaged in consensual sexual contact with D.M.B. but never penetrated her vagina, and that while this was happening, D.M.B. changed her mind and began yelling for him to stop. DNA from semen found on vaginal swabs from D.M.B. matched a DNA sample from Moussaoui.

The jury found Moussaoui guilty of rape in the second degree as charged.

Prior to the sentencing hearing, Moussaoui filed a sentencing memorandum requesting an exceptional sentence below the standard range based on the mitigating circumstance that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a). Moussaoui's memorandum requested that the court grant him an evidentiary hearing to present evidence, by way of Moussaoui's own testimony, that D.M.B. was "an initiator and willing participant in sexual intercourse with Mr. Moussaoui."

At the sentencing hearing, after hearing from both parties regarding Moussaoui's request for an evidentiary hearing, the trial court denied his request but accepted and read his proffer and allowed him "wider latitude than may be normal to supplement what he wants to say in allocution." Moussaoui exercised his right of allocution but did not address his request for an evidentiary hearing or his claim that D.M.B. was an initiator or willing participant in the rape.

The court denied Moussaoui's request for an exceptional sentence downward. The court declined to impose an exceptional sentence stating,

> The Court declines to impose an exceptional sentence because it could not find substantial and compelling reasons to do

> so. Nor does it find that the mitigating factor advanced by Mr. Moussaoui had been demonstrated by a preponderance of the evidence. The evidence presented at trial was clear, that [D.M.B.] lacked the capacity to consent. It was also clear that she sustained numerous bruises and road rash-type injuries on her body. The information now proffered is little more than a more detailed description of the evidence that was already presented to the jury and which the jury rejected. In fact, the proffer provided by Mr. Moussaoui's Counsel is somewhat inconsistent with the presentence investigation report we received yesterday, the September 4th version which discusses the use of alcohol and marijuana. So, the Court will not be imposing an exceptional sentence.
>
> By so ruling, the Court is not saying that an exceptional sentence is never warranted in a case such as this. To be sure, there may be factual situations that justify the imposition of an exceptional sentence in a case such as this. But as explained, the facts presented to me do not establish by a preponderance of the evidence that [D.M.B.] was, to a significant degree, the initiator or willing participant in the rape at issue in this case. Nor is there any evidence before me that would justify a finding that substantial and compelling reasons exist in this case to impose an exceptional sentence downward. Accordingly, the Court denies Mr. Moussaoui's request for a downward exceptional sentence.

The court sentenced Moussaoui to a standard range, a minimum term of 96 months in prison. The court included an Appendix H to the judgment and sentence, which required that, as a condition of community custody, the defendant pay supervision fees as determined by the Department of Corrections.

Moussaoui appeals.

DISCUSSION

Defendant's Request for Evidentiary Hearing

Moussaoui first argues that the trial court erred by denying his request for an evidentiary hearing at sentencing to present testimony regarding his claim that D.M.B. was an initiator or willing participant in the rape.

A court "may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1). Here, Moussaoui sought to prove the mitigating circumstance that "to a significant degree, the victim [D.M.B.] was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

Moussaoui argues that RCW 9.94A.530(2) entitled him to an evidentiary hearing to present testimony regarding his claim that D.M.B. was an initiator or willing participant in the rape. The statute provides:

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or *proved in a trial* or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant *disputes material facts*, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence…"

RCW 9.94A.530(2) (emphasis added).

In his written motion requesting an evidentiary hearing, Moussaoui proffered the following facts that he contends are relevant to his claim that D.M.B. was an initiator or willing participant in the rape:

> 19. One of the women then asked Mr. Moussaoui if he could help bring [D.M.B.] into Ms. Coty's residence. When Mr. Moussaoui picked her up, [D.M.B.] whispered that she wanted to go home, she wanted him to take her home, and she wanted Mr. Moussaoui to come with her. Their faces were close together and he felt she was trying to seduce him.
>
> 20. Mr. Moussaoui took [D.M.B.] back to the car. [D.M.B.] walked part of the way with no help and got into the back seat. Mr. Moussaoui asked her for an address and she said not to worry, to just start driving.

> 21. They drove maybe half a block when [D.M.B.] reached over from the back seat and started fondling his genitals. She said to pull over somewhere, that anywhere was fine. It was about 4:00 am and he pulled over. It was dark and she told him to get into the back seat. He did so and she climbed on top of him and started kissing him.
>
> 22. She was tugging at his pants and so he helped her remove them. She had shorts on and she took them off. They were both naked from the waist down and she was grinding on him…

These proffered facts contesting the central issues at trial—consent and sexual intercourse—were not "disputed material facts" at sentencing for which Moussaoui was entitled to an evidentiary hearing under RCW 9.94A.530(2). The types of disputed material facts contemplated by RCW 9.94A.530(2) which entitle a defendant to an evidentiary hearing are new facts at sentencing—that is, those facts not previously admitted, acknowledged, or proven. For example, in State v. Talley, 83 Wn. App. 750, 757, 923 P.2d 721, we held that the sentencing court was required to hold an evidentiary hearing where the defendant had entered an Alford[1] plea—clearly manifesting an intention not to admit the State's factual allegations—and it was undisputed that the sentencing court relied on facts in police reports and in the State's probable cause certification that the defendant neither admitted nor acknowledged for sentencing purposes. See also State v. Cabos, 178 Wn. App. 692, 697-700, 315 P.3d 600 (2013) (sentencing court erred by failing to hold evidentiary hearing when defendant objected to every prior conviction which controlled his offender score).

[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

In contrast, Moussaoui was trying to dispute facts the State had proven at trial, which RCW 9.94.530(2) explicitly permits the sentencing court to rely on. Moussaoui was not presenting evidence of a mitigating factor but instead presenting evidence of a complete defense which had already been rejected by the jury. In sentencing Moussaoui, the judge relied on facts that had been proven beyond a reasonable doubt at trial. Moussaoui fails to cite any case where a defendant was granted an evidentiary hearing at sentencing to dispute proven facts that he could have attempted to dispute during trial.

To support his request for an exceptional sentence, Moussaoui argues "[t]hat [D.M.B.] was unable to consent to sexual intercourse does not necessarily mean she could not initiate or willingly participate in it." In support of this proposition, Moussaoui cites State v. Clemens, 78 Wn. App. 458, 468, 898 P.2d 324 (1995). "There we affirmed the use of the 'willing participant' mitigating factor in an exceptional sentence, but only because the perpetrator and the victim were relatively close in age, and the victim, not the perpetrator, initiated the contact." State v. Khanteechit, 101 Wn. App. 137, 140, 5 P.3d 727 (2000) (distinguishing Clemens, which involved rape of a child in the third degree, from a child-rape case between a 38-year-old and a 13-year-old). Clemens is distinguishable because the defendant was convicted of third degree rape of a child, which is a strict liability offense, and it did not involve a request for an evidentiary hearing at sentencing.

To convict Moussaoui of rape in the second degree, the jury was required to find that Moussaoui engaged in sexual intercourse with D.M.B. when D.M.B.

was "incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). "Mental incapacity" is a condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or from some other cause. RCW 9A.44.010(4). "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. RCW 9A.44.010(5).

As the trial court aptly put:

> The evidence presented at trial was clear, that [D.M.B.] lacked the capacity to consent. It was also clear that she sustained numerous bruises and road rash-type injuries on her body. The information now proffered is little more than a more detailed description of the evidence that was already presented to the jury and which the jury rejected.

In short, Moussaoui was not entitled to an evidentiary hearing under RCW 9.94A.530(2) to re-litigate the rape that had already been proven beyond a reasonable doubt at trial.

Use of Victim's Initials in To-Convict Jury Instruction

Moussaoui contends the use of D.M.B.'s initials in the to-convict instruction on rape in the second degree[2] was an improper judicial comment on the evidence in violation of article IV, section 16 of the Washington State

[2] D.M.B.'s initials were used in two elements of the crime of rape in the second degree in the to-convict instruction: "(1) That on or about September 4, 2017, the defendant engaged in sexual intercourse with D.M.B.; and (2) That the sexual intercourse occurred when D.M.B. was incapable of consent by reason of being physically helpless or mentally capacitated…"

Constitution.

Article IV, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional provision prohibits a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.' " State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). We review de novo whether a jury instruction constitutes an improper comment on the evidence "within the context of the jury instructions as a whole." Levy, 156 Wn.2d at 721.

We recently rejected the argument that using a victim's initials in the to-convict instruction was an improper judicial comment on the evidence in State v. Mansour, 14 Wn. App. 2d 323, 470 P.3d 543 (2020), review denied 196 Wn.2d 1040, 479 P.3d 708 (2021). We held that a trial court's use of initials to identify a victim of child molestation in the to-convict instructions was not a judicial comment on the evidence because identifying a victim either by full name or initials "did not impermissibly instruct the jury that a matter of fact had been established as a matter of law." Id. at 330. And a juror would likely not presume that the individual identified by her initials was a victim, or that the court considered her one, merely because the court chose to use her initials. Id.

Like the victim in Mansour, D.M.B. in the instant case testified using her full name at trial and was consistently referred to by her full name throughout the

proceedings; her identity was not concealed. Identifying D.M.B. by her initials did not impermissibly instruct the jury that a matter of fact had been established as a matter of law. See id. A juror would not presume that D.M.B. was a victim, or that the court considered her one, merely because the court chose to use her initials. See id. In short, Moussaoui fails to provide any compelling reason to depart from Mansour here. The use of D.M.B.'s initials was not an improper judicial comment on the evidence.[3]

Community Custody Supervision Fees

Moussaoui argues that the trial court erred by imposing Department of Corrections community custody supervision fees. RCW 9.94A.703(2)(d) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to: (d) Pay supervision fees as determined by the department." Because supervision fees are waivable, they are discretionary legal financial obligations (LFOs). State v. Dillion, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020) (citing State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018)). The preprinted language ordering supervision fees was buried in the appendix to the judgment and sentence form and did not give the sentencing judge the option on the form to waive it short of having to find it and physically strike it out. The court imposed only mandatory LFOs, did not

[3] Because we find no error in using D.M.B.'s initials in the to-convict instruction, we reject Moussaoui's argument that their counsel rendered ineffective assistance in proposing the instruction using D.M.B.'s initials. See State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (person claiming ineffective assistance of counsel must show that his counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances).

discuss the supervision fees, and did not impose any other discretionary LFOs. The State concedes that supervision fees should be stricken from the judgment and sentence. We accept the State's concession.

Affirmed, but remanded to the trial court to strike the supervision fees from the judgment and sentence.

Coburn, J.

WE CONCUR:

Andrus, A.C.J.

Appelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80558-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 8, 2021
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