NO. 45913-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TYLER SAVAGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda C.J. Lee, Judge

No. 10-1-03608-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly apply the rape shield statute to prevent defendant from admitting bondage pornography someone privately viewed on his developmentally disabled victim's computer to suggest she consented to the ligature strangulation that caused her death in the course of a sexual assault defendant subjected her to in an abandoned lot near his house?

2. Should this Court refuse to review defendant's claim the trial court erred in not *sua sponte* electing to give an unrequested supplemental instruction on the definition of rape when the jury was accurately instructed on that crime's elements and its statutorily defined terms?

3. Has defendant failed to prove his attorneys were ineffective in not proposing a novel supplemental instruction to emphasize forcible rape requires a living victim since that undisputed component of the crime was clearly implied by the standard instructions given to his jury?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with one count of aggravated first degree murder contrary to RCW 9A.32.030(1) and RCW 10.95.020(11) for the premeditated murder of a developmentally disabled sixteen year old in the course of, in furtherance of, or in immediate flight from raping her in the first degree, knowing she was a particularly vulnerable or incapable of resistance. CP 3-5. The Honorable Linda C.J. Lee presided over defendant's trial. 1RP 3.

During preliminary motions, the court applied Washington's Rape Shield statute[1] to exclude evidence *someone* with usernames similar to the victim's name visited bondage websites on a laptop located in a house the victim shared with her father and grandmother. CP 182-84, 434, 436, 446-447[2] 5RP 822-25; 8RP 1168. Fifty five exhibits were admitted through twenty witnesses. CP 457-464. Defense counsel proposed several jury instructions, but never requested the novel supplemental instruction at issue on appeal. CP 254-83; RP 16RP 1899-1913. The jury was accurately instructed on the applicable law before convicting defendant as charged. CP 307, 344-48. The court sentenced defendant in accordance with RCW 10.95.030. His notice of appeal was timely filed. CP 389.

[1] RCW 9A.44.020.

[2] Citations to the Clerk's papers beyond No. 432 are based on the State's estimate of how its supplemental designations will be numbered.

2. Facts

Kimmie[3] was born on March 15, 1994, but she could not be released from the hospital right away and her life would never be normal. *E.g.*, 8RP 1147, 1154-55. She remained hospitalized for a month before she could be transferred to spend the second month of her life at the pediatric internal care center. 8RP 1142, 1151-52. She was eventually released to live with her father and grandmother in Puyallup. 8RP 1142, 1151-52.

Doctors quickly discovered the controlled substances Kimmie was exposed to *in utero* left her with a complicated array of extreme disabilities. 8RP 1152-55. The first nine years of her life consisted of a steady regiment of physical, occupational, and speech therapy. 8RP 1152. Physical therapy helped her cope with the bilateral-club feet caused by the drug induced absence of uterine fluid her ankles needed to develop. 8RP 1152. Three surgeries enabled her to walk by swinging her legs while dragging her left foot in tow. 8RP 1153. Yet Kimmie persevered. 8RP 1157; 9RP 1332, Ex.66. She enjoyed riding her bike in the neighborhood, spending time with friends and participating in Special Olympics. *Id.*

[3] The State will refer to K.D. as "Kimmie" because that is how her family, friends and the public honor her memory. See "Kimmie's Law" Senate Bill 6162 (requiring Amber Alerts to be transmitted six hours earlier when a disabled person goes missing).

At sixteen—the age Kimmie was when defendant strangled her to death—every day of her life was still a struggle. 8RP 1175. She was very small, standing about 4' 10", weighing about 100 lbs, still walking with a distinct drag, and far more likely to spend time playing with toddlers than interacting with kids her age. 8RP 1180; 14RP 1826-27. She mentally functioned somewhere between the third and fifth grade level. 8RP 1155; 15RP 1877-88. And she required a number of special accommodations to participate in special education classes. 8RP 1155-56, 1185; 14RP 1826.

Kimmie woke up sometime around 9:00 a.m. the day she died. 8RP 1177. It was August 17, 2010. *Id.* She was eager to ride her bike and to see her friends. 8RP 1177, 1122. Around 10:00 a.m. she rode her bike to a friend's house, only to be sent home with an invitation to return once the children in the house woke up. 8RP 1221-23; 14RP 1826-27. Kimmie set out on her bike again about two hours later. 8RP 1178. It was the last time Kimmie's grandmother saw her alive. 8RP 1178.

Kimmie never made it back to her friend's house. 8RP 1223. Instead, she met defendant by a couple of dirt hills in the neighborhood where she liked to ride her bike. 14RP 1761-62. Defendant was eighteen at the time. 13RP 1752. Kimmie started talking to him about the tricks she could do on her bike. 14RP 1762. Defendant invited her to see his house.

14RP 1763. Sean Sills observed a man he later identified to be defendant walking behind a girl on a bike he subsequently learned was Kimmie. 8RP 1184-86. They were traveling toward the vacant lot where her body was found. 8RP 1184; Ex. 12A. Although Sills did not know Kimmie at the time, he immediately perceived her to be "specia[l]", which he described as an obvious disconnect between her physical and mental age. 8RP 1198-99. Another neighbor also saw a man he later recognized to be defendant walking alongside Kimmie. 8RP 1205-06. He thought it was strange for Kimmie to be so far from home with a person he did not recognize, and noticed Kimmie appeared to "hestitat[e]". 8RP 1205-06.

Defendant led Kimmie into the middle of a secluded lot near his house. 11RP 1585, Ex. 83-84. They were surrounded by tall grass, blackberry bushes and trees. *Id.*, Ex. 7, 29, 32. Kimmie tried to leave about twenty minutes later. Ex. 83-84. Defendant, who stands 5'11" and weighed about 180 lbs, "pretty much thought that was lame", so he choked her from behind, tackling her to the ground where he continued to choke her as she "wiggl[ed] about" struggling to breath. *Id.*; 11RP 1586; 13RP 1752; 14RP 1826-27. He took off her clothes, inserted two fingers in her vagina, touched her breasts and probably her buttocks; he then strangled her to death with her own shirt and bra. *Id.*; 12RP 1669-70, 1679-80, 1694, 1696, 1672-75, 1694. Defendant tossed Kimmie's body in some sticker bushes

once he was through. *Id.* He scattered Kimmie's clothing and bicycle over her, disassembled her cell phone to prevent police from tracking it to her location, and discarded the pieces on his way home to relax with a video game. *Id.*, Ex. 7, 9, 83-84; 11RP 1597-98.

Kimmie's father arrived home around 4 o'clock to find Kimmie an hour overdue. 8RP 1144. He first looked for her at the friend's house she visited that morning. 8RP 1144. Not finding her there, he called her phone; when the calls went directly to voice mail, he called the police. 8RP 1144. The search expanded August 18, 2010. 8RP 1146. Police and community volunteers scoured several square miles looking for Kimmie with an airplane, helicopter, dogs, all-terrain vehicles and on foot from August 18th to the evening of August 23rd, when defendant finally revealed the location of her body. 8RP 1262-73; 10RP 1464.

On August 18, 2010, Sean Sills helped a group of neighborhood kids look for Kimmie. 8RP 1185. Kimmie's friend Tamara led the group to defendant's house to enlist him in the effort. 8RP 1185; 14RP 1831. Defendant initially resisted the invitation, but eventually joined the group. 14RP 1831. Sills recognized defendant to be the man he saw walking with Kimmie the day she went missing, which defendant admitted when confronted with Sill's observation. 8RP 1186;14RP 1831. Sills reported defendant's contact with Kimmie to police. 8RP 1187, 1199.

Police met with defendant on three separate occasions. 9RP 1329; 10RP 1454, 56. Detectives first contacted defendant August 18, 2010. 9RP 1329-30. He claimed meeting Kimmie was a chance encounter which ended with them quickly parting ways. 9RP 1330. A friend noticed defendant started secluding himself, as if to stay out of the way, following this first police contact.14RP 1831-32. When detectives re-contacted defendant August 18, 2010, he changed the timeline of events. 10RP 1454-56. Detectives returned to defendant August 23rd as the investigation revealed he was the last person known to have seen Kimmie alive. 10RP 1456. Defendant agreed to help retrace Kimmie's steps only to misdirect police to areas where he knew her body could not be found. 14RP 1467-68, 1492-93.

Detectives eventually sat with defendant at a picnic table along the search route. 9RP 1284; 10RP 1493. He appeared relaxed yet fixated on the cadaver dogs. 10RP 1493; 11RP 1571. One of the detectives abruptly told defendant police knew he killed Kimmie and he needed to start making things right by leading police to her body. 11RP 1573. Defendant nodded, then directed the detectives to the vacant lot where he discarded Kimmie's remains. 11RP 1574, 1576-79; 12RP 1660, 1664, Ex. 7, 9, 46.

Defendant ultimately confessed he chocked Kimmie from behind when she tried to leave, stripped off her clothes, wrapped her bra and shirt around her neck, inserted two fingers in her vagina, and tossed her body in a bush. Ex. 83-84; 11RP 1580-84. He never described the death as accidental or the strangulation as consensual. *E.g.*, 10RP 1490-92; 11RP 1589-90; Ex. 83-84. A red stain on one of his shirts contained Kimmie's DNA. 9RP 1387; 11RP 1601-02, 1620. Several of Kimmie's belongings were recovered where defendant left them. 9RP 1287, 1313, 1335, 1396. Police informed Kimmie's father of her untimely death. 8RP 1147.

The autopsy revealed several pertinent details about the last moments of Kimmie's life. Defendant tied the shirt and bra around Kimmie's neck so tightly it left abraded-red furrows as it compressed the blood vessels causing death by ligature strangulation. 12RP 1660, Ex. 39-41. 12RP 1660, 1662-63, 1676, 1679, Ex. 39-41 44-45, 84. This trauma was inconsistent with defendant's initial claim he haphazardly tied the shirt around Kimmie's neck as a ruse to misdirect police after he choked her to death from behind with his arms. *Id.* An examination of Kimmie's vagina and cervix revealed abrasions most likely resulting from blunt force trauma consistent with "nonconsensual" digital penetration (or "sexual assault") that occurred while she was alive. 12RP 1669-70, 1672-75, 1694.

It is highly unlikely the prominent red discoloration of those internal injuries would have manifested if her heart stopped prior to penetration. 12RP 1675-76, 1696. Whereas an attack beginning with the chokehold, followed by vaginal penetration and concluding with ligature strangulation, was consistent with the autopsy. 12RP 1679-80, 1694, 1696.

At trial defendant testified to a new version of events wherein he inadvertently strangled Kimmie to death in the course of bondage sex he reluctantly participated in at her behest. 13RP 1768-71. Defendant claimed he only digitally penetrated Kimmie's vagina to make her death look like a rape. 13RP 1771-72, 1780-1808. He explained his earlier admission to brutally strangling Kimmie to death was an attempt to spare himself the embarrassment of admitting her death was accidental. 14RP 1775.

C. ARGUMENT.

1. THE COURT PROPERLY APPLIED THE RAPE SHIELD STATUTE TO PREVENT DEFENDANT FROM ADMITTING PORNOGRAPHY SOMEONE VIEWED ON KIMMIE'S COMPUTER TO PROVE SHE CONSENTED TO THE LIGATURE STRANGULATION THAT CAUSED HER DEATH.

"[A] defendant's right to present a defense ... is subject to reasonable restrictions and must yield to established rules of ... evidence designed to assure ... fairness and reliability in the ascertainment of guilt and innocence." ***State v. Donald,*** 178 Wn. App. 250, 263, 316 P.3d 108

(2013) (citing ***United States v. Scheffer***, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 413 (1998)); ***Crane v. Kentucky***, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting ***California v. Trombetta***, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)); ***State v. Finch***, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing ***Chambers v. Mississippi***, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); ***State v. Acosta***, 123 Wn. App. 424, 441, 98 P.3d 503 (2004)). A defense must be limited to the presentation of admissible evidence. ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) *rev. denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993)).

The exclusion of evidence is largely left to the sound discretion of trial courts. ***Rehak***, 67 Wn. App. at 162; ***State v. Kilgore***, 107 Wn. App. 160, 185, 26, P.3d 308 (2001) (citing ***State v. Mak***, 105 Wn.2d 692, 710, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Kunze***, 97 Wn. App. 832, 859, 988 P.2d 977 (1999), *review denied*, 140 Wn.2d 1022, 10 P.3d 404 (2000)). A trial court only abuses that discretion when an exclusion is "manifestly unreasonable or based upon untenable grounds or reasons." *See* ***State v. Magers***, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Unreasonableness is manifest when it is "obvious, directly observable, overt or not obscure...." ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

At trial defendant proposed showing the jury thirteen internet-video clips depicting erotic asphyxiation viewed on a laptop taken from Kimmie's house to prove Kimmie had sexual proclivities which allegedly made it more likely she consented to the strangulation that caused her death. CP 182-84 (appx.2). Police obtained the laptop from Kimmie's father to look for information relevant to her disappearance. CP 436. Officers found a vast array of sexually explicit images, most of which depicted adult males engaging in homosexual sex, including sadomasochistic bondage with transvestites. 5RP 797, 816; CP 182-84 (appx.1-2);436.

Both Kimmie's father and Kimmie maintained accounts on the laptop. CP 436; 8RP 1168. It is unknown whether the laptop was ever loaned to someone outside the house, so Kimmie's grandmother is the only other person known to have access. *Id.* The pornography was viewed online by someone with user names similar to Kimmie's name; however, there was no direct evidence Kimmie ever viewed the pornography. *E.g.* CP 182-84. There was no proffer Kimmie ever discussed the pornography with defendant.

The trial court found the pornography was irrelevant on the issue of Kimmie's consent for several reasons. 5RP 823-25. Foremost, the fact she may have privately viewed the pornography on a home computer did

not equate to evidence she ever participated in similar behavior or ever would with defendant or another. 5RP 822-23. The court likewise found the defense failed to establish Kimmie ever shared the purported interest in bondage with defendant. *Id.* The pornography's relevance was further undermined by the absence of any direct evidence Kimmie actually viewed the pornography defendant sought to admit as proof of her proclivities, and through them her consent to being strangled. 5RP 822-23. Notwithstanding the pornography's exclusion, defendant was allowed to cross-examine police about the thoroughness of the investigation related to the laptop. 7RP 1047-48.[4] He was also permitted to testify he accidently strangled Kimmie to death during bondage sex she persuaded him to participate in after assuring him she knew it to be safe from past experience. 14RP 1768-69; 16RP 1953-54.

a. Defendant was properly prevented from admitting irrelevant evidence of bondage websites someone viewed on a laptop found in the victim's home.

Washington's rape shield statute generally bars the use of a victim's alleged sexual mores to prove the victim consented to a sexual act charged as an offense. *See* RCW 9A.44.020(2). Such evidence is recognized for its inherent capacity to "confus[e] the issues, mislea[d] the jury, or caus[e] it to decide the case on an improper or emotional basis[;]" thereby,

[4] Throughout trial the court also prevented the defense from indirectly exposing the jury to the pornographic content of the computer through cross-examination allegedly intended to impeach the thoroughness of the investigation and rebut testimony detailing the disparity between Kimmie's mental and physical age. RP 1047, 1190-93, 1349, 1812.

"creat[ing] substantial prejudice to the truth finding process ..." of a trial. ***State v. Gregory***, 158 Wn.2d 759, 783, 147 P.3d 1201 (2006)(rape victim's prior acts of prostitution properly excluded). The rape shield law recognizes a victim's prior sexual behavior is not predictive enough of future consent to meet the bare relevancy test of ER 401.[5] See ***Hudlow***, 99 Wn.2d 10. Under limited circumstances history of a sexual relationship between a defendant and victim may be admissible as might a victim's *modus operandi* for acquiring sexual partners; however, to be relevant there must be particularized—not generalized—factual similarities connecting the prior behavior to sexual contact the defendant claims to be consensual. RCW 9A.44.020(3); ***Gregory***, 158 Wn.2d at 784-85; ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); ***State v. Morley***, 46 Wn.App. 156, 730 P.2d 687 (1986).

Defendant continues to advocate for the admissibility of Kimmie's alleged proclivity for bondage from the prohibited inference a person is more likely to have wanted a particular kind of sex with the accused, or others indiscriminately, because the person was privately interested in that type of sex in the abstract. Permitting this outmoded syllogism to prevail in this case because the alleged behavior is unusual would only create an incentive for rapists to tailor attacks to a victim's known interests, which

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[5] ER 401 "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

may in this digital age be inadvertently or freely shared with would-be assailants through careless or carefree use of the Internet.

State v. Posey rejected a similar attempt to introduce computer evidence of a victim's expressed sexual interests to prove consent to subsequent sexual assaults apparently catering to those interests. 161 Wn.2d 638, 649, 167 P.3d 560 (2007). Unlike defendant, Posey actually had an intimate relationship with his victim prior to the offense underling his rape charges. 161 Wn.2d 641. But like defendant, Posey sought to introduce an e-mail police located on the victim's computer as evidence of consent. *Id.* at 642, 648. The e-mail was written around the time the victim met Posey and stated she "would enjoy being raped and ... wanted a boyfriend that would choke her and beat her." *Id.* at 642. The Supreme Court held "admission of the e-mail violat[ed] the rape shield statute." *Id.* at 649. In doing so, the Court made it unmistakable "potential sexual mores" are not admissible to prove a victim's consent to pursuing them with the defendant absent proof the victim shared them with the defendant. See *Id.* at 641-42, 649. At the heart of the decision is a common sense appreciation for the reality a mere expression of interest in a particular kind of sex is far less predictive of future conduct than a past instance of actually engaging in it with another person:

> "People might talk about something, but it is very different talking about it then actually doing it. Anybody who's had an e-mail correspondence with anybody knows it's easy to

> say things during that correspondence that you wouldn't necessarily say to their face." 161 Wn.2d at 649.

Anyone who has ever watched a film or read a book treating an extreme aspect of human behavior must similarly know curiosity in the conduct of others is often far removed from any plan to expose oneself to consequences of engaging in that behavior. *See* ER 201.

The rape shield law was enacted to put an end to the disgraceful-predominately sexist practice of putting a rape victim's life on trial. *See* ***Hudlow***, 99 Wn.2d 10-11. It is difficult to conceive of an interpretation of RCW 9A.44.020 more antithetical to its purpose than one which would permit defendants to prove a victim's consent to a charged sexual assault by exposing the jury to the sexually explicit websites the victim might have visited, books she might have read, or movies she might have watched, prior to the incident. *See* ***Posey***, 161 Wn.2d at 649; *see also e.g.*, ***Com. v. Widmer***, 446 Pa.Super. 408, 421, 667 A.2d 215 (1995) *reversed on other grounds* 547 P.a. 137, 689 A.2d 211 (1997)(defendant not permitted to adduce evidence of "the victim's appetite for risky sex ... to bolster claim of consent...."). In contrast, the trial court's challenged ruling was consistent with the statute's intent as well as the decision in ***Posey***, so it is incapable of being accurately characterized as a manifest abuse of discretion.

Defendant mistakenly compares his case to ***State v. Carver***, 37 Wn. App. 122, 124, 678 P.2d 842 (1984). ***Carver*** addressed the unrelated issue of whether evidence of prior sexual abuse should be admitted to provide an explanation other than defendant's guilt for a precocious sexual knowledge exhibited by extremely young children while testifying. There was no similar testimony to rebut in defendant's case, nor was Kimmie ever established to be someone who could have only learned about bondage from defendant. *E.g.*, RP 1047, 1190-93, 1349, 1812. Her well documented disabilities only evinced the particular vulnerability the State was obligated to prove. *E.g.* RP 1047, 1190-93, 1349, 1812. Defendant failed to establish the court erred in preventing him from using Kimmie's unverified internet activity to show she wanted him to strangler her.

b. Any relevance adhering to the pornography was substantially outweighed by the danger of undue prejudice attending its use.

RCW 9A.44.020 (d) calls for a balancing process where the probative value of the evidence must substantially outweigh the probability its admission will create a substantial danger of undue prejudice. *See* ***Hudlow***, 99 Wn.2d at 12, 14. The standard is considerably more exacting than ER 403, which requires excluded evidence to be substantially more prejudicial than probative. RCW 9A.44.020 (d)'s more stringent gate-keeping provision is consistent with traditional evidentiary

law mandating the exclusion of evidence that interferes with the truth seeking function of trial. *Id.*

Although the trial court did not reach the issue of the pornography's prejudicial effect, the challenged ruling may be affirmed on that basis.[6] 5RP 820-24; ***State v. Cervantes***, 169 Wn. App. 428, 433, 282 P.3d 98 (2012)(citing RAP 2.5). As the proponent of the excluded evidence, defendant bore the burden of establishing its proper purpose. *See* ***Hudlow***, 99 Wn.2d at 12-14; ***State v. Gresham***, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The proffered theory of admissibility is dependent on this faulty syllogism:

> **Major Premise**: Teenage girls who privately view bondage pornography on their laptops are more likely to consent to being strangled during sexual encounters with other people than teenage girls who have not viewed bondage pornography on their laptops.
>
> **Minor Premise**: Kimmie *may have* privately viewed bondage pornography on her laptop.
>
> **Conclusion**: Kimmie was more likely to have consented to being strangled by defendant during a sexual encounter.

See ***Hudlow***, 99 Wn.2d 10; ***State v. Bell***, 60 Wn. App. 561, 565, 805 P.2d 815 (1991) (victim's reputation as a homosexual inadmissible to prove action in conformity on the night of his murder). If one assumed Kimmie actually viewed the pornography, the court could have rationally found

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[6] At trial the State argued the pornography was irrelevant character evidence violative of ER 404(a) that was too prejudicial for admissibility under both RCW 9A.44.020 and ER 403. 5RP 816; CP 437.

any probative value adhering to this flawed chain of inferences could not be substantially more probative than prejudicial as required for admissibility under RCW 9A.44.020(d), or even survive ER 403's greater tolerance for prejudicial effect.

The pornography's already inadequate probative value was further abated by the possibility someone other than Kimmie used the laptop. The trial court noted the absence of any direct evidence Kimmie viewed the pornography while issuing the challenged ruling. 5RP 822. It would not have been manifestly unreasonable for the court to conclude the abundance plausible alternative explanations for the pornography's presence on the laptop made the circumstantial link to Kimmie too attenuated to survive any prejudice. Meanwhile, the pornography was extremely prejudicial due to its inherent capacity to insight the jury's moral condemnation of anyone associated with the behavior it condoned. *See* ***Bell***, 60 Wn. App. at 565. The pornography would have been properly excluded on account of its prejudicial effect if the trial court had not accurately recognized its irrelevance.

c. The challenged ruling was harmless if error.

Any non-constitutional error attending the exclusion of evidence is harmless if within reasonable probabilities it did not affect the trial's

outcome. ***State v. Russell***, 104 Wn.App. 422, 434, 16 P.3d 664 (2001)(citing ***State v. Calegar***, 133 Wn.2d 718, 727, 947 P.2d 235 (1997)).

The exclusion of the pornography did not deprive defendant the ability to defend against the aggravated murder with evidence that complied with the rape shield statute. *See* ***State v. Jones***, 168 Wn.2d 713, 230 P.3d 576 (2010). The jury heard defendant's taped confession that he choked Kimmie from behind when she tried to leave him, tied her clothing around her neck, inserted his fingers in her vagina, and discarded her body in a bush before heading home to relax with a video game. Ex. 83-84. The autopsy established the admitted vaginal penetration preceded Kimmie's death by ligature strangulation. 12RP 1669-70, 1672-75, 1694. Defendant conceded he never suggested Kimmie's death was accidental or that the strangulation was consensual while discussing the incident with police. 14RP 1775. He illogically explained the omission at trial in terms of him finding it more difficult to admit he accidently killed Kimmie during consensual sex than to lead police to believe he callously murdered her out of irritation, then defiled her remains to leave police with a mistaken impression she had been raped. *See Id.*

Defendant was able to explain to the jury how he was seduced into strangling a developmentally disabled sixteen year old girl at her behest despite his profound discomfort with pleasuring her in that way. 14RP

1768-70. He offered the testimony of Kimmie's friend to establish Kimmie's capacity for age-appropriate social interactions, which he linked to erotic asphyxiation in closing argument. 14RP 1826-27. The problem defendant could not avoid is the hard reality Kimmie's life could never have supported defendant's theory of the case with or without evidence *someone* used Kimmie's laptop to watch bondage pornography. Trained medical professional's nearly misdiagnosed Kimmie's fetal alcohol syndrome as Down syndrome on account of her protruding forehead. 8RP 1157; 14RP 1827. Defendant's own witness admitted her tendency to ignore Kimmie's obvious limitations, acknowledging Kimmie was far more interested in playing with the witness's two year old cousin than interacting with kids her own age. 14RP 1826-27. *Id.* The witness also impeached defendant's claim he never noticed Kimmie's mental handicaps by acknowledging they made him uncomfortable. 15RP 1876-79; 15RP 1827. Defendant's testimony was further impeached by the State's rebuttal witness (Kimmie's Special Olympics coach) who flatly rejected the notion anyone could ever mistake Kimmie as being anything other than a severely disabled child.15RP 1876-79. It is not reasonably probable admission of the excluded pornography would have changed the outcome of defendant's trial provided one assumes a jury capable of limiting it to some yet to be identified legitimate purpose.

2. THIS COURT SHOULD REFUSE TO REVIEW DEFENDANT'S UNPRESERVED CLAIM THE TRIAL COURT FAILED TO SUA SPONTE GIVE AN UNREQUESTED SUPPLEMENTAL INSTRUCTION ON THE DEFINITION OF RAPE.

Defendants generally cannot challenge a trial court's failure to give a particular jury instruction for the first time on appeal absent "manifest error affecting a constitutional right." RAP 2.5(a)(3); ***State v. Kronich***, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); ***State v. Scott***, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Only if the claim is found to be constitutional, will the court examine the effect of the error on the trial under a harmless error standard. *Id.*; ***State v. Kirkpatrick***, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). A proven omission of an essential element from the jury instructions falls within the narrow category of unpreserved claims capable of appellate review. ***State v. Mills***, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). But "[f]ailure to give a definitional instruction is not failure to instruct on an essential element." ***State v. Brown***, 132 Wn.2d 529, 612, 940 P.2d 546 (1997). And "[a] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." *Id. at* 605.

For the first time on appeal defendant claims the trial court erred in failing to supplement the standard definitions given for the rape aggravator with language explicitly stating the victim had to be alive at the time of penetration. At trial he proposed defining the aggravator as follows:

> "A person commits the crime of Rape in the First degree when he engages in sexual intercourse with another living person, knowing the other person is living, by forcible compulsion when he kidnaps the other person or inflicts serious physical injury." CP 75 (No. 18) (WPIC 40.01(modified))(emphasis added).

On appeal, defendant rightly concedes this instruction was properly rejected as written, and acknowledges he never proposed a modified version of the instruction that eliminated the inaccurate *mens rea* component while retaining the "living person" language he now claims to be necessary. 16RP 1899-1915. Yet he nevertheless contends the trial court erred in failing to take it upon itself to make the unrequested revision despite the absence of any Washington authority identifying the resulting instruction to be necessary or proper. App. p. 28.[7] Trial courts are not required to rewrite inaccurate statements of law contained in proposed definitional instructions since such instructions are not constitutionally required. ***Brown***, 132 Wn.2d at 612. They may be rejected if incorrect in any material respect. ***State v. Robinson***, 92 Wn.2d 361, 597 P.2d 892

[7] The court also declined to give defendant's definition of death from ***In re Welfare of Bowman***, 94 Wn.2d 407, 421, 617 P.2d 731 (1980), which is not the subject of defendant's appeal and was also without the "living victim" language he claims was erroneously omitted.

(1979). Defendant's unpreserved claim of instructional error should not be reviewed.[8] RAP 2.5(a)(3); ***Kronich***, 160 Wn.2d at 899.

3. DEFENDANT FAILED TO PROVE HIS ATTORNEYS WERE INEFFECTIVE IN NOT PROPOSING A NOVEL INSTRUCTION TO EMPHASIZE FORCIBLE RAPE REQUIRES A LIVING VICTIM SINCE THAT UNDISPUTED COMPONENT OF THE CRIME WAS CLEARLY IMPLIED BY THE GIVEN INSTRUCTIONS.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and that deficiency prejudiced the defense. ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Counsel is only constitutionally deficient when the representation is demonstrated to fall below an objective standard of reasonableness. ***State v. McFarland***, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995). "***Strickland*** begins with a strong presumption ... counsel's performance was reasonable." ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing ***State v. Richenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also* ***State v.***

[8] Had the trial court actually refused to give the instruction defendant proposes on appeal the decision would have been harmless if error as the jury was accurately instructed on the applicable law, which enabled defendant to argue his theory of the case. CP 307-44; 16RP 1951-92.

Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968). "In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight." ***State v. Brown***, 159 Wn. App. 336, 371, 245 P.3d 776 (2011) (citing ***State v. Nichols***, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007)).

a. Defendant failed to prove his counsel was deficient.

Defense counsel is not required to raise every conceivable point, however inconsequential it may appear, or which in retrospect may seem important to the defendant. Counsel may legitimately deem it wise to avoid such issues according to sound tactical theory, or because they are poorly supported by the facts or law. ***Piche***, 71 Wn.2d at 590; ***In re Stenson***, 142 Wn.2d 710, 734, 16 P.3d 1 (2001).

Appellate courts interpret instructions that recite statutory language according to the plain meaning of their ordinary usage to give effect to the Legislature's intent. *See* ***State v. Swanson***, 181 Wn. App. 953, 959, 327 P.3d 67 (2014). "Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." ***Brown***, 132 Wn.2d at 611-12. "[A] specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case." *See* ***Brown***, 132 Wn.2d at 605.

At trial, the court, State, and defense understood the rape statutes provided to the jury through its instructions on the aggravating factor required the State to prove Kimmie was alive when the vaginal penetration occurred. *E.g.*, 13RP 1732-38. The introductory instruction on the rape aggravator tracked RCW 10.95.020(11)(b):

> "if you find the defendant guilty of premeditated murder in the first degree, you must determine whether the following aggravating circumstance exists: The murder was committed in the course of, in furtherance of, or in immediate flight from rape in the first degree...." CP 334 (Inst. 23).

Instruction No. 24 likewise tracked RCW 9A.44.040(1)(c):

> "A person commits the crime of Rape in the First Degree when he engages in sexual intercourse with another person by forcible compulsion when he inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious." CP 335 (Inst.24) (emphasis added).

The same faithfulness to the statutory text can be found in the defined terms, *e.g.*: "forcible compulsion" means:

> "physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another." CP 337 (Inst. 26) (emphasis added); RCW 9A.44.010(6).

Only a living person would be commonly perceived as capable of resistance or fear. *See* RCW 46.04.405; RCW 9A.04.110(17) (" 'person' include[s] any natural person.");RCW Chapter 9A.44 (distinguishes sexual intercourse with a "person" from sexual intercourse with a "dead human

body."); RCW 68.04.020 (defines "human remains" not as a person, but as "the body of a deceased person."); ***State v. Wagner***, 97 Wn. App. 344, 348, 984 P.2d 425 (1999). The instruction on the statutory definition of "sexual intercourse" likewise described an interaction between living people. CP 336 (Inst. 25); RCW 9A.44.010(1).

An ordinary English speaker confronted with the given instructions on first degree rape would naturally conclude it referred to a living victim; meanwhile, the jury was never called upon to reconcile that reading of the instructions with a technical definition explaining the aggravator could also be found if the jury determined Kimmie died prior to penetration. The only actual dispute regarding the rape instructions was whether the clearly implied requirement of a living rape victim itself implied the State must prove defendant knew Kimmie was alive when the penetration occurred. *E.g.*,:

> **Counsel**: "The statute ... uses the word 'person'. A person is legally defined as someone who is alive....
> **Court**: Right. But where do I find [defendant's] *mens rea* in the rape statute? ...
> **Counsel**: "It has that implied within the context of raping a live person ....
> **Court**: "Are you advocating I read into a statute an element that the legislature did not put in there? ...
> **Counsel**: "Did not explicitly put in there... [I]f it makes sense under the context, which in this case the legislature used the word 'person'. Person means alive....*Id.*[9]

[9] Defendant rightly acknowledges error of this argument on appeal. App. p. 29.

Kimmie's vitality at the moment of penetration was proved by presenting defendant's description of choking, stripping, strangling, and penetrating her in the context of the *ante-mortem* trauma to her vagina and cervix. 12RP 1672-75, 1695-96; CP 83-84. The State then argued the case in terms of how the autopsy proved Kimmie was alive when raped:

> **State's Closing**: "His confession was corroborated by Dr. Clark. 'Yes, there was penetration. Yes, it was by an object. She was alive, in my opinion.' He strangled her with a ligature. The ligature is what killed her. Not the choke-out with the arm bar. The ligature. She was alive, and it was not consensual ... ." *E.g.* 16 RP 1939-42 (emphasis added).
>
> "He choked her, subdued her, raped her, wrapped a ligature around her neck, tied it tight. That's what killed her. When he was done, he threw her away and he went home. And he played some video games to forget. ..." 16RP 1947 (emphasis added).

Counsel is presumed to know trial courts should not readily accede to requests for definitional instructions on words or expressions of common understanding. *See* ***Brown***, 132 Wn.2d at 612. So counsel cannot be fairly characterized as deficient for declining to request a novel instruction to explain forcible rape can only be committed against a living person when a natural reading of the given instructions led every lawyer in the courtroom to assume as much without such an instruction.

b. Counsel's competence cannot be called into question for neglecting to request a ruling on a previously uninterpreted component of the aggravated murder statute that was not disputed at trial.

Ineffective assistance of counsel cannot be predicated on counsel's failure to pursue claims in anticipation of a change in the law. ***State v. Pearsall***, 156 Wn. App. 357, 362, 231 P.3d 849 (2010), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1113 (2011). Reasonable trial strategies need not adjust to advance claims which may become meritorious as the law evolves. *See* ***State v. Slighte***, 157 Wn. App. 618, 624, 238 P.3d 83, *remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011). An assessment of effective representation is based on the law at the time of the representation. ***Slighte***, 157 Wn. App. 625. Counsel's failure to raise novel theories does not render performance constitutionally ineffective. ***Brown***, 159 Wn. App. at 371-72 (citing *e.g.*, ***Anderson v. United States***, 393 F.3d 749, 754 (8th Cir. 2005)).

Defendant's research leads him to conclude "no Washington case has previously addressed whether sexual intercourse with a corpse constitutes rape." App.p.22. By framing the issue as he does, defendant confuses the elements of rape as a stand-alone offense with the aggravating fact of a murder committed "in the course of, *furtherance of*, or flight from" rape. He then directs this Court to California precedent,

hoping to encourage the Court to interpret Washington's rape statute as requiring the victim to be alive at the moment of penetration. Yet his ineffective assistance of counsel claim does not require a decision either way.

Defendant's trial counsel cannot be deemed incompetent for neglecting to request a novel supplement to the standard rape instructions which, if accepted, would apply California's interpretation of its rape statutes to those enacted in Washington. For the reasons detailed above, counsel was also without cause to request such an instruction as no one at defendant's trial doubted the plain language of the given instructions clearly implied the requirement of a living-rape victim. Since defendant's trial proceeded under the defense-endorsed understanding of the relevant law, his ineffective assistance claim fails irrespective of whether aggravated murder predicated on rape statutorily requires the victim to survive until penetration occurs.

There are nonetheless sound reasons to interpret the aggravated murder statute as permitting a conviction even where the murder victim does not survive until the instant of penetration, so future juries can be instructed accordingly. RCW 10.95.020(11)(b)'s "in furtherance " language is capable of qualifying the stand-alone crimes of rape to contemplate a victim who is alive when a sexual assault begins, but dies before penetration is accomplished. "Furtherance" literally means "a

helping forward: advancement [or] promotion." Webster's Third International Dictionary 924 (2002); ***State v. Watson***, 146 Wn.2d 947, 954–56, 51 P.3d 66 (2002). In ***Brown***, the Supreme Court expanded that meaning to include an "intimate connection" between the killing and the felony, making the killing '*res gestae*'[10] to the felony. 132 Wn.2d at 608.

The Court later elaborated on how the "in furtherance" phrase operates within *res gestae* to encompass an entire criminal incident rather than the precise moment when the aggravating felony is completed. ***State v. Hacheney***, 160 Wn.2d at 518, n.6., 158 P.3d 1152 (2007). Using robbery as an example, the Court observed a robber could not avoid an aggravated murder conviction by killing the victim before committing the taking element of the offense since "a killing to facilitate a robbery would clearly be 'in the furtherance of' the robbery." *Id.* "And where the killing itself is the force used to obtain or retain the property ... the death can be said to be the probable consequence of the felony. *Id.* (citing *see* ***State v. Allen***, 159 Wn.2d 1, 9, 147 P.3d 581 (2006)).

It follows a murdering rapist cannot avoid an aggravated murder conviction merely by killing the victim before penetration is achieved, since a killing to facilitate a rape would clearly be in the furtherance of the rape. And where the killing itself is the force used to overcome the rape victim's will, the death can be said to be the probable consequence of the

[10] "[Latin things 'things done'] The events at issue, or other events contemporaneous with them." Black's Law Dictionary 1335 (8th ed. 2004)(alteration in original).

felony. This interpretation is reinforced by ***Brown's*** conclusion an aggravating felony could elevate premeditated murder where the felony and murder were committed pursuant to mutual motive and transpired within an overarching scheme. *Id.* at 609-10.

Construing "in furtherance" within *res gestae* of an aggravated murder to relate back to the moment a defendant initiates the sexual assault intended to culminate in penetration and murder is also consistent with RCW 10.95.020 (11)'s structure, which captures the beginning, middle and end of an aggravated murder event through the qualifying series of: "furtherance", "course", and "flight". The Legislature is presumed to have deliberately selected each word to have a binding effect. *See* ***Amalgamated Transit Union Local 587 v. State***, 142 Wn.2d 183, 260, 11 P.3d 762 (2000)(courts "should not embrace a construction causing redundancy or rending words superfluous"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174–79 (2012) (discussing surplusage cannon) (citing *see* ***Kungys v. United States***, 485 U.S. 759, 778, 108 S.Ct. 1537 (1988)(Scalia, J., plurality opinion)(it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant").

Hacheney concluded "in the course of" requires the aggravating felony to be committed prior to the killing. 160 Wn.2d 518 ("[F]or a killing to have occurred 'in the course of' arson, logic dictates that the

arson must have begun before the killing."). In the context of rape, this means a killing that occurs after the first act of penetration. There is no reason to assume the legislature intended "in the furtherance of" to redundantly capture the same conduct as "in the course of". And "in immediate flight from" obviously denotes a perpetrator who kills the victim, or another, to flee from a completed rape. If "in furtherance" is to have independent meaning it must contemplate the killing of a victim targeted for rape and murder before the penetration required to complete the rape occurs provided penetration is committed within the *res gestae* of the murder. *See* ***Hacheney***, 160 Wn.2d at 518, n.6.

In addition to being supported by the text, construing "in furtherance" to bear this technical meaning is consistent with RCW 10.95.020(11)(b)'s purpose of ensuring the most dangerous predators receive the most severe penalties. ***Hacheney***, 160 Wn.2d at 521. Among the most dangerous predators are "sadistic rapists" who design their attacks "to live out ... sadistic sexual fantasies on ... unwilling victim[s] ... [wherein] [a]ggression and sadistic fantasy feed on each other, so as the level of aggression rises, [the] level of arousal raises accordingly." *See*

CCM, Rape & Sexual Assault Classification § 315.[11] *Id.* Sadistic rapists employ a level of violence in excess of what is required to force compliance because "the offender's sexual arousal is a function of the victim's prolonged pain, fear, or discomfort." *Id.* And this most dangerous species of predator is among the most likely to avoid an aggravated murder conviction if "in furtherance" is not given an antecedent meaning since the progressive application of violence inflicted to reach a desired point of arousal may in many instances result in the victim's death sometime before the intended rape-murder ritual is completed.

A brutal but useful example is the sadist who initiates rapes by forcing a plastic bag over the victim's head to secure compliance as well as to be aroused by the victim's struggle for air as her clothing is slowly removed. Vaginal penetration is accomplished one second after the victim's heart stops even though the perpetrator intended the victim to expire at the moment of penetration or in the midst of repeated penetration. Should such a predator avoid an aggravated murder

[11] Crime Classification Manual: A Standard System for Investigating and Classifying Violent Crimes (1992) is a text on the classification of violent crimes by John E. Douglas, Ann W. Burgess, Allen G. Burgess and Robert K. Ressler. The publication is a result of a project by the Federal Bureau of Investigation's National Center for the Analysis of Violent Crime. http://en.wikipedia.org/wiki/Crime_Classification_Manual; http://www.fbi.gov/stats-services/publications/serial-murder: "The National Center for the Analysis of Violent Crime (NCAVC) is a component of the FBI's Critical Incident Response Group (CIRG), located at the FBI Academy in Quantico, Virginia. *See also* ***State v. Russell***, 125 Wn.2d 24, 69, 882 P.2d 747 (1994); ("John Douglas ... widely recognized as authorit[y] in crime scene analysis ... [with] extensive experience in serial crime analysis and investigation."); ***State v. Seager***, 341 N.W.2d 420, 426 (1983)("FBI crime scene exper[t] John Douglas....").

conviction merely because his tortuous method of building up to a rape has a high probability of killing the victim before the planned penetration is complete? The answer ought to be no, for the undeserved beneficiaries of reading the aggravated murder statute in the alternative would be sadists who pleasure themselves by subjecting victims to excessive violence as a prelude to penetration and murder.

Several jurisdictions understandably express an inability to embrace the notion that commission of aggravated murder predicated on rape can be negated by the fortuitous circumstance, for the rapist, that the victim's death preceded penetration by an instant. Those jurisdictions conscientiously conclude reading a "live only" requirement into the statute would encourage rapists to kill victims just prior to penetration. 76 A.L.R. 4th 1147 §2[a]-[b] (1989). A "live only" requirement would also unduly insulate from prosecution those who for reasons beyond their control do not leave appreciable forensic evidence of *ante-mortem* penetration capable of being interpreted through expert analysis. In such circumstances, only the honest perpetrator who discloses the sequence of the rape in relation to the killing could be charged with aggravated murder.

Jurisdictions abiding by the "live only" requirement apparently accept these iniquities believing dead victims do not experience the suffering rape-murder statutes are intended to address. Regardless of

whether such reasoning betrays a commendable or naïve lack of appreciation for the depravity some offenders are capable of, it ðbviously under appreciates the unspeakable agony experienced by victims purposely subjected to protracted sexual assaults designed to build up to penetration followed by murder. *See Id.*; CCM, § 315.

c. Defendant cannot show any prejudice resulting from the absence of his novel instruction.

Prejudice only exists if there is a reasonable probability the result of the proceeding would have been different but for counsel's deficient performance. *See* ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert denied*, 497 U.S. 922 (1986); ***State v. Neff***, 163 Wn.2d 453, 466, 181 P.3d 819 (2008). "[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." ***State v. Teal***, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). Error resulting from a missing or misstated element is harmless if the element is supported by uncontroverted evidence. ***State v. Brown***, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)(citing ***Neder v. United States***, 527 U.S. 1, 18-19, 119 S. Ct.1827, 144 L. Ed. 2d 35 (1999). "[F]ailure to give a definitional instruction is not failure to instruct on an essential element." ***Brown***, 132 Wn.2d at 612. "The court need not give a party's proposed instruction if it is repetitious or collateral to instructions already given." ***Brown***, 132 Wn.2d at 605.

There is no reason to assume counsel's request for a supplemental instruction defining rape as a crime committed against a living person would have altered the outcome of the case. *Ante-mortem* penetration was established at trial. The given instructions clearly implied it to be a requirement for an aggravated murder conviction. And the State argued the evidence consistent with that implied requirement. 16 RP 1939-42, 1947; CP 334-37. Nothing presented at trial supports defendant's argument the jury might have found him guilty of the rape aggravator despite believing Kimmie perished prior to penetration.

The record is also devoid of any evidence suggesting defendant's *legitimate* theory of the case was prejudicially hindered by the absence of the unrequested instruction. Counsel argued a theory of negligent homicide during consensual sex. *E.g.* 16RP 1951-55. Counsel never argued defendant murdered Kimmie prior to sexually penetrating her remains as a defense to the aggravating factor. And it was immaterial to the lesser included of second degree manslaughter when penetration occurred in relation to death. RCW 9A.32.070.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S.Ct. 2039 (1984); ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). For "[t]he essence of an ineffective assistance claim is ... counsel's

unprofessional errors so upset the adversarial balance between defense and prosecution ... the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986). Even proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. ***Cronic***, 466 U.S. at 656.

Defendant's two attorneys ably subjected the State's case to adversarial testing from pretrial motions to verdict. They conducted *voir dire*, actively objected during direct examinations, extensively cross-examined critical witnesses, proposed and argued instructions, and challenged the State's case in summation. Defendant received the assistance contemplated by the constitution.

Defendant is also mistaken about the remedy attending success of his ineffective assistance claim, which could only be remand for retrial on the *aggravating factor*, since the alleged instructional error had no bearing on the base offense of premeditated murder.

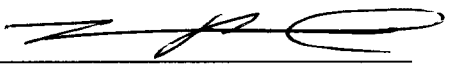
D. CONCLUSION.

The trial court properly applied the Rape Shield statute to exclude irrelevant evidence of the victim's alleged interest in viewing pornography on the internet offered to prove she consented to the strangulation that

caused her death. Thereafter, defendant was fairly convicted by jury accurately instructed on the law having received constitutionally effective assistance of counsel. His conviction should be affirmed.

RESPECTFULLY SUBMITTED: April 13, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.15.15 Theresa Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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