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Court of Appeals
Division II
State of Washington

Supreme Court No. _______
COA No. 47432-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAWRENCE E. DIESE,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Lawrence Diese, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Diese seeks review of the unpublished opinion of the Court of Appeals in cause number 47432-8-II, filed May 2, 2017, and the order denying motion for reconsideration filed June 8, 2017. A copy of the decision is in the Appendix A at pages A-1 through A-31. A copy of the order denying appellant's motion for reconsideration is in the Appendix B at page B-1.

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision below conflict with decisions of the Court concerning admission of a nonconsensual recording of a private conversation between petitioner Lawrence Diese and N.B., in violation of the Washington Privacy Act (WPA)?

2. Does the decision below conflict with decisions of the Court when it excluded relevant evidence that supported the defense theory that N.B. fabricated the rape claim, where the excluded evidence included text messages indicating that she engaged in sexual activity including insertion of her fingers into her vagina and insertion of a sexual device into her vagina that could have resulted in a one millimeter hematoma discovered during an examination, that the texts following the incident were of a highly sexual nature and sent to

several individuals and gave no indication that N.B. was traumatized by the alleged rape as she claimed, and showed that the complaining witness also lied about being pregnant?

D. STATEMENT OF THE CASE

1. **Procedural history:**

Lawrence Diese was charged in Clark County Superior Court by amended information with Rape in the Second Degree—Domestic Violence, alleging that Diese engaged in sexual intercourse by forcible compulsion with N.B. on or about February 23, 2014. Clerk's Papers (CP) 106.

Prior to trial, the court heard defense counsel's motion challenging the legality of a conversation with Diese that N.B. recorded using her cell phone. 1Report of Proceedings[1] (RP) at 32-57. Diese argued the recording was inadmissible because it recorded a private conversation without his consent in violation of the Privacy Act. 1RP at 37-44; CP 31. The State argued that the exception contained in RCW 9.73.030 is applicable and that the recording contains threats or unlawful demands that N.B. would be homeless if she did not comply with Diese's alleged demand for sex, and that N.B. had seen her mother physically thrown out of his house in 2009 and therefore was afraid

[1]The record of proceedings consists of ten volumes, which are designated as follows: 1RP March 7, 2014, March 20, 2014, April 8, 2014, April 15, 2014, June 2, 2014, July 30, 2014, October 7, 2014, November 6, 2014 (RCW 9.73.030 suppression hearing), and February 6, 2015; 2RP February 9, 2015, (jury trial); 3RP February 10, 2015, (CrR 3.5 suppression hearing, jury trial); 4RP February 10, 2015, (jury trial);5RP February 11, 2015, (jury trial);6RP February 11, 2015, (jury trial);7RP February 12, 2015, (jury trial); 8RP February 12, 2015, (jury trial); 9RP February 13, 2015, (jury trial); February 17, 2015, (jury trial); and April 3, 2015 (sentencing).

that he would physically harm her. 1RP at 46-48. The State argued that the recording contained that phrase "[d]rop them," which referred to a demand by Diese that N.B. drop her pants and comply with his unstated demand for sex, and that if she did not comply, Diese's statements implied a threat that she would be homeless or that he would physically evict her, as she had witnessed him do in 2009. 1RP at 47-49. The trial court admitted the recording. 1RP at 55.

The jury found Diese guilty of second degree rape as charged. 9RP at 998; CP 247. The jury found by special verdict that Diese and N.B. are members of the same family or household and that the offense was a part of an ongoing pattern of psychological, physical or sexual abuse manifested by multiple incidents of abuse over a prolonged period of time or that the conduct manifested deliberate cruelty or intimidation of the victim. 9RP at 999; CP 248, 249.

By unpublished opinion filed May 2, 2017, the Court of Appeals, Division II, affirmed the conviction. See unpublished opinion.

The petitioner thereafter filed a timely motion for reconsideration, arguing that the court should reverse Diese's conviction because the court misinterpreted Washington's Privacy Act and the rape shield statute. By order entered June 8, 2017, the Court of Appeals, denied the motion for reconsideration. Diese now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. **THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE RECORDING OF PRIVATE CONVERSATIONS IN VIOLATION OF THE WASHINGTON PRIVACY ACT**

The trial court admitted a conversation secretly recorded by N.B. using her cell phone which contained the following exchange with Diese:

MR. DIESE: (inaudible). Drop them. Let's go. (Inaudible).
N.B.: I don't want to.
. . .
N.B.: Okay. Well, I'll leave because I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me.
MR. DIESE: I can do whatever I want how I want.
N.B.: Not with me.
MR. DIESE: So I got to tell your mom now (inaudible) and get you out of here?
N.B.: I guess, because I'm not (inaudible).
MR. DIESE: We shall see. You know you have nowhere to go. You have no one to help you.
N.B.: (Inaudible).
MR. DIESE: Say again? Stand up.
N.B.: No.
MR. DIESE: Come on. Get up. Let's go. Your pants are already halfway off. Let's go. Right now. Stand up. Come on. (Inaudible). Come on. (Inaudible). Come on. I'll hold your hand. Let's go. (Inaudible).
N.B.: (Inaudible).

MR. DIESE: I'm going to count to three. One, two. Come on (Inaudible).

1RP at 34-36.

Another portion of the recorded conversation contained the sound of crying and the sound of running water. The trial court found that the statements constituted a threat of extortion and unlawful requests and was therefore admissible under RCW 9.73.030(2)(b). 1RP at 55

In Washington, generally speaking, private conversations cannot be lawfully recorded unless all of the participants in the conversation consent to the recording. "Washington's privacy act broadly protects individuals' privacy rights." ***State v. Roden,*** 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The Privacy Act "puts a high value on the privacy of communications." ***State v. Christensen***, 153 Wn.2d 186, 200, 102 P.3d 789 (2004). The WPA, codified at RCW 9.73.030 is "one of the most restrictive in the nation[, and] [e]vidence obtained in violation of the statute is inadmissible in a criminal case. RCW 9.73.050." ***State v. Townsend***, 147 Wn.2d 666, 672, 57 P.3d 255 (2002). The WPA is designed to protect private conversations from governmental intrusion. ***State v. Clark***, 129 Wn.2d 211, 232, 916 P.2d 384 (1996). The privacy act places the court system between the police and private citizen to protect against electronic eavesdropping. ***Johnson v. Hawe***, 388 F.3d 676, 682 (9th Cir. 2004), cert. denied, 544 U.S. 1028 (2005). An exception permits the admission of recordings made of threatening communications, which "convey threats of extortion, blackmail, bodily harm, or other unlawful

requests or demands..." RCW 9.73.030(2)(b). Courts strictly construe this exception. See ***State v. Williams***, 94 Wn.2d 531, 548, 617 P.2d 1012 (1980).

Here, it is uncontroverted that the spoken portion of the recording constitutes a "conversation" and that it was intended as a private conversation. *State v. Diese*, No. 47432-8-II, slip. op. at 12. The court below incorrectly found that the conversation constituted (1) a threat of extortion, and (2) unlawful request. *Diese*, slip. op. at 14-15.

The Court relied in large part on the following statements to find that "Diese tried to intimidate and threaten N.B. with eviction when she did not comply with his demands" The court relied on the phrase "drop them, that he had to "tell [Dual] and "get [N.B.] out of here," that N.B. had "nowhere to go," and "no one to help" her and that her "pants [were] already half off" and "let's go. Right now. Stand up. Come on." 1RP at 35-36. *Diese*, slip. op. at 14. The lower court also relied on statements by N.B. "I ain't doing that. You're my mom's boyfriend. You should be doing that with mom, not me." 1RP at 35, 55. *Diese*, slip. op. at 14.

Diese testified that he was angry with N.B. because he and her mother Juline Dual had just reached an agreement to let her return to the house under the condition that she perform her household chores, and that within minutes of being allowed to return, she was refusing to do her chores, that N.B. was not complying with previous promises to dress appropriately

around when at home, and that Diese's alternative was for N.B., who was twenty years old at the time of the alleged incident, to move out again because she was not complying with household rules that Dual and Diese set out for her. Diese stated that he was frustrated and resorted to his military training by counting to three, and testified that the reference to her pants was that she was on the couch with loose pants which were partially exposing her rear. He stated that this was something he had had to admonishment her about in the past and he was upset by her behavior. He also stated that N.B. frequently cried, particularly when she did not want to do her housework, which explained her crying on the recording. He stated that the phrase "drop them" referred to a cat she was holding after she got up off the couch. 8RP at 824

The court found that the statements taken as a whole, along with the fact that N.B. was crying on the recording, constitute extortion-- a threat to make her homeless if she did not comply. 1RP at 55. The lower court affirmed the ruling and conviction, relying on the definition of term "extortion," which is "to obtain from an unwilling or reluctant person by physical force, intimidation, or the abuse of legal or official authority." *Diese*, slip op. at 14. Diese submits that the court's reliance on the term "extortion" is misplaced and overlooks the failure of the State to prove a "threat" by Diese.

"Threat," is defined as "[a] communicated intent to inflict harm or

loss on another or on another's property, esp[ecially] one that might diminish a person's freedom to act voluntarily or with lawful consent" Black's Law Dictionary 1618 (9th ed. 2009); see also Webster's Third New International Dictionary 2382 (2002) ("threat" defined as "expression of an intention to inflict loss or harm on another by illegal means and esp[ecially] by mean involving coercion or duress of the person threatened...".) ***State v. Schaler***, 169 Wn.2d 274, 293, 236 P.3d 858 (2010). RCW 9A.04.110 (28) defines "threat" as the act of communicating directly or indirectly the intent:

> (a) To cause bodily injury in the future to the person threatened or to any other person; or
>
> (b) To cause physical damage to the property of a person other than the actor; or
>
> (c) To subject the person threatened or any other person to physical confinement or restraint; or
>
> (d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or
>
> (e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
>
> (f) To reveal any information sought to be concealed by the person threatened; or
>
> (g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
>
> (h) To take wrongful action as an official against anyone or

> anything, or wrongfully withhold official action, or cause such action or withholding; or
>
> (i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or
>
> (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships;

The definition of "threat" while broad, "must be strictly construed" in order to effectuate the underlying legislative intent. ***Williams***, 94 Wn.2d at 548; see also ***Christensen***, 153 Wn.2d at 201 ("In light of its strong wording, the act must be interpreted to effectuate the legislative intent.") When strictly construed, the exception does not extend to ambiguous statements, or to communications that might provide "context" to threats that fall within the exception. RCW 9.73.030(2).

Here, the implied "threat" inferred by the lower court that N.B. would be evicted if she did not comply with Diese is illusory at best. N.B. had only lived with her mother and Diese one or two months after living with her father in California in 2012. 3RP at 233, 234, 4RP at 350, 5RP at 415. When N.B. returned to Washington from California, she was upset to discover that her mother had resumed her relationship with Diese. 3RP at 234, 4RP at 350. In December, 2013, N.B. asked to move in with her mother and Diese in his house. Dual stated that she asked Diese about

her request, and he was "adamantly against it." 4RP at 354. Dual stated she pushed to let N.B. stay with them and eventually Diese relinquished, but made it clear that it would be short term. N.B. moved into the house with her mother and Diese in late December 2013 or early January in 2014. 3RP at 239, 4RP at 354. Diese permitted N.B. to return to the house on the conditions that she pick up after herself and help with household chores, go to counseling, get a job, and when her mother was not home, she was not allowed to be in the house. 3RP at 238, 4RP at 354. Diese made it clear that he did not want her there and told her that the living arrangement was temporary and that she needed to find a new place to live. 4RP at 356.

Moreover, the "threat" was meaningless because N.B. knew that she was going to have to move out again *before* the alleged incident. Diese stated that on February 23, 2014, he woke up after working his swing shift, came out of the bedroom and saw once again that nothing had been done around the house. He said "I had enough. I couldn't do it anymore . . ." 8RP at 801. He stated that he gathered N.B.'s things and found out where she was in order to drop them off, and that he was going to kick her out of the house. 8RP at 801. Diese took her belongings and "dumped the items off." 8RP at 803. He had kicked her out of the house at least two other times. 8RP at 801. Later on February 23, 2014, Dual received texts from Diese saying that he was "done" and that N.B. needed to leave. She also received texts from N.B. that Diese was going to dump her belongings at the

house a friend. 4RP at 356, 358. When Dual returned to the house she found N.B. outside the house waiting for her to come home. 4RP at 358. She stated that Diese talked with N.B. alone in the backyard, and when she returned she appeared to be upset. 4RP at 360. The incident occurred after Dual went to a RedBox kiosk to rent movies and was gone for approximately thirty minutes. 4RP at 360, 361.

In ***State v. Brown***, 137 Wn.App. 587, 154 P.3d 302 (2007), Division Two held insufficient to establish a "threat" the defendant's statements about a judge regarding the defendant's past thoughts about harming the judge and the judge's family. ***Brown***, 137 Wn.App. at 591. In ***Brown***, the defendant said in a phone conversation that he "had thought about shooting" the judge who sentenced him for driving under the influence of an intoxicant. ***Brown***, 137 Wn.App. at 591-92. Like Brown's remarks, Diese's words were not true threats and were similarly without force or effect because the decision that N.B. was being evicted had previously been announced. Moreover, although eviction may mean inconvenience and moderate financial hardship to N.B. while she secured a new place to live, it does not convey the "extortion" that is required by the statute. N.B. lived with Diese for a short amount of time, had lived on her own on other occasions, and was twenty years old—certainly capable of securing her own residence. In addition, she already knew that she was going to have to leave the house *prior* to the incident. Therefore, "threat of eviction" found by

the trial court is hollow and without force or ability to coerce or otherwise extort N.B. to comply. The recording does not convey a threat, even under a broad definition because does not communicate intent to inflict harm or loss to N.B. or by illegal means involving coercion or duress to harm N.B. or her property, in any manner that might diminish her freedom to act voluntarily or with lawful consent.

The lower court also affirmed the admission of the recording as an "unlawful requests," by Diese "to elicit sexual intercourse from N.B. against her will with threats," constituting an unlawful request in visitation or Ch. 9A.44 RCW. *Diese*, slip. op. at 15. The lower court engages in a tautology; according to the court the unlawful request was to elicit sex from N.B. against her will, and therefore it can be admitted to show that Diese was referring to sex rather than doing her chores and pulling up her pants.

Without proof that the recording captured a threat, the lower court erred in ruling that the recording was admissible. Diese did not consent and the exception in RCW 9.73.030(2) does not apply. The recording of his private conversation with N.B. is therefore inadmissible under RCW 9.73.050. It was error for the trial court to admit the recorded conversation. The recording did not constitute a "threat" because eviction from the house was a *fait accompli* of which N.B. and Dual were already aware.

2. <u>THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE RAPE SHIELD STATUTE. THE STATE WAS PRECLUDED FROM INTRODUCING TEXT MESSAGES AND PHOTOS SENT BY N.B. NEARLY CONTEMPORANEOUSLY WITH THE ALLEGED OFFENSE</u>

N.B. provided her cell phone to police after the alleged incident, who examined text messages on her phone. The texts reviewed by police were from the period of time immediately proceeding and following the alleged incident on February 23, 2014. Among these texts are a photo that N.B. sent that show her inserting her fingers into her vagina and referring to the use of a "two headed bob" sexual device with another person in text messages sent approximately 30 days before the alleged rape. 2RP at 111, 114, 115. The text messages also included topless photos of N.B., a message to an individual named "Daniel" about wanting to have sex with him, a text message to an individual named "Adam," in which she asserted that she was pregnant. "Adam" texted back: "Got bad news for you. I didn't [ejaculate]," and N.B.'s responded that she "was joking." 2RP at 119; CP 173.

The State objected to admission of the texts and texted photos on the grounds that they were prohibited by ER 403 and by the rape shield statute, RCW 9A.44.020. 2RP at 118-20, 123-24. The court denied the defense motion for admission of the evidence. 2RP at 124-25.

The proffered evidence was relevant to the defense theory that the hematoma was inflicted by sexual activity that occurred before February

23-27, 2014. The texts are also notable because they contain no reference to the alleged rape and show no sense of being distraught or otherwise traumatized by the alleged rape, but instead shows a pattern of sexting with others that continued in the days following February 23.

N.B.'s credibility and her motive to lie and its relevancy outweighed any potential unfair prejudice under ER 403. The rape shield statute did not apply, and even if it did apply, the statute cannot be used to bar evidence of high probative value.

The rape shield statute provides:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

RCW 9A.44.020(2).

The rape shield statute applies only to past sexual behavior. ***State v. Jones***, 168 Wn.2d 713, 722, 230 P.3d 576 (2010). The evidence refers not to past sexual conduct but to conduct nearly contemporaneously with and after the alleged rape on February 23. The evidence indicated that N.B. engaged in a pattern of "sexting" which included topless photos, a text to a person named Daniel that she "always wanted to f**k" him, her false

statement to a person named Adam that she was pregnant," when he texted that he had not ejaculated, a photo of her vagina with fingers inserted, and texts referencing use of an insertable sexual device. 2RP at 116; CP 173.

When the defense seeks to admit evidence that has some relevance, the State must show that the evidence is so prejudicial as to interfere with the jury's fact finding process. ***Jones***, 168 Wn.2d at 720. The trial court must balance the State's interest in excluding the evidence against the defendant's need for the information sought. ***Jones***, 168 Wn.2d at 720. If the evidence is highly probative, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." ***Jones***, 168 Wn.2d at 720 (citing ***State v. Hudlow***, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

In ***Jones***, the defendant proffered evidence that the sexual intercourse underlying the second degree rape charge occurred at a drug-fueled sex party at which the victim danced for money and engaged in consensual intercourse with three men. ***Jones***, 168 Wn.2d at 717. The trial court excluded any reference to the sex party, reasoning that such evidence was offered to attack the victim's credibility barred by the rape shield statute. ***Jones***, 168 Wn.2d at 717–18. This Court reversed, concluding that the party evidence was highly probative because it supported Jones's testimony that the victim consented to sex. ***Jones***, 168 Wn.2d at 721. Further, the Court held that the rape shield statute did not apply because

Jones's evidence referred to conduct on the night of the alleged rape and not to the victim's past sexual conduct. ***Jones***, 168 Wn .2d at 722–23. This Court noted that the evidence was "not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence." ***Jones***, 168 Wn.2d at 721, 230 P.3d 576. Rather, it was "evidence of extremely high probative value" concerning the night in question, and excluding it would have precluded Jones from presenting his version of the incident. ***Jones***, 168 Wn.2d at 721, 230 P.3d 576. The court concluded there was no State interest compelling enough to preclude introduction of such evidence and that excluding it violated Jones's right to present a defense. ***Jones***, 168 Wn.2d at 721.

Jones is controlling authority that should have guided the lower court's decision. Diese asserted that N.B. concocted the story to force him out of her mother's life so that she would receive her mother's full attention. 8RP at 945, 946. Defense counsel moved to introduce evidence a series of texts made by N.B. during the period before and after the alleged assault showing sexual behavior by N.B., which rebutted her assertion that she was not sexually active at the time of the incident and also showing possible causes for a one millimeter hematoma observed during an examination of N.B. 6RP at 537. The relevant texts were described in defense counsel's motion as the following:

- A text dated January 11, from N.B. to "Adam" that states, "Got bad news, i am pregnet, which was determined to be a false claim.

2RP at 114-16, 119; CP 169.

- A text from N.B. on January 12 showing N.B., showing her inserting her own figures into her vagina, a text from N.B. on January 13 showing a topless photo of N.B.,
- a photo sent on January 17 of N.B.'s vagina,
- a text sent January 19 to an individual named "Jordon" which states "it is ok me and my friend will have fun f**king one another with her two head bobb."

CP 169-70; 2RP at 112.

- a text by N.B. on January 21 to an individual named "Normen" that "we can make out and shit but I don't make the firsted move," in conjunction with a topless photo of herself,
- a text on February 16 is a topless photo of N.B. to "Chris" with a text stating "so horney",
- a text from N.B. to "Daniel" on February 18 that she likes him and she "always wanted to fuck u."

CP 170.

Texts obtained from N.B.'s cell phone showed that she continued "sexting" *after* the alleged rape on February 23, 2014. Diese sought admission of the following texts sent after the alleged offense:

- On February 25 she sent a topless photo to Kkharpole@outlook with a text message stating "Here u go baby."
- On February 25 she sent a text to "Colt" asking why he continued to talk to her, and he responded that she was "pretty full" of herself "for being the that wanted to be f**k buddys . . . ."

CP at 62.

The defense argued that the evidence was relevant because N.B. had a one millimeter hematoma in her vagina and that a witness would testify

that a hematoma of that size would not be expected to be present four days after the alleged assault. 2RP at 112. Defense counsel also argued that the "sexting" was relevant because it showed that she was willing to lie about sexual matters—i.e. her claim to "Adam" that she was pregnant, and also relevant because some of the sexting occurred only days after her allegation of rape, which N.B. said was a "shocking, terrifying, horrific kind of experience[,]" yet contained no sign of trauma or emotional distress. 2RP at 112.

The court found that the defense's proposed text regarding the "two headed" sex device "comes the closest" to admissibility because it would show penetration by an object that would cause the one millimeter hematoma, but nevertheless denied the motion for admission of the text messages and photos. 2RP at 124, 125. The proffered "sexting" evidence dealt with sexual activity that directly rebuts a significant allegation by the State: that the one millimeter hematoma was inflicted by Diese during the alleged rape. The sexts supported the logical inference that the sexual activity depicted and implied in the sexts created the hematoma and also refuted several claims made by N.B. that she had not inserted objects in her vagina.

The texts were not related to N.B.'s "past sexual behavior" or her reputation for "promiscuity, non-chastity, or sexual mores contrary to community standards," nor is it intended to show consent. See RCW 9A.44.020(2), (3). The admission of self-created texts does not discourage

rape victims to prosecute a subsequent rape allegation and it is not prejudicial evidence of prior sexual conduct. Texts related to sexual activity—authored by the complaining witness and voluntarily transmitted to others is not evidence the rape shield statute was intended to exclude. See ***State v. Kilgore***, 107 Wn. App. 160, 177-179, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288 (2002); ***State v. Carver***, 37 Wn.App. at 123-124. Because evidence of sexual activity after the alleged offense is not excluded under the rape shield statute and should not have been affirmed the lower court's position. In addition, N.B.'s allegation texted to "Adam" that she was pregnant was false and therefore relevant to her credibility. A majority of jurisdictions have held that the evidentiary rules preventing evidence of specific acts of untruthfulness must yield to the defendant's right of confrontation and right to present a full defense. These courts have held that evidence of prior false accusations is admissible to attack the credibility of the complaining witness and as substantive evidence tending to prove the current offense did not occur.

Here, the proffered evidence showed N.B.'s short-lived claim that she was pregnant was false. The evidence also supported the defense theory that N.B. was (1) seemingly unaffected by the rape and (2) was willing to make false accusations about sexual matters. Evidence that N.B. made a false allegation regarding a sexual matter, and wrote other sexts only days after the alleged rape was directly relevant on the issue of her credibility.

There was virtually no physical evidence; no DNA evidence

supported the allegation other that two male cells, which were of such a small sample that the DNA could not be developed into a profile even by use of the Y-STR amplification method. The "sexting" and photos are probative because it supports the theory that N.B. fabricated her claim and rebuts her statement that she was horrified and terrified by the rape, because it was unlikely that she would be sexting men within days of the incident. The texts regarding the photo of her vagina and the use of an insertable sexual device were probative in that they rebutted the assertion that the hematoma was inflicted by Diese, and that the one millimeter injury could have been inflicted by other methods—including digital penetration by N.B. herself or by use of the artificial phallus—after the date of the alleged rape. The lower court's ruling affirming the trial court overlooked the holding of ***Jones***. *Id.*, 168 Wn.2d at 721.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: July 6, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 6, 2017, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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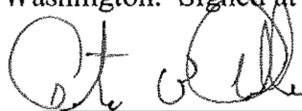
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on July 6, 2017.



PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 2, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent,	No. 47432-8-II
v.	
LAWRENCE E. DIESE, Appellant.	UNPUBLISHED OPINION

LEE, J. — Lawrence E. Diese appeals his conviction for second degree rape-domestic violence. We hold that the trial court did not err, Diese received effective assistance of counsel, and there is no cumulative error. We also hold that Diese's arguments raised in a statement of additional grounds (SAG) fail. Accordingly, we affirm.

FACTS

A. THE INCIDENT

In 2008, Diese; his daughter, Kary Diese; his girlfriend, Juline Dual; Dual's daughter, N.B.[1]; and Kary's friend, Tyler Lobes, lived together in Diese's home in Vancouver, Washington. Dual and N.B. lived with Diese from 2008 to 2009. During that time, Diese raped N.B. multiple times. Diese would pressure her to have sexual intercourse with him, and N.B. resisted at first,

[1] Pursuant to General Order 2011-1, we use initials for witnesses known to have been under the age of 18 at the time of any event in the case.

but was unsuccessful. The rapes occurred when N.B. was alone with Diese, and either after N.B. and Dual had an argument or N.B. got in trouble at school. N.B. did not tell anyone about the rapes at the time because she had always been afraid of Diese and was afraid the situation would get worse if she told. Also, Diese had thrown N.B. against a wall and given her a "fat lip" on one occasion. 3 Verbatim Report of Proceedings (VRP) at 224.

In May 2009, Dual and N.B. moved out of Diese's home after an argument between Diese and Dual. During that incident, Diese "grabbed [N.B.] by the scruff of the neck and threw her out the front door" and dragged Dual out of the home by her hair. 4 VRP at 347. Diese admitted to throwing N.B. and Dual out of his home in 2009.

In May 2013, Dual moved back in with Diese. N.B. was not happy that Dual had resumed her relationship with him and told Dual that Diese had raped her when they previously lived together. Dual did not believe N.B.

In January 2014, N.B. asked Dual if she could move in with Diese and Dual. Diese was against the idea, but he agreed after conditioning the move on N.B. staying short term, helping with chores, getting a job, going to counseling, and being in the house only when Dual was home.

After N.B. moved in, on February 23, Diese was upset that the house was dirty and that N.B. was not there to clean it. Diese later asked N.B. to go for a walk, during which Diese told her that she "had to do everything he said without argument." 3 VRP at 245. N.B., assuming that Diese was referring to housework, agreed.

When they returned home, Dual was gone, leaving Diese and N.B. home alone. N.B. sat on the couch and started an audio recording on her cell phone because she felt uncomfortable being home alone with Diese. Diese came up to N.B. and said that she "didn't live up to what he was

deciding and what he wanted." 3 VRP at 252. Diese tightly grabbed N.B.'s hand and told her to get up. N.B. pulled back, but Diese started counting down. She was afraid of him because he had been violent before, so she got up. Diese led N.B. to the bathroom where he pulled down her pants and raped her while she cried. N.B. tried to push Diese away, but was unsuccessful. Afterwards, N.B. retrieved her phone and stopped recording. When Dual returned home, N.B. was crying, but she did not disclose the rape because Diese was still home.

On February 26, while Diese was at work, N.B. told Dual that she had proof Diese raped her and played the recording. The next day, N.B. played the recording for her counselor, who made her call the police. The police interviewed N.B. several times.

N.B. received a physical exam on February 27, where a 1mm hematoma on N.B.'s vagina was discovered. The hematoma was consistent with blunt force trauma; such injuries are not typical of non-assaultive sexual intercourse. The nurse stated that she would not expect to see that injury four days after the sexual contact N.B. described.

Also on February 27, Diese went to the Vancouver Police Department for questioning. There, Detective Anderson informed Diese that serious charges were brought against Diese so he had some questions. Diese then requested an attorney and was arrested. While Diese was being advised that he was being arrested for second degree rape and false imprisonment, he responded, "I didn't imprison anyone."[2] 3 VRP at 186. On the way to jail, Diese asked, "Does [N.B.'s] mother know?" 3 VRP at 186. The State charged Diese with second degree rape-domestic violence.

[2] The trial court did not admit this statement.

B. PRETRIAL PROCEEDINGS

1. Cell Phone Recording

Diese moved to suppress N.B.'s February 23 cell phone recording because he did not consent to being recorded. On the first part of the recording, N.B. and Diese are heard:

> DIESE: (Inaudible). Drop them. Let's go. (Inaudible).
> N.B.: I don't want to.
> DIESE: (Inaudible).
> N.B.: No, not that.
> DIESE: (Inaudible).
> N.B.: (Inaudible) and stuff.
> DIESE: (Inaudible).
> N.B.: No, not (inaudible).
> DIESE: (Inaudible) without question.
> N.B.: Okay. Well, I'll leave because I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me.
> DIESE: I can do whatever I want how I want.
> N.B.: Not with me.
> DIESE: So I got to tell your mom now (inaudible) and get you out of here?
> N.B.: I guess, because I'm not (inaudible).
> DIESE: We shall see. You know you have nowhere to go. You have no one to help you.
> N.B.: (Inaudible).
> DIESE: Say again? Stand up.
> N.B.: No.
> DIESE: Come on. Get up. Let's go. Your pants are already halfway off. Let's go. Right now. Stand up. Come on. (Inaudible). Come on. (Inaudible). Come on. I'll hold your hand. Let's go. (Inaudible).
> N.B.: (Inaudible).
> DIESE: I'm going to count to three. One, two. Come on. (Inaudible).

1 VRP at 35-36. On the second part of the recording, only N.B. crying and the sound of running water are heard.

The trial court acknowledged that the recording was created without Diese's permission, but found that the first part contained a conversation in which Diese was extorting sexual activity from N.B. with threats of being homeless. The trial court reasoned that Diese's statement ("[Y]ou have nowhere to go. You have no one to help you"), in conjunction with N.B. crying and seeming

upset throughout; N.B.'s statements ("I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me"); and Diese's mention of N.B.'s pants being down, showed that Diese's statements were threats of extortion and unlawful requests, and thus, admissible. The trial court also found that the second part of the recording only contained crying and the sound of running water. Since the second part did not contain any verbal conversation, it was not subject to RCW 9.73.030(1)(b).[3] Thus, the trial court ruled that the recording was admissible under RCW 9.73.030(2)(b).[4]

2. Evidence of Diese's Prior Misconduct

The State moved to admit evidence that Diese raped N.B. from 2008-2009, and that he assaulted N.B. in 2008-2009. Diese objected and argued that evidence of prior misconduct was inadmissible under ER 404(b).

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[3] RCW 9.73.030(1)(b) states:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, . . . to intercept, or record any:
>
> . . . .
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

[4] RCW 9.73.030(2)(b) states:

> (2) Notwithstanding subsection (1) of this section, wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands.

The trial court ruled that evidence of the prior rapes was admissible after finding that (1) the State established by a preponderance of the evidence the acts occurred because N.B. testified to the rapes in 2008-2009 and Diese did not want to be alone with N.B.; (2) the purpose of admission was to show (a) lustful disposition, because in "the period of time [Diese] had direct access to [N.B.], there were a number of sexual assault allegations, and then that period of time where he had limited to no contact . . . there were no allegations," and (b) a common plan or scheme, because the prior rapes and the rape for which Diese was charged "share the common feature, that the victim was isolated [and] pressured"; (3) the evidence was relevant and probative; and (4) the probative value outweighed the prejudicial effect. 10 VRP at 1139-1140. The trial court also ruled that evidence of the 2008-2009 assault was admissible after finding that (1) the State established by a preponderance of the evidence the acts occurred because three witnesses testified to the event; (2) the purpose of admission was to show forcible compulsion because the assault helped show why N.B. was afraid of Diese; (3) the evidence was relevant and probative to understanding why N.B. did not put up more resistance on February 23, 2014; and (4) the probative value outweighed the prejudicial effect.

3. Evidence of N.B.'s Prior Sexual Activity

Diese moved to admit evidence of N.B.'s prior sexual activity, which consisted of text messages sent before and after February 23, 2014, with sexually explicit photos of N.B. and references to sexual activities, including the mention of using a sex toy. Diese argued that the evidence would be used to prove Diese was not the cause of N.B.'s hematoma and to impeach N.B. on her prior statements.

The trial court found that the text messages did not directly admit that N.B. participated in other sexual activity around February 23, 2014 and that the most recent evidence of any sexual activity occurred over a month before on January 12, 2014. Therefore, the trial court ruled that the evidence was not relevant to proving the source of the hematoma and not admissible.

C. TRIAL PROCEEDINGS

At trial, N.B. testified that Diese raped her when she lived with him in 2008-2009; threw her into a wall, which resulted in a fat lip; threw her and Dual out of his home in May 2009; and raped her on February 23, 2014. Kary Diese and Tyler Lobes also testified to N.B. having a fat lip at one point. The trial court gave the jury a limiting instruction regarding the purpose of the evidence relating to the events in 2008 and 2009.

After N.B. testified, the State sought to introduce N.B.'s cell phone recording. Diese objected based on lack of proper foundation, but the trial court admitted and played the recording after finding that the recording was sufficiently identified and the proper foundation was laid.

Dual testified and stated that she received letters, cards, and a phone call from Diese while he was in jail. The State sought to admit these letters and cards. Outside the presence of the jury, Diese argued that the mention of him in jail resulted in prejudice—jeopardizing the presumption of innocence—and that no instruction could cure the prejudice. The trial court offered to give an instruction to the jury, but Diese declined and asked for a mistrial. The trial court denied Diese's request for mistrial, but ordered all references to Diese being in jail be redacted from the letters and cards, and admitted the redacted documents. The trial court also instructed the parties that there was to be no further mention of Diese being in jail.

Diese sought a lesser degree instruction on third degree rape. The trial court denied the request. The trial court, adopting the reasoning of *State v. Ieremia*, 78 Wn. App. 746, 899 P.2d 16 (1995), *review denied*, 128 Wn.2d 1009 (1996), held that Diese was not entitled to a third degree rape instruction because there was no evidence that the intercourse was nonconsensual and unforced; if the jury believed N.B., Diese was guilty of rape in the second degree, and if it believed Diese, he was not guilty of any rape.

During closing arguments, Diese played the admitted cell phone recording. The jury requested to hear the recording again during jury deliberations because they had missed words the first time and wanted to be closer to the recording. Diese did not object. The trial court obliged and replayed the recording in the courtroom.

After further deliberation, the jury asked, "There's an undecided jury (divided, members on both sides who state they have made their decision and won't budge). Does a divided jury mean not guilty?" 9 VRP at 982. Over Diese's objection, the trial court responded no to the jury's question. The trial court noted that the jury had deliberated for less than three hours. It was also mindful of avoiding any jury coercion that may result from polling too soon. Fifteen minutes later, the jury asked what their options were on a split jury. The trial court then polled the jury to determine whether there was a reasonable probability of reaching a verdict. Ten jurors said no and two said yes. Diese moved for a mistrial, but the trial court denied the motion and instructed the jury to "continue to deliberate." 9 VRP at 990.

The jury then requested to hear the cell phone recording one more time after one of the jurors disclosed that he had difficulty hearing a good portion of the audio and asked that an amplified version be played. The trial court noted that case law allowed the recording to be

replayed and that the recording was a good portion of the evidence. The trial court offered counsel the option of either replaying the recording or calling in an alternate juror. In response to the trial court's offer, Diese stated that "it's not like this is a great recording. So there's only going to be some degree that any individual is going to be able to hear it" and that he did not want to use an alternate juror at this point of the trial. 9 VRP at 992. The recording was replayed one more time with an assisted listening device provided to the juror who had disclosed he had difficulty hearing. The jury was then released for the weekend and instructed to return on the next judicial day to continue deliberations.

When the jury commenced deliberations after the weekend, the jury found Diese guilty as charged. Diese appeals.

ANALYSIS

A. LESSER DEGREE RAPE IN THE THIRD DEGREE INSTRUCTION

Diese argues that the trial court erred when it refused to instruct the jury on rape in the third degree as a lesser degree offense. We hold that the trial court did not abuse its discretion when it declined to instruct the jury on rape in the third degree because the evidence did not support an inference that Diese only committed rape in the third degree.

1. Legal Principles

We review a trial court's refusal to give an instruction on a lesser degree offense, based on a factual dispute, for an abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A defendant charged with an offense consisting of different degrees may be found guilty of a lesser degree of the charged offense. RCW 10.61.003. A jury instruction on a lesser degree offense is proper when "(1) the statutes for both the charged offense and the proposed [lesser] degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is [a lesser] degree of the charged offense; and (3) there is evidence that the defendant committed only the [lesser] offense." *State v. Fernandez–Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

In determining whether the evidence supports giving a lesser degree instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. *Id.* at 455-56. The evidence must support an inference that the defendant committed only the lesser degree offense instead of the greater one. *State v. Ieremia*, 78 Wn. App. 746, 755, 899 P.2d 16 (1995).

A person is guilty of second degree rape when the person engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). Forcible compulsion is "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person." RCW 9A.44.010(6).

A person is guilty of rape in the third degree when the person engages in sexual intercourse with another person without consent and "such lack of consent was clearly expressed by the victim's words or conduct." RCW 9A.44.060(1)(a). In other words, third degree rape requires a showing of unforced nonconsensual sexual intercourse. *Ieremia*, 78 Wn. App. at 756.

2. Lesser Degree Instruction Not Supported By The Evidence

Diese argues that the trial court erred because the evidence only showed Diese committed third degree rape as there was no evidence of forcible compulsion. We disagree.

Diese argues that when the evidence is viewed in the light most favorable to the defense, the jury could find there was no forcible compulsion because "N.B. did not offer any resistance which was overcome by physical force, and there was no threat, express or implied, which placed her in fear other than a threat that she would be kicked out of the house." Br. of Appellant at 30. However, the record belies Diese's argument.

At trial, Diese denied that he raped N.B., either in the past or on February 23, 2014. N.B. testified that she was scared of Diese because he had raped her when they lived together from 2008-2009, her resistance then was ineffective, and he had thrown her against a wall and gave her a fat lip. N.B. also testified that on February 23, 2014, Diese tightly grabbed her hand, and told her that she had nowhere to go and no one to help her. She tried to pull her hand back when Diese grabbed her, but he started counting down. Because she was scared of him due to his past violence, she complied with his demand to get up. N.B. also tried to push Diese away while in the bathroom, but was unsuccessful.

If the jury believed N.B., the evidence showed that Diese used physical force to overcome resistance. And Diese's counting down along with his other statements and past acts constituted, at the very least, an implied threat of physical injury. Even when the evidence is viewed in the light most favorable to Diese, the evidence fails to support Diese's assertion that he only committed third degree rape, not second degree rape. Therefore, we hold that the trial court did not abuse its discretion when it declined to instruct the jury on rape in the third degree.

B. ADMISSION OF CELL PHONE RECORDING AND DIESE'S PRIOR MISCONDUCT

1. Cell Phone Recording

Diese argues that the trial court erred when it admitted the cell phone recording of a conversation between him and N.B. We disagree.

It is unlawful to record a private conversation without first obtaining the consent of all persons in the conversation. RCW 9.73.030(1)(b). Any recordings obtained in violation of this statute are generally inadmissible in court. RCW 9.73.050. However, conversations that "convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands" may be recorded with the consent of only one party to the conversation and are admissible. RCW 9.73.030(2)(b).

The trial court considered the cell phone recording in two parts, and we do the same. We review a trial court's legal conclusions on a motion to suppress de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014).

a. Private conversation[5]

In determining when a communication between individuals constitutes a "conversation" under RCW 9.73.030, courts have used the ordinary meaning for the term "conversation"—oral exchange, discourse, or discussion. *See State v. Smith*, 85 Wn.2d 840, 846, 540 P.2d 424 (1975) (applying the ordinary meaning of a "conversation," although holding that the court did not attempt to definitively define "private conversation."). However, RCW 9.73.030(1)(b) and RCW 9.73.050, which render a nonconsensual recording of a private conversation inadmissible as evidence, are not applicable to sounds of an event which do not constitute a "conversation." *Id.*

[5] The parties do not dispute that the interaction was private.

In the first part of the recording, Diese told N.B. that she "had to do everything he said without argument," and N.B. agreed. 3 VRP at 245. The discussion then evolved into an exchange about N.B. moving out if she did not comply with Diese's demands. This communication between N.B. and Diese falls squarely within the ordinary meaning of a "conversation," as it was a discussion and, at the very least, an oral exchange. Because the first part of the recording contained a conversation, the recording was a private conversation recorded without the consent of both parties and is subject to RCW 9.73.030(1)(b).

The second part of the recording contained only crying and the sound of running water. Because the second part of the recording did not include any verbal conversation, discussion, or exchange of any sort, it is more akin to the sounds of an event that are not subject to the restrictions of RCW 9.73.030(1)(b).

b. Exceptions

While private conversations recorded without the consent of both parties are typically inadmissible under RCW 9.73.050, conversations that include threats of extortion and unlawful requests are not subject to the same exclusions. RCW 9.73.030(2)(b). The threat exception applies to more than conversations where the defendant expressly states the threat of bodily harm. *State v. Babcock*, 168 Wn. App. 598, 609, 279 P.3d 890 (2012).[6]

[6] Diese argues that the trial court improperly admitted the cell phone recording because the recording did not include threats of bodily harm. However, the trial court did not admit the recording on that basis; instead, it admitted the recording because it found that it contained threats of extortion and unlawful requests. Furthermore, the threat exception under RCW 9.73.030(2)(b) applies to more than just conversations where the defendant expressly states the threat of bodily harm. *Babcock*, 168 Wn. App. at 609.

i. Threats of extortion

Diese's statements captured within the first part of the cell phone recording constitute threats of extortion. Threats of extortion are expressly excepted from the restrictions of RCW 9.73.030(1)(b). RCW 9.73.030(2)(b).

Extortion is not defined in the statute. Therefore, we look to its ordinary meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The dictionary defines "extortion" as "the act or practice of extorting," which is further defined as "to obtain from an unwilling or reluctant person by physical force, intimidation, or the abuse of legal or official authority." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 806 (1969).

Here, the recording shows that Diese tried to intimidate and threaten N.B. with eviction when she did not comply with his demands. The recorded conversation in the recording has Diese telling N.B. (1) to "Drop them"; (2) that he had to go "tell [Dual] and get [N.B.] out of here" because N.B. would not allow him to do whatever he wanted with her; (3) that she had "nowhere to go" and "no one to help" her; and (4) that her "pants [were] already halfway off" so "[l]et's go. Right now. Stand up. Come on." 1 VRP at 35-36. These statements, combined with N.B. seeming upset and crying throughout the recording and her statement, "I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me," rendered Diese's statements threats of homelessness used to extort sexual intercourse from N.B. 1 VRP at 35. While Diese argues that his statements were references to N.B. doing chores, his argument is undermined by N.B.'s statement that Diese should be doing that with Dual and not her. Diese's threats amounted to "extortion" within the plain meaning of the term. Therefore, we hold that the recording met the exception of RCW 9.73.030(2)(b), and the trial court did not err in admitting it.

ii. Unlawful requests

Diese's statements captured within the recording also constitute unlawful requests. It is unlawful for a person to engage in sexual intercourse with another person without the other person's consent. *See* ch. 9A.44 RCW. Here, as discussed above, Diese's statements in the recording were threats of extortion, attempting to elicit sexual intercourse from N.B. against her will with threats that he would have to "get [N.B.] out of [the house]" and that she had "nowhere to go" and "no one to help" her. 1 VRP at 35-36. Such statements also constitute unlawful requests as it is unlawful to engage in nonconsensual sexual intercourse. Ch. 9A.44 RCW. N.B. expressly refused to comply with Diese's demand to drop her pants and told Diese that he should be doing that with Dual instead of her. Nonetheless, Diese insisted that she get up and noted that N.B.'s pants were already halfway off. Therefore, we hold that the trial court did not err in admitting N.B.'s recording because it contained a conversation conveying unlawful requests in addition to threats of extortion.

2. Evidence of Diese's Prior Misconduct

Diese claims that the trial court erred when it admitted evidence of his prior rapes and assault against N.B. We disagree.

a. Legal principles

We review the trial court's admission of evidence for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *State v. Barnett*, 104 Wn. App. 191, 199, 16 P.3d 74 (2001).

Generally, evidence of a defendant's prior crimes, wrongs, or acts is not admissible to show that he has a propensity to commit crimes. ER 404(b); *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014). But such evidence may be admitted for other purposes, such as proof of the defendant's lustful disposition towards the victim or to prove a common scheme or plan. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012); *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991).

When the State offers evidence of a defendant's prior misconduct, before admitting the evidence, the trial court must (1) find by a preponderance of the evidence that the prior misconduct occurred; (2) identify the purpose for introducing the evidence; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) balance the probative value of the evidence against its prejudicial effect. *Gunderson*, 181 Wn.2d at 923; ER 403; ER 404(b). The trial court must conduct this analysis on the record. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Evidence of prior sexual misconduct may be admitted to show the defendant's lustful disposition toward the victim. *Ray*, 116 Wn.2d at 547. Such evidence is admissible "for the purpose of showing the lustful inclination of the defendant toward the [victim], which in turn makes it more probable that the defendant committed the offense charged." *Id.* (internal quotation marks omitted). "The limits of time over which evidence may range lies within the discretion of the trial court." *Id.* Such evidence is admissible even if it is not corroborated by other evidence. *Id.*

Evidence of prior misconduct is also admissible to show the existence of a common scheme or plan. *Gresham*, 173 Wn.2d at 421-22. To be admissible, such evidence must be offered to show that "the defendant has developed a plan and has again put that particular plan into action." *Id.* at 422. To introduce prior misconduct as evidence of a common plan or scheme, the prior misconduct must show "'common features that the various acts are naturally to be explained as caused by a general plan of which' the two are simply 'individual manifestations.'" *Id.* (quoting *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995)). The commonality between the prior misconduct and the charged crime "need not be 'a unique method of committing the crime.'" *Id.* (quoting *State v. DeVincentis*, 150 Wn.2d 11, 19-21, 74 P.3d 119 (2003)).

b. 2008-2009 Rapes

Diese argues that the trial court erred in admitting the prior rapes because of their remoteness in time and the absence of any corroborating evidence. We disagree.

Here, the trial court conducted the required analysis on the record and found that the prior rapes were admissible to show a lustful disposition towards N.B. because the prior rapes involved the same victim, N.B. The trial court did not find it significant that the prior rapes occurred prior to 2009. However, the trial court did find relevant the fact that during the periods Diese had access to N.B., "there were a number of sexual assault allegations," but during the period of time where Diese did not have any opportunity to be alone with N.B. for any significant period of time in a private place, there were no allegations of rape against N.B. The trial court also found that the prior rapes were admissible to show a common scheme or plan because the prior rapes and the charged crime shared the common feature of isolating and pressuring N.B. by threatening punishment or being kicked out of the house in exchange for sexual contact. Finding that the prior

rapes were relevant and probative to the charged crime and the probative value of the evidence outweighed the prejudicial effect, the trial court admitted the evidence of prior rapes against N.B. for the purpose of showing lustful disposition and common scheme or plan.

Diese fails to show how the trial court abused its discretion in determining the remoteness of the prior rapes was not significant under the circumstances. And corroborating evidence is not necessary. Also, Diese was able to respond to and deny N.B.'s allegations of prior rapes and the trial court gave a limiting instruction, instructing the jury that the prior rapes are limited to showing lustful disposition and a common scheme or plan. We assume the jury follows the court's instructions. *State v. Lord*, 117 Wn.2d 829, 861, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Thus, we hold that the trial court did not abuse its discretion in admitting the prior rapes as evidence of lustful disposition and common scheme or plan.

c. Prior assault

Diese also argues that the trial court erred in admitting evidence of his prior assault of N.B. We disagree.

i. Preponderance of the evidence that the assault occurred

N.B. testified about the prior assault, and two other witnesses corroborated that she had a fat lip. Therefore, the occurrence of the assault was established by a preponderance of the evidence.

ii. Purpose and relevance for admitting evidence of the assault

Evidence of prior misconduct, while inadmissible to prove propensity, is admissible to prove a victim's state of mind. *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). At trial, N.B. indicated that she was afraid of Diese and always had been. She testified that Diese had

thrown her against a wall and gave her a fat lip on one occasion. N.B. also testified that she pulled back when Diese grabbed her on February 23, 2014, but because he started counting down and she was afraid of him due to his past violence, she got up. Thus, the evidence of Diese's prior assault of N.B. was relevant to show N.B.'s state of mind, demonstrating why N.B. was afraid of Diese. This is a proper purpose.

Moreover, the evidence was relevant and probative to understanding why N.B. did not put up more resistance on February 23, 2014. That day, N.B. complied with Diese's demand to get up and walked with him to the bathroom after Diese had tightly grabbed her hand and started counting down. While someone who is about to be raped may put up greater resistance, N.B. did not do so because she was mindful of his prior violence and afraid of Diese. Evidence of the prior assault is relevant and highly probative to proving N.B.'s lack of resistance due to fear. Therefore, the trial court did not abuse its discretion when it admitted evidence of Diese's prior assault to show N.B.'s state of mind.

iii. Probative value and prejudicial effect of the prior assault

Here, the evidence of the prior assault was relevant to proving forcible compulsion because Diese had placed N.B. in fear of physical injury. The prior assault in 2008-2009, during which N.B. received a fat lip, was a direct example of such prior violence and probative of why N.B. perceived Diese's statements and actions on February 23, 2014 as an implied threat.

Although evidence of such prior misconduct may be prejudicial, such prejudice was mitigated. Diese explained the circumstances surrounding the event, testified to making real changes in his life and attending therapy, and noted that such changes led him to rekindle his relationship with Dual. Additionally, the trial court gave an instruction that limited consideration

of the prior assault to determining N.B.'s state of mind. As a result, the probative value of the evidence of the prior assault outweighed its prejudicial effect. Therefore, we hold that the trial court did not abuse its discretion when it admitted evidence of Diese's prior assault on N.B.

C. EXCLUSION OF SEXUAL TEXT MESSAGES AND PHOTOS

Diese argues that the trial court erred when it excluded evidence of N.B.'s sexual text messages and photos. We disagree.

1. Legal Principles

We review decisions by the trial court to admit or exclude evidence for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The trial court abuses its discretion if its "discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (quoting *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999)) (alteration in original). However, we may affirm on any ground adequately supported by the record, and the exclusion of evidence lies largely within the discretion of the trial court. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Thomas*, 150 Wn.2d at 869. Ultimately, the appellant bears the burden of proving an abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538 (1983).

Under Washington's Rape Shield statute evidence of a victim's past sexual behavior is inadmissible to prove credibility or consent. RCW 9A.44.020(2). Such evidence is only admissible if (1) it is relevant to the issue of the victim's consent; (2) its probative value is not substantially outweighed by the danger of undue prejudice; and (3) its exclusion would result in denial of substantial justice to the defendant. RCW 9A.44.020(2), (3)(d).

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. ER 401. The threshold for relevance is low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (noting that "[e]ven minimally relevant evidence is admissible."). But the trial court has considerable discretion in considering relevancy of evidence. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

Extrinsic evidence is not admissible to prove a witness's character for truthfulness. ER 608. However, a witness can be cross-examined about specific instances of truthfulness. ER 608(b).

2. Text Messages and Photos Properly Excluded

Diese argues that N.B.'s text messages and photos were relevant to prove Diese was not the cause of N.B.'s hematoma and to impeach N.B. on her previous statements. While the threshold for relevance is low, the text messages and photos do not meet that threshold.

The most recent evidence of any possible sexual activity by N.B. was in the January 12, 2014 text message. And because the nurse who examined N.B. stated that she would not expect to see a hematoma four days after the sexual assault, any alleged sexual activity over a month before the sexual assault was not likely to have been the cause of the hematoma. Therefore, the text messages and photos were not relevant to show an alternative source for the hematoma.

Diese also argues that the messages and photos directly undermine N.B.'s credibility that she was distraught and traumatized by the incident. However, extrinsic evidence is not admissible to prove a witness's character for truthfulness and can only be asked about on cross-examination. ER 608(b). While the trial court in this case did not allow the text messages and photos to be admitted, it did not prohibit Diese from asking about the specific instances on cross-examination.

Furthermore, although the sexual photographs sent via text messaging establish the date the photo was sent, they did not establish the date the photo was taken. And the text messages merely suggested that N.B. was sexually promiscuous, which is the exact reason why the Rape Shield statute excludes such evidence.

Although Diese suggests that admission of the messages was required to preserve his right to present a meaningful defense, the trial court did not prohibit him from cross-examining N.B. about her previous statements. The trial court excluded the text messages and photos based on lack of relevance, which was supported by the record and Washington's Rape Shield statute. The trial court did not exercise its discretion on untenable grounds or for untenable reasons. Therefore, we hold that the trial court did not abuse its discretion when it excluded N.B.'s text messages and photos.

D. MOTION FOR MISTRIAL

Diese argues that the trial court erred when it denied his motion for a mistrial after Dual mentioned receiving letters from him while he was in jail. We disagree.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A new trial will only be granted based on a trial irregularity when there is a substantial likelihood the resulting prejudice affected the jury's verdict. *State v. Young*, 129 Wn. App. 468, 472-73, 119 P.3d 870 (2005). To determine whether there was a substantial likelihood the prejudice affected the jury's verdict, we consider three factors: (1) the irregularity's seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Emery*, 174 Wn.2d at 765. A

mistrial is only warranted when the prejudice is so great that a new trial is the only way to ensure that the defendant will be fairly tried. *Id.* at 765.

The presumption of innocence flows from the right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). This presumption may be violated when a defendant appears in court physically restrained because such restraints are inherently prejudicial. *State v. Finch*, 137 Wn.2d 792, 844-45, 975 P.2d 967 (1999). Although references to a defendant being in custody can result in some prejudice, they do not rise to the same level as physical restraints because jurors "must be expected to know that a person awaiting trial will often do so in custody." *State v. Mullin-Coston*, 115 Wn. App. 679, 693, 64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004).

Here, the testimony of Diese being in jail did not result in prejudice so great that it warranted a mistrial. At trial, Dual testified that she received letters, cards, and a phone call from Diese while he was in jail. When Diese objected, he argued that the mention of him in jail resulted in prejudice that could not be cured with an instruction and asked for a mistrial. The trial court denied the motion for a mistrial, but ordered the letters and cards be redacted to remove any references to Diese being in jail before admitting the redacted documents. The trial court also ordered the parties to not comment on Diese being in jail. Although the evidence was not cumulative, the trial court took steps to reduce any potential prejudice to Diese. Also, the trial court offered to give an instruction to the jury, but Diese declined. Thus, Diese waives any error by declining the trial court's offer to give an instruction. *State v. Russell*, 33 Wn. App. 579, 588, 657 P.2d 338 (1983), *aff'd in part, rev'd in part on other grounds*, 101 Wn.2d 349, 678 P.2d 332

(1984). We hold that the trial court did not abuse its discretion when it denied Diese's motion for a mistrial.

E. REPLAY OF ADMITTED RECORDING DURING JURY DELIBERATIONS

Diese argues that the trial court erred when it allowed the jury to hear N.B.'s recording during deliberations. We hold that the trial court did not abuse its discretion when it replayed N.B.'s recording during deliberations.

1. Legal Principles

We review a trial court's decision to replay an electronically recorded exhibit that is properly admitted for an abuse of discretion. *State v. Frazier*, 99 Wn.2d 180, 190-91, 661 P.2d 126 (1983). We find an abuse of discretion only if no reasonable person could have taken the view chosen by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The jury is allowed to take all admitted exhibits into the jury room during deliberations. CrR 6.15(e); *Castellanos*, 132 Wn.2d at 97. A trial court may permit the replaying of an admitted exhibit but should do so in a "way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence." CrR 6.15(f)(1). A trial court's control of the jury's access to the recording is a method to reduce any prejudice. *Castellanos*, 132 Wn.2d at 98-100.

2. No Abuse of Discretion by Allowing Replay of Admitted Recording

Here, the trial court's replay of N.B.'s admitted cell phone recording during deliberations was permitted under CrR 6.15. During deliberations, the jury requested replay of N.B.'s admitted recording because they had previously missed words. Although a jury is allowed to take all admitted exhibits into the jury room during deliberations, the trial court replayed the recording in the courtroom, without objection. The jury requested replay of the admitted recording a second time because one juror could not hear a part of the recording. The request was again accommodated by replaying recording in the courtroom. Thus, the trial court maintained control of the recording to reduce any prejudicial effects.

Diese argues that replaying the recording for the jury during deliberations placed undue emphasis on N.B.'s testimony and likely stimulated an emotional response. However, the record shows that trial court only replayed the recording because the jury was not able to hear the recording very well. Even Diese admitted that the recording was not easy to hear. Also, Diese apparently did not deem the recording to be unfairly prejudicial because he also played the recording during closing arguments. Therefore, we hold that the trial court did not abuse its discretion when it allowed the jury to hear N.B.'s recording twice during deliberations.

F. INSTRUCTION TO CONTINUE DELIBERATION

Diese argues that the trial court violated his due process rights when it instructed the jury to continue deliberations after the jury stated it was divided. We disagree.

1. Legal Principles

We review constitutional claims de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). When a jury is undecided on a general verdict, the trial court has authority, after polling

the jurors, to instruct the jury to continue deliberations. CrR 6.16(a)(3). But the court "shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2).

If it appears that the jury is deadlocked—that there is no reasonable probability of the jurors reaching agreement—the jury may be discharged by the court on consent of both parties. CrR 6.10. The trial court may then declare a mistrial if extraordinary and striking circumstances justify such action; there must be a factual basis for the court's determination that the jury is hopelessly deadlocked. *State v. Burdette*, 178 Wn. App. 183, 195, 313 P.3d 1235 (2013). In making this determination, the trial court has broad discretion and may consider the length of jury deliberations relative to the length of the trial and the complexity of issues and evidence. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982).

2. Reasonable Probability of Reaching Agreement

Diese argues that the jury was deadlocked when they asked about an undecided jury, which warranted a mistrial, and that the trial court failed to consider the length of deliberations or the complexity of the issues. The record shows otherwise.

Here, the jury began deliberating on the fourth day of trial. The jurors had deliberated for only a short period of time before declaring they were divided. The jury notified the court that "[t]here's an undecided jury (divided, members on both sides who state they have made their decision and won't budge). Does a divided jury mean not guilty?" 9 VRP at 982. The jury had deliberated for less than three hours, and the trial court tried to avoid any jury coercion by not polling too soon. Therefore, the trial court responded no to the jury's question. Thus, the trial court did consider the length of deliberations and was mindful of possible jury coercion.

Fifteen minutes after receiving the trial court's response, the jury asked what their options were on a split jury. The trial court then polled the jury on whether there was a reasonable probability of reaching a verdict. Ten jurors said no and two said yes. Diese then moved for a mistrial, but the trial court denied the motion and instructed the jury to "continue to deliberate." 9 VRP at 990. At that point, the jury had deliberated for only three hours after a four-day trial. The jury continued deliberating for another hour and fifty-five minutes before the trial court instructed them to return on the next judicial day to resume their deliberations. Given these circumstances, we hold that the trial court did not abuse its discretion in determining that there was a reasonable probability the jurors would reach an agreement and instructing them to continue deliberating.

G. INEFFECTIVE ASSISTANCE OF COUNSEL

Diese argues that he received ineffective assistance of counsel when defense counsel failed to move for a mistrial or new trial after a juror disclosed that he had trouble hearing the admitted cell phone recording. We disagree.

1. Legal Principles

We review claims of ineffective assistance de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when there is reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Lord*, 117 Wn.2d at 883-84.

There is a strong presumption of effective assistance, and the defendant bears the burden of rebutting that presumption by showing the lack of a legitimate strategic or tactical reason for the challenged conduct. *State v. McFarland,* 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Failure to move for a mistrial or curative instruction "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

"A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant receives a fair trial." *State v. Jungers*, 125 Wn. App. 895, 901-02, 106 P.3d 827 (2005). The declaration of a mistrial is a "drastic measure," and the trial court may exercise other options to remedy the event in question based on the particular facts of the situation. *See State v. Falk*, 17 Wn. App. 905, 908, 567 P.2d 235 (1977).

2. Effective Assistance of Counsel

Here, Diese fails to show that defense counsel's failure to move for a mistrial or new trial was unreasonable or not a legitimate trial tactic. During deliberations, one of the jurors disclosed that he had difficulty hearing a good portion of the cell phone recording and asked for an amplified version. At this point, the jury had already twice informed the trial court that it was divided. It was reasonable for defense counsel to determine that maintaining the composition of the jury for a possible hung jury was a better tactical choice over seeking a mistrial. Also, defense counsel played the recording during closing arguments; therefore, it was reasonable for defense counsel to want all jurors to hear evidence helpful to the defense theory of the case.

Diese also fails to show a motion for a mistrial or new trial would likely have been granted. The circumstances here do not warrant a mistrial or new trial. The jury asked for the recording to

be amplified because a juror had difficulty hearing the recording. Defense counsel admitted that the recording was not a "great recording." 9 VRP at 992. There is no evidence that the juror had difficulty hearing any other evidence presented during trial. Also, a jury has the ability to access an admitted exhibit during deliberations. Therefore, the record does support any basis for the trial court to grant a mistrial or new trial. We hold that defense counsel did not provide ineffective assistance when she failed to move for a mistrial or new trial.

H. CUMULATIVE ERROR

Diese argues that cumulative error denied him a fair trial. We disagree.

The cumulative error doctrine applies when more than one error occurred at the trial court level, but none alone warrant reversal. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (1984). Numerous errors, harmless standing alone, can deprive a defendant of a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The defendant bears the burden of proving the cumulative effect of the errors is of a sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 123 Wn.2d 737, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Where no prejudicial error is shown, we do not apply the cumulative error doctrine. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990).

Here, we find no error. Therefore, Diese is not entitled to relief based on cumulative error.

I. STATEMENT OF ADDITIONAL GROUNDS

Diese also filed a SAG, arguing that (1) transcripts were missing; and (2) the trial court erred when it admitted the statements he made to the police because he was not *Mirandized*.[7] We disagree.

1. Missing Transcripts

Diese argues that there were missing transcripts from his first appearance and hearings for readiness, ER 404(b) evidence, CrR 3.5 confessions, motion to recuse, and motion for a mistrial. However, transcripts for these appearances and hearings are in the appellate record. Therefore, we hold that Diese's argument fails because it is factually meritless.

2. Custodial Statements

Diese argues that the trial court erred when it admitted the statements he made to the police because he was not *Mirandized*. Diese made two statements to police while being placed under arrest, one while being advised of his charges and one while on the way to jail. A CrR 3.5 hearing was held, and the trial court only admitted the statement Diese made while on the way to jail because it was voluntary and not in response to any conduct designed to elicit a response. When a person voluntarily and spontaneously makes a statement to the police, those statements are admissible. *State v. Cloud*, 7 Wn. App. 211, 214, 498 P.2d 907, *review denied*, 81 Wn.2d 1005 (1972). Therefore, we hold that Diese's argument fails.

CONCLUSION

The trial court did not err in refusing to instruct the jury on a lesser degree offense; admitting N.B.'s cell phone recording and evidence of Diese's prior misconduct; excluding

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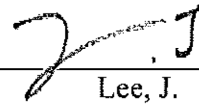
[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

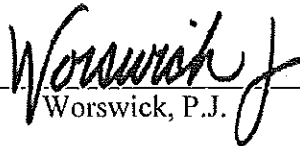
evidence of N.B.'s sexual behavior; denying Diese's motion for a mistrial; allowing the jury to hear the admitted cell phone recording during deliberations; and instructing the jury to continue deliberations. Also, defense counsel did not provide ineffective assistance, and there is no cumulative error. And Diese's SAG arguments fail. Accordingly, we affirm.

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

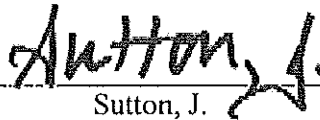


Lee, J.

We concur:



Worswick, P.J.



Sutton, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

June 8, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

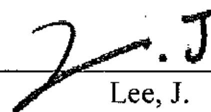
DIVISION II

STATE OF WASHINGTON, Respondent, v. LAWRENCE E. DIESE, Appellant.	No. 47432-8-II ORDER DENYING MOTION FOR RECONSIDERATION

Lawrence E. Diese, appellant, moves for reconsideration of this court's opinion issued on May 2, 2017. After review of the records and file herein, it is hereby

ORDERED that the motion for reconsideration is denied.

For the Court: J. Worswick, J. Lee, J. Sutton.



Lee, J.

THE TILLER LAW FIRM

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Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	State of Washington, Respondent v Lawrence E. Diese, Appellant
Superior Court Case Number:	14-1-00407-9

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