98067-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 35901-8-III

STATE OF WASHINGTON, Respondent,

v.

LELAND HONN KNAPP IV, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Leland Knapp requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on December 10, 2019, affirming the Spokane County Superior Court's refusal to give Knapp's proposed instruction allocating to the State the burden to disprove consent beyond a reasonable doubt. A copy of the Court of Appeals' partially published opinion is appended hereto.

III. ISSUES PRESENTED FOR REVIEW

The State tried Knapp on charges of second degree rape by forcible compulsion. The trial court refused to give Knapp's proposed instruction informing the jury that Knapp had no burden to prove that sexual intercourse was consensual; rather, the State bore the burden to prove the absence of consent beyond a reasonable doubt. Instead, the instructions stated that evidence of consent could be considered in determining whether Knapp used forcible compulsion to have sexual intercourse. Did the trial court's instruction relieve the State of its burden of proving the essential element of forcible compulsion?

IV. STATEMENT OF THE CASE

It was undisputed that Knapp and Brandy Spaulding had intercourse on Superbowl Sunday, February 7, 2016. *Opinion*, at 2-3. But Knapp and Spaulding significantly disputed whether how the intercourse came about and whether it was consensual.

Knapp claimed that he and Spaulding had known each other since high school and had a "friends with benefits" relationship for years. *Opinion*, at 2, 3. They also used drugs together frequently. IV RP 639. On the day in question, Knapp said that he had stopped by Spaulding's house and she realized he was high on methamphetamine and hinted that she wanted some. IV RP 639-40. Knapp refused and left, but realized a short time later he had left his bandana at her house and went back to retrieve it. IV RP 641-42.

When he returned, Spaulding offered to have sex with him in exchange for drugs and Knapp agreed. IV RP 642-44. But afterward, Knapp could not find the methamphetamine he had promised her and Spaulding became irate, telling him to leave and that she would call the police to report he had raped her. IV RP 644. Knapp left and was walking away through the park when police arrested him. III RP 479, IV RP 645.

Spaulding reported a significantly different course of events. According to her, she and Knapp had never had a sexual relationship and when he began to make vulgar comments expressing his interest in sex, she made it clear sex was not going to happen. IV RP 615-16, 625. She refused a kiss from him and he left, but then he returned a short time later, telling her he had left his bandana inside. IV RP 616. She let him back inside and Knapp physically attacked her, throwing her to the ground and attempting to remove her pants. IV RP 617.

In Spaulding's account, she struggled against Knapp, told him "No," attempted to pull her pants back up, and screamed for help from the neighbors. IV RP 617, 619. Knapp then gagged her with the bandana to keep her from screaming. IV RP 620. Although Spaulding continued to try to escape, Knapp eventually succeeded in pinning her against a wall, removing her underwear, and raping her. IV RP 621.

Knapp left immediately afterward and Spaulding called her mother, then the police. IV RP 626. A sexual assault examination revealed bruising and a tear to the posterior fourchette, but the injuries could have been caused by consensual sex as well as rape. *Opinion*, at 3. Forensic analysis revealed Spaulding's saliva and skin cells on the bandana. *Opinion*, at 3-4. However, she had no carpet burns, bruising, or

other abrasions on her body, despite the significant physical struggle she had described. III RP 539.

The State charged Knapp with second degree rape by forcible compulsion. CP 55. He requested a jury instruction that slightly modified Washington Pattern Jury Instruction 45.04, which read:

> Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating a freely given agreement to have sexual intercourse. The Defendant has no burden to prove that sexual intercourse was consensual. It is the State's burden to prove the absence of consent beyond a reasonable doubt.

CP 412. The trial court refused to give the instruction and instead gave pattern instruction no. 18.25, which read: "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." IV RP 681-82, CP 430. The instructions did not otherwise define consent or allocate the burden to disprove consent to the State, beyond the general instruction that the defendant has no burden to prove a reasonable doubt exists. CP 418-33.

The jury convicted Knapp of second degree rape and the trial court sentenced him to 110 months to life. CP 435, 446. On appeal, Knapp contended that the trial court erred in refusing his proposed instruction and the refusal relieved the State of its burden to prove forcible compulsion

beyond a reasonable doubt. *Appellant's Brief*, at 8; *Opinion*, at 4. In the published portion of its opinion, the Court of Appeals affirmed the conviction, reasoning that the State is not required to prove the absence of consent. *Opinion*, at 8, 9. It concluded that the instructions given allowed Knapp to argue his theory of the case by contending that the State failed to prove forcible compulsion beyond a reasonable doubt. *Opinion*, at 9-10.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(1), (3), and (4), review will be accepted if the opinion conflicts with a decision of the Supreme Court, if a significant question of law under the Constitution of the State of Washington or of the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. All three factors are satisfied in the present case.

The Court of Appeals' opinion is inconsistent with *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) and long-standing prior authority allocating the burden to disprove certain affirmative defenses to the State. It has long been the law in Washington that the State bears the burden to prove the absence of a defense beyond a reasonable doubt when the absence of the defense is an ingredient of the offense, such as when one or more elements of the defense negate one or more elements of the offense

that the State is required to prove beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). This rule arises from the Due Process clause of the Fourteenth Amendment and its requirement that the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *Id.* at 494 (*citing In re Winship*, 397 U.S. 658, 664, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Thus, for example, because self-defense is a lawful use of force, it negates the element of unlawfulness that inheres in the intent element of murder. *McCollum*, 98 Wn.2d at 495-96. Thus, in a first degree murder prosecution, the State bears the burden to prove the absence of self-defense beyond a reasonable doubt. *Id.* at 496.

This Court applied these principles to rape by forcible compulsion in *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014). In *W.R.*, this Court expressly held:

> [C]onsent negates the element of forcible compulsion. Therefore, once a defendant asserts a consent defense and provides sufficient evidence to support the defense, the State bears the burden of proving lack of consent as part of its proof of the element of forcible compulsion.

Id. at 763. This express statement of the holding is irreconcilable with the Court of Appeals' ruling here that *W.R.* "did not hold that the State must prove the absence of consent." *Opinion*, at 8. To the extent the Court of

Appeals worried that expressly allocating that burden to the jury would effectively add an additional element of absence of consent to the crime, this is no different than requiring the State to disprove self-defense in a murder prosecution in cases where the facts put self-defense at issue. *See McCollum*, 98 Wn.2d at 496; *Opinion*, at 8. Thus, by publishing an opinion directly contradicting the holding of *W.R.*, the Court of Appeals has introduced significant confusion into the question of the nature of the State's burden of proof of forcible compulsion when evidence of consent is presented.

Moreover, without giving Knapp's proposed instruction, the instructions as a whole failed to make it clear that as part of its burden to prove the element of forcible compulsion, the State bore the burden to disprove consent beyond a reasonable doubt. *See State v. Imokawa*, __ Wn.2d __, 450 P.3d 159, 163 (Oct. 10, 2019) (jury instructions that fail to expressly allocate a burden of proof to the State are not reversible error if the instructions as a whole make the burden clear). In *dicta*, the *Imokawa* Court evaluated pattern instruction no. 18.25 and concluded that so long as the instructions do not shift the burden to the defense, the jury need not be expressly instructed that the State bears the burden to disprove it as long as it is specifically instructed on the essential elements of the crime. *Id.* at 164. However, the *Imokawa* Court went on to affirm the instructions

given in the case because the essential element and the defense were mutually exclusive, meaning proof of the essential element beyond a reasonable doubt necessarily proved the absence of the defense. *Id.* at 165.

In the present case, pattern instruction 18.25 alone does not unambiguously place the burden of proving the absence of consent on the State. The instruction neither defines consent nor makes it clear that consent and forcible compulsion are mutually exclusive. Indeed, the instruction does not even communicate to the jury that it must evaluate the evidence of consent presented in order to determine whether the State has proved the essential element of forcible compulsion beyond a reasonable doubt, telling it only that it "may" do so. CP 430. By framing the relationship between consent and forcible compulsion in permissive terms, the instructions allow the jury to disregard the evidence of consent in concluding whether the State proved forcible compulsion. This outcome cannot be squared with the holding of *W.R.* or the Fourteenth Amendment's due process requirement that the jury be instructed on the State's burden of proof of the elements at issue in the case.

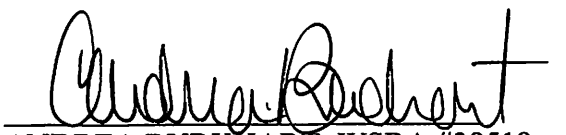
Accordingly, the case meets the standards of review set forth in RAP 13.4(a)(1), (3), and (4). The Court of Appeals' opinion squarely

contradicts *W.R.*'s express holding that the State bears the burden to disprove consent. Moreover, whether pattern instruction no. 18.25 sufficiently communicates to the jury that the State bears the burden to disprove consent beyond a reasonable doubt raises substantial questions of constitutional law. Because pattern instructions are widely relied upon in criminal cases, a ruling from this Court expressly evaluating the adequacy of instruction no. 18.25 in light of *W.R.* and the *McCollum* line of jurisprudence will be of substantial public interest. Review is therefore appropriate and should be granted.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (3), and (4) and this Court should enter a ruling that the trial court erred in declining to give Knapp's proposed instruction specifically allocating the burden to disprove consent to the State when the remaining instructions failed to unambiguously inform the jury of that burden.

RESPECTFULLY SUBMITTED this 9 day of January, 2020.



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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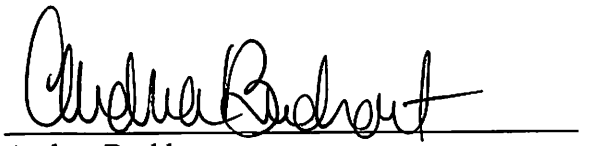
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9 day of January, 2020 in Kennewick, Washington.



Andrea Burkhart

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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 35901-8-III
	)	
Respondent,	)	
	)	
v.	)	OPINION PUBLISHED
	)	IN PART
LELAND HONN KNAPP IV,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Leland Knapp appeals his conviction for second degree rape by forcible compulsion. He argues the trial court erred when it refused to give his proposed instruction on consent, which required the State to prove lack of consent beyond a reasonable doubt. We disagree. The trial court correctly instructed the jury on consent, that evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse. The trial court's instruction was consistent with *State v. W.R.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) and permitted Knapp to argue his theory of the case.

APPENDIX

FACTS

Leland Knapp and Brandy Spaulding met in high school and were friends for more than a decade. On February 7, 2016, Ms. Spaulding was preparing to watch the Super Bowl when Knapp came to her home. Ms. Spaulding let him in. The events following this were disputed.

According to Ms. Spaulding, Knapp began to make sexual comments toward her and expressed an interest in having sex. Ms. Spaulding denied his advances. Knapp then left, but soon returned to the home, claiming he forgot his bandana. Ms. Spaulding let him in again and while she was sitting on the couch, Knapp threw her to the ground and attempted to pull down her pants. Ms. Spaulding said "[n]o" and tried to pull up her pants but Knapp was successful in pulling them down. Report of Proceedings (Feb. 7, 2018) (RP Trial) at 617-18. Ms. Spaulding screamed for her neighbors, but they did not hear her. Knapp then used his bandana to gag her. The struggle continued until Knapp pinned her against a wall and raped her. Ms. Spaulding continued to say, "No," "Stop," and "Don't do this." RP Trial at 623. Knapp left, and Ms. Spaulding called her mother and then the police. Ms. Spaulding was taken to the hospital where she underwent a sexual assault examination.

According to Knapp, he and Ms. Spaulding were "friends with benefits" for years and engaged in sex together on and off. RP Trial at 638. After Ms. Spaulding let him in the first time, Ms. Spaulding realized Knapp was high on methamphetamine and she hinted that she wanted some. Knapp refused to give her any. Ms. Spaulding became upset, and Knapp decided to leave. After he left, Knapp realized he forgot his bandana and returned to retrieve it. Ms. Spaulding let him in again, and she pressed Knapp to get her high. Eventually, Ms. Spaulding offered sex for drugs. At that point, Knapp "gave in" and they had sex. RP Trial at 643. Afterward, Knapp could not find the methamphetamine to give to her. Ms. Spaulding became upset and threatened to call the police and falsely accuse him of rape. Knapp left and was later arrested. The State charged Knapp with rape in the second degree by forcible compulsion.

At trial, the State called Crissa Flink, a sexual assault nurse examiner. Ms. Flink utilized a sexual assault kit on Ms. Spaulding. Ms. Flink noted bruising to the prepuce and a tear to the posterior fourchette. Ms. Flink testified that these injuries could have been caused by consensual sex or rape.

The State also called Alison Walker, a DNA[1] scientist with the Washington State Patrol Crime Laboratory. Ms. Walker tested the bandana and found Ms. Spaulding's

[1] Deoxyribonucleic acid.

saliva and skin cells on it. Ms. Walker also testified that the perineal swabs gathered by Ms. Flink in the sexual assault kit matched a mixture of Knapp and Ms. Spaulding.

Knapp requested an instruction that told the jury the State had the burden of proving an absence of consent beyond a reasonable doubt. The State opposed this instruction, arguing it was not a correct statement of the law. The State instead proposed Washington pattern jury instruction 18.25, which reads, "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." RP Trial at 677-78; *see also* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 18.25 (4th ed. 2016). The trial court declined to give Knapp's proposed instruction and instead gave the State's.

The jury found Knapp guilty of second degree rape. The trial court sentenced Knapp to a midrange sentence—110 months to life. The court also imposed a $200 criminal filing fee and a $100 DNA fee.

Knapp timely appealed.

ANALYSIS

A. JURY INSTRUCTION

Knapp contends the trial court erred when it declined to give his proposed jury instruction on consent. We disagree.

Our review of a trial court's refusal to give a jury instruction depends on the basis of the trial court's decision: If the decision was based on a factual determination, it is reviewed for an abuse of discretion; if the decision was based on a legal conclusion, it is reviewed de novo. *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). Here, the trial court denied Knapp's instruction because it believed it would add an additional element to the crime charged. Because the trial court's decision not to give Knapp's instruction was based on a legal conclusion, our review is de novo. *See State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

Each party is entitled to have the jury instructed on its theory of the case when there is sufficient evidence to support that theory. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Jury instructions are sufficient "'if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.'" *State v. Rodriguez*, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004) (quoting *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000)). Read as a whole, the jury instructions must make the legal standard apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

The United States Supreme Court has interpreted the due process clause of the Fourteenth Amendment to the United States Constitution as "requiring the State to prove

'beyond a reasonable doubt . . . every fact necessary to constitute the crime with which [a defendant] is charged.'" *W.R.*, 181 Wn.2d at 761-62 (alterations in original) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Sometimes, the burden is allocated to the defendant to prove an affirmative defense—when the defense excuses conduct that otherwise would be punishable. *Id.* at 762.

In *W.R.*, the defendant was charged with rape in the second degree under RCW 9A.44.050(1)(a). *W.R.*, 181 Wn.2d at 760. The defendant proceeded to a bench trial and conceded that he had sex with the victim, but asserted the sex was consensual. The court convicted the defendant, finding the State proved rape in the second degree beyond a reasonable doubt while the defendant failed to prove consent by a preponderance of the evidence.

On appeal, the court began by reevaluating precedent, and recognized a flaw in its prior rulings—that requiring the defendant to prove consent by a preponderance of the evidence overlooked the "negates" analysis. *Id.* at 763. The "negates" analysis stands for the proposition that the State cannot "burden a defendant with proving a defense that necessarily negates an element of the charged offense." *Id.* at 764. The court then found that consent negates the "forcible compulsion" element in second degree rape. *Id.* at 765-68.

Under RCW 9A.44.010(6), "'[f]orcible compulsion'" is defined as "physical force which overcomes resistance, or a threat . . . that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." "There can be no forcible compulsion when the victim consents, as there is no resistance to overcome." *W.R.*, 181 Wn.2d at 765. Therefore, because consent negates the element of "forcible compulsion," it violates due process to allocate the burden of proving consent by a preponderance of the evidence to the defendant. *Id.* at 766-68. In essence, it would relieve the State of its burden and place it on the defendant.

For this reason, the Washington Supreme Court overturned years of precedent and held that in rape cases involving forcible compulsion and a defense of consent, consent negates forcible compulsion and due process prohibits burdening the defendant to prove consent by a preponderance of the evidence. *Id.* at 768. The defendant may be burdened with putting consent at issue, but such evidence need only create reasonable doubt as to the victim's consent. *Id.*

Here, both parties rely heavily on *W.R.* Knapp argues that *W.R.* stands for the proposition that the burden to prove consent has now shifted to the State, and the State must prove a lack of consent beyond a reasonable doubt. Knapp's proposed jury

instruction read: "Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating a freely given agreement to have sexual intercourse. The Defendant has no burden to prove that sexual intercourse was consensual. It is the State's burden to prove the absence of consent beyond a reasonable doubt." Clerk's Papers (CP) at 75. He argues this proposed jury instruction was erroneously denied. We find Knapp's reading of *W.R.* not reflective of its actual holding.

The court in *W.R.* focused on whether the burden to prove consent was correctly placed on the defendant. It did not hold that the State must prove the absence of consent. The court stated:

> As such, the defense of consent should be treated similar to the alibi defense at issue in [*State v.*] *Riker*[, 123 Wn.2d 351, 869 P.2d 43 (1994)] in that the defendant need only produce sufficient evidence to create a reasonable doubt as to the victim's consent. . . . [T]he burden must remain on the State to prove forcible compulsion beyond a reasonable doubt.

181 Wn.2d at 766-67. If the trial court had given Knapp's instruction, it would have added a fourth element to the charged offense. The State would have had to prove: (1) Knapp engaged in sexual intercourse with Ms. Spaulding, (2) the sexual intercourse occurred by forcible compulsion, (3) the act occurred in Washington, *and* (4) there was an absence of consent. *See* RCW 9A.44.050(1)(a).

Here, the trial court's instructions required the State to prove beyond a reasonable doubt the first three elements recited above. With respect to consent, the trial court's instruction read: "Evidence of consent may be taken into consideration in determining whether the defendant used forcible compulsion to have sexual intercourse." CP at 430. The consent instruction was taken verbatim from WPIC 18.25. WPIC 18.25 was modified after the Supreme Court's ruling in *W.R.* The comments to WPIC 18.25 direct courts to use this instruction with WPIC 41.02—rape in the second degree. Although the WPICs are not authoritative and do not have prior approval from any court, they are persuasive as restatements of the existing law. *See State v. Mills*, 116 Wn. App. 106, 64 P.3d 1253 (2003), *rev'd on other grounds by* 154 Wn.2d 1, 109 P.3d 415 (2005).

We conclude the trial court did not commit legal error when it denied Knapp's proposed instruction. Knapp's proposed instruction was an incorrect statement of the law—*W.R.* did not hold that the burden to prove an absence of consent shifted to the State. Instead, it held that the burden to prove consent cannot be placed on the defendant.

Moreover, when read as a whole, the trial court's instructions allowed Knapp to argue his theory of the case. Knapp claimed the sexual intercourse was consensual. The court's instructions on the elements of the offense and consent allowed Knapp to argue

his theory of the case—that Ms. Spaulding consented to sexual intercourse and the State failed to prove forcible compulsion beyond a reasonable doubt.

Affirmed.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

B. CRIMINAL FILING FEE AND DNA FEE

Knapp contends that the $200 criminal filing fee and the $100 DNA fee must be struck from his judgment and sentence based on *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The State concedes this point and we agree.

Engrossed Second Substitute House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3); *Ramirez*, 191 Wn.2d at 745-47. Among the changes was an amendment to former RCW 36.18.020(2)(h) (2015) to prohibit the imposition of the $200 criminal filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). As held in *Ramirez*, the changes to the criminal filing fee statute apply prospectively to cases pending on direct appeal prior to June 7, 2018.

Ramirez, 191 Wn.2d at 747. Accordingly, the change in the law applies to Knapp's case. Because Knapp was indigent in the trial court and is still indigent on appeal, the $200 criminal filing fee should be struck pursuant to *Ramirez*.

The change in the law also prohibits imposition of the DNA collection fee when the State has previously collected the offender's DNA as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18. The record establishes that Knapp has two prior Washington State felonies since 2002. Since that time, Washington law has required defendants with a felony conviction to provide a DNA sample. *State v. Catling*, 193 Wn.2d 252, 259, 438 P.3d 1174 (2019); *see also* RCW 43.43.754; LAWS OF 2002, ch. 289, § 2. Knapp's prior felonies give rise to a presumption that the State has previously collected a DNA sample from him. The State has not requested an opportunity to contest this presumption. We, therefore, direct the trial court to strike the DNA collection fee.

C. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Knapp filed a statement of additional grounds for review alleging prosecutorial misconduct and ineffective assistance of counsel. But Knapp's assertions do not inform us of the specific conduct he claims was prosecutorial misconduct nor does he describe with sufficient specificity how his counsel was ineffective. Because Knapp's assertions

do not inform us of the nature and the occurrence of the claimed errors, we decline to review them. *State v. Clark-El*, 196 Wn. App. 614, 625, 384 P.3d 627 (2016).

Affirmed.

Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

BURKHART & BURKHART, PLLC

January 09, 2020 - 12:28 PM

Transmittal Information

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