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Supreme Court No. 99258-4
(COA No. 79178-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY VENTAR,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Corey Ventar, petitioner here and appellant below, asks this Court to accept review of the unpublished Court of Appeals decision, filed September 28, 2020, terminating review.[1] The Court of Appeals denied a motion to reconsider on October 29, 2020. RAP 13.3(a)(1); RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. To convict a person of second-degree rape based on mental incapacitation or physical helplessness, the prosecution must prove more than the complainant was simply intoxicated. Instead, it must prove either the influence of substances produced a condition that prevented the complainant from understanding the nature or consequences of the act of sexual intercourse, or the complainant was unconscious or unable to communicate. Here, the State proved Jessica consumed alcohol and Xanax, but it also proved Jessica was conversing with people, walking around, and engaging in intentional acts throughout the evening. This Court should accept review because the Court of Appeals ignored the plain language of the governing statutes and numerous cases from this Court and the Court of Appeals and improperly affirmed Corey's conviction based on evidence of intoxication alone.

[1] As he did in the Court of Appeals, Corey refers to himself and Jessica Carpenter, the complainant, by first names.

2. A person who reasonably believes the complainant is not mentally incapacitated or physically helpless is not guilty of second-degree rape. Jessica was talking and walking around, interacting with others, and engaging in intentional acts, and Corey testified she initiated their encounter and was a willing participant. This Court should accept review because Corey proved the affirmative defense by a preponderance of the evidence, yet the Court of Appeals affirmed his conviction.

3. The due process right to a fair trial and the rules of evidence prohibit courts from admitting irrelevant or unduly prejudicial evidence. The court here admitted irrelevant and highly inflammatory evidence that Jessica attempted suicide in the year after her encounter with Corey. It also denied Corey's motion for a mistrial where a witness repeatedly violated the court's in limine ruling and testified Corey sold drugs. This Court should accept review because Corey properly objected to both errors and demonstrated the inadmissible evidence prejudiced him and denied him a fundamentally fair trial.

4. Article IV, section 16 prohibits judges from commenting on the evidence, including the credibility of witnesses. Here, after both parties and the court had referred to the complainant by her given name throughout the entire trial, the court used only initials to refer to her in the jury instructions, including the "to convict" and affirmative defense

instructions. The court's use of initials was an unconstitutional comment on the evidence and signaled to the jury the court thought the complainant was a victim of a sexual offense in need of protection.

5. The Fourteenth Amendment and article I, section 3 provide defendants with the rights to due process of law and the presumption of innocence. The court redacted the "to convict" and affirmative defense instructions to signal the complainant was the victim of a sexual offense who required unanimity, in violation of these constitutional rights

6. Article I, section 10 guarantees the open administration of justice and prohibits courts from redacting court documents without engaging in an on-the-record analysis. The court's redaction of Jessica's name in the jury instructions and of Jessica's and other witnesses' names in nearly every court document violated article I, section 10.

C. STATEMENT OF THE CASE

Nineteen-year-old Corey and fifteen-year-old Jessica spent an evening together in the park, talking and socializing with each other and other teenagers, drinking alcohol, and taking Xanax. RP 232, 242, 423, 463-67, 507-09, 702-05.

Jessica engaged in intentional activity throughout the evening. She talked with people and walked around. RP 278-79, 374-76, 703-05. She actively evaded the park director who tried to send her home. RP 354-58,

374-78. Jessica also denied consuming intoxicants and said she did not want the park staff to call her mother. RP 358, 374-78, 408.

When the park director was distracted, Jessica, Corey, and several other teenagers ran into the woods to hide. RP 250, 360, 515, 522-24, 771-72. Jessica and Corey remained hiding while the others went to find their friends and soon began "making out." RP 250, 516, 772-73. Each gave the other oral sex. RP 773-74. Jessica, who did not remember giving or receiving oral sex, believed they had vaginal sex because she felt something between her legs and remembered saying no. RP 564. Corey denied they had vaginal intercourse, explaining Jessica said no and told him she did not want to because she was only sixteen. RP 773-74.

After their encounter, Corey and Jessica returned to a bench. RP 774-75. A park ranger saw them walk out of the woods "holding hands, sort of arm in arm." RP 759-60. Jessica then left Corey to go to the bathroom. RP 775. One of her friends saw her in the bushes outside of the bathroom and helped her inside so she could clean up. RP 430-31.

When Jessica's mother arrived and found Jessica in the bathroom, she became mad and began yelling at her. RP 432, 440, 713-14, 717. Jessica "perked up" and told her mother she was fine but had just thrown up in the bushes. RP 432-33, 441, 713, 717. Jessica's mother pulled her to the car, where Jessica told her she had been raped. RP 564, 586, 712.

The State charged Corey, who was forty-eight months and three days older than Jessica, with second-degree rape and third-degree rape of a child based on the theories Jessica was incapable of consent due to mental incapacity and age. At trial, over Corey's objection, the court admitted testimony that Jessica attempted suicide after the encounter. RP 590. The court also denied Corey's motion for a mistrial after a witness repeatedly violated the court's in limine order by testifying Corey sold her and Jessica Xanax. RP 452-53, 461, 467-69. After hearing this inflammatory testimony, a jury convicted Corey of both counts.[2]

D. ARGUMENT

1. The Court of Appeals wrongly affirmed Corey's second-degree rape conviction based on evidence of mere intoxication where the State presented insufficient evidence of mental incapacity or physical helplessness.

a. Mere intoxication does not establish mental incapacity or physical helplessness.

To convict Corey of rape in the second degree, the State was required to prove beyond a reasonable doubt that he had sexual intercourse with Jessica when she was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). "Physically helpless" means being "unconscious" or "physically unable to

[2] The Court of Appeals vacated the rape of a child conviction on double jeopardy grounds and ordered resentencing of the remaining rape count. Slip op. at 5-6.

communicate unwillingness to an act." RCW 9A.44.010(5). "Mental incapacity" means "that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether the condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4). Because the State presented insufficient evidence under either theory, this Court should accept review.

To prove a person is incapable of consent by mental incapacity, the State must prove more than the person was in an intoxicated condition. Instead, the State must prove that, at the time of the act, the person suffered from a condition, produced by the influence of a substance, which prevented her from understanding the nature or consequences of the act of sexual intercourse. RCW 9A.44.010(4); *State v. Ortega-Martinez*, 124 Wn.2d 702, 716, 881 P.2d 231 (1994). Only where the evidence establishes the complainant is so "debilitatingly intoxicated" that she could not understand the nature or consequences of sexual intercourse at the time when it happened does intoxication rise to the level of mental incapacity. *State v. Al-Hamdani*, 109 Wn. App. 599, 609, 36 P.3d 1103 (2001). The State must also prove causation between the condition and the lack of understanding of the sexual acts. *Ortega-Martinez*, 124 Wn.2d at 713-14; *State v. Summers*, 70 Wn. App. 424, 431-32, 853 P.2d 953 (1993).

In addition to case law, the plain language of the statute demonstrates that mere intoxication is insufficient to establish incapacity. Basic rules of statutory construction require courts rely on the plain language of a statute to interpret its meaning. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Where the plain language of a statute is "unambiguous" and has only one reasonable interpretation, the court's inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In addition, courts must give criminal statutes "a literal and strict interpretation," and avoid a reading that creates "absurd results." *State v. Delgado*, 148 Wn.2d 723, 727, 730, 63 P.3d 792 (2003).

Here, by statutory definition, mental incapacity is a condition produced by the influence of a substance which "prevents a person from understanding the nature or consequences of the act of sexual intercourse." RCW 9A.44.010(4). Therefore, proof of an intoxicated condition alone is insufficient.

Historically, the legislature has clearly distinguished between intoxication and incapacity. "[V]oluntary intoxication does not render an act less criminal." *State v. Mriglot*, 88 Wn.2d 573, 574, 564 P.2d 784 (1977). "A criminal act committed by a voluntarily intoxicated person is not justified or excused." *State v. Coates,* 107 Wn.2d 882, 890, 735 P.2d 64 (1987) (quoting *State v. Fuller*, 42 Wn. App. 53, 55, 708 P.2d 413

(1985)). Nor may a court consider a defendant's intoxication as a grounds for an exceptional sentence, even where the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired. RCW 9.94A.535(1)(e). Only where intoxication is so severe that it negates a mens rea element may it rise to the level of a defense. RCW 9A.16.090; *see, e.g., State v. Norby*, 20 Wn. App. 378, 380-81, 579 P.2d 1358 (1978) (recognizing intoxication can negate knowingly element of assault).

b. <u>The prosecution did not present sufficient evidence of either mental incapacity or physical helplessness.</u>

Here, the State argued Jessica was incapable of consent due to mental incapacitation. RP 219, 7/30/18RP 34-42. The State did not present any evidence Jessica was incapacitated due to physical helplessness. Indeed, both the prosecution and defense witnesses testified Jessica was conscious and communicative. *State v. Bucknell*, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008) (finding insufficient evidence physically limited complainant was physically helpless where she had ability to communicate orally). Therefore, the State was required to prove her impaired condition made her unable to understand the nature or consequences of sexual intercourse.

All the witnesses testified Jessica drank alcohol and took Xanax, but they differed on her level of intoxication. One witness testified Jessica

was “out of control” but remained aware enough that she “wouldn’t let anyone help her.” RP 245, 248. Another witness thought Jessica appeared intoxicated but recalled she could walk and talk. RP 278-79. Even park director Tom Teigen, who believed Jessica was under the influence, said she understood the questions he asked her, even though she was not speaking clearly. RP 354, 376. And Sophie Garrison, who was with Jessica most of the evening, believed she was “obviously like really intoxicated” but also “thought she was okay.” RP 705-06.

Jessica also had sufficient mental capacity to formulate and participate in plans to evade getting caught using substances in the park. She was sufficiently coherent to realize she appeared under the influence to the park director, so she lied and denied his accusations. RP 358, 374-76, 408. Jessica also understood the park staff wanted her to leave the park and intended to call her mother, so she ran and hid in the woods with the other teenagers to avoid that result. RP 360-61, 515, 523-24, 771-72.

Neither Jessica nor anyone else testified she was passed out, unconscious, or asleep at any point before or during the sexual encounter. Jessica recalled taking one-half Xanax and then claimed to remember nothing else about the entire evening, save for one brief flash during the

sexual encounter, until her mother arrived.[3] RP 562-65. Although Jessica did not recall how she left the woods after the incident, a park ranger testified he saw Jessica and Corey walk out of the woods together arm in arm. RP 758-60.

Where the State fails to prove beyond a reasonable doubt that the complainant was, in fact, incapacitated or helpless, the State fails to establish the offense. *State v. Corstine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013). Here, the State proved Jessica ingested intoxicants but failed to prove she was physically helpless or mentally incapable of consenting due to those intoxicants.

c. Corey proved by a preponderance of the evidence that he reasonably believed Jessica knowingly consented.

Where the State avers a person cannot consent to sexual intercourse due to mental incapacitation, it is an affirmative defense that the defendant reasonably believed the complainant was not mentally incapacitated. RCW 9A.44.030(1); *State v. Lozano*, 189 Wn. App. 117, 124, 356 P.3d 219 (2015). To establish this affirmative defense, the jury may consider the complainant's words or conduct, including those which

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[3] A person experiencing a black-out is not unconscious and may function as usual, even though they do not later remember their activities. Annamarya Scaccia, Healthline, *Understanding Why Blackouts Happen*, August 21, 2018, available at https://americanaddictioncenters.org/alcoholism-treatment/blackout; American Addiction Centers, *Blackout Drinking: Impaired Judgement, Memory Loss, and Other Harmful Effects*, February 3, 2020, available at https://www.healthline.com/health/what-causes-blackouts#prevention.

indicate consent. While consent is not a defense where the State proves the complainant was mentally incapacitated, evidence of consent is relevant to the defendant's reasonable belief the complainant could consent and was not mentally incapacitated. *Lozano*, 189 Wn. App. at 125 n.6.

Here, as explained above, multiple people testified to Jessica's actions that indicated she was capable of consent, even though intoxicated. In addition, Corey testified Jessica was responsive to him and to other teenagers throughout the night. Consistent with other witnesses, Corey explained that Jessica and others ran into the woods to avoid the park ranger. RP 250, 515, 524, 768-72. In the woods, Jessica initiated the encounter by kissing him. RP 772-73. She both gave and received oral sex. RP 773-74. All of Jessica's actions signified to Corey that she was capable of, and was in fact, consenting. He had no reason to believe she was incapacitated to the point of being unable to understand the sex acts in which they were engaging.

Corey proved by a preponderance of the evidence that he reasonably believed Jessica was not incapacitated.

d. <u>The Court of Appeals confused intoxication or impairment with physical helplessness and mental incapacity and improperly affirmed despite insufficient evidence.</u>

The Court of Appeals held the evidence demonstrated Jessica was intoxicated or impaired. As a result, it rejected Corey's challenge to the

sufficiency of the evidence establishing the offense and disproving the affirmative defense. Slip op. at 7.

The court held that because witnesses testified Jessica slurred her speech, had trouble walking, and appeared unaware of her surroundings at times, the State presented sufficient evidence she was mentally incapacitated or physically helpless. Slip op. at 7. But this is evidence merely of intoxication. Considered in the light most favorable to the State, the evidence established Jessica was inebriated. The evidence did not establish mental incapacity. RCW 9A.44.010(4). Nor did evidence establish Jessica was unconscious, unable to communicate, or physically helpless. RCW 9A.44.010(5). Indeed, the State made no such argument at trial and proceeded only under a theory of mental incapacity. RP 219; 7/30/18RP 34-42.

Insufficient evidence supported the element of mental incapacity or physical helplessness. Alternatively, a preponderance of the evidence established Corey reasonably believed Jessica was not mentally incapacity or physically helpless. This Court should accept review and clarify that a complainant’s mere intoxication is insufficient to support a conviction for rape in the second degree.

2. The admission of irrelevant, unduly prejudicial evidence denied Corey a fair trial.

The right to a fair trial is a fundamental part of due process of law. *United States v. Salerno*, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d

697 (1987); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Erroneous evidentiary rulings violate due process when they deprive an accused person of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990). Here, two evidentiary errors denied Corey his right to a fair trial.

First, Jessica's mother testified Jessica attempted suicide in the first year after the encounter. RP 590. Corey immediately objected, but the court overruled the objection. RP 590. The court should have sustained the objection and excluded this evidence as irrelevant and unrelated to any element of the crimes or the affirmative defenses. ER 401, 402. Moreover, any marginal relevance was outweighed by the danger of unfair prejudice from this extremely inflammatory, highly prejudicial testimony that served no purpose other than to elicit improper sympathy for Jessica. ER 403.

The Court of Appeals declined to review this claim because it found Corey's objection did not adequately preserve the error. Slip. op. at 8-9. However, the inflammatory nature of the answer, its irrelevance, and prejudice are immediately apparent. Where the basis for an objection is "apparent from the context," an objection is sufficient to preserve the error for review. ER 103(a)(1); *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 127 (1987) (reviewing error even where defendant "did not specifically raise a

challenge to reliability" because "this ground for objection is readily apparent from the circumstances"); *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (reviewing objection absent citation to specific rule where objection was apparent from context); *State v. Jones*, 71 Wn. App. 798, 813, 863 P.2d 85 (1993) (same). Moreover, defendants may challenge a violation of their fundamental right to a fair trial on appeal. RAP 2.5(a)(3). The Court of Appeals should have considered the error and reversed.

Second, the trial court granted Corey's motion to exclude evidence of prior acts under ER 403 and 404, except for evidence that Corey provided Jessica with Xanax on the night of their encounter. CP 107; 7/23/18RP 63-65. The court permitted the State to elicit evidence of the "voluntary exchange of the drug" but not "in the context of a sales transaction." RP 456, 458. Despite this ruling, the State repeatedly elicited testimony from Jessica's friend Sophie that Corey *sold* Xanax. RP 452-53, 467-68. Although the court sustained several objections to the repeated violation of its order, it denied Corey's motions for a mistrial. RP 461, 469, 493.

The Court of Appeals rejected Corey's challenge because it found the evidence was admissible as res gestae. Slip op. at 10. But the jurors already heard testimony the teenagers were consuming intoxicants and that Corey gave some of his Xanax to Jessica. The claim that he *sold* the

Xanax was not necessary to provide the jury "a complete picture." Slip op. at 10 (quoting *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)).

The witness' repeated testimony Corey was *selling* Xanax portrayed Corey as a drug dealer, as opposed to someone who was sharing Xanax with a friend at a party. RP 452, 467-68. This testimony was irrelevant, more prejudicial than probative, and violated the in limine ruling. RP 454-61.

The prejudicial effect from this improper testimony is evident from the fact that the court had to dismiss a juror who was offended by the evidence suggesting Corey was a drug dealer. RP 496-501. The morning after the jury heard Corey sold Xanax to Jessica and her friend, Juror No. 11 informed the court that he "didn't want nothing to do with no drug dealers" and "d[id]n't really have much use for drug dealers" because his son died from Xanax. RP 498. After questioning the juror, the court dismiss him from the case. RP 496-501.

The court properly sustained Corey's objections and properly dismissed the offended juror. However, the testimony was so inflammatory that it necessarily affected the remaining jurors and denied Corey a fair trial. *See, e.g., State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015); *In re Pers. Restraint Petition of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). It should have granted Corey's motion and declared a mistrial.

The combined evidentiary errors prejudiced Corey. It is "reasonably probable that absent the highly prejudicial evidence . . . the jury would have reached a different verdict." *State v. Gunderson*, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). This Court should accept review.

3. The court impermissibly commented on the evidence and violated the presumption of innocence when it referred to Jessica by her initials in the jury instructions.

Article IV, § 16 provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court's personal opinion on the evidence. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

After both parties, all the witnesses, and the court itself had referred to the complainant as "Jessica," "Jessica Carpenter," or "Ms. Carpenter" throughout jury selection and the entire trial, the court suddenly redacted Jessica's name and referred to her by only initials in the "to convict" and affirmative defense instructions. CP 86, 89, 91-92. In doing so, the court conveyed to the jury its opinion that Jessica was, in fact, a victim of a sexual offense requiring unanimity. The impact of this was particularly significant when everyone had referred to Jessica by her

name throughout the trial. It was only *after* hearing all of the evidence that the court changed the way it referred to Jessica.

The court's use of initials amounted to an impermissible comment on the evidence in violation of article IV, section 16. In addition, the use of Jessica's initials in the instructions also undermined the presumption of innocence by preemptively telling the jury the court was protecting her as a sexual assault victim. This deprived Corey of his constitutional right to due process and to a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

The Court of Appeals ignored the significance of this redaction by relying on its recent decision in *State v. Mansour*, 14 Wn. App. 2d 323, 470 P.3d 543 (2020) (petition for review pending). Slip op. at 11. But the opinion in *Mansour* is wrong. In *Mansour*, the court held "the name of the victim of child molestation is not a factual issue requiring resolution." 14 Wn. App. 2d at 329. The error here is not the State's need to prove Jessica's identity, but the court's choice to shield her identity, giving her the status of a victim of a sexual assault. The prejudice from the comment was heightened where the court used the initials *only* in the jury instructions, and *only* after hearing the evidence. CP 86, 89, 91-92.

The Court of Appeals' reliance on *State v. Levy* is similarly misplaced because there was no redaction in the "to convict" instruction in

Levy. *Mansour*, 14 Wn. App. 2d at 329-31 (citing *State v. Levy,* 156 Wn.2d 709, 722, 132 P.3d 1076 (2006)). The *Levy* court found the use of a robbery victim's name in the "to convict" instruction was not a comment on the evidence because the victim's identity was not an element. This has no bearing on whether it is a comment to redact that person's name in the instruction to protect their identity.

Finally, the *Mansour* court's reliance on *State v. Alger* is flawed. 14 Wn. App. 2d at 330 (citing *State v. Alger*, 31 Wn. App. 244, 248-50, 640 P.2d 44 (1982)). In *Alger*, the court read an agreed-upon stipulation between the parties containing the word "victim." 31 Wn. App. at 248. *Alger* did not address the redaction of the victim's name in the "to convict" following the use of her name throughout trial.

The use of initials concealed Jessica's identity and told the jury the court believed she was, in fact, a sexual assault victim in need of protection. This was an unconstitutional comment on the evidence and served to improperly shift the burden onto Corey to prove Jessica was not his victim. This Court should accept review.

4. The redaction of Jessica's name and other witnesses' names in court documents without an *Ishikawa* analysis violated Corey's right to a public trial.

The Washington Constitution requires, "Justice in all cases shall be administered openly." Const. art. I, § 10. Transparency is critical in

fostering understanding and trust in the judicial system and ensuring a fair trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). "The open administration of justice is a vital constitutional safeguard" necessary to protect the integrity of the courts. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). The onus is on the court to ensure compliance with this constitutional mandate. *Id.* at 9.

Court records, like courtrooms, must be open, absent justified closure demonstrated on the record. *Id.* at 7. Names of litigants or alleged victims in court documents are encompassed by article I, section 10 and subject to an *Ishikawa* analysis. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) (portion of statute requiring courts to preclude disclosure of identity of all child victims of sexual assault violates article I, section 10); *Doe G. v. Dep't of Corr.*, 190 Wn.2d 185, 410 P.3d 1156 (2018) (court was required to apply *Ishikawa* framework before allowing litigants seeking to preclude release of SSOSA evaluations to proceed in pseudonym).

In Corey's case, his constitutional public trial right was repeatedly violated each time his accuser's name and some of the witnesses' names were redacted without an on-the-record *Ishikawa* analysis. Jessica's name was redacted in the jury instructions, CP 86, 89, 91-92, information, CP 117-20, 134-35, affidavit of probable cause CP 127-32, pre-trial sexual

assault protection order, CP 14-50, and trial memorandum, CP 136-48. In addition, the State referred to her as only "the victim" in its motion and affidavit for a DNA sample, CP 123-25, and its response to Corey's motion for a mistrial, CP 96-103. Finally, the State also used initials for other witnesses in its trial memorandum, CP 136-48, and response to Corey's motion for a mistrial, CP 96-103.

The concealment of Jessica's and other witnesses' identities in court documents violated article I, section 10. The Court of Appeals' opinion is contrary to this Court's opinions in *Eikenberry*, *Hundtofte*, and *Ishikawa* and disregards the robust protection of Article I, section 10, those opinions require. Slip op. at 12-13.

E. CONCLUSION

This Court should accept review under RAP 13.4(b).

DATED this 25th day of November, 2020.

Respectfully submitted,

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APPENDIX A

September 28, 2020, Opinion

FILED
9/28/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

COREY ALEXANDER VENTAR,

Appellant.

DIVISION ONE

No. 79178-8-I

UNPUBLISHED OPINION

DWYER, J. — Corey Alexander Ventar appeals from the judgment entered on a jury's verdicts finding him guilty of rape in the second degree and rape of a child in the third degree. He contends that the judgment violates his right to be free from double jeopardy. Ventar also avers that his convictions were supported by insufficient evidence, that the trial court erred in admitting certain testimony, and that the use of the victim's initials in the jury instructions constituted both an impermissible comment on the evidence and an unconstitutional court closure.

The State concedes that the trial court's entry of judgment on convictions for both rape in the second degree, premised on rape of an incapacitated victim, and rape of a child in the third degree based on a single underlying act violated Ventar's right to be free from double jeopardy. We accept this concession and order vacation of Ventar's conviction of rape of a child in the third degree. We

affirm the trial court's ruling in all other challenged respects. Accordingly, we affirm Ventar's conviction of rape in the second degree.

I

In August 2016, 19-year-old Corey Ventar came to Snohomish County to visit his friend T.R. On August 4, 2016, Ventar and T.R. met with T.R.'s girlfriend, S.G., and her friend, J.C., to attend a "Movie in the Park Night" at Willis Tucker Park. J.C. was 15 years old.

Movie nights in Willis Tucker Park were typically attended by 1,300 to 2,000 people. J.C. and her friends went to "movie night" every week to drink and socialize. On this occasion, J.C. drank "[a]t least half" of a bottle of vodka. S.G. and J.C. split a tablet of Xanax that they obtained from T.R. and Ventar. Ventar also later gave J.C. an additional quarter tablet of Xanax.

J.C. became intoxicated and, according to several witnesses, was having difficulty walking, talking, and understanding her surroundings. Another witness remembered that J.C. could walk and talk, but had a slowed reaction time.

Park director Tom Teigen observed J.C. and became concerned. Teigen spoke with her and, although she was able to respond to his questions, he noticed that her speech was slurred and that she quickly became less coherent. Teigen determined that J.C.'s mother should be called to take her home. Ventar offered to walk J.C. home but it was "obvious" to Teigen that J.C. was so intoxicated that she could not physically succeed in walking home. Teigen believed that J.C.'s friends were calling her mother, however, and gave his

attention to other park patrons. When he returned to check on J.C., she and her friends were gone.

In fact, Ventar, J.C. and several others had hidden in the nearby woods. J.C. and Ventar remained in the woods while J.C.'s friends left to tell Teigen that they had secured a ride home for J.C. When these teens returned, Ventar and J.C. were no longer at that location. After approximately 45 minutes, during which her friends were unable to find J.C., S.G. located J.C.'s younger sister and asked her to call J.C.'s mother.

Testimony diverged as to what occurred while Ventar and J.C. were alone in the woods. Although J.C. does not recall much of the evening, she remembered seeing Ventar on top of her, and feeling a pressure between her legs. J.C. put her hand down and said "no" before "black[ing] out."

According to Ventar, J.C. began kissing him and they each performed oral sex on the other. They did not have vaginal sex, Ventar stated, because J.C. told him she did not want to have sex because she was "still a virgin," and "only 16."[1] Ultimately, J.C. and Ventar walked out of the woods together and sat on picnic benches. Several of J.C.'s friends saw them, noticed that there was something in J.C.'s hair, and escorted her to the bathroom.

Another teen testified to helping J.C. into the bathroom after finding her lying face down in a bush nearby.

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[1] J.C. was, in fact, 15 years old at the time of these events.

Meanwhile, J.C.'s mother arrived at the park. J.C.'s mother and S.G. walked into the bathroom together and found J.C. vomiting and unable to stand. J.C.'s mother helped her into the backseat of her car.

J.C. then told her mother that she had been raped. J.C. was transported to the hospital. A forensic nurse examined J.C. and observed that her hymen had a recent laceration and that there was dirt and debris in her genital area. The nurse also conducted swabs testing from a standard sexual assault kit and cut off a piece of J.C.'s hair that appeared to have semen on it. Lab tests indicated that semen was present in the hair sample, and in external anal, perineal, and oral swabs. Saliva was discovered from the perineal and external anal swabs. DNA from the hair, perineal, and oral samples matched a DNA sample provided by Ventar.

Ventar was charged with rape in the second degree and rape of a child in the third degree. At trial, although her full name had been used in open court, J.C.'s initials were used in the written jury instructions.

Ventar was convicted on both counts. He was sentenced to a period of incarceration of 120 months to life on the second degree rape conviction, with a 36 month sentence on the child rape conviction. The sentencing court did not treat the two convictions as the same criminal conduct at sentencing, thus including each offense in the offender score of the other. The sentencing court also ordered a $100 DNA collection fee and certain mandatory legal financial

obligations, imposing interest on those legal financial obligations "from the date of the judgment until payment in full."

Ventar appeals.

II

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. State v. Gocken, 127 Wn.2d. 95, 100, 896 P.2d 1267 (1995).

Ventar contends—and the State concedes—that entering judgment on the convictions for rape in the second degree and rape of a child in the third degree, under the circumstances of this case, violated double jeopardy. We agree.

The State's concession is motivated by our Supreme Court's decision in State v. Hughes, 166 Wn.2d 675, 212 P.3d 558 (2009). In that decision, the court described the issue before it thusly:

> Whether convictions for rape of a child in the second degree and rape in the second degree due to nonconsent by reason of mental incapacity or physical helplessness which arise out of the same act violate double jeopardy.

Hughes, 166 Wn.2d at 681. The court answered that query in the affirmative, explaining that

> [a]lthough the elements of the crimes facially differ, both statutes require proof of nonconsent because of the victim's status. Regardless of whether nonconsent is proved by the age of the victim and the age differential between the victim and the perpetrator or by the mental incapacity or physical helplessness of the victim, both statutes protect individuals who are unable to consent by reason of their status.

Hughes, 166 Wn.2d at 684.

The State correctly concedes that the age differentials between rape of a child in the second and third degrees do not remove the latter offense from the reach of the Hughes decision.[2]

The remedy for a violation of double jeopardy protections is to vacate the conviction of the lesser offense. State v. Albarran, 187 Wn.2d 15, 22, 383 P.3d 1037 (2016). Here, the lesser of the two offenses is rape of a child in the third degree.[3] Therefore, we order that conviction vacated and remand for resentencing on the remaining conviction.

III

Ventar next argues that insufficient evidence supports each of his convictions. Because we have already determined that the conviction for rape of a child in the third degree must be vacated, we need not address the evidentiary sufficiency underlying that verdict. As to the other conviction, because a rational trier of fact could have found the elements of rape in the second degree proved beyond a reasonable doubt, Ventar's contention fails.

Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

[2] The Hughes decision is consistent with case law preceding the effective date of the Sentencing Reform Act of 1981, chapter 9.94A RCW. See, e.g., State v. Birgen, 33 Wn. App. 1, 651 P.2d. 240 (1982).

[3] RCW 9A.44.050(2) establishes that rape in the second degree is a Class A felony. RCW 9A.44.079(2) establishes that rape of a child in the third degree is a Class C felony.

therefrom." Salinas, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, the credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Ventar asserts that the State proffered insufficient evidence to support his conviction of rape in the second degree because it did not prove that J.C. was physically helpless or mentally incapacitated at the time that he had sexual intercourse with her or, alternatively, that Ventar was unaware that J.C. was physically helpless or mentally incapacitated. These arguments are without merit. Numerous witnesses remembered J.C. slurring her speech, unable to walk on her own, and appearing unaware of her surroundings after "chugging" half of a bottle of vodka and taking Xanax. A park official who interacted with J.C. was concerned enough about J.C. that he determined that her mother should be called.

A rational finder of fact could infer that a 15-year-old girl whose level of intoxication was as described by multiple witnesses, and who an adult had already identified as physically unable to walk home, was physically helpless or mentally incapacitated. Similarly, a rational finder of fact could find it unbelievable that Ventar merely perceived J.C. as "happy" and "excited."

From the evidence adduced at trial, a rational finder of fact could find that J.C. was physically helpless or mentally incapacitated, and that Ventar was aware of J.C.'s helplessness or incapacitation. Thus, a constitutionally sufficient quantum of evidence supports Ventar's conviction of rape in the second degree.

IV

Ventar next avers that the trial court erred by admitting evidence of J.C.'s subsequent suicide attempt. Because no adequate objection was interposed to this testimony, Ventar failed to preserve this claim of error for review. Appellate relief is not warranted.

A party may not raise an objection that was not properly preserved in the trial court absent manifest constitutional error. RAP 2.5(a). An evidentiary error is not a constitutional error. State v. Powell, 166 Wn.2d 73, 83, 206 P.3d 321 (2009). "A party may only assign error in the appellate court on the specific ground of evidentiary objection made at trial." State v. Collins, 45 Wn. App. 541, 546, 726 P.2d 491 (1986) (citing State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)); accord ER 103 (a)(1).[4]

When asked about her daughter's demeanor following the events of August 4, 2016, J.C.'s mother testified that although, for the first few weeks, J.C. seemed to be "in denial," things became more difficult later on. She went on to testify that she had "had to deal with the suicide attempt." At this point, Ventar's counsel stated, "Objection," but specified no basis therefor.

On appeal, Ventar now argues that it was not necessary to state a specific ground for his objection because the specific ground was apparent from the

[4] ER 103 states:

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.

context. Ventar then undercuts this claim by offering several different grounds for potential objection—that the testimony was inflammatory, or irrelevant, or unduly prejudicial. However, these are distinct grounds for objecting. See ER 401, 402, 403. Ventar's approach on appeal makes clear that the *specific* basis for objection urged on the trial court is still not clear. This is the reason that the requirement of ER 103(a)(1) exists. The claim of error was not preserved for review.

Accordingly, Ventar does not establish an entitlement to appellate relief.

V

Ventar next argues that the trial court erred by denying his motion for a mistrial. Ventar claims that a State witness, S.G., violated a trial court order in limine by testifying that she and J.C. purchased Xanax from Ventar.

A trial court should grant a mistrial only when the defendant has been so unfairly prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). We review the trial court's denial of a mistrial request for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). We will find such an abuse of discretion only when "'no reasonable judge would have reached the same conclusion.'" Rodriguez, 146 Wn.2d at 269 (internal quotation marks omitted) (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

Here, the trial court's ruling in limine did not address the sale of drugs, which neither party raised as an issue, but did exclude evidence of bad acts except "activity surrounding Xanax." Following testimony by the State's witness

that the Xanax was purchased by J.C., as opposed to given to her, the trial court sustained Ventar's objection. Ventar then asked for a mistrial, asserting that he had not been informed that this testimony would be presented. Following an offer of proof by the State that an interview with the State's witness had included references to drug sales and had been provided to Ventar, the trial court changed its ruling on the issue. The trial court ruled that, without the prejudice of unfair surprise, the sale of Xanax was admissible res gestae evidence.

Testimony may be admissible as res gestae evidence, "'if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.'" State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 115, at 398 (3d ed.1989)), aff'd, 120 Wn.2d 616, 845 P.2d 281 (1993). Res gestae evidence is admissible "in order that a complete picture be depicted for the jury." State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Here, J.C.'s inability to consent to sexual intercourse was proved by evidence of her intoxication (as a result of drinking alcohol and taking Xanax provided to her by Ventar). Thus, a reasonable judge could rule admissible evidence as to how it was that J.C. obtained the Xanax. There was no unfair prejudice.

The trial court did not abuse its discretion by denying Ventar's request for a mistrial.

VI

Ventar next claims that the use of J.C.'s initials, instead of her full name, in the jury instructions (1) constituted an impermissible judicial comment on the evidence, (2) relieved the State of its burden of proof, and (3) together with the use of J.C.'s initials in other court documents amounted to a court closure in violation of Ventar's right to a public trial. We disagree.

A

The Washington Constitution prohibits a judge from conveying personal attitudes to the jury, or instructing a jury that "'matters of fact have been established as a matter of law.'" State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). However, the use of a child victim's initials in jury instructions do not constitute a judicial comment on the evidence. State v. Mansour, 78708-0-I, slip op. at 1 (Wash. Ct. App. Aug. 24, 2020), https://www.courts.wa.gov/opinions/pdf/787080.pdf.

This claim of error fails.

B

Ventar additionally claims that the use of J.C.'s initials undermined the presumption of innocence by "preemptively telling the jury that the court was protecting her as a sexual assault victim," thus depriving him of his constitutional right to due process. We disagree.

"Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable

doubt." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). "It is reversible error to instruct the jury in a manner relieving the State of its burden to prove every element of a crime beyond a reasonable doubt." Bennett, 161 Wn.2d at 307. An allegation that a jury instruction relieved the State of this burden is an error of constitutional magnitude reviewable for the first time on appeal. State v. Ridgley, 141 Wn. App. 771, 779, 174 P.3d 105 (2007). We review challenged jury instructions de novo in the context of the instructions as a whole. Bennett, 161 Wn.2d at 307. However, it is established that the use of a child victim's initials in jury instructions does not undermine the presumption of innocence. Mansour, slip op. at 8.

C

Finally, Ventar contends that the use of J.C.'s initials in the jury instructions violated his right to a public trial. Again, we disagree.

"Both our federal and state constitutions guarantee a criminal defendant's right to a public trial." State v. Turpin, 190 Wn. App. 815, 818, 360 P.3d 965 (2015). "An alleged violation of the right to a public trial presents a question of law that this court reviews de novo." Turpin, 190 Wn. App at 818. A public trial claim may be raised for the first time on appeal. Turpin, 190 Wn. App. at 819.

Here, Ventar asserts that the use of J.C.'s initials constituted a court closure for which the trial court was required to conduct an on-the-record analysis applying the framework set forth in Seattle Times Co. v. Ishikawa, 97

Wn.2d 30, 640 P.2d 716 (1982). He further argues that because the trial court did not conduct such an analysis, reversal is required.[5]

An Ishikawa analysis is required only when the public trial right has been implicated and when a closure is contemplated. Mansour, slip op. at 9. A closure has occurred "'when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave,'" or "where a portion of a trial is held someplace 'inaccessible' to spectators." State v. Love, 183 Wn.2d 598, 606, 354 P.3d 841 (2015) (quoting State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

Here, J.C. testified using her full name in open court and was consistently referred to by her full name throughout the proceedings. J.C.'s name was fully accessible to spectators and open to any member of the public who physically appeared in the courtroom, or who read a transcript of the trial court proceedings. No closure occurred. No Ishikawa analysis was necessary. Ventar's argument thus fails.

VII

Ventar next makes several arguments regarding his sentence. First, he contends that his offender score was incorrectly calculated because the two convictions were erroneously not treated as the same criminal conduct. Second, he avers that certain legal financial obligations should not have been imposed.

[5] Ventar also filed a motion to strike the State's brief, which used J.C. and other juveniles' initials instead of their names. We deny that motion.

A

Because we have determined that the child rape conviction must be vacated, the same criminal conduct claim is moot.

B

Ventar asserts that a DNA collection fee should not have been imposed on him because (1) he has prior felony convictions for which his DNA would have been collected, and (2) the State did not provide any evidence that his DNA had not already been collected. His argument has merit. "[W]hen a defendant has a prior Washington felony conviction, the State must show that the defendant's DNA has not previously been collected." State v. Houck, 9 Wn. App. 2d 636, 651 n.4, 446 P.3d 646 (2019). On remand, the trial court shall strike the DNA collection fee unless the State meets its burden of proof.

Ventar additionally claims that interest should not have been imposed on his nonrestitution legal financial obligations. Again, this claim has merit. The plain language of RCW 10.82.090(1)[6] makes clear that interest should not accrue on nonrestitution legal financial obligations. On remand, the trial court shall comply with the statute when resentencing Ventar.

VIII

Ventar also submitted a statement of additional grounds for review. Pursuant to RAP 10.10, a defendant may file such a document to raise, identify, and discuss those matter the defendant believes have not been adequately

[6] "As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1).

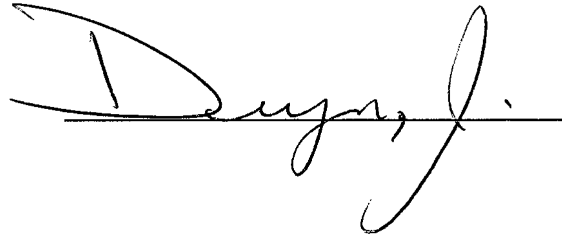
addressed by defense counsel. We will not, however, consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of the alleged errors, and we are not obligated to search the record for support of claims made in a defendant's statement of additional grounds. RAP 10.10(c).

In his statement of additional grounds, Ventar argues that because he was also drinking alcohol and using Xanax during the events at issue, he was also necessarily incapable of consent. Accordingly, Ventar reasons, a "double negative" rule should apply and "cancel out" his criminal behavior. Our law recognizes no such rule.

Here, the jury was instructed that a reasonable belief that J.C. was not mentally incapacitated or physically helpless was a defense to rape in the second degree. If the jury believed that Ventar had proved by a preponderance of the evidence that he was so intoxicated that he was unable to perceive J.C.'s mental incapacity or physical helplessness, the jury's verdict would have reflected this finding. Ventar's novel legal assertions fail to establish a ground for appellate relief.

Ventar's conviction of rape in the second degree is affirmed. Ventar's conviction of rape of a child in the third degree must be vacated, and the matter is remanded to the trial court for resentencing.

Affirmed in part, reversed in part, and remanded.



WE CONCUR:

APPENDIX B

October 29, 2020, Order

FILED
10/29/2020
Court of Appeals
Division I
State of Washington

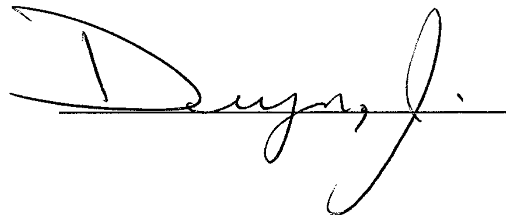
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COREY ALEXANDER VENTAR, Appellant.	DIVISION ONE No. 79178-8-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79178-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine
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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: November 25, 2020
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