

65324-5

65324-5

NO. 65324-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

REC'D

NOV 29 2010

King County Prosecutor
Appellate Unit

8

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

The Honorable Brian Gain, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in excluding relevant evidence and testimony in violation of appellant's constitutional rights to present a defense and cross examine witnesses.

2. Appellant was denied effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional rights to present a defense and to confront the complaining witness when it excluded relevant evidence that supported the defense theory, showed the complaining witness had a motive to lie and impeached the complaining witnesses credibility?

2. Was appellant denied his constitutional right to effective assistance of counsel where counsel: (1) failed to object to inadmissible and unfairly prejudicial testimony; (2) failed to request an instruction on a lesser degree offense under the alternative means of committing that offense supported by the evidence; and (3) disregarded appellant's desire to testify?

B. STATEMENT OF THE CASE

1. Procedural Facts¹

Michael Tovar was charged with second degree rape. CP 1-7. Specifically, the State charged that Tovar “on or about March 16, 2009, by forcible compulsion did engage in sexual intercourse” with Andrea Palmer. CP 1; RCW 9A.44.050(1)(a). The State also alleged Tovar was armed with a deadly weapon in the commission of the offense. CP 2. A jury found Tovar guilty as charged. CP 43-44. He was sentenced to a minimum term of 120 months with an additional 48 month deadly weapon enhancement and a maximum term of life. CP 111-122.

2. Substantive Facts

a. *State’s Case*

Andrea Palmer and her husband of nine years, Brent Palmer², and their three children moved to Washington State in 2006. 5RP 102-105; 8RP 11. After moving to Washington the Palmer’s became involved with “swinging.” 5RP 105. Palmer described “swingers” as people who engage in sex with others as couples or individuals. 8RP 126. In August

¹ IRP refers to the verbatim report of proceedings for December 14, 2009; 2RP for January 4, 2010; 3RP for January 5, 2010; 4RP for January 6, 2010; 5RP for January 7, 2010; 6RP for January 11, 2010; 7RP for January 12, 2010; 8RP for January 13, 2010; 9RP for January 14, 2010; 10 RP for January 15, 2010; 11RP for January 28, 2010; 12 RP for February 4, 2010; 13RP for April 1, 2010; 14 RP for April 2, 2010.

² To avoid confusion Andrea Palmer is referred to as Palmer and Brent Palmer is occasionally referred to as Brent.

2008 Palmer and her husband separated because Palmer wanted more freedom and other types of relationships. 5RP 105.³

In early February 2009 Palmer met Tovar in the Lifestyle Lounge, an internet website catering to “swingers” and people looking for sexual relationships. 8RP 12-14, 126. According to Palmer, she and Tovar were both “highly” sexual and they had an “instant” sexual chemistry. 8RP 14. Shortly after their internet meeting, Palmer and Tovar arranged to meet in person. At that first in person meeting they had sex in Tovar’s car. 8RP 15-16, 126.

Palmer and Tovar immediately started dating and Palmer told Tovar about her multiple sex partners some of whom continued contacting her which upset Tovar. 8RP 19-20. Palmer said Tovar accused her of wanting those other men and after he saw photographs of some of those men he became insecure about the size of his penis. 8RP 20.

By mid-February, only days into their relationship, Palmer and Tovar had their first argument over the size of Tovar’s penis. 8RP 25-26. After the argument Tovar wrote Palmer a letter apologizing. He told her there was a “dark guy” inside him who was strong, protected him from getting hurt and who would tell him he was inadequate. 8RP 32-34. Palmer said Tovar told her he wanted her to be his “safe place.” 8RP 34.

³ The court excluded evidence the reason for the separation was because Palmer cheated on her husband with someone they met swinging. IRP 24-26.

Tovar was affectionate and spoiled Palmer and she described their relationship was “sexually charged.” 8RP 17, 127. Tovar also told Palmer he was interested in a monogamous relationship. Palmer testified she was becoming “burnt” out with the “swinger” lifestyle and missed the family structure she had with her husband but she was not yet ready for a monogamous relationship. 8RP 14-15, 17, 128. On the other hand, Palmer testified said she tried to prove to Tovar she too wanted a monogamous relationship by deleting the phone numbers of her previous partners. 8RP 19-24.

Palmer, who stayed in the family home after she and her husband separated, needed a roommate for financial reasons. She thought Tovar was a good “catch” and he could pay rent so by the first week of March she had Tovar move in with her. 5RP 105, 8RP 39, 128-129.

After Tovar and Palmer began living together they continued to argue over what Palmer described as Tovar’s jealousy and the size of his penis. 8RP 39. Palmer admitted she belittled Tovar. She told Tovar that his penis size was only in the 40 percentile because she knew it was easy to hurt him by commenting about his penis. 8RP 157, 167-168.

A few days after they started living together Palmer discussed with Tovar bringing other sexual partners into their relationship. 8RP 41, 157. Two days after that discussion, on Sunday March 15th, Palmer’s children

were with their father. 8RP 40-41. As Palmer and Tovar drove around doing errands they got into an argument. Palmer believed the argument started because Tovar found pictures she had of one of her “play” partners and because told him she did not want a monogamous relationship. 8RP 41-42, 129. Palmer said Tovar became angry, punched the dashboard of the car cutting his fist and he started to drive fast and “crazy.” 8RP 42-43. When Tovar stopped the car at a stoplight Palmer got out because Tovar was screaming. 8RP 43.

Palmer went into a nearby Starbucks and then a Big Lots store. Tovar parked the car and followed her. 8RP 44. Tovar started making a scene in the store so Palmer told Tovar to leave her alone. 8RP 47. Palmer did not, however, go the police station that was across the street. 8RP 131.

Tovar eventually apologized and told Palmer he was hungry and does crazy things when he hasn’t eaten so they got back into the car and decided to go to a restaurant for dinner. 8RP 131. According to Palmer, at the restaurant Tovar had six glasses of wine, although in an interview with defense counsel she said Tovar only had four glasses of wine. 8RP 48, 134. Palmer testified Tovar became intoxicated and when they returned home from the restaurant she could not get him up the stairs so

she left him on the ground and went to her husband's house to pick up her children. 8RP 50-51.

When Palmer arrived at her husband's house, he and the children were making brownies. 8RP 51. The scene made Palmer realize she missed the family experience. She stayed for a while and she and her husband talked about reconciling. 8RP 51-53. Palmer returned home with her children at about 11:30 p.m. and found Tovar on the bathroom floor making phone calls. 8RP 53-54. Palmer put her children to bed in one bedroom and she went into her bedroom to watch television. 8RP 54.

Later, Palmer heard Tovar downstairs yelling and talking about his inadequacies. 8RP 55. Palmer went downstairs and found Tovar in the home office. Although Palmer did not see Tovar stab himself, it appeared to her Tovar had stabbed his hand and was bleeding. Id.; 8RP 57. Palmer threw some band-aids at him, rounded up the kitchen knives and locked them in her car and told Tovar he had to leave the next day. 8RP 55-56. Palmer then went back upstairs to the bedroom. 8RP 57.

A short time later Tovar came into the bedroom carrying what Palmer described as a hunting knife with a folding blade and a Samurai sword taken from a Samurai sword display in the home office. 8RP 58. Tovar sat on the couch across from the bed and played with the sword and talked about killing himself. Tovar then turned off the lights, threw the

sword on the floor and walked over to the closet. 8RP 58-59, 136. Palmer heard what she thought were clothes being torn and skin being cut. 8RP 59-60. Palmer told police Tovar sliced his neck and she heard the knife going into his skin but she admitted at trial she never saw any injuries to Tovar's chest. 8RP 144-145. Palmer thought the whole thing was ridiculous. 8RP 136.

Palmer also heard Tovar talking to himself in two different voices. She described one voice as a pathetic, crying voice and the other as a strong angry voice. 8RP 61. Tovar mentioned to Palmer that if he killed her that her children would be fine with their father. 8RP 62, 71. Tovar then told Palmer he wanted her to tell him that his penis was too small for her and she cheated on him to give him the courage to kill himself. 8RP 62.

According to Palmer, Tovar then leapt from the closet to the bed, put his hands on her throat and a pillow over her face. 8RP 62. Palmer testified on direct examination it was then that Tovar stabbed a pillow that was near her head with the hunting knife, although she admitted on cross examination Tovar stabbed the pillow with the knife later in the evening. 8RP 63, 143. Palmer also testified on direct examination that Tovar put his hands over her face and his thumbs in her mouth and squeezed. 8RP 65. On cross examination, however, Palmer was unsure whether Tovar's

thumbs or his fingers were in her mouth. 8RP 153-155. In any event, Palmer started kicking and Tovar got off her and apologized. 8RP 65-66.

Palmer then went to check on her children and Tovar accompanied her. 8RP 67. Afterwards, the two then went back into the bedroom and continued talking. At some point during the conversation Tovar hugged Palmer and as he did she felt the flat part of hunting knife he had in his hand against her back. 8RP 134.

Tovar talked about his sexual inadequacies and her sexual experiences with other men. He was crying. 8RP 69-70. Palmer and Tovar talked for a few hours when, according to Palmer, Tovar angrily told Palmer he wanted to give her something nobody else could. 8RP 69-70, 73. Tovar put the hunting knife on the side table (Palmer did not remember if the knife was open or closed), got into the bed, and started crying about her relationships with other men and how he was not able to please her sexually while at the same time he pulled her legs apart. 8RP 72. Palmer was wearing a skirt but not any underwear. Id.

Tovar then stopped, got out of the bed, stood up and took his clothes off. Palmer laid on the bed facing the television and tried to ignore him. 8RP 73-74, 147-148. Tovar got back on the bed, ran his hand up her leg and touched her while talking about “fucking” her “like no other guy has ever fucked me.” 8RP 73. Palmer told Tovar to leave her alone

and turned her body away from him. 8RP 74. Tovar got on top of her, however, forced himself inside her and a few minutes later he ejaculated. 8RP 75. Palmer did not tell Tovar “no” and did not try to push him off her. 8RP 146.

According to Palmer, Tovar then asked her if he just raped her and said, “I’ve given you something nobody else has.” 8RP 77. They continued to lay together on the bed and talk. Tovar said he wanted to work it out with her and they talked about counseling. 8RP 77, 143. Palmer admitted that it was while they were talking about counseling that Tovar stabbed the pillow with the knife and she admitted that is also what she told police. 8RP 143.

Palmer and Tovar talked for about 15 minutes and Tovar asked Palmer if they could make love again. RP 78, 148. Palmer said she shook her head but did not say “no.” They had sex again and Tovar told her he loved her. 8RP 79-81.*

Afterwards, Tovar asked Palmer if he could stay a few more hours and promised to leave before the children woke up. 8RP 83, 150. Palmer agreed to let him stay and she went into the bedroom where her children were sleeping and fell asleep. 8RP 151-152. She did not call police.

* The State did not allege this second sex act was a rape and elected to rely solely on the first sex act to support its case. 9RP 71.

Palmer testified that during the entire time she and Tovar were together that night and early morning Tovar did not pick her up, throw her around or hit her. 8RP 155. She also said Tovar never threatened her with the knives. 8RP 134. Palmer and Tovar had a “safe” word, “hero”, they agreed to use if sex became too rough between them and if one of them said the word everything would stop. 8RP 155-156. Palmer never used the word that evening. 8RP 156. By 8:30 a.m. Palmer discovered Tovar was gone. 8RP 85.

After Tovar left the house he met a friend, Tyson Baker, for coffee and breakfast. 4RP 61. Tovar looked exhausted and stressed. He told Baker he had gotten in a fight with his girlfriend and at some point he blacked out. 4RP 62-64. Baker noticed Tovar had cuts on the top of his hands and fingers and band-aids on the cuts. 4RP 64-66. That evening on Tovar’s Facebook page a message was posted stating Tovar was facing some life-altering changes and will miss his son for the next 10 to 20. 4RP 39.

Palmer meanwhile emailed her husband and told him Tovar assaulted her. 5RP 115; 8RP 153. Palmer took her oldest children to school and then she and her youngest child drove to her husband’s recently opened restaurant in Tukwilla. 8RP 86-87.

Palmer's husband described Palmer as distraught, crying and exhausted. 5RP 116. Palmer said her husband gave her a key to his apartment so she could go there and get some rest. 8RP 87. Her husband, however, testified Palmer stayed at the restaurant until about 11:30 a.m. and then he drove her back to his apartment where they stayed until it was time to pick their children up from school. 5RP 124-125. Palmer's husband encouraged Palmer to go to police so after picking up their children Palmer's husband dropped her off at the King County Sheriff's Fairwood substation. 5RP 118; 8RP 90. He told Palmer she could not stay with him because his girlfriend was living at his house. 5RP 127.

Deputy Ryan Olmsted was sitting in his parked car outside the substation when Palmer tapped on his window. 6RP 7-8. Olmsted spoke to Palmer then contacted Detective Marylisa Priebe-Olson who arrived a short time later. 6RP 12.

Priebe-Olson spoke with Palmer then accompanied Palmer back to Palmer's house where Priebe-Olson photographed and seized evidence. 4RP 18-32. Palmer showed Priebe-Olson a pillow with puncture marks, a Samurai sword display with three swords hanging on a wall and other items in the bedroom that appeared to have small blood stains. 4RP 24-32.

After Preibe-Olson retrieved and photographed the evidence Palmer took herself to the Valley Medical Center. 4RP 33. Palmer did not appear distressed or uncomfortable. 7RP 32-33. A medical examination showed Palmer had some bruising on the inside of her mouth. 7RP 24-26. Palmer told the doctor that her boyfriend had nonconsensual sex with her and in addition to putting his hands in her mouth; he put his hands around her neck. 7RP 22-23. Palmer, however, had no other injuries and no marks on her neck. 7RP 38. There was no physical evidence that showed Palmer was raped. 7RP 47.

Later that day Tovar sent an email to both Palmer and her husband, Brent. Tovar apologized for how things turned out and asked if they could coordinate a time when he could get the rest of his belongings from the house. 4RP 37. At about midnight Tovar sent Palmer another message thanking her for talking through things with him the night before and asking her if he could send her some pictures he had. He also told Palmer he was respectful of her desire to move on. 4RP 35. Palmer responded she was going to court to deal with a ticket she received, that she would leave the door open so he could go in and get his belongings and she thanked him for the pictures. 4RP 39. The next day Palmer sent Tovar an email telling him her ticket was dismissed. 4RP 40.

Throughout the course of their approximately one month relationship Palmer and Tovar communicated primarily through text messages. 8RP 18. They exchanged hundreds of text messages and police retrieved the messages between Palmer and Tovar from Tovar's phone. Ex. 22, 23.⁵ A number of the messages between Palmer and Tovar were sexually explicit conversations. Ex. 22. In some of the exchanges Palmer and Tovar discuss the size of Tovar's penis, his belief based on Palmer's past experiences that she preferred black men and men with larger penises, Palmer's desire to continue to be with other men and Palmer's assurances she loved Tovar. 6RP 42-72.

In text messages the two exchanged the day after the incident, Palmer accused Tovar of raping her. 6RP 75. Tovar denied the accusation. 6RP 76. Tovar told Palmer he remembered they started having sex but they both felt weird about it and then they talked about Palmer's desire to get back with her husband. He said he also remembered asking her at one point if they could finish having sex and she nodded "yes." 6RP 77. Palmer asked Tovar if he remembered asking her if he had just raped her. 6RP 77. Tovar replied he did not remember any conversation about rape. 6RP 79. Palmer told Tovar that if he turned himself in she would not press charges. 6RP 80.

⁵ Defense counsel initially objected to the admission of the text messages on hearsay grounds. 5RP 143-144. The objection was later withdrawn. 6RP 38-39.

Two days later, on March 18th, Palmer and Tovar arranged to talk on the telephone. Palmer contacted Priebe-Olson so Priebe-Olson could listen in on the conversation. 4PR 40-41. Priebe-Olson met Palmer in a parking lot. They sat in Priebe-Olson's car and while Palmer spoke with Tovar on the telephone Priebe-Olson had her ear next to the phone and took notes of the conversation. 4RP 42-44.⁶ The telephone conversation between Tovar and Palmer lasted about an hour and Priebe-Olson described it as emotional. 4RP 88.

Tovar asked Palmer what was the worst thing she remembered and Palmer said it was Tovar putting his hands in her mouth. 4RP 70-71. Tovar apologized and started to cry. 4RP 71. Tovar told Palmer his attorney did not want him to talk to her and that he was sorry for everything but he did not remember everything. 4RP 72. He said he tried to be what she wanted him to be and referenced his insecurities. Id.

As in her earlier text message, Palmer again asked Tovar if he remembered asking her if he had raped her. Tovar responded he remembered being scared. 4RP 72-73. Palmer told Tovar his "dark guy" was there and Tovar responded his "dark guy" was not here now and that he just wanted to be with her. Id.

⁶ Although Priebe-Olson's notes were not a word for word rendition of the conversation but a general summary of what she overheard, the court allowed her to read her notes to the jury over Tovar's objection. 4RP 44-55.

Palmer also told Tovar he said he was to going to kill her and kill himself. In response, Tovar said it sounded like he owed her an apology, that he cared about her and he could not go to prison. 4RP 73. Tovar told Palmer that “he didn’t care for you” and Palmer responded, “You hurt me. He didn’t hurt me.” 4RP 73-74.⁷

Tovar then asked Palmer if she remembered him asking to make love to her one last time and she nodded “yes.” 4RP 74. Tovar told Palmer he did not remember hurting her and that she brings out the dark side in him and she just wanted to put him down. 4RP 75. As the conversation continued Tovar told Palmer he thought his hand was broken because he hit the dashboard and he asked if she was going to call police. 4RP 76-77.

Tovar said that he was going to end his life and asked her to wait a couple of hours before she called police. 4RP 79-80. Tovar said he would tell her where to find his body and that he could not go to prison because if he went to prison he would lose the option of taking his life. 4RP 81-82. Tovar then asked her to call police and tell them he was going to turn himself in. 4RP 85.

⁷ They were referencing an incident a few month earlier where Palmer told Tovar she raped by a Medina Police officer. The court, however, excluded any evidence or testimony about that alleged rape.

Police received a court order to trace the location of Tovar's cell phone. 4RP 89. Officers with the Peirce County Sheriff's Office and the Tacoma Police Department found Tovar's car in a parking lot. 5RP 8. When Tovar got into his car and left the parking lot they followed him. 5RP 76; 6RP 27.

Police finally stopped Tovar and with weapons drawn ordered him out of his car. 5RP 81. Tovar told police he did not know how to put his car in park or turn the engine off. 5RP 83. Tovar sat in his car and vacillated between being calm and screaming and crying. He insisted the police were going to kill him. 5RP 83-86. After about 20 minutes, Tovar let out a scream and took off. 5RP 87. Tovar's car went through an embankment and hit a tree. 5RP 88. He was seriously injured and an officer who was also an emergency room doctor rendered life saving aid. 5RP 9, 94-98.

Inside Tovar's car police found three knives. 5RP 29. Two of knives were folding hunting type knives. Palmer said the knives looked like the one Tovar had the night of the incident. 5RP 24-31; 8RP 124.

In a February 13th text message to Tovar, Palmer said she tried to get back together with her husband in October and December. 6RP 83. Palmer admitted in October and December following her separation from her husband and again the day of the incident with Tovar, she talked to her

husband about getting back together with him. 8RP 53, 158. Palmer's husband, Brent, testified Palmer brought up getting back together a couple of times while they were separated including while she was dating Tovar. 5RP 111, 123. Brent had a girlfriend and he told Palmer he was not interested in getting back together with her. 5RP 111. Brent had opened his restaurant that February and he was planning to divorce Palmer by the end of March. 5RP 111, 116.

Palmer admitted that On March 23rd, a few days after Tovar was arrested, she sent Tovar an email. She told Tovar she missed him, loved him and wished she could go back and prevent the past. 4RP 41.

Within 10 days after the incident, Brent left his girlfriend and he and Palmer had sex. A few days later Palmer had moved back with Brent. 8RP 12, 159-160. Palmer, however, told defense counsel it was a month after the incident with Tovar before she and Brent even had sex again. 8RP 160. At the time of the trial Palmer testified she and Brent now owned two restaurants. 8RP 11.

b. *Defense Case*

Theresa and Joe Paviglianti met Tovar on the internet in December 2008. 9RP 16, 35. The Paviglianti's are "swingers" as well and had a sexual relationship with Tovar until Tovar met Palmer. 9RP 17-18, 36-38. On the morning of March 16th, Tovar came to their house and while there

he received a phone call from his brother. 9RP 20. During the phone call Tovar was in a state of shock and took off shirt. 9RP 21-22. He did not have any cuts on his chest or torso. 9RP 22.

Jolyn Hendrix worked and lived with Palmer for a short time while Palmer was separated from her husband. 9RP 58, 20. Hendrix testified Palmer had a reputation for being untruthful. 9RP 59.

c. *Motion for New Trial*

On February 4, 2010, the court granted Tovar's appointed trial counsel's motion to withdraw and appointed Tovar new counsel. 11RP 2; CP 45, 46. Tovar moved for a new trial alleging ineffective assistance of trial counsel and submitted his own affidavits and the affidavit of Wendy Latham in support of his motion. CP 47-51, 52-54, 55-72. Tovar alleged trial counsel prevented him from testifying at trial and was generally unprepared because counsel failed to properly investigate the case or interview witnesses. CP 47-51. On April 1, 2010 a hearing was held on the motion.

Tovar testified that his initial appointed counsel withdrew because of a conflict of interest and Brian Todd was appointed to represent him sometime in May 2009. 13RP 11-12. Todd only visited Tovar in jail a few times between May and August and Tovar had no other way to effectively communicate with Todd. 13RP 12. Tovar wrote a letter to

both the Office of Public Defense and Judge Sharon Armstrong outlining his dissatisfaction with Todd and requested the appointment of new counsel. 13RP 13-14.

On November 10, 2009, Judge Armstrong held a hearing on Tovar's request and at the hearing Todd promised to start working on Tovar's case so Tovar told Judge Armstrong he was comfortable with Todd remaining on the case. 13RP 13-14, 30-31. Tovar stated his relationship with Todd, however, worsened to the point where the two were screaming and yelling at each other and Todd was still not investigating the case. 13RP 14-15.

Todd hired Katy Dacanay in October 2009 and according to Todd, Dacanay "took the reins on the case." 13RP 15, 46, 70. Dacanay frequently met with Tovar and Tovar did not see Todd again until the trial started. 13RP 15-16, 71. Dacanay did most of the work on the case and was responsible for preparing the case for trial. 13RP 46, 58. She conducted witness interviews, except for the interviews with the Palmers, reviewed the State's evidence, researched motions, prepared the trial notebook and met with Tovar exclusively. 13RP 46, 55, 58, 71. At some point that fall while the trial was pending, Dacanay passed the bar. 13RP 47, 71.

Tovar consistently informed Todd and Dacanay he wanted to testify at his trial and it was always assumed he would testify. 13RP 18. 26. The night before the defense rested its case, Todd and Dacanay met with Tovar at the jail. Tovar believed the purpose of the meeting was to review his testimony. At the meeting Todd and Dacanay told Tovar they did not believe the State had proven its case and that Palmer did not come across well. 13 RP 19. They also told Tovar that if he testified the prosecuting attorney might trick him into saying something that would then open the door to allow admission of ER 404(b) evidence the court excluded. 13RP 21.⁸ They advised Tovar not to testify. Despite their advice, Tovar was adamant he wanted to testify because in voir dire jurors indicated they would want to hear from him and he believed the jury would wonder why he did not testify if he was innocent. 13RP 19. The

⁸ Prior to trial Tovar moved to exclude evidence of what the State claimed were prior similar incidents involving two different women (Tovar's ex-wife, Angela Schmitke and ex-girlfriend, Brandy Brazeau). 1RP 11. The State argued the evidence was admissible under ER 404(b) to show a common scheme or plan and to rebut a consent defense. 1RP 14, 18. The State contended that in each prior incident Tovar was confronted with the relationship's demise and in response he threatened suicide and homicide, smothered the women, armed himself with a knife and inflicted injuries to himself. 1RP 12. In one incident, although there was no allegation of improper or nonconsensual sex, Tovar referred to the "dark guy" and "safe place." 1RP 13. Tovar argued the prior incidents were not similar and that Palmer knew about those incidents and could therefore tailor her testimony to make what happened between her and Tovar appear similar. 1RP 14-17. The court granted the defense motion to the exclude the evidence finding the prejudice to the defense outweighed the evidence's probative value. 1RP 18. The court also ruled it would reconsider the exclusion of the evidence if Tovar testified and based on his testimony opened the door the admission of the evidence. Id.

meeting lasted about ten minutes and Todd and Dacanay told Tovar they would “figure it out” the following morning. 13RP 20.

Tovar panicked and when Todd and Dacanay left he started to cry. He called his ex-wife, Wendy Latham, and asked her to call Dacanay and tell Dacanay there was no question he was going to testify. 13RP 21-22. After Tovar spoke with Latham, Todd returned to the jail to talk with Tovar again. 13RP 22. Tovar again told Todd he wanted to testify and he showed Todd a draft of questions he wanted Todd to ask him. 13RP 23. The following morning and during the lunch break, Tovar reiterated to Todd he wanted to testify. 13RP 24-25. Todd rested the defense case, however, without calling Tovar to the stand. Tovar did not confront Todd at the time or mention anything to the court because Todd told him earlier that he could not personally address the judge and that he had to show confidence in front of the jury. 13RP 24.⁹ Following the verdict Tovar spoke with Dacanay. He was upset because he did not get to testify. 13RP 77, 84.

In her declaration in support of the new trial motion, Wendy Latham, stated she attended most of Tovar’s trial and frequently spoke with him on the phone. CP 52. Tovar had always told Latham he wanted to testify to tell his side of the story. *Id.* On the evening of January 13,

⁹ Tovar’s affidavit in support of his new trial motion is consistent with his testimony at the hearing. CP 55-58.

2010, the day before the defense rested its case, Tovar called Latham in a panic. Id. He told Latham he was anxious and upset because he had not able to testify yet. CP 52-53. Tovar begged Latham to call his attorneys and tell them he was adamant about testifying. CP 53. Latham then called Dacanay and repeated what Tovar had told her. CP 53.

Todd and Dacanay testified the night before the defense case they spoke to Tovar about testifying. 13RP 48-49. Dacanay and Todd confirmed that Tovar had consistently indicated he intended to testify. 13RP 58, 82. Todd and Dacanay told Tovar that if he testified there was a possibility the excluded ER 404(b) evidence would be admitted. 13RP 49, 73. Todd said he told Tovar that it was his (Tovar's) decision whether to testify. 13R 50, 73. They told Tovar it was their opinion that Tovar should not testify. 13RP 74. They discussed whether Tovar should testify for about 30 minutes and Dacanay said when she and Todd left Tovar he was agitated but he decided not to testify. Id.

Consistent with Latham's declaration and Tovar's testimony, later that evening Dacanay received a phone call from Latham. Latham told Dacanay she spoke with Tovar and Tovar insisted he was going to testify. 13RP 75. Dacanay contacted Todd. 13RP 50, 62, 75.

Todd went back to the jail and spoke with Tovar. Todd again told Tovar it was his (Tovar's) decision whether to testify but that Todd

believed he should not. 13RP 51. Todd told Tovar the defense theory came out in the text messages so Tovar's testimony was not necessary. Tovar could inadvertently say something damaging to his case and there were credibility problems with Palmer's testimony. 13RP 51-52. According to Todd, Tovar again told Todd he would not testify. 13RP 52. Todd admitted, however, Tovar gave him a list of questions that evening or early the next morning that Tovar wanted Todd to ask him on the stand. 13RP 63-64. Todd testified that after the last defense witness testified he thought he asked Tovar if he was "good to go" and then the defense rested its case. 13RP 54.

Todd denied he ever yelled or screamed at Tovar. 13RP 60. Todd did not remember how many times he saw Tovar before hiring Dacanay. 13RP 61. Todd admitted he did not hire investigator. 13RP 55. Todd admitted he had not prepared any questions for Tovar in the event Tovar chose to testify. 13RP 62. Todd did not remember if he interviewed the two ER 404(b) witnesses. 13RP 65. Tovar asked Todd to retain a medical expert to examine his chest for wounds because Palmer told police Tovar cut himself in the chest area. Todd did not believe it was necessary because had other witnesses to testify Tovar's chest was not injured. 13RP 64.

Dacanay testified Tovar told her that some of the text messages the State introduced were out of sequence but Dacanay did not remember if she ever told Todd. 13RP 85. Dacanay explained she and Todd withdrew their objection to the admission of the text messages because they believed it would give the jury a better picture of Palmer if the jury saw the messages. 13RP 78.

The court denied Tovar's new trial motion. The court found Todd and Dacanay were prepared, had a reason to withdraw the objection to the test messages, and properly represented Tovar. The court also concluded counsel did not prevent Tovar from testifying based on a finding Tovar did not protest when Todd rested the defense case and a finding Tovar was not as credible as Todd and Dacanay because of his emotional instability. 14RP 8-12.

C. ARGUMENTS

1. TOVAR WAS DENIED HIS RIGHT TO PRESENT A DEFENSE AND CROSS EXAMINE THE COMPLAINING WITNESS.

Prior to trial Tovar moved to admit evidence that Palmer alleged Medina Police Officer Ismael Ramirez raped her just a few months before she alleged Tovar raped her or alternatively to cross examine Palmer on whether she told Tovar about the alleged Ramirez rape. 1RP 28-33; 2RP 10-14; 8RP 3-5. The State objected to admission of the evidence or the

cross examination of Palmer about the alleged rape on the grounds that both were prohibited by the rape shield statute. RCW 9A.44.020. 1RP 31-33. 8RP 5. The court denied the motions. 1RP 33-35; 2RP 14-15; 8RP 4-5.

The proffered evidence would have shown that after Ramirez cited Palmer for driving on a suspended license and possession of marijuana they met in early December 2008 and went to Ramirez's home. CP 383-406 (Appendix A). Ramirez promised Palmer he would give her letter to take to court that would help in her defense. Id. Ramirez did not give Palmer the promised letter and according to Palmer, Ramirez instead pushed her down on the bed and had sexual intercourse with her over her objections. Id.

As she did after the incident with Tovar, Palmer told her husband about the alleged rape. CP 383-406 (Appendix A). At the same time Palmer also asked her husband about getting back together. 8RP 158.

Despite the alleged rape, Palmer and Ramirez continued to communicate with each other. Palmer discussed her date with Ramirez with her friends and co-workers. She seemed happy, went on a second date with Ramirez and engaged in sexual intercourse with him again. Ramirez did not request the marijuana he seized from Palmer be tested and

he tried to get the prosecuting attorney to dismiss the case against Palmer. CP 383-406 (Appendix A).

Palmer did not mention to her friends that Ramirez allegedly raped her until she initially went to court and discovered the charges were not dismissed. 2RP 10-14; CP 8-11. It was then that Palmer told her co-worker and roommate, Jolyn Hendrix, that she was going to “ruin” Ramirez. CP 9. On February 9, 2009 the prosecuting attorney dismissed the charges against Palmer based on an email sent by Ramirez. CP 383-406 (Appendix A).

Early in their relationship, Palmer told Tovar that Ramirez raped her. CP 388-389. Tovar brought up the Ramirez rape in their telephone conversation that Priebe-Olson listened in on. 4RP 73-74. It was after that phone call that Priebe-Olson asked Palmer about what happened with Ramirez and when Palmer indicated Ramirez raped her Priebe-Olson investigated the allegation and Ramirez was eventually charged with official misconduct. Id.

The proffered evidence was relevant to the defense theory, Palmer’s credibility and her motive to lie and its relevancy outweighed any potential unfair prejudice. Additionally, the evidence was not prohibited under RCW 9A.44.020, the rape shield statute. Excluding the alleged Ramirez rape evidence or disallowing Tovar to cross examine

Palmer about it denied Tovar his constitutional rights to present an defense and to cross examination.

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 22 of the Washington Constitution, guarantee the right to trial by jury and to defend against the State's allegations. These constitutional guarantees provide persons accused of crimes the right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003) (citing Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). The right to present a defense is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Relevant evidence may only be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. "Evidence tending to establish a party's

theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. [State v. Darden, 145 Wn.2d [612], 622, [41 P.3d 1189 (2002)]. The State's interest in excluding prejudicial evidence must also be balanced against the defendant's need for the information sought, and relevant information can be withheld only if the State's interest outweighs the defendant's need. Id. We must remember that the integrity of the truth finding process and [a] defendant's right to a fair trial are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of high probative value it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22. Id., at 16.

Jones, 168 Wn.2d at 580.

In mounting a defense a defendant is also guaranteed the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Under the constitutional rights to confront and cross examine witnesses a defendant has the right to attack the credibility of a witness to reveal biases, prejudices, or ulterior motives of the witness. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, L.Ed.2d 347 (1974). The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such

as motive, bias, credibility, or foundational matters. Darden, 145 Wn.2d at 619. Where a case stands or falls on the jury's belief of particular witnesses, credibility and motive is subject to close scrutiny. State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). This is especially true in the prosecution of sex crimes. State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970).

The defense was consent and the defense theory was that Palmer alleged Ramirez, and now Tovar, raped her to engender sympathy with her husband in order to get him back. Evidence Palmer alleged Ramirez raped her only a few months before her allegations against Tovar and both times Palmer went to her husband with the allegations and discussed reconciling with him was relevant to establish that theory and to show Palmer had a motive to lie.

Palmer testified that after the first sex act Tovar asked her if he just raped her and he said, "I've given you something nobody else has." The statement implies Tovar believed he was the only person who ever raped her. If Ramirez had raped Palmer just a few month earlier, as she claimed and as she told Tovar, his statement made no sense and logically undermined Palmer's credibility.

The evidence was not inadmissible under RCW 9A.44.020, Washington's rape shield statute. The 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....

RCW 9A.44.020(2).

The purpose of the statute is "to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of a victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent." State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). The statute, however, "was not intended to establish a blanket exclusion of evidence which is relevant to other issues which may arise in prosecutions for rape." Carver, 37 Wn. App. at 124, 678 P.2d 842 (citing State v. Simmons, 59 Wn.2d 381, 368 P.2d 378 (1962)). Past sexual behavior may be admitted if (1) it is relevant to the issue of the victim's consent, (2) its probative value is not substantially outweighed by a substantial danger of undue prejudice, and (3) its exclusion would result in denial of substantial justice to the defendant. RCW 9A.44.020(3)(d). In Carver, the court held that evidence that neither prejudices the victim nor discourages prosecution generally does not fall within the scope of the statutory prohibition. Carver, 37 Wn. App. at 126.

The proffered Ramirez rape evidence dealt with prior sexual abuse. It was not related to Palmer's "past sexual behavior" or her reputation for "promiscuity, nonchastity, or sexual mores contrary to community standards." See RCW 9A.44.020(2). The admission of prior sexual abuse does not discourage rape victims to prosecute a subsequent rape allegation and it is not prejudicial evidence of prior sexual conduct. Prior sexual abuse 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 prior sexual abuse is not excluded under the rape shield statute, to the extent the court relied on the statute to exclude evidence of the Ramirez rape, its decision was wrong as a matter of law.

In addition, Tovar argued Palmer's allegation Ramirez raped her was false and thus 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.¹⁰ In State v. Demos, 94 Wn.2d 733, 617 P.2d 968 (1980), the Washington Supreme Court recognized the rule in other jurisdictions that rape shield statutes do not bar evidence of prior false rape reports. Id. at 736.

Even if the rape shield statute applied to alleged past sexual abuse, here the proffered evidence showed Palmer's allegation Ramirez raped her was false. After the alleged rape Palmer did not go to police, continued to correspond with Ramirez, went on a second date with Ramirez, did not mention to co-workers and friends that Ramirez raped her until she discovered the charges had not been dismissed and despite Palmer's allegation the State did not charge Ramirez with rape. These facts show by at least a preponderance of the evidence the allegation was false.

The proffered evidence, however, was relevant and critical to the defense case. The evidence supported the defense theory that Palmer made up these rape allegations to garner sympathy with her husband in the hope he would acquiesce to a reconciliation. See Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (in a rape case the

¹⁰ E.g. Clinebel v. Commonwealth, 235 Va. 319, 368 S.E.2d 263, 266 (1988); Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987, 991 (1978); West v. State, 290 Ark. 329, 719 S.W.2d 684, 687 (1986); People v. Adams, 198 Cal. App.3d 10, 243 Cal. Rptr. 580, 583-584 (1988); State v. Anderson, 211 Mont. 272, 686 P.2d 193, 198-201 (1984); People v. Evans, 72 Mich. 367, 40 N.W. 473, 478 (1888); Miller v. State, 105 Nev. 497, 779 P.2d 87, 90 (1989); State v. Barber, 13 Kan.App.2d 224, 766 P.2d 1288, 1290 (1989); Lawrence v. United States, 482 A.2d 374, 377 (D.C.1984); State v. LeClair, 83 Or. App. 121, 730 P.2d 609, 615 (1986); Smith v. State, 259 Ga. 135, 377 S.E.2d 158, 160 (1989).

defendant's constitutional right to confrontation was violated where the court excluded evidence the complaining witness was married and having an affair with a married man who she was living with at the time of trial because the evidence was relevant to support the defense theory the complaining witness invented the rape story because she did not want to disturb the relationship with her married lover, who saw the defendant drop her off, by admitting she had consensual sex with the defendant).

The proffered evidence was also relevant to impeach Palmer's testimony that after the first act of intercourse on March 16th, Tovar allegedly asked Palmer if he raped her and that he gave her something nobody else had. As counsel argued, because Palmer told Tovar she had been raped by Ramirez it made no sense that if Tovar believed he raped Palmer he would have referred to it as giving Palmer something she never had before and therefore the evidence cast doubt on Palmer's credibility. Evidence that Palmer made a prior false allegation of rape only a few months earlier was directly relevant on the issue of her credibility.

This Court cannot determine the jury would necessarily have reached the same result if the jury had heard evidence tending to impeach Palmer's believability. "Credibility determinations 'cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpatory story is not facially unbelievable.'" State v. Holmes, 122 Wn.

App. 438, 446, 93 P.3d 212 (2004) (quoting, State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)); see also State v. Romero, 113 Wn. App. 779, 795, 54 P.3d 1255 (2002) (constitutional error not harmless beyond a reasonable doubt where verdict ultimately turned on the testimony of one eyewitness and the case came down to a credibility contest). As sole judges of witness credibility, jurors were entitled to have the benefit of the defense theory so that they could make an informed judgment regarding the believability of Palmer's accusation. Davis, 415 U. S. at 317. Tovar had the right to present evidence that might influence the determination of guilt. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In sum, the court improperly excluded evidence of the Ramirez rape allegation under either the rape shield statute or a finding the evidence was not relevant. The evidence was not offered to assassinate Palmer's character or impeach her general credibility or embarrass her based on her prior sexual conduct. The jury heard extensive testimony about Palmer's unconventional sexual lifestyle. The additional evidence of the circumstances surrounding her prior rape allegation had little potential for undue or unfair prejudice by confusing or misleading the jury or by causing the jury to base its decision on an emotional response rather than reason. See ER 403 (evidence "may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...”); see also Lockwood v. AC & S, 109 Wn.2d 235, 257, 744 P.2d 605 (1987) (unfair prejudice is caused by evidence that is more likely to arouse an emotional response than a rational decision by the jury).

On the other hand, the evidence was extremely relevant to both the defense theory and the issue of Palmer’s credibility. The improper exclusion of evidence of the alleged Ramirez rape or the improper limitation on Tovar’s right to cross examine Palmer about the alleged rape, violated Tovar’s constitutional rights to present a defense and cross examine witnesses. Reversal is required unless the State demonstrates the error was harmless beyond a reasonable doubt. Kilgore, 107 Wn. App. at 178. It cannot do so on these facts. Tovar’s conviction should be reversed.

2. TOVAR WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P. 3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective

standard of reasonableness; and (2) the deficient performance prejudiced him. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334- 35, 899 P.2d 1251 (1995). 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, but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

a. *Failure to Object to Prison Testimony*

A defendant who claims ineffective assistance based on the failure to challenge the admission of evidence must show (1) there were no legitimate strategic or tactical reasons to support the failure; (2) an objection to the evidence would likely have been sustained, and (3) that the admission of the evidence was prejudicial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). To meet the prejudice prong, the appellant must show that, but for the deficient performance, there is a reasonable probability the verdict would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

During Palmer's direct examination she testified that before Tovar left he asked her not to call police. 8RP 84. The State asked Palmer. "Tell me those conversations about contacting the police." Id. Palmer responded, "He [Tovar] told me he couldn't go back to prison and that, you know, I don't know like what it's like there." Id. Counsel failed to object to Palmer's testimony.

Failure to object to irrelevant and prejudicial evidence may be deficient performance. See State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (counsel's failure to object to inadmissible prior conviction evidence could not be considered tactical and constituted deficient performance); State v. Dawkins, 71 Wn. App. 902, 910 & n.3, 863 P.2d 124 (1993) (counsel was ineffective and new trial ordered where counsel failed to object to evidence of other bad acts).

Evidence that Tovar was previously in prison, implying he was convicted of a serious crime, was clearly inadmissible and if counsel had objected the evidence would have stricken. Counsel failure to object to the inadmissible evidence constituted deficient performance.

Tovar was prejudiced by admission of the evidence. Evidence that Tovar was previously convicted and served time in prison prejudiced the jury in the same manner as improperly admitted ER 609 or 404(b) evidence. It allowed the jury to find guilt based on a prior bad act. State

v. Calegar, 133 Wn.2d 718, 724, 947 P.2d 235 (1997). Prior conviction evidence is inherently prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. Calegar, 133 Wn.2d at 724; State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984) (overruled in part on other grounds by State v. Ray, 116 Wash.2d 531, 806 P.2d 1220 (1991)). Reference to prior crimes in a criminal trial has extraordinary potential for misleading a jury into concluding the accused is a bad person and therefore guilty. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again.

The State's case rested primarily on Palmer's credibility. Palmer's credibility was impeached with her inconsistent statements, behavior following the alleged rape and the defense evidence she had a bad reputation for truthfulness. The jurors may have doubted Palmer's veracity but decided to resolve those doubts against Tovar by concluding that since he was in prison before he was criminal and consistent with his propensity for criminality he must have committed the charged offense.

Counsel's failure to object to the inadmissible prison testimony denied Tovar his right to effective assistance of counsel. Admission of the testimony was prejudicial. Thus, Tovar is entitled to a new trial.

b. *Failure to Request Instructions on the Lesser Degree Offense of Third Degree Rape on the Grounds of Lack of Consent*

Defendants are entitled to jury instructions not only on the charged offense, but also on all inferior degree offenses. RCW 10.61.003. A defendant is entitled to such instructions if:

- (1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense;
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and
- (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150, 1153 (2000) (quoting, State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

The evidence does not need to be produced by defense witnesses; instead, a court considers all evidence presented at trial. Fernandez-Medina, 141 Wn.2d at 456. To warrant an inferior degree instruction, the evidence need not be consistent with the accused's primary defense. Id. at 457-60. The analysis turns on whether evidence is presented by either party from which the necessary inference may be drawn. A defendant may argue for acquittal and yet also be entitled to an instruction on a lesser offense. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998).

A person commits second degree rape when, under circumstances not constituting first degree rape, he engages in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). Forcible compulsion means that “the force exerted was (1) directed at overcoming the victim's resistance and (2) was more than that which is normally required to achieve penetration.” State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). A person commits third degree rape when, under circumstances not constituting first or second degree rape, that person engages in sexual intercourse with another person who does not consent and the lack of consent is clearly expressed by his or her words or conduct, or where there is threat of a substantial harm to property rights of the victim. RCW 9A.44.060(1)(a) and (b).

The first two prongs of the three-pronged "inferior degree" test are met. Third degree rape is an inferior degree of second degree rape and each proscribe one offense. State v. Jeremia, 78 Wn. App. 746, 753, 899 P.2d 16 (1995), *review denied*, 128 Wn.2d 1009 (1996).

Under the third prong of the test the evidence viewed in the light most favorable to the defense must raise an inference that only the inferior degree offense was committed, to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. This requirement was met as well.

Palmer testified that Tovar never threatened her with the knife and at some point after Tovar cut himself he laid the knife on the night stand. Later, Tovar removed his clothes while Palmer laid on the bed. Palmer tried to ignore Tovar and told him to leave her alone. When Tovar got on the bed Palmer tried to turn her body away from his but he got on top of her and penetrated her. Palmer did not say “no” and did not try to push Tovar off her. Based on these facts the jury could have found that Tovar’s threat much earlier in the evening to kill her and himself was hyperbole or unrelated to forcing Palmer to have sex. But, the jury could have found Palmer’s statement that she wanted Tovar to leave her alone and turned away from him expressed her lack of consent and that Tovar did not use anymore force than that which is normally required to achieve penetration. The facts supported a lesser degree instruction on third degree rape under the lack of consent alternative.

Defense counsel requested an instruction on third degree rape under the threat of substantial harm to property rights alternative. 9RP 65-66; RCW 9A.44.060(1)(b). Counsel argued the substantial harm to property rights was supported by Palmer’s testimony that Tovar stabbed her pillow. Id. The court found the evidence insufficient to support the instruction on that alternative, citing Ieremia. 9RP 69-70. Counsel, however failed to request the instruction based on the lack of consent

alternative. If counsel had requested the instruction based on the lack of consent alternative, it should have been given.

But, to the extent the court's reference to Ieremia signaled it would not have given the jury an instruction on third degree rape even under the lack of consent alternative, the court was wrong. Ieremia is distinguishable.

In Ieremia there were two victims. One testified the defendant Singh grabbed her by the arms, carried her to a bedroom, took off her clothes, raped her, and covered her mouth with his hand when she cried out for him to stop, she slapped him and repeatedly said she wanted to go home. Ieremia, 78 Wn App. at 749. The victim suffered trauma to her pelvis, her vaginal area was torn, and she had multiple bruises and abrasions on her arms, back, breasts, and other parts of her body, which corroborated her testimony. Id.

The second victim testified Ieremia grabbed her wrists and pulled her to his car. Ieremia, 78 Wn App. at 749-50. She tried to pull away unsuccessfully and Ieremia drove her to a park, pulled her hair, covered her mouth to muffle her screams, overcame her struggles, and raped her. Id.

Singh and Ieremia claimed the intercourse was consensual. This Court, citing State v. Charles, 126 Wn.2d 353, 355-56, 894 P.2d 558

(1995), noted that there was no testimony supporting an inference of third degree rape for the jury to consider. Id. at 755, n. 3. It held that “[a]s in Charles, there was no affirmative evidence that the intercourse was unforced but still nonconsensual” and, therefore, the defendants were not entitled to a third degree rape instruction. Id. at 756.

In Charles, the victim testified the defendant grabbed her, pushed her, and took off her clothes and she struggled to get away. Charles, 126 Wn..2d at 354. The defendant testified that the victim consented to sex. The Court reasoned that if the jury believed the victim, the defendant was guilty of second degree rape. But, if the jury believed the defendant, he was not guilty of any rape. Id. at 355-56. The court concluded that the trial court properly refused to instruct the jury on third degree rape because, to convict, the jury would have had to disbelieve the defendant's claim that the intercourse was consensual and also disbelieve the victim's testimony that the act was forcible. Id.

Here, on the other hand, there was evidence that only third degree rape was committed based on Palmer's own testimony. The jury would not have had to disbelieve the defense claim intercourse was consensual and also disbelieve Palmer's testimony like in Charles or Jeremia. And, neither case supports a legal proposition that where the defense theory is

consent an instruction on the lesser degree offense of third degree rape is never warranted regardless of the evidence.

Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Because counsel requested a third degree rape instruction but for the wrong reasons and under the wrong alternative means, it cannot be said there was any legitimate trial strategy for not requesting the instruction on the alternative means supported by the evidence. Counsel's performance was deficient.

Counsel's deficient performance prejudiced Tovar. The lesser offense rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 250, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973). Because the jury was never given the option to find Tovar guilty of third degree rape but only to acquit or find him guilty of second degree rape, the jury likely chose the later course.

Reversal is required when a defendant is entitled to instruction on a lesser charge but does not receive it. See State v. Parker, 102 Wn.2d 161,

163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). Because Tovar was entitled to instructions on third degree rape, counsel's failure to properly request the instruction resulted in prejudice and Tovar's conviction should be reversed.

c. *Counsel Disregarded Tovar's Right to Testify*

A criminal defendant has both a state and federal constitutional right to testify. State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)). A defendant's right to testify is protected under the Fifth, Sixth, and Fourteenth Amendments to the federal constitution. Robinson, 138 Wn.2d at 758 (citing Rock, 483 U.S. at 51-52). Under Washington State's Constitution, a defendant is guaranteed the right to testify under article I, section 22. Robinson, 138 Wn.2d at 758 (citing State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). This right is fundamental and cannot be abrogated by defense counsel or by the court. Robinson, 138 Wn.2d at 758 (citing Thomas, 128 Wn.2d at 558).

A defendant ultimately decides whether to testify and the relinquishment of his right to testify must be knowing and intentional. Robinson, 138 Wn.2d at 758-59 (citing Thomas, 128 Wn.2d at 558-59);

United States v. Pino-Noriega, 189 F.3d 1089, 1094 (9th Cir.1999). The right to testify is violated when an attorney uses threats and coercion against his client, or when the attorney flagrantly disregards the defendant's desire to testify. Robinson, 138 Wn.2d at 763 (citations omitted). "If a defendant is able to prove by a preponderance of the evidence that his attorney actually prevented him from testifying, he will have established that the waiver of his constitutional right to testify was not knowing and voluntary." Robinson, 138 Wn.2d at 764-65.

The court found defense counsel did not disregard Tovar's desire to testify. 14RP 11. The court based its decision on finding that Tovar did not protest when Todd rested his case and that both defense counsel were more credible than Tovar because of Tovar's emotional instability. 14 RP 11-12. The court's decision was wrong.

Todd and Dacanay both confirmed that up until the day before the defense rested Tovar was adamant that he wanted to testify because he understandably believed the jury would expect him to testify. Although Todd testified that after the second meeting Tovar agreed he would not testify, Todd was unclear whether Tovar asked to meet the following morning because he had a list of possible questions he wanted Todd to ask him on the stand. Todd said Tovar might have even given him the list the

night before. Todd also admitted, despite Tovar's consistent insistence that he would testify, Todd never prepared any direct examination questions.

Both Todd and Dacanay were uncertain about how Todd communicated to Tovar whether he wanted to testify just before the defense rested its case. Todd stated that after the last defense witness testified he believed he asked Tovar if he was "good to go." 13RP 65. Dacanay said Todd stood up and "kind of looked" at Tovar and asked something along the lines of whether they were good and Tovar nodded yes. 13RP 76.

Even if Todd looked at Tovar and made some statement like are you "good to go" or "are we done" and received a nod in response, there is no indication Tovar understood that to mean he agreed he did not want to testify sufficient to conclude he knowingly, voluntarily and intentionally waived his right to testify. A reasonable person in Tovar's situation would have logically inferred Todd was asking Tovar if he was ready to testify. And, that Tovar made the inference is borne out by Latham who stated Tovar looked "shocked" when Todd then immediately rested the defense case.

That Tovar did not protest when Todd rested likewise does not show Tovar waived his right to testify. Tovar testified counsel told him he could not speak directly to the judge and our Supreme Court has

recognized a defendant may be too intimidated to speak out or does not have the sophisticated knowledge of constitutional rights or criminal procedure to object. See Robinson, 138 Wn.2d at 764 (citing Underwood v. Clark, 939 F.2d 473, 476 (7th Cir.1991)).

Finally, the trial court's finding that Tovar was less credible than Todd or Dacanay because he is emotionally unstable, does not change anything and is unsupported. First, even if Todd is believed, his brief "good to go" statement to Tovar, as shown above, was likely interpreted by Tovar as meaning was he ready to testify and Tovar's nod was his answer that he was ready.

Second, there is nothing in the record that shows Tovar was emotionally unstable at the time of trial or during his testimony at the new trial motion hearing. And, even if the record did show Tovar was emotionally unstable, the court gave no indication what that meant or how it might have effected his credibility. A preponderance of the evidence shows Todd disregarded Tovar's wish to testify.

Counsel disregarding Tovar's desire to testify was prejudicial. This case rested on whether the jury believed Palmer's story. Palmer gave conflicting accounts of what happened, she talked to Tovar about counseling following the first time they had intercourse and had intercourse again, she let him stay while she slept in another room and

after Tovar left she went to her husband instead of the police. These facts cast a long shadow over her credibility. Tovar's testimony denying he raped Palmer and his version of what happened that night could have been all that was necessary for the jury to conclude Palmer's story was unbelievable or at least raise a reasonable doubt about whether the State proved its case. And, although the jury was instructed it was to not infer Tovar was guilty because he did not testify, jurors would undoubtedly have wanted to hear Tovar's version if it was different than Palmer's because Palmer and Tovar were the only two people in that bedroom so they were the only two people who could speak to what happened.

Tovar ran the risk that by testifying he would open the door to the ER 404(b) evidence, but it was far from certain that would have happened. Todd's sole reliance on the later text messages between Palmer and Tovar to support the defense consent theory was dubious and no substitute for Tovar's testimony where the jury would have been able to assess Tovar's demeanor and where Tovar could have more fully explained what happened that night.

Based on the record, Tovar was denied his right to testify and to effective assistance of counsel. The trial court erred in denying Tovar's new trial motion. Tovar's conviction should be reversed.

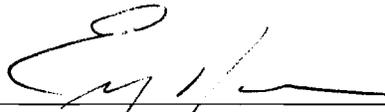
D. CONCLUSION

For the any of the above reasons Tovar's conviction should be reversed. Tovar is entitled to a new trial.

DATED this 29 day of November, 2010.

Respectfully submitted.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 65324-5-1
)	
MICHAEL TOVAR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF NOVEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL TOVAR
DOC NO. 874007
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF NOVEMBER 2010.

x Patrick Mayovsky

2010 NOV 29 PM 4:11
MONROE CORRECTIONAL COMPLEX