

70721-3

70721-3

NO. 70721-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TOVAR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE

1. To prevail on a motion for post-conviction DNA¹ testing, a defendant must show the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis. In deciding the motion, the trial court must assume that the DNA results would be favorable to the defendant, and view such results in light of all of the evidence presented at trial. Because Tovar admitted to sexual intercourse with A.P., but argued that it was consensual, evidence of someone else's sperm in the "rape kit" could do no more than impeach A.P. as to her claim that her relationship with Tovar was monogamous. Forensic evidence corroborated A.P.'s account of the force used in the rape, and A.P.'s credibility was extensively attacked in various ways at trial. Did the trial court properly exercise its discretion in finding that favorable DNA results would not demonstrate Tovar's innocence on a more probable than not basis?

¹ Deoxyribonucleic Acid.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Michael Tovar was charged by information with Rape in the Second Degree – Domestic Violence of victim A.P.², pursuant to RCW 9A.44.050(1)(a) (forcible compulsion). The State further alleged that the rape was a crime of domestic violence, and that Tovar had been armed with a deadly weapon (knife). CP 1-7.

A jury found Tovar guilty as charged. CP 8. After an evidentiary hearing and argument of counsel, the trial court denied Tovar's motion for a new trial. 13RP; 14RP 3-12.³ The court imposed an indeterminate standard-range sentence of 120 months to life imprisonment, plus 48 months for the deadly weapon finding.⁴ CP 9, 12.

² To protect her privacy, the rape victim will be referred to by her initials, and her husband by his first name only (Brent).

³ The Verbatim Report of Proceedings ("VRP") from trial has been transferred to this appeal. In referring to the VRP, the State adopts the system set out in the Brief of Appellant at page 2, footnote 2. The report of proceedings from the hearing on Tovar's motion for post-conviction DNA testing will be referenced as RP (7/25/13).

⁴ The statutory term of 24 months under RCW 9.94A.533(4)(a) was doubled under RCW 9.94A.533(4)(d), because Tovar's previous conviction for Burglary in the First Degree – Domestic Violence included a deadly weapon enhancement. 14RP 12; CP 15.

Tovar appealed. CP 20-22. His conviction was affirmed in an unpublished opinion (State v. Tovar, No. 65324-5-I, filed on February 13, 2012). CP 23-56.

Tovar subsequently filed a motion for post-conviction DNA testing pursuant to RCW 10.73.170. CP 59-72. He argued that, because he had undergone a vasectomy prior to the incident on which his conviction was based, the single spermatozoon detected in the biological samples obtained from A.P. (the "rape kit") could not have come from him. CP 60, 72. He reasoned that, if the spermatozoon came from someone else, this would impeach A.P.'s testimony that she had been in a monogamous relationship with Tovar at the time of the incident underlying the rape conviction. RP (7/25/13) 4.

The State opposed the motion, noting that Tovar did not dispute having sexual intercourse with A.P. on the date in question, but rather claimed that the intercourse was consensual. CP 85; RP (7/25/13) 6. The State also pointed out that A.P.'s credibility had been vigorously attacked by the defense at trial. RP (7/25/13) 6. Thus, the State argued, Tovar could not meet his statutory burden to show a likelihood that the DNA testing that he requested

would demonstrate his innocence on a more probable than not basis. CP 85.

The trial court assumed for purposes of the motion that Tovar had satisfied the threshold procedural requirements of RCW 10.73.170. RP (7/25/13) 7. The court nevertheless denied the motion on substantive grounds: "I am also persuaded having heard the trial in this case that even if it were shown that the complaining witness in this case lied about having sex with another individual other than Mr. Tovar [i.e., even if the results of DNA testing were favorable to Tovar], that the – that does not demonstrate innocence under the statute by a more probable than not basis." RP (7/25/13) 7; CP 73. In reaching this conclusion, the court considered the evidence introduced by the State at trial, as well as Tovar's defense of consent. RP (7/25/13) 7-8.

Tovar has now appealed the trial court's order denying his motion for post-conviction DNA testing. CP 74-76.

2. SUBSTANTIVE FACTS

a. Background.

A.P. and Brent were married for almost nine years before they separated in August 2008. 5RP 102, 105; 8RP 9-11. They

have three children together, who were ages four, seven and eight at the time of trial. 8RP 10. A.P. and Brent had an unconventional marriage -- they were involved in what is loosely referred to as "swinging." 5RP 104-05.

In mid-February 2009, while she was separated from Brent, A.P. met Tovar on an adult website set up for "purely carnal" sexual relationships. 8RP 11-14. A.P. and Tovar chatted on-line and exchanged text messages. 8RP 12-14, 18. Then, a few days later, they met. 8RP 15. The first two days of their relationship were good—A.P. and Tovar had an immediate sexual chemistry. 8RP 14-17, 127. They established a monogamous relationship. 8RP 14, 17.

Before long, Tovar began to express feelings of inadequacy concerning the size of his penis, and his belief that he would not be able to satisfy A.P. sexually. 8RP 18-23. A.P. tried to reassure him, but Tovar remained jealous and insecure. 8RP 20.

On February 17, 2009, A.P. and Tovar argued at the store where A.P. worked about the size of Tovar's penis and his belief that A.P. preferred "bigger men." 8RP 24-26. Later that night, Tovar delivered a letter to A.P. at her home, in which he alluded to his "dark guy." 8RP 27-32. A.P. understood the "dark guy" to be a

protective wall that Tovar had built around himself. 8RP 32-33. Tovar said that, as a child, when he experienced difficulties, his “dark guy” stepped up and protected him. 8RP 32-34. But “dark guy” was also a primary driving force within Tovar who told him lies. 8RP 33-34. The “dark guy” told Tovar that he was inadequate—that A.P. would not be satisfied with his penis size and that she would cheat on him. 8RP 33-34.

Tovar also told A.P. that he needed her to be his “safe place.” 8RP 34. A.P. told Tovar that she could not be his “safe place,” but she would try to help him feel safe on his own. 8RP 35.

Despite Tovar’s jealousy and feelings of inadequacy, there were times that A.P. thought the relationship was going well. 8RP 39. In early March 2009, Tovar moved into A.P.’s house. 8RP 38-40.

b. March 15 And 16: The Charged Incident.

As A.P. and Tovar ran errands earlier on the day of the charged incident, they argued about Tovar’s insecurities. 8RP 42. When A.P. told Tovar that they were having too many arguments too early in their relationship, Tovar reacted angrily—he drove

aggressively and started to punch the dashboard with his fist.⁵
8RP 42-43. Tovar screamed at A.P. 8RP 43. A.P. got out of the car, but Tovar followed her on foot through the parking lot and into a store, where Tovar made a scene. 8RP 44-46. Tovar then apologized and attributed his conduct to a lack of food. 8RP 47.

A.P. and Tovar went to a restaurant for dinner. 8RP 48. Tovar, who never drank alcohol, had about six glasses of wine. 8RP 48. He was obnoxious. 8RP 48. Tovar did not grasp that his relationship with A.P. was over because he relied on her to be his "safe place." 8RP 50.

After dinner, A.P. took Tovar back to her house, but told him that she wanted him to move out the next morning. 8RP 50. Then, at about 9:00 P.M., she left to pick up her children from Brent. 8RP 51. A.P. returned home around 11:30 P.M. and put her children to bed. 8RP 53. Tovar was on the bathroom floor making telephone calls to friends and family. 8RP 54.

A.P. went downstairs to watch television. 8RP 55. Tovar came downstairs and yelled, once again, about his inadequacies. 8RP 55. A.P. saw Tovar appear to stab one of his hands (the other

⁵ On another occasion, when A.P. and Tovar argued about the size of his penis, Tovar repeatedly punched himself in the face. 8RP 43.

hand than the one injured when he punched the dashboard).⁶

8RP 55. A.P. was “pretty terrified”; she had never seen anyone inflict so much pain on himself. 8RP 55. Both of Tovar’s hands were bleeding. 8RP 55. A.P. threw some Band-Aids at him.

8RP 55. Then, frightened for her children’s safety, A.P. took all of the kitchen knives and locked them in her car. 8RP 56.

Wishing to avoid further conflict, A.P. went to bed. 8RP 57. Tovar followed her to the bedroom; he had a samurai sword (taken from a display in the house) and a hunting knife that he flipped open and shut. 4RP 25; 8RP 58. He vacillated between being “drunk and pathetic” and “tough.” 8RP 58. He talked to himself in a pathetic, sad, crying voice; he commiserated about his life, his past, and his mother. 8RP 61. Then Tovar’s “dark guy” appeared, his voice strong and angry. 8RP 61. The “dark guy” told Tovar that Brent was a really good dad and that A.P.’s kids would be “just fine with him.” 8RP 62.

⁶ A.P. said that she did not see Tovar stab his hand, but she saw him holding a knife, she saw puncture wounds, and she heard Tovar scream in pain. 8RP 56-57. Two defense witnesses, Joe and Teresa Paviglianti—a couple with whom Tovar “swung”—saw Tovar on the morning of March 16. Tovar’s right hand looked swollen (like he had punched something) and the back of his left hand had an injury consistent with a knife wound. 9RP 23, 31-35, 41. However, despite A.P.’s belief that Tovar had also made cuts on his neck or chest, the Pavigliantis did not see any such injuries. 8RP 59-61; 9RP 21-22, 40-41.

Tovar moved around the bedroom and talked about killing himself; he said that he had tried suicide before, but this time it was for real. 8RP 59. Tovar wanted A.P. to tell him things like “he had too small of a dick,” or that she did not care about him and would cheat on him, so that he could muster the courage to kill himself. 8RP 62. A.P. took Tovar’s suicide threat very seriously. 8RP 61. He kept playing with the knife. 8RP 59.

Every time that A.P. “freaked out” and started to cry, Tovar became angrier and more aggressive. 8RP 62. Tovar told A.P. not to cry because it made the “dark guy” want to hurt her. 8RP 64. Tovar jumped on the bed and stabbed a pillow that was about two feet from A.P.’s head with the hunting knife. 8RP 63, 66. He put the knife down on the nightstand. 8RP 81. He put his hands around A.P.’s throat and held a pillow over her face. 8RP 62-65, 71. A.P. was unable to breathe for a few seconds; she kicked and thrashed around in an attempt to get Tovar off her. 8RP 65. Tovar jammed his hands or his thumbs down A.P.’s throat and squeezed her face. 8RP 65, 71.

Tovar seemed to suddenly realize what he was doing; he got off A.P. and said, “Oh my God, I’m sorry.” 8RP 66. A.P. begged Tovar to let her sleep with her children. 8RP 66. Tovar said no—

that she needed to be his “safe place.” 8RP 66. Tovar allowed her to tuck her children in again, but he went with her—still armed with his hunting knife. 8RP 67-68.

Tovar pulled A.P. back into her bedroom; he alternated between his “dark guy” and a more sympathetic side. 8RP 69. Tovar rambled on about his inadequacies and how he wanted to give A.P. something that nobody else could. 8RP 70. He became enraged about his self-perceived inability to sexually satisfy A.P. 8RP 72.

While A.P. was on the bed, Tovar forced her legs apart. 8RP 72. He undressed himself and told A.P. that he was going to “fuck[] [her] like no other guy has ever fucked [her].” 8RP 73. A.P. cried; she told Tovar to leave her alone. 8RP 74. She wanted to fight Tovar off, but she was afraid that he would severely hurt or kill her if she tried. 8RP 74-77. The less A.P. resisted, the less she saw of Tovar’s “dark guy.” 8RP 75-77. Tovar forced his penis inside A.P.’s vagina. 8RP 75. After Tovar climaxed, he said, “Oh my God, did I just rape you?” 8RP 77.

A short while later, Tovar asked to make love to A.P. so that the memory of their relationship did not end with the rape. 8RP 79.

The second time that Tovar penetrated A.P., she shook her head no, but did not say no; she felt she had no choice.⁷ 8RP 80-81.

Tovar left at around 8:30 A.M. on March 16. 8RP 84-85. A.P. sent Brent an email, telling him that she had been assaulted.⁸ 5RP 115; 8RP 85-86. After dropping the two older children at school, A.P. went to Brent's workplace with her youngest child. 5RP 116; 8RP 86-87. Brent gave her the key to his apartment, and she went there and tried to rest. 8RP 87. After they picked up the children from school, Brent dropped A.P. off at the police station. 5RP 117-18. After taking a statement from her, and photographing and seizing evidence at her house, King County Detective Marylisa Priebe-Olson told A.P. to go to Valley Medical Center for a rape examination.⁹ 4RP 14, 16-33; 8RP 90-91.

⁷ The State did not charge or argue that this second penetration was the basis for the rape in the second degree charge.

⁸ A.P. said that she gave Brent "just the basics, you know, just to help him understand why [she would need his help with the children that day], you know, because we got along, but not like, you know, great. You know, he does have a girlfriend and he'd had a girlfriend." 8RP 86.

⁹ In a declaration attached to his motion for post-conviction DNA testing, Tovar claims that it was not until he was working on his direct appeal of his conviction that he learned for the very first time that "there may have actually been a rape kit done." CP 69. But Detective Priebe-Olson testified at trial that she submitted the rape kit to the Washington State Patrol Crime Laboratory, that the lab was unable to complete the required testing (Y-STR), and that she decided not to send the rape kit to a private lab (at considerable expense) because Tovar did not deny having sex with A.P. 5RP 42-43; CP 72.

c. "Facebook" And The "Tipped-Receiver"
Telephone Call.

Two days later, Detective Priebe-Olson reviewed Tovar's recent "Facebook" postings. 4RP 37. A posting on March 14 said, "Michael went from being in a relationship to single." 4RP 39. On March 16, at 7:46 P.M.: "Michael Tovar is missing his family." 4RP 39. On March 17, at 7:20 P.M.: "Michael Tovar is under the gun"; at 8:01 P.M.: Tovar is "facing some life-altering changes right now"; and at 11:19 P.M.: "Michael Tovar is going to miss his son for the next 10 to 20." 4RP 39.

On March 18, Priebe-Olson met A.P. so that the detective could listen in on a telephone conversation between Tovar and A.P.¹⁰ 4RP 40; 8RP 99-101. During this "tipped-receiver" telephone call, Tovar asked A.P. what was the worst part of what she remembered, and A.P. said that it was the bruises inside her mouth. 4RP 70. Tovar said that he was sorry, and he cried. 4RP 71. A.P. told Tovar that he had threatened to kill her and himself. 4RP 73. Tovar told A.P. that it sounded like he owed her a "lot of apologies." 4RP 73. Tovar then said, "I can't go to prison.

¹⁰ The police were trying to locate Tovar before he hurt himself or another. Tovar did not want to text-message A.P.; he wanted to talk to her on the telephone. Detective Priebe-Olson and A.P. sat in Priebe-Olson's car and A.P. tipped the receiver so that Priebe-Olson could hear the conversation. 4RP 40; 8RP 99-102.

I can't believe you are doing this to me. I cared about you. . . .

I can't go to prison." 4RP 73.

Tovar told A.P. that he did not recall hurting her. 4RP 75.

He told A.P. that she brought out the dark side in him—that she just wanted to put him down. 4RP 75. Tovar then asked A.P. if she was going to call the police after she hung up—although Tovar suspected that the call was being either recorded or traced.¹¹

4RP 73, 77, 79.

Tovar said that he had called his son, Chaz, and told him good-bye. 4RP 78. Tovar told Chaz that he loved him, but that he had to "go away." 4RP 78. Tovar said, "I'm going to end my life." 4RP 78. A.P. asked Tovar if he had a gun; he replied, "I have all I need." 4RP 79. Tovar said that he would let her know "when and where I do it," and where to find his body. 4RP 81, 87.

d. Arrest.

After the telephone call, the Pierce County Sheriff's Department and Tacoma Police located Tovar's cellular telephone signal and then Tovar. 4RP 89; 5RP 7, 69-76; 6RP 19-24. When

¹¹ Tovar's brother had called him and told him that there was a warrant out for his arrest. 1RP 40; 4RP 87.

Tovar got into his car and drove out of a business park, the police officers activated their sirens and overhead lights and tried to stop him. 5RP 76-77, 81; 6RP 30. Tovar fled down a dirt road, but reached a dead end. 5RP 80; 6RP 30.

The police officers drew their weapons; they ordered Tovar to turn his vehicle off and put his hands outside the window. 5RP 81-82. Tovar screamed and cried and refused to comply. 5RP 82; 6RP 32. Police officers negotiated with Tovar for 15 - 20 minutes. 6RP 32. Because Tovar had barricaded himself inside his car, officers called for a SWAT team and a supervisor. 5RP 85, 87.

Suddenly, Tovar screamed and floored the accelerator. 5RP 87; 6RP 32. Tovar's car sped down an embankment, crashed into a tree, and stopped. 5RP 88; 6RP 33. As officers flanked the car, they could see Tovar slumped over the center console toward the passenger seat. 5RP 89. There was a lot of blood inside the car. 5RP 90, 93. There was a knife with the blade covered in blood on the front passenger seat. 8RP 7-8. A Pierce County Sheriff's Reserve Deputy, who is a doctor, performed life-saving measures until medics arrived and transported Tovar to a hospital, where he was formally arrested. 5RP 9-10, 93-94, 96.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT TOVAR HAS FAILED TO SHOW THAT FAVORABLE DNA TEST RESULTS WOULD DEMONSTRATE HIS INNOCENCE ON A MORE PROBABLE THAN NOT BASIS.

Tovar contends that the trial court erred in denying his motion for post-conviction DNA testing under RCW 10.73.170. He argues that the court misapplied the law by considering only evidence supporting the conviction in deciding his request. This is incorrect. The court followed the law by assuming that the result of the testing would be favorable to Tovar, and evaluating the likely effect of that result on the outcome in light of other evidence presented at trial. The court did not abuse its discretion in denying Tovar's motion for post-conviction DNA testing.

A convicted felon serving a term of imprisonment in Washington may file a motion in the trial court for postconviction DNA testing, provided that certain threshold procedural requirements are met.¹² RCW 10.73.170(1). The trial court "shall grant" such a motion if the threshold requirements have been met

¹² Because the trial court assumed for purposes of Tovar's motion that the threshold requirements had been satisfied, these requirements are not at issue here and will not be discussed.

“and the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” RCW 10.73.170(3) (italics added).

“In determining whether a convicted person ‘has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis,’ a court must look to whether, viewed in light of all of the evidence presented at trial or newly discovered, favorable DNA test results would raise the likelihood that the person is innocent on a more probable than not basis.” State v. Riofta, 166 Wn.2d 358, 367, 209 P.3d 467 (2009). The court must grant a motion for post-conviction DNA testing “when exculpatory results would, *in combination with the other evidence*, raise a reasonable probability the petitioner was not the perpetrator.”¹³ Id. at 367-68 (italics in original).

The statute places a “heavy burden” on defendants seeking post-conviction relief. Id. at 369. The trial court’s application of the statutory standard is reviewed for abuse of discretion. Id. at 370. A trial court abuses its discretion when its order is manifestly unreasonable, or is based on untenable grounds or made for

¹³ The Washington Supreme Court recently held explicitly that, in deciding a motion for post-conviction DNA testing, the trial court should assume that the result would be exculpatory. State v. Crumpton, No. 88336-0 (filed 8/21/14), slip op. at 8.

untenable reasons. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts that are not supported in the record, or if it was reached by applying an incorrect legal standard.

Id.

The trial court's denial of Tovar's motion for post-conviction DNA testing was a proper exercise of discretion under the statute. The court properly looked to all of the evidence introduced at trial to determine whether a DNA test that produced the result that Tovar seeks (someone else's sperm in the rape kit) would demonstrate his innocence on a more probable than not basis.

In concluding that even a favorable DNA result would not demonstrate a likelihood of innocence in light of the evidence introduced at trial, the court cited to A.P.'s testimony, Tovar's apologies to A.P. for what he had done, Tovar's flight from police officers, Tovar's attempt to injure himself or take his own life, and his defense of consent. RP (7/25/13) 7-8. This analysis comported with the supreme court's directive that the trial court should consider exculpatory DNA results in combination with the other evidence in determining whether DNA evidence would demonstrate

innocence on a more probable than not basis. See Riofta, 166 Wn.2d at 367-68.

Moreover, there is even more evidence in the record that figures into this calculus and supports the trial court's conclusion.¹⁴ First of all, there was abundant physical evidence that corroborated A.P.'s account of forcible rape. Both the case detective and the emergency room doctor observed the injuries to the inside of A.P.'s mouth; the doctor testified that the bruising was consistent with A.P.'s account of Tovar jamming his thumbs into her mouth.¹⁵ 4RP 21; 7RP 22-27. In addition, police recovered a pillow from A.P.'s bed that had a puncture mark in it, consistent with A.P.'s account of Tovar stabbing the feather pillow next to her head with a hunting knife while he terrorized her on the night of the rape. 4RP 32-33; 8RP 63.

Tovar never explained this evidence. In his closing argument, counsel attacked the State's allegations of force. "The one element that it comes down to and the one thing that we really

¹⁴ Even if the trial court based its decision on inappropriate grounds, thus abusing its discretion, the appellate court may affirm on any ground within the pleadings and proof. Rohrich, 149 Wn.2d at 654.

¹⁵ A.P. described the force used in her testimony at trial: "And he like put his hands like in my face with his thumbs like in my mouth and just like squeezed down on my face, like had his hands like all the way down in my face and was just like squeezing it and like trying to stretch it out. I don't know what he was doing, but it felt like he was going to like rip apart my lips." 8RP 65.

ask you to look at is that forcible compulsion. Was force use[d] in this relationship, and what was going on at the time?” 9RP 107. Counsel stressed the lack of violence in the overall relationship: “At no time during any time that Michael Tovar was communicating with [A.P.] was there ever a threat of violence made” 9RP 110. “[Tovar’s] [i]nsecurities . . . didn’t lead to violence in this particular case either.” 9RP 111. “Not once did he ever threaten her in any manner.” 9RP 113.

But counsel had no effective way to counter the evidence of bruising in A.P.’s mouth. He was left to quibble over minor inconsistencies in her testimony: “She does have injuries, granted. But she doesn’t remember whether it was thumbs or fingers.” 9RP 119; see also 9RP 153. He then tried to blame the injuries on A.P.’s fondness for role-play and sex. 9RP 119. There was never any explanation offered for the puncture in the pillow.

In addition, A.P.’s credibility was extensively attacked at trial – counsel’s cross-examination was full of impeachment with inconsistent statements. See, e.g., 8RP 130-31 (did A.P. get out of the car because she was tired of dealing with Tovar, or because she was scared?), 133 (did Tovar have six glasses of wine or four?), 136-40 (did Tovar stab the pillow during his aggressive acts

toward A.P., or later when she was talking to him about going to counseling?), 151-52 (did A.P. fall asleep when she lay down with her children after the rape was over, or not?), 153 (A.P. did not mention rape in her email to Brent after the incident in question).

Significantly, A.P. was impeached specifically as to whether she had been truthful about her sexual activities. Defense counsel brought this up during cross-examination of Brent:

Q: And when you started sleeping over at her house the second week of April, did you guys start having sex after that?

A: Yes.

Q: Had you had sex before you moved in?

A: Yes, I think we had sex. I had broken up with my girlfriend, so I had had sex with her, I think, on her birthday or shortly after her birthday.

Q: That was March 26?

A: Yes.

5RP 128. Counsel then revisited the subject on cross-examination of A.P.:

Q: And you indicated that you weren't able to have sex for a month after this incident; is that right?

A: I did, actually. I think it was about three weeks after, when Brent had left his girlfriend and we had started to consider getting back together, we attempted to have sex in the bedroom. It was not

pleasurable and I couldn't do it and I kept on seeing Michael's body on top of me. And we didn't have sex again for some time.

Q: Do you recall telling me that you weren't able to have sex for a month after that?

A: So is like three weeks and a month a big difference? So, yeah, okay, I recall telling you that.

Q: This incident was on March 16, correct?

A: March, 16th, yes.

Q: And your birthday is on March 26?

A: Yes.

Q: And you had sex with Brent on your birthday?

A: No, I don't think so. It may have been then, yes, you are right. I thought it was in April.

8RP 160-61.

Counsel incorporated this disparity in dates into his closing argument:

She goes to Utah.^[16] Comes back and says, oh, I couldn't have sex for a month. I couldn't have sex – another exaggeration. I couldn't have sex for a month after this incident.

But what did we hear from Brent? We hear from Brent that [A.P.]'s birthday is March 26. This incident was supposed to have happened on March 16. Brent tells us, we had sex on her birthday, ten days later.

¹⁶ A.P. had gone to stay with family in Utah a few days after the rape. 8RP 88.

Remember when I asked [A.P.], you had sex on your birthday, didn't you?

Oh, yes, I did.

9RP 122.

Tovar nevertheless argues that “[i]f DNA evidence shows the semen was not from Tovar, or the presence of spermatozoa, it would be powerful new evidence A.P. had sex with someone other than Tovar and she lied about only having sex with him” Brief of Appellant at 16. But *any* semen obtained from A.P.’s body on the same day that Tovar admittedly had sexual intercourse with her would likely include cells containing Tovar’s DNA (even if it contained a mixture that included someone else’s DNA as well). Moreover, DNA testing would not “show[] . . . the presence of spermatozoa.” The laboratory report in this case already confirms that “[a] spermatozoon was observed” CP 72. DNA analysis on that single spermatozoon would presumably be aimed at determining the identity of the source.

The real question, of course, is this: *If* the biological samples that comprise the “rape kit” taken from A.P. on the day of the rape contain the DNA of another male in addition to Tovar’s (the only “exculpatory” result that Tovar can hope for), does this fact, in

combination with the evidence introduced at trial, raise a reasonable probability that Tovar is innocent? The trial court reasonably concluded that the answer is “no.”

The evidence that Tovar raped A.P. is simply overwhelming. In addition to A.P.’s extensive testimony and Tovar’s admissions and actions in the aftermath of this incident, there is forensic evidence (injuries to A.P.’s mouth, punctured pillow) that corroborates A.P.’s version of events, and contradicts Tovar’s claim of consensual intercourse. Even if the jury had learned that A.P. lied about being in a monogamous relationship with Tovar at the time of the rape, this would not have added significantly to the impeachment already accomplished by defense counsel on cross-examination.

Moreover, this specific impeachment would have had little impact on the jury’s decision in light of Brent’s testimony that he and A.P. had engaged in “swinging” and that the couple separated because A.P. wanted “more freedom and relationships”; A.P.’s acknowledgment that she was “highly sexual” and that she and Tovar had met on a website that was set up for “purely carnal” relationships; and A.P.’s acknowledgment that one of the reasons for her fight with Tovar just before the rape happened was that she

told him that she couldn't continue to be in a monogamous relationship with him. 5RP 104-05; 8RP 14, 129. Where a jury believed A.P.'s account of the rape after hearing all of this, it is not reasonable to think that the addition of the DNA evidence that Tovar seeks (even assuming that any DNA results are favorable to his theory) would so change a rational assessment of her testimony as to lead to a conclusion that he is innocent of rape.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm the trial court's denial of Tovar's motion for post-conviction DNA testing.

DATED this 29th day of August, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Eric J. Nielsen**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. MICHAEL TOVAR**, Cause No. **70721-3-I**, in the Court of Appeals for the State of Washington, Division I.

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

U Brame
Name
Done in Seattle, Washington

8/29/14
Date

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STATE OF WASHINGTON
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