Court of Appeals No. 35690-2
Thurston County Superior Court No. 01-1-01136-1

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

In re the Personal Restraint of:

JERRY D. WIATT, JR.

Petitioner.

PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT AND AUTHORITIES
FILED UNDER SEAL

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I. STATUS OF PETITIONER/PROCEDURAL HISTORY

Petitioner Jerry D. Wiatt, Jr. is currently incarcerated at the Stafford Bay Corrections Center in Aberdeen, Washington.

On October 21, 2002, the Thurston County prosecutor filed a fourth amended information charging Wiatt with five counts of second degree rape, one count of third degree rape of a child, two counts of third degree rape, four counts of sexual exploitation of a minor, four counts of voyeurism, one count of communication with a minor for immoral purposes, one count of unlawful imprisonment with sexual motivation, and eight counts of furnishing liquor to a minor. CP 66-70; App. V. The court severed 18 counts from the others for trial. Wiatt was convicted by a jury of all counts except for count I (second degree rape of A. Cruz) and count XI (unlawful imprisonment). He was found not guilty of count X (rape in the third degree of H. Kalmikov) but guilty of the lesser charge of attempted rape in the third degree. CP 71-90. He then resolved the remaining counts by pleading guilty to one count of voyeurism and one count of communication with a minor. CP 139-150. The trial court sentenced him to a total of 340 months confinement. CP 163-173; App. LL.

On direct appeal, this Court issued an unpublished decision on April 26, 2005. App. MM. It reversed counts two through six because they were based on an illegal search, and affirmed the remaining counts. Wiatt's petition for review was denied by the Supreme Court, and the mandate issued on December 14, 2005.

Mr. Wiatt was represented in the superior court by David Allen, Todd Maybrown, and Cassandra Stamm of Allen, Hansen and Maybrown, 600 University Street, Suite 3020, Seattle, Washington 98101-4105. He was represented on appeal by Lenell Nussbaum, Market Place Two, Suite 200, 2001 Western Avenue, Seattle, Washington 98121-2163.

Mr. Wiatt is not seeking to proceed at public expense.

II. STATEMENT OF THE CASE

A. SOURCES OF FACTS

The facts relating to this petition are based on the materials filed in the Appendix, and on the clerk's papers and transcripts filed in the direct appeal. Wiatt has filed a motion to transfer the record from the direct appeal to this file.

B. TRIAL TESTIMONY

1. Overview

Mr. Wiatt, age 26, owned a home he shared with several others. Young people often gathered and partied there. Alcohol frequently was served, but Wiatt did not permit drugs in his household.

Having heard rumors that Mr. Wiatt had a video of him having sex with her, A. Cruz reported that Mr. Wiatt raped her. Based on the rumors, the police obtained a search warrant and located a video showing Mr. Wiatt having sex with the woman. The police then issued a press release suggesting there were other videos with other women. Several other young women then came forward, concerned they were on a video, and reported that Wiatt had sex with them when they did not, or could not,

consent. Because the counts involving A. Cruz were reversed on appeal, petitioner will discuss only the remaining counts that resulted in a guilty verdict.

2. Ct. VIII, Rape 3° (J. Bowles)

Ms. Bowles was at Mr. Wiatt's home more than once. She had a history of drinking problems and of blackouts. She drank alcohol combined with medication she was not to mix with alcohol. RP 577, 605-09, 654.[1] Witnesses including her best friend saw her interact with Mr. Wiatt and go willingly to his room; heard sounds from the room consistent with consensual intercourse; joined them in the room afterwards, where she appeared happy; and heard her brag how Mr. Wiatt was "hot," and "it was good" with him because he was older and more experienced. RP 1579-89, 1624-26, 1819-26, 1838-42, 1989-91.

Ms. Bowles, however, testified she continually told Mr. Wiatt "no" while he kissed her, undressed her, and ultimately had intercourse with her. RP 557-63.

3. Ct. XII, Rape 2° (K. Hoskins)

This Count is discussed in detail in section IV(A), below. In short, Hoskins testified that she could remember nothing of her encounter with Jerry Wiatt, but knew Wiatt had sex with her because he told her so.

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[1] The consecutively-paginated transcripts of the trial are designated as "RP". The separately-paginated transcripts of other hearings are designated as "RP [date]".

4. Ct. XIV, Rape 2° (Z. Hawkins)

Ms. Hawkins went to Mr. Wiatt's home as a guest of his younger brother Jeffry. RP 1312. She drank two or three beers from bottles, all before Jerry Wiatt came home. RP 1318. Hawkins, Jeff Wiatt, and Hawkins' friend E. Gundlach agreed that it would be a good idea to invite more people over. RP 1319. Jeff placed a call to Jerry. RP 1319. Although Hawkins denied it, both Kevin Barlow and Jerry Wiatt testified that Hawkins got on the phone and enticed the men to come home by saying that she had "big boobs." RP 1301-02; 2062-63. Hawkins testified that she felt ill and lay down on the floor downstairs. RP 1321-22. She said Wiatt dragged her upstairs to his room. RP 1325-25. Anthony Grant testified that she walked upstairs on her own. RP 1595-96. Hawkins' friend, E. Gundlach did not see Hawkins passed out. In fact, she observed Hawkins to be fine up to the time that Hawkins walked upstairs with Wiatt. RP 870-78.

Hawkins testified that in Wiatt's room, she was unable to move while she lay on his bed. He undressed her and began intercourse. RP 1328-30. When her friend E. Gundlach knocked on the door and called her name, she pushed him off, put on her clothes, and left the room. RP 1336-37. Wiatt testified that he and Hawkins began consensual sex but when others walked into the room, she became embarrassed and wanted to stop. Wiatt became annoyed and asked Hawkins to leave. RP 2070-76.

5. Ct. XVI, Rape 3° (R. Rankis)

Ms. Rankis partied at Mr. Wiatt's a number of times. On one occasion she drank 6-7 drinks and secretly ingested cocaine she had. RP 716-18, 723-30, 747, 759. She was flattered Mr. Wiatt was flirting with her. She told others she was interested in having sex with Mr. Wiatt. RP 732-33, 1791-93, 1818, 1985-86, 2006.

She walked up to his room with him. They kissed lying on his bed. RP 763-66, 1791-93. Mr. Wiatt began removing her clothes. She testified she might have been saying "what are you doing?" and she may have responded by giggling. RP 734, 768. Ms. Rankis next recalled they were having sexual intercourse, and "I think I was saying, no, no, no, but I couldn't move really." RP 734. Ms. Rankis never said "no" before they began having intercourse. RP 769-70. After she said no, Mr. Wiatt stopped.

Wiatt testified that he and Rankis had consensual sex on several occasions. RP 1960-68.

6. Ct. X, Attempted Rape 3° (H. Kalmikov)

Ms. Kalmikov went to Mr. Wiatt's home with him after a date. She testified that while she and Wiatt were in his hot tub he removed her bathing suit and raped her. RP 1165-69. She then went with Wiatt to his bedroom and lay down with him. When he tried to have sex with her again, she left the house. RP 1175-79. Wiatt testified that he and Kalmikov were in his bedroom kissing. When she made it clear she did

not wish to go farther, he got annoyed with her and she left the house in anger. RP 2037-40.

III. GROUNDS FOR RELIEF

1) The evidence was insufficient for conviction on count 12 (K. Hoskins), in violation of the Fourteenth Amendment due process clause.
2) The prosecutors violated Wiatt's Fourteenth Amendment right to due process by misleading the defense about the theory they would pursue at trial.
3) Wiatt was denied his Sixth Amendment right to effective assistance of counsel.
4) The trial court violated Wiatt's federal constitutional rights to present a defense and to rebut the State's evidence, under the Sixth and Fourteenth Amendments, by excluding various evidence of the victims' sexual behavior.
5) Newly discovered evidence requires a new trial.
6) The State violated Wiatt's Fourteenth Amendment right to due process in several ways due to misconduct by the case detective and victims' advocate.
7) Wiatt's Fourteenth Amendment right to due process was violated when the jurors considered extrinsic information.
8) The trial court failed to recuse itself despite actual bias and/or an appearance of bias, in violation of the Fourteenth Amendment due process clause, the Code of Judicial Conduct, and the appearance of fairness doctrine.

9) The trial court excluded Wiatt and the public from a pretrial hearing, in violation of Wiatt's right to a public trial under the Sixth Amendment and Art. I, § 22 of the Washington Constitution, and his right to be present under the Sixth and Fourteenth Amendments.

IV. ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON COUNT 12 (K.HOSKINS)

1. Legal Standards

The Court must determine whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The Jackson test replaced the less stringent "substantial evidence" test previously employed by the Washington courts. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[T]he application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." Jackson, 443 U.S. at 317 n.10. "A properly instructed jury may occasionally convict when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." Id. at 317. "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir.), amended on denial of reh'g, 798 F.2d 1250 (9th Cir. 1986), cert. denied, 489 U.S. 1032, 109

S.Ct. 1169, 103 L.Ed.2d 227 (1989). Nevertheless, "mere suspicion or speculation cannot be the basis for creation of logical inferences." Id.

2. Analysis

Count 12 charged Jerry Wiatt with rape in the second degree by engaging in sexual intercourse with K. Hoskins "when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." CP 68; App. V at 3.

K. Hoskins testified that she went to Jerry Wiatt's house on December 19, 2000. RP 950. Five to ten people were there. RP 952. Hoskins had been to Wiatt's house before. RP 946. On December 19, Hoskins drank some alcohol. RP 952. During the course of a card game, Hoskins accidentally bumped into someone and got a bloody nose. RP 953. She recalled Wiatt and her friend Danielle Couey being with her in the bathroom while she vomited some blood. RP 953-54. Danielle also helped clean up the blood. RP 953.

Hoskins claimed her next memory was waking up naked in Wiatt's bed the next morning. RP 954. She asked Wiatt if they had sex and he said yes in a laughing voice as if to say "don't you know that." RP 955. Since she had no memory of what happened in Wiatt's room that night she could not say whether or not she consented to sex. RP 994.

Hoskins testified that she continued to see Jerry Wiatt after that night, and had consensual sex with him five or ten times. RP 959-60. Although she claimed at trial that she never really enjoyed being with Wiatt, she previously told the police that "being with him made me feel

special like I never felt before." RP 995-98. Hoskins agreed that she might have "blocked out some of the memory" of what went on between her and Wiatt.

Hoskins approached Det. Adams after a friend warned her that she might be on a videotape. RP 979. In fact, she was not. RP 981.

The State called Hoskins' friend, Lindsey Howard, who was present at Wiatt's house on December 19, 2000. RP 912-19. She observed Hoskins up to the time that she went upstairs to Wiatt's room. RP 929-31. At all times, Hoskins seemed aware of what was going on around her, was able to communicate, was not slurring her words, and was not stumbling or falling down. RP 930-31. Lindsey had seen Hoskins "way more intoxicated" than she was on that evening. RP 931.

Jerry Wiatt testified that he and Hoskins had consensual sex on the evening of December 19 and that she was not incapacitated at the time. RP 2054-56.

Even when the testimony is taken in the light most favorable to the State, there is simply no evidence that K. Hoskins was incapable of consent on December 19, 2000. Even if fully believed, her testimony proves only that she could not recall what happened in Wiatt's bedroom. She did not claim, for example, to be physically helpless or to be unable to think clearly at the time the sex occurred. No rational factfinder could infer from this lack of recall that the State had proved beyond a reasonable doubt that Hoskins was incapacitated at the time of the sex. Such an inference would be mere speculation.

Hoskins admitted that her lack of memory might have been due to her effort to block out recollections of her relationship with Jerry Wiatt. But even if the lack of memory was due to alcohol or drugs, that would not justify a conclusion that she was incapacitated during the events she could not recall. It is not unusual, for example, for people to have memory "black outs" after drinking alcohol, but that does not necessarily mean they were helpless or incapacitated while they were drinking.

The State could, of course, fill this gap in the evidence through the testimony of other witnesses. By all accounts, many other people were present on the night of the bloody nose. Yet the State could not produce any witness who claimed that Hoskins appeared incapable of consent. In fact, Hoskins' own friend testified to the contrary.

By contrast, in what appears to be the only Washington case involving a similar issue, there was ample evidence of the victim's incapacity. State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001). In that case, the victim testified that she consumed at least 10 alcoholic drinks on the evening in question, and the State provided expert testimony that someone with such a high blood alcohol level could not appreciate the consequences of her actions. Id. at 609. A witness testified that the victim was stumbling and passing in and out of consciousness shortly before the sexual intercourse took place. Id. Here, by contrast, no witness testified that K. Hoskins was highly intoxicated or unconscious at any time. Not even K. Hoskins made such a claim. The State's case was based solely on her lack of memory.

Thus, Count 12 must be dismissed for insufficient evidence.

B. THE PROSECUTORS VIOLATED WIATT'S RIGHT TO DUE PROCESS BY MISLEADING THE DEFENSE ABOUT THE THEORY IT WOULD PURSUE AT TRIAL

1. Legal Standards

The State deprives a defendant of his Fourteenth Amendment right to due process when it misleads the defense, whether intentionally or inadvertently, about the evidence it will present. Gray v. Netherland, 518 U.S. 152, 116 S. Ct. 2074, 135 L. Ed. 2d 457, 472 (1996), citing Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed 2d 1344 (1959), and Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed 791 (1935).

2. Relevant Facts and Procedural History

In a pretrial motion, the defense argued that "the State should not be permitted to claim – or to even suggest – that the defendant used date rape drugs at any time. Simply put, the State lacks a proper factual basis to raise this issue at trial." CP 55; App. W at 24. On September 20, 2002, the prosecutor conceded the point because of recently-received forensic results. RP (9/20/02) 80; App. A, Declaration of David Allen at ¶ 1. FBI laboratory tests of A. Cruz's hair found no trace of such drugs. Ex. A to App. A.

Nevertheless, the prosecutors repeatedly elicited testimony from the alleged victims that in retrospect appear calculated to suggest a date rape drug theory. First, when questioning R. Rankis the prosecutor specifically brought out that Jerry Wiatt mixed the first of several drinks she had. RP 728. Rankis then testified to a mysterious effect on her: "I

felt like I couldn't really control my motions, like my motor skills were more harder to move than I normally would be, even if I was drunk, which I had been drunk before, and it was kind of more intensely drunk." Id. at 735. Second, although the only charge involving E. Gundlach was furnishing alcohol to a minor, the prosecutors had her testify about mysterious effects from the one drink Wiatt gave her. RP 847, 850, 855. Third, as discussed above in section IV(A), K. Hoskins claimed she had little to drink besides a "B-52" that Wiatt mixed for her, yet she could remember little about the rest of the evening.

Z. Hawkins claimed in a pretrial interview that Jerry Wiatt appeared to put some substance into a drink he offered her. The trial court granted a defense motion in limine to exclude such testimony because Hawkins admitted that she never drank anything that Wiatt gave her. RP 1269-74. Nevertheless, Hawkins testified that she was completely incapacitated, unable to move even her little finger. RP 1322-23. The only drinks she had consumed were two or three beers given to her by Jeff Wiatt. RP 1318. In closing, the prosecutor argued that "whatever the reason" Hawkins was clearly incapacitated. RP 2450.

After the conviction, the defense investigator interviewed the jurors. See CP 132-36; App. EE. Juror No. 6, Norman Spencer, reported that during deliberations the jury discussed whether date rape drugs had been used on the complainants. He explained that he and other jurors concluded that if the complainants had had only a few drinks, they would

not have been as incapacitated as they described, and there must have been another reason to explain their physical condition, such as being drugged.

Mr. Spencer learned about date rape drugs from watching several television programs, including news programs; "America's Most Wanted;" "The New Detectives;" and a program on The Learning Channel. He had seen more than one episode on "America's Most Wanted" dealing with cases in which date rape drugs had been used. From what he recalled from these television programs, he explained to the rest of the jurors that there is a type of date rape pill that would dissolve completely in someone's drink, would have no aftertaste, and would not leave a film or milkiness in the drink. He told the other jurors that it was possible for someone to have dropped such a pill in a victim's drinks and for the victim not to know.

In response to a question from another juror, Mr. Spencer explained that he had learned from "The New Detectives" that there were some date rape drugs that would not show up on a blood test. Mr. Spencer and the other jurors decided that the circumstantial evidence instruction authorized them to consider a date rape drug theory.

Juror No. 10, Rosemary Walsh, stated that she also raised the issue of date rape drugs with other jurors because she felt this explained what the complainants described in their testimony. She told the other jurors that she thought it would have been possible to slip something into the victim's drinks because it would only take a second to do so.

Several other jurors confirmed that the subject of date rape drugs was discussed during deliberations and that the consensus of the jurors

was that some of the girls had been drugged. Id. The jurors specifically included A. Cruz as a victim they believed might have been drugged. Declaration of Charles H. Williams at 2; Dkt. 159.2; App. HH.

When the attorneys interviewed the jurors after the verdict,

> Mr. Tunheim stated that date-rape drugs had been an issue in the case but that this evidence had been excluded from the trial by the court. He asked jurors whether they had noticed his asking complainants the question, "How did your body feel?" Several answered yes.

Id.

The defense moved for a new trial on the ground that the jurors had brought prejudicial extrinsic information into the jury room. Dkt. 157, App. DD and CP 132-36, App. EE. In response to the motion, the prosecutors did not dispute for the most part the defense account of what information was brought into the deliberations by jurors. They argued that "the information brought to the jury's deliberation by Juror #6 is merely a recitation of information that is clearly in the public domain and now a part of common knowledge and experience." Dkt. 159 at 4, App. FF. Further, the prosecutors contended that "[t]he possibility of other intoxicating substances being used in this case is a clear, if not strong, inference from the testimony of the witnesses." Id. at 6.

In reply, the defense requested an evidentiary hearing at which the jurors could be questioned under oath. Dkt. 159.1 at 1-2; App. GG. It also provided an additional declaration concerning Juror Lisa Rosseels. She confirmed that a male juror provided specific information about date rape drugs. Further, she herself provided information to the jurors about how

long the drugs could stay in someone's system. She claimed to have learned from television programs such as "60 Minutes" that drugs could be detected only through a blood test and that they do not stay in a person's system very long. Therefore, she did not believe testing was possible in this case because too much time elapsed between the incidents and the time they were reported to the police. Dkt. 159.3 at 2; App. II. As discussed below, this information was incorrect.

The trial court denied the defense motion for a new trial, "finding that anyone on this jury could be expected to have some knowledge of date rape drugs." Dkt. 160; App. JJ.

On direct appeal, this Court agreed with the State.

> Here, although neither party presented direct evidence that date-rape drugs may have been involved in the rapes, the jury could reasonably infer, based on common knowledge about alcohol and date-rape drugs, the possibility of these drugs as circumstantial evidence.

Unpublished Opinion at *15; App. MM. Further, it found that defense counsel "invited" the jury speculation by arguing that alcohol would not cause the selective memory loss and incapacitation claimed by the alleged victims. Id. at *15.[2]

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[2] Wiatt argued on direct appeal that the jury improperly considered the subject of date rape drugs. This Court disagreed and the Supreme Court denied review. Because this Court will not permit relitigation in a PRP of an issue addressed on direct appeal, Wiatt will not argue in this brief that the jurors committed misconduct by inferring from the evidence that date rape drugs were used or by sharing their pre-existing knowledge of such drugs. Wiatt does bring a new claim, below, based on allegations that information on date rape drugs was actually placed in the jury room.

3. The Defense Could Have Challenged a Date Rape Drug Theory

Defense counsel were misled by the prosecutors' pretrial assertion that they would not present evidence and argument in support of the date rape drug theory, and by the court's granting the defense motion in limine. The prosecutors had an obligation to state their true position at the time of the defense motion in limine. An honest response would have been as follows: "Your Honor, we have no forensic evidence to support a theory that the defendant used date rape drugs, but we will nevertheless present evidence that some of the victims suffered symptoms consistent with such drugs. The jury will be free to infer that Wiatt drugged them, and will be free to bring to the jury room information they've learned about date rape drugs from various sources."

Had the prosecution taken that forthright approach, the defense would have been quite different. See Declaration of David Allen at ¶ 4, App. A. First, Mr. Allen would have questioned the jurors individually about their knowledge of and feelings about date rape drugs. That would have led him to excuse jurors like Ms. Rosseels and Mr. Spencer, who had strong, preconceived opinions about date rape drugs. Id. at ¶ 4(a).

Second, the defense would have brought into evidence the negative FBI test on A. Cruz's hair. Mr. Allen would also have demanded more discovery from the FBI concerning the test, to bolster the significance of a negative result. As it turns out, the chemist who prepared the report would have testified that the results had more meaning than his report might

suggest. See Declaration of Mark LeBeau, Ph.D; App. J. His testing in 2002 was sufficiently sophisticated that it would most likely have revealed the presence of Rohypnol – a drug commonly associated with drug-facilitated sexual assault – and many other drugs in the same family as Rohypnol. He could also have explained how he tested for a wide variety of other drugs that could be used to facilitate sexual assault. Although Dr. LeBeau is hesitant to draw conclusions from the negative results regarding other drugs, the jury would at least have understood how thorough was his testing. Dr. LeBeau could also have explained that drugs remain in hair indefinitely, which would have directly contradicted the "expert opinion" given to the other jurors by Ms. Rosseels. Id.

Third, the defense would have called police witnesses to establish that they thoroughly searched Mr. Wiatt's house yet found no traces of drugs, and that they had no information indicating he had purchased or otherwise obtained such drugs. Declaration of David Allen at ¶ 4(f); App. A. See also App. U (a-e). In her application for the search warrant, Detective Adams specifically requested permission to search for "contraband (controlled substances)" and the warrant grants that request. Id.

Fourth, defense counsel would have explicitly asked various state and defense witnesses – including Mr. Wiatt – whether they were involved in any way with date rape drugs because counsel knew that everyone denied it. Declaration of David Allen at ¶ 4(c). The witnesses would have testified under oath that neither they, nor anyone else to their knowledge,

had anything to do with date rape drugs. See Declaration of Justin Allison at ¶ 12 (App. B); Declaration of Kevin Barlow at ¶ 3 (App. C); Declaration of Ryan Carlson at ¶ 2 (App. E); Declaration of Thomas Ho at ¶ 3 (App. H); Declaration of Joel Hawkins at ¶ 5 (App. G); Declaration of Ian Klotz at ¶ 5 (App. I); Declaration of Barry Specht at ¶ 2 (App. N); Declaration of Natalie Van Brunt at ¶ 7 (App. O); Declaration of Jerry Wiatt, Jr. at ¶ 6 (App. Q). The defense would have called Jeff Wiatt as a witness because Z. Hawkins said that he gave her the only drinks she consumed on the night of her alleged rape. Jeff would have confirmed that he did not drug Ms. Hawkins and that there were never any date rape drugs in the house. Declaration of David Allen at ¶ 4(d) (App. A); Declaration of Jeffry Wiatt at ¶ 18 (App. P).

Fifth, the defense would have challenged J. Bowles' testimony that Jerry Wiatt served her some drinks by bringing up her statement in a pretrial interview that she did not know who served her drinks. Declaration of David Allen at ¶ 4(e) and Ex. C (App. A).

Thus, the trial would have been quite different had the State forthrightly admitted before trial that it would introduce evidence from which the jury could infer that Mr. Wiatt drugged his victims. Because the State misled the defense, Mr. Wiatt's right to due process was violated and he is entitled to a new trial on all counts.

C. DEFENSE COUNSEL WERE INEFFECTIVE

1. In the Alternative to Ground 2, Defense Counsel were Ineffective in Their Handling of Date Rape Drug Issue

A defendant is denied his Sixth Amendment right to counsel if he is prejudiced by his attorney's deficient performance, that is, if there is a reasonable likelihood that the errors affected the outcome. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

On direct appeal, this Court found that defense counsel "invited" the jurors to speculate that date rape drugs were involved. Wiatt understands that he cannot relitigate that issue in this PRP. Rather, for purposes of this PRP, he will assume that the Court was correct on this point. He therefore argues in the alternative that defense counsel were ineffective for extending that invitation to the jurors. Obviously, it was not part of defense counsel's strategy to invite speculation about date rape drugs.

Wiatt argues above in section IV(B) that the State misled the defense by suggesting that date rape drugs would not be an issue in this case. If the Court finds that the State did not mislead the defense, it must also conclude that defense counsel should have known that the jury would infer from the evidence that some or all of the alleged victims were under the influence of such drugs. In that case, Wiatt argues in the alternative that defense counsel were ineffective in their handling of this issue. Clearly, performance is deficient when the attorney does not attack a theory of guilt that he should have known the jurors would consider.

The State itself supports this claim. Its response to defendant's motion for new trial includes the following:

> [D]espite the obvious inference of the possibility of drugs being used, the defense attorneys never asked the jury venire if anyone had knowledge of such substances or heard about them in the media. Therefore, the juror was never given the opportunity to disclose that information to the court during jury selection, nor did the juror deliberately hide or mislead anyone during jury selection. **Under those circumstances, the defense assumes the risk that someone on the jury has read or heard about such matters and would disclose that in deliberations.**

Dkt. 159 at 6-7; App. FF (emphasis added).

As discussed above in section IV(B)(3), lead counsel David Allen admits that he would have handled the case quite differently had he realized that the jurors could infer that date rape drugs were involved. Further, Mr. Allen has explained how the trial would have proceeded differently in that event. It is at least reasonably likely that this would have changed the result. The jurors would have heard the following evidence:

- The police found no trace of date rape drugs in the house and had no evidence that Wiatt had any access to them.
- The FBI could find no trace of such drugs in A. Cruz's hair.
- Most or all of the people who could have provided the alleged victims with date rape drugs denied under oath that they did so.
- Many other witnesses testified under oath that they never heard or saw anything to suggest the presence of date rape drugs at Wiatt's house.

Further, the defense would have excluded jurors like Mr. Spencer and Ms. Rosseels who had strong, preconceived notions about date rape drugs.

As discussed above, lead counsel David Allen would have called Jeff Wiatt as a witness had they realized that the jurors would adopt a date rape drug theory. "Had I known that some of the jurors would infer that [Z.] Hawkins was drugged, that would have tipped the balance towards calling him as a witness." Declaration of David Allen at ¶ 4(d); App. A. Mr. Allen had prepared extensively for Jeff Wiatt's testimony. Id. at Ex. B (notes for direct examination). In addition to disputing a date rape drug theory, Jeff Wiatt would have directly contradicted Z. Hawkins' account of her alleged rape. See Declaration of Jeffry Wiatt at ¶¶ 3-9; App. P. Jeff could also provide considerable exculpatory information regarding J. Bowles. Id. at ¶¶ 11-15.

2. Defense Counsel were Ineffective in Other Ways

The State presented Lindsey Howard to testify about the incident involving K. Hoskins. RP 912-27. Defense counsel Todd Maybrown cross-examined her about Ms. Hoskins. Id. at 927-37. He then stated that his cross-examination was done but that "we will need the witness back for our case." Id. at 937. Ms. Howard was never recalled.

Howard could have provided highly exculpatory testimony concerning the incident involving R. Rankis. She told Detective Adams that Rankis was her best friend and that they would talk "every day." Ex. B to Declaration of Todd Maybrown; App. K. Howard said she knew "for a fact" that Rankis wanted to have sex with Jerry Wiatt. Rankis would have told Lindsey if Jerry had done something Rankis did not want. Id. Howard later gave further details to defense investigator Paula Howell.

Ex. C to App. K. Rankis had told Lindsey that she wanted to sleep with every guy in Jerry's house. On the night of the charged incident, Lindsey watched Rankis go into Jerry's room and then the next day she and Ranks talked. Rankis said she had sex with Jerry. She did not appear upset and said nothing about it being forced. Lindsey "knows [Rankis] well and would know if she was upset." Rankis was aware that Jerry had a lot of money. Lindsey believed that Rankis was making her allegation of rape only because other girls had done so and because Rankis was hoping to get money from Jerry. Id.

Todd Maybrown prepared questions for Lindsey Howard that track the above information. Ex. D to App. K. He also was apparently aware that Lindsey had seen Jerry and Rankis flirting. Id. He cannot recall any reason that the defense did not recall Ms. Howard to the stand. App. K at ¶ 3.

This failure was particularly harmful because the defense had suggested in its cross-examination of Rankis that Lindsey Howard would contradict her on certain points. When questioning Rankis, Maybrown established her close friendship with Howard, and the fact that Howard was sometimes present with her at Wiatt's house. RP 755-56. He then repeatedly asked Rankis whether she had told Howard that she was interested in Wiatt and wanted to have sex with him, but Rankis denied that. Id. at 756. Maybrown later got Rankis to confirm that Lindsey Howard was with her at Wiatt's house and that Lindsey was not intoxicated. RP 772-73. By failing to recall Howard, Maybrown left the

impression that he had no good faith basis for suggesting that Howard would contradict Rankis.

In his cross-examination of Z. Hawkins, Mr. Maybrown neglected to bring out that she was thinking about suing Jerry Wiatt. Hawkins had admitted as much in her pretrial interview. Maybrown acknowledges that this omission was a mistake and not a tactical decision. App. K at ¶ 2 and Ex. A. A witness' financial interest in the outcome of a case is of course highly relevant to her bias and motivation. See Alston v. Blythe, 88 Wn. App. 26, 41, 943 P.2d 692 (1997). Hawkins did in fact sue Wiatt after he was convicted. App. KK.

Kevin Barlow testified for the State that he gave Z. Hawkins a ride home from Wiatt's house and that she was angry. RP 1293-99. On cross-examination, defense counsel never asked him whether Hawkins seemed intoxicated. (Hawkins claimed to be so incapacitated during her encounter with Wiatt that she could not even move her little finger.) Barlow could have testified that Hawkins did not seem to be under the influence of drugs. Declaration of Kevin Barlow at ¶ 4; App. C.

> She had no difficulty walking around and talking. She was not stumbling or slurring her words. She had no trouble getting into or out of my car. She was talking to me during the entire ride back to her house.

Id. Further, Barlow could have confirmed that the only reasons Hawkins gave for being mad were that Wiatt told her she had to leave the house and that her friends would not give her a ride home. Id.

In his cross-examination of H. Kalmikov, defense counsel David Allen established that she did not speak with Detective Adams about the alleged offense until about a year after it happened. RP 1265. He then asked: "And isn't it a fact that that was the first time you ever told anybody that Jerry Wiatt raped you?" Id. Ms. Kalmikov denied that. Id. As the prosecutor quickly pointed out, this questioning opened the door to testimony from Luke and Erik Nelson. RP 1395. The two of them then gave detailed testimony about Kalmikov's account of the incident shortly after it took place. RP 1409-31. The State then rested. RP 1432. By opening the door in this way, Mr. Allen permitted the State to emphasize Kalmikov's testimony through repetition.

In his cross-examination of J. Bowles, David Allen asked whether she ever said she would like to "get with" Jerry Wiatt. She denied that. RP 615. Justin Allison could have testified that Bowles did make such a statement. Declaration of Justin Allison at ¶ 13; App. B. But the defense never asked him about that.

Petitioner argues below in section E that the statements of several witnesses support reversal based on newly discovered evidence. In the alternative, to the extent the Court finds that counsel could have obtained this testimony through the exercise of due diligence, Wiatt argues that counsel were ineffective in failing to do so.

3. When Viewed Cumulatively, Counsels' Errors were Prejudicial

The prejudicial effect of counsel's errors must be considered cumulatively rather than individually. Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000); Harris v. Wood, 64 F.3d 1432, 1438-39 (9th Cir. 1995).

It is reasonably likely that efforts to attack a date rape drug theory would in itself have changed the result of the trial. As to several alleged victims, the defense argued that her claimed lack of memory was feigned. Defense counsels' theory was that the girls simply did not wish to admit that they had willingly engaged in sex with Jerry Wiatt against their better judgment. The jurors would have been far more likely to accept that theory as a reasonable possibility if they had some affirmative evidence disproving a date rape drug theory, and if the prospective jurors predisposed to conclude that date rape drugs were involved were excluded from the jury.

In addition, as noted above, the defense could have significantly impeached the testimony of Z. Hawkins, R. Rankis and J. Bowles, and could have prevented the State from reinforcing the testimony of H. Kalmikov through repetition.

D. THE TRIAL COURT VIOLATED WIATT'S RIGHT TO PRESENT A DEFENSE AND TO REBUT THE STATE'S EVIDENCE

1. The Court Improperly Excluded Evidence Relevant to Consent

As to both R. Rankis and J. Bowles, Wiatt was charged with rape in the third degree (lack of consent) rather than rape in the second degree (incapacity or helplessness).

Prior to trial, the defense filed a timely Motion to Admit Evidence of Complainant's Past Sexual Behavior. Dkt. 73; App. X. According to the supporting declaration, two witnesses were prepared to testify that, after having sexual intercourse with the defendant, R. Rankis left the defendant's home and then had sexual intercourse with another young man. App. Y. In addition, three witnesses could testify that Ms. Rankis stated that her goal was to have sex with everyone in the defendant's house. Two of these witnesses, Justin Allison and Barry Specht, were roommates at the house and did in fact have consensual intercourse with Ms. Rankis. In the presence of others, Ms. Rankis told the defendant that he should have a pole installed in the kitchen so that she could dance for everyone. Id. See also, Declaration of Justin Allison at ¶ 14; App. B.

In addition, Justin Allison could have testified that J. Bowles performed a striptease in his bedroom for several young men, including Jerry Wiatt. He also heard Ms. Bowles state that she wanted to "get with" Mr. Wiatt, which Mr. Allison understood to mean that she wished to have sexual intercourse with him. App. Y at ¶ 5; Declaration of Justin Allison at ¶ 13; App. B.

The court initially excluded much of this evidence, relying on Washington's "rape shield law," RCW 9A.44.020. See RP (10/18/02) 42-45. The court reasoned that the striptease and desire to pole dance did not

"rise[] to the level of sexual activity." Id. at 53. "To be [sic] otherwise would say, well, if anyone performs a striptease, then they're consenting to sex to anyone that observes it." Id. "One might very well be a so-called free spirit that has no problem with others seeing their body in an unclothed state, and does that somehow mean that they can't have the right to consent or not consent to sexual activity?" Id. at 53-54.

The court excluded any evidence that R. Rankis had sex with another individual shortly after her encounter with Mr. Wiatt. Id. at 50-53. It believed that evidence of "sex with Indiviual A does not have relevance as to whether or not they had sex with Individual B, unless it is in exactly the same context or circumstance." Id. at 51. The court acknowledged that a person who had just been raped might be so traumatized that she would not desire sex immediately afterwards with another, but believed it also possible that the victim might desire "physicial intimacy or closeness with another person." Id. at 52.

The court ultimately permitted testimony that J. Bowles wished to "get with" Jerry Wiatt, but excluded any testimony about what Bowles meant by that. RP (10/21/02) 4.[3] As to R. Rankis' statement that she wished to have sex with every man in the house, the court permitted the defense to introduce only a "sanitized" version, that is, that she expressed a desire to have sex with the defendant. Id. at 6-12.

[3] This hearing was not transcribed for the direct appeal. It is attached as App. AA.

2. The Evidence Was Admissible in the Defense Case-in-Chief

The trial court's rulings denied Wiatt his right to present a defense under the due process clause of the Fourteenth Amendment, and the compulsory process and confrontation clauses of the Sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). Further, the exclusion of this evidence was not required by Washington's Rape Shield Law.

Washington's rape shield statute makes "[e]vidence of the victim's past sexual behavior" "inadmissible on the issue of credibility and . . . inadmissible to prove the victim's consent except as provided in subsection (3)." RCW 9A.44.020(2). Subsection (3)(d) provides in part:

> [I]f the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

RCW 9A.44.020(3).

The rape shield statute is not designed to establish a blanket exclusion of evidence which is relevant to issues which may arise in prosecutions for rape. State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842, rev. denied, 101 Wn.2d 1019 (1984). The statute was instead designed to combat the practice of introducing evidence of a complainant's past sexual conduct, unconnected to the charged crime, in order to show a general lack of veracity and to prejudice the complainant. Id.; State v. Peterson, 35 Wn. App. 481, 485, 667 P.2d 645, rev. denied, 100 Wn.2d 1028 (1983).

By its very terms, this statute is directed at the use of a complainant's prior sexual behavior to impeach her "general credibility for truth and veracity." RCW 9A.44.020(2), (3); State v. Hudlow, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). Accordingly, evidence of the complainant's past sexual behavior offered to prove anything else is subject only to general relevancy requirements. Carver; 37 Wn. App. at 124; State v. Williams, 18 Wn. App. 398, 569 P.2d 1190 (1977); State v. Kilgore, 107 Wn. App. 160, 177, 26 P.3d 308 (2001).

As the Hudlow Court recognized, a complainant's past sexual behavior may be relevant to the issue of consent in a number of indirect ways.

> Factual similarities between prior consensual acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401. For instance, if a complaining witness frequently engages in sexual intercourse with men shortly after meeting them in bars, this would have some

> relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances. Such a particularized factual showing would demonstrate enough similarity between the past consensual sexual activity and defendant's claim of consent that it would have the necessary predictive valued required by ER 401.

Hudlow, 99 Wn.2d at 11.[4]

This example from Hudlow is quite similar to the excluded evidence concerning R. Rankis. Rather than making a habit of meeting men in bars for sexual encounters, Ms. Rankis had a more specific goal of sleeping with every man who lived in Mr. Wiatt's house. She had notched several victories towards that goal before her encounter with Mr. Wiatt. See App. Y at ¶¶ 5-6. This entire course of conduct was highly relevant to whether she consented to sex with Wiatt. The sanitized version permitted by the trial court was not nearly as compelling. The jurors could have believed that Rankis merely made a joking comment to Justin Allison that she did not mean to be taken seriously.

Further, that R. Rankis had consensual sex with someone else immediately after allegedly having been raped by Jerry Wiatt was highly relevant to impeach her belated claim that she did not consent to sex with Jerry Wiatt. If Ms. Rankis had actually been raped by Mr. Wiatt, it is unlikely that she would rush out and have consensual sex with someone else that same evening. While it is conceivable, as the trial court noted,

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[4] "Respondent's testimony that two women whom they had never before met had agreed to engage in sexual intercourse with them was highly implausible, absent the evidence the two women were highly promiscuous." To refuse such evidence "could conflict with respondent's rights of confrontation and compulsory process." Hudlow, 99 Wn. 2d at 14.

that a woman who had been raped could react as Rankis did, that goes to weight and not admissibility. In this case, the State was permitted to offer evidence of the complainants' activities and demeanor immediately following their interactions with Mr. Wiatt to show that they acted like a woman who had been raped. See RP 10/23/02 17 (A. Cruz seemed quiet after the incident); RP 1047-48 (H. Kalmikov seemed distressed). The court did not exclude that evidence on the ground that rape victims might be just as likely to run off to parties seeking "intimacy." The court should have likewise permitted the defense to show that R. Rankis did *not* act like a woman who had been raped.

Further, testimony that J. Bowles performed a striptease in Mr. Wiatt's presence, and that R. Rankis told Mr. Wiatt that she would like to do so, was highly relevant to consent. Removing ones clothing in a provocative manner is a very strong indication that the person is interested in sexual relations. Certainly it is true, as the trial court noted, that a woman does not give up her right to refuse sex simply because she performs a striptease. But the same could be said about even a prior act of sexual intercourse with the defendant, which would unquestionably be admissible. The issue before the trial court was not whether the striptease conclusively established consent, but whether it was relevant to consent.

Finally, although the trial court permitted testimony that J. Bowles wished to "get with" Wiatt, it would not permit anyone to explain what she meant by that. As the trial court noted, the words in themselves could have a variety of meanings. For that reason, the jury likely gave them little

weight. But the people who actually heard Bowles make the statement knew what she meant because they heard her tone of voice and observed her facial expressions. Such testimony is clearly permissible. ER 701 permits a witness to testify to "opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." As Tegland explains:

> [I]n most instances, the difference between fact and opinion is only a matter of degree. Suppose the witness says, "X was drunk." The statement could be viewed as fact, and yet it becomes a mere conclusion or opinion when compared to the statement, "X had poor muscular control and the odor of alcohol on his breath." Strictly speaking, all statements about one's observations involve the perception process and therefore an inference process.

5A Tegland, Evidence Law and Practice, § 283 (3d ed. 1989). See also, State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) (lay witness can testify that rape victim exhibited signs of emotional trauma); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (witness permitted to testify that defendant seemed embarrassed when told that he resembled a murder suspect); United States v. Yazzie, 976 F.2d 1252 (9th Cir. 1992) (statutory rape conviction reversed because defense witnesses not permitted to give opinion as to victim's age, but forced to describe specific physical characteristics). Similarly, a lay witness – particularly one familiar with J. Bowles – would be qualified to testify about what she meant when she said she would like to "get with" Jerry Wiatt.

3. Even if the Evidence was Properly Excluded Initially, The Defense was Entitled to Present Some of it in Rebuttal

Further, even if J. Bowles' actions were properly excluded in the first instance, the defense had a right to bring them up in rebuttal of the prosecutor's arguments. The federal due process clause guarantees a right to rebut evidence presented by the State, even if the defense evidence would not otherwise be admissible. Simmons v. South Carolina, 512 U.S. 154, 164-65, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

The defense revisited this issue during the trial. It noted that evidence of the striptease would make Tony Grant's testimony more believable because he would testify that he later saw J. Bowles sitting comfortably in Waitt's room wearing only her underwear. RP 636-39. The court maintained its ruling that a striptease would not be highly relevant to whether someone would consent to sex. RP 647-48.

Grant later testified that he recalled an evening when he, J. Bowles, and several other people went up to Jerry's room to see his new massage chair. RP 1579-80. Wiatt and J. Bowles began kissing and after a few minutes the others left the room. RP 1581. Later, after Wiatt and J. Bowles engaged in sexual intercourse, several people walked into the room. RP 1585-86. Bowles was "in her underwear and bra" and was "not at all" embarrassed. RP 1587. They all sat around talking and Bowles acted "as though it was normal." RP 1588.

On cross-examination, the prosecutor ridiculed the notion that Wiatt and J. Bowles would be kissing passionately while everyone else

was still in the room. RP 1625. "Well, did it strike you as unusual at all that two people who hadn't really been interacting at all just all of a sudden start heavy kissing right in front of everybody else in the room?" RP 1626. When Grant explained that the kissing seemed to follow naturally from Wiatt's and Bowles' interactions, the prosecutor again expressed disbelief: "Okay. So it didn't strike you as unusual; is that what you're saying to me?" RP 1626. The prosecutor then ridiculed the notion that, after engaging in sex, Wiatt and Bowles would sit around comfortably in their underwear chatting with four other people. RP 1628-32. The following is representative of the questioning:

Q: And all she has on is her undergarments, right?
A: Right
Q: Bra, panties?
A. Right.
Q: And nobody seemed to be bothered by that?
A: Not at all.
Q: The defendant didn't seem to be?
A: No.
Q: You weren't?
A: No.
Q: Pat?
A: No.
Q: Everybody just thought this was no big deal?

RP 1629-30.

At the next break, defense counsel noted that the prosecutor had expressed "incredulity" as to Tony Grant's testimony, and argued that this opened the door to testimony about J. Bowles performing a striptease on a prior occasion. RP 1671-72. The court maintained its ruling excluding

that evidence on the ground that Mr. Grant was not present when Ms. Bowles performed the striptease. RP 1674.

This ruling violated Wiatt's right to due process. The prosecutor was permitted to exploit the exclusion of evidence by arguing the contrary. As the trial court itself observed, J. Bowles' striptease proved at the least that she was a "free spirit that has no problem with others seeing their body in an unclothed state." Yet the prosecutor was permitted to suggest that Tony Grant's testimony was incredible precisely because he claimed J. Bowles had no problem with others seeing her body in an unclothed state. Similarly, that Bowles would perform a striptease in front of many people also makes more credible that she would begin "making out" with Wiatt even though others were in the room. Whether or not Mr. Grant had seen the striptease was irrelevant. The issue was not whether *he* personally found Ms. Bowles behavior unusual, but whether his account was so incredible that the jury should disbelieve it.

4. The Exclusion of This Evidence was Highly Prejudicial

The excluded evidence would likely have changed the result as to the counts involving J. Bowles and R. Rankis. This is clear even from the offer of proof given by the defense. The actual testimony would have been somewhat stronger. See Declaration of Justin Allison at ¶¶ 12-13 (App. B); Declaration of Jocelyn Campbell at ¶¶ 6-7 (App. D); Declaration of Kevin Murphy at ¶ 8 (App. M); Declaration of Natalie Van Brunt at ¶ 5 (App. O); Declaration of Jeffry Wiatt at ¶¶ 11-15 (App. P); Declaration of Jerry Wiatt, Jr. at ¶¶ 2-5 (App. Q).

5. Appellate Counsel was Ineffective in Failing to Raise This Claim

This claim should be considered under the standards for a direct appeal because Wiatt was denied his federal due process right to effective assistance on appeal. See Personal Restraint of Dalluge, 152 Wn.2d 772, 788-89, 100 P.3d 279 (2004). It is clear that appellate counsel did not make an informed strategic choice to omit the issue because she did not even obtain a transcript of the proceedings on October 21, 2002, when the trial court made its final rulings. In the alternative, the Court should find under the PRP standards that Wiatt suffered substantial prejudice.

E. NEWLY DISCOVERED EVIDENCE SUPPORTS A NEW TRIAL

1. Legal Standards

To obtain a new trial based on newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). RAP 16.4(c)(3) expressly lists newly discovered evidence as a proper ground for relief in a PRP. That factors 2-5 are satisfied should be clear from the discussion of each witness' testimony below. Factor 1 will be discussed at the end, since the overall effect of the new evidence should be viewed cumulatively.

2. Justin Allison

Justin Allison testified about certain matters at trial. He was afraid to say anything about K. Hoskins, however, because he was afraid for his safety. Declaration of Justin Allison at ¶ 2; App. B. Hoskin's boyfriend, Jared Trigg, made it known that he did not want Allison or others to testify in any way that could go against Hoskins. Id. at ¶ 3. "Jared was a very large man, probably about six feet, three inches and 240 pounds of solid muscle. He now competes as an "ultimate fighter" . . . I had no doubt that he could hurt me very badly if he wanted to." Id. at ¶ 4. Allison also received some threatening notes on his car when he left work, including one that said "If you testify, you'll die." Id. at ¶ 5.

Because of these threats, Allison told the defense that he was unwilling to testify concerning K. Hoskins. The defense agreed not to ask him any questions about her. Allison is now willing to testify about Hoskins because Jared Trigg is no longer involved with her. Id. at ¶ 9. He could testify as follows:

> I was at Jerry's house in Cedrona on the night that [K.] Hoskins had a bloody nose. I remember that evening well because [K.] got sick from the bloody nose and threw up. I helped clean everything up.
>
> Later, after [K.] was feeling better and cleaned up, Jerry and [K.] were holding hands and cuddling while watching a movie downstairs. I was hanging out with them and my girlfriend Danielle ("Danny") Couey. Jerry and [K.] went upstairs together. Danny and I walked over to the bottom of the stairs at one point and we could hear Jerry and [K.] having sex. Danny gave me a hug and we laughed. When [K.] came downstairs later she seemed happy. I'm sure

> that [K.] had something to drink that night but she never seemed out of it. I wasn't surprised that [K.] and Jerry got together that evening because [K.] had expressed interest in Jerry before.

Id. at ¶¶ 9-10.

Allison also ran into Hoskins a few months after the trial. Hoskins said the detective had pressured her to confirm that Wiatt had drugged her, but Hoskins no longer believed that to be true. Id. at ¶ 11.

3. Joel Hawkins

Joel Hawkins did not reveal exculpatory information at the time of trial because, based on statements the detective made to him, he was concerned that any assistance to the defense could cause him to lose his job as a high school teacher. Declaration of Hawkins at ¶¶ 2-3; App. G. He could have testified to the following:

> One time when I was over at Jerry's house I overheard [K.] Hoskins and some other girls talking in the kitchen. [K.] seemed to be bragging about how good it was to have sex with Jerry Wiatt. She said that she had her first orgasm the first time she had sex with Jerry.

Id. at ¶ 4.

4. Kevin Murphy

The defense was initially leery about calling Kevin Murphy as a witness because he would have been equivocal concerning the S. Waltermeyer count. After the trial court severed that count, however, David Allen sent a memo to his associate asking her to reinterview Murphy. After many attempts, she could not reach him. Declaration of David Allen at ¶ 7; App. A. Murphy now acknowledges that he was "not

eager" to testify because "if I said anything, something might happen to me or my family." One reason for that concern was Jared Trigg, "who is a very scary guy." Declaration of Kevin Murphy at ¶ 9; App. M. He can now provide helpful testimony regarding several counts.

First, although Murphy spent considerable time at the Wiatt home in the Cedrona neighborhood, he never saw or heard anything suggesting that date rape drugs were in the house. Nor did he ever see anything to suggest that young women were ever forced to have sex, or taken advantage of while intoxicated. Id. at ¶¶ 2-4.

Murphy saw Z. Hawkins at Wiatt's house at least twice. That contradicts her testimony that she was there only on the night that Wiatt allegedly raped her. He recalls the evening that was the subject of the rape charge in count 14. Id. at ¶ 6.

> Jerry and [Z.] seemed to hit it off. I saw them go into the hot tub at one point and they were making out. Then they went upstairs to Jerry's room. [Z.] seemed happy about what was going on. I believe [Z.] had something to drink, but she didn't seem intoxicated. She had no trouble talking or moving around.

Id. This directly rebuts Hawkins account of the evening. See section II(B)(4), above.

Murphy was also present on the night that K. Hoskins had a nosebleed. Id. at ¶ 7.

> Jerry was a gentleman about it and helped get [K.] cleaned up. Later that night, I saw Jerry and [K.] cuddling on the couch. [K.] seemed fine. She was not out of it. At some point, Jerry and [K.] went upstairs. I assumed they were

going to Jerry's room to have sex, but I have no first-hand knowledge about that.

Id.

5. Alisha Cochran

The defense was "very much interested in presenting the testimony of Alisha Cochran because her statement to Detective Adams was so favorable to Mr. Wiatt." Declaration of David Allen at ¶ 5; App. A. "We hired an Oregon attorney who obtained an out-of-state subpoena which was served on her. Ms. Cochran accepted service of the subpoena and a check to cover her travel expenses. She cashed the check but never appeared for trial." Id. See also RP 1750-52. Ms. Cochran now works in Tumwater, Washington. Declaration of David Zuckerman at ¶ 3; App. T. Undersigned counsel has had several conversations with her since September, 2006. She has reviewed the statement she gave to Detective Adams and confirms that she told the truth. Nevertheless, she refuses to sign a declaration because she does not wish to be involved in the case. Id. at ¶ 4. Because Ms. Cochran is now available in this State at a known address, she could be compelled to testify at a new trial or other hearing, whether she wishes to or not.

Ms. Cochran was present on the night that R. Rankis and Jerry Wiatt had sexual relations. Ex. D to App. A at 5. She recalled Rankis being "all over him." Id. "I know that it ended up them being in the bedroom, and I was trying to get [R.] to leave but she didn't want to." Id. Rankis was not slurring her speech and Ms. Cochran did not think that she

had too much to drink. Id. Rankis told Cochran she had sex with Wiatt but never suggested that she was raped. Id. at 6, 10. Cochran was convinced that Rankis brought charges because "she just heard all the commotion and wanted to be a part of it." Id. at 11. Cochran agreed that girls would often drink alcohol and end up having sex with Wiatt, but explained: "It's not like he drags 'em up there . . . you know." Id. at 11.

6. Ian Klotz

Ian Klotz, a roommate of Jerry Wiatt's in early 2000, had left town by the time charges were filed. Declaration of Ian Klotz at ¶¶ 1, 6; App. I. He could have confirmed Wiatt's account of the incident with Z. Hawkins. Id. at ¶¶ 2-4. Klotz could clearly hear that Hawkins was enjoying sex with Wiatt. Klotz then barged into the room as a prank, causing Hawkins to become embarrassed and end the sexual encounter. Id.

7. Natalie Van Brunt

Natalie Van Brunt has recently come forward with information about several alleged victims. Declaration of Natalie Van Brunt; App. O. J. Bowles bragged to Van Brunt about sleeping with both Wiatt brothers, a statement inconsistent with her later claim of rape. Id. at ¶ 3. Later, after rumors started spreading about Wiatt videotaping girls, Bowles suggested to Van Brunt that she could get some money out of Wiatt. Id. at ¶ 4. Van Brunt was also present on the night that E. Gundlach claimed to have been mysteriously incapacitated after being served a drink by Wiatt. Van Brunt knew that Kevin Barlow was the one mixing the drinks, and had some herself. Id. at ¶ 6.

8. Diane Moye

Diane Moye, the mother of alleged victim Magen Blevins, possessed considerable information that would be helpful to the defense on all counts. See section F, below. Among other things, she knew of the case detective's efforts to slant the testimony of State witnesses. She did not reveal that information in her pretrial defense interview, however, "because I was still riled up about Jerry Wiatt and did not want to say anything that could help him." Declaration of Diane Moye at ¶ 8; App. L.

9. This Evidence Meets the Standards for a New Trial

The new evidence would probably change the result of the trial on all counts. First, as discussed above in section IV(A), the State's case regarding K. Hoskins was based solely on her inability to remember her sexual encounter with Jerry Wiatt. Even if the Court finds that to be legally sufficient, the new testimony of Justin Allison, Kevin Murphy and Joel Hawkins thoroughly rebuts any inference that Hoskins was incapable of consent during the encounter. Similarly, the testimony of Kevin Murphy and Ian Klotz regarding Z. Hawkins would effectively rebut Hawkins' uncorroborated account of her encounter with Wiatt.

As to R. Rankis, Alisha Cochran's testimony would very likely change the result. As with the others, there was no corroboration whatsoever for Rankis' account. Cochran's testimony is thoroughly inconsistent with any notion that Rankis did not consent to sex with Wiatt. The jury would likely believe Cochran since she was a friend of Rankis and had no reason to favor Wiatt.

Natalie Van Brunt's testimony calls into doubt the testimony of J. Bowles. Further, Ms. Van Brunt contradicts the testimony of E. Gundlach, which was used against Wiatt on *all* counts as evidence of a common scheme or plan.

Finally, Diane Moye's testimony would likely change the result on all counts, since she defeats the prosecutors best argument in this case, that is, that the similar accounts of various alleged victims proves that they all must be telling the truth. See section F, below.

F. THE CASE DETECTIVE AND VICTIM'S ADVOCATE VIOLATED WIATT'S RIGHT TO DUE PROCESS BY IMPROPERLY INFLUENCING WITNESSES

The lead detective and victim's advocate improperly influenced the testimony of witnesses in several ways. Some of the misconduct was revealed at the trial. For example, Amanda Chinn testified that she told Detective Louise Adams that J. Bowles went back to Mr. Wiatt's house after the alleged rape incident. Det. Adams then informed her that Bowles said otherwise, causing Ms. Chinn to backtrack and say she was unsure. RP 521-24. Similarly, when Det. Adams interviewed E. Gundlach about Z. Hawkins, Adams informed Gundlach at several points that her memory of the events was different from Ms. Hawkins'. Adams also suggested certain facts to her and obtained Gundlach's agreement to them. When Gundlach said she saw Hawkins go up the stairs to Wiatt's room without difficulty (which was contrary to Hawkins' account) the detective pushed her about whether she was really clear that she had seen that. RP 897-901.

J. Bowles testified that Adams claimed to have a videotape of several girls lying on a bed in a row and Mr. Wiatt having sex with them one after another. RP 623. It is clear from the discovery and the trial record that no such tape exists. M. Blevins (the victim in a count to which Wiatt pled guilty) confirmed at Wiatt's sentencing hearing that Detective Adams tried to scare everyone by telling rumors about Jerry, such as him being involved in the Chinese Mafia. RP (3/31/03) at 67.

Additional information has come out after the trial. Diane Moye, the mother of alleged victim M. Blevins reports the following:

> Det. Adams told me various things about Jerry Wiatt that got me mad at him and made me determined to see him put away for long time. She said that he was connected with the Asian Mafia. She said the police had had him under surveillance for over a year and that there had been several incidents when girls ran out of the house half-naked after being raped but were then too scared to prosecute. She said that when the police raided Jerry's house they found evidence of date rape drugs. Det. Adams said that such drugs would make someone feel like a brick; that they could tell what was going on but not be able to move. The next day, they would be vomiting and would want to sleep all day.

Declaration of Diane Moye at ¶ 2; App. L. Neither the discovery nor the testimony in this case contains any evidence of girls running out of the house half-naked, of the police having Wiatt under surveillance, or of the police finding any traces of date rape drugs.

The detective took advantage of a "victims' support group" to further influence the witnesses.

> Shortly after my first meeting with her, Det. Adams referred me to a victim's advocate named Kim who in turn set up a support group for the parents of victims at a downtown Olympia crisis center. Det. Adams showed up at the first meeting. To the best of my recollection, that is when she brought up the information about date rape drugs discussed in the last paragraph. She may have also brought up at this meeting some of the other information about Jerry discussed above.
>
> Detective Adams had us parents so scared that one of the fathers slept with a gun under his pillow. I slept for weeks with all my house lights on because I was afraid that the Asian Mafia was going to get me. . . .
>
> Other people who attended the support group were Breda Cruz, Terry Hoskins, and the Gundlachs. . . . Another mother showed up at least once but I can't remember her name. At the meetings, people would talk about what their children were saying happened to them. I repeated to my daughter some of the information I learned about the other victims. . . . All of the parents, including me, were talking about suing Jerry. We believed him to have a lot of money because he had such a nice house and seemed to have a lot of expensive possessions. I never followed through with that because it became clear by the time of Jerry's sentencing that he was broke.

Id. at ¶¶ 3-5.

The use of the victims' support group in this manner is particularly significant because the prosecutors at trial made much of the supposed independence of the complaining witnesses' testimony. When each one took the stand, the prosecutors established how they were not friends with all or most of the other complaining witnesses. Then, in closing, Mr. Tunheim explained that he went through the list of names with each girl "because we wanted you to know and to take into consideration in the

evidence in this case that these girls did not get together and plan this out ahead of time." RP 2455. In fact, the case detective and at least one of the trial prosecutors knew that the parents of the complainants were discussing their daughters' testimony with each other. Declaration of Diane Moye at ¶ 6; App. L. It is a reasonable inference that they shared this information with their children, as Moye did.

Several witnesses corroborate that Detective Adams consistently misrepresented the strength of the evidence against Wiatt, and attempted to frighten them into believing that Wiatt was dangerous if not locked up.

> I was present at Mr. Wiatt's house when the police came to serve a search warrant. Detective Adams took me aside and questioned me. She told me that they had found "trace elements" of drugs during the search. She also told me that Jerry Wiatt was in the Chinese Mafia.

Declaration of Thomas Ho at ¶ 2; App. H. Alleged victim K. Hoskins told Justin Allison after the trial that Detective Adams pushed her to say that Wiatt drugged her. Adams held up a plastic bag that seemed to contain a drug in it and said: "Is this what Jerry put in your drink?" Declaration of Justin Allison at ¶ 11; App. B. Many other witnesses had similar experiences. See Declaration of Kevin Barlow at ¶ 2 (App. C); Declaration of Ryan Carlson at ¶ 2 (App. E); Declaration of Joel Hawkins at ¶ 2 (App. G); Declaration of Barry Specht at ¶ 2 (App. N); Declaration of Jeffry Wiatt at ¶ 18 (App. P).

Further, Det. Adams told Joel Hawkins that his connection to Jerry Wiatt might cause him problems with his job as a high school teacher.

This caused Hawkins to refrain from revealing information helpful to the defense. Declaration of Hawkins at ¶¶ 2-3; App. G.

According to two witnesses, the State's victim's advocate coached the complainants to cry during their testimony. See Declaration of Natalie Van Brunt at ¶ 9 (App. O); Declaration of Lina Wiatt at ¶ 2 (App. S).

As the Court of Appeals has noted, "there is an important ethical distinction between a prosecutor discussing testimony and improperly seeking to influence it. State v. Delarosa-Flores, 59 Wn. App. 514, 799 P.2d 736 (1990), citing Geders v. United States, 425 U.S. 80, 90 n.3, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976). Other courts have cautioned against prosecution coaching of witnesses. See, e.g., United States v. Malik, 800 F.2d 143 (7th Cir. 1986). Certainly, the same principles should apply when the case detective does the coaching. Cf. Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995) (due process violated when either prosecutor or case detective withholds exculpatory evidence).

Similarly, the Washington courts have noted in the context of the child hearsay rule that overly suggestive interview techniques may render a child's statement inadmissible. See Dependency of A.E.P., 135 Wn.2d 208, 230-31, 956 P.2d 297 (1998); State v. Carol M.D., 97 Wn. App. 355, 983 P.2d 1165 (1999). Improper influences on adult witnesses raise similar issues. As the New Jersey courts have noted, it is appropriate to analogize suggestive witness interrogation techniques to suggestive pretrial identification procedures. State v. Michaels, 264 N.J. Super. 579, 630, 625 A.2d 489 (1993). The U.S. Supreme Court has held that

identification testimony may violate the federal due process clause if it was the product of impermissibly suggestive procedures. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977); Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 (1967). Similarly, "courts must provide a remedy where the record demonstrates that an accuser's testimony is founded upon unreliable perceptions, or memory cause by improper investigative procedures if it results in a defendant's right to a fair trial being irretrievably lost." Michaels at 631-32. Although the witnesses in Michaels were younger than those in this case, the improper interrogation techniques were remarkably similar: telling witnesses they needed to talk to help their friends; informing witnesses of the information their friends had revealed; telling witnesses they would be safe from the bad suspect if they helped the police keep him locked up; and suggesting methods that the suspect might have used to assault them. Id. at 621-22. See also, State v. Brooks, 20 Wn. App. 52, 64, 579 P.2d 961 (1978) (State concedes it would be improper for a police officer to manipulate a witness).

The actions of the victim's advocate raises additional concerns. The Washington Supreme Court has directly addressed the sort of in-court coaching that took place here. In State v. Barker, 43 Wash. 69, 86 P. 387 (1906), a private attorney made signals to his client, a prosecution witness, while she testified before the jury. The Supreme Court reversed without any specific showing of prejudice.

> How far her evidence may have been changed by reason of the giving and receiving of these signals, it is impossible to know. The exact significance and effect of the same were known only to themselves. On account of the incident referred to, we think the defendant's constitutional right to a fair trial was infringed.

Id. at 71. Similarly, in this case it is impossible to know how much the signals of the victim's advocate influenced the witnesses.

As noted above, Det. Adams intimidated Joel Hawkins into declining to testify for the defense. It is a violation of due process to intimidate witnesses into not testifying for the defense.

> The right to compulsory attendance of material witnesses is a fundamental element of due process and goes directly to the right to present a defense. State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976) (citing Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967)). If a defense witness is threatened and those threats effectively keep that witness off the stand, the defense is deprived of due process of law. Webb v. Texas, 409 U.S. 95, 98, 34 L. Ed. 2d 330, 93 S. Ct. 351 (1972); United States v. Morrison, 535 F.2d 223 (3d Cir. 1976). See also, United States v. Lord, 711 F.2d 887, 889 (9th Cir. 1983).

State v. Carlisle, 73 Wn. App. 678, 769, n.1, 871 P.2d 174 (1994).[5]

In the Lord case, cited with approval in Carlisle, the Ninth Circuit held that the prosecutor may not "distort[] the fact-finding process" by threatening a defense witness with prosecution if he testifies. United States v. Lord, 711 F.2d at 891. When this occurs, the court must dismiss

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[5] It does not violate due process, however, for the prosecutor to truthfully inform a witness' attorney that the witness might face a risk of self-incrimination if he testified at the request of the defense. State v. Carlisle, 73 Wn. App. at 681.

the charges unless the prosecutor agrees to immunize the defense witness. Id. at 891-92. See also, United States v. Morrison, 535 F.2d 223 (3d Cir. 1976) (prosecutor's intimidation of defense witness, designed to induce her to assert privilege against self-incrimination, violated defendant's right to due process). In Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), Judge (later Chief Justice) Burger disapproved of prosecutors selectively using their power to shape the evidence:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the [immunity] statute *as applied* denied him due process.

Id. 361 F.2d at 534 n.1 (emphasis in original). See also Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L. Ed. 214 (1942).

When taken in their totality, the actions of the detective and victims' advocate in this case were so outrageous as to require reversal, even if there were no other constitutional violation. The Washington Supreme Court set out the relevant standards in State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996).

> [O]utrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). For the police conduct to violate due process, the conduct must shock the universal sense of fairness. Id. at 432, 93 S.Ct. at 1643. Whether the State has engaged in

> outrageous conduct is a matter of law, not a question for the jury. United States v. Dudden, 65 F.3d 1461, 1466-67 (9th Cir. 1995). See State v. Hohensee, 650 S.W.2d 268, 272 (Mo.App.1982) (citing federal cases).
>
> Following Russell, nearly every federal circuit court and many state courts, including Washington, have recognized that the State's conduct may be so inappropriate as to violate due process. See United States v. Harris, 997 F.2d 812, 815 (10th Cir.1993); Commonwealth v. Nelson, 446 Pa.Super. 240, 666 A.2d 714, 719 (1995); State v. Shannon, 892 S.W.2d 761, 765 (Mo.App.1995).

Lively, 130 Wn.2d at 19. The conduct described above meets these standards.

Further, even if the conduct of Detective Adams and the victim's advocate did not in itself amount to a due process violation, the failure to disclose some of the conduct to the defense violated due process. Under Brady v. Maryland, 373 U.S 83, 87, 83 S.Ct. 1194, 1196-97, 10 L. Ed.2d 215 (1963) and its progeny, the government violates a defendant's right to due process when it fails to disclose exculpatory or impeachment evidence, whether or not requested by the defense, where the evidence is material either to guilt or to punishment. See also, Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999). The Brady rule encompasses evidence not actually known by the individual prosecutor: "In order to comply with Brady, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" Strickler v. Greene, 119 S.Ct. at 1948 (quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490 (1995)). In

Strickler, a witness expressed certainty at trial about observing certain key events. Id. at 271-72. The defense was not told, however, that this certainty came about only after considerable effort on the part of the case detective. Among other things, the State failed to disclose a letter sent by the witness to the detective in which she thanked him for "patience with my sometimes muddled memories," and stated that without his help "I never would have made any of the associations that you helped me make." Id. at 274. The Court had no difficulty in concluding that Brady required disclosure of this impeachment information. Id. at 282.[6]

In this case, the withheld information was related even more directly to impeachment. The case detective engaged in a deliberate campaign to influence the witnesses by exaggerating the evidence against Wiatt, falsely portraying him as a danger to the witnesses if he were not convicted and sent to prison, and leading the alleged victims to believe they had been drugged by reporting that date rape drugs were actually found at Wiatt's house. The detective further influenced the complainants by using a parents' support group to spread these ideas among their families. The withheld information was reasonably likely to change the result because the convictions in this case rested almost entirely on the testimony of the alleged victims. There was little or no corroboration that

[6] The majority found, however, that even had this witness been completely discredited, there was no reasonable likelihood that the result of the proceedings would have been different. Id. at 292-96.

any of them failed to consent to sex, or that they were too incapacitated to consent.

G. THE JURORS RECEIVED EXTRINSIC EVIDENCE

As noted above, this Court found on direct appeal that the jurors' discussion of date rape drugs was not extrinsic evidence but rather a matter of common knowledge. There is new proof, however, that the information was in fact injected improperly into the deliberations. Diane Moye, the mother of one of the alleged victims, now reveals the following:

> Jeannette Hawkins, the mother of victim [Z.] Hawkins, was an Olympia city councilwoman. At some point during the trial, I heard her say that she would use her connections to get an article concerning date rape drugs to the jurors. She said she would either arrange for the article to be left in the jury room or have copies provided to the jurors some other way. She said the article concerned the Max Factor heir who was accused of using date rape drugs to rape and videotape women.

Declaration of Diane Moye at ¶ 6; App. L. This interference with the jurors violated Wiatt's constitutional rights.

> The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury . . .
>
> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). In Turner, the Court reversed a state murder conviction where the state's two key witnesses attended the sequestered jury, sharing meals and conversation during the trial. This outside influence violated the defendant's Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial.

Here, Ms. Moye's revelation creates a strong inference that the verdict was not based only on the evidence and the jurors' common experiences but also on prejudicial extrinsic information. The presence of an article concerning date rape drugs in the jury room could easily explain why the jurors leaped to the conclusion that Wiatt used such drugs. Ms. Moye's declaration is at least sufficient to require a reference hearing.

H. THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF BECAUSE OF HIS DAUGHTER'S CONNECTION TO THIS CASE

At one point during Mr. Wiatt's trial, Judge Tabor informed the parties that his daughter was in the audience observing. She appeared to be about 20 years old. Declaration of Jerry Wiatt, Sr. at ¶ 3; App. R. Recently, several witnesses disclosed that the daughter, Alison Tabor, attended more than one party at Jerry Wiatt's house.

Andrea Denton, now in the U.S. Army, attended Timberline High School and attended several parties at Wiatt's house. Declaration of PFC Andrea Denton at ¶¶ 1-3; App. F. She relates the following:

> I saw Alison Tabor at several parties at Jerry's house. People talked about how she was the daughter of a judge. I had also seen Alison at Timberline High School. To the

> best of my recollection, Alison was friends with [Z.] Hawkins, the daughter of Councilwoman Jeannette Hawkins.

Id. at ¶ 4.

Natalie Van Brunt used to date Jeffry Wiatt, the younger brother of Jerry Wiatt, Jr. and was often at the Wiatt's Cedrona house. Declaration of Natalie Van Brunt at ¶ 1; App. O. She states:

> I went to the same school (Timberline High School) as Alison Tabor, the daughter of Judge Tabor. She is a year older than me. I saw her at Jerry Wiatt's Cedrona house in the Spring of 2000. There was a party going on. I said hi to her but we didn't spend much time talking.

Id. at ¶ 8.

Jocelyn Campbell, a friend of Ms. Van Brunt's, also saw Alison Tabor at more than one party at Jerry Wiatt's house. Declaration of Jocelyn Campbell at ¶¶ 1-3; App. D. She is "pretty sure" that Ms. Tabor was drinking alcohol. Id. at ¶ 3.

The Code of Judicial Conduct, the appearance of fairness doctrine, and the federal due process clause require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). See also, Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (due process clause requires a judge "with no actual bias against the defendant or interest in the outcome of his particular case").

CJC 3 of the Code of Judicial Conduct provides in part:

> (D) Disqualification.
>
> (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
>
> (d) the judge or the judge's spouse or member of the judge's family residing in the judge's household, or the spouse of such a person:
>
> . . . (iii) is to the judge's knowledge likely to be a material witness in the proceeding.

The appearance of fairness doctrine, implicit within the Code, requires a court to inquire as to how the proceedings would appear to a reasonably prudent and disinterested person. Smith v. Behr, 113 Wn. App. 306, 340, 54 P.3d 665 (2002). "The test to determine whether a judge's impartiality might reasonably be questioned is an objective one that assumes that a reasonable person knows and understands all the relevant facts." Id. (citations and internal quotations omitted).

Here, three witnesses recall seeing Alison Tabor at more than one party at Jerry Wiatt's house during the time period of the allegations in this case. One of the witnesses believes that Ms. Tabor was a friend of Z. Hawkins, one of the alleged victims in this case. It seems likely that Ms. Tabor would have first-hand knowledge of the goings-on at the Wiatt residence, including the furnishing of alcohol to minors and the behavior of Mr. Wiatt and others at these parties. She may be a friend or

acquaintance of others involved in this case besides Z. Hawkins. She may have spoken with some of the trial witnesses – either before or after the trial – about the allegations in this case.

Based on this, a reasonable person might be concerned that Ms. Tabor would communicate some of her personal knowledge to Judge Tabor. A reasonable person might also be concerned that Judge Tabor might harbor some animus towards Mr. Wiatt for exposing his daughter to illegal and/or immoral conduct.

Alison Tabor participated in a telephone interview from the prosecutor's office with undersigned counsel on October 25, 2006. She denied any knowledge of Jerry Wiatt or his house, but admitted that she went to many drinking parties during the relevant time period and did not always know whose house she was at. She stated that she would not have told her father about being at a party where alcohol was served because he would have disapproved. Nevertheless, it is possible that Ms. Tabor's recollection of what she told her father may be inaccurate, or that her father learned from other sources of her connection to Jerry Wiatt's case.[7] Ms. Tabor may be reluctant to reveal information harmful to the State's case since she is currently an employee of the Thurston County prosecutor's office.

Because the circumstantial evidence raises significant questions about actual bias, or at least an appearance of impropriety, Wiatt should at

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[7] At the request of the prosecutors, I have not yet brought these allegations to the attention of Judge Tabor.

least be entitled to an evidentiary hearing on this claim. See Bracy, 520 U.S. at 908-09 (finding that habeas petitioner had shown good cause for discovery on his claim of judicial bias by presenting circumstantial evidence that judge may have been motivated to treat him harshly).

I. WIATT'S RIGHT TO BE PRESENT, AND TO A PUBLIC TRIAL, WERE VIOLATED

Prior to trial, co-defendant Johan Lo pleaded guilty to reduced charges as part of an agreement to testify for the State. RP (8/23/02) 5-6. His attorney filed a motion to exclude any reference to an e-mail that Mr. Lo sent to Wiatt's attorney David Allen. RP (9/20/02) 95-96.

The trial court addressed the motion on October 4, 2002. Lo's counsel asked that the court close the courtroom for the hearing, and exclude everyone from the hearing – including Mr. Wiatt – other than the attorneys for Wiatt and Lo. RP (10/4/02) at 6. Counsel for Wiatt agreed to a closed courtroom but objected to the exclusion of Mr. Wiatt. Id. at 7, 12. The prosecutor agreed to leave the courtroom for the hearing, but expressed concern about the defendant being excluded. Id. at 8. The court nevertheless had Mr. Wiatt escorted out of the courtroom. Id. at 13.

Lo's counsel then argued that the e-mail was a privileged attorney-client communication. Id. at 14-19. Wiatt's attorney David Allen argued that it was not privileged because it was an unsolicited, unilateral communication from Mr. Lo. He also argued that it was highly relevant to the defense because Lo acknowledged some points that would be

exculpatory as to Wiatt, and other points that could be used to show Lo's bias in favor of the State. Id. at 19-29.

The court concluded that the e-mail communication was not covered by the attorney-client privilege. Id. at 31. But the court nevertheless excluded on other grounds any reference to the e-mail. Id. at 32-37. The court ordered the exhibit containing the e-mail sealed and prohibited defense counsel from discussing its contents with Mr. Wiatt. 39-40. The court also ordered that no transcript of the closed hearing could be made public.[8] See also, Dkt. 198.

The unnecessary closure of the courtroom violated Wiatt's right to a public trial under Article I, Section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution. See State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Waller, 467 U.S. at 45 (citations and internal quotations omitted). The trial court must perform a weighing test consisting of five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair

[8] Petitioner has filed this portion of the transcript under seal as App. Z. Undersigned counsel has discussed the general nature of the hearing in this document without mentioning the content of the communications.

trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

Protection of the right to a public trial "clearly calls for a trial court to resist a closure motion except under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Closure can be justified only if the trial court enters specific findings in support; an appellate court's post hoc determination cannot cure deficient trial court findings. Bone-Club, 128 Wn.2d at 261, citing Waller, 467 U.S. at 49 n.8.

When the right to a public trial is violated, prejudice is presumed and a new trial must be granted even when the closure related only to a pretrial hearing. Bone-Club, 128 Wn.2d at 261-62. The same standards generally apply on collateral attack because the petitioner would be deprived of effective assistance on appeal if his appellate attorney failed to raise the issue. Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

In this case, the trial court never discussed the five Bone-Club factors nor made specific findings to justify the closure. The factors could not have been satisfied here for many reasons, perhaps the simplest of which is that the closure was far more extensive than necessary. At most, the court may have had a legitimate concern that arguably privileged information in Mr. Lo's e-mail should not be disclosed before the court determined whether the privilege applied. But that issue could be decided without revealing the precise nature of the incriminating statements Mr. Lo made in his e-mail. Whether those statements were privileged did not turn on the details of the information he disclosed, but rather on the circumstances under which he disclosed them. Further, to the extent that the details of the e-mail were necessary for the court's review, the court could review the document during an open hearing without showing it or quoting from it. Finally, even if it were necessary to discuss the details of the e-mail, the courtroom could have been closed for only the limited time necessary to accomplish that. Cf. Waller, 467 U.S. at 48-49 (improper to close an entire pretrial hearing to suppress wiretap tapes when the actual playing of the tapes took up only a small portion of the hearing).

As the transcript of the proceeding reveals, the trial court was able to conclude without any detailed reference to the e-mail's contents that Mr. Lo's e-mail was *not* covered by the attorney-client privilege. Once the court made that determination, there was certainly no need to close the proceedings to any further discussion of the e-mail. While Mr. Lo might have preferred to keep the e-mail a secret, that was not a sufficiently

weighty interest to outweigh the defendant's right to a public hearing regarding these non-privileged communications.

The Washington courts have not specifically addressed whether a defendant may raise a public trial claim when his attorney has consented to closure of the courtroom. The Washington Supreme Court has explained, however, that the failure to object cannot constitute a waiver. See Bone-Club, 128 Wn.2d at 257. "The motion to close, not Defendant's objection, triggered the trial court's duty to perform the weighing procedure." Id. at 261. By the same reasoning, a defense attorney's consent to closure should not alter the trial court's duty to make the necessary findings. The requirement of open courtrooms is not, after all, merely a right of the defendant, but also the right of the public to open proceedings. See Bone-Club, 128 Wn.2d at 257-58 (adopting the same standards for a challenge to courtroom closure under the defendant's right to a public trial as under the public's right to open proceedings); Waller, 467 U.S. at 47 n.5 (discussing independent public interest in the Sixth Amendment public-trial guarantee).

Even if the Court finds the closure claim to be waived, it must grant relief because Wiatt's Sixth and Fourteenth Amendment right to presence was violated. See United States v. Gagnon, 470 U.S. 522, 527-28, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985). A hearing to exclude defense evidence is certainly a critical stage of the trial. Facts were elicited at the hearing concerning an incident at which both Mr. Lo and Mr. Wiatt were witnesses. Thus, Wiatt's presence at this hearing had "a

relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Gagnon, 470 U.S. at 526 (citations and internal quotations omitted).

V. REQUEST FOR RELIEF

The Court should dismiss the count involving K. Hoskins with prejudice because the evidence was insufficient. As to the remaining counts, the Court should dismiss with prejudice due to governmental misconduct. In the alternative, it should order a new trial on the remaining counts for various reasons discussed above.

VI. OATH

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

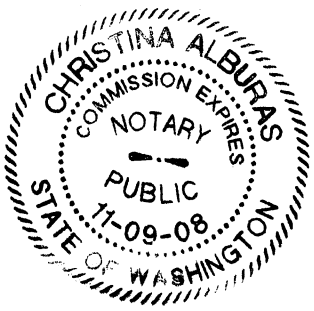
DATED this 13TH day of December, 2006.

Respectfully submitted,

David B. Zuckerman, WSBA #18221
Attorney for Jerry D. Wiatt, Jr.

SUBSCRIBED AND SWORN TO before me, the undersigned notary public, on this 13TH day of DECEMBER, 2006.

Notary Public for Washington
My Commission Expires: 11/09/08



CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing pleading and accompanying appendix[9] on the following:

13 Dec 06

Mr. Jon Tunheim
Thurston County Prosecuting Attorney's Office
2000 Lakeridge Drive NW, Suite 2
Olympia, WA 98502-6001

Mr. Jerry Wiatt, Jr. #850497
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Washington 98520

12/13/06
Date

Rubén García Fernández

[9] In compliance with the trial court's order, I did not serve a copy of App. Z, a transcript of a closed hearing concerning the disclosure of confidential information.

Court of Appeals No. 35690-2
Thurston County Superior Court No. 01-1-01136-1

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

ORIGINAL

In re the Personal Restraint of:

JERRY D. WIATT, JR.

Petitioner.

APPENDIX TO PERSONAL RESTRAINT PETITION
FILED UNDER SEAL

By:
David B. Zuckerman
Attorney for Petitioner
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

FILED
COURT OF APPEALS
DIVISION II
06 DEC 13 PM 1:46
STATE OF WASHINGTON
BY
DEPUTY

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U. Thurston County Sheriff's Office Documents Re: Search Warrant

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V. Fourth Amended Information, October 21, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

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Y. Declaration of Counsel in Support of Motion to Admit Evidence of Complainant's Past Sexual Behavior, September 18, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

Z. Verbatim Report of Proceedings (DO NOT RELEASE), Pretrial Motions, October 4, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

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A. Declaration of David Allen, December 5, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF DAVID ALLEN

David Allen declares as follows:

1) I was the lead trial attorney for the defendant in this case. My partner Todd Maybrown tried the case with me. Our associate Cassandra Stamm assisted us outside of court.

2) Before trial, I made a motion in limine to exclude any evidence or argument that Mr. Wiatt administered "date rape drugs" to the alleged victims. The State concurred in the motion. The prosecutors took that position after they received the FBI lab report finding no drugs in Alvina Cruz's hair. A copy of the report is attached as Ex. A.

3) After trial, I learned from interviews conducted by my investigator that some of the jurors decided that my client must have used some sort of date rape drug. Several of the jurors discussed information about such date rape drugs that they had learned from television shows or other sources. I filed a motion for a new trial arguing that the jurors had brought prejudicial extrinsic information into the deliberations. The State took the position that it was a reasonable inference from the evidence that Mr. Wiatt used date rape drugs and that

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Seattle, Washington 98104
(206) 623-1595

the jurors were permitted to bring their common experience on this issue into the deliberations. The trial court agreed with the State.

4) Had I known before the trial started that the jurors would be permitted to conduct their deliberations in this way, I would have handled the case differently in several ways:

a) I would have asked to question the prospective jurors individually about their knowledge of and feelings about date rape drugs. Presumably, several of the jurors would have expressed strong, preconceived notions about such drugs, as they did when the defense interviewed them after trial. I would have excused such jurors during voir dire.

b) I would have followed up on the negative FBI lab report by interviewing the FBI chemist and calling him as a witness.

c) I would have had Mr. Wiatt testify directly that he had no involvement in such drugs. I would also have asked his roommates and others who were often present at the house whether they had ever seen or heard anything about date rape drugs being used in the house. Based on pretrial interviews, I knew that they would all answer in the negative.

d) In particular, had I known that the jurors would infer that Zoe Hawkins was drugged, I would have called Jeff Wiatt to the stand. Ms. Hawkins testified that she never drank anything that Jerry Wiatt offered her, but that she did accept some beers from Jeff Wiatt. The jurors must have concluded that Jeff somehow drugged her beer. Jeff would certainly have denied that. As I recall, it was a close call for me whether to use Jeff as a witness. I prepared extensively for his direct testimony but then ultimately decided that it would not be necessary. Had I known that some of the jurors would infer that Zoe Hawkins was drugged, that would have tipped the balance towards calling him as a witness. My notes for the direct examination of Jeff Wiatt are attached as Ex. B.

e) Jennifer Bowles testified at trial that Jerry Wiatt served her some drinks. Had I known that the jurors would infer that Mr. Wiatt drugged Ms. Bowles, I would have brought up

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on cross-examination her statement in a pretrial interview that she did not know who served her the drinks. A copy of the relevant portion of that interview is attached as Ex. C. I would also likely have called as witnesses anyone else with access to the drinks so that they could deny any drugging.

f) I would have called police witnesses to establish that they thoroughly searched Mr. Wiatt's house yet found no traces of drugs, and that they had no information indicating he had purchased or otherwise obtained such drugs.

5) I was very much interested in presenting the testimony of Alisha Cochran because her statement to Detective Adams was so favorable to Mr. Wiatt. A copy of the statement is attached as Ex. D. We hired an Oregon attorney who obtained an out-of-state subpoena which was served on her. Ms. Cochran accepted service of the subpoena and a check to cover her travel expenses. She cashed the check but never appeared for trial.

6) I would also have liked to present the testimony of Nicole Smith, who had given a statement to the case detective that was favorable to the defense. We were unable to find her by the time of trial.

7) At first, I was not planning to call Kevin Murphy as a witness because his testimony concerning Sherri Waltermeyer would not have been entirely helpful. After the court severed that count, however, I asked my associate Cassandra Stamm to re-interview him concerning other counts where his testimony would have been helpful. She informed me that she tried to call him at least five times but could not get a response.

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

Dec 5, 2006
Date
Seattle, WA

David Allen

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

7-1 (Rev. 5-13-99)

FBI LABORATORY

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Date: August 22, 2002

To: Detective Louise Adams
2000 Lakeridge Drive SW
Olympia, Washington 98502-6045

Case ID No.: 95A-HQ-1356026

Lab No.: 011119018 GH

Reference: Letter dated November 13, 2001

Your No.: 01-24273-07

Title: SUSPECTED DRUG-FACILITATED SEXUAL ASSAULT

COPY RECEIVED
THURSTON COUNTY
PROSECUTING ATTORNEY
AUG 27 2002
BY
TIME 330

Date specimens received: November 19, 2001

The items listed below were submitted under cover of communication dated November 13, 2001 and were received in the Chemistry Unit:

Q1 Hair sample from ALVINA CRUZ

NE1 Police report

NE2 VHS videotape

This report contains the results of the toxicological analysis of specimen Q1.

Results of Examinations:

No commonly encountered drugs associated with drug-facilitated sexual assaults were identified in the Q1 hair. This specimen was analyzed using the following analytical techniques: immunoassays, solids probe mass spectrometry, gas chromatography/mass spectrometry, and liquid chromatography/mass spectrometry.

EXHIBIT A

This Report is Furnished for Official Use Only

Remarks:

It should be noted that the lack of positive findings in the Q1 hair should not be misinterpreted as proof that the donor did not ingest any drugs. Hair analysis for drugs has many limitations and is traditionally utilized to identify chronic drug users.

The unconsumed portion of the submitted specimens will be returned to your office by Federal Express.

Marc LeBeau

Marc A. LeBeau, MS
Chemistry Unit
(202) 324-8472

EXHIBIT A

October 15, 2002

JEFF WIATT'S TESTIMONY (with DA)

Name:
Residence: PLU
Student: at PLU – major.
Where did you grow up? Oly
Where HS – Capital HS.
Year of Graduation: '99
Sports or extra circular activity: baseball

Did you live at the Cedrona house, when: sept 99.
How long: 3-4 months
Did you spend time there when not living there? Yes – most every day.

How would you describe your relationship with brother Jerry during 1999 -2001:
Good friends, fishing, skiing together.

Were you working? 2 jobs: Bon Marche; assistant manager at retail shop.

ZOE HAWKIN

Know Zoe Hawkins – she came over one night with Erin Gunlach.

How do you know Erin? -- thru Barry Spech?

How would you describe your relationship with Erin – great friends.

How was it that Zoe and Erin came over – I think I invited Erin.

When you invited Erin, any discussion about her bringing a friend:
Yes, Zoe.

Any discussion about Jerry or others being there? – yes, at club.

What time did they arrive – mid evening.

What happened when they came? -- we hung out, just us 3 chatting.
(doesn't remember any drinks at this time).

Discussion about Jerry Wiatt – yes: Erin was describing brother to Zoe, and Zoe became excited about him.

What did Erin say about Jerry? -- muscular mixed asian, smart

EXHIBIT B

What was Zoe's response to this: she was eager to meet him, she wanted to call him at club, she wanted to call him.

Who made the phone call: I called and gave Zoe the phone.

What did Zoe say over the phone: stated her name, your house is quiet you should come back, Jeff took phone back and Jerry said he wasn't coming back now; Jeff told Erin; Zoe took the phone back and said she had big breasts and that Jerry should come back.

Did Zoe seem intoxicated – no.

What happened when Jerry came home? Zoe went out to greet him and gave him a HUG.

Next: we hung out in kitchen around the Island; Jerry and Zoe went into the hot tub. They were "messing around".

Were you watching: yes, Erin and I were spying.

Describe the messing around: kissing & hugging in the hot tub, consensual.

Did you say anything to them: You guys get a room, get out, it's our turn in the tub.

What did you and EG do: we went in hot tub.

What did Zoe do: took a shower to get chlorine off.

Next: I went up to Jerry's bedroom to get a towel, they were in the bathroom together with the shower going.

Next: Jeff came down to tub.

Next: Ian and Kevin Barlow came home.

Next: Zoe coming out of the bedroom, dressed

What was Zoe's condition when she came out: Looked fine.
Trouble walking, staggering, slurring words? NO, no no.

Did she seem intoxicated? No.

EXHIBIT B

Did she say anything: had to go home because of her parents, didn't say why, she wanted Erin to go, Erin wanted to go, Kevin Barlow gave her a ride.

Did she seem upset or out of sorts: Neutral expression.

What Erin do? She stayed at our place, she slept with me.

(What did Jerry say happened? Ian walked in on them making out, Ian walked in on them, she wanted to stop, he got mad at her because she led him on, she left, he never said that he had sex with her, he told her to leave)

ALVINA CRUZ

Did you know her from before that night: yes, thru Ryan Carlson, she came over the night before this incident.

NOI, what time did you get there: early evening.

Describe the scene that evening: Kevin Murphy and others.

When did Simile and AC come over: later

When did JW show up – after the club closed, around 2 AM.

How long was AC there when JW showed up: hour or two.

Drinking before JW showed up – yes. Not sure how much people drank.

Who mixed the drinks: the girls – they knew the ingredients to sex on the beach.

What was scene before JW was there: casual hanging out, drinking, ALVINA said she wanted to be a PORNO STAR.

Who came back with JW? Johan, Tammy a couple of other guys and one girl.

What happened when JW showed up? Hung out.

Did you talk to Alvina about her age: she said she was 18, and said she had a tattoo to prove it and pulled up her shirt and showed me her back. **She said that she had a fake ID showing she was 21, to go to clubs and stuff.** Jeff did not see it though.

Did Alvina and sister and Alvina do anything together: chatting,

EXHIBIT B

Did you hear anything about it at the party: yes, people talked about it.

Did anyone offer to take her home: Ryan Carlson, she didn't want to leave.

What did AC do: she asked Ryan to stay & relax;

What did AC and JW do: Started kissing in front of the garage.

Next: Simile wanted to leave; I told Simile to leave, AC was 18, can't force her to leave.

Did AnnLee show up? She was screaming and upset.

Come out of bedroom: what was wearing: bathrobe;
What did she say she was going to do: she said that she was going to drive down the street, trick her friends and come back, she was afraid the police

how was she acting: she was fine, in hurry, ran down stairs.

Stumbling: no; Slurring words: no.

Where was your brother: in car, then dropped off.

How long was she gone for : seems liked 30 minutes.

Remembered her coming back: yes.

Did she explain what happened: went down to exit and then made a circle and then came:

Did she call: yes on my cell phone, she wanted to talk to brother said she was coming back, handed phone to brother.

How did she seem when she came back: same

Where was Johan: in the bedroom sleeping.

Did you know that Johan was in the bedroom earlier: no.

Were you there when AC left in the morning: no.

Did JW tell you what happened that night: she showed him ID, they had sex,

Did Johan say he had sex with her: yes.

EXHIBIT B

Did you know that he videotaped her: no

Did you ever see videl: no.

JENNIFER BOWLES

How do you know JB? Grew up next door from JW.

Did she come over to the Lacey house, yes
Cedrona: yes, lots.

Strip tease: Justin A's bedroom.

Was Jerry Wiatt there: not sure.

What went on: hip hop music, describe, she is on bed, she ended up with bra and thong on, it happened in less than 10 minutes, and tease us while we were doing it.

Have you had sex with Jennifer: yes at the Lacey house.

He wasn't there when JW had sex with her.

Did you ever hear Jennifer say that she wanted to have sex with your brother: I recall her saying that she wanted to have sex with my brother (not sure where or when).

KRYSTAL HOSKINS:

Knows her – cheer leader.

How often over at the house: often.

Was not there the night of the bloody nose.

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,

Plaintiff(s),

vs. No. 01-1-01136-1

JERRY WIATT, JR.,

Defendant(s).

RECORDED INTERVIEW OF

JENNIFER BOWLES

10:00 a.m.
August 15, 2002
2415 Evergreen Park Drive Southwest
Suite C-1
Olympia, Washington

Pam L. Cantu, C.C.R.
Court Reporter

1201 Third Avenue, Suite 2760
Seattle, Washington 98101

A P P E A R A N C E S

APPEARING FOR THE DEFENDANT(S): MS. CASSANDRA L. STAMM
MR. TODD MAYBROWN
Attorneys at Law
ALLEN, HANSEN & MAYBROWN
600 University Street
Suite 3020
Seattle, Washington 98101

APPEARING FOR THE PLAINTIFF(S): MS. CHRISTEN ANTON PETERS
Deputy Prosecuting Attorney
THURSTON COUNTY
2000 Lakeridge Drive Southwest
Building 2
Olympia, Washington 98502-6001

ALSO PRESENT: MS. KIM CARROLL
Victim Advocate

*** Notes ***

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EXAMINATION INDEX

BY MS. STAMM: PAGES: 4 - 118

JENNIFER BOWLES, appeared and testified as follows:

* * * * * * * * * *

EXAMINATION

BY MS. STAMM:

Q. Hi, Jennifer. My name is Casey Stamm. I'm one of Jerry Wiatt's lawyers.

Today I'm going to ask you some questions; you're going to go answer some questions. It's not designed to be tricky or nasty other unpleasant particularly.

So let me know if you want a break or need some water or anything at all like that. We're very flexible.

A. Okay.

Q. Okay. Also if my questions don't seem to make sense or you're not exactly sure what the heck I'm taking about, just let me know. You shouldn't force yourself to answer things that you don't understand.

And likewise if you can't remember something, you shouldn't force yourself to come up with an answer. Just say, I don't remember.

A. Okay.

Q. Okay. If anything -- like as we go through if you think back and wish you would have said something

*** Notes ***

EXHIBIT C

Page 53

I think it was like one or two, and then I think they were all really pretty close together.
Q. Okay. And was that pretty close also to the Malibu that you were drinking mixed?
A. I don't know.
Q. Okay. And if you can, can you say whether or not you drank more or less this time than the first time you were there?
A. More or less? I'd have to say I could drink a lot more by then.
Q. Uh-huh.
A. I wasn't afraid to or anything. I don't know. It was either equal or more.
Q. Okay. And I assume this time you also felt kind of drunk?
A. Oh, yeah. I don't think I had drank a while before that.
Q. For like how long?
A. Oh, geez.
Q. Just roughly?
A. A month, maybe a month and a half.
Q. Okay. Did you know how make a B-52?
A. No.
Q. Who was making them?
A. Guys. Don't know who solely, but I knew it was

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a guy.
Q. Do you know if Jerry made any for you?
A. I'm pretty sure he would. I mean it was his house.
Q. How are you pretty sure he would?
A. I don't know. His house, his alcohol. It could have been him. It could have been his friends.
Q. Okay. It could have been him, or it could have been these roommate-type people?
A. Yes.
Q. And you're not sure which?
A. I already said that, no.
Q. Do you think one is more likely than the other?
A. I -- I wouldn't be able to know that.
Q. Okay. After -- well, after you got there, besides drinking these things, what did you do?
A. I think some of guys were dancing by themselves, and we were sitting -- there's like a breakfast bar type thing in the middle.
We were sitting there, and they were talking. I don't know what else we did.
Q. When you say some guys were dancing by themselves?
A. I think there was like this one weird guy.
Q. Okay.

*** Notes ***

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A. He's strange.
Q. Not --
I assume you don't know who this is. This is Todd Maybrown.
A. Yeah. I'm assuming he's your --
Q. He is. He's just going to be sitting in.
This one weird guy, this is not Jerry or Jeff or Justin?
A. Oh, no. It's one of their friends.
Q. Okay. And you mentioned that we were sitting by the bar. Who is "we"?
A. Amanda and I.
Q. And was Justin there as well?
A. I actually believe that he was not there.
Q. Okay. And so it's just -- just of the two of you, and you're talking?
A. And I think there's s couple -- couple guys or something there trying to make conversation with us.
Q. The guys were?
A. Yeah.
Q. Do you know which guy those were?
A. I don't even remember their names.
Q. Okay. And was this would this have been before or after you had the four or five B-52's?
A. During, while, before, after, all.

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Q. Okay. You stayed there for a while?
A. Probably two or -- two or three hours.
Q. Okay. And on this night when you were there, did you ever talk to Jerry?
A. Yeah.
Q. When was that?
A. During the time we were having all those lovely drinks.
Q. And do you have any idea what you were talking about?
A. Honestly, no, I don't remember.
Q. Do you remember if he said or did anything that made you uncomfortable?
A. He gave me a back massage.
Q. At the breakfast bar?
A. Yeah.
Q. And how did that start?
A. He was behind me, and he started massaging my shoulders.
Q. Was that the first time he'd ever done anything like that?
A. Massage my shoulders?
Q. Or touch you in any way.
A. Yeah. I'm pretty sure. I mean I don't -- I don't know if I brushed by him once or twice before. I have

*** Notes ***

EXHIBIT C

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 27 Aug 2001
Time: 1350 hours

NAME: COCHRAN, ALISHA J.

DATE OF BIRTH: 06-27-81

ADDRESS: [redacted]
Home: [redacted]

INTERVIEWING OFFICER: Det. Louise Adams, TCSO

INTERVIEW LOCATION: Thurston County Sheriff's Office

ALSO PRESENT:

Q. Alisha, when we talk today, I'm going to record this conversation, is that with your permission and consent?
A. Yes.

Q. You have to talk out loud, you have a soft voice. Do you know a gentleman by the name of Jerry Wiatt?
A. Yes.

Q. How long have you known Jerry?
A. About four years.

Q. About four years.
A. It's 3½, 4.

Q. Okay. And how old are you now?
A. I'm 20.

Q. So when you first met him, you were how old?
A. About 16.

Q. Okay. How did you meet him?
A. Um, his little brother was my best friend's friend. They went to school together. (Indistinguishable)

Q. So Jeff Wiatt...
A. Yeah.

EXHIBIT D

Q. ...went to school with?
A. My friend, Jenny.

Q. Okay. And when you first met Jerry, where was he living?
A. Um, on College.

Q. Okay. In Lacey?
A. Yeah.

Q. Alright. Um, were you ever at his house in Lacey?
A. Yeah.

Q. Okay. And what kind of things generally went on at Jerry Wiatt's house in Lacey?
A. We just went over there, I don't know.

Q. Hung out?
A. Yeah.

Q. Okay. Um, was that a place where young girls would generally hang out?
A. No.

Q. No?
A. It was somet-, mostly like his friends...

Q. Okay.
A. ...and stuff from college or school.

Q. Who'd he live there with?
A. Um, two of his roommates.

Q. Do you know who they are?
A. Yeah.

Q. Who?
A. Tony and Pat.

Q. Tony who?
A. Grant.

Q. Okay, and Pat?
A. I don't know his last name.

Q. Okay. Both Tony and Pat are males though?
A. Yeah.

Q. Okay. Um, when La-, when you, when Jerry was living in Lacey and you were going there, did he ever serve you alcoholic drinks?
A. Um, oh, sure.

EXHIBIT D

Q. Okay.
A. We, yeah, I'm sure we drank over there.

Q. Okay. And Jerry provided the alcohol?
A. I don't know that.

Q. Okay.
A. But it was alw-, yeah, I don't know, I can't say that he did.

Q. Okay. But you did drink at his house but you're not sure whether he provided the alcohol?
A. Yeah.

Q. Okay. And, um, were other teenagers there drinking when you were there?
A. Just like my friends.

Q. Okay, and I'm assuming, were those teenagers too, under the age of 21?
A. Yeah.

Q. Okay. And how did they get their alcohol?
A. Who?

Q. Your friends?
A. We, they just came with me.

Q. Okay. And how did you get your alcohol when you got there?
A. Pour a drink.

Q. Okay. And whose alcohol was it?
A. I don't know. We were just-

Q. Okay. Well, talk to me about the alcohol in the house. You went over to the house and you wanted to drink, how would you go about getting one?
A. (I don't know sound made) Get one.

Q. Okay, and where was the alcohol kept?
A. I, he, he didn't have it in a certain place, I don't know what you mean.

Q. Okay. Well, I mean like if you'd come to my house, and you'd want a drink, you'd have to go into my cupboard and get down a bottle of alcohol and-
A. Oh. It never was, I don't know.

Q. Did he have just alcohol on a counter and people just helped themselves or how did that work?
A. Yeah, if it was like a party or something...

Q. Okay.
A. ...like prom night or something.

Q. Okay. Um-
A. It wasn't like every day that I went over there at all.

EXHIBIT D

Q. Right.
A. (Inaudible)

Q. Right. But when you went there, there was alcohol, there was generally no, I'm assuming there was no questions asked from what you're saying, and if you wanted a drink, you just made a drink or someone made you one?
A. Sure.

Q. Okay. Um, while you were at his house in Lacey, um, the, the times that you were there, was there ever any problems with any of the females that went there? Were an-, any of those girls ever have a problem with Jerry or complain to you about Jerry's behavior?
A. No.

Q. Okay. Alright. Um, and have you been to his house in the Cedrona Development?
A. Yes.

Q. Okay. And how many times do you think you've been there?
A. Probably about 2 or 3 times.

Q. 2 or 3 times?
A. Um hm.

Q. Okay. And-
A. Well, one, two, yeah, about three.

Q. Okay. And did Jerry ever, um, serve you alcohol beverage at his house in Cedrona?
A. I'm sure.

Q. Okay.
A. Yeah.

Q. Alright. That's, was that a pretty common thing, to drink when you went to Jerry's house?
A. Yeah.

Q. Okay.
A. I'm (indistinguishable) (laughing)

Q. (Laughing) Um-
A. Not.

Q. While you were at, um, his house in the Cedrona Development, did any females or friends of yours ever complain to you about Jerry Wiatt's behavior in that house?
A. No.

Q. Okay. Did anything ever happen in his Lacey house while you were there that caused you to be concerned at all?
A. No.

Q. How about in the Cedrona house?
A. No.

EXHIBIT D

Q. Okay. Um, did Jerry ever do anything inappropriate with you or anything that caused you to be uncomfortable?
A. No.

Q. Okay. Um, do you know a young girl by the name of Raminta Rankis?
A. Yes.

Q. Did you ever go with her or were you ever with her at Jerry Wiatt's house in the Cedrona Development?
A. Yes.

Q. Okay. Can you tell me what you remember about that time?
A. Yeah. Um, we went there, and we were just hanging out, watching movies.. Everybody was there, we were drinking. Um, I don't, it was so long ago. I don't really remember. Somehow she was all over him, and they were whatever, and I tri-

Q. In front of everybody or-
A. Yeah.

Q. Okay.
A. Well, I'm trying to remember. I know that it ended up them being in the bedroom, and I was trying to get Raminta to leave but she didn't want to.

Q. Okay.
A. And-

Q. Was Raminta drinking?
A. Um, yeah. (Indistinguishable)

Q. Okay. Was she intoxicated? Did she become intoxicated?
A. I, I don't know. What do you, like-

Q. Well, was she slurring her speech, did you think she had too much to drink...
A. No.

Q. ...anything like that happened?
A. No.

Q. Okay. And somehow she ends up in Jerry's room, you're not real sure how?
A. Um hm.

Q. And then what do you do?
A. I just kept going up there and, you know, Raminta, let's go. She's like, no, no, you know, and-

Q. When you go up there, is the door open or shut?
A. Shut.

Q. Okay. .
A. I just-

Q. Locked or not locked?
A. I just walked in.

Q. Okay. When you walked in-
A. I think after a while, they locked the door.

EXHIBIT D

Q. Okay.
A. So-

Q. When you walked in, what was going on?
A. I sure they were making out or...

Q. Okay.
A. ...whatever.

Q. Alright. Um, do you know if Raminta had sex with Jerry Wiatt that...
A. Yes.

Q. ...that time? How do you know that?
A. She told me.

Q. What'd she tell you?
A. Well, it's kinda funny. We left, finally, you know, I got her to leave, we left, and then we went over to, um, one of my friends, over in Breckenridge, and, um, she had sex with, uh, my friend's roommate also. So it was kinda like the next day thing, I was like, you know, I asked her, 'cause, you know, they had sex, and I could hear 'em, I'm like, you had sex with him and Jerry? And she's like, yeah. I'm like, don't you feel, you know, that's horrible, she, that's how (indistinguishable)

Q. Did that surprise you?
A. Yeah.

Q. Is that something she would normally do?
A. Well, I don't really know her, that's the thing. Like we just went to high school together, and we just started hanging out like right then. So I don't even know the girl, it just, I stopped hanging out with her, of course, (indistinguishable) I don't talk to her at all.

Q. Okay.
A. But-

Q. So you don't know if that was normal behavior for her?
A. Yeah.

Q. Or if-
A. As far as, as much as I hear, it is because I actually met her at another party, um, she was with, I went to Olympia Christian School with her boyfriend at that time.

Q. Who was?
A. Um, Eric Fisher. And then like, it's kind of like a pattern, like she always had different boyfriends. Then I went to another party, um, she was going with this guy named Adam.

Q. Um hm.
A. And, um, so it was like, you know, I was like, oh, okay. That's why I really didn't hang out with her again. You know that night I hung out with her, and I was like, okay, really, I'm not going to hang out with her again.

Q. Okay. And you were kinda su-, surprised 'cause she had sex with two different people?
A. Very surprised.

Q. Okay.
A. And Jerry's like my friend, that's kinda like, I don't know.

EXHIBIT D

Q. Okay. Um, did Jerry ever do anything to you that made you uncomfortable?
A. No.

Q. Okay. Um, what's your relationship with Jerry?
A. He's just my friend.

Q. Okay. Did you guys ever have a sexual relationship?
A. No.

Q. Okay. So you've never had sex with Jerry?
A. No.

Q. Okay. You know anything about video taping that goes on in his residence?
A. No. That's the first I heard of it. 'Cause first it was, everybo-, his house g-, everybody'd steal stuff, and then, what was it, yeah, it was just the stealing thing, and then...

Q. Do you think that stealing is really going on?
A. ...(indistinguishable) want to. I don't know. He just would tell me...

Q. Do you think your friend...
A. ...about it.

Q. ...Valerie, ever did that stealing?
A. Sh-, no.

Q. Okay.
A. (Indistinguishable)

Q. Alright.
A. She never ad-, admitted to me, as far as I know so-

Q. Okay, alright. Um, can you just give me briefly an idea of what kinds of things, typical behavior of things that go on at Jerry's house.
A. Just everybody having fun.

Q. Okay.
A. He's got a play house, you know, pool table, hot tub, I don't know, people just go over there to have fun Friday night.

Q. Okay. Is there a lot of sex that goes on at that house?
A. I would imagine. He always had new roommates so-

Q. Okay. Um-
A. I mean, everybody, you know.

Q. Okay. How, what was the general age of the girls that were going there?
A. Um, range?

Q. Um hm.
A. That, probably like...

Q. Ages.
A. ...at the youngest, 17. And usually like 18 to 26, you know, 'cause his friends would be there too, his girlfriends and friends...

EXHIBIT D

Q. Um hm.
A. ...and guy friends and everything.

Q. Okay. Um, and how many times do you think you've been at his residence in Cedrona?
A. Probably about, I think I-, more than three but I want to say three.

Q. Okay. And never ever, and correct me if I'm wrong here, any times that you went there, there were girls that go upset or girls that had too much to drink or anything like that?
A. I ha-, th-, like I said, this is the first that I've heard like of everything. And no one's ever said anything to me.

Q. Um hm.
A. So-

Q. But did you see anything like that?
A. See anything, no.

Q. Okay, or hear anything if it was going on?
A. No. I always left early.

Q. Okay.
A. I just went over there and leave early.

Q. Do you know of, have any of the girls, um, since he was arrested and all that, talked to you about this or come forward or told you things that happened at his house?
A. H-

Q. You had any contact with any of 'em?
A. Hu-uh.

Q. Do you know who any of 'em are?
A. Um, Raminta.

Q. Okay. Anybody else?
A. Um, Alvina.

Q. Okay.
A. I, I can't think of any other names.

Q. How did you man-, how did you end up talking to Alvina about this?
A. I didn't ta-, well, everybody, it's just everybody knows...

Q. Okay.
A. ...the, the names, you know. I, I stay secluded from all the drama and all the...

Q. Right.
A. ...high schoolers and all the, all my friends. I have like two friends.

Q. Okay.
A. And my boyfriend and that's all.

Q. Did you ever have a discussion with Alvina about this case and what happened to her?
A. Briefly. She w-, she didn't talk about it so-

EXHIBIT D

Q. Okay. Um, did you ever tell Alvina that you were a victim of Jerry Wiatt's...
A. No.

Q. ...or that he'd done bad things to you?
A. No.

Q. Okay. Um, and you've never seen, have you ever seen any video taping equipment at his house?
A. Um, no.

Q. Okay. Did you ever-
A. I'm sure I have, you know.

Q. Okay.
A. But I mean I can't remember briefly, or you know, what I saw, you know.

Q. Okay. Has he ever taken a video tape of you?
A. No.

Q. Has he ever photographed you when you were not completely clothed?
A. No.

Q. Okay. There's no picture out there that he had on his computer that had you sitting on a bed without your shirt on?
A. No.

Q. Um, what would you say if I told you that I've talked to lots of people who've seen that picture?
A. They don't know what they're talking about.

Q. Okay. When was the last time you talked to Jerry?
A. (Sigh) Um, I don't know, probably like couple weeks ago he called me.

Q. Okay. And did you discuss any of this investigation?
A. Um, no.

Q. Okay.
A. Not really.

Q. This wasn't even brought up in conversation?
A. Well, yeah, it, 'cause I didn't know that it had happened. I didn't see the news, I didn't hear anything. It was actually when it first happened and, you know, uh, he just told me briefly he couldn't really talk about it.

Q. Okay.
A. So-

Q. Alright.
A. He just-

Q. Did anybody ever offer you any money not to say anything?
A. No.

Q. Okay. Did he ever ask you not to say anything to law enforcement or tell you what to say to law enforcement...
A. No.

EXHIBIT D

Q. ...if and when you were contacted?
A. No.

Q. Okay. Um, how about with Jeff, have you talked to Jeff about this case?
A. No.

Q. Alright. Has, um, Jeff, or so, hang on. I got my train of thought messed up here. She's just coming in to get some water.
A. Okay.

Q. It's unlocked Cheryl. Um, and so you have never talked to Jeff about this?
A. Um, well, then both at the same time. When I talked to Jerry.

Q. Oh, you were on the phone together with them?
A. No, I had stopped by...

Q. Okay.
A. ...to say hi.

Q. Alright. Is this after he had been arrested or before?
A. Uh, gosh, I think it was after.

Q. Okay.
A. Yeah.

Q. Alright. And so you stopped by his house in Cedrona?
A. Yeah.

Q. Okay. And who was there when you stopped by?
A. Just him and Jeff.

Q. Just Jeff and Jerry?
A. Yeah.

Q. Okay. And that's when it came up briefly into the conversation but not very much?
A. It, well, he was like, did you hear? He was like, is that why you're here? Like, I'm like, what are you talking about? He kinda just briefly told me, and I was like, oh, okay.

Q. Okay. So you know that, um, Raminta has come forward and indicated to me that she was a victim, and all you pretty much know about that is that the night you were there with her, she had sex with Jerry and another, and then you guys left, and then she had sex with someone else?
A. Yeah.

Q. Okay. And she's never, she never told you that she was raped?
A. No.

Q. Okay. Jerry ever do anything that upset you?
A. Yeah, I'm sure.

Q. Okay.
A. But nothing, nothing like this.

Q. Okay.
A. I mean, I like him but I don't like him, you know. It's like that, like I n-

EXHIBIT D

27X

Q. Okay, why wouldn't you like him?
A. I don't know.

Q. Have you ever heard about any date rape drugs or anything like that...
A. No.

Q. ...used at the residence?
A. I heard that, that's, uh, usually the girls, this is what I have to explain to you. I'm one of the smart ones. The girls that go over there are, they know like they're going over there to do, to, you know, drink and have fun and everyth-, every, you know, and they go over there because they like Jerry or they like his roommates, you know? That's what I, I don't understand how it became this big. I mean, I'm not sticking up for Jerry at all. But, I mean, girls know they're going over there because they either talk to Jerry and they like Jerry or they talk to, you know, his other four roommates, you know, it's, they know that, I can't explain it. Like they've been talking to him, and you know, they hang out with him. He takes 'em out to dinner or, you know, I can't explain it. Like if they ever thought that he was like a rapist or something or whatever, everybody saying that there's date rape drugs over there, you know, I would be smart enough not to go over there.

Q. Um hm.
A. If that were the case.

Q. Um hm.
A. But I just, I don't know. I don't know in Alvina's case but I know that Raminta, that, you know, that wasn't. That's not even, I'm sure she just heard all the commotion and wanted to be a part of it.

Q. Um hm.
A. As far as that may apply to all the other girls too, you know. Oh, you know, I don't know. Like if they go over there and they drink, you know, and they know how much they're drinking, and they're drinking or whatever, and then they decide to go, you know, you can, you see what I'm trying to get at? Like if you were being raped or whatever or, is it more of like they drink, and then they don't remember, and then the next day then it bugs them? Or like what is the case, like I don't-

Q. It's all different.
A. I mean, I don't know.

Q. Were you ever there when, um, someone got upset because a friend was in a bedroom, and people were pounding on doors and trying to get girls out or anything like that?
A. Uh, hu-uh.

Q. So as far as you know, everybody that was up in Jerry's room was completely sober, knew exactly what they were doing, and they were in his room because they wanted to have sex with him?
A. No, they weren't so-, well, I'm sure they weren't so-, they weren't sober but-

Q. Do you, um-
A. I mean, they'd choose to go upstairs with him, and, you know, if they have sex, then they have sex but-. It's not like he drags 'em up there or, you know.

Q. Okay.
A. You know what I mean? I don't know.

Q. Do you believe that there's ever a point where someone has too much to drink where they're not capable of consenting to a sex act?
A. I'm sure that that happens.

EXHIBIT D

Q. Okay. Do you think that ever happened at Jerry's house?
A. That may have.

Q. Okay. Alright. Is there anything else, Alisha, that you would like to add to this statement at all?
A. No.

Q. Is everything you told me today true and correct to the best of your knowledge?
A. To the best of my knowledge.

Q. At any time since we've been talking have you asked me to turn off the tape recorder?
A. No.

Q. I'm going to conclude this statement. It's approximately 2:08 PM.

ENDING TIME: 1408 hours

EXHIBIT D

B. Declaration of Justin Allison, November 29, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JUSTIN ALLISON

Justin Allison declares as follows:

1. As I testified at trial, I was a roommate of Jerry Wiatt's at his Cedrona house. I lived there for approximately a year.
2. Although I testified about Jerry's relationship with some of the alleged victims in this case, I did not testify about Krystal Hoskins because I was afraid for my safety.
3. Some time before Jerry's case came to trial, Krystal Hoskins started going out with Jared Trigg. I had known Jared for many years and used to be friends with him. But Jared stopped talking to me after he learned that I might be a witness for the defense in Jerry's case. He made it known to me through others that he did not want me to testify in any way that could go against Krystal.
4. Jared was a very large man, probably about six feet, three inches and 240 pounds of solid muscle. He now competes as an "ultimate fighter" and I believe he was already training as a

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705 Second Avenue
Seattle, Washington 98104

fighter around the time of trial. I knew him to start fights with people frequently. I had no doubt that he could hurt me very badly if he wanted to.

5. As the trial date approached, I started seeing threatening notes on my car when I left work. One of them said: "If you testify, you'll die." I took those notes very seriously. At some point before Jerry's trial, I stopped answering telephone calls from anyone associated with Jerry because I did not want to be involved.

6. When I went to the Seattle office of Jerry's trial lawyers I told them I didn't want to testify regarding Krystal Hoskins and the reason for that. They agreed that I wouldn't have to. I may have told them what I knew about Krystal during the meeting.

7. When I was interviewed by the prosecutor, Jerry's lawyer said that I wouldn't be testifying about Krystal so there was no need for the prosecutor to ask questions about her. When I took the stand, though, the prosecutor asked me about Krystal. The lawyers then had a private talk with the judge and the prosecutor moved on to a different subject.

8. I have recently had some communications with Jared Trigg. He is no longer involved with Krystal Hoskins and he made it clear that he is no longer concerned about my connection to Jerry Wiatt's case. I am now willing to go on record about what I know about Krystal Hoskins' relationship with Jerry Wiatt.

9. I was at Jerry's house in Cedrona on the night that Krystal Hoskins had a bloody nose. I remember that evening well because Krystal got sick from the bloody nose and threw up. I helped clean everything up.

10. Later, after Krystal was feeling better and cleaned up, Jerry and Krystal were holding hands and cuddling while watching a movie downstairs. I was hanging out with them and my girlfriend Danielle ("Danny") Couey. Jerry and Krystal went upstairs together. Danny and I walked over to the bottom of the stairs at one point and we could heard Jerry and Krystal having sex. Danny gave me a hug and we laughed. When Krystal came downstairs later she

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seemed happy. I'm sure that Krystal had something to drink that night but she never seemed out of it. I wasn't surprised that Krystal and Jerry got together that evening because Krystal had expressed an interest in Jerry before.

11. A few months after the trial I ran into Krystal at the YMCA. She said she felt bad about the long sentence Jerry got. She told me that the detective in Jerry's case had pushed her to say that Jerry drugged her. When Krystal met with the detective, she (the detective) held up a plastic bag that seemed to contain a drug in it and said: "Is this what Jerry put in your drink?" Krystal felt pressured to confirm that Jerry had used date rape drugs on her. Krystal told me she didn't really believe that Jerry had drugged her.

12. When I met with the defense lawyers before trial I told them I had seen Jennifer Bowles performing a striptease in my room at Jerry's house. I walked in and saw her standing on the bed removing the last of her clothes. She was completely naked. A couple of guys were standing around the bed watching. I took her out of the room because I didn't want that going on. I've heard that she performed a striptease at Jerry's house another time but I didn't see that.

13. I also told the defense lawyers that Jennifer once told me that she wanted to "get with" Jerry. I understood that to mean that she wanted to have sex with him.

14. As I told the defense lawyers before trial, I was present when Raminta Rankis said that her goal was to have sex with every man who was living at Jerry's house. Another time, I heard her tell Jerry that he should have a pole installed in the kitchen so she could dance for everyone.

15. I was not asked at trial about date rape drugs. I never saw or heard anything while I was living at Jerry's house to suggest that he or anyone else used or possessed such drugs. Jerry was very much against illegal drugs. If he made an exception for date rape drugs I can't imagine that he would have kept it secret from his roommates. He was the type of guy who

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would always talk about anything he was doing. If I ever had reason to suspect that anyone was using date rape drugs I would have gone to the police about that. I have no sympathy for that sort of behavior.

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

11-29-06
Date
Lacey, Washington

Justin Allison

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Seattle, Washington 98104

C. Declaration of Kevin Barlow, November 29, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF KEVIN BARLOW

Kevin Barlow declares as follows:

1. I lived for a time at Jerry Wiatt's house in the Cedrona neighborhood. I met Jerry through his brother Jeff. I testified at Jerry's trial as a State witness.
2. When Detective Adams interviewed me, she said she knew that Jerry was giving people date rape drugs and that he was getting them from China. She also told me that he was in the mafia. She may have said or hinted that she actually found date rape drugs in Jerry's house when she searched it.
3. Other than Detective Adams's statements, I never saw or heard anything to suggest that Jerry or anyone else at this house was associated in any way with date rape drugs. Jerry was very much opposed to illegal drugs although he did like to have alcohol around.
4. I testified at trial about giving Zoe Hawkins a ride home from Jerry's house. Nobody asked me whether she seemed to be under the influence of drugs. I would have said that she did

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not. She had no difficulty walking around and talking. She was not stumbling or slurring her words. She had no trouble getting into or out of my car. She was talking to me during the entire ride back to her house. Mostly, she was telling me how mad she was at Jerry and how she didn't like him. She said something about wanting to get her friends to come over to his house and beat him up. The reason she gave for being mad at Jerry was that he told her she had to leave his house. She was also mad that her friends wouldn't give her a ride home.

5. Had I been asked, I would have testified at trial to any of the things I have said in this declaration.

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

11/28/06
Date
Olympia, WA

Kevin Barlow

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D. Declaration of Jocelyn Campbell, November 17, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JOCELYN CAMPBELL

Jocelyn Campbell declares as follows:

1. I graduated from Timberline High School in 2000. I was friendly with Alison Tabor, who was a year ahead of me. I knew Alison to be the daughter of a local judge.
2. In the spring of 2000, I was good friends with Natalie Van Brunt. She was going out with Jeff Wiatt at the time. I often went with Natalie to Jeff's house. Jeff lived in the Cedrona neighborhood with his brother Jerry and some other roommates. I would sometimes go there on weekends when a party was going on.
3. I saw Alison Tabor at those parties a couple of times. I'm pretty sure that she was drinking alcohol.
4. Several times when I was at the Wiatt's house, Jerry would come home late in the evening to find a party going on. He would sometimes get annoyed at Jeff about that. At least twice, I heard him yell at Jeff that he shouldn't be bringing over so many people that Jerry didn't

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know. Jerry also said he was concerned that Jeff might be bringing over people who were under 18.

5. I often heard girls lying about their age when they were at the Wiatt's house. Many of them would claim to be 18 even though I knew that they weren't. The reason they did this is that everyone knew you weren't supposed to come to parties at the house unless you were at least 18.

6. I was an acquaintance of Raminta Rankis. Sometime shortly after the allegations against Jerry Wiatt were in the news, Raminta talked to me about what happened with her and Jerry. She said it took place on the same night that she saw me at a second party at someone else's house. She had come from Jerry's house to the other party. When Raminta described the incident with Jerry to me, she said something about Jerry drugging her so that she didn't know what she was doing. She might have said something about him slipping a drug into her drink.

7. I remember seeing Raminta at that second party and she did not seem intoxicated. She was alert and making sense and seemed to be having a good time. I was aware that she ended up having sex with a guy at that party.

8. Other than Raminta's comment, I never heard or saw anything at the Wiatt's house to suggest that anyone was drugged.

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

11/17/06
Date
Lacey, Washington

Jocelyn Campbell

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Seattle, Washington 98104

E. Declaration of Ryan Carlson, August 10, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF RYAN CARLSON

Ryan Carlson declares as follows:

1. I was a roommate of Jerry Wiatt's at his house in the Cedrona neighborhood. I testified as a State witness at his trial.
2. Detective Louise Adams interviewed me shortly after Alvina Cruz's allegations came to light. She told me that she knew that Jerry was involved with date rape drugs. She may have said that she actually found such drugs when searching his house. She also seemed to be suggesting that I might be in trouble for things that had happened at Jerry's house.
3. I was a long time friend of Jeff and Jerry Wiatt and spent a lot of time at their house, even after I was no longer a roommate there. Other than what Detective Adams said to me, I never saw or heard anything to suggest that Jeff, Jerry, or anyone else at their house was associated in any way with date rape drugs.

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4. I was present at Jerry's house when Jennifer Bowles preformed a strip tease. There were many people present, both male and female, when she did this. She removed her shirt and pants but left on her underwear. She did not seem at all embarrassed about being seen by everyone wearing only her bra and panties.

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

8/18/06
Date
Seattle, WA

Ryan Carlson

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F. Declaration of PFC Andrea Denton, September 17, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF PFC ANDREA DENTON

Andrea Marie Denton declares as follows:

1. I am currently completing basic training in the U.S. Army.
2. I went to Timberline High School in Olympia, Washington. I was a friend of Jeff Wiatt's. I visited him several times when he was living with his brother Jerry Wiatt in the Cedrona neighborhood. I also became friends with Jerry.
3. I attended several parties at Jerry's house. Sometimes I would stay the night there. I never saw Jerry behave improperly towards me or anyone else.

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4. I saw Alison Tabor at several parties at Jerry's house. People talked about how she was the daughter of a judge. I had also seen Alison at Timberline High School. To the best of my recollection, Alison was friends with Zoe Hawkins, the daughter of Councilwoman Jeannette Hawkins.

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

17 Sept 04

Date
Fort Leonard Wood, MO

PFC Andrea Marie Denton

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G. Declaration of Joel Hawkins, August 2, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JOEL HAWKINS

Joel Hawkins declares as follows:

1. I first met Jerry Wiatt when I was in the 7th grade. I lived with Jerry for about a month in January 2001 at his home in the Cedrona neighborhood.
2. Not long after the videotaping allegations came to light, Detective Louise Adams interviewed me about Jerry's case. She suggested to me that the police had actually found "trace elements" of date rape drugs at Jerry's house. The tape recorder may not have been running at the time that she said that. Detective Adams also suggested to me that my connection to Jerry Wiatt might cause me problems with my job. I was a high school teacher at the time. Detective Adams said that if it were up to her, she would put Jerry away for life.
3. After speaking with the Detective, I was very concerned about getting in some sort of trouble because I had lived with Jerry Wiatt. I may not have been entirely forthcoming when I was

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interviewed by a defense investigator because I was worried that there could be some adverse consequences to me if I were seen as helping the defense.

4. One time when I was over at Jerry's house I overheard Krystal Hoskins and some other girls talking in the kitchen. Krystal seemed to be bragging about how good it was to have sex with Jerry Wiatt. She said that she had her first orgasm the first time she had sex with Jerry.

5. I never heard or saw anything suggesting that Jerry Wiatt or anyone else at his house was in any way involved with date rape drugs.

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

8/2/06
Date
Olympia, WA

Joel Hawkins

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H. Declaration of Thomas Ho, August 1, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF THOMAS HO

Thomas Ho declares as follows:

1. I am a cousin of defendant Jerry Wiatt.
2. I was visiting Jerry Wiatt during the summer of 2001. I was present at Mr. Wiatt's house when the police came to serve a search warrant Detective Adams took me aside and questioned me. She told me that they had found "trace elements" of drugs during the search. She also told me that Jerry Wiatt was in the Chinese Mafia. Two uniformed officers then guarded me while Det. Adams went to question Jeff Wiatt.
3. I never heard or saw anything suggesting that Jerry Wiatt had access to any illegal drugs, such as date rape drugs. I knew him to be strongly opposed to drugs. Other than what Det. Adams said to me, I never heard or saw anything suggesting that date rape drugs were ever present in Mr. Wiatt's house. I have never possessed or used such drugs myself.

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4. I am not aware of the existence of any "Chinese Mafia" and I certainly have no reason to think that Jerry Wiatt was ever affiliated with such an organization.

5. I was acquainted with Magen Blevins during the summer of 2001. She claimed to be over 21 years old. She showed me an identification card to prove that she was that old.

6. I was interviewed by the defense prior to Mr. Wiatt's trial. I was asked about Magen Blevins and I told them the information in the above paragraph. I do not recall being asked anything about Det. Adams' conversations with me during the search, or anything about date rape drugs.

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

01 Aug 2006
Date
Queens, NY

Thomas Ho

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I. Declaration of Ian Klotz, December 8, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF IAN KLOTZ

Ian Klotz declares as follows:

1. When Jerry Wiatt bought his home in Cedrona, I moved in as a roommate. That would have been in the winter of 1999-2000. I lived in that house for several months.
2. One time when I was living in Jerry's house, Kevin Barlow and I met Jerry at the China Clipper restaurant. Jerry received a phone call and then told us he was going home because a girl wanted to hook up with him. Kevin and I returned to the house after Jerry did, probably about 30 minutes or so later. When we got to the house, Jeff Wiatt and Erin Gundlach were in the hot tub outside and some people were playing pool inside.
3. Kevin and I could hear sexual noises coming from Jerry's room. We could clearly hear the sound of a girl moaning in pleasure. I decided to spy on them as a prank. At the time, I thought I was being funny. I went upstairs, opened the door, and saw the girl moving up and down naked on top of Jerry. She got very embarrassed and stopped what she was doing. I left the room.

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4. A short time later, the girl came out of the room. She was asking people for a ride home because it was past her curfew. When Jerry came out of his room, he said he had kicked the girl out of his house because she stopped in the middle of sex.

5. During the time I was living with Jerry, I never saw or heard anything to suggest that he or anyone else possessed date rape drugs or had any access to them. I never heard anyone complain that they had been drugged or taken advantage of in any way.

6. When I moved out of Jerry's house I went to live in Seattle. I didn't know anything about the charges against him except for a few things that were in the news. Nobody from the defense or prosecution contacted me until recently. If I had been called as a witness, I would have testified to everything in this declaration. I'm sure I would have remembered more details at the time.

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

12-8-06
Date
Seattle, Washington

Ian Klotz

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J. Declaration of Marc A. LeBeau, Ph.D., November 3, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF MARC A. LEBEAU, Ph.D.

Marc LeBeau declares as follows:

1. I am the Chief of the Chemistry Unit at the FBI Laboratory in Quantico, Virginia. A copy of my C.V. is attached as Exhibit A.
2. On November 19, 2001, I received from Detective Louis Adams a hair sample from Alvina Cruz. Under my direction, my staff tested the hair for some of the drugs commonly associated with drug-facilitated sexual assaults and found none. A copy of my laboratory report dated August 22, 2002, is attached as Exhibit B.
3. The significance of this negative finding varies depending on the drug. In 2002, the likelihood of detection was best for the family of drugs known as Benzodiazepines. Our laboratory had several methods of testing available for those drugs, including immunoassays, solids probe mass spectrometry, gas chromatography/mass spectrometry, and liquid chromatography/mass spectrometry. All of those methods were employed.

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4. Flunitrazepam (Rohypnol) is a benzodiazepine that was reported to have been associated with many cases of drug-facilitated sexual assault in the 1990s. That Rohypnol was not detected in Alvina Cruz's hair likely means that she most likely did not ingest Rohypnol within a five-month period prior to the time that her hair was cut for analysis because of the sensitivity of the targeted methods employed for this drug. I would have a similar level of confidence for the drugs Diazepam (Valium), Lorazepam (Ativan), Alprazolam (Xanax), and to a lesser extent Clonazepam (Klonopin). I would not have expected much success in finding Triazolam (Halcion).

5. It is possible that our testing might have failed to reveal the presence of any drug in the benzodiazepine class if it was ingested in a small quantity. It is also possible that such a small quantity could have an effect on the subject if the drug were combined with a significant amount of alcohol or another central nervous system depressant.

6. Our laboratory also tested for Gamma Hydroxybutyrate (GHB) using gas chromatography/mass spectrometry. There is some research indicating that GHB can be detected in hair using such techniques; however, interpreting a positive test is problematic because GHB may occur naturally in hair without the ingestion of a drug. In any event, the FBI Laboratory did not detect GHB in the hair submitted in this case.

7. The hair was also screened for ketamine using gas chromatography/mass spectrometry and liquid chromatography/mass spectrometry. The significance of a negative result using these methods as they existed in 2002 is not clear. At least one other laboratory claimed the ability to detect it using similar methods. Certainly, it is known that ketamine does get into a subject's hair after it has been ingested. I cannot say, however, that we would have detected ketamine in Alvina Cruz's hair even if she had ingested an amount sufficient to cause intoxication.

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8. Because there are over 50 drugs known to have been used to facilitate sexual assaults, we screened for the presence of other alkaline drug using gas chromatography/mass spectrometry and liquid chromatography/mass spectrometry. It should be noted that most pharmaceutical agents are considered alkaline drugs. I view the negative results as being insignificant since this was a broad-based screen conducted simply to determine if there were any abnormal results. A negative screen that is not targeted to a particular drug or drug class may not be specific enough to thoroughly determine if an individual was exposed to a drug. Furthermore, not all drugs are incorporated into hair.

9. We returned Alvina Cruz's hair sample to the Thurston County Sheriff's Office after completing our testing. If the hair sample has been preserved, it can be retested today. Once hair has been cut, any drugs in it should stay in the hair indefinitely. The tests that are available today are more sensitive than those existing in 2002. I would now put more significance to a negative result, particularly for ketamine and benzodiazepines. However, my overall opinion for a negative result for all drugs that can be used to facilitate a crime will remain the same as that expressed in my reported dated August 22, 2002: "...the lack of a positive finding in the Q1 hair should not be misinterpreted as proof that the donor did not ingest any drugs. Hair analysis for drugs has many limitations and is traditionally utilized to identify chronic drug users."

10. The forensic services of the FBI Laboratory are available to federal, state, county, and municipal law enforcement agencies. The FBI Laboratory does not accept requests for forensic testing from other entities, including private law offices. Given the changes in technology, I will consider retesting the hair sample from Alvina Cruz if the investigating agency deems it necessary and requests such. The laboratory will also retest the sample if it is requested by a judge. Additionally, the FBI Laboratory is willing to provide names of other independent laboratories that are also capable of doing this retesting.

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

Nov 3, 2006
Date
Quantico, Virginia

Marc A. LeBeau, Ph.D.

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Last Modified: 9/5/2006

CURRICULUM VITAE

Marc A. LeBeau, Ph.D.

FBI Laboratory
Chemistry Unit, Room 4220
Federal Bureau of Investigation
2501 Investigation Parkway
Quantico, VA 22135
(703) 632-7408 FAX (703) 632-7411

PROFESSIONAL EXPERIENCE

Sept 2000 - Present

Unit Chief / Supervisory Chemist
FBI Laboratory
Federal Bureau of Investigation
Washington, D.C.

Manage the daily operation of the Chemistry Unit. Responsibility includes acceptance and assignment of cases, review of technical reports, training of personnel, coordination of Unit's response to major crimes, and performance of forensic examinations on evidence submitted to the Chemistry Unit.

Oct 1994 – Sept 2000

Forensic Chemist / Toxicologist
FBI Laboratory
Federal Bureau of Investigation
Washington, D.C.

Performed forensic examinations on evidence submitted to the Chemistry Unit. Casework involves toxicological analyses, drug and drug residue examinations, bank dye assays, ink comparisons and investigations into product tampering claims.

June 1990 – Oct 1994

Forensic Toxicology Supervisor
Saint Louis County Medical Examiner's Office
Saint Louis, Missouri

Managed the daily operation of the forensic toxicology laboratory; reviewed and signed official laboratory reports; performed medicolegal analyses on postmortem and antemortem biologicals; testified in court on validity of laboratory results; researched/developed new analytical methods.

Sept 1988 – Apr 1990

Chemistry Instructor
University of New Haven
West Haven, Connecticut

Taught general chemistry lecture and laboratory courses.

EXHIBIT A

July 1989 – Sept 1989 **Intern**
National Medical Services
Willow Grove, Pennsylvania

Assisted supervisor of forensic casework; learned principles of environmental and forensic toxicology; assisted scientists with case analyses.

Summers 1985 & 1986 **Laboratory Technician**
Monsanto Chemical Company
Saint Louis, Missouri

Performed extractions and instrumental analyses.

EDUCATION

Aug 1984 – May 1988 **Central Missouri State University**
Warrensburg, Missouri
Bachelor of Arts Degree
Majors: Chemistry & Criminal Justice

Sept 1988 – June 1990 **University of New Haven**
West Haven, Connecticut
Master of Science Degree
Major: Forensic Science

Aug 1990 – July 1994 **Saint Louis University**
Saint Louis, Missouri
Graduate Course Work
Major: Pathology
Concentration: Toxicology

Sept 1997 – Dec 2005 **University of Maryland - Baltimore**
Baltimore, Maryland
Doctorate of Philosophy
Toxicology

PROFESSIONAL TRAINING

Jun 1992: *An International Symposium on Forensic Toxicology.* Sponsored by The FBI Lab.

Jun 1993: *Professional Practice in Toxicology: A Review.* Sponsored by the American Association for Clinical Chemistry.

Dec 1994: *Chromatographic Methods in Forensic Science.* Sponsored by The FBI Laboratory.

Feb 1995: *XSQ 7000 Operations Course.* Finnigan MAT Institute.

Mar 1995: *Forensic Examiner Training Course.* Federal Bureau of Investigation.

Oct 1995: *Fundamentals of Forensic Toxicology: A Basic Course.* Society of Forensic Toxicologists - 25th Anniversary Meeting.

Oct 1995: *Advanced Forensic Toxicology: Pharmacologic and Interpretative Topics.* Society of Forensic Toxicologists 25th Anniversary Meeting.

Oct 1995: *Advanced Forensic Toxicology: Analytical Topics.* Society of Forensic Toxicologists - 25th Anniversary Meeting.

Jun 1996: *GCQ Operations Course.* Finnigan MAT Institute.

Aug 1996: *Ethics Training.* FBI Headquarters.

Dec 1996: *Management Training for Laboratory Supervisors.* FBI Laboratory.

Feb 1997: *Pharmacokinetics and Interpretation of Old and New Drugs.* American Academy of Forensic Sciences - 49th Annual Meeting.

Feb 1997: *Forensic Toxicology: A Living Science.* American Academy of Forensic Sciences - 49th Annual Meeting.

Feb 1997: *Looking Backward and Forward: Three Decades of Toxicological Adventure.* American Academy of Forensic Sciences - 49th Annual Meeting.

Jul 1997: *Bank Security Device Training.* ICI Americas, Inc. demonstration at FBI Academy.

Jul 1997: *Capillary Electrophoresis.* Hewlett-Packard Company.

Feb 1998: *Standardized Methods in the Forensic Science Laboratory.* American Academy of Forensic Sciences - 50th Annual Meeting.

Feb 1998: *Methamphetamine: Synthesis, Pharmacology, Analysis and Toxicology.* American Academy of Forensic Sciences - 50th Annual Meeting.

Feb 1998: *Tryptamines: Natural and Synthetic.* American Academy of Forensic Sciences - 50th Annual Meeting.

May 1998: *The Science of Solid Phase Extraction.* United Chemical Technologies, Inc.

Oct 1998: *Rohypnol.* 1998 SOFT/TIAFT Meeting. Albuquerque, New Mexico.

Oct. 1998: *Chemical Ionization Mass Spectrometry.* 1998 SOFT/TIAFT Meeting. Albuquerque, New Mexico.

Feb 1999: *Marijuana: A Forensic Symposium.* 1999 American Academy of Forensic Sciences - 51st Annual Meeting.

Apr 1999: *Chemical Warfare Agent Awareness.* Edgewood Arsenal. Aberdeen Proving Grounds. Edgewood, Maryland

Aug 1999:	*Xcalibur Training Course.* Finnigan MAT Institute.
Feb 2000:	*The Use of Micro-Plate Immunoassay Systems in Analytical Toxicology.* 2000 American Academy of Forensic Sciences - 52nd Annual Meeting.
Feb 2000:	*Forensic Applications of Capillary Electrophoresis.* 2000 American Academy of Forensic Sciences - 52nd Annual Meeting.
Apr 2000:	*Ethics Training.* FBI Headquarters.
Oct 2000:	*The Forensic Toxicological Aspects of Chemical Terrorism.* 2000 SOFT Meeting. Milwaukee, Wisconsin.
Oct 2000:	*Forensic Applications of LC/MS at the Beginning of the 21st Century.* 2000 SOFT Meeting. Milwaukee, WI.
Oct 2000:	*Benzodiazepines: Pharmacology and Analytical Challenges.* 2000 SOFT Meeting. Milwaukee, Wisconsin.
Feb 2001:	*Raves, Nightclubs, and the New Youth Drug Culture.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.
Mar 2002:	International Conference on Domestic Violence, Sexual Assault, and Stalking. San Diego, California.
Apr 2002:	Club Drugs: Dancing with Death Conference. Sun Valley, Idaho.
May 2002:	Situational Leadership. Ninth House Network On-line Training.
Sept 2002:	Leading Scientific Organizations. 30th Annual FBI Symposium on Crime Lab Development, St. Louis, Missouri.
Oct 2002:	Drug Deterrence Program's Supervisory Drug-Free Workplace Training, Washington, DC.
Jan 2003:	Chemical Agents of Opportunity for Terrorism: Preparedness and Response. Atlanta, GA.
Sept 2003:	Achieving Excellence through Partnerships. 31st Annual Symposium on Crime Laboratory Development, Minneapolis, MN.
Oct 2003:	Preparation and Planning for Laboratory Accreditation by the American Board of Forensic Toxicology (ABFT), 2003 SOFT Meeting, Portland, Oregon.
Feb 2005:	Executive Development Institute. FBI Academy, Quantico, Virginia.
May 2005:	ASCLD-LAB *International* Assessor Training Course. Lansing, Michigan.
Aug 2005:	Crime Laboratory Development Symposium. Ross School of Business - University of Michigan. Ann Arbor, Michigan.
Oct 2005:	Blood Alcohol Concentration Extrapolation. 2005 SOFT Meeting, Nashville, Tennessee.
Oct 2005:	Postmortem Toxicology Interpretation. 2005 SOFT Meeting, Nashville, Tennessee.

PROFESSIONAL AFFILIATIONS / COMMITTEES

1989-Prsnt:	American Academy of the Forensic Sciences; Fellow
1988-1990:	American Chemical Society
1993:	American Association for Clinical Chemistry
1995-Prsnt:	The International Association of Forensic Toxicologists; Member
1995-Prsnt:	Society of Forensic Toxicologists; Full Member
1997-1998:	National Institute of Justice *Drug Testing Technology* Panel
1997-1999:	American Academy of Forensic Sciences Representative to the *Joint Committee on Education and Training in Toxicology.*
1997-2000:	*Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG)* - FBI Laboratory Representative
1998:	Department of Justice *Drug Facilitated Rape* Panel
1999-Prsnt:	Member of the Editorial Board of *Forensic Science Communications*
1999-2002:	Consultant to the College of American Pathologists-Forensic Identity Committee
1999-Prsnt:	American Society of Crime Laboratory Directors - Laboratory Accreditation Board (ASCLD-LAB) Certified Inspector
1999-Prsnt:	Chairman of SOFT *Drug-Facilitated Sexual Assault Ad-Hoc Committee*
1999-2001:	Member of SOFT *Continuing Education Ad-Hoc Committee*
1999-2004:	Chair of the 2004 FBI Laboratory Symposium on Forensic Toxicology and Joint Meeting of the Society of Forensic Toxicologists and The International Association of Forensic Toxicologists
2000:	Member of Office for Victims of Crime *Drug-Facilitated Sexual Assault* Panel
2002-2005:	Consultant to Quality Forensics – Toxicology Committee
2002-Prsnt:	Chairman of the *Scientific Working Group on the Forensic Analysis of Chemical Terrorism (SWGFACT)*
2002-2004:	Consultant to the Violence Against Women's Office – Committee to set *National Standards for the Sexual Assault Forensic Examination*
2002-Prsnt:	Member of The International Association of Forensic Toxicologists (TIAFT) Young Scientists Committee
2003-Prsnt:	Member of The International Association of Forensic Toxicologists (TIAFT) Systematic Toxicological Analysis Committee
2005:	Co-editor of the Special Issue of *Forensic Science International* dedicated to the 2004 Joint Meeting of SOFT and TIAFT. Vol. 153, No. 1, October 2005.
2005:	Co-editor of the Special Issue of *Journal of Chromatography B* dedicated to the 2004 Joint Meeting of SOFT and TIAFT.
2005:	Co-editor of the Special Issue of *Journal of Analytical Toxicology* dedicated to the 2004 Joint Meeting of SOFT and TIAFT. Vol. 29, No. 5, July/August 2005.

2006: Guest Editor of the SOFT Special Issue of *Journal of Analytical Toxicology*

2006-Prsnt: Member of *Journal of Analytical Toxicology* Editorial Board

CERTIFICATIONS & AWARDS

1995: Department of Justice, Federal Bureau of Investigation, *Performance Award.*

1996: Department of Justice, Federal Bureau of Investigation, *Performance Award.*

1997: Federal Bureau of Investigation. *Incentive Award.*

1997: Department of Justice, Federal Bureau of Investigation, *Performance Award.*

1998: Federal Bureau of Investigation. *Quality Step Award.*

1998: Department of Justice, Federal Bureau of Investigation, *Performance Award*

1999: Department of Justice, Federal Bureau of Investigation, *Performance Award*

1999: Federal Bureau of Investigation. *Quality Step Award.*

1999: Certificate of Achievement - TWA Investigation.

1999: Certificate of Achievement - JASMUR Investigation

2000: Department of Justice, Federal Bureau of Investigation, *Performance Award.*

2004: Federal Bureau of Investigation. *Director's Award for Outstanding Scientific Advancement*

PRESENTATIONS & TECHNICAL INSTRUCTION

Jun 1996: *Forensic Toxicology.* DEA International Training Conference - Alexandria, Virginia.

Jul 1996: *Forensic Chemistry and Toxicology.* Aspen Systems, Inc. - Rockville, Maryland.

Sept 1996: *Forensic Toxicology.* DEA International Training Conference - Alexandria, Virginia.

Mar 1997: *Submission of Chemistry Evidence.* Evidence Program In-Service - Quantico, Virginia.

May 1997: *Submission of Chemistry Evidence.* Evidence Program In-Service - Quantico, Virginia.

Jun 1997: *Forensic Toxicology.* DEA International Training Conference - Alexandria, Virginia.

Jul 1997: *The Use of Chromatography in Forensic Toxicology.* ***Chromatographic Methods in Forensic Science.*** Sponsored by The FBI Laboratory.

Jul 1997: *Murder by Poison.* 49th Annual Meeting of the American Association of Clinical Chemists - Atlanta, Georgia.

Mar 1998: *The Use of Chromatography and Mass Spectrometry in Forensic Toxicological Examinations.* ***Chromatographic Methods in Forensic Science.*** Sponsored by The FBI Laboratory.

Mar 1998: *Submission of Chemistry Evidence.* Evidence Program In-Service - Quantico, Virginia.

Jul 1998: *The Use of Chromatography and Mass Spectrometry in Forensic Toxicological Examinations.* ***Chromatographic Methods in Forensic Science.*** Sponsored by The FBI Laboratory.

Aug 1998: *Forensic Toxicology.* DEA International Training Conference - Alexandria, Virginia.

Sept 1998: *The Toxicological Investigation of Drug-Facilitated Sexual Assaults.* New York State Forensic Toxicology Seminar - Albany, New York.

Oct 1998: *Direct Analysis of Urine for Succinylcholine.* 1998 SOFT/TIAFT Meeting. Albuquerque, New Mexico.

Nov 1998: *Drug-Facilitated Sexual Assault.* New York Prosecutors Training Institute, Inc., Queens County, New York.

Feb 1999: *The Analysis of Biofluids for Flunitrazepam and Metabolites by Electrospray LC/MS.* American Academy of Forensic Sciences - 51st Annual Meeting, Orlando, Florida.

Apr 1999: *The Toxicological Investigation of Drug-Facilitated Sexual Assaults.* Southern Association of Toxicologists - Houston, Texas.

Jun 1999: *The Toxicological Investigation of Drug-Facilitated Sexual Assaults.* Henry Lee Institute. Meriden, Connecticut.

Jun 1999: *The Toxicological Investigation of Drug-Facilitated Sexual Assaults.* Virginia Campus Law Enforcement Association - Virginia Beach, Virginia.

Aug 1999: *Submission of Chemistry Evidence.* Evidence Supervisors Program In-Service - Quantico, Virginia.

Sept 1999: *The Investigation of Drug-Facilitated Sexual Assaults.* Salt Lake City Police and Crime Lab Personnel. Salt Lake City, Utah.

Oct 1999: *Analytical Issues Surrounding Drug-Facilitated Assaults.* 1999 SOFT Meeting. Rio Mar, Puerto Rico.

Oct 1999: *Rapid Analysis of Biofluids for GHB and GBL using Headspace GC-FID and GC-MS.* 1999 SOFT Meeting. Rio Mar, Puerto Rico.

Feb 2000: *Differentiation of Bufotenine and Psilocin by GC/MS(CI).* American Academy of Forensic Sciences - 52nd Annual Meeting, Reno, Nevada.

Feb 2000: *Brodifacoum Identification by Electrospray LC/MS and LC/MS/MS/MS.* American Academy of Forensic Sciences - 52nd Annual Meeting, Reno, Nevada.

Apr 2000: *The Investigation of Drug-Facilitated Sexual Assaults.* Los Angeles Police and Crime Lab Personnel. Los Angeles, California.

Apr 2000: *The Investigation of Drug-Facilitated Sexual Assaults.* Santa Monica Rape Treatment Center. Santa Monica, California.

May 2000: *Drug-Facilitated Sexual Assaults.* National Organization of Women - National Judicial Education Program. Chicago, Illinois.

May 2000: *Investigations of Drug-Facilitated Sexual Assaults.* New York State Police Sex Offense Seminar. Albany, New York.

Jun 2000: *Drug-Facilitated Sexual Assaults.* Rochester-Area Multidisciplinary Team. Rochester, New York.

Jun 2000: *Drug-Facilitated Sexual Assaults.* National Organization of Women - National Judicial Education Program. Burlington, Vermont.

Aug 2000: *The Effect of Storage Temperature on Endogenous GHB Levels in Urine.* TIAFT Meeting, Helsinki, Finland.

Oct 2000: *The Use of LC/MS and LC/MS^n to Solve Analytical Challenges in Forensic Toxicology* . 2000 SOFT Meeting. Milwaukee, Wisconsin.

Oct 2000: *A Comparison of Instrumental Approaches to Benzodiazepines Analysis: A Case Study.* 2000 SOFT Meeting. Milwaukee, Wisconsin.

Oct 2000: *Intra- and Interindividual Variations in Urinary Levels of Endogenous GHB.* 2000 SOFT Meeting. Milwaukee, Wisconsin.

Dec 2000: *Drug-Facilitated Sexual Assault.* Ohio University Drug Facilitated Sexual Assault Conference. Athens, Ohio.

Jan 2001: *Drug-Facilitated Sexual Assaults.* Third National Symposium on Victims of Federal Crime. Washington, DC.

Feb 2001: *Homicidal Poisonings.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.

Feb 2001: *Managing and Testifying in Drug-Facilitated Sexual Assault Cases.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.

Feb 2001: *Drug-Facilitated Sexual Assault: An FBI Perspective.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.

Feb 2001: *Solving Investigative Challenges in Drug Facilitated Rape.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.

Feb 2001: *Advances in Drug Detection in Drug Facilitated Rape.* American Academy of Forensic Sciences - 53rd Annual Meeting, Seattle, Washington.

Mar 2001: *Investigations of Drug-Facilitated Sexual Assaults.* California Sexual Assault Investigators Association Meeting - Shell Beach, California.

Apr 2001: *Investigations of Drug-Facilitated Sexual Assaults.* Southern Indiana Sexual Assault Training Project - New Albany, Indiana.

May 2001: *Homicidal Poisonings.* California Association of Toxicologists Quaterly Meeting, San Diego, California.

May 2001: *Toxicological Investigations of Drug-Facilitated Sexual Assaults.* First National Sexual Assault Response Team Conference - San Antonio, Texas.

Aug 2001: *Intra- and Interindividual Variations in Urinary Levels of Endogenous GHB.* 2001 TIAFT Meeting. Prague, Czech Republic.

Sept 2001: *Toxicological Investigations and Evidence Collection in Drug-Facilitated Sexual Assault Cases.* 7th International Congress of Therapeutic Drug Monitoring and Clinical Toxicology - Washington, DC.

Oct 2001: *Does Creatinine-Normalization Decrease the Variations in Urinary Levels of Endogenous GHB?* 2001 SOFT Meeting. New Orleans, Louisiana.

Feb 2002: *The Interpretation of GHB in Biological Specimens* as part of *GHB: Old Substance, New Problem* workshop. 2002 AAFS Meeting, Atlanta, Georgia.

Mar 2002: *Drug-Facilitated Sexual Assault – Toxicology: What You Need to Know.* 2nd International Conference on Domestic Violence, Sexual Assault and Stalking. San Diego, California.

Mar 2002: *Overcoming the Challenges of Drug-Facilitated Sexual Assault Investigations.* 2002 Pittsburgh Conference. New Orleans, Louisiana.

Mar 2002: *Drug-Facilitated Sexual Assault Investigations.* 2002 Missouri Office of Prosecution Services Spring Statewide Training, Osage Beach, Missouri.

April 2002: *Club Drugs: Dancing with Death.* Sponsored by United States Attorney's Office, Sun Valley, Idaho.

Aug 2002: *Toxicological Investigations of Drug-Facilitated Sexual Assault.* 2002 Drug Enforcement Administration Victim Witness Conference, Las Vegas, Nevada.

Sept 2002: *Fentanyl in Hair by LC/MS and LC/MS/MS.* 2002 TIAFT Meeting. Paris, France.

Oct 2002: *Managing and Testifying in Drug-Facilitated Sexual Assault Cases.* 2002 SOFT Meeting, Dearborn, Michigan.

Dec 2002: *Toxicological Investigations of Drug-Facilitated Sexual Assault.* New York City Alliance Against Sexual Assault, New York, New York.

May 2003: *Evidence Collection in DFSA Cases: Clinical and Forensic Issues.* Gamma Hydroxybutyrate: Spotlight on GHB Conference. Orlando, Florida.

May 2003: *Drug-Facilitated Sexual Assault: Why We Fail...How We Can Succeed.* Second National Sexual Assault Response Team Conference – New Orleans, Louisiana.

May 2003: *Toxicological Investigations of Drug-Facilitated Sexual Assault* Colorado Coalition Against Sexual Assault – Breckenridge, Colorado.

Aug 2003: *Toxicological Investigations of Drug-Facilitated Sexual Assault.* Kane County Coalition Against Sexual Assault, Illinois.

Sept 2003: *Drug-Facilitated Sexual Assault: The U.S. Perspective.* 2003 International Congress on Therapeutic Drug Monitoring and Clinical Toxicology, Basel Switzerland.

Nov 2003: *The Challenges of Drug-Facilitated Sexual Assault.* New Zealand and Australia Forensic Science Society, Sydney, Australia.

Nov 2003: *Drug-Facilitated Sexual Assault.* 2003 TIAFT Meeting, Melbourne, Australia.

Mar 2004: *DFSA Investigations: What's New With DFSA.* California Sexual Assault Investigators Association Meeting - Shell Beach, California.

Apr 2004: *Forensic Chemistry.* Saudi Arabia National Police – Riyadh, Saudi Arabia.

Apr 2004: *Drug-Facilitated Sexual Assault.* The Other Half of the Solution: Men Taking a Stand to End Sexual Violence. New Jersey Coalition Against Sexual Assault – Long Branch, New Jersey.

May 2004: *Application of Analytical Chemistry at the FBI Laboratory.* Analytica Conference 2004, Munich, Germany.

June 2004: *Evidence Collection for Drug-Facilitated Sexual Assault.* Attorney General's Sexual Assault Task Force, SART Training, Eugene, Oregon.

Jun 2004: *Challenges of Drug-Facilitated Sexual Assault.* Attorney General's Sexual Assault Task Force, SART Training, Eugene, Oregon.

Jun 2004: *Drug-Facilitated Sexual Assault.* Maryland Coalition Against Sexual Assault. Columbia, Maryland.

Aug 2004: *Forensic Chemistry.* 2004 FBI Laboratory Symposium on Forensic Toxicology. Washington, DC.

Aug 2004: *Managing Cases of DFSA.* 2004 FBI Laboratory Symposium on Forensic Toxicology. Washington, DC.

Sept 2004: *The Toxicological Evidence in Drug-Facilitated Sexual Assault Cases.* Spotlight on GHB Conference. Las Vegas, Nevada.

Oct 2004: *Drug-Facilitated Sexual Assault Training for Forensic Scientists.* NEAFS Conference. Mystic, Connecticut.

Feb 2005: *Bank Security Dye Packs and the FBI Laboratory.* 2005 AAFS Meeting. New Orleans, Louisiana.

Mar 2005: *Drug-Facilitated Sexual Assault:* 2005 Federal Conference for Victims of Crime, Atlanta, Georgia.

Mar 2005: *The Challenges of Drug-Facilitated Sexual Assault.* Louisiana SANE/SART Program, Baton Rouge, Louisiana.

Jun 2005: *Recommendations for Combating Drug-Facilitated Sexual Assault,* Third National SART Training Conference, San Francisco, California.

Jul 2005: *The Toxicological Evidence in Drug-Facilitated Sexual Assault Cases.* Columbia, South Carolina.

Aug 2005: *A Comprehensive Study on the Variations of Urinary Concentrations of Endogenous GHB.* The International Association of Forensic Toxicologists Conference, Seoul, South Korea.

Sept 2005: *Drug-Facilitated Sexual Assault.* Fairfax Coalition Against Sexual Assault. Fairfax, Virginia.

Sept 2005: *Drug-Facilitated Sexual Assault.* The Peace Corps, Washington, DC.

Oct 2005: *Drug-Facilitated Sexual Assault.* The EVAW International Conference on Sexual Assault, Domestic Violence, and Stalking. Baltimore, Maryland.

Nov 2005: *Recommendations for Combating Drug-Facilitated Sexual Assault,* Los Angeles Chief of Police Conference, Los Angeles, California

Feb 2006: *Health Care Fraud.* Health Care Fraud Coordinators' Conference. Columbia, South Carolina.

Mar 2006: *Drug-Facilitated Sexual Assault*. Georgia Network to End Sexual Assault, Atlanta, Georgia.

Apr 2006: *Recommendations for Combating Drug-Facilitated Sexual Assault*, Armed Forces Institute of Pathology Conference Against Sexual Violence, Rockville, Maryland.

Apr 2006: *Drug-Facilitated Sexual Assault*. EVAW Conference, Kansas City, Missouri.

Jun 2006: *Challenges of Drug-Facilitated Crimes*. Deutsche Pharmazeutische Gesellschaft, Saar, Germany.

Jul 2006: *Drug-Facilitated Sexual Assault*. EVAW Conference, Washington, DC.

Aug 2006: *Mivacurium and Metabolites by LC/FLU and LC/MS/MS*. The International Association of Forensic Toxicologists Annual Meeting, Ljublijana, Slovenia.

Aug 2006: *Further Evidence of In Vitro Production of GHB in Urine*. The International Association of Forensic Toxicologists Annual Meeting, Ljublijana, Slovenia.

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LeBeau, M., Montgomery, M., and Miller, M. *Direct Analysis of Urine for Succinylcholine.* In: Proceedings of the 1998 SOFT/TIAFT Meeting. Albuquerque, New Mexico.

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LeBeau, M. *Toxicological Investigations of Drug-Facilitated Sexual Assaults.* Forensic Science Communications, Volume 1, Number 1, 1999.

Schwartz, R., Milteer, R., LeBeau, M. *Drug-Facilitated Sexual Assault (Date Rape).* Southern Medical Journal, Volume 93, Number 6, 2000.

LeBeau, M., Montgomery, M., Wagner, J., and Miller, M. *Analysis of Biofluids for Flunitrazepam and Metabolites by Electrospray Liquid Chromatography/Mass Spectrometry.* Journal of Forensic Sciences, Volume 45, Number 5, 2000.

LeBeau, M., Montgomery, M., Miller, M., and Burmeister, S. *Analysis of Biofluids for Gamma-Hydroxybutyrate (GHB) and Gamma-Butyrolactone (GBL) by Headspace GC/FID and GC/MS.* Journal of Analytical Toxicology, Volume 24, 2000.

LeBeau, M., Montgomery, M., Jufer, R., and Miller, M. *Elevated GHB in Citrate Buffered Blood.* Journal of Analytical Toxicology, Volume 24, 2000.

LeBeau, M., Miller, M., and Levine, B. *Effect of Storage Temperature on Endogenous GHB Levels in Urine.* Forensic Science International, Volume 119(2), 2001.

Darby, S., Miller, M., Allen, R., and LeBeau, M. *A Mass Spectrometric Method for Quantitation of Insulin in Blood Samples.* Journal of Analytical Toxicology, Volume 25, 2001.

Drug-Facilitated Sexual Assault: A Forensic Handbook. Marc A. LeBeau and Ashraf Mozayani, Eds. (2001), Academic Press: London.

LeBeau, M.A. *Forensic Toxicology at the FBI Laboratory.* NEACT Journal, Volume 20, Number 1, 2001.

SWGDRUG Recommendations for Education and Training, Quality Assurance, and Methods of Analysis, U.S. Department of Justice, Drug Enforcement Administration, 2001.

LeBeau, M.A., Christenson, R.H., Levine, B., Darwin, W.D., and Huestis, M.A. *Intra- and Interindividual Variations in Urinary Concentrations of Endogenous Gamma-Hydroxybutyrate (GHB)*, Journal of Analytical Toxicology, Volume 26, 2002.

LeBeau, M.A. and Quenzer, C.F. *Succinylmonocholine Identified in Negative Control Tissues,* Volume 27, 2003.

LeBeau, Marc A., et al. *Quality Assurance Guidelines for Laboratories Performing Forensic Analysis of Chemical Terrorism,* Forensic Science Communications, Volume 6, Number 2, 2004.

Montgomery, Madeline A., LeBeau, Marc A., Miller, Mark L., and Jufer, Rebecca A. *The Identification of Mivacurium and Metabolites in Biological Samples.* Journal of Analytical Toxicology, Volume 29, 2005.

LeBeau, M.A. et al. *A Comprehensive Study on the Variations of Urinary Concentrations of Endogenous GHB*, Journal of Analytical Toxicology, Volume 30, 2006.

Jagerdeo, E., Leibowitz, J.N., Schumacher, L., Henningsen, D.A., and LeBeau, M. *Analysis of Trace Amount of Bank Dye and Lachrymators from Exploding Bank Devices by Solid-Phase Microextraction and Gas Chromatography-Mass Spectrometry*, Jounral of Chromatographic Science, Volume 44, 2006.

Bradley, M.J., Keagy, R.L., Lowe, P.C., Rickenbach, M.P., Wright, D.M., and LeBeau, M.A. *A Validation Study for Duct Tape End Matches*, Journal of Forensic Sciences, Volume 51, Number 3, May 2006.

LeBeau, M. Gamma-Hydroxybutyric Acid (GHB) in *Principles of Forensic Toxicology.* Barry Levine, Ed., 2nd edition, (2006), AACC Press, Washington, DC.

LeBeau, M. Montgomery, M., Morris-Kukoski, C., Schaff, J., and Deakin, A. *Further Evidence of In Vitro Production of GHB in Urine Samples*, Forensic Science International, Accepted for Publication.

01-24273-7

7-1 (Rev. 5-13-99)

FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

To: Detective Louise Adams
2000 Lakeridge Drive SW
Olympia, Washington 98502-6045

Date: August 22, 2002

Case ID No.: 95A-HQ-1356026

Lab No.: 011119018 GH

Reference: Letter dated November 13, 2001

Your No.: 01-24273-07

Title: SUSPECTED DRUG-FACILITATED SEXUAL ASSAULT

COPY RECEIVED
THURSTON COUNTY
PROSECUTING ATTORNEY
AUG 27 2002
BY
TIME 330

Date specimens received: November 19, 2001

The items listed below were submitted under cover of communication dated November 13, 2001 and were received in the Chemistry Unit:

Q1 Hair sample from ALVINA CRUZ

NE1 Police report

NE2 VHS videotape

This report contains the results of the toxicological analysis of specimen Q1.

Results of Examinations:

No commonly encountered drugs associated with drug-facilitated sexual assaults were identified in the Q1 hair. This specimen was analyzed using the following analytical techniques: immunoassays, solids probe mass spectrometry, gas chromatography/mass spectrometry, and liquid chromatography/mass spectrometry.

EXHIBIT B

This Report is Furnished for Official Use Only

01-24273-

Remarks:

It should be noted that the lack of positive findings in the Q1 hair should not be misinterpreted as proof that the donor did not ingest any drugs. Hair analysis for drugs has many limitations and is traditionally utilized to identify chronic drug users.

The unconsumed portion of the submitted specimens will be returned to your office by Federal Express.

Marc LeBeau

Marc A. LeBeau, MS
Chemistry Unit
(202) 324-8472

K. Declaration of Todd Maybrown, November 27, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF TODD MAYBROWN

Todd Maybrown declares as follows:

1) David Allen and I were the trial attorneys in this case. I have reviewed portions of the discovery and trial transcript in preparing this declaration.

2) I cross-examined complaining witness Zoe Hawkins. I was interested in presenting any available evidence that the alleged victims had a financial motivation to accuse Jerry Wiatt of rape. Zoe Hawkins admitted in a pretrial interview that she was thinking of suing Mr. Wiatt. See Ex. A. If I did not bring that up in cross-examination, that was a mistake on my part and not a strategic decision.

3) I cross-examined Lindsey Howard after the State presented her testimony concerning Krystal Hoskins. I asked her questions about Krystal Hoskins but not about Raminta Rankis. At the end of my questioning, I told the court that the defense would recall Ms. Howard during our case. If we did not put Ms. Howard on the stand again, I cannot recall any reason for that. She could have provided helpful testimony regarding Raminta Rankis. Attached as Ex. B is

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

the portion of Ms. Howard's taped statement to Detective Adams that deals with Raminta Rankis. Attached as Ex. C is the portion of her statement to defense investigator Paula Howell that deals with Raminta Rankis. Attached as Ex. D are my notes for questioning Ms. Howard. The second page includes questions relating to Raminta Rankis.

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

11/27/06
Date
Seattle, WA

Todd Maybrown

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

In Re:

STATE OF WASHINGTON,

Plaintiff,

-vs- 01-1-1136-1

JERRY D. WIATT, JR.

Defendant.

RECORDED INTERVIEW OF ZOE V. HAWKINS

1:27 p.m.

January 3, 2002

2415 Evergreen Park Dr. SW

Suite C-1

Olympia, Washington 98502

* * * * *

COPY

Cheryl L. Wiese, Court Reporter

EXHIBIT A

A. No.

Q. Are you planning to sue Jerry Wiatt?

A. I don't know.

Q. Have you thought about it?

A. I've thought about it.

Q. Is it something that you might or might not do, or just that you haven't decided?

A. I have not decided. It's not a priority of mine right now.

MR. MAYBROWN: Let's take a break because I'm going into something here.

(Brief Recess Taken)

Q. When did you first meet Jerry Wiatt?

A. February 12th of 2000.

Q. Before meeting him that night had you ever seen him?

A. No.

Q. Did you know who he was before that?

A. I don't think so.

Q. Did you know his brother Jeff?

A. Yes. I knew of his brother.

Q. When you say you "knew of him" had you ever met him before February 12th?

A. I had seen him.

Q. Where had you seen him?

EXHIBIT A

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 28 Aug 2001
Time: 1517 hours

NAME: HOWARD, LINDSEY L.

DATE OF BIRTH: 10-07-82

ADDRESS: [redacted]

INTERVIEWING OFFICER: Det. Louise Adams, TCSO

INTERVIEW LOCATION: Telephonically from the Thurston County Sheriff's Office

ALSO PRESENT:

Q. Lindsey, when we speak today I'm using a tape recorder to record our conversation. Is that with your permission?
A. Yes.

Q. Lindsey, um, do you know a gentleman by the name of Jerry Wiatt?
A. Yes.

Q. How long have you known Jerry?
A. Um, about two years.

Q. Okay. So you're 18 years old now?
A. Yes.

Q. So how old were you when you first met him?
A. About 16.

Q. Okay. And where did you meet him at? How did you meet him?
A. Um, I met him through my boyfriend, which is friends with Jerry.

Q. And who's your boyfriend?
A. He's no longer my boyfriend, but it was Barry Speck.

Q. Okay. And when, you've been to the Wiatt residence I'm assu-, in the Cedrona development?
A. Yes.

Q. Okay. And was that when Barry was living there?
A. Yes.

EXHIBIT B

Q. Ever any concerns about anything like that?
A. No.

Q. Okay. Were you ever concerned, um, or did you ever see girls not drink that much but appear to get really intoxicated? Anything like that?
A. Hm, no.

Q. Okay. Um, is there anything else you can think of, um, that I need to know about that we haven't talked about?
A. No.

Q. Okay. Do you know a young girl by the name of Raminta Rankis?
A. Yeah.

Q. Okay.
A. She's my best friend.

Q. Okay. Um, did she ever complain to you a-, about Jerry Wiatt or inappropriate behavior on his behalf?
A. Um, I (indistinguishable), she's like my best friend, I talked to her today, I talk to her everyday.

Q. Um hm.
A. Um, she is kinda (indistinguishable) that's mean to say but I know she's had sex with him, and I know that she wanted to probably.

Q. Okay.
A. I know she was intoxicated but I know that she probably didn't, if it was a big thing, she'd say something, and it wasn't.

Q. Okay.
A. I'm not, I wouldn't-

Q. You mean if it was a big thing, she would have told you earlier, is that what you mean?
A. Um, yeah. I know that she's had sex with him like probably once or twice or maybe three times but it's all because she wanted to, I know.

Q. Okay.
A. For a fact.

Q. Okay, so if Raminta was saying at this point, um, that she didn't want to say sex with Jerry, y-, you wouldn't think that would be true?
A. I wouldn't, hu-uh.

Q. Okay. Um, any, um, you ever see any pictures of girls on computers without their shirts on?
A. No.

Q. Okay. Um, you ever see Jerry or hear about Jerry filming girls?
A. Um-

Q. I know you talked about the one incident with you where Ryan was in the closet but-
A. Um, no.

EXHIBIT B

PAULA HOWELL
INVESTIGATIONS

TO: Todd Maybrown

FROM: Paula Howell

DATE: October 1, 2002

RE: State v. Jerry Wiatt
Witness Lindsey Howard

Lindsey has recently moved and could not inform me of her new address but her mailing address is P.O. Box 14863, Tumwater, 98511, and she can be reached at 360-556-0388. She is 19 years old and her date of birth is 10/07/82. She attended Black Hills High School and graduated in 2001. She is not attending college but is currently employed at Home Depot.

Lindsey has known Jerry for about four years. She met Barry Specht around August 1999 and they dated for approximately 6-9 months. Shortly after she met Barry he moved in with Jerry at the Cedrona address. Jerry and Justin were at the house when she helped Barry move in, which is the first time she met Jerry. She met Jeff about a week later when he came home for the weekend. She did not live with Jerry and did not go to school with him but she saw Jerry almost every day for at least six months while she was dating Barry. She considers Jerry a friend but not a really good friend, just someone to hang out with and talk to. However, once she and Barry broke up she had no further contact with Jerry except by accident, like when she saw him at the mall. She and Jerry made no attempt to make have further contact.

Lindsey viewed the photographs and responded as follows:

Zoe Hawkins: Has never seen her at Jerry's house and does not know her.

Amanda Johansen: Amanda was a next door neighbor for about 2 ½ years. Described Amanda as a liar, weird and possibly bi-polar. They were friends for maybe the first two months but no longer than that and her reason is that Amanda was weird and very moody. Amanda is one year older and attended Timberline her freshman and sophomore years but attended Black Hills her junior year. Amanda missed a lot of school

EXHIBIT C1

and later dropped out and did not graduate. She was the attendance TA so she knew when students, such as Amanda, were gone. She never saw Amanda at Jerry's house and did not know her to sleep around but she was into drugs. Estimated Amanda used Ecstasy at least two times a week. She knows this because she would see Amanda take the drugs or Amanda would talk about taking them. She would see Amanda flirt and do things like take off her shirt when she was high but it was usually to lead guys on without going any further. Amanda had two boyfriends, one was an African American from Timberline name Wanay (guess at spelling) and another guy who drove a red Honda Civic. Wanay was a couple years older than Amanda and so was the second boyfriend. She knows Amanda was having sex with Wanay because Amanda told her. She has never known Amanda to sleep with Jerry and did not see her go to Jerry's house at any time.

Erin Gunlach: Has never seen her and does not know her. Never saw her at Black Hills.

Heather Kamilkov: Doesn't know who she is but saw her at Jerry's one time and never saw her do anything with any of the guys. Heather arrived at Jerry's with 5 or 6 girls but doesn't recall if Heather drank at all.

Raminta Rankis: Raminta is her best friend and she has known her for 7 years.. When she started dating Barry she told Raminta about the guys who were living at the house Barry moved in to. Raminta said that she wanted to sleep with every guy in the house. She knows that Raminta slept with Jerry, Barry and at least messed around with Justin. Raminta has been sexual since she was 14 years old and has had one long relationship with a guy named Eric that last for about two years, off and on. She was dating a guy named Brian when she and Raminta became friends and then she introduced Raminta to Brian's friend, Eric. Raminta was not a Jerry's house that often, maybe ten times total. Raminta is a heavy drinker and liked to drink just to drink. The type of drunk Raminta is depends on who's around her. Raminta is not shy. If there are guys around, Raminta will pick one out and make a point of getting him in bed. This occurred at Jerry's house. She knows Raminta went into Jerry's room at least twice and never said anything bad about Jerry. She watched Raminta go into Jerry's room and then the next day she and Raminta talked. She asked Raminta where she went with Jerry and Raminta told her that she had sex with Jerry. Raminta did not say it was forced and she did not appear to be upset. She knows Raminta well and would know if she was upset. Raminta is not normally a liar and she believes Raminta would not start this (the allegations) unless someone lese did first. Raminta knows Jerry has a lot of money. She believes Raminta is a money digger. She believes Raminta wanted a relationship and Jerry did not. Raminta never told her she was involved in the case against Jerry and she did not find out until someone called her for a statement. Afterwards, she called Raminta and Raminta told her that Jerry made her have sex. A couple of days later Raminta told her that they should just not talk about it and see what happens. She told Raminta that she thinks Raminta is lying. She believes that if it had really happened that Jerry forced her, Raminta would have told her that next morning when they discussed the fact that she'd had sex with Jerry. They have not talked about the case at all except for when Raminta tells her that Jerry did do it and she responds by saying, "whatever."

EXHIBIT C

LINDSEY HOWARD CROSS

1. Krystal Hoskins

Known KH for how long
You both were cheerleaders
Friends ?
Night of the Bloody Nose

Fooling around with Jerry and Danielle Cooey
Tag game
Accidental bump; Krystal got a bloody nose
You and Jerry helped to stop the bleeding
Explain

OK after ten minutes or so

Level of Intoxication
From all appearances, she was very aware what was going on
Able to communicate
Not slurring her words
Not stumbling
Walked with JW up to his room
No trouble

Seen her much more intoxicated than she was on that evening
Seen her way worse.

Sometimes Krystal supplied her own alcohol (PH at 3)
Krystal stayed the night on several weekends (PH at 3)
She's seen JW and KH kiss (PH at 3)
She knows KH had spent the night (PH at 3)

Like bf & gf →
shopping, dolls & dinner

EXHIBIT D

2. Raminta Rankis

Raminta
How do you know her
Consider her to be a close friend
Seen RR over JW's house how many times – 10 or so

Seen RR and JW interact at house
Describe what you recall
Seen the two of them flirting

On at least one occasion, did you hear RR say that she was interested in having sex with Jerry

Seen RR go up to JW's room with him
More than one occasion

Recall a discussion with her after one of these evenings in Jerry's bedroom
Day after the event
RR told you that she and JW had had sex on the previous evening
RR was not upset
You know her well
Would know if she was upset about incident
RR did not tell you that JW forced sex upon her

EXHIBIT D

L. Declaration of Diane Moye, July 12, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF DIANE MOYE

Diane Moye declares as follows:

1. I am the mother of Magen Blevins, one of the victims in this case.
2. I met with Detective Louise Adams shortly after reading a news article about Jerry Wiatt videotaping himself having sex with girls. I knew that my daughter had been dating someone named Jerry. I showed her pictures of my daughter, and Det. Adams said yes my daughter was in the videos, she also told me a detail of what was on the tape that has haunted me this whole time. I did not or do not want to hear a visual of what my daughter went through by Det. Adams, it made me sick knowing she told me what my daughter was doing. Det. Adams told me various things about Jerry Wiatt that got me mad at him and made me determined to see him put away for long time. She said that he was connected with the Asian Mafia. She said the police had had him under surveillance for over a year and that there had been several incidents when girls ran out of the house half-naked after being raped but was

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(206) 623-1595

then too scared to prosecute. She said that when the police raided Jerry's house they found evidence of date rape drugs. Det. Adams said that such drugs would make someone feel like a brick; that they could tell what was going on but not be able to move. The next day, they would be vomiting and would want to sleep all day.

3. Shortly after my first meeting with her, Det. Adams referred me to a victim's advocate named Kim who in turn set up a support group for the parents of victims at a downtown Olympia crisis center. Det. Adams showed up at the first meeting. To the best of my recollection, that is when she brought up the information about date rape drugs discussed in the last paragraph. She may have also brought up at this meeting some of the other information about Jerry discussed above.

4. Detective Adams had us parents so scared that one of the fathers slept with a gun under his pillow. I slept for weeks with all my house lights on because I was afraid that the Asian Mafia was going to get me. I had co-workers walk me to my car parked across the street in a parking garage, as for fear someone would get me while I was walking to my car.

5. Other people who attended the support group were Breda Cruz, Terry Hoskins, and the Gundlachs. I knew Mr. Gundlach because I used to live in Aberdeen and he used to work as a police officer there. Another mother showed up at least once but I can't remember her name. At the meetings, people would talk about what their children were saying happened to them. I repeated to my daughter some of the information I learned about the other victims. The parents seemed to feed off of each others' anger at Jerry Wiatt. All of the parents, including me, were talking about suing Jerry. We believed him to have a lot of money because he had such a nice house and seemed to have a lot of expensive possessions. I never followed through with that because it became clear by the time of Jerry's sentencing that he was broke.

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6. Detective Adams and a prosecuting attorney named Christy were in a meeting room with the parents on the day of a pretrial hearing. They both knew that the parents were all discussing the trial, including what our children would be saying when they testified.

7. Jeannette Hawkins, the mother of victim Zoe Hawkins, was an Olympia city councilwoman. At some point during the trial, I heard her say that she would use her connections to get an article concerning date rape drugs to the jurors. She said she would either arrange for the article to be left in the jury room or have copies provided to the jurors some other way. She said the article concerned the Max Factor heir who was accused of using date rape drugs to rape and videotape women.

8. Although I was interviewed by defense counsel prior to trial, I did not reveal most of this information because I was still riled up about Jerry Wiatt and did not want to say anything that could help him.

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

12/06/06
Date
Olympia, Washington

Diane Moye

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M. Declaration of Kevin Murphy, October 18, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF KEVIN MURPHY

Kevin Murphy declares as follows:

1. I went to high school with Jeffry Wiatt. I met his sisters and his brother Jerry through Jeff.
2. Around 2000 and 2001, I was often over at the house Jeff and Jerry shared in the Cedrona neighborhood of Olympia. Lots of young men and women would hang out there. Often, people would drink alcohol.
3. I never heard or saw anything suggesting that there were date rape drugs at the house. It makes no sense to me that Jerry Wiatt would use such drugs. For one thing, it just wasn't necessary. Jerry was very popular with young women. He was a great talker and very charming. There was no shortage of women who were happy to have sex with him.
4. There was plenty of sexual activity at Jerry's house, but I never saw or heard any sign that a woman was forced to do anything against her will or while she was too intoxicated to know

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what she was doing. If I had ever thought something like that was going on in someone's room, I would have been the first to bust down the door and stop it.

5. I do recall a few times that girls got falling down drunk. The guys who lived there sent them home. It wasn't something that anyone wanted going on.

6. I saw Zoe Hawkins at Jerry's house at least twice. She would hang around with her friend Erin. One of those times Jeff came by the house with a few women including Zoe. Jerry showed up later after returning from a night club. Jerry and Zoe seemed to hit it off. I saw them go into the hot tub at one point and they were making out. Then they went upstairs to Jerry's room. Zoe seemed happy about what was going on. I believe Zoe had something to drink, but she didn't seem intoxicated. She had no trouble talking or moving around.

7. I was at the house on the night Krystal Hoskins had a nosebleed. It made a big mess. Jerry was a gentleman about it and helped get Krystal cleaned up. Later that night, I saw Jerry and Krystal cuddling on the couch. Krystal seemed fine. She was not out of it. At some point, Jerry and Krystal went upstairs. I assumed they were going to Jerry's room to have sex, but I have no first-hand knowledge about that.

8. I once saw Jennifer Bowles do a striptease at Jerry's house. I can't recall exactly who else was there. She ended up in her underwear. She seemed comfortable with everyone seeing her like that.

9. I was not eager to testify at Jerry's trial. I was concerned that if I said anything, something might happen to me or my family. One reason for concern was that Krystal Hoskins was going out with Jared Trigg, who is a very scary guy.

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10. I would be willing to testify now to anything I've said in this declaration.

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

10-18-06
Date
Olympia, Washington

Kevin Murphy

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N. Declaration of Barry Specht, November 22, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF BARRY SPECHT

Barry Specht declares as follows:

1. As I testified at trial, I was a roommate of Jerry Wiatt's at his home in the Cedrona neighborhood.
2. When Det. Adams interviewed me, she said something to indicate that the police had actually found some traces of date rape drugs in the house. She said other things to me that made Jerry look bad, although I can't recall exactly what she said.
3. Nobody asked me any questions at trial about date rape drugs. Had they asked, I would have truthfully explained that I had no reason to believe that Jerry or anyone else at his house used or possessed such drugs. I never heard anyone talking about them and I never saw any suspicious liquids or powders in the house. I never heard anyone complain that they thought they were drugged. Jerry made a point of keeping his house drug free so I would have noticed if anything like that was going on.

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Seattle, Washington 98104

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

11/22/06
Date
Tumwater, WA

Barry Specht

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1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

O. Declaration of Natalie Van Brunt, August 25, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF NATALIE VAN BRUNT

Natalie Van Brunt declares as follows:

1. For a time in 1999 and 2000, I dated Jeffry Wiatt, the younger brother of Jerry Wiatt, Jr. I am about one year younger than Jeff. I would often be at the house in the Cedrona neighborhood that Jerry and Jeff shared. I continued to be friends with Jeff and Jerry after I stopped dating Jeff.
2. I was an acquaintance of Jennifer Bowles. Jennifer told me that she had slept with Jeff and wanted to sleep with Jerry. On Jeff's eighteenth birthday in the Spring of 1999, Jennifer and I were both at Jeff's house. Jennifer started performing a striptease for Jeff, with a bunch of other people present. I was upset about that and left.
3. At a later party at Jerry and Jeff's house, Jennifer told me that she had slept with both brothers. She seemed proud of that.

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4. Some time in 2001 after the rumors started that Jerry had been videotaping girls, I saw Jennifer at a party. She was suggesting that she might be able to get some money from Jerry because of his misconduct.

5. Raminta Rankis was also an acquaintance of mine, mostly from parties at Jeff's house. One time in 2000 Raminta said she would like to sleep with every guy who lived at the house. She said she had already slept with some of them and that she wouldn't mind if that happened with Jerry. She said something like: "If that happens, that's fine with me."

6. I also knew Erin Gundlach. One time, I was in the kitchen of Jeff and Jerry's house along with Erin, Mindy Bouvier and Kevin Barlow. There may have been another girl there as well. Kevin was making alcoholic drinks with some fruit juice in them. I might have had a few sips. Jerry was not in the kitchen at that time.

7. I never heard or saw anything suggesting that Jeff Wiatt, Jerry Wiatt, or anyone else at their house had access to date rape drugs.

8. I went to the same school (Timberline High School) as Alison Tabor, the daughter of Judge Tabor. She is a year older than me. I saw her at Jerry Wiatt's Cedrona house in the Spring of 2000. There was a party going on. I said hi to her but we didn't spend much time talking.

9. I watched some of Jerry Wiatt's trial. I saw a woman in the hallway telling some of the girls to cry when they got on the stand. The same woman sat in the back of the courtroom during some of the testimony. During a couple of the girls' testimony, I saw this woman make a motion with her hand near her eye, seeming to indicate that the witness should cry. The girls did cry at times during their testimony.

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

Aug 25, 2006
Date
Lacey, Washington

Natalie Van Brunt

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P. Declaration of Jeffry Wiatt, December 6, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JEFFRY WIATT

Jeffry Wiatt declares as follows:

1. I am the younger brother of the defendant Jerry Wiatt, Jr. I grew up in Olympia, Washington and graduated from Capitol High School in 1999. I obtained a B.A. degree from Pacific Lutheran University. I currently work as an account executive for Door-To-Door Moving.
2. I moved into Jerry's house in the Cedrona neighborhood in September of 1999. I lived there for about three to four months. Even after I moved out, I was over at the house nearly every day.

3. I became good friends with Erin Gundlach in 1998 or 1999. One night, I invited Erin over to the Cedrona house and she brought her friend Zoe Hawkins. Zoe and Erin arrived some time in the middle of the evening. Jerry was out at a club at that time. Erin started describing Jerry to Zoe in a very positive way. She was saying how Jerry was smart and good looking and muscular. Zoe said she was eager to meet him.

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4. After awhile, Zoe decided to call Jerry at the club. I dialed Jerry's number and then gave Zoe the phone. Zoe was saying how Jerry should come back to the house. After Jerry said he wasn't planning on coming back right away, Zoe started talking about how she had big breasts and that Jerry should come back if he wants to get lucky with her.

5. Zoe did not seem intoxicated at any point that evening. She drank a couple of Bud Light beers, which I gave her from the refrigerator. She opened them herself. I certainly did not put a drug in her drink. I have never had access to any sort of date rape drug. I never saw or heard anything to suggest that my brother or anyone else who lived in or visited his house had access to such drugs. Jerry was very much opposed to illegal drugs, and would never let any in the house.

6. When Jerry came home that night, Zoe went out to greet him and gave him a big hug. After that, we hung out in the kitchen for awhile. Jerry and Zoe went into the hot tub and were messing around. Erin and I were spying on them a bit. We could see Jerry and Zoe kissing and hugging in the hot tub. This was obviously mutual.

7. Later, I went out to the hot tub and said that it was our turn to use it. I probably said something to them like "you guys should get a room." Erin and I then got in the hot tub and Zoe went to take a shower to get the chlorine off.

8. A little later, I went up to Jerry's bedroom to get a towel. Jerry and Zoe were in the bathroom together with the shower going.

9. I then went back down to the hot tub. After awhile, Ian Klotz and Kevin Barlow came home. Some time later, I saw Zoe coming out of Jerry's bedroom. She was all dressed and she did not seem intoxicated. She looked fine and she was having no trouble walking. She was not staggering or slurring her words. Zoe said she had to go home because of her parents. She was a little upset because Ian Klotz had walked in on them earlier. She wanted Erin to leave too, but Erin wanted to stay with me. Erin slept with me that night.

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10. I recall another night when Erin Gundlach and Jerry Wiatt were flirting with each other at his house. This was definitely mutual. There were a couple of other girls there as well, and I'm pretty sure that Kevin Barlow was there. Kevin often kept Tanqueray gin in the house. He liked to make mixed drinks with that. He was making the drinks that night for everyone, and he was the only one who knew how to make specialty drinks with Tanqueray. I would have remembered the night better in 2002. I know that I left the house a short time after people started drinking and before Erin went up to my brother's room.

11. I knew Jennifer Bowles very well. She grew up next door to us. She would often come over to Jerry's house when he lived in Lacey and then also when he moved to Cedrona. Jennifer was easy to get with because she liked to have sex. I gave her # to my brother and told him that he should call her and invite her over.

12. I remember a time when Jennifer was doing a striptease in Justin Allison's bedroom. I can't remember whether or not my brother was there. She was dancing around on the bed to hip-hop music.

13. Jennifer Bowles also did a striptease on my eighteenth birthday. She undressed down to her bra and panties. There were a lot of people there at the time, and my brother was probably one of them. Jennifer was never shy about taking off her clothes, no matter who was watching.

14. Jennifer and I had sex with each other back when I was living with Jerry at his house in Lacey. I remember Jennifer saying that she wanted to have sex with Jerry. I wasn't there at the house on the night that it happened.

15. Some time after Jennifer and Jerry got together, I heard Jennifer bragging to some people at a party about how she had "hooked up" with both Wiatt brothers. She said something about how it was better with Jerry because he was more experienced.

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16. I knew Krystal Hoskins. She was a cheerleader at High School. She was often over at Jerry's house in Cedrona. I was not there on the evening that she got a bloody nose.

17. Some time before Jerry's trial, I ran into Krystal's boyfriend, Jared Trigg, at a party. He said he would beat me up if I testified to anything involving Krystal. Jared is a very large and muscular man. His tone was threatening.

18. Prior to my brother's trial, Detective Louise Adams arrested me. She said I could be charged in some sort of conspiracy. She had me handcuffed and the police drove me around for awhile. I think they wanted it to appear that they were taking me to jail. Detective Adams wanted me to confirm that Jerry was using date rape drugs. She claimed that the police had found "trace elements" of such drugs when they searched his house. She kept talking about what a bad guy Jerry was and how I should help her convict him. I kept telling her that she was wrong about Jerry. After awhile she let me go and I was never charged with any crime.

19. I was expecting to testify at my brother's trial. The defense attorneys never told me why they didn't call me as a witness. I would have testified to everything that is in this declaration.

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

12/6/06
Date
Seattle, Washington

Jeffry Wiatt

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705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

Q. Declaration of Jerry D. Wiatt, Jr., December 5, 2006

FILED
COURT OF APPEALS
DIVISION II

06 DEC 21 PM 1:31

STATE OF WASHINGTON
BY _____ DEPUTY

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JERRY D. WIATT, JR.

Jerry D. Wiatt, Jr., declares as follows:

1. I am the defendant in this case.
2. On my brother's eighteenth birthday, I was present when Jennifer Bowles performed a striptease in the kitchen of my house. She was dancing around to hip-hop music and she took off all her clothing except for her bra and thong panties. She did not seem at all shy about people seeing her undressed like that.
3. On a later occasion, I was present when Jennifer Bowles performed a striptease for a few people in Justin Allison's bedroom. She was dancing on top of Justin's bed as she removed all her clothes until she was completely naked. Jennifer seemed comfortable being seen naked. In fact, she seemed to like the attention.
4. Before the night that Jennifer and I had sexual intercourse, I had heard from my brother Jeff and from other friends of mine that Jennifer expressed an interest in having sex with me.

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5. One time at my house, Raminta Rankis told me that I should have a stripper pole installed on top of my kitchen island so that she could dance for everyone. She then got up on the island and started dancing, pretending that there was a pole there already.

6. Raminta Rankis also announced in front of me and my roommates that she wanted to have sex with all the guys in the house because they were all hot. Justin Allison took her up on that the same night. I was aware that Barry Specht had sex with her as well on several occasions. Kevin Barlow also had sex with her at least once.

7. Had I been asked at trial, I would have explained that I had nothing to do with any sort of "date rape drugs." To my knowledge, there were never any such drugs in my house. I am very much opposed to illegal drugs of any type. I wouldn't even know where to get such drugs.

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

12-12-06
Date
Aberdeen, Washington

Jerry D. Wiatt, Jr.

LAW OFFICE OF
DAVID B. ZUCKERMAN
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705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

R. Declaration of Jerry Wiatt, Sr., October 17, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF JERRY WIATT, SR.

Jerry Wiatt, Sr. declares as follows:

1. I am the father of the defendant Jerry Wiatt, Jr.
2. I attended much of my son's trial.
3. At one point during the trial, Judge Tabor informed the parties that his daughter was in the audience observing. She appeared to be about 20 years old or so.

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

10-17-06
Date
Olympia, Washington

J. Wiatt, Sr.
Jerry Wiatt, Sr.

LAW OFFICE OF
DAVID B. ZUCKERMAN
1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104

S. Declaration of Lina Wiatt, December 4, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR. Defendant.	Thurston County Cause No. 01-1-01136-1 DECLARATION OF LINA WIATT

Lina Wiatt declares as follows:

1. I am the mother of the defendant Jerry Wiatt, Jr.
2. At some points during my son's trial, I was sitting outside of the courtroom in the hallway. I would sometimes see the victim's advocate, a woman named Kim, speaking with the alleged victims. Once or twice, I saw her making a motion with her hand near her eyes just before the witness went into the courtroom to testify. It was obvious that she was indicating that the witness should cry. To the best of my recollection, this happened with Jennifer Bowles and/or Zoe Hawkins.

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

12/04/06
Date
Olympia, Washington

Lina Wiatt
Lina Wiatt

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705 Second Avenue
Seattle, Washington 98104

T. Declaration of David Zuckerman, December 11, 2006

IN THE THURSTON COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	No. 01-1-01136-1 DECLARATION OF DAVID ZUCKERMAN

David Zuckerman declares as follows:

1) I am the attorney for Defendant Jerry Wiatt, Jr.

2) I am aware that trial counsel attempted to obtain the testimony of Alisha Cochran through an out-of-state subpoena, but were ultimately unsuccessful. A transcript of the taped statement Ms. Cochran gave to Detective Louise Adams, originally provided to the defense through discovery, is attached to the Declaration of David Allen.

3) Through investigation, I learned in September, 2006, of Ms. Cochran's business address and telephone number. It is located in Tumwater, Washington.

4) I have had several telephone conversations with Ms. Cochran since then. I have also sent her a copy of her statement to Detective Adams. Ms. Cochran has confirmed for me that everything she told the detective was the truth. Nevertheless, she adamantly refuses to sign a declaration because she does not wish to be involved in this case.

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Seattle, Washington 98104
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5) If a court were to rule that Ms. Cochran must testify at a deposition, reference hearing, or new trial, I could serve her with a subpoena at her place of employment. If she were to fail to comply with the subpoena, the court could issue a bench warrant and have her brought into court. Ms. Cochran appears to have been steadily employed at the same workplace since September.

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

12/11/06
Date
Seattle, WA

David Zuckerman

LAW OFFICE OF
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1300 Hoge Building
705 Second Avenue
Seattle, Washington 98104
(206) 623-1595

U. Thurston County Sheriff's Office Documents Re: Search Warrant

a. Application and Affidavit for Search Warrant, July 11, 2001

b. Search Warrant, July 11, 2001

c. Inventory and Return of Search Warrant, July 11, 2001

d. Evidence/Property Forms, July 11 and 12, 2001

e. Excerpt of Officer's Report Re: Search

a. Application and Affidavit for Search Warrant, July 11, 2001

FILED
JUL 12 2001
THURSTON CO. DIST COURT

IN THE DISTRICT COURT
FOR THURSTON COUNTY, WASHINGTON

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

NO. SW01-101
TCSO Case #: 01-24273-07

Detective Louise Adams, being first duly sworn on oath, states as follows:
(Applicant=s Name)

1. I am a duly commissioned law enforcement officer with the Thurston County Sheriff's Office, and currently hold the rank or assignment of Detective.

2. I am requesting a search warrant granting authority to search the following premises, thing(s), vehicle(s) and/or person(s):

   Two story single family dwelling located at 3443 32nd Way NW in the Cedrona housing development located in Thurston County.

   Any outbuildings located on the above mentioned property.
   All vehicles located on the above mentioned property.

3. My background training and experience are as follows:

   I have been a law enforcement officer for approximately thirteen years. In March 1995, I was assigned to the Detective Division of the Thurston County Sheriff's Office. My primary assignment as a Detective has been to investigate sex offenses, physical abuse allegations and crimes against people. I have conducted over seven hundred sex offense investigations. I attended the Washington State Basic Law Enforcement Academy and have had numerous hours of additional training throughout my Career.

4. I believe that probable cause exists to believe that a crime has been committed and that evidence of that crime will be located at or on the aforementioned premises, thing(s) vehicle(s) or person(s) listed in paragraph two, based on the following facts and circumstances:

On July 9, 2001, at about 1:54 AM, Alvina CRUZ filed a report with the Thurston County Sheriff's Office indicating she was a victim of a sexual assault. Sgt. Cliff Ziesemer contacted CRUZ (Alvina) at her residence. CRUZ (Alvina) stated that on June 29, 2001, she went with a friend, Huyen THOONG (Similie), to a party at Jerry WIATT's residence. WIATT's residence is located at 3443 32nd Ave. NW, in Thurston County.

At the residence, CRUZ (Alvina) and THOONG (Similie) participated in several alcoholic drinking games. It should be noted that CRUZ (Alvia) was seventeen years old and THOONG (Similie) was eighteen years of age at the time of this incident. CRUZ (Alvina) became highly intoxicated from the drinking games. CRUZ (Alvina) said that she ended up in a bedroom and recalls pain in her vaginal area. CRUZ (Alvin) said that she heard Jerry WIATT telling her about putting on lubrication. CRUZ (Alvine) woke up completely naked, lying next to Jerry WIATT in bed. CRUZ (Alvina) said she did not consent to this. CRUZ (Alvina) was later told that she was "tag teamed" and there was a video made of them having sex. (Never said anything about rape.)

Huyen THOONG (Similie) was contacted and said that when she learned CRUZ (Alvina) was in a bedroom, she had tried to get her out. The bedroom door was locked and Jerry WIATT kept telling her to go away.

The case was refered to the Detective Division of the Thurston County Sheriff's Office and I received it for further investigation on July 9, 2001.

On July 9, 2001, I contacted Alvina CRUZ and requested she come to the Sheriff's Office for an interview. On July 9, 2001, a tape recorded statement from CRUZ was obtained. During the interview, CRUZ told me that she had gone to a party at Jerry WIATT's residence with a girlfriend, Huyen THOONG. Jeff WIATT, Jerry WIATT's brother had invited them to the residence. When they arrived at the residence, late on June 29, 2001, Jerry WIATT was not present. CRUZ and THOONG played a drinking game with Jeff WIATT and CRUZ became intoxicated. While they were playing the drinking game Jerry WIATT arrived home. Jerry WIATT began playing the drinking game and encouraged CRUZ to drink more alcohol. CRUZ told me that she is currently on medication and she believes the medication may intensify the effect of alcohol. CRUZ said that she was very intoxicated and recalls getting in a hotub at the residence with her clothes on. CRUZ said that sometime while she was in the hotub her pants came off. CRUZ said the hotub was uncomfortably hot and she got out of the hottub. When CRUZ got out of the hot tub she began looking for THOONG. CRUZ found THOONG outside of the residence sitting in her vehicle and talking on a cell phone. THOONG told CRUZ she had spoken with a friend named "Joe" and Joe had told THOONG they should leave the residence. CRUZ said she was wearing a white robe, a shirt and a bra when she was speaking with THOONG. CRUZ did not know where her pants were. When CRUZ was speaking with THOONG outside they were contacted by Jerry WIATT. Jerry WIATT told CRUZ she should come back inside, he knew where her clothes were. CRUZ entered the residence and recalls that THOONG was pounding on the bedroom door. CRUZ said that THOONG was trying to get her out of the bedroom and was screaming that she had called a friend of theirs, AnnLee. CRUZ said that all the sudden, AnnLee was at the residence. CRUZ said that AnnLee called her on her cell phone and AnnLee told her to leave the residence. Jerry WIATT and CRUZ left the residence in WIATT's vehicle, a Land Cruiser. CRUZ and WIATT drove to the entrance of the development and then turned around and returned to the residence.

CRUZ said she ended up in her car and Jerry WIATT was in the passenger seat. CRUZ said that somewhere between the residence and the housing development entrance WIATT exited her vehicle. CRUZ drove home and was followed by AnnLee and THOONG. CRUZ said that while driving home she was talking with them on a cell phone. AnnLee told CRUZ she was swerving all over but CRUZ said all she could think about was getting home. CRUZ said she knows she made it to her residence because later AnnLee told her she followed her to the Freeway exit closest to her residence. At her residence, CRUZ realized she didn't have all her clothes on and was concerned about entering her residence partially dressed. CRUZ then received a telephone call on her cell phone and she spoke with a male caller she thought was Jerry WIATT. The male told CRUZ he had her clothes and asked her if she was okay. CRUZ told the caller she was okay but she needed her clothes. CRUZ told me she somehow managed to drive back to the WIATT residence. At the residence CRUZ was invited inside.

The next thing CRUZ recalls is being in a bedroom on a bed, laying on her back. A male who she believes was Jerry WIATT, was putting his penis in her vagina. CRUZ told me that she had been a virgin and this was the most painful experience she has ever had. CRUZ said it hurt so bad and the male offered CRUZ some lubricant. CRUZ believes she passed out and the next thing she recalls is waking up in bed with Jerry WIATT. CRUZ said she was totally naked when she woke up and WIATT did not have his shirt on.

CRUZ wrapped a sheet around her and began looking for her clothing. CRUZ found her shirt in a bathroom, her bra on the floor and her pants in the clothes dryer. CRUZ got dressed and asked WIATT if he knew where her car keys were. WIATT fumbled through his clothing and and took her keys out of a jacket pocket. WIATT gave CRUZ her keys and asked her if she was mad. WIATT kissed CRUZ on the

cheek and she left the residence. ALVINA CRUZ believes she left the residence at about 9:30 AM on June 30, 2001.

ALVINA CRUZ told me she drove straight home and contacted AnnLee on the telephone. ALVINA CRUZ said she wanted to speak with AnnLee to find out what had happened and to ask her if she had been at the residence that night. When ALVINA CRUZ spoke with AnnLee she could tell that AnnLee was angry. AnnLee told ALVINA CRUZ she had tried to get her out of the residence and that she had been scared when ALVINA CRUZ came out of the residence only wearing a robe.

ALVINA CRUZ told me that she did not imediately report this to law enforcement because she didn't want any "Drama" in her life. ALVINA CRUZ is also scheduled to leave for college in the very near future. ALVINA CRUZ did speak with her Aunt Marie about the incident and she was encouraged to report the incident to law enforcement. ALVINA CRUZ said she didn't want her parents to find out and she wasn't sure what she should do. ALVINA CRUZ said that for about a week after the incident she didn't leave her residence. She was grounded

ALVINA On Sunday, July 8, 2001, CRUZ left her residence to attend a Mariners game with a girlfriend, Nicole SMITH. On the trip to Seattle, SMITH told ALVINA CRUZ she had heard what had happened. ALVINA CRUZ asked SMITH what she was talking about and SMITH said that she had been told that ALVINA CRUZ was caught on video tape being "tag teamed" by two guys. ALVINA CRUZ said she was shocked and SMITH told her it was only a rumor and it probably wasn't even true. When ALVINA CRUZ returned home she contacted THOONG and asked her if she had heard a rumor about a video tape. Similar THOONG told ALVINA CRUZ that she had heard that Jerry WIATT showed a male friend named "Barry" a video tape on Saturday, June 30, 2001. The video tape was ALVINA CRUZ having sexual intercourse, "doggy style"

Never Similar

When CRUZ learned that a video might exist she again contacted her Aunt Marie. After speaking with her Marie, Alvina contacted law enforcement.

On July 10, 2001, I interviewed AnnLee HOY and obtained a tape recorded statement. During the interview, HOY told me that she received a telephone call from Huyen THOONG at about 3:00AM on June 30, 2001. THOONG told HOY that she and Alvina CRUZ were at Jerry WIATT's residence. THOONG wanted to go home but CRUZ was really drunk and she didn't want to leave her at the WIATT residence. HOY suggested that a friend, Ryan CARLSON, take them home and THOONG said he had already left the residence. HOY does not have a drivers license and she was afraid to drive CRUZ's vehicle. HOY told THOONG to try and find another way home and terminated the conversation. At about 3:30 AM, THOONG called HOY again and she was crying. THOONG said CRUZ was in Jerry WIATT's bedroom with WIATT and she was standing outside the bedroom door trying to get her to come out. THOONG was knocking on the door and yelling that CRUZ was only seventeen years old and was to get the hell out of there. CRUZ was not coming out of the bedroom and THOONG was scared. HOY told THOONG to tell CRUZ that HOY was going to call her mother if she didn't come out of the bedroom right away. When CRUZ did not come out of the bedroom HOY told THOONG to tell them that she was going to call the Cops. When CRUZ did not exit the bedroom, HOY told THOONG she would come to the residence and take them home. HOY got dressed and went to the WIATT residence in the Cedrona housing development.

When HOY arrived at the residence she CRUZ came outside dressed in a white robe. CRUZ aproached HOY and told her she was sorry. HOY told CRUZ she didn't want to talk to her and walked toward the residence. CRUZ told HOY not to enter the residence and grabbed HOY's arm to stop her. HOY pushed CRUZ away and entered the residence. HOY entered the residence and located Jerry WIATT in the

kitchen. HOY told WIATT that CRUZ was only seventeen years old and accused him of raping her. WIATT told HOY that CRUZ had told him she was eighteen. HOY threatened to call the Police and WIATT said go ahead. HOY called WIATT a "sick perverted fuck" and left the residence. HOY contacted CRUZ and THOONG outside and told them they were leaving. THOONG followed HOY to her car but CRUZ was convinced by other people inside the residence to come back inside. CRUZ went back inside the WIATT residence. HOY said that she wanted to get CRUZ out of the residence but she was scared of being assaulted if she again entered the residence. Jerry WIATT contacted HOY outside the residence, looked her up and down and then called her a "cunt." HOY and THOONG got in HOY's vehicle and they drove to the entrance of the housing development. HOY called a friend named "Joe" and he offered to help. During this time, HOY and THOONG were maintaining contact with CRUZ via cell phones. CRUZ kept telling them she was getting her belongings and would meet them at the entrance. CRUZ did not come out of the house and a Sports Utility Vehicle pulled up behind them. HOY thought the vehicle belonged to WIATT and she drove out of the development. HOY saw the vehicle turn around and then return to the WIATT residence. HOY spoke with CRUZ on the cell phone and CRUZ said she didn't know if WIATT had left the residence or not. HOY told CRUZ she needed to come out of the residence and talk to her. CRUZ said she needed to go home her mother needed her home. HOY told CRUZ she would drive her and CRUZ said no, I need to be home. CRUZ hung up the phone and HOY saw CRUZ drive by. HOY said that CRUZ was swerving all over the road and via cell phone she tried to get her to pull over. CRUZ would not pull over and kept saying she needed to get home. HOY followed CRUZ south on I-5 and watched her get off the freeway at the exit closest to her residence. HOY assumed CRUZ would get home safely from there. HOY turned around and returned to her residence where she showered and got ready for work. HOY believes it was about 5:15 Am when she arrived at her residence.

HOY said that she knew CRUZ was intoxicated because she was swerving all over the road. CRUZ's speech had been slurred, she was using expressions she didn't normally use and she didn't look like her friend at all.

At about 8:00 AM CRUZ called HOY at work but HOY didn't answer the phone. HOY made contact with Ryan CARLSON and about 10:00AM and CARLSON was very upset. CARLSON told HOY he never wanted to speak with CRUZ again or his friends at the WIATT residence. CARLSON said that CRUZ and WIATT were messing around and he was angry because CRUZ was like a sister. CARLSON said that CRUZ had left the WIATT residence at 8:00 AM. HOY said no, CRUZ had left earlier because she had followed her home. HOY then realized that CRUZ must of returned to the WIATT residence.

HOY contacted CRUZ later that afternoon and CRUZ told HOY she didn't remember anything and apologized. CRUZ said she remembered waking up that morning naked in WIATT's bed and she felt dirty. Several day's later, CRUZ told HOY that she remembered it hurting really bad and someone saying they would get lubricant. CRUZ said she kept blacking out and when she woke up someone was raping her. HOY said that CRUZ did not use the term rape but HOY assumed that was what CRUZ was telling her.

HOY does not believe CRUZ had consensual sex with WIATT. HOY said that CRUZ had been a virgin prior to this incident. HOY has seen CRUZ intoxicated in the past and CRUZ has never done anything like this before. HOY believes that Jerry WIATT either forced CRUZ to have sex or just took advantage of an underage female. I asked HOY if she had heard anything about a video tape. HOY said that Ryan CARLSON told her a couple days after the incident that Jerry WIATT had told another friend, Barry SPECHT, that he had made a video. The video showed

WIATT and another male having sexual intercourse with CRUZ. One of the sexual positions was rear entry intercourse. Annle HOY said she has heard lots of stories in the past about video taping in the WIATT residence. HOY said that WIATT needs to be thrown in Jail and he has done this type of thing many times but nobody will say anything because they are afraid of him.

On July 10, 2001, I interviewed Huyen THOONG and obtained a tape recorded statement. During the interview THOONG told me that on or about June 30, 2001, she had gone to a party at Jerry WIATT's residence with her girlfriend, Alvina CRUZ. At the residence when they arrived were Jeff WIATT, Ryan CARLSON and Kevin MURPHY. Jeff WIATT made THOONG and CRUZ a drink and they began playing an alcohol drinking game.

At about 1:00 AM, Jerry WIATT arrived home with several other people and Jerry WIATT played the drinking game with THOONG and CRUZ. THOONG quit drinking but CRUZ continued to drink. After drinking they got into a hot tub at the residence. THOONG soon left the hot tub and made a phone call to a friend. When THOONG returned to the hot tub, CRUZ was gone. THOONG asked where CRUZ was at and she was told that CRUZ was upstairs with Jerry WIATT and WIATT's cousin in Jerry WIATT's bedroom. THOONG knocked on WIATT's bedroom door and WIATT said, who is it. THOONG identified herself and asked where CRUZ was. WIATT said that CRUZ was with him. THOONG asked them what they were doing and WIATT asked her what she wanted. THOONG said she wanted CRUZ to come out of the bedroom and she called out to CRUZ. THOONG heard CRUZ calling her name and THOONG told her to get up and open the door. THOONG pounded on the bedroom door and the male inside the bedroom got angry and told her to go away. THOONG kept pounding on the door and the male began cussing at her. CRUZ was no longer responding so THOONG called a girlfriend, AnnLee HOY. THOONG

asked HOY what she should do and HOY told her to pound on the door and tell them HOY was going to call CRUZ's mother if they didn't let her out of the room. THOONG pounded on the bedroom door and yelled that CRUZ was just seventeen years old and she needed to get out of that room. THOONG talked to Jeff WIATT and THOONG told Jeff he needed to help get CRUZ out of the bedroom. Jeff WIATT knocked on the door and tried to open the door but the door was locked. Jeff WIATT's sister, Tammy, also tried to get CRUZ out of the bedroom but was not sucessful. THOONG called HOY again and HOY said she was coming over to get them.

THOONG was talking to HOY on a cell phone and CRUZ came out of the residence wearing a white robe. CRUZ apologized and THOONG asked her what had happened. CRUZ said she couldn't remember. HOY arrived at the residence and was very angry. CRUZ tried to prevent HOY from talking to Jerry WIATT but HOY found Jerry WIATT and began yelling at him. HOY and THOONG got in HOY's vehicle and told CRUZ to get in. CRUZ would not leave with them and they drove to the entrance of the development. They contacted CRUZ via cell phone and CRUZ said "I'm coming right now." THOONG said CRUZ did not come right away to their location and they continued to call her on her cell phone. About fifteen minutes later a sport utility vehicle pulled up and they got scared and left the housing development. They turned around and returned to the development and called CRUZ on her cell phone. CRUZ said they didn't need to take her home and HOY said they needed to speak with her. CRUZ then drove by their parked vehicle and did not stop. Via cell phone they asked CRUZ to pull over, but she refused. HOY and THOONG followed CRUZ to her freeway exit and then drove to HOY's residence. HOY got ready for work and THOONG went with her.

At about 8:30 CRUZ contacted THOONG and asked THOONG if she knew where her watch was. THOONG asked CRUZ where she was and CRUZ said she had fallen asleep in her driveway. CRUZ did not tell THOONG that she had returned to the WIATT residence.

In a later conversation, CRUZ told THOONG that she recalled looking down because it hurt and she was having sexual intercourse. CRUZ was told something about lubrication and then she passed out. CRUZ then recalled waking up in the morning naked with Jerry WIATT in bed with her. CRUZ was able to find her clothes and WIATT had her car keys.

THOONG told me that CRUZ was very intoxicated that night. THOONG said that CRUZ had at least one mixed drink and at least ten shots of hard alcohol. THOONG does not believe that CRUZ was capable due to her intoxication level of consenting to a sex act. I asked THOONG if she had heard about a video tape. THOONG said yes she had heard that a guy named Barry said there was a video of them doing it "doggy style."

Based on the above information, I believe probable cause exists to believe the crimes of RAPE IN THE SECOND DEGREE, (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. SEXUAL EXPLOTATION OF A MINOR and VOYEURISM occurred on or about June 30, 2001, and that evidence of those crimes may exist at the WIATT residence located at 3443 32nd Ave. NW.

5. Therefore I am requesting that the court issue a search warrant allowing me to search the premises, thing(s), vehicle(s) and/or person(s) listed in paragraph two and seize the following items as evidence of the crime:

Bedding
Clothing
Lubricant
Video recording equipment
Video tapes
Photographs that depict what may be minors engaged in sexual acts.
Documents or papers that show dominion or control of the residence.
as well as all contraband (including controlled substances), fruits of the crime or other things unlawfully possessed, weapons or other things with which a crime has been committed or reasonably appears about to be committed, weapons subject to forfeiture under RCW 9.41.098 or any other property seizable under RCW 10.105.010 or RCW 69.50.505:

Louise Adams

Louise Adams, Affiant

6. Court's summary of additional evidence considered at the time of this application:

SUBSCRIBED AND SWORN TO BEFORE ME ON:

Date: July 11, 2001

Time: 3:25 PM

S. Dubuisson

Judge

Susan A. Dubuisson

Printed Name

Revised 12-02-00

b. Search Warrant, July 11, 2001

FILED

JUL 12 2001

THURSTON CO. DIST COURT

IN THE DISTRICT COURT
FOR THURSTON COUNTY, WASHINGTON

SEARCH WARRANT

NO. SW01-101

TCSO #: **01-24273-07**

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

Upon the sworn affidavit of Detective Adams made before me and incorporated herein by reference, it appears that there is probable cause to believe that evidence of a crime, contraband (including controlled substances), fruits of the crime or other things unlawfully possessed, weapons or other things with which a crime has been committed or reasonably appears about to be committed are under the control or in the possession of some person(s) and are located in or on certain premises, thing(s), vehicle(s) or person(s) within Thurston County, State of Washington hereinafter described.

THEREFORE, YOU ARE COMMANDED:

1. Within 10 days, to search said premises, thing(s), vehicle(s) or person(s) specifically described as follows:

   Two Story single family dwelling located at 3443 32nd Way NW in the Cedrona housing development located in Thurston County.
   Any outbuildings located on the above mentioned property
   Any vehicles located on the above mentioned property.

2. And seize the following items:

   Bedding
   Clothing
   Lubricant
   Video recording equipment
   Video tapes
   Photographs that depict what may be minors engaged in sexual acts
   Documents or papers that show dominion or control of the residence

   as well as all contraband (including controlled substances), fruits of the crime or other things unlawfully possessed, weapons or other things with which a crime has been committed or reasonably appears about to be committed, weapons subject to forfeiture under RCW 9.41.098 or any other property seizable under RCW 10.105.010 or RCW

69.50.505.

3. Safely keep the items seized.

4. Return this warrant to the above court within 10 days following issuance for controlled substances, or promptly following execution for all others. The return must include an inventory of all property seized.
A copy of this warrant and a receipt (inventory) for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found.

Dated: July 11, 2001

Time: 3:25 PM

S. Dubuisson
Judge

As authorized by the above judge pursuant to CrR 2.3 (telephone search warrant).

Date: _____

Time: _____

_____
Judge's Name

BY: _____
Peace Officer's Signature
Thurston County Sheriff's Office

DATE/TIME of Execution 7-11-01 1625 HRS

Revised May 19, 1997
K:\TC200S\USERS\COMMON\WORDTEMPLATES\SEARCHWARRANT.DOT

c. Inventory and Return of Search Warrant, July 11, 2001

FILED

JUL 12 2001

THURSTON CO. DIST COURT

IN THE DISTRICT COURT
FOR THURSTON COUNTY, WASHINGTON

INVENTORY AND RETURN OF SEARCH WARRANT NO. SW01-101

TCSO #: 01-24273-07

1. I received a search warrant for the premises, thing(s), vehicle(s) or person(s) specifically described as follows:

   Two Story single family dwelling located at 3443 32nd Way NW in the Cedrona housing development located in Thurston County.
   Any outbuildings located on the above mentioned property.
   Any vehicles located on the above mentioned property.

2. I made a diligent search of the above-described premises, thing(s), vehicle(s) or person(s) and found and seized the items listed as follows:
   SONY HANDYCAM Serial # 1549Z6, 1 JAR "ForPlay Cleanser 1 JAR Slippery STUFF LUBRICANT, 12 VCR TAPES, 2 WHITE terry CLOTH ROBES TOP AND BOTTOM SHEETS, 1 CASE Logic Camera BAG W/ MISC. VIDEOTAPES

3. Name(s) of person(s) from whom or from whose premises the property was taken:
   TAKEN from 3443 32ND WAY NW.

4. The inventory was made in the presence of (at least one other person than the undersigned):

5. Name of person served with a copy the warrant and inventory, or description of place where posted: Served in person to JEFF WYATT

Dated: 7-11-01

Louise Adams
Signature of Peace Officer

Time and Date Executed 7-11-01 1625 HRS

DET. Louise ADAMS
Printed Title and Name of Peace Officer

Revised May 19, 1997

d. Evidence/Property Forms, July 11 and 12, 2001

THURSTON COUNTY SHERIFF'S OFFICE
EVIDENCE/PROPERTY FORM

CASE NUMBER: 01-04273-7

TYPE OF CRIME: RAPE 2ND

EVID | PERS PROP | SAFEKEEPING | RECOV PROP | FOUND | CONTRA

OW/VI/FI/SU/WI LAST, FIRST MI DOB	SUSPECT: LAST NAME, FIRST MI DOB
WIATT, JENNY D 12-10-73	
ADDRESS/P.O. BOX: 3443 32ND AVE NW	ADDRESS/ P.O. BOX
CITY/STATE/ZIP CODE PHONE: Olympia WA 98512 866 2320	CITY/STATE/ZIP CODE PHONE

Item Number	ITEM (NOUN NAME, THEN DESCRIBE: MANUFACTURER, CALIBER, MODEL, SERIAL NUMBER, CONDITION, QUANTITY, ECT.)	EVIDENCE USE
EVIDENCE USE	1 Sony Handycam SS# 154926 LOADED W/ 1 TAPE	
	2 FORPLAY cleanser (1 CONTAINER)	
	3 1 JAR Slippery Stuff Lubricant	
	4 2 White Terry Cloth ROBES	
	5 22 VCR TAPES	
	6 Grey fitted sheet & Grey TOP sheet	
	7 1 CASE Logic camera Bag W/ 10 DV TAPES	
	8	

X AFTER ADJUDICATION | X RETURN TO OWNER | X DISPOSE/DESTROY

PHOTOGRAPH | LAB TEST | FINGERPRINT | NARCOTICS FIELD TEST POSITIVE

REMARKS/TYPE OF TESTING REQUESTED

RECOVERED BY: ADAMS | SSN: A8979 | DATE: 7-11-01 | TIME: 1625

X PLACED IN EVIDENCE LOCKER | DIRECT TO EVIDENCE OFFICER

RECEIVED IN EVIDENCE BY: | DATE: | TIME:

ITEM(S)	RELEASED BY	RECEIVED BY	DATE	TIME

EV-PROP2.FRM(01/98) (For general use)

THURSTON COUNTY SHERIFF'S OFFICE
EVIDENCE/PROPERTY FORM

CASE NUMBER: 01-24273-7

TYPE OF CRIME: RAPE | SUP CT: X | DIST CT | JUV CT

X EVID | PERS PROP | SAFEKEEPING | RECOV PROP | FOUND | CONTRA

OW/VI/FI/SU/WI LAST, FIRST MI DOB	SUSPECT: LAST NAME, FIRST MI DOB
NIATT, JERRY D 12-10-73	
ADDRESS/P.O. BOX: 3443 32ND AVE NW	ADDRESS/ P.O. BOX
CITY/STATE/ZIP CODE PHONE: OLYMPIA WA 98512	CITY/STATE/ZIP CODE PHONE

Item Number	ITEM (NOUN NAME, THEN DESCRIBE: MANUFACTURER, CALIBER, MODEL, SERIAL NUMBER, CONDITION, QUANTITY, ECT.)
EVIDENCE USE 1	1 - VHS VIDEO TAPE
2	
3	
4	
5	
6	
7	
8	

X	AFTER ADJUDICATION		RETURN TO OWNER	X	DISPOSE/DESTROY		
	PHOTOGRAPH		LAB TEST		FINGERPRINT		NARCOTICS FIELD TEST POSITIVE

REMARKS/TYPE OF TESTING REQUESTED

VIDEO TAPE MADE OF ORIGINAL SONY DV TAPE THAT WAS RECOVERED DURING SEARCH WARRANT EXECUTED ON - 5-12-01

RECOVERED BY: ADAMS | SSN: A8474 | DATE: 7-12-01 | TIME: 1130

X PLACED IN EVIDENCE LOCKER | DIRECT TO EVIDENCE OFFICER

RECEIVED IN EVIDENCE BY: | DATE: | TIME:

ITEM(S)	RELEASED BY	RECEIVED BY	DATE	TIME

M:\-FORMS\EV-PROP2.REV(01/98) (For general use)

e. Excerpt of Officer's Report Re: Search

THURSTON COUNTY SHERIFF'S OFFICE
OFFICER'S REPORT
DET. Louise Adams

CASE NUMBER: 01-24273-07
MAJOR CASE NUMBER: 437

VICTIM: CRUZ, Alvina B.
DOB: 08/18/83
[redacted]

INCIDENT: RAPE 2ND, 2 COUNTS
SEXUAL EXPLOITATION OF A MINOR, 2 COUNTS
VOYEURISM, 2 COUNTS
FURNISHING ALCOHOL TO A MINOR

DATE OF INCIDENT: June 29-30, 2001

LOCATION: 3443 32nd Way NW

VICTIM: 2 BOWLES, Jennifer M.
DOB: 07-27-84
[redacted]

INCIDENT: RAPE THIRD DEGREE
FURNISHING ALCOHOL TO A MINOR

DATE OF INCIDENT: August 2000

LOCATION: 3443 32nd Way NW

away to their location and they continued to call her on her cell phone. About fifteen minutes later a sport utility vehicle pulled up and they got scared and left the housing development. They turned around and returned to the development and called CRUZ on her cell phone. CRUZ said they didn't need to take her home and HOY said they needed to speak with her. CRUZ then drove by their parked vehicle and did not stop. Via cell phone they asked CRUZ to pull over, but she refused. HOY and THOONG followed CRUZ to her freeway exit and then drove to HOY's residence. HOY got ready for work and THOONG went with her.

At about 8:30 CRUZ contacted THOONG and asked THOONG if she knew where her watch was. THOONG asked CRUZ where she was and CRUZ said she had fallen asleep in her driveway. CRUZ did not tell THOONG that she had returned to the WIATT residence.

In a later conversation, CRUZ told THOONG that she recalled looking down because it hurt and she was having sexual intercourse. CRUZ was told something about lubrication and then she passed out. CRUZ then recalled waking up in the morning naked with Jerry WIATT in bed with her. CRUZ was able to find her clothes and WIATT had her car keys.

THOONG told me that CRUZ was very intoxicated that night. THOONG said that CRUZ had at least one mixed drink and at least ten shots of hard alcohol. THOONG does not believe that CRUZ was capable, due to her intoxication level, of consenting to a sex act. I asked THOONG if she had heard about a video tape. THOONG said yes, she had heard that a guy named Barry said there was a video of them "doing it doggy style."

Based on the above information, on July 11, 2001, I applied for and received a search warrant that allowed me to search the WIATT residence located at 3443 32nd Way, NW. The search warrant was executed on July 11, 2001, at 1625 hours. The following items were located, seized and placed into evidence:

1) Sony Handycam video camera, serial # 154926, containing one tape

2) Foreplay cleanser
3) Jar of "Slippery Stuff" lubricant
4) Two white terry cloth robes
5) 22 VCR tapes
6) Grey fitted top and bottom sheet
7) Case Logic camera bag containing 10 D/V tapes

Photographs were taken and placed in the case file. Jeff WIATT arrived at the residence with a male identified as Thomas HO. A taped statement was obtained from Jeff WIATT. During the interview, Jeff WIATT told me that sometime prior to July 4, 2001, he had invited Alvina CRUZ and her friend Simily to his residence. At the residence Jeff WIATT made the girls an alcoholic drink called "Sex on the Beach." Jeff WIATT said they played a few drinking games and then "leisurely" drank more alcohol. Jerry WIATT, Jeff's brother, arrived home from a club called Thekla's with several friends. Jeff WIATT left the residence for a brief period of time and when he returned CRUZ and Simily were drinking and talking with Jerry WIATT. Jeff's sister Tammy came over to the residence and they all went into the hot tub. Jeff said everyone seemed to have made friends and he started hanging out with other people at the residence. Later, Simily approached Jeff WIATT because she could not find CRUZ and needed his help to locate her. Jeff WIATT said that Simily found CRUZ in his brother's bedroom and was knocking on the door and "freaking out." Simily wanted to leave but she had been drinking so Jeff WIATT told her to "hang out for a little bit." Jeff told me he did not knock on Jerry's door and went to bed. Jeff WIATT said he was pretty intoxicated himself but he believes that a friend came and got Simily. Jeff WIATT did not see CRUZ again that night and did not see CRUZ in the morning. Jeff WIATT told me that after the incident he had called CRUZ to invite her back to the residence but she did not return his phone call. Jeff WIATT denied any knowledge of video taping. Jeff WIATT described CRUZ as being intoxicated that night and said she was too intoxicated to drive a vehicle. I asked Jeff WIATT if he knew CRUZ was seventeen years old. Jeff told me that CRUZ had told him she was eighteen or nineteen. I told Jeff WIATT that CRUZ and Simily had mentioned a male named Johan that was at the residence

V. Fourth Amended Information, October 21, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

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THURSTON COUNTY, WASH.
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BETTY J. GOULD, CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

JERRY D. WIATT, JR.
DESC: W/M;6'0";165;BRN;BRN
DOB: 12/10/73
SID: NONE YET KNOWN; FBI: NONE YET KNOWN
BOOKING NO. NONE YET KNOWN
Defendant.

NO. 01-1-1136-1

FOURTH AMENDED INFORMATION

CHRISTEN ANTON PETERS
Deputy Prosecuting Attorney

Co-Defendant
N/A

Comes now the Prosecuting Attorney in and for Thurston County, Washington, and charges the defendant with the following crime:

TRIAL I

COUNT I - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 through June 30, 2001, did engage in sexual intercourse with A.C. (DOB: 8/18/83), when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated.

COUNT II - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 through June 30, 2001, did engage in sexual intercourse with A.C. (DOB: 8/18/83), when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated.

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COUNT III - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3),

In that the defendant, JERRY D. WIATT, JR., in the, State of Washington, on or about June 29, 2001 and June 30, 2001, did aid, invite or cause a minor to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT IV - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, did aid, invite or cause a minor to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT V - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film A.C. (DOB: 8/18/83) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT VI - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2001 and June 30, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film A.C. (DOB: 8/18/83) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT VII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about June 29, 2000 and June 30, 2000, did give or otherwise supply liquor to A.C. (DOB: 8/18/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT VIII - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

In that the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about August 1, 2000, did engage in sexual intercourse with another, to wit: J.M.B. (DOB: 7/27/84), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT IX - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about August 1, 2000, did give or otherwise supply liquor to J.M.B. (DOB: 7/27/84), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

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COUNT X - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about September 1, 2000 through September 30, 2000, did engage in sexual intercourse with H.A.K. (DOB: 9/3/79), when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

or in the alternative:

COUNT X - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

That the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about September 1, 2000 through September 30, 2000, did engage in sexual intercourse with H.A.K. (DOB: 9/3/79), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT XI - UNLAWFUL IMPRISONMENT WITH SEXUAL MOTIVATION, RCW 9A.40.040 and 9.94A.127:

That the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about September 1, 2000 through September 30, 2000, did knowingly restrain another person, to-wit: H.A.K. (DOB: 9/3/79). It is further alleged that this offense was committed with sexual motivation.

COUNT XII - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(b)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or December 19, 2000, did engage in sexual intercourse with K.N.H. (DOB: 12/13/83), when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

COUNT XIII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about December 19, 2000, did give or otherwise supply liquor to K.N.H. (DOB: 12/13/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT XIV - RAPE IN THE SECOND DEGREE, RCW 9A.44.050(1)(a)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 12, 2000, did engage in sexual intercourse by forcible compulsion with Z.H. (DOB: 2/2/83), or when Z.H. (DOB: 2/2/83) was mentally incapacitated or physically helpless.

COUNT XV - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 12, 2000, did give or otherwise supply liquor to Z.H. (DOB: 2/2/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

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COUNT XVI - RAPE IN THE THIRD DEGREE, RCW 9A.44.060(1)(a):

That the defendant, JERRY D. WIATT, JR, in the State of Washington, on or about May 1, 2000 through October 1, 2000, did engage in sexual intercourse with another, to wit: R.R. (DOB: 9/25/82), a person not his spouse, who did not consent to have sexual intercourse, and such lack of consent was clearly expressed by the victim's words or conduct.

COUNT XVII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about May 1, 2000 through October 1, 2000, did give or otherwise supply liquor to R.R. (DOB: 9/25/82), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

COUNT XVIII - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about May, 2000, did give or otherwise supply liquor to E.G. (DOB: 11/16/83), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

TRIAL II

COUNT XIX - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about July 8, 1999 through July 17, 2000, did give or otherwise supply liquor to A.J. (DOB: 7/7/82), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

TRIAL III

COUNT XX - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT XXI - SEXUAL EXPLOITATION OF A MINOR, RCW 9.68A.040(1)(b), 9.68A.011(3)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, did aid, invite or cause a minor, to wit: M.E.B. (DOB: 8/14/84) to engage in sexually explicit conduct knowing that such conduct would be photographed.

COUNT XXII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any

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person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

COUNT XXIII - VOYEURISM, RCW 9A.44.115:

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about January 1, 2000 through July 31, 2001, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film M.E.B. (DOB: 8/1/84) without her knowledge and consent and while she was in a place where she had a reasonable expectation of privacy.

TRIAL IV

COUNT XXIV - RAPE OF A CHILD IN THE THIRD DEGREE, RCW 9A.44.079

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1999 through March 31, 1999, did engage in sexual intercourse with and was at least forty-eight months older than S.N.W. (DOB: 3/30/84), a person who was at least fourteen years of age but less than sixteen years of age and not married to the accused.

COUNT XXV - FURNISHING LIQUOR TO A MINOR, RCW 66.44.270(1)

In that the defendant, JERRY D. WIATT, JR., in the State of Washington, on or about February 1, 1998 through March 31, 1998, did give or otherwise supply liquor to S.N.W. (DOB: 3/30/84), a person under the age of 21 years or did permit a person under that age to consume liquor on his premises or on premises under his control.

DATED this 21st day of October, 2002.

CHRISTEN ANTON PETERS, WSBA# 23559
Deputy Prosecuting Attorney

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W. Excerpt of Defendant's Motions In Limine and Memorandum of Authorities in Support Thereof, September 9, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

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PROSECUTING ATTORNEY
SEP 09 2002
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TIME

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SEP 09 2002
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT, JR., Defendant.	NO. 01-1-01136-1 DEFENDANT'S MOTIONS IN LIMINE AND MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF

I. INTRODUCTION

Jerry Wiatt, Jr. is charged with twenty-four offenses involving ten different complainants. *See* Third Amended Information.[1] The charges can be summarized as follows:

- Counts I through VI (relating to A.C.);
- Counts VII and VIII (relating to J.B.);
- Counts IX and X (relating to H.K.);
- Counts XI through XIV (relating to M.B.);
- Counts XV and XVI (relating to S.W.);
- Counts XVII and XVIII (relating to K.H.);
- Counts XIX and XX (relating to Z.H.);
- Count XXI (relating to E.G.);
- Counts XXII and XXIII (relating to R.R); and
- Count XXIV (relating to A.J.).

[1] The defense has moved this Court to sever counts as to each complainant. *See* Defendant's Motion to Sever.

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condition, unless they contain otherwise inadmissible evidence such as expressions of opinion, conjecture or speculation). As such, the defense also maintains that such expert testimony is not likely to assist the trier of fact. *See* ER 702.

I. Neither the State nor the Witnesses Should be Permitted to Claim that the Defendant Ever Possessed or Provided Date Rape Drugs.

The State, and some of the State's witnesses (including the State's lead investigator), have suggested that the defendant may have used some unidentified date rape drug during the course of these offenses. The State has found no evidence to support this supposition. In fact, all persons associated with the defendant have confirmed that he never used drugs and that they never saw or heard of such drugs at the defendant's residence.

The State located no such drug when they searched the defendant's home. Moreover, the State has found no witness who will testify that the defendant possessed or used any such drug. As to the only alleged victim who has been tested for such drugs, the FBI crime lab found no trace or evidence of such drug.[6]

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offender and there was other overwhelming evidence.

[6] At the State's request, the FBI crime laboratory tested a hair sample provided by A.C. On August 30, 2002, the State provided a report which confirms that after several rounds of forensic testing, no commonly encountered drugs associated with drug facilitated sexual assaults were identified in A.C.'s system. A copy of the lab test will be provided to the Court.

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In light of this, the State should not be permitted to claim - or to even suggest - that the defendant used date rape drugs at any time. Simply put, the State lacks a proper factual basis to raise this issue at trial. There must be substantial evidence of drug usage before the issue can be injected into this trial. If the State is permitted to inject this issue into the trial and to suggest that defendant utilized date rape drugs, based on speculation and conjecture, without supporting evidence, it will surely undermine the defendant's opportunity to obtain a fair trial.

J. **The Court Should Exclude all Testimony to the Effect that Certain Complainants were "Virgins" Before their Encounters with the Defendant.**

In their statements to the police, four of the alleged victims in this case claim that they were "virgins" at the time of their sexual contacts with defendant. The defense believes that A.C., H.K., K.H., and S.W. may make such claims at trial.

Whether the complainant was a virgin at the time of the incident in question is irrelevant to whether she was raped or assaulted. *See, e.g., Goodson v. State*, 566 So.2d 1142, 1148 (Miss. 1990); *State v. Anguiano*, 672 A.2d 595, 596 (Maine 1996) (question whether alleged victim lost virginity was irrelevant); *Heflin v. State*, 643 So.2d 512, 518 (Miss. 1994) ("The victim's virginity is not relevant."); *Evans v. State*,

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X. Memorandum in Support of Motion to Admit Evidence of Complainants' Past Sexual Behavior, September 10, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

Honorable Gary Tabor
September 13, 2002

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 MEMORANDUM IN SUPPORT OF MOTION TO ADMIT EVIDENCE OF COMPLAINANTS' PAST SEXUAL BEHAVIOR

I. INTRODUCTION

In pertinent part, defendant Jerry Wiatt Jr. is charged with the following offenses:

- Counts I through VI (Rape in the Second Degree, Sexual Exploitation of a Minor, and Voyeurism Relating to A.C.);
- Counts VII and VIII (Rape in the Third Degree and Furnishing Liquor to a Minor Relating to J.B.); and
- Counts XXII through XXIV (Rape in the Third Degree and Furnishing Liquor to a Minor Relating to R.R.).

With respect to these three complainants, the defense plans to offer evidence of past sexual behavior pursuant to RCW § 9A.44.020. As detailed more fully in the Declaration of Counsel filed herewith and as argued below, this evidence is relevant to whether these complainants' consented to having sexual intercourse with Jerry Wiatt Jr. Pursuant to RCW §§

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9A.44.020(3)(a)-(b), the defendant hereby submits this memorandum in support of the admissibility of certain evidence relating to the complainants' past sexual behavior.

II. THE RAPE SHIELD STATUTE

Washington's rape shield statute makes "[e]vidence of the victim's past sexual behavior" "inadmissible on the issue of credibility and . . . inadmissible to prove the victim's consent except as provided in subsection (3)." RCW § 9A.44.020(2). Subsection (3) provides:

> In any prosecution for the crime of rape . . . evidence of the victim's past sexual behavior . . . is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:
>
> (a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.
>
> (b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.
>
> (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.
>
> (d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue

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> prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

RCW § 9A.44.020(3).

Importantly, the statute concludes: "[n]othing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence." RCW § 9A.44.020(4).

III. ARGUMENT

A. Relevant Evidence of the Complainant's Past Sexual Behavior is Not Excluded by the Rape Shield Statute.

The rape shield statute is not designed to establish a blanket exclusion of evidence which is relevant to issues which may arise in prosecutions for rape. *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842, *rev. denied*, 101 Wn.2d 1019 (1984). The statute was instead designed to combat the practice of introducing evidence of a complainant's past sexual conduct, unconnected to the charged crime, in order to show a general lack of veracity and to prejudice the complainant. *Id.; State v. Peterson*, 35 Wn. App. 481, 485, 667 P.2d 645, *rev. denied*, 100 Wn.2d 1028 (1983).

By its very terms, this statute is directed at the use of a complainant's prior sexual behavior to impeach her "general

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credibility for truth and veracity." RCW §§ 9A.44.020(2), (3); *State v. Hudlow*, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). Accordingly, evidence of the complainant's past sexual behavior offered to prove anything else is subject only to general relevancy requirements. *Carver*; 37 Wn. App. at 124; *State v. Williams*, 18 Wn. App. 398, 569 P.2d 1190 (1977); *State v. Kilgore*, 107 Wn. App. 160, 177, 26 P.3d 308 (2001).

For example, the *Hudlow* Court identified several factual situations in which past sexual conduct may be relevant:

> (1) evidence of prior sexual conduct by complainant with defendant; (2) to rebut medical evidence on proof of origin of semen, venereal disease or pregnancy; (3) distinctive sexual patterns so closely resembling defendant's version of the alleged encounter as to tend to prove consent on the questioned occasion; (4) evidence of prior sexual conduct by complainant with others, known to the defendant, tending to prove he believed the complainant was consenting to his sexual advances; (5) evidence of sexual conduct tending to prove complainant's motive to fabricate the charge; (6) evidence tending to rebut proof by the prosecution regarding the complainant's past sexual conduct; and (7) evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts charged.

Hudlow, 99 Wn.2d at 11.

As explained by one court, the statute is not a blanket exclusion of relevant evidence:

> The purpose of the statute is to encourage rape victims to prosecute, and to eliminate prejudicial evidence of prior sexual conduct of victim which often has little, if any, relevance on the issues for which it is usually offered, namely, credibility or consent. <u>However, the statute was not intended to establish a blanket exclusion of evidence which is relevant to other issues which may arise in prosecutions for rape.</u>

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Carver, 37 Wn. App. at 124 (emphasis added).

Such evidence may be admitted where relevant to issues other than the character of the victim. *See State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992) (statute does not bar evidence of prior abuse; may not preclude evidence to show fabrication); *State v. Cosden*, 18 Wn. App. 213, 568 P.2d 802 (1977) (statute does not prohibit evidence of victim's recent sexual activity when offered to explain the results of sperm tests); *State v. Williams*, 18 Wn. App. 398, 569 P.2d 1190 (1977) (victim witness may be attacked on reputation as to truth and honesty).

If the Washington rape shield law was read to prohibit evidence of motive to lie or fabricate, the statute must yield to constitutional requirements, especially in this case the Sixth Amendment. This principle of the Sixth Amendment Confrontation Clause trumping a limiting state evidentiary statute was recognized in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974), where a defendant in a criminal case sought to cross-examine a witness regarding his juvenile probation, in order to show that he might be subject to undo influence from the police, thereby demonstrating bias. The trial court excluded this evidence because of a state law protecting the records of juvenile offenders. The United States Supreme Court reversed, emphasizing that the Sixth Amendment right to confront witnesses takes precedence over state evidentiary statutes and the state law protecting the confidentiality of a juvenile's record "must fall before the

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right of the petitioner to seek out the truth in the process of defending himself." *Id.* at 320.

In so ruling, the Court emphasized the right of confrontation and cross-examination as paramount to obtaining a fair trial:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are attested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness . . . A more particular attack on the witness' credibility is effected by means by cross-examination directed towards revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony."

Id. at 316.

Davis v. Alaska was not a sexual abuse case nor did it involve a rape shield law. However, in *Olden v. Kentucky*, 488 U.S. 227, 102 L.Ed.2d 513, 109 S.Ct. 480 (1988),[1] the Supreme Court held that Kentucky's rape shield law unconstitutionally limited the cross-examination of a complaining witness in a sexual abuse case under a set of facts not even as compelling as those in the instant case. *Id.*

In *Olden*, two African American men who were charged with raping a Caucasian female, claimed she consented. The alleged victim claimed that when she was out drinking with a girlfriend,

[1] Copies of *Olden v. Kentucky* and other out-of-state cases cited in this

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from whom she became separated, she accepted a ride from the defendants, who then raped her. At trial, the defendants attempted to bring in evidence that the complaining witness was having an extra-marital affair at the time of the rape with another man who was present at the bar that evening, and concocted the story in order to protect her relationship with him, in that he would have grown suspicious that she was cheating on him if he learned she left with the two men. The trial court rejected this testimony on the basis of the Kentucky rape shield law.

The United States Supreme Court reversed, holding that the proposed cross-examination would have given a reasonable jury "a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." *Id.* at 233. Since the Kentucky rape shield law did not acknowledge the significance of petitioner's Sixth Amendment right to confront witnesses, the Supreme Court reversed the conviction and held that the rape shield law was unconstitutionally applied:

> In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual acts and that Matthews -- out of fear of jeopardizing the relationship with Russell -- lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination."

Id. at 232.

---

brief are attached as Appendix A for the court's convenience.

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The Florida Supreme Court decided this same issue in *Lewis v. State*, 591 So.2d 922 (Fla. 1991), where it held that a defendant was denied his confrontation rights by the trial court's refusal to permit him to show that his stepdaughter, who was accusing him of rape, was doing so in order to keep her mother from discovering that she had been sexually active with her boyfriend. The court held that this prohibition violated the *Olden* rule and his Sixth Amendment confrontation rights:

> Lewis' defense is for all practical purposes the same as that raised in *Olden*, that the alleged victim fabricated the accusations in order to preserve a sexual relationship with a third party. 570 So.2d at 421 (Allen, J., dissenting). Lewis, like Olden, has a constitutional right to confront his accuser and develop his defense through reasonable cross-examination . . .
>
> * * *
>
> As in *Olden*, exclusion of the proffered cross-examination with such strong potential to demonstrate the falsity of the alleged victim's accusations cannot be justified by the public policy furthered by the exclusion. We cannot conceive of a reasonable juror who would not have received a significantly different impression of the victim's credibility had the proffered cross-examination been allowed . . . Since the entire case against Lewis was based on his stepdaughter's accusations, we cannot say that the error was harmless beyond a reasonable doubt.

591 So.2d at 925-26.

State v. Jalo, 557 P.2d 1359 (Or. App. 1976), is also on point. There, the defendant, charged with sexually abusing a ten-year-old girl, denied the allegation and contended that the ten-year-old made up the charge when he had discovered that she and his thirteen-year-old son were engaging in sexual conduct and threatened to tell her parents, but that she falsely accused him of the crimes before he could do so. The trial court

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excluded this defense on the basis of the Oregon rape shield law. The Oregon Court of Appeals reversed, holding that the Oregon rape shield law was unconstitutionally applied in that it kept him from confronting the complaining witness:

> Here the only evidence adverse to defendant came from the complainant. In response the defendant sought to place before the jury evidence, not inherently incredible, that he had discovered the young complainant's sexual misconduct and had threatened to tell her parents. This was offered to attempt to establish the inference, not inherently unreasonable, that the complainant had a motive to and did falsely accuse defendant of the offenses in question.

Id. at 1361.

In *Stephens v. Miller*, 989 F.2d 264 (7th Cir. 1993), the court held that it was a denial of the Sixth Amendment Confrontation Clause for the Indiana courts to rely on its rape shield law to prohibit a defendant from testifying concerning specific contents of conversations that allegedly angered the victim and provoked fabrication during the course of the sexual intercourse.

Through Westlaw, defendant Wiatt found 25 Washington cases wherein the rape shield law was referenced.[2] In many of these cases, the Washington courts held that the rape shield law required the exclusion of proffered evidence regarding the victims' past history. However, *Olden v. Kentucky* was neither cited nor mentioned in any of these published cases. This suggests that the *Olden* case has never been presented to the court in the context of the rape shield statute. Since the

[2] This includes published Washington cases containing the term: "rape shield."

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Sixth Amendment of the United States Constitution is a constitutional requirement, the United States Supreme Court's decision on a matter involving the constitution will take precedence over a state court's review of the same issue.

Moreover, an analysis of the cases decided post-*Olden* demonstrate that they are distinguishable from the instant case. For example, *State v. Knutson*, 121 Wn.2d 766, 854 P.2d 617 (1993), involved a discovery motion for a nurse's notes of a fourteen-year-old female complaining witness's medical records stating that she had been a prostitute in the past. Since the only issue at trial was whether the complaining witness misrepresented her age, and since neither consent nor an offer of prostitution would in any way be relevant, the order denying discovery of these notes was affirmed:

> Although we are sensitive to the importance impeachment evidence can have in sexual assault cases where the complaining witness and the accused are the only witnesses, we hold that the connection between the nurse's note and the misrepresentation of age issue is too tenuous to create a reasonable probability that the outcome of defendant's trial would have been different if he had had access to this evidence. (Emphasis added.)

121 Wn.2d at 775.

In *State v. Summers*, 70 Wn. App. 424, 853 P.2d 953 (1993), the court considered whether prior sexual history was relevant to show that a 44-year-old developmentally disabled woman consented to sex with a stranger. The court held that the record was insufficient to establish that some vague references to prior sexual behavior would in any way be probative of this issue of whether she consented.

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In *State v. Markle*, 118 Wn.2d 424, 823 P.2d 1101 (1992), the court held that the trial court improperly ruled that evidence of prior sexual abuse of minor children could be excluded under the rape shield statute, although it could be excluded on other grounds.

Likewise, in *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989), the court explained that the testimony of the victim in a homosexual rape case that he did not find anal intercourse pleasurable did not open the door to testimony of other individuals who claimed that they had consensual anal intercourse with him, because:

> This testimony revealed, rather than concealed, that [the victim] on previous occasions had consensually engaged in anal intercourse. The state's evidence thus created no favorable impression about [the victim's] sexual mores that [the defendant] would need to rebut. And the sort of cross-examination [the defendant] sought to undertake could not in any event have cast a less favorable light on [the victim's] testimony.

113 Wn.2d 631.[3]

As previously stated, none of these cases cited mentioned *Olden v. Kentucky*. The only Washington case defendant could find through computer research where *Olden v. Kentucky* was cited was *State v. Rosborough*, 62 Wn. App. 341, 814 P.2d 679 (1991), a felony harassment case where the defendant claimed that his lawyer failed to cross-examine the victim regarding their relationship and the fact that they had previously lived together. In a footnote, Division One explained that *Olden v.*

[3] The only other post-*Olden*, published "rape shield" case is *State v. Kilgore, supra.*

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Kentucky was distinguishable. Nevertheless, the court recognized its importance in a case where the evidence of prior sexual history was relevant to the complainant's motivation:

> Here, unlike *Olden*, the defendant was able to cross-examine [the victim] and present his own testimony on the issue of the couple's living arrangement. More important, the excluded evidence in *Olden* went directly to the defendant's theory of the case, involving a motivation for the complaining witness's alleged lying. No similar claim is raised with respect to the evidence here. (Emphasis added.)

Id. at 350.

Importantly, in *State v. Hudlow*, 99 Wn.2d at 16, a case which predated *Olden v. Kentucky*, the Washington court nevertheless recognized that where there is highly relevant evidence involving prior sexual history, it must be admitted in accordance with the federal and state constitutions:

> As to evidence of high probative value, however, it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22.

The *Hudlow* Court also held that a trial court should not engage in a balancing process to determine the adverse or prejudicial effects on the victim when considering the rape shield law, because those interests are implicit in the statute itself:

> We agree with the Court of Appeals in this case that the balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truth finding process itself. Rape shield statutes such as the one before us are, by their very nature, intended to minimize the embarrassment and humiliation to the prosecution witness by limiting the introduction of evidence of prior sexual behavior. Thus, considerations of prejudice to the victim are built into the rape

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> shield statute and further consideration of that factor may be too far in protecting the victim at the expense of defendant's right to a fair trial. The prejudice to the fact finding process itself must be considered to determine whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis. In addition to legitimate state concerns of preserving the integrity of the truth finding process, the statute requires the trial judge to consider the effect of excluding such evidence on the defendant's right to a fair trial. Former RCW 9.79.150(3)(d). These considerations -- the integrity of the truth finding process and the defendant's right to a fair trial -- should be the factors considered by the trial court in exercising its discretion to admit or exclude the evidence. Further consideration of the impact of past sexual behavior evidence on the complaining witness, as in *Kalamarski* and *Williams*, should no longer be the standard for balancing the probative value of such evidence against its possible prejudicial effect.

99 Wn.2d at 14. Therefore, the court must not

> consider the possible adverse effect the evidence might have on the victim. Under the statute, the possibility of humiliating and embarrassing the victim is irrelevant.

5A Wash. Prac., Tegland, 4th Ed., § 412.3, p. 97 (emphasis added).

IV. CONCLUSION

For all of these reasons the Court should admit evidence of A.C., J.B., and R.R.'s past sexual behavior because it is

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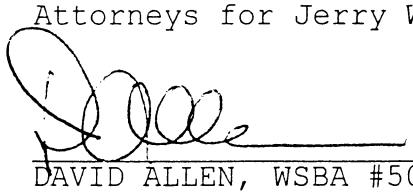
relevant, not unduly prejudicial, and to refuse to allow such evidence would violate defendant's right to confront and cross-examine the witnesses against him.

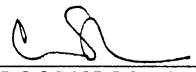
DATED this 10th day of September, 2002.

Allen, Hansen & Maybrown, P.S.
Attorneys for Jerry Wiatt Jr.



DAVID ALLEN, WSBA #500

TODD MAYBROWN, WSBA #18557



CASSANDRA L. STAMM, WSBA #29265

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Y. Declaration of Counsel in Support of Motion to Admit Evidence of Complainant's Past Sexual Behavior, September 18, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
BETTY J. GOULD, CLERK
9-18-02
By DEPUTY

FILED UNDER SEAL

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO ADMIT EVIDENCE OF COMPLAINANT'S PAST SEXUAL BEHAVIOR

I, Todd Maybrown, do hereby declare:

1. I am one of the attorneys representing the defendant, Jerry Wiatt Jr. in the above-entitled proceedings. I am familiar with the facts and circumstances surrounding the charges in this case.

2. Consistent with RCW 9A.44.020, this declaration is being submitted in support of defendant's motion to present evidence of the past sexual behavior of complainants Raminta Rankis (R.R.), Jennifer Bowles (J.B.), and Alvina Cruz (A.C.).

3. Witness Alisha Cochran has been interviewed by the police regarding this case. The defense anticipates that Ms. Cochran will testify consistent with the attached statement. *See* Appendix A. In particular, Ms. Cochran will testify that, after having sexual intercourse with the defendant, Raminta Rankis left the defendant's home and then had sexual intercourse with another young man.

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4. Witness Lindsay Howard has been interviewed by the police regarding this case. The defense anticipates that Ms. Howard will testify consistent with the attached statement. *See* Appendix A. In addition, the defense anticipates that Ms. Howard will testify that she overheard Ms. Rankis state that she wanted to have sexual intercourse with all of the men who lived at the defendant's residence.

5. The defense also anticipates presenting the testimony of Justin Allison. Mr. Allison lived in the home of Jerry Wiatt Jr. during 2000 and 2001. Mr. Allison knows Raminta Rankis, and he was present on an occasion that Ms. Rankis stated that her goal was to have sex with every man who was living at the defendant's house. On another occasion, while several persons were sitting together in the kitchen at the defendant's residence, Mr. Allison overheard Ms. Rankis tell the defendant that he should have a pole installed in the kitchen so she could dance for everyone.

Mr. Allison has had intercourse with Ms. Rankis on one occasion. After this encounter, Ms. Rankis purchased a visor with a Playboy bunny emblazoned on it and gave it to Mr. Allison as a gift.

Mr. Allison also knows Jennifer Bowles. On one occasion, Justin Allison walked into his own bedroom and found Ms. Bowles performing a striptease for several other young men, including Jerry Wiatt Jr. Mr. Allison put a stop to this display and asked Ms. Bowles to leave his room. On a few occasions, Mr. Allison has overheard Ms. Bowles state that she wanted to "get

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with" - or have sex with - the defendant. Given Ms. Bowles actions and behaviors while with the defendant, it was very clear to Mr. Allison that that she was actively seeking a sexual encounter with the defendant.

6. The defense will also present the testimony of Barry Specht. Mr. Specht lived in the home of Jerry Wiatt Jr. during 2000 and 2001. Mr. Specht knows Raminta Rankis, and he was present on an occasion that Ms. Rankis stated that her goal was to have sex with every man in the defendant's house. Like the other residents of the Wiatt home, Mr. Specht has had sexual intercourse with Ms. Rankis on one occasion.

7. If the Court denies the defendant's motion in limine and allows Alvina Cruz to testify that she was a virgin at the time of her encounter with the defendant, the defense will present evidence that Ms. Cruz has told other persons that she did in fact have sex prior to the incident involving the defendant.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 9th day of September, 2002.

TODD MAYBROWN, WSBA #18557
Attorney for Defendant

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APPENDIX A

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 27 Aug 2001
Time: 1350 hours

NAME: COCHRAN, ALISHA J.

DATE OF BIRTH: 06-27-81

ADDRESS: [redacted]
Home: [redacted]

INTERVIEWING OFFICER: Det. Louise Adams, TCSO

INTERVIEW LOCATION: Thurston County Sheriff's Office

ALSO PRESENT:

Q. Alisha, when we talk today, I'm going to record this conversation, is that with your permission and consent?
A. Yes.

Q. You have to talk out loud, you have a soft voice. Do you know a gentleman by the name of Jerry Wiatt?
A. Yes.

Q. How long have you known Jerry?
A. About four years.

Q. About four years.
A. It's 3½, 4.

Q. Okay. And how old are you now?
A. I'm 20.

Q. So when you first met him, you were how old?
A. About 16.

Q. Okay. How did you meet him?
A. Um, his little brother was my best friend's friend. They went to school together. (Indistinguishable)

Q. So Jeff Wiatt...
A. Yeah.

Q. ...went to school with?
A. My friend, Jenny.

Q. Okay. And when you first met Jerry, where was he living?
A. Um, on College.

Q. Okay. In Lacey?
A. Yeah.

Q. Alright. Um, were you ever at his house in Lacey?
A. Yeah.

Q. Okay. And what kind of things generally went on at Jerry Wiatt's house in Lacey?
A. We just went over there, I don't know.

Q. Hung out?
A. Yeah.

Q. Okay. Um, was that a place where young girls would generally hang out?
A. No.

Q. No?
A. It was somet-, mostly like his friends...

Q. Okay.
A. ...and stuff from college or school.

Q. Who'd he live there with?
A. Um, two of his roommates.

Q. Do you know who they are?
A. Yeah.

Q. Who?
A. Tony and Pat.

Q. Tony who?
A. Grant.

Q. Okay, and Pat?
A. I don't know his last name.

Q. Okay. Both Tony and Pat are males though?
A. Yeah.

Q. Okay. Um, when La-, when you, when Jerry was living in Lacey and you were going there, did he ever serve you alcoholic drinks?
A. Um, oh, sure.

Q. Okay.
A. We, yeah, I'm sure we drank over there.

Q. Okay. And Jerry provided the alcohol?
A. I don't know that.

Q. Okay.
A. But it was alw-, yeah, I don't know, I can't say that he did.

Q. Okay. But you did drink at his house but you're not sure whether he provided the alcohol?
A. Yeah.

Q. Okay. And, um, were other teenagers there drinking when you were there?
A. Just like my friends.

Q. Okay, and I'm assuming, were those teenagers too, under the age of 21?
A. Yeah.

Q. Okay. And how did they get their alcohol?
A. Who?

Q. Your friends?
A. We, they just came with me.

Q. Okay. And how did you get your alcohol when you got there?
A. Pour a drink.

Q. Okay. And whose alcohol was it?
A. I don't know. We were just-

Q. Okay. Well, talk to me about the alcohol in the house. You went over to the house and you wanted to drink, how would you go about getting one?
A. (I don't know sound made) Get one.

Q. Okay, and where was the alcohol kept?
A. I, he, he didn't have it in a certain place, I don't know what you mean.

Q. Okay. Well, I mean like if you'd come to my house, and you'd want a drink, you'd have to go into my cupboard and get down a bottle of alcohol and-
A. Oh. It never was, I don't know.

Q. Did he have just alcohol on a counter and people just helped themselves or how did that work?
A. Yeah, if it was like a party or something...

Q. Okay.
A. ...like prom night or something.

Q. Okay. Um-
A. It wasn't like every day that I went over there at all.

Q. Right.
A. (Inaudible)

Q. Right. But when you went there, there was alcohol, there was generally no, I'm assuming there was no questions asked from what you're saying, and if you wanted a drink, you just made a drink or someone made you one?
A. Sure.

Q. Okay. Um, while you were at his house in Lacey, um, the, the times that you were there, was there ever any problems with any of the females that went there? Were an-, any of those girls ever have a problem with Jerry or complain to you about Jerry's behavior?
A. No.

Q. Okay. Alright. Um, and have you been to his house in the Cedrona Development?
A. Yes.

Q. Okay. And how many times do you think you've been there?
A. Probably about 2 or 3 times.

Q. 2 or 3 times?
A. Um hm.

Q. Okay. And-
A. Well, one, two, yeah, about three.

Q. Okay. And did Jerry ever, um, serve you alcohol beverage at his house in Cedrona?
A. I'm sure.

Q. Okay.
A. Yeah.

Q. Alright. That's, was that a pretty common thing, to drink when you went to Jerry's house?
A. Yeah.

Q. Okay.
A. I'm (indistinguishable) (laughing)

Q. (Laughing) Um-
A. Not.

Q. While you were at, um, his house in the Cedrona Development, did any females or friends of yours ever complain to you about Jerry Wiatt's behavior in that house?
A. No.

Q. Okay. Did anything ever happen in his Lacey house while you were there that caused you to be concerned at all?
A. No.

Q. How about in the Cedrona house?
A. No.

Q. Okay. Um, did Jerry ever do anything inappropriate with you or anything that caused you to be uncomfortable?
A. No.

Q. Okay. Um, do you know a young girl by the name of Raminta Rankis?
A. Yes.

Q. Did you ever go with her or were you ever with her at Jerry Wiatt's house in the Cedrona Development?
A. Yes.

Q. Okay. Can you tell me what you remember about that time?
A. Yeah. Um, we went there, and we were just hanging out, watching movies.. Everybody was there, we were drinking. Um, I don't, it was so long ago. I don't really remember. Somehow she was all over him, and they were whatever, and I tri-

Q. In front of everybody or-
A. Yeah.

Q. Okay.
A. Well, I'm trying to remember. I know that it ended up them being in the bedroom, and I was trying to get Raminta to leave but she didn't want to.

Q. Okay.
A. And-

Q. Was Raminta drinking?
A. Um, yeah. (Indistinguishable)

Q. Okay. Was she intoxicated? Did she become intoxicated?
A. I, I don't know. What do you, like-

Q. Well, was she slurring her speech, did you think she had too much to drink...
A. No.

Q. ...anything like that happened?
A. No.

Q. Okay. And somehow she ends up in Jerry's room, you're not real sure how?
A. Um hm.

Q. And then what do you do?
A. I just kept going up there and, you know, Raminta, let's go. She's like, no, no, you know, and-

Q. When you go up there, is the door open or shut?
A. Shut.

Q. Okay. .
A. I just-

Q. Locked or not locked?
A. I just walked in.

Q. Okay. When you walked in-
A. I think after a while, they locked the door.

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Q. Okay.
A. So-

Q. When you walked in, what was going on?
A. I sure they were making out or...

Q. Okay.
A. ...whatever.

Q. Alright. Um, do you know if Raminta had sex with Jerry Wiatt that...
A. Yes.

Q. ...that time? How do you know that?
A. She told me.

Q. What'd she tell you?
A. Well, it's kinda funny. We left, finally, you know, I got her to leave, we left, and then we went over to, um, one of my friends, over in Breckenridge, and, um, she had sex with, uh, my friend's roommate also. So it was kinda like the next day thing, I was like, you know, I asked her, 'cause, you know, they had sex, and I could hear 'em, I'm like, you had sex with him and Jerry? And she's like, yeah. I'm like, don't you feel, you know, that's horrible, she, that's how (indistinguishable)

Q. Did that surprise you?
A. Yeah.

Q. Is that something she would normally do?
A. Well, I don't really know her, that's the thing. Like we just went to high school together, and we just started hanging out like right then. So I don't even know the girl, it just, I stopped hanging out with her, of course, (indistinguishable) I don't talk to her at all.

Q. Okay.
A. But-

Q. So you don't know if that was normal behavior for her?
A. Yeah.

Q. Or if-
A. As far as, as much as I hear, it is because I actually met her at another party, um, she was with, I went to Olympia Christian School with her boyfriend at that time.

Q. Who was?
A. Um, Eric Fisher. And then like, it's kind of like a pattern, like she always had different boyfriends. Then I went to another party, um, she was going with this guy named Adam.

Q. Um hm.
A. And, um, so it was like, you know, I was like, oh, okay. That's why I really didn't hang out with her again. You know that night I hung out with her, and I was like, okay, really, I'm not going to hang out with her again.

Q. Okay. And you were kinda su-, surprised 'cause she had sex with two different people?
A. Very surprised.

Q. Okay.
A. And Jerry's like my friend, that's kinda like, I don't know.

Q. Okay. Um, did Jerry ever do anything to you that made you uncomfortable?
A. No.

Q. Okay. Um, what's your relationship with Jerry?
A. He's just my friend.

Q. Okay. Did you guys ever have a sexual relationship?
A. No.

Q. Okay. So you've never had sex with Jerry?
A. No.

Q. Okay. You know anything about video taping that goes on in his residence?
A. No. That's the first I heard of it. 'Cause first it was, everybo-, his house g-, everybody'd steal stuff, and then, what was it, yeah, it was just the stealing thing, and then...

Q. Do you think that stealing is really going on?
A. ...(indistinguishable) want to. I don't know. He just would tell me...

Q. Do you think your friend...
A. ...about it.

Q. ...Valerie, ever did that stealing?
A. Sh-, no.

Q. Okay.
A. (Indistinguishable)

Q. Alright.
A. She never ad-, admitted to me, as far as I know so-

Q. Okay, alright. Um, can you just give me briefly an idea of what kinds of things, typical behavior of things that go on at Jerry's house.
A. Just everybody having fun.

Q. Okay.
A. He's got a play house, you know, pool table, hot tub, I don't know, people just go over there to have fun Friday night.

Q. Okay. Is there a lot of sex that goes on at that house?
A. I would imagine. He always had new roommates so-

Q. Okay. Um-
A. I mean, everybody, you know.

Q. Okay. How, what was the general age of the girls that were going there?
A. Um, range?

Q. Um hm.
A. That, probably like...

Q. Ages.
A. ...at the youngest, 17. And usually like 18 to 26, you know, 'cause his friends would be there too, his girlfriends and friends...

Q. Um hm.
A. ...and guy friends and everything.

Q. Okay. Um, and how many times do you think you've been at his residence in Cedrona?
A. Probably about, I think I-, more than three but I want to say three.

Q. Okay. And never ever, and correct me if I'm wrong here, any times that you went there, there were girls that go upset or girls that had too much to drink or anything like that?
A. I ha-, th-, like I said, this is the first that I've heard like of everything. And no one's ever said anything to me.

Q. Um hm.
A. So-

Q. But did you see anything like that?
A. See anything, no.

Q. Okay, or hear anything if it was going on?
A. No. I always left early.

Q. Okay.
A. I just went over there and leave early.

Q. Do you know of, have any of the girls, um, since he was arrested and all that, talked to you about this or come forward or told you things that happened at his house?
A. H-

Q. You had any contact with any of 'em?
A. Hu-uh.

Q. Do you know who any of 'em are?
A. Um, Raminta.

Q. Okay. Anybody else?
A. Um, Alvina.

Q. Okay.
A. I, I can't think of any other names.

Q. How did you man-, how did you end up talking to Alvina about this?
A. I didn't ta-, well, everybody, it's just everybody knows...

Q. Okay.
A. ...the, the names, you know. I, I stay secluded from all the drama and all the...

Q. Right.
A. ...high schoolers and all the, all my friends. I have like two friends.

Q. Okay.
A. And my boyfriend and that's all.

Q. Did you ever have a discussion with Alvina about this case and what happened to her?
A. Briefly. She w-, she didn't talk about it so-

Q. Okay. Um, did you ever tell Alvina that you were a victim of Jerry Wiatt's...
A. No.

Q. ...or that he'd done bad things to you?
A. No.

Q. Okay. Um, and you've never seen, have you ever seen any video taping equipment at his house?
A. Um, no.

Q. Okay. Did you ever-
A. I'm sure I have, you know.

Q. Okay.
A. But I mean I can't remember briefly, or you know, what I saw, you know.

Q. Okay. Has he ever taken a video tape of you?
A. No.

Q. Has he ever photographed you when you were not completely clothed?
A. No.

Q. Okay. There's no picture out there that he had on his computer that had you sitting on a bed without your shirt on?
A. No.

Q. Um, what would you say if I told you that I've talked to lots of people who've seen that picture?
A. They don't know what they're talking about.

Q. Okay. When was the last time you talked to Jerry?
A. (Sigh) Um, I don't know, probably like couple weeks ago he called me.

Q. Okay. And did you discuss any of this investigation?
A. Um, no.

Q. Okay.
A. Not really.

Q. This wasn't even brought up in conversation?
A. Well, yeah, it, 'cause I didn't know that it had happened. I didn't see the news, I didn't hear anything. It was actually when it first happened and, you know, uh, he just told me briefly he couldn't really talk about it.

Q. Okay.
A. So-

Q. Alright.
A. He just-

Q. Did anybody ever offer you any money not to say anything?
A. No.

Q. Okay. Did he ever ask you not to say anything to law enforcement or tell you what to say to law enforcement...
A. No.

Q. ...if and when you were contacted?
A. No.

Q. Okay. Um, how about with Jeff, have you talked to Jeff about this case?
A. No.

Q. Alright. Has, um, Jeff, or so, hang on. I got my train of thought messed up here. She's just coming in to get some water.
A. Okay.

Q. It's unlocked Cheryl. Um, and so you have never talked to Jeff about this?
A. Um, well, then both at the same time. When I talked to Jerry.

Q. Oh, you were on the phone together with them?
A. No, I had stopped by...

Q. Okay.
A. ...to say hi.

Q. Alright. Is this after he had been arrested or before?
A. Uh, gosh, I think it was after.

Q. Okay.
A. Yeah.

Q. Alright. And so you stopped by his house in Cedrona?
A. Yeah.

Q. Okay. And who was there when you stopped by?
A. Just him and Jeff.

Q. Just Jeff and Jerry?
A. Yeah.

Q. Okay. And that's when it came up briefly into the conversation but not very much?
A. It, well, he was like, did you hear? He was like, is that why you're here? Like, I'm like, what are you talking about? He kinda just briefly told me, and I was like, oh, okay.

Q. Okay. So you know that, um, Raminta has come forward and indicated to me that she was a victim, and all you pretty much know about that is that the night you were there with her, she had sex with Jerry and another, and then you guys left, and then she had sex with someone else?
A. Yeah.

Q. Okay. And she's never, she never told you that she was raped?
A. No.

Q. Okay. Jerry ever do anything that upset you?
A. Yeah, I'm sure.

Q. Okay.
A. But nothing, nothing like this.

Q. Okay.
A. I mean, I like him but I don't like him, you know. It's like that, like I n-

Q. Okay, why wouldn't you like him?
A. I don't know.

Q. Have you ever heard about any date rape drugs or anything like that...
A. No.

Q. ...used at the residence?
A. I heard that, that's, uh, usually the girls, this is what I have to explain to you. I'm one of the smart ones. The girls that go over there are, they know like they're going over there to do, to, you know, drink and have fun and everyth-, every, you know, and they go over there because they like Jerry or they like his roommates, you know? That's what I, I don't understand how it became this big. I mean, I'm not sticking up for Jerry at all. But, I mean, girls know they're going over there because they either talk to Jerry and they like Jerry or they talk to, you know, his other four roommates, you know, it's, they know that, I can't explain it. Like they've been talking to him, and you know, they hang out with him. He takes 'em out to dinner or, you know, I can't explain it. Like if they ever thought that he was like a rapist or something or whatever, everybody saying that there's date rape drugs over there, you know, I would be smart enough not to go over there.

Q. Um hm.
A. If that were the case.

Q. Um hm.
A. But I just, I don't know. I don't know in Alvina's case but I know that Raminta, that, you know, that wasn't. That's not even, I'm sure she just heard all the commotion and wanted to be a part of it.

Q. Um hm.
A. As far as that may apply to all the other girls too, you know. Oh, you know, I don't know. Like if they go over there and they drink, you know, and they know how much they're drinking, and they're drinking or whatever, and then they decide to go, you know, you can, you see what I'm trying to get at? Like if you were being raped or whatever or, is it more of like they drink, and then they don't remember, and then the next day then it bugs them? Or like what is the case, like I don't-

Q. It's all different.
A. I mean, I don't know.

Q. Were you ever there when, um, someone got upset because a friend was in a bedroom, and people were pounding on doors and trying to get girls out or anything like that?
A. Uh, hu-uh.

Q. So as far as you know, everybody that was up in Jerry's room was completely sober, knew exactly what they were doing, and they were in his room because they wanted to have sex with him?
A. No, they weren't so-, well, I'm sure they weren't so-, they weren't sober but-

Q. Do you, um-
A. I mean, they'd choose to go upstairs with him, and, you know, if they have sex, then they have sex but-. It's not like he drags 'em up there or, you know.

Q. Okay.
A. You know what I mean? I don't know.

Q. Do you believe that there's ever a point where someone has too much to drink where they're not capable of consenting to a sex act?
A. I'm sure that that happens.

Q. Okay. Do you think that ever happened at Jerry's house?
A. That may have.

Q. Okay. Alright. Is there anything else, Alisha, that you would like to add to this statement at all?
A. No.

Q. Is everything you told me today true and correct to the best of your knowledge?
A. To the best of my knowledge.

Q. At any time since we've been talking have you asked me to turn off the tape recorder?
A. No.

Q. I'm going to conclude this statement. It's approximately 2:08 PM.

ENDING TIME: 1408 hours

APPENDIX B

Thurston County Sheriff's Office

☐ Suspect
☐ Victim
☒ Witness

Case #: 01-24273-07
Date: 28 Aug 2001
Time: 1517 hours

NAME: HOWARD, LINDSEY L.

DATE OF BIRTH: 10-07-82

ADDRESS: [redacted]

INTERVIEWING OFFICER: Det. Louise Adams, TCSO

INTERVIEW LOCATION: Telephonically from the Thurston County Sheriff's Office

ALSO PRESENT:

Q. Lindsey, when we speak today I'm using a tape recorder to record our conversation. Is that with your permission?
A. Yes.

Q. Lindsey, um, do you know a gentleman by the name of Jerry Wiatt?
A. Yes.

Q. How long have you known Jerry?
A. Um, about two years.

Q. Okay. So you're 18 years old now?
A. Yes.

Q. So how old were you when you first met him?
A. About 16.

Q. Okay. And where did you meet him at? How did you meet him?
A. Um, I met him through my boyfriend, which is friends with Jerry.

Q. And who's your boyfriend?
A. He's no longer my boyfriend, but it was Barry Speck.

Q. Okay. And when, you've been to the Wiatt residence I'm assu-, in the Cedrona development?
A. Yes.

Q. Okay. And was that when Barry was living there?
A. Yes.

Q. Okay. And is that how you ended up meeting him?
A. Yes.

Q. Okay. Um, what kinds of things, um, were going on at the Jerry Wiatt residence while you were there?
A. Um, not exactly a party but a get-together with guys and girls and alcohol and we were just having fun.

Q. Okay. And, um, who was providing the alcohol?
A. Um, whoev-, how everybody got it, they would probably, somebody that was over 21 would, Jerry and probably some of his older friends.

Q. Okay. Did you ever drink alcohol at the house?
A. Yeah.

Q. Okay. And who provided you that alcohol?
A. Who gave it to me?

Q. Yeah.
A. Um, I got it myself but I, Jerry probably.

Q. Okay.
A. He, I gave him money if th-, if they'd go on a run.

Q. Okay. And-
A. I don't know.

Q. And they'd go on a booze run and then everyone would have their alcohol, is that how that worked?
A. Yeah.

Q. Okay. And you were clearly under the age of 21 when that's happening because right now you're 18, is that correct?
A. Right.

Q. Okay. Um, what other kinds of things happened at the house?
A. Um, I..., guys trying to get on girls.

Q. Okay.
A. It's known as like a, I don't know, a lot of people knew them as like sex people. I don't know. It's hard to explain. I tried to stay out of it since I had a boyfriend.

Q. Okay. Did you personally have any problems at Jerry Wiatt's house?
A. No.

Q. Okay. Did Jerry Wiatt or anybody else at that house do anything that made you feel uncomfortable?
A. Um, no.

Q. O-
A. Well, kind of yes. It's, it's like if Jerry or anyone else in the house was trying to get on a girl, and she was saying no, they'd try to keep, you know, asking her...

Q. Um hm.
A. ...or asking the person.

Q. Uh huh.
A. So that kinda, but it never happened to me 'cause I had the boyfriend there so-

Q. Okay, who did it happen to?
A. Um, I remember a couple times Crystal, um, uh-

Q. Crystal who?
A. Hoskins.

Q. Um hm.
A. Um, I could name a couple other, I don't know their names but I've seen them over at the house a couple times. I don't even remember their names.

Q. Um hm.
A. But a couple girls.

Q. Okay. And how old was Crystal when you saw this?
A. Crystal was 17.

Q. Okay. And how old d-, were the other girls?
A. Um, probably their ag-, like their ages probably 17, 18, or 19.

Q. Okay. And when you say, I don't really quite understand, or can you explain to me, you know, you said when they're trying to get over 'em, or whatever. What, can you tell me what's going on at the house when that happens? What, what made you uncomfortable?
A. It's like you just down-, like say I was like downstairs like watching a movie, and you can see the kitchen from there where most of 'em like hung out 'cause that's where the alcohol is.

Q. Uh huh.
A. Um, like say for instance Jerry was trying to like (indistinguishable) come here, you know, come upstairs, or you know, and she's like, no. If she said no, you know, if this happened...

Q. Um hm.
A. ...for stance like, if she'd say no, he'd keep, you know, asking, oh, come on, you know, that kind of stuff.

Q. Okay.
A. If they, she said no, he'd (indistinguishable)

Q. Um hm.
A. So-

Q. And that generally, when people said no at that house, people pushed the limit, is that what you're telling me, and that kind of made you uncomfortable?

A. Yeah.

Q. Okay. Um, was there ever during the times that you were at the house, wa-, was there anything that happened with other girls, any other girls, that made you uncomfortable? Did you see anything that caused you to be concerned about the other girls?

A. Um, I, like sometimes Jerry did get the girls in his room, and with the door closed I had no idea what went on...

Q. Okay.

A. ...you know. If, I'm sure it's not like they'd say yes right away but if you did, I don't, it just like it kind of made me wonder if, what he was doing to them in the room, you know, if he was doing something that they didn't want to do but I wasn't going to go in.

Q. Okay. How come?

A. Um, I don't know. 'Cause it's like they, if he got 'em in the room, you know, then I'm sure, then that's what they wanted, I guess, in a way. I don't know.

Q. Did you ever, um, see any girls leaving the room and they were upset?

A. No.

Q. Do you ever know of a time where some of the different roommates or whatever hid girls from Jerry or let 'em stay in someone else's room or anything like that?

A. Hid them?

Q. Well, like, um, let's say, uh, for instance, you know, Jerry's interested in someone, and they're not really interested in him, and so he keeps pestering and so one of the roommates say, well, you can stay in my room tonight, you'll be okay or safe or anything like that? Do you remember anything like that happening?

A. Um, I didn't, I didn't hear them offer them to stay but they might have been in a different room. Like I don't know if Dustin Allison's in this picture...

Q. Um hm.

A. ...um, I know he had a couple, like Crystal, and her friend, Danni, I know they've stayed in Justin's room or sometimes even Barry's room.

Q. Um hm. And why would they do that?

A. Um, maybe because they didn't want to stay in Jerry's room, the, maybe they were trying to override the problem.

Q. Um hm. Okay. Do you think bad things, um, happened at the Wiatt residence?

A. Yeah.

Q. Or have bad things happened there?

A. Yes.

Q. What kind of bad things?

A. Um, well, first of all I'm sure most the people, like the girls he hangs out with are not 21 so that's, and once, once you're intoxicated, it's kinda, you know, you're kinda, and knowing Crystal, I've seen her there intoxicated, and she's kinda, you know, easy, not easy like that but like, oh, come up here, it's like, oh, okay, you know. And kind of believes anything they say.

Q. Um hm.
A. So-

Q. Tell me about the time that Crystal was there. What do you remember about that time?
A. Um, I've been there with Crystal a couple times.

Q. Um hm.
A. Like I haven't been there, I've been there when she's been there. Um, I remember one time we were all joking around, and like she had a really bad bloody nose.

Q. How'd she get the bloody nose?
A. I don't remember if it was Danni or Jerry accidentally bumped her in the nose.

Q. Um hm.
A. And she was drinking, and she was bleeding like pretty bad on her nose. And me and Jerry like tilted her head back and like, and it stopped, and then everything was fine. And before (indistinguishable) I, I didn't want to (indistinguishable), I just went upstairs in Barry's room with him, and we just watched TV in there.

Q. Um hm.
A. Um, I know that she's stayed the night with him, and maybe somebody else in the house, Justin, a couple times. Probably even more. I remember he used to take her out to breakfast, and she used to say that he liked her a lot but it's like, like me and her-, me and like Danni and a couple of friends were like, you know, come on, he doesn't, he's 26 or 28 or however old he is, he doesn't like a 17 year old.

Q. Um hm.
A. It's like one thing he's trying to get out of you.

Q. Um hm. That night that Crystal had the bloody nose...
A. Uh huh.

Q. ...had she been drinking that night?
A. Yes.

Q. And have you been around Crystal when she's intoxicated before?
A. Yes.

Q. How intoxicated was she that night?
A. Uh, I wouldn't say she wasn't, she knew what was going on, and she could walk and, I've seen her worse.

Q. Um hm.
A. She knew what she was, she knew if she, she knew what was going on.

Q. Um hm. And were you with her in the bathroom when she had her bloody nose?
A. Actually, we didn't take her to the bathroom, we took her to the kitchen sink.

Q. Okay. And do you know who supplied Crystal the alcohol that night?
A. Jerry.

Q. Okay. How do you know that?
A. Um, 'cause when they came over, I was already there, and he was like, let's go in the kitchen, you know, play Kings or whatever game, a card game, and started drinking, so I'm assuming it was his. I'm not for sure, I didn't see him bring it in and give it to 'em.

Q. Is Kings, what kind of game is that?
A. It's a drinking game with cards.

Q. Okay, and was Crystal playing that game with Jerry?
A. Uh, yeah.

Q. Okay. Do you know how much she had to drink?
A. No. I know she had at least three drinks.

Q. Okay. And then how does she get the bloody nose?
A. Um, we were all just joking around, and playing around, like wrestling and like chasing around each other in the house, and I don't remember if it was Jerry or her friend Danni that accidentally bumped her in the nose.

Q. Uh huh.
A. With their elbow.

Q. Um hm.
A. And it just started bleeding like bad.

Q. Okay. And then what happened?
A. Um, and then Danni went to go get wash rags and stuff, and me and Jerry went in the kitchen and tilted her head back and like held pressure on her nose.

Q. Um hm.
A. And made her sit and relax. And then we got a cold wash rag, and after like ten minutes, it stopped.

Q. Okay. And then what happens?
A. Then what happened is, I don't really, I don't really remember after that. Uh-

Q. What did you do?
A. I went upstairs. I didn't really hang out downstairs. It was loud and music and (indistinguishable) there were people, many girls like in and out, and guys in and out.

Q. Um hm.
A. So I didn't, I don't know, I wasn't really a big, even if I was single then, I probably would be downstairs and have fun like they were but I had a boyfriend so-

Q. Okay. And so after the bloody nose, and after you helped her, do you know what Crystal does or where she goes or-
A. She just probably goes back to, they played pool there, they had a pool table.

Q. Um hm.
A. And they played pool, and I know they played more games. They watched DVD's.

Q. Um hm.
A. Um, I know after a while her and Jerry went up to the bedroom.

Q. Okay, do you know how she got up there?
A. She walked.

Q. Okay. And so you saw her walk up there?
A. Yeah.

Q. Okay. And do you know about what time that was?
A. Um, no.

Q. Okay. And so then you see her go up to the bedroom with Jerry?
A. I seen her like once or twice.

Q. Okay. And do you see her again after that?
A. No.

Q. Okay. Are-
A. I'm either asleep or I left.

Q. Okay. When she went up to the bedroom with Jerry, were you concerned about her at all?
A. Uh, yeah, a little bit.

Q. Tell me why you were concerned.
A. Um, 'cause I've known Crystal for a long time, and she's not a (indistinguishable), she's not, she's not a very, she's not into sex like he is.

Q. Um hm.
A. Um, she's, I don't know, she's a young cheerleader, and she's, she's pretty, and she's a blonde, you know, she's like cool. Guys look at her but I, it just didn't seem to me like that's how she was.

Q. Um hm. And so that's, so when she went in the bedroom with Jerry, that kind of concerned you?
A. Yeah, I was thinking why, you know, like why is she doing that if, I don't know. Just didn't seem like she'd want to.

Q. Okay. And did you spend the night at the house that night?
A. Uh, I don't remember.

Q. Okay. Do you remember if you saw Crystal in the morning or anything like that?
A. I don't remember.

Q. Okay. Um, has anybody, um, talked to you about, or do you know anything about any video tapes being done at the house?
A. Um, yes.

Q. What can you tell me about that?
A. Um, I know, I don't know who directly, but I know Jerry and some of his friends would probably video tape like, actually I know had video taped some of the girls.

Q. How do you know that?
A. Um, just 'cause like, for instance, um, like this (indistinguishable) Barry broke up but like me and him were having sex, and his friend was like hiding in the closet.

Q. You and Jerry were-
A. No, no, no, me and Barry.

Q. Okay, were having sex.
A. Yeah, and his friend was in the closet video taping. And I heard a noise, and then I stopped and I figur-, I saw it, and I was like, oh, my gosh. And it's like, if it doe-, I'm sure his friends, it's like they've offered to, oh, you want to watch a video, you know? Just as a joke but it's like, I'm not going to say yes. I know they have, I know they have videos.

Q. Okay.
A. I've heard some of Jerry's friends (indistinguishable) outside of that house they, oh, Jerry made a video, you know. So I know that he has videos. I don't know who of.

Q. Um hm. Have you ever seen any of those videos?
A. Nope.

Q. Okay. Who was Barry's friend that was hiding in the closet, and what did you do when you discovered he was there?
A. Um, it was Ryan.

Q. Um hm.
A. And-

Q. Ryan Carlson?
A. Yes.

Q. Um hm.
A. And I was pretty ticked off. I, I'm like, oh, (indistinguishable), and I was going to go out the door, and then like Ryan left the room, and Barry like put me back in the, like he didn't put me back in there, I walked back in the room, and like he explained, you know, he's like, da-da-da. He explained himself, and I told him how I feel, and I was like, well, we just need a break, you know, I, I just don't-

Q. What, what did he say about what happened?
A. He's like, he's just joking around. He's like, I was just joking, na-na-na. He's like, it was just a joke.

Q. Okay. Do you think Ryan was actually filming you while...
A. I don't-

Q. ...when he was in the closet? Did he have a camera when he came out of the closet or-
A. Yeah, he had a video camera, a little one.

Q. Okay. Do you know who that-
A. I don't know if it was recording or not but I saw him with the video camera.

Q. Okay. Were you ever concerned about getting that video?
A. N-, not really.

Q. Okay. Alright. Um, did you ever, were you ever concerned that maybe it had happened before and, um, you didn't know about it being video taped?
A. Um, it crossed my mind but I don't think I was that concerned about it at the time.

Q. Okay. When Ryan was in the closet and that happened, how long ago was that?
A. Oh, a long time ago.

Q. So how old were you?
A. It was when I, it was probably like 8, 9 months ago.

Q. Okay, and you were how old 8 or 9 months ago?
A. Probably just turned 18 or was 17.

Q. Okay. Alright. Um, anything else happen at the Wiatt house that concerns you?
A. Hm, nope.

Q. Okay. Have any, has anybody ever complained to you or told you that things happened to them at the Wiatt house?
A. Um, actually recently I went to a clothing store (indistinguishable) and my friend, Laura, works there.

Q. Um hm.
A. And she's like, oh, did you hear what happened with Jerry, and I was like, yeah. And she's like, yeah, my friend, she's like me and my friends went there and, and that happened to my friend, and she was too scared to say anything, and she didn't tell me her name, she just, only like two people know, she didn't even tell her parents, and it was like a long time ago, it was like years ago.

Q. Um hm.
A. And she didn't say anything but I was like, ev-, she's like, yeah, hopefully more girls will confess and, 'cause this happened to a lot of girls, I know for sure.

Q. How do you know for sure?
A. Just 'cause like I, I se-, I dated Barry for like, I don't know, four months.

Q. Uh huh.
A. And with me going there like almost every day and seeing how many girls went in and out, like day in, day out, weekend, you know.

Q. Um hm.
A. And what he'd say to 'em, it just-

Q. What who would say to 'em?
A. Jerry.

Q. Like what kinds of things would he say?
A. Oh, I like you, you know, I'm not gonna, you know, 'cause he had a reputation of being a player or whatever you want to say.

Q. Uh huh. Uh huh.
A. And it was just like, Crystal was for like (indistinguishable), you know, and then I'd see, then Crystal wasn't there, and I, there'd be different girls. It just, I don't know, he's gross.

Q. Okay. That night that Crystal had the bloody nose...
A. Yeah.

Q. ...do you think she had sex with Jerry Wiatt that night?
A. I have no idea.

Q. Okay. Um, is that the first time that you ever saw her in his room?
A. Yes.

Q. Okay. And then did you see her in his room after that?
A. Not that I recall.

Q. Okay.
A. I'm sure one or, I'm, I don't even know. I want to say yes but I don't remember.

Q. Okay. Alright. And, and I don't want to put words in your mouth. I, I'm, you know, I wasn't there, I don't know what happened, and that's, you know, and all you can do is just answer to the best of your ability.
A. Yeah.

Q. Um, do you know of any other girls that maybe had problems?
A. Um, I heard that this happened to Alvina Cruz, and I went to school with her since like the 8th grade.

Q. Uh huh.
A. I haven't talked to her personally.

Q. Uh huh.
A. But I heard that's what happened, and that's how this (indistinguishable) started.

Q. Okay.
A. I don't have a clue if it has or if that's what (indistinguishable) but I know Crystal Hopkins is like a (indistinguishable)

Q. Okay. Have you talked to Barry about this case?
A. Um, no, h-, I talked to him like when it first like came out in the paper or whatever. He's like, yeah, did you hear what happened to Jerry, he's like, and I was like, yeah, and that's, that's all that was said.

Q. Okay. And have you talked to Jerry or Jeff about this case?
A. Nope.

Q. Okay.
A. I haven't seen Jerry, I haven't seen Jeff, I haven't seen Jeff in a long time.

Q. Okay. Um, what about, um, date rape drugs or anything like that at the house?
A. No.

Q. Ever any concerns about anything like that?
A. No.

Q. Okay. Were you ever concerned, um, or did you ever see girls not drink that much but appear to get really intoxicated? Anything like that?
A. Hm, no.

Q. Okay. Um, is there anything else you can think of, um, that I need to know about that we haven't talked about?
A. No.

Q. Okay. Do you know a young girl by the name of Raminta Rankis?
A. Yeah.

Q. Okay.
A. She's my best friend.

Q. Okay. Um, did she ever complain to you a-, about Jerry Wiatt or inappropriate behavior on his behalf?
A. Um, I (indistinguishable), she's like my best friend, I talked to her today, I talk to her everyday.

Q. Um hm.
A. Um, she is kinda (indistinguishable) that's mean to say but I know she's had sex with him, and I know that she wanted to probably.

Q. Okay.
A. I know she was intoxicated but I know that she probably didn't, if it was a big thing, she'd say something, and it wasn't.

Q. Okay.
A. I'm not, I wouldn't-

Q. You mean if it was a big thing, she would have told you earlier, is that what you mean?
A. Um, yeah. I know that she's had sex with him like probably once or twice or maybe three times but it's all because she wanted to, I know.

Q. Okay.
A. For a fact.

Q. Okay, so if Raminta was saying at this point, um, that she didn't want to say sex with Jerry, y-, you wouldn't think that would be true?
A. I wouldn't, hu-uh.

Q. Okay. Um, any, um, you ever see any pictures of girls on computers without their shirts on?
A. No.

Q. Okay. Um, you ever see Jerry or hear about Jerry filming girls?
A. Um-

Q. I know you talked about the one incident with you where Ryan was in the closet but-
A. Um, no.

Q. Okay. Did Barry ever tell you about seeing videos?
A. Um, he said that Jerry has a couple videos...

Q. Um hm. Did he-
A. ...from parties.

Q. Um hm. Did he tell you what was on the videos?
A. Um, just sexual stuff.

Q. Okay, do you know if the girls knew they were being filmed or anything about, like that?
A. I don't know.

Q. Do you have any idea how old the girls were?
A. Hu-uh. Nope.

Q. Okay. And are you concerned that there may be videos with you on them?
A. No.

Q. Okay. And it was al-, and the reason you believe there were videos, and correct me if I'm wrong here, is 'cause one time while you were having sex with Barry, Ryan was hiding in the closet, and you discovered it, and Ryan had a video camera?
A. Right, and I've heard other guys say, oh, you want to watch a video of, they didn't say any names, they're just like, you know, well, a porno video, (indistinguishable), you know, made ones (indistinguishable). I don't know who said it, I don't remember but I know they have.

Q. Okay, what do you mean made ones?
A. Huh?

Q. You mean ones that were homemade or...
A. Yeah.

Q. ...are we talking regular porn?
A. No, I'm talking about homemade ones.

Q. Okay. And who was talking about that?
A. I, I've heard a couple people say it.

Q. Who they, who's that?
A. Um, I've heard Jerry, I've heard Barry, I've heard Justin, I've heard Jeff. Um, I don't, I'm sure there's more but I don't remember their names, that just were guys that'd come over once in a while. I don't remember their names.

Q. Okay. And they never mentioned who the girls were that had been filmed?
A. No.

Q. Okay. Did that concern you?
A. Hm, not really. Well, yeah, but no. Just 'cause it was probably a long time ago, I don't, and I probably wouldn't even really know who the girls were 'cause I've, only know like two or three girls that Jerry's had sex with.

Q. Um hm. Who are the girls that you know that Jerry's had sex with?
A. I know Crystal's had sex, and a girl named Alisha, and Raminta.

Q. Um hm. Okay. That Alisha Cochran?
A. Yeah.

Q. Okay.
A. And, yeah. Sorry, I don't really care for her.

Q. Okay. Um, did you ever see pictures of Alisha without all her clothes on?
A. No.

Q. Okay, did you ever hear about pictures like that?
A. No.

Q. Okay. Is there anything else you can think of that we haven't talked about that I need to know?
A. Nope.

Q. Okay. Is everything you told me today true and correct to the best of your knowledge?
A. Yes.

Q. Okay. At any time since we've been talking, have you asked me to turn off the tape recorder?
A. No.

Q. I'm going to go ahead and conclude the tape. It's approximately 3:41.

ENDING TIME: 1541 hours

Z. Verbatim Report of Proceedings (DO NOT RELEASE), Pretrial Motions, October 4, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,	)	COURT OF APPEALS NO
	)	30168-7-II
Plaintiff,	)	
	)	
vs.	)	SUPERIOR COURT NO.
	)	01-1-01136-1
JERRY WIATT, JR.,	)	
	)	PRETRIAL MOTIONS
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on October 4, 2002, the above-entitled and numbered cause came on for hearing before JUDGE GARY R. TABOR, Thurston County Superior Court, Olympia, Washington.

COPY

Pamela R. Jones, Official Court Reporter
Certificate No. 2154
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October 4, 2002 Olympia, Washingt n

MORNING SESSION

Department 7 Hon. Gary R. Tabor, Presidir

APPEARANCES:
The Defendant, with his Counsel, David Allen, Todd Maybrown and Cassandra Stamm, Attorneys at Law;
Wayne Fricke, Attorney at Law; Jon Tunheim and Christen A. Peters, Deputy Prosecuting Attorneys of Thurston County, representing the State of Washington.

Pamela R. Jones, Official Reporter
--ooOoo--

THE COURT: Good morning.

MS. PETERS: Morning, Your Honor.

THE COURT: I think the matter we're going to take up first this morning is in regard to Mr. Lo. I see that Mr. Fricke is here. It's my understanding Mr. Lo is not here.

MR. FRICKE: That's correct, Your Honor.

THE COURT: Have you discussed with him his waiving his presence for this hearing today?

MR. FRICKE: Yes, Your Honor, I have, but not in formal terms. First of all let me -- I guess he's not really here necessarily as a defendant, and I didn't know in that regard necessarily had to be here. I guess he's more as a witness in a companion case, in which obviously

the issue centers around him, but I didn't really necessarily believe he was required to be here. But again, he was aware of the hearing, is aware of the hearing, in fact, is available by telephone, if need be, but he chose not to be here, and I indicated that he did not have to be here.

Before we begin on it, Your Honor, if I may, given the nature of the issue involving Mr. Lo and me representing him, I'm asking that and privileged -- what we belief to be privileged communications, we ask that it be a closed hearing because they are going to be ceased to be privileged regardless of what the Court rules if everybody is allowed to be in this courtroom.

However, before you get there, Ms. Peters and myself were going to put on the record that his sentencing that is currently is set for 1:30 this afternoon be reset. We've already provided to the court system, as well as Ms. Peters, his waiver of right to speedy sentencing, and I guess we're not asking for a specific date. We're asking that it be stricken from today's calendar.

MS. PETERS: That's correct, Your Honor. I'd ask that the Court for the purposes of

the record today strike the sentencing today subject to renote as soon as we have a more accurate idea of when the State will be calling Johan Lo in the State's case. We will attempt our best to accommodate the sentencing to occur as close in time to his testimony in the case.

THE COURT: Well, I'd previously indicated that I wouldn't participate in the sentencing so I don't know that I'm the judge that needs to authorize a continuance. That would appear appropriate, but it's set in front of the criminal presiding judge, I assume.

MS. PETERS: It is, Your Honor, and I actually have already indicated to the Clerk by way of e-mail yesterday that we were going to be striking the sentencing subject to renote. I'm just asking for the purpose -- I don't think there's any problem with the Court striking the hearing today so Mr. Fricke doesn't have to return at 1:30.

MR. FRICKE: And I would ask that the Court take that upon itself and strike it.

THE COURT: I guess there's no prejudice to anybody by my doing so. It's agreed, in any event, so I'll authorize the striking of

the sentencing today and resetting that matter at some future time. And, just for the record, that's in the case of Johan Lo, Cause No. 01-1-1276-7.

MR. FRICKE: So, Your Honor, again, I guess I would request that the court be cleared from anyone who other than, quite frankly, myself and obviously the court personnel and Mr. Allen and Mr. Maybrown, and I say that including Mr. Wiatt, and I know the Court has his case at this time set under State vs. Lo for the purposes of a hearing, and it does again involve a privileged -- what we believe to be a privileged communication, and I don't believe anyone, or anyone other than the parties I just mentioned, should be present to discuss the matter when the substance, I suspect, is going to be brought out in the open in this courtroom.

THE COURT: I think it's actually set under State vs. Wiatt, the pleadings.

MR. FRICKE: That's correct. I filed the pleadings under State vs. Wiatt. I was looking at your calendar outside on the calendar or chalkboard and I saw State vs. Lo.

THE COURT: Well, counsel, the first

thing I want to do is see counsel in chambers. I want to talk to you about my reviewing the communication. I think that that's something that needs to be done, but I want to talk with you about that. If there are objections, I suppose we'll make a record of that. I'll have the court reporter come into my chambers and make that record. In any event, that's my first step and then we'll see if there's a need to close the hearing further. We'll be in recess and I'll see you in chambers.

MR. ALLEN: Your Honor, with regard to Mr. Wiatt?

THE COURT: I want to see you in chambers but Mr. Wiatt should stay out here.

(A recess was had.)

* * * * *

MR. ALLEN: We had a chambers conference and there was the discussion back there about sealing or a emptying the courtroom which we agree with. I spoke to Jerry Wiatt about it, as I indicated I would, and he says to me that he wants to be here for this hearing, so that's going to be his position on this, Your Honor.

THE COURT: Okay. I'm going to excuse

the prosecution right now. I don't believe that you have standing in this particular issue.

MR. TUNHEIM: I agree with that, Your Honor, and we had planned to leave. I just wanted to make sure that there was a record on concern that I had that I raised with Mr. Fricke informally, but just within the last few days the Ninth Circuit ruled on a case where there was a hearing regarding a conflict of interest on the part of the defense lawyer, and in that case the Ninth Circuit Court of Appeals, my analysis, held that the defendant did have a right to be present at a -- in that case it was an in chambers conference that was done off the record and that's what originally raised my concern, but did have a right to be present in order to make any kind of personal objections the defendant might have to the attorney continuing to represent him, and ultimately the court found that that was error. And so I wanted to bring that to the Court's attention and in terms of keeping that in mind and making decisions about the defendant's presence.

The second thing is I do want to indicate that I believe the State does have an interest in whether defense counsel stays on the case. I know

that's one of the remedies that's sought by Mr. Fricke is to have defense counsel recused or removed from the case, and, obviously, we've spent a lot of time in discovery, and Mr. Allen and Mr. Maybrown have done numerous interviews with victims and witnesses and are very much invested and prepared for the case, and the State has a significant interest and would feel significantly prejudiced if we were to start from zero with a new lawyer, so I wanted to make a record on that before we leave, and we are going to leave the courtroom. I would ask the Court to invite us back in if there's any issues that you feel that we're a necessary -- or that you would like to hear from us further on.

THE COURT: All right. Thank you.

MR. TUNHEIM: Thank you, Your Honor.

(Mr. Tunheim and Ms. Peters exit the courtroom.)

(The following proceedings were held in closed session:)

THE COURT: Let me just indicate on the record that we did meet in chambers. We were not on the record. This was an informal discussion to allow me to formulate in my mind better what the issues were in the case.

There had been pleadings filed by both Mr. Fricke on behalf of Mr. Lo, and Mr. Allen on behalf of Mr. Wiatt, in regard to a e-mail communication that was sent by Mr. Lo to Mr. Allen. The Court had not been provided with a copy of this communication, and in discussing whether or not I should see that counsel indicated -- first Mr. Allen indicated that he did not provide it to the Court because he wanted to see if there was an objection. Mr. Fricke said that he thought that I should see that. And so I did get a copy of that communication and I have reviewed that.

Secondly, my consideration was whether or not there needed to be a discussion of specifics that were within this communication for the Court to reach a decision on the issue posed. I believe that I do, and that's the reason I closed the courtroom because it appears that Mr. Allen needs to refer on the record to portions of this communication as far as the Court considering, well, the -- I guess the relative positions of the parties, and so the issue now before me is whether or not the defendant should be allowed to remain present.

Mr. Allen has just indicated that Mr. Wiatt wishes to be present during this hearing. I will note that Mr. Allen has not previously disclosed anything in this communication to Mr. Wiatt. I, in the exercise of caution, I am just going to turn to the parties to see if there's any legal authority or argument that you wish to make on this issue, Mr. Fricke?

MR. FRICKE: Your Honor, as mentioned previously, and, as you noted, this case is -- there's actually two cases, two companion cases, and the pleadings that I filed and have to be responded to, of course, are under State vs. Wiatt, which Mr. Wiatt is present here as a defendant. Mr. Lo, who I represent currently and have since after this e-mail, is another case, obviously the same subject matter, but the whole situation, in my opinion, rises out of State vs. Lo, notwithstanding the fact we filed under State vs. Wiatt, was unclear myself what would be the appropriate course or if I should have filed under In re: Communication of Mr. Lo. But, at any rate, I don't believe given that we're indicating and taking the position that it's a privileged communication that Mr. Wiatt, or again, anyone

else, should be present because then it ceases to be privileged at that point in time.

And it also, I guess, bears out the fact that there is the potential conflict for Mr. Allen because he has to represent Mr. Wiatt, as he does very well, and should be doing very well, but he can't at the time prior to the Court making a decision as to whether it's privileged, he can't divulge that information to Mr. Wiatt, and it puts him in an awkward situation to be able to discuss the contents which you may ultimately rule is privileged, and having him divulge those privileges to his current client, so I don't believe he should be here.

THE COURT: Mr. Allen?

MR. ALLEN: Your Honor, as I indicated, Mr. Wiatt has told me that he wishes to be present. I believe that this is one of those hearings where the defendant has the right to be present at.

THE COURT: Well, you can't unring a bell, and if, indeed, this is a communication, that's what I have to decide, that is privileged under the attorney/client privilege, then, Mr. Allen, you're in an ethical situation in which

you can't disclose this, clearly, and I am unaware for any authority of my inadvertently disclosing that in some hearing.

Now, while Mr. Wiatt has an obvious right to be present during the presentation of the case against him, this is really a different issue. And while Mr. Wiatt may ultimately have some obvious interest in how the Court rules, the process of how the Court reaches its decision is not something, in my opinion, that requires Mr. Wiatt to be present for. I find that this is not a critical stage in the proceeding regarding Mr. Wiatt, this is, rather, an issue that may, as I say, have some affect upon Mr. Wiatt depending upon my decision, but, because of the fact that my decision is going to touch on whether or not Mr. Allen can divulge anything here, that is, at a trial of Mr. Wiatt by asking questions about this, I'm simply not going to allow Mr. Wiatt to be present, so I'm going to excuse Mr. Wiatt from the courtroom at this time. We're going to proceed and I'll allow his return as soon as I've ruled.

(The defendant, Jerry Wiatt, Jr., was escorted from the courtroom.)

THE COURT: Now, counsel, let me

indicate that because pleadings have been filed and I think the issues are already framed, I don't want to spend a lot of time about going back over the facts. The record's already going to be clear. I am going to -- well, I indicated that I would be sealing this document, I guess actually that depends upon my ruling, so, in saying that I would seal the document, I was probably jumping the gun there. So, if appropriate, the document will be sealed. It's not filed now, and whether or not it's going to be filed and sealed or otherwise filed will depend upon what happens here.

Mr. Fricke, this is your motion, so, as I say, please don't spend a lot of time going back over the facts that get us here. Make your legal arguments as concisely as you can, please.

MR. FRICKE: Thank you, Your Honor, and I appreciate that. And I'm not -- you have the letter in front of you, the e-mail in front of you, I guess I need to give it its appropriate characterization, so I'm not here to discuss the detail that's in there as far as what he disclosed as part of his involvement or lack of involvement in any particular offense. But what I will point

out, obviously he goes into some detail on some of the matters that he's seeking consultation on, and I guess ultimately that's the issue here. And I think when he winds up the letter or the e-mail, again, at the very end, about his confusion and throughout this thing about seeking advice from Mr. Allen, now, granted, Mr. Allen's not there, this is on a computer using the internet to converse.

But let me say this. As a practicing attorney, a criminal defense attorney in particular, and I suspect it's probably true for Mr. Allen and Mr. Maybrown, and I would hope all defense attorneys out there, there's a suggestion in the responsive brief that this is an unsolicited e-mail, and I would grant you that it is an unsolicited e-mail to the extent that someone contacted their website seeking an attorney. They didn't know what was going on on the other side. But any time a person gets a call or a letter seeking representation in a criminal case, it's unsolicited. The whole beginnings of representing a client is whether, again by mail, by phone, in this case by e-mail, is that initial call comes in and you don't know it's coming and

then they leave information seeking consultation, and that's why these cases that are set out here talk about it's not that you're hired, that's not the defining moment, it's what the initial communications involve and what's the expectation on the part of the party.

Now, I did provide another pleading this week, just a very brief pleading, but it demonstrates that Mr. Lo on the day after sending this e-mail followed up with at least two phone calls to Mr. Allen's office, again seeking representation. Now, ultimately, as I understand Mr. Allen's affidavit, he wasn't there. But as can be pointed out, and, obviously, I can't have the whole website here, but we -- I think I put what's important in front of the Court for purposes of the exhibits.

Mr. Allen and Mr. Maybrown and their firm have a website like a lot of attorneys do these days, and it's for, I would suggest, marketing and for clients to be able to or potential clients to be able to contact them, and, in fact, it has, as you can see from the home page areas, where a person can contact them, where the person can e-mail them, when you go to certain sites to get

certain information, and then when you go to, I believe it's the contact us site, they specifically set out that general questions be sent to a specific person, and I presume that's the office manager or the head secretary or whoever the person is. I don't know who it is. Although I guess maybe it's Paula Smelter.

But then specifically if you want to talk to a specific individual, presumably an attorney, they're set out down below there and you can contact each individual on their own personal e-mail address. That's what Mr. Lo did. But again, ultimately, when you go down here he clearly wants to discuss the situation with the intent of hiring him for representation in this, his particular case. It's not important that he ultimately does not hire Mr. Allen or the firm but that he was attempting to do so. And every communication and every client starts out with initial communications, again, whether it's by mail, phone, or e-mail is irrelevant. It has to start out with a communication, and then the parties, and that goes both to the potential client and the attorney, make a decision as to whether they want to or are able to join in an

employment relationship.

Mr. Wiatt relies primarily on this State vs. Hansen case, suggesting that that's a dispositive case on this particular issue. And I would suggest to Your Honor Hansen is just simply not on point. Number one, the communication there, which is an unsolicited phone call, I would suggest, begins with information given, a little bit of information, but then the attorney explicitly states, "I'm not representing you, you need to go somewhere else." And after that point in time that defendant then makes further communications which are the essence of that case, after he's been told we're not representing you, and not only that, obviously, the communications involved a potential for future criminal conduct, which is not the case here. This is going specifically to past events and asking advice about those past events, even to the point of cooperating and cutting a deal with the prosecuting attorney.

So, I would suggest, based on the Intercapital case which discusses the fiduciary relationship, and when it exists this is a privileged communication, and I can tell you I have searched and searched, and I am certainly

less than perfect, but I could only find the one case, that's the California case, People vs. Gardner, which even got close to this issue. I found no cases on the use of the internet or e-mail specifically. And that one case, People vs. Gardner, with the letter that's sent, it's set out there and that was unsolicited. Again, perhaps factually different to a certain extent, but the essence of the law is the same that when that communication is for purposes of representation, the initial communication prior to any suggestion that you're not going to be retained, it remains privileged, and we would ask the Court to find that it's privileged, then ultimately if you find that it's privileged, what's the remedy here, and I guess I can go into that now or we can wait on that issue.

THE COURT: Why don't we wait.

MR. FRICKE: Okay.

THE COURT: Mr. Allen.

MR. ALLEN: Your Honor, I realize that the Court's very familiar with the facts, but I'd like to talk, I guess, about the burden of proof. The moving party, that's Mr. Lo, has the burden of proof. And I really don't think that they have

met their burden of proof, and I'll be arguing this further by having the one-page fairly conclusory affidavit that they filed today and then a statement of facts in their brief. All we have is that Mr. Lo says that it was his intention of retaining professional and legal advice, et cetera, et cetera, when he contacted our office by e-mail and telephone. The issue is, and the test is, that as I understand it, is the client's subjective belief at the time that the communication was made, but the subjective belief is not the whole story. Because in cases that we've cited, the main case being Bohn v. Cody on Page 3 and 4 of our brief, the court said, Supreme Court says, "The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words and actions."

So we have to look to that, and I don't know how we're going to do that without having Mr. Lo present so that we can question him and say is this the only e-mail you sent out, how many attorneys did you sent out this e-mail to. I don't know whether he just sent it out to me or

whether he blanketed the Seattle/Tacoma/Thurston County area with e-mails to various attorneys, and that might make his subjective belief unreasonable.

But, nevertheless, even if I was the only one it was sent to, it is clear that this was unsolicited. Mr. Lo's attorney makes the point that our website, because it contains our e-mail, somehow encourages clients to share information with us even though they're prospective clients, but our e-mails in our website is no different than our name in the phone book with a phone number on that, there's no difference at all, I would suggest.

We, for one, do not have much of a yellow page ad, many firms do. Nevertheless, a client calling and leaving a voice mail message would be in very much -- a prospective client, I shouldn't say client, a prospective client is in very much the same position as an e-mail, and I would like in that context talk about, as Mr. Fricke raised, a telephone communication.

I've had many telephone communications where a person says, yes, I'm interested in hiring you, tell me a little bit first, what's the case about.

I'm very careful to say I don't want to have any privileged information over the phone, just tell me what the case is about. And in many of those situations I've been able to short circuit and say, well, excuse me, I'm representing so-and-so, I believe there's a conflict, or I'm representing a co-defendant, or is this other case that I'm involved in involved in your case, do you know that person. So that gives me the opportunity to screen the calls.

Now, Mr. Lo took it upon himself to send this e-mail that has a great deal of information about the case that's very relevant now that Mr. Lo is going to be a witness for the State, and now that his felony charges, his Class B felony charges, B and C, have been reduced to a gross misdemeanor and the condition is that he's supposed to testify truthfully for the State.

In the offer of proof made by Mr. Fricke and the cover letter sent by, I believe it is, Ms. Peters, it said that he's going to say that Alvina did not show him an ID, though there was a phone call where somebody, he's not sure whom, tried to convince him that an ID was shown.

As I said in chambers, and I think I have to

repeat it for the record here so I do have it on the record, the issue of whether an ID was shown is crucial because that's the only defense that's available in the sexual exploitation counts, and there's four sexual exploitation counts, and they're Class B felonies, and the only defense is that the subject under 18 showed the person taking the photographs a governmental ID showing that they were over 18 years old.

The e-mail sent by Mr. Lo on August 19th says, very clearly, here are things that I feel make my case especially strong for me. "The girl showed us ID's (being fake) which said that they were 18." That is crucial to our defense and that's going to be crucial for us to bring out when Mr. Lo testifies. And if I'm not allowed to use this or some other attorney isn't allowed to use this, then Mr. Lo will be able to potentially -- again I'm just saying potentially, commit perjury and commit a fraud on this Court and this will affect the right that Jerry Wiatt has to have a fair trial.

The other very important point which has never been disclosed before and which we would

very much plan to cross-examine Mr. Lo on, is the fact that where he says, "And I had a menage a trois with my cousin and a girl that said she was 18." That would be Alvina Cruz, and that's very relevant also because in the Alvina Cruz count the State charged that Alvina Cruz was not able to consent because of being incapacitated. If I'm allowed to go into this or some other attorney is going into this, we may be able to establish that Alvina Cruz consented, or that at least Mr. Lo will say that Alvina Cruz consented to his sexual advances and sexual intercourse with her. So the contents of the e-mail is crucial.

Now, getting back to the point of whether there is an attorney/client privilege, I would share Mr. Fricke's view that or at least attempts that we looked over the -- we researched this also, and we could not find a case any more on point than any of the cases that are cited. We have the Hansen case, which, there again, that case is not perfect; nevertheless, the court in Hansen could have said this is not attorney/client privilege because the person is making a threat against the judge, it comes within the crime fraud exception to the attorney/client privilege and,

therefore, you lose meaning. Mr. Hansen loses the appeal. Nevertheless, the court went into some detail when they were discussing the phone call and said that, "Hansen's total contact with Youtz" -- I'm reading now from Page 5 of our brief -- "consisted of one phone call. The conversation consisted of Hansen expressing a desire to bring certain individuals to trial, to which Youtz," the attorney, "explained that he would not take Hansen's case and that Hansen might be better off finding another attorney. There's no evidence on which could have led Hansen to believe that an attorney/client relationship existed."

We'll say that the same is true here, that the fact that we have a website, I notice that Mr. Fricke has one too, and many attorneys do now, but that's not different than yellow page ads, I would suggest, does not give, I believe, any client or any prospective client the assurance or suggestion that anything said to, as I say, voice mail or to a secretary or sent in a letter or sent in an e-mail will be privileged.

People v. Gardner, which is cited on Page 5 of my brief, and it's cited -- it was raised by Mr. Fricke, is a case that I think is helpful, but

I think it's more helpful to our side. That's a California case where a defendant was in jail and wrote a letter to the public defender's office which, before he could send it, it was seized by jail guards and utilized against him at trial, and the court said -- the Court of Appeals said that the letter was privileged, and they said, "It is abundantly clear from the letter and its context that it should be privileged because it was sent by an indigent prisoner to the public defender's office whom had previously represented him seven times prior to his arrest in this case." And they said based on that he certainly had a reasonably subjective belief that this would be privileged.

Nothing is even close in our situation. Mr. Lo didn't know us, Mr. Lo never spoke to us, we did get the -- Mr. Fricke's declaration this week regarding telephone conversations and we did look back through our records and there was a phone message that was taken by my secretary on August 20th -- I'd like to pass up a copy, if I could, to the Court and have this made a part of the record -- where he left a message. This was during the time that I was on vacation.

There was apparently one other phone call for

one minute, I think that that was probably to our answering service, which is on in the evenings or during lunch and they do not keep records after 90 days. So as far as we can tell, nobody spoke to Mr. Lo from our office.

There was the unsolicited e-mail that was on the computer when I came back from vacation that I, to the best of my memory, probably just skimmed. I met Mr. Wiatt approximately a few days or a week later. I never disclosed any of the contents of the e-mail to Mr. Wiatt except insofar to tell him that I had received an e-mail from Mr. Lo and he said, well, don't worry, I've talked to Mr. Lo, he's hired Mr. Fricke. And I've never disclosed, as the Court knows and as the Court indicated too, I never disclosed that to him and it really didn't come up until a year later until we learned that Mr. Lo was going to be a witness, and I searched through my files in terms of preparing and came across this e-mail that I saved, and at that point I provided Mr. Fricke and that's why we're before the Court.

In conclusion, I believe that the Court should rule that Mr. Lo did not have a reasonable belief that we were his attorneys or that there

was an attorney/client relationship. Otherwise, any time someone sends out a letter or an e-mail or an unsolicited voice mail, that would have the effect of unfairly disqualifying a witness, I'm sorry, an attorney from being involved in the case in the situation where the person might turn out to be a witness at a later period of time.

The privilege should not arise until the relationship is established except insofar as those cases where it's very, very clear that the subjective belief was reasonable, and that's certainly is not the case here.

For those reasons, Your Honor, and especially to prevent Mr. Lo from perpetrating potentially again, maybe he'll get up on the stand and tell the truth when we ask him these questions, but we're going to have to ask him these questions about whether he saw an ID because that's implicit in the offer of proof from the State, and any attorney's going to have to ask him that question, did you see an ID. And if he says no, I think we're all going to be in a very, very difficult situation that I don't believe should be protected by resorting to the attorney/client privilege in a case like this where there was no reasonably

subjective belief that such a relationship had or was to be formed.

Thank you, Your Honor.

THE COURT: Anything else, Mr. Fricke?

MR. FRICKE: I would just point out I think again the -- and I appreciate this being provided because I didn't get the phone records. I asked my client to search for his phone records to see if there was any calls because he actually had this year or later did not recall but did find those, so I appreciate this, but it does demonstrate obviously that he's again seeking representation.

And I pointed out, I think it's also as an attachment, when you get to -- you can get to the website, which is probably true with most people from a couple different avenues, and the one avenue, which is Exhibit C, is through Martindale-Hubbell, and they have this -- I guess I'll call it a disclaimer about privileged communication, and says specifically if you go here we're not -- you can't claim this basically as a privileged communication. That same disclaimer is not on the website if you go to it directly, the one that Mr. Lo visited, and he's

not an attorney, he's not of legal mind, all he knows he's being referred, ironically by Mr. Wiatt at that time, to the Allen & Hansen firm to try to get representation. And, apparently, Mr. Allen's on vacation but he seeks him out specifically and then follows up that communication with phone calls.

And although they obviously didn't speak, again it bears out again that he is indeed seeking representation and it ceases at that time and there's no longer any other communications, and I think importantly, and I think I was indicated, it would be one thing if he was already representing Mr. Wiatt, but he wasn't. And, as far as I can tell, there were no communications between he and Mr. Wiatt at that time, so there was no reason to believe that Mr. Lo, from his perspective, that he was going to be seeking the same attorney that his cousin, Mr. Wiatt, was.

So I would again ask that the Court rule that it's privileged communication and cannot be used. Thank you.

THE COURT: Counsel, this is an extremely important issue, as everybody is aware, and I'm aware that whatever I rule may have

consequences that affect the underlying case here. Here's the way I see the situation. Based upon the facts that have been presented, I do not find that there was an attorney/client privilege. I guess another way of saying that in the positive, is I find that there was no attorney/client privilege in this particular case. This was a solicitation for representation, it was not made face-to-face, it was made by an e-mail. Had Mr. Allen talked face-to-face with Mr. Lo, he would have, as his usual practice, informed him that there were certain considerations for retaining counsel and setting forth facts that would not have come, he would not have allowed facts to be set forth until there had been that discussion.

I think the primary basis for my ruling is the common sense extension of this argument that Mr. Allen presented, and, that is, if simply communicating something by e-mail is -- brings into play the attorney/client privilege, then in any case there could be all kind of shenanigans of someone communicating by e-mail and then saying, okay, you can't question me as a witness.

Now, I understand that this was long ago, this was before charges were filed, this was

before Mr. Allen had come on as the attorney for Mr. Wiatt. There is mention in the communication by Mr. Lo that my cousin introduced me to your website. He then goes on to describe that his cousin is in trouble.

We wouldn't be here today if Mr. Allen hadn't read this e-mail, and I did want to state on the record something that I didn't hear mentioned but was mentioned in chambers, and, that is, Mr. Allen has also shared this communication with others in his firm, including Mr. Maybrown.

To be quite frank with you, this whole issue is fraught with implications, as I've already said. Had I found an attorney/client privilege the issue would be whether or not Mr. Allen or anyone in his firm could represent Mr. Wiatt if Mr. Lo was a witness, even if they did not refer to confidential attorney/client privileged communication.

Now, having said all that, however, I'm going to go the next step, and, that is, that I'm going to go ahead and discuss with counsel that I don't believe any of this communication should be available to the defendant to use against Mr. Lo. There are several reasons for that, and I will

acknowledge that there's no case that I am aware of that specifically addresses this.

Let me give you some analogies. A defendant pleads guilty, and then that plea is withdrawn. Statement of defendant on plea of guilty would not be admissible, could not be used to impeach the defendant, even though people know about it. There are some public policy reasons for that. There are sometimes in the law, I'm searching for the word that I'm looking for, but legal requirements that certain things simply be set aside or disregarded. There are times when a person cannot be impeached with a particular situation based on particular facts for other reasons.

Aside from the attorney/client privilege, there is, in this Court's opinion, a perhaps less pervasive, but nevertheless recognized right of privacy in certain things. For instance, an e-mail or a fax that is addressed to one person should not be fair game if it's somehow inadvertently received by someone else. The fact that Mr. Lo discussed aspects of this case does not necessarily mean that he was stating the absolute truth.

Mr. Allen has said that if in the course of this case Mr. Lo takes the stand and says that he never saw an identification, then that brings up the issue of his saying here that he did. Well, here's the way I see that whole situation. Mr. Lo can be asked if he saw it, but the defendant is going to be stuck with Mr. Lo's answer in that regard unless there is testimony by some other witness for a situation other than this one that Mr. Lo told him otherwise or some other witness that such an identification was seen. I don't see that the defense is going to be thwarted from asking questions about whether or not Mr. Lo saw an identification card, other than they're not going to be allowed to refer to this communication, and I guess thinking out loud, they can't ask the question that would be open-ended, did you ever tell anybody else that there was such. That would be too open-ended because I'm not going to allow reference to this particular communication.

As to whether or not there was consent by a alleged victim to sexual intercourse, the issue is not whether or not there was consent to intercourse by Mr. Lo, but, rather or not whether

there was consent regarding the defendant in the case, Mr. Wiatt, and whether or not Mr. Lo would have overheard any consent is something that can be inquired into in regard to Mr. Wiatt.

I don't think that I've completely articulated every basis for my consideration. Let me just candidly tell you that I understand that the Court's decision here is fraught with peril.

As a secondary position, I'll just tell you that if I'm mistaken, and this were an attorney/client privilege, I believe that basically the same outcome could be achieved, and although I've not heard specific argument on this because I said we'd delay that until later, it is this Court's opinion that Mr. Allen could continue to represent Mr. Wiatt despite his inability to ask questions in regard to this communication for attorney/client reasons. Thus, I feel that regardless of how a Court ultimately views this, the issue is now based on my primary ruling whether or not Mr. Wiatt is being somehow prejudiced by my not allowing such testimony.

And, in that regard, I wish to cite to rules of evidence, specifically Evidence Rule 403, which indicates that even if relevant, and I think it's

clear that there is relevance to the issue of whether or not Mr. Wiatt may have told in this e-mail Mr. Allen something different than what he testifies to, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." I find in this particular case there would be unfair prejudice because we're opening a bucket of worms for -- in several regards. If the jury, the trier of fact in this case, were to hear a series of questions by Mr. Hansen, Mr. Allen, excuse me, say, in cross-examination of Mr. Lo, Mr. Lo, didn't you tell someone else that you had seen an ID? Well, yes, I did. Who did you tell? I told you that. How did you tell me that? Well, I was trying to get you to consider being my attorney and I sent you an e-mail saying that.

I think this would also perhaps lead to confusion of the issues which is another part of 403. Mr. Fricke might then redirect and say, Mr. Lo, were you trying to put yourself in the best light? Yes, I was.

It's simply going to cause more confusion and more potential prejudice than be helpful; in other words, it's going to obscure the issue rather than

to shed light on the issue, in my estimation, and, therefore, I will not allow its admission at trial.

Finally in that regard, I think that there are other alternatives for exploring Mr. Lo's credibility aside from anything that's in this particular document. While one might say, well, Mr. Allen has seen this so how can he not at least in the back of his mind know that this document is there and somehow reflect that in questions that he asked. Well, the law often requires people to raise issues in a particular context. There are facts that cannot be gone into for various legal reasons, and this is one of those, in my opinion.

As I've said, I believe that Mr. Allen can present issues regarding Mr. Lo's credibility in ways unrelated to the receipt of this particular e-mail.

Now, as to sealing of the document, while I found that there's no attorney/client privilege, I'm going to direct that this document be sealed. As I said, maybe I'm wrong and a court, higher court may have to review this. Again, I don't see allowing the bell to be rung at this stage in time, and, for that reason, I'm going to direct

that that be sealed.

Mr. Allen, did you want the phone call reference that you hand up to me, did you want that to be marked as an exhibit?

MR. ALLEN: Yes, Your Honor.

THE COURT: I think that that's appropriate, although I don't think that it needs to be sealed.

MR. ALLEN: That's fine.

THE COURT: I did want to refer to that, by the way. I'm sorry that I'm jumping back and forth, but in the communication that's reflected by a phone message form filled out on August the 20th of 2001 at 9:55, it says for David Allen, or D.A., from Johan Lo, and it gives a phone number, "said he sent you an e-mail last night, needs representation."

Let me just indicate that he was seeking representation and understood that he did not have that representation yet. He wanted to discuss that further. That was one of the bases for my finding that this was not an attorney/client privilege at the time it was expressed. In short, while Mr. Lo does not meet the legal criteria for an attorney/client communication by this

unsolicited e-mail, there are other principles of privacy or confidentiality that come into play, in this Court's opinion, and based upon weighing the relative prejudice or probative value as required by Evidence Rule 403, while I am not finding this a attorney/client privileged communication, I am denying the use of this communication in any way, shape or form.

However, the defendant will be allowed to raise issues from other sources regarding Mr. Lo. And let me just indicate in that regard, as a part of the pleadings on this issue, there are offers of proof by Mr. Fricke on behalf of his client, proffers I guess is the correct term, and there is a Statement of Defendant on Plea of Guilty by Mr. Lo, and I'm not in any way referring to any of that material, I just want to make that clear.

MR. FRICKE: I understand that, Your Honor.

MR. ALLEN: Your Honor, could I have a point of clarification here? Since you've ruled that it's not covered by the attorney/client privilege, can I share the contents of the e-mail with my client and with the prosecutor?

THE COURT: No. I guess here's the way

I see that. If you could have talked to Mr. Lo in person you would have told him, I don't want to hear anything about this case. The fact that he laid it all out to you is not something that, in fairness, you have any right to, in my opinion. That's why I'm sealing the document, and it's not going to be available to either your client or to the prosecution, and I guess by analogy, although I haven't looked at cases on that particular matter, there are things that courts can direct that a defendant not be given, for instance, witness addresses and so forth. There is the criminal rule that indicates that a defendant is not to be provided unfettered access to discovery, that materials turned over to his attorney can only be divulged in part if there's court direction that certain things not be made available to the defendant.

In this case I'm ordering that there not be any reference to this in court, but also that you not discuss this with anyone outside of your firm or with Mr. Fricke.

MR. FRICKE: Your Honor, may I also request that the transcript which references the substance of those conversations not be allowed to

be ordered? I don't know how to phrase it.

THE COURT: This was a closed hearing and that closed hearing transcript would also be closed and would not be available without further order of the court.

MR. FRICKE: And notice to myself and the parties.

THE COURT: That's correct.

MR. FRICKE: Your Honor, if I may approach the bench, I have an order sealing as well as an envelope for the particular e-mail.

MR. ALLEN: Your Honor, I think we're going to need an order that we can have in the file basically without disclosing the private part of the communication, saying words to the effect that the Court finds that the attorney/client relationship has not been established, nevertheless, the contents of the e-mail are private and not to be disclosed.

THE COURT: Yes, I think that an order would be appropriate. You got to tell people what the Court ruled without going into the details of what went on that concerns the communication contents.

MR. ALLEN: Does the Court have -- do

you have a form blank order here that I could fill out? Is there such a thing?

THE COURT: I'm sure the State does. I think we have a blank order, and whether or not that's going to be sufficient for you, I'll let you see.

MR. ALLEN: There's an advantage to try to do it now with Mr. Fricke here if we can hammer it out.

THE COURT: Mr.Fricke, could I have you sign this order sealing, please.

MR. FRICKE: I'm sorry, Your Honor.

THE COURT: Here's the envelope, go ahead and seal it up.

Counsel, it's 11:15. I think we'll take about a 10-minute recess and allow the people to come back in, the defendant be returned to the courtroom and we'll proceed on other matters. Mr. Fricke, as soon as -- I hope in that 10 minutes you can come up with something. If you need longer, I'll be available after we recess at noon.

MR. FRICKE: I'm sure I'm excused once --

THE COURT: Once that's signed, yes.

MR. FRICKE: Thank you, Your Honor.

MR. ALLEN: Just so we can have this on the record, I assume that at this point we will -- then Mr. Fricke will then continue his past cooperation in terms of setting up an interview for me and Mr. Lo?

MR. FRICKE: Yep.

THE COURT: Well, that's clearly on the record.

MR. FRICKE: I didn't mumble.

THE COURT: I'll be in recess.

(A recess was had.)

(The following proceedings were held in open court:)

THE COURT: The parties are probably aware that the Court did rule that there was no attorney/client privilege; however, any communication with Mr. Allen was privileged and cannot be used. I've signed an order to that effect. I also sealed the e-mail in question and that's been filed in the court file. I've signed that order and so Mr. Fricke was excused, and let's go on now to the next issue. It would appear to me that the next issue is probably most logically, whether or not the Court will order a Franks hearing.

AA. Verbatim Report of Proceedings, Jury Trial Excerpt, October 21, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

BB. Motion for A New Trial, November 25, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

COPY RECEIVED
THURSTON COUNTY
PROSECUTING ATTORNEY
NOV 25 2002
BY _____
TIME _____

FILED
NOV 25 2002
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT, Defendant.	NO. 01-1-01136-1 MOTION FOR A NEW TRIAL

RECEIVED
'02 NOV 25 A11:08
THURSTON COUNTY
SUPERIOR COURT

Defendant Jerry Wiatt, through his attorneys, David Allen and Todd Maybrown, hereby moves for a new trial pursuant CrR 7.5(a)(1-8).

DATED this 22nd day of November, 2002.

ALLEN, HANSEN & MAYBROWN, P.S.
Attorneys for Jerry Wiatt, Jr.

DAVID ALLEN, WSBA #500

TODD MAYBROWN, WSBA #18557

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CC. Defendant's Amended Motion for A New Trial, December 5, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT, Defendant.	NO. 01-1-01136-1 DEFENDANT'S AMENDED MOTION FOR A NEW TRIAL

Defendant Jerry Wiatt, through his attorneys, David Allen, Todd Maybrown, and Cassandra L. Stamm, herewith files this Amended Motion for a New Trial. This Amended Motion supplements his Motion for a New Trial which was timely filed on November 25, 2002.

Defendant Wiatt moves for a new trial pursuant CrR 7.5(a)(1), (2), (5), and (8), based upon the receipt by the jury of extrinsic evidence concerning date rape drugs that had never been introduced at trial. This Motion is supported by the Declaration of Larry Freeman, the Defendant's Memorandum of

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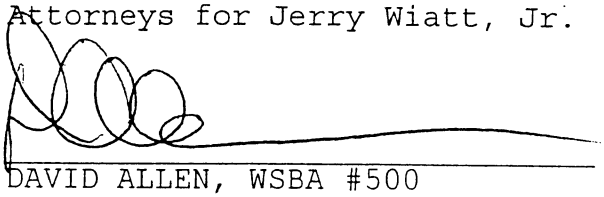
Authorities in Support of Motion for a New Trial, and the files and records herein.

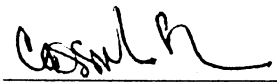
DATED this 5th day of December, 2002.

ALLEN, HANSEN & MAYBROWN, P.S.
Attorneys for Jerry Wiatt, Jr.



DAVID ALLEN, WSBA #500

TODD MAYBROWN, WSBA #18557



CASSANDRA L. STAMM, WSBA #29265

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DD. Defendant's Memorandum of Authorities in Support of Motion for A New Trial, December 5, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

The Honorable Gary Tabor

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 DEFENDANT'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR A NEW TRIAL

I. INTRODUCTION

The jury in this case returned verdicts on November 13, 2002, convicting the defendant of the following crimes: Three counts of rape in the second degree; two counts of rape in the third degree; one count of attempted rape in the third degree; two counts of sexual exploitation of a minor; two counts of voyeurism; and six counts of furnishing liquor to a minor.

On November 25, 2002, the defendant timely filed his Motion for a New Trial.[1]

This memorandum will address grounds for a new trial.

II. FACTUAL BACKGROUND

There was absolutely no evidence in this case to support a claim that any of the alleged victims had been drugged at the

[1] Which is supplemented by his Amended Motion for a New Trial, being filed herewith.

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time of the charged incidents. There were no witnesses who could testify that they observed date rape drugs at the Wiatt house. No witnesses ever heard Jerry Wiatt or others discussing date rape drugs. The police searched the Wiatt house and located videotapes of Jerry Wiatt having sex with two of the complainants, which indicates that the search was not expected and no effort was made to destroy or move evidence. Importantly, the police found no evidence of date rape drugs at the Wiatt house during the search.

As to complainant Alvina Cruz, the State obtained hair samples from her following the incident and sent them to the FBI laboratory for testing to determine whether she had ingested a date rape drug. The attached report (Appendix A) confirms that the test results were negative as there were no traces of such drugs in the sample. The State never offered this evidence at trial and did not designate an expert witness on the issue of the effects of alcohol or date rape drugs.

As a result, the defense moved *in limine* to prohibit the State from mentioning, suggesting or introducing any evidence of date rape drugs. The prosecution conceded that there was no evidence to support a theory of date rape drugs being used and agreed to the defense motion *in limine*. The Court entered such order *in limine* with the proviso that either side could ask for reconsideration if other evidence developed at trial. The State never moved for reconsideration of this order *in limine* and no evidence concerning date rape drugs was ever offered. In fact the phrase "date rape drugs" was never mentioned at all

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during the jury trial, either by witnesses, attorneys or the court.

III. JURY POST-VERDICT INTERVIEWS

At the time the verdict was returned, defense counsel David Allen and Todd Maybrown were unable to be present due their being in Seattle. As a result, they arranged for Charles Williams, an Olympia attorney, to take the verdict and speak with the jurors afterwards.

Approximately three or four jurors mentioned to Mr. Williams that they thought Jerry Wiatt had used date rape drugs on the complainants. He does not know the names or juror numbers of those jurors who reported this.

Since there was no evidence presented at trial of the use or presence of date rape drugs, the defense was concerned that the jury may have considered extrinsic[2] information in deciding the case. The defense therefore instructed its investigator, Larry Freeman, to contact as many jurors as he could locate who would talk to him.

From Freeman's speaking with several jurors, the defense learned the following:

Juror No. 6 reported that during deliberations the jury discussed whether date rape drugs had been used on the complainants. He explained that he and other jurors concluded that if the complainants had had only a few drinks, they would not have been as incapacitated as they described, and there

[2] Extrinsic evidence is defined as information that is outside the evidence admitted at trial. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266,

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must have been another reason to explain their physical condition, such as being drugged.

Juror No. 6 learned about date rape drugs from watching several television programs, including news programs; "America's Most Wanted;" "The New Detectives;" and a program on The Learning Channel. He had seen more than one episode dealing with cases where date rape drugs had been used on "America's Most Wanted." From what he saw on these television programs, he was able to explain to the rest of the jurors that there is a type of date rape pill that would dissolve completely in someone's drink, without an aftertaste and which would not leave a film or milkiness in the drink. He told the other jurors that it was possible for someone to have dropped such a pill in a victim's drinks and for the victim not to know.

According to Juror No. 6, some other juror stated during deliberations that if the complainant(s) had reported the incidents quickly enough, police could have taken blood samples and tested for the presence of those drugs. Juror No. 7 replied that on another television program he had seen, called "The New Detectives," he had learned that there were some date rape drugs that would not show up on a blood test.

He reported that some jurors initially stated that they thought that date rape drugs had been used, while others did not. By the end of the deliberations, Juror No. 7 was convinced that date rape drugs were used by Jerry Wiatt on at

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270, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014 (1991).

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least some of the victims. He stated that most of the other jurors agreed with him.

He also stated that the jury discussed whether it could even consider whether date rape drugs were involved. He said that he and other jurors decided that it was permissible for them to consider information regarding date rape drugs because they were instructed by the Court that the jury could consider circumstantial evidence, which they believed this was.

Juror No. 10 stated that she also raised the issue of date rape drugs with other jurors because she felt this explained what the complainants described in their testimony. She told the other jurors that she thought it would have been possible to slip something into the victim's drinks because it would only take a second to do so.

Several other jurors confirmed that the subject of date rape drugs was discussed during deliberations.

IV. THE INTRODUCTION OF EXTRINSIC EVIDENCE REGARDING DATE RAPE DRUGS CONSTITUTED JUROR MISCONDUCT, WHICH VIOLATED JERRY WIATT'S RIGHT TO A FAIR AND IMPARTIAL JURY AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, § 21 OF THE WASHINGTON STATE CONSTITUTION

It is fundamental that a defendant has a right to a fair, unbiased and impartial jury. Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961). The right of a trial by jury means a trial by an unprejudiced jury, free of disqualifying jury misconduct. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989). It is misconduct for a juror to consider extrinsic evidence:

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> The injection of information by a juror to fellow jurors, **which is outside the recorded evidence of the trial** and not subject to the protections and limitations of open court proceedings, constitutes jury misconduct. (emphasis in original.)

Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 937 (1990), rev. denied, 116 Wn.2d 1014 (1991).

An impartial jury is the cornerstone of a fair trial:

> The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial. . . . At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principle way this is implemented is through the system of challenges exercised during the voir dire of prospective jurors.

United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976).

If even one juror was biased, a new trial must be granted. Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962). Any doubts that such misconduct affected the verdict must be resolved in favor of granting a new trial. Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973).

While appellate courts generally will not examine how a jury reached its verdict, an exception to this rule exists where a juror interjects extrinsic evidence into the deliberations. Halverson v. Anderson, 82 Wn.2d at 752. Once misconduct has been shown and there is a reasonable doubt as to its effect, the doubt must be resolved against the verdict. Gardner v. Malone, 60 Wn.2d at 841-43. Importantly, each case of juror misconduct must be decided on its own facts. State v. Cummings, 31 Wn. App. 427, 429, 642 P.2d 415 (1982).

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A new trial is required where the jury improperly considers extrinsic evidence and where there is a reasonable probability to believe the defendant may have been prejudiced. See: State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967) (receipt and consideration of cartoon and editorial implying that judges were too lenient, which was sent into the jury room, required new trial); Gardner v. Malone, supra (several jurors' unauthorized view of scene of accident, as well consideration of effect of other possible lawsuits against the defendant, was jury misconduct which required granting of new trial); State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (court's inadvertently permitting unproved aliases to go to jury room on cover sheet of instructions constituted reversible error); State v. McChesney, 114 Wash. 113, 194 P. 551 (1921) (juror's personal experience with cattle theft in the area of defendant's residence was improper and required reversal); State v. Parker, 25 Wash. 405, 65 P. 776 (1901) (juror who communicated that the defendant was a member of a gang that had been implicated in a murder required reversal of grand larceny conviction); State v. Cummings, supra (juror discussed the defendant's criminal record, when there was no such evidence admitted at trial, which constituted jury misconduct and required reversal).

It is elementary that a deliberating jury can only consider evidence that is introduced in open court. See United States v. Navarro-Garcia, 926 F.2d 818, 820 (9th Cir. 1991). A jury's "verdict must be based upon the evidence developed at the trial." Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85

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S.Ct. 546 (1965). Court's Instruction No. 1 told the jury that: "The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence." This requirement "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." Id. at 472.

> The jury is an essential instrumentality -- an appendage -- of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.

Sinclair v. United States, 279 U.S. 749, 763, 73 L.Ed. 938, 49 S.Ct. 471 (1929). The constitution requires that "at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. at 472-73. It is axiomatic that a jury must be "willing to decide the case solely on the evidence before it." State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989) (*quoting* from McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 78 L.Ed.2d 663, 104 S.Ct. 845 (1984)). "[T]he injection of evidence outside the record during jury deliberations affecting a material issue in the case constitutes misconduct." Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. 904, 907, 720 P.2d 845, rev. denied, 107 Wn.2d 1006 (1986).

It is not necessary for a juror to withhold information or provide false information during jury selection for there to be

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actionable misconduct where a juror introduces extraneous or extrinsic evidence. For example, in Halverson v. Anderson, supra, a young man who was injured in an automobile accident sought damages for future losses, claiming that he was planning to be an airline pilot or surveyor. 82 Wn.2d at 747. Although there was no evidence introduced at trial regarding future wages, one of the jurors told the others what he understood airline pilots and surveyors earned. Id. The Court held that this was improper, even though there was no withholding of information during voir dire, concluding that the juror who provided this information,

> was guilty of misconduct in placing before his fellow jurors evidence which was not subject to objection, cross-examination, explanation or rebuttal by the defendants.

Id. at 752. Likewise, in a slip and fall case, a juror's comment during deliberations as to what an attorney previously told him was the value of pain and suffering for his injury constituted reversible error. Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. at 906.

While jurors are allowed to bring their real-life experiences into the jury deliberation process, these are limited to "opinions, insights, common sense and everyday life experiences." State v. Briggs, 55 Wn. App. at 58. However, where a juror brings highly specialized information, such as explaining how one with a stuttering problem can talk without stuttering in certain circumstances, "this is evidence outside the realm of the typical juror's general life experience." Id.

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58-59. Therefore, in Briggs, an identification case, the introduction of such "highly specialized" information, which was outside a typical juror's everyday life experiences, required reversal. Id. Importantly, this was the holding even though, unlike the instant case, there was an expert witness called by the State on this very same topic.[3]

A juror's statement presenting evidence outside the record on a material issue in the case is:

> in the nature of expert testimony. It is akin to a jury bringing a book or text into the jury room which was never admitted in evidence but is relied upon by the jury in arriving at its verdict. Kirby v. Rosell, 133 Ariz. 42, 648 P.2d 1048 (Ct. App. 1982); Johnson v. Haupt, 5 Kan. App.2d 682, 623 P.2d 537 (1981). As noted in Halverson [82 Wn.2d 746, 513 P.2d 827 (1973)], such statements are not subject to objection, cross examination, explanation or rebuttal.

Fritsch v. J. J. Newberry's, Inc., 43 Wn. App. at 907.

In the instant case, one or more jurors interjected extrinsic evidence concerning the properties and effects of date rape drugs. One of the jurors admitted he provided very specific and extensive information regarding date rape drugs based upon information he learned from various television programs. The jury was therefore exposed to expert-type evidence from a lay person, whose information came from television shows of untested reliability, which could not be confronted, cross-examined or rebutted by the defense. This extrinsic evidence significantly prejudiced the defense in many

[3] In Briggs, the Court of Appeals explained that there were two very closely related acts of misconduct, material non-disclosure during voir dire and the use of undisclosed information during jury deliberations. 55

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ways in violation of the Sixth Amendment of the United States Constitution and Article 1, § 21 of the Washington State Constitution.

It must again be emphasized that the State had absolutely no evidence that date rape drugs were utilized. The State arranged for the FBI laboratory to test Ms. Cruz's hair for the presence of a date rape drug, which tested negatively. The State did not have any witnesses who had any knowledge that date rape drugs were used by Jerry Wiatt. During the search of Jerry Wiatt's house, no date rape drugs were found. While the prosecution has never revealed its trial preparation, it must be assumed that it most likely consulted with experts with regard to the nature and effect of date rape drugs and decided that such expert testimony would not assist or help its case. This is known to be the case on the Alvina Cruz rape counts.

With regard to the defense, there was no way it could reasonably be expected to call an expert on the issue of date rape drugs when there was nothing to counter in the State's case. That is, since the State had the burden of proof and did not attempt to prove that date rape drugs were used, it would have been tantamount to ineffective assistance of counsel for the defense to call such an expert in order to rebut evidence that had not been first presented by the State.[4]

Wn. App. at 54. Here, the second form of misconduct is involved.

[4] In fact, it would have been akin to trying to prove a negative -- that the State did not prove that date rape drugs were involved, but the defense was concerned about the jury speculating about it, therefore the defense would attempt to prove in the first instance that no date rape drugs were used. As is well known, it is usually impossible to prove a negative.

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For this reason, the defense moved *in limine* to prohibit the State from mentioning, suggesting, or in any way opening the door to date rape drugs. As the Court surely recalls, the State conceded on the record during pretrial hearings that it had no evidence of date rape drugs and readily agreed to this motion *in limine*. This being the case, the defense reasonably relied upon the oaths of jurors; the many admonitions of the Court to not seek out evidence and only decide the case on the evidence before it; the Court's jury instruction, No. 1, which limited the jury's consideration to evidence admitted at trial; and, defense counsel's closing argument wherein he specifically referred to the Court's instruction No. 1 and told the jury that it had to decide the case based on the testimony of the witnesses and exhibits admitted, and could not speculate or hypothesize in reaching its verdict. That being the case, the jury engaged in improper conduct wherein extrinsic, unreliable, unfiltered and uncross-examinable information regarding a highly technical subject learned from television programs was introduced through a lay juror.

The next question is whether there are reasonable grounds to believe that the extrinsic evidence may have prejudiced the defendant. State v. Cummings, 31 Wn. App. at 429. The obvious answer is yes. The State had proof problems with their case on many counts where the complainant(s) claimed that they were incapacitated, but according to them had not drunk a great amount. An example of this is the Zoe Hawkins count wherein she claims she drank just slightly more than two beers at a

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time when Jerry Wiatt was not present and became incapacitated to such an extent that she became unconscious and Jerry Wiatt had to drag her up the stairs.

It was the defense theory that Ms. Hawkins (as well as the other complainants) was not credible and made up the story about her incapacity because of embarrassment and humiliation. In fact, Ms. Hawkins' testimony regarding passing out on the floor and then being dragged up the stairs by Jerry Wiatt was directly rebutted by her friend Erin Gundlach as well as defense witness Tony Grant.

Rather than judging the case on the evidence, and either deciding the State's case did not make sense or there was insufficient evidence presented by the State, and thereby concluding there was a reasonable doubt, the jury resorted to the consideration of extraneous evidence involving the alleged use of date rape drugs that had neither been alleged, introduced nor proved. This is clear misconduct that mandates a new trial since it demonstrates obvious prejudice.

The same is true on other counts regarding rape in the second degree charges where the complainants were alleged to be incapacitated, including the Hoskins and Cruz counts. Moreover, this error infected other counts, including the Rankis and Bowles counts, where the women also claimed that they were also incapacitated after drinking, and the Cruz sexual exploitation of a minor and voyeurism counts. In point of fact, with the exception of the Kalmikov count, where the complainant did not claim incapacity, and the furnishing

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alcohol counts, this error infected all the other rape convictions.

V. CONCLUSION

The jury misconduct that occurred in this case deprived Jerry Wiatt of the essential constitutional requirement "that a jury's verdict must be based upon the evidence developed at trial," which goes to the "fundamental integrity" of the jury's verdict. Turner v. Louisiana, 379 U.S. at 472.

For the foregoing reasons, a new trial must be granted on Counts 2, 3, 4, 5, 6, 8, 12, 14, and 16.

DATED this 5th day of December, 2002.

Allen, Hansen, & Maybrown, P.S.
Attorneys for Jerry Wiatt Jr.

DAVID ALLEN, WSBA # 500

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CASSANDRA L. STAMM, WSBA #29265

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EE. Declaration of Larry Freeman in Support of Motion for New Trial, December 5, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 DECLARATION OF LARRY FREEMAN IN SUPPORT OF MOTION FOR NEW TRIAL

I, Larry Freeman, do hereby declare:

1. I am an investigator licensed in the State of Washington.

2. I am a 1984 graduate of Holy Cross College in Massachusetts and a 1991 graduate of the University of Maine School of Law.

3. I have worked as an investigator for 4½ years. Approximately two years of that time was for The Public Defender Association in Seattle, Washington. I was an investigator for approximately one year for The Federal Public Defender in Seattle, Washington. For approximately the past 1½ years I have operated my own investigation agency.

4. On or about November 15, 2002, I was retained by the law firm of Allen, Hansen & Maybrown to interview jurors with regard to their verdict in State v. Wiatt. Among other matters,

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I was directed to inquire as to whether jurors discussed the possibility that date rape drugs were used in the alleged sexual assaults by Jerry Wiatt, Jr.

5. I contacted Juror No. 6, Norman Spencer, on November 20, 2002. As with all the jurors I contacted, I identified myself and told him that I was working with the attorneys for Jerry Wiatt, David Allen and Todd Maybrown, and I told him that they were interested in the discussions during the jury deliberations.

6. Mr. Spencer said the subject of date rape drugs came up during the jury deliberations because he and other members of the jury felt there must be another reason to explain the physical condition of the victims, given the fact that if they only had a few drinks they would not have been incapacitated as they described. Mr. Spencer said he had seen shows describing date rape drugs on several television programs, including "America's Most Wanted;" "The New Detectives;" and a program on The Learning Channel. He said he had seen more than one episode dealing with cases where date rape drugs had been used on "America's Most Wanted."

7. Mr. Spencer said he described to the rest of the jurors during deliberations information he had learned from television programs about date rape drugs including the fact that date rape drugs would dissolve completely in someone's drink, they would not leave an aftertaste and would not leave a film or milkiness in the drink. He told the other jurors that

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it was possible for someone to have put a date rape pill in a victim's drink without the victim's knowledge.

8. In response to a question from another juror, Juror Spencer explained that he had learned from the television program on "The New Detectives" that there were some date rape drugs that would not show up on a blood test. Mr. Spencer said most of the information he related to the jury came from "America's Most Wanted" and "The New Detectives" programs.

9. Mr. Spencer said there had been a discussion among the jurors about whether they could consider this date rape drug information. He said at the conclusion of that discussion, the jury felt that the information about date rape drugs was circumstantial evidence that they could rely upon based on the circumstantial evidence instruction.

10. On November 19, 2002, I spoke with Juror Rosemary Walsh, Juror No. 10. Ms. Walsh stated that she also raised the issue of date rape drugs in the jury room. She thought date rape drugs may have been involved because some of the girls, although she could not recall which ones, testified that they had drunk alcohol before but had never felt the way that they did at the Wiatt house. She also explained that it would have been possible to slip something into the girls' drinks because it would only take a second to do that, and even if a girl only had one drink, she could have set it down to go to the bathroom. Ms. Walsh said she explained to the jurors that Jerry Wiatt may have had a system and it would only take a second to put something in a drink.

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11. Juror Bruce Hooker, Juror No. 3, remembers date rape drugs being discussed by the jurors and feeling there was a consensus among the jurors that some of the victims had been drugged. The jury also discussed the fact that a drink the girls described, called "Sex on the Beach," was a colorful drink that could mask any milky appearance and that drink also had a fruity taste that could hide a date rape drug.

12. Juror Hooker recalls a discussion among the jurors that date rape drugs would dissolve in a drink without leaving a taste or milky appearance.

13. Juror Hooker also recalls a discussion among the jurors about whether they could consider date rape drugs given the fact that there had been no evidence of them introduced at trial. He said there was consensus among the jurors that the circumstantial evidence instruction allowed them to factor date rape drugs into the deliberations.

14. I spoke with Juror Phil Muxen, Juror No. 30, on November 25, 2002. He said he heard a female juror, who he could not identify, raise the issue of date rape drugs about three-quarters of the way through the jury deliberations. He does not remember anybody else raising date rape drugs.

15. I spoke with Juror Richard Dittrich, Juror No. 2, on November 27, 2002. Mr. Dittrich also confirmed that date rape drugs had been discussed during deliberations and that he believes some of the girls had been given these drugs.

16. I spoke with Juror Roman Daniels-Brown on November 27, 2002. He also confirmed that the jury discussed the use of

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date rape drugs and further that the jury determined that they could consider date rape drugs as circumstantial evidence. He felt that it was clear that at least for some of the girls alcohol was not the only factor contributing to an altered state of consciousness and he said the potential was there that date rape drugs had been used.

17. I spoke with Juror Linda Bowman on November 21, 2002. She also confirmed that date rape drugs were discussed and recalls a juror, who she would not identify, saying that such drugs would dissolve completely, were tasteless and did not leave a film. She stated that she and other jurors felt that some of the girls had been drugged.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 5th day of December, 2002.

LARRY FREEMAN
Investigator

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FF. Plaintiff's Memorandum Opposing Motion for A New Trial, December ___, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	
STATE OF WASHINGTON, Plaintiff, vs. JERRY D. WIATT, JR., Defendant.	NO. 01-1-1136-1 ***PLAINTIFF'S MEMORANDUM OPPOSING MOTION FOR A NEW TRIAL***

COMES NOW Edward G. Holm, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Jon Tunheim and Christen Anton Peters, Deputy Prosecuting Attorneys, and respectfully submits this memorandum of law and authority opposing the defendant's motion for a new trial.

I. STATEMENT OF FACTS

In support of his motion, the defendant has submitted an affidavit from Charles Williams, substitute counsel during the taking of the verdict, and Larry Freeman, a private investigator retained by the defense to investigate the jury verdict.

In his declaration, Mr. Williams indicates that a discussion with the jury about the possibilities of date rape drugs being involved was in response to a prosecutor's question asking the jurors what factors most influenced their verdicts. The State disputes that characterization of the discussion. Instead, the question was asked of the jury what issues were discussed during deliberations and if the jury had any questions of the lawyers. In that context, one juror asked if date rape drugs were involved. At least one juror indicated that there was discussion of that

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possibility during deliberations. The prosecutor explained that there was, in his opinion, a possibility that such drugs were involved but that the State had no forensic evidence to present on that issued. The Prosecutor explained that the delay between the events and the disclosure of those events to law enforcement made successful forensic recovery of such evidence impossible. In response, a juror asked if that's why the prosecution team phrased their questions to jurors in terms of how the person felt. The prosecutors explained that the ultimate issue was that of incapacitation and that they felt that it was more helpful for a witness to describe how they felt instead of how intoxicated or impaired they were.

According to the affidavit filed by the defense, the defense investigator later questioned juror #6 about the deliberations. That juror indicated that the jury discussed the issue of whether the incapacitation described by the victims would be caused by alcohol. The juror said he told the jurors that he was aware of drugs that could be put into a person's drink and not be detected by taste or appearance. He indicated that he had learned such information while watching several television programs.

The remarks and comments of several other jurors are summarized in the defense affidavit. However, the State asserts that such comments involved the deliberation process and therefore inheres in the verdicts. The State urges the court to disregard such comments as required by case law.[1]

II. ARGUMENT

A. THE DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO SHOW THAT THE JUROR'S COMMENTS DURING DELIBERATIONS WERE OUTSIDE THE SCOPE OF A TYPICAL JUROR'S GENERAL LIFE EXPERIENCE AND WOULD THEREFORE NOT BE INTRODUCED INTO THE JURY'S DELIBERATIONS.

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[1] *Gardner v. Malone*, 60 Wn.2d 836 (1962); *Richards v. Overlake Hospital Medical Center*, 59 Wn.App. 266 (1990).

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The defendant moves for a new trial after retaining a private investigator to investigate the jury's verdict. Preliminarily, the Court should note that post-verdict interviewing of jurors is generally disfavored:[2]

> [Courts] have repeatedly refused to 'denigrate jury trials by afterwards ransacking the jurors in search of some new ground, not previously supported by evidence, for a new trial.' Prohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the 'chances and temptations' for tampering with the jury, increases the certainty of ... trials, and spares the district courts time-consuming and futile proceedings. We have therefore uniformly refused to upset the denial of leave to interview jurors for the purpose of obtaining evidence of improprieties in the deliberations unless specific evidence of misconduct was shown by testimony or affidavit.[3]

Nonetheless, the defense now urges the Court to examine the deliberations of the jury and reverse it's verdict and reset the matter for trial. However, Washington policy requires a strong, affirmative showing of the juror misconduct before a verdict may be impeached:

> Verdicts should be upheld and the free, frank and secret deliberation upon which they are based held sacrosanct unless (1) the affidavits of the juror allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict.[4]

As described in the factual section, the law is well settled that in considering a motion for a new trial, the Court should not consider matters that involve the individual or collective thought processes leading to a verdict because they are said to "inhere in the verdict".[5] Therefore, this Court should not consider any information contained in the defense affidavits that

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[2] *State v. Finch*, 137 Wn.2d 792 (1999) (Citations omitted).

[3] *Finch*, at 867 (citing *Haeberle v. Texas Int'l Airlines*, 739 F.2d 1019 (5th Cir. 1984).

[4] *Richards v. Overlake Hospital*, 59 Wn.App. 266, 271 (1990) (Citations omitted).

[5] *Richards*, at 272.

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describes a jury's individual thought process or conclusion about the evidence in reaching verdicts, or the collective thought process or conclusions of the jury in reaching its verdict.

For example, the affidavit of the defense investigator contains several references to juror's individual opinions about whether a date rape drug could have been or was used by the defendant. Furthermore, some jurors related that they believed a consensus existed among the jury that a date rape drug might have been used. Finally, there was a discussion about whether considering a possibility of a date rape drug was proper in light of the jury's instruction on circumstantial evidence. Again, several jurors believed that a consensus existed that they could consider such information under that instruction. All of these comments are example of statements that reflects the individual or collective thought process of the jury in reaching its verdict.

Therefore, the only issue for the Court to consider is whether Juror #6 interjected into the deliberations any extrinsic evidence that somehow prejudiced the defendant. In *State v. Carlson*[6] the Court of Appeals, Division One, wrote:

> [a] juror is expected to bring his or her opinions, insights, common sense, in everyday life experiences into deliberations. He or she may not, however, introduce highly specialized knowledge in to the jury's deliberations.[7]

In the present case, the information brought to the jury's deliberation by Juror #6 is merely a recitation of information that is clearly in the public domain and now a part of common knowledge and experience.

In *State v. Carlson,*[8] a prosecution for rape and child molestation, a defendant claimed jury misconduct where a juror revealed that over the years she had read a great deal about

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[6] 61 Wn.App. 865 (1991).

[7] *Carlson*, at 878 (Citing *State v. Brigg,* 55 Wn. App. 44 (1989))

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dysfunctional families. She admitted that during deliberations she used the term "pedophile" several times and told the jury that pedophiles come from all walks of life. The defense claimed that such information was extraneous and could have influenced the jury's verdict. The Court rejected the defendant's claim finding that the comments were not "highly specialized knowledge". [9]

In *Richards v. Overlake Hospital*[10] a medical malpractice case, the Court of Appeals considered a jury misconduct claim where the plaintiff, after receiving a verdict in favor of the defendant, claimed that a juror engaged in misconduct when the juror expressed opinions about the evidence formed on her specialized training as a medical professional. In that case, the juror, during jury selection, had disclosed that she had medical training and was an Occupational Therapist by profession. Additionally, she said that she had the opportunity in her profession to work with retarded children. A portion of the evidence centered on a discussion of whether a mother's illness or flu at 20 weeks gestation during pregnancy could explain an infant's deficiencies that the plaintiff alleged were caused by malpractice. During deliberation, the juror expressed the opinion that flu during pregnancy could result in birth defects and therefore she did not believe the theory advanced by the Plaintiffs. The trial court denied a motion for a new trial.

On appeal, the court recognized that the expertise she possessed in giving her opinions was outside the realm of a typical juror's general life experience and would not usually be introduced into a jury deliberation. However, the Court found that because the juror disclosed

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[8] *Supra.*

[9] *Carlson* at 878.

[10] *Supra.*

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her specialized training and experience, and the plaintiffs did not excuse her, they accepted a risk that such experience would be interjected into the deliberation process.

In the present case, the type of information brought to the jury's deliberation by Juror #6 was not outside the realm of common experience. The possibility of other intoxicating substances being used in this case is a clear, if not strong, inference from the testimony of the witnesses. The possibility of a person introducing such a substance to another in their drink is an inference that clearly falls within common knowledge and experience. Furthermore, the issue of the use of date rape drugs has been at the forefront of media discussions for several years. Here, the juror disclosed that the source of his information was in fact mainstream television programs. Clearly, information brought into deliberation that has been part of mainstream media and public discussion is within the public domain and falls within a juror's common experience.

To hold otherwise will create an entire new standard for courts and juries in using their own common sense and experience in jury deliberations. To effectively eliminate a juror considering their own knowledge and experience from mainstream media, the Court would have to give an instruction to the jury that they are to forget everything they have ever learned about any topic involved in the case. Such an instruction would be exactly the opposite of what is expected of a jury as described in the *Carlson* and *Richards* decisions.

In addition, despite the obvious inference of the possibility of drugs being used, the defense attorneys never asked the jury venire if anyone had knowledge of such substances or heard about them in the media. Therefore, the juror was never given the opportunity to disclose that information to the court during jury selection, nor did the juror deliberately hide or mislead anyone during jury selection. Under those circumstances, the defense assumes the risk that

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someone on the jury has read or heard about such matters and would disclose that in deliberations.

Because the information described by Juror #6 to the jury was within common experience and not tantamount to "highly specialized knowledge", it becomes part of the deliberation and is not misconduct, therefore, the Court should find that the defendant has failed to demonstrate juror misconduct and deny the motion without further inquiry.

B. EVEN IF THE COURT WERE TO FIND JUROR MISCONDUCT, THE DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE DENIED BECAUSE THE MISCONDUCT DID NOT INFLUENCE THE VERDICT.

To grant a motion for a new trial based on jury misconduct, the Court must engage in a two part analysis. First, the Court must examine the alleged misconduct to determine whether a juror engaged in such misconduct. If the Court finds misconduct through the introduction of extraneous evidence, the Court must then determine what, if any, possibility exists that the misconduct affected the verdict. In the present case, the defense has failed to demonstrate that the information described by Juror #6 influenced the verdict.

In several counts of this case, the ultimate issue was whether the victim was mentally incapacitated or physically helpless at the time of sexual intercourse. Importantly, the evidence to support the elements of those crimes came either directly from the victim, or from videotape. As the Court ruled after the State's case in chief, there was clearly sufficient evidence to support a jury finding that the victims were mentally incapacitated or physically helpless.

However, the issue of the *cause* of that mental incapacity or helplessness was only a secondary issue. While there was evidence that alcohol was introduced to the each victim, the evidence was such a jury could infer from common experience that other substances might also be involved. Such consideration would only go to a jury's evaluation of whether the victims'

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description of the events was possible. Arguably, the testimony of the victim's may be possible even without the introduction of date rape drugs or other intoxicating substances. Therefore, had the jury not considered this possibility, or disregarded it, there is no reason to believe that they would have changed their belief as to the weight of the evidence or the creditability of the victims and ultimately their changed verdicts.

Even if the information provided by Juror #6 had not been provided, the jury clearly could consider the possibility of other intoxicating substances being introduced to the victims by the defendant within their own common knowledge and experience. The fact that Juror #6 related that there were substances that were colorless, odorless and tasteless was not so critical as to convince jurors who otherwise did not believe the victims to change their mind and become convinced that a date rape drug was used. Therefore, any close analysis of the impact of the information imparted by Juror #6 reveals that there is no reasonable probability that such information influenced the verdicts reached by the jury.

III. CONCLUSION

Based on the foregoing, the State urges the Court to find that the information related by Juror #6 in this case fell within common experience and generalized knowledge and did not amount to the introduction of "specialized knowledge or training" into the deliberations. Furthermore, where the defense takes no effort to discover such knowledge during deliberations, they assume the risk that a juror will discuss his or her own knowledge or experience with other jurors. Therefore, the Court should conclude that there was no juror misconduct in this case and deny the defendant's motion for a new trial.

Even if the Court finds that a juror engaged in misconduct, the Court should deny the motion for a new trial because the defense has failed to demonstrate any reasonable probability

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that the information provided in deliberations by Juror #6 influenced the verdict. Therefore, the defendant's motion should be denied.

DATED the ____ day of December, 2002.

PRESENTED BY:
EDWARD G. HOLM
Prosecuting Attorney

CHRISTEN ANTON PETERS, WSBA #23559
Deputy Prosecuting Attorney

JON TUNHEIM, WSBA #19783
Deputy Prosecuting Attorney

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GG. Defendant's Response to Plaintiff's Memorandum Opposing Motion for A New Trial, December 12, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

The Honorable Gary Tabor
December 16, 2002
at 1:30 p.m.

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM OPPOSING MOTION FOR A NEW TRIAL

I. INTRODUCTION

The State suggests in its Reply Memorandum that only one juror, Juror No. 6, introduced information regarding date rape drugs. This is not the case. In addition to Juror No. 6, other jurors, including Jurors No. 9 and 10, also provided information regarding date rape drugs. Moreover, other jurors engaged in discussion about whether they should consider this date rape drug information as circumstantial evidence.

II. AN EVIDENTIARY HEARING MUST BE HELD

This Court must conduct an evidentiary hearing. All jurors must be summoned into court and examined by the parties as to exactly what was said. Some of the jurors refused to talk to the investigator. The jurors who did speak with the investigator were not under subpoena or any type of compulsion

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to discuss these matters. Obviously, none of the jurors were under oath. Even if the Court were leaning towards ruling in the defendant's favor, an evidentiary hearing must be held so that a complete record of what actually occurred with regard to the extrinsic evidence is made, since this matter has a great potential to be appealed, irrespective of which side wins this motion. *State v. Cummings*, 31 Wn. App. 427, 431-432, 642 P.2d 415 (1982) (where affidavits established question of fact about juror misconduct, fact finding hearing must be held to resolve issue); *United States v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1991).

III. THE AUTHORITIES CITED BY THE STATE ARE EITHER DISTINGUISHABLE OR DO NOT SUPPORT ITS POSITION

The State cites *State v. Carlson*, 61 Wn. App. 865, 812 P.2d 536 (1991), in support of its argument that extrinsic evidence about date rape drugs "clearly falls within [a juror's] common knowledge and experience." Plaintiff's Reply, p. 6. The *Carlson* case does not support this.

Carlson was a case where a respected businessman was charged with the rape and molestation of his 3½-year-old granddaughter. A juror revealed after the guilty verdict that she had made a comment during deliberations "that pedophiles come from all walks of life." Based on this, the defense argued that her voir dire answers, wherein she stated that she did not have specialized knowledge about child abuse, were false. In rejecting this challenge, the Court of Appeals, *citing State v. Briggs*, 55 Wn. App. 44, 776 P.2d 1347 (1989),

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emphasized that while a juror may not "introduce highly specialized knowledge into the jury's deliberations," a juror is expected to bring her common sense and everyday life experiences into deliberations. 61 Wn. App. 878.

The Court concluded that the juror's comment about pedophiles coming from all walks of life did not fit within the highly specialized knowledge prohibition, and instead was a simple common sense observation. Importantly, the *Carlson* Court distinguished its facts from those in *State v. Briggs*,[1] *supra*, where a new trial was granted relating to a juror's personal experience with control of stuttering, an issue on which there had already been expert testimony. *Id.*

The State also unsuccessfully tries to compare the jury misconduct in the instant case with the facts of *Richards v. Overlake Hospital*, 59 Wn. App. 266, 796 P.2d 737 (1990). While the Court in *Richards* clearly recognized that injection of information "which is outside the recorded evidence of the trial" is misconduct, it found that there was no "novel or extrinsic" evidence introduced in that case. 59 Wn. App. at 270.

In *Richards, id.*, a malpractice action where physicians were sued for the negligent care of a newborn, evidence of a viral infection during the mother's pregnancy was introduced through the testimony of a doctor and also through medical reports. 59 Wn. App. at 274. A juror, who the parties knew from voir dire had medical knowledge from her work as an

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occupational therapist and who also had worked with retarded children, told the other jurors during deliberations that she felt that evidence of the mother's viral infection during her pregnancy at least partially explained the birth defects of the child. The Court held that this was not extrinsic or extraneous evidence since the medical records and the testimony of the doctor "were introduced into evidence and sent to the jury room with the jury for its use in deliberations." 59 Wn. App. at 274.

The trial judge, who was quoted in the Court of Appeals' decision, stated that he would have been

> otherwise persuaded if she had done something extra-judicial, if you will, to the extent of bringing in a document into the courtroom or into the jury room that supported her position, but basically it seems to me that what she did was argue for a proposition. (emphasis added.)

59 Wn. App. at 275. The judge also noted that when he heard the testimony regarding the infection, he "wondered . . . whether the flu could have had something to do with it."

This is obviously distinguishable from the instant case where there was absolutely no testimony or evidence of date rape drugs in the record. On the contrary, all the evidence pointed to one of two theories: Either the complainants were so intoxicated from drinking alcohol that they could not control themselves or lost consciousness; or, that the complainants were confabulating or exaggerating, and were therefore not credible. Unlike *Richards*, where there was

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[1] Not discussed by the State in its Memorandum.

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actually evidence in the record of the mother's illness during pregnancy, here there was absolutely no evidence from which a jury could deduce that drugs were being used.

Moreover, in *Richards*, the alleged misconduct consisted solely of one juror saying that in her view the birth defects were at least partially caused by the mother's flu, which was certainly a permissible circumstantial evidence inference based on facts in the record. The judge specifically noted that if the juror had brought in any extra judicial evidence, that he would have found misconduct. Unlike *Richards*, here several jurors brought in definitive facts and information demonstrating specialized knowledge and information which did not come in through the testimony of the witnesses or exhibits. *Richards*, insofar as it upholds a verdict in a civil medical malpractice case where the confrontation clause is not implicated, is clearly distinguishable.

In fact, more on point than *Richards* is *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973), cited and discussed in Defendant's Memorandum, and not discussed or rebutted by the State in its response. In *Halverson*, an injured young man who hoped to be a pilot or a surveyor but claimed he could not because of his injuries sued for damages. There was no evidence presented as to the possible future earnings of a pilot or surveyor. Nevertheless, a juror stated during deliberation what he understood a pilot's and surveyor's salary would be and also that a pilot could retire at age 40. The Court found that this was misconduct in that evidence of

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earnings of pilots and surveyors was extrinsic evidence "which was not subject to objection, cross-examination, explanation or rebuttal by the defendant." 82 Wn.2d at 752.

Comparing *Richards* with *Halverson*, it will be clear that *Halverson* is the controlling authority. That is so because in *Richards* there was evidence of the mother's illness during her pregnancy actually presented at trial, which the jury could have properly considered in deciding what caused the newborn's birth defects. In contrast, in *Halverson*, there was absolutely no evidence of the value of future earnings and the information provided by the juror was therefore extrinsic evidence, to which the other side could not object, cross-examine, explain, or rebut.

In fact, had there been no evidence of the mother's illness in *Richards*, and a juror speculated that the birth defects were caused by an infection, and brought extrinsic evidence of the effect of such illnesses on birth defects, then we would have a situation analogous to that presented here, and a new trial would have been required.

The State also argues in its brief that the fact that Juror No. 6 brought in information from "mainstream" television programs "is within the public domain and falls within a juror's common experience." Reply, p. 6. To put this into context, this juror and others[2] brought in very specific information of the type that could only be introduced through

[2] The State wants to limit consideration of just the information brought in by Juror No. 6. A reading of the declarations of Larry Freeman demonstrate

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expert testimony: That date rape drugs were involved; how date rape drugs function; that date rape drugs would dissolve completely; that they would not leave an aftertaste; and, that they would not show up on blood tests. If this is to be considered information "within a juror's common experience" as the State argues, then there will be no limit on what a jury can consider in any civil or criminal case with the proliferation of real-life crime shows, dramatizations and internet information retrieval sources. Moreover, pursuant to the State's invitation, precedents such as *State v. Briggs*, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989) involving a juror's knowledge of the properties of stuttering, which was the central issue in the case; *Halverson v. Anderson, supra*, regarding knowledge of lost wages; *Fritsch v. J.J. Newberry's, Inc.*, 43 Wn. App. 904, 907, 720 P.2d 845, *rev. denied*, 107 Wn.2d 1006 (1986), where juror related what he had heard from his attorney about the value of a slip and fall case, which the court found to be "akin to a jury bringing a book or text into the jury room which was never admitted in evidence;" and other cases cited in detail in Defendant's Memorandum of Authorities, would no longer be good law.

If, as the State argues, a juror is allowed to use information gleaned from the "mainstream media," how will there ever be any assurance that this information was correct in the first place as presented by the media? Or, even assuming the program presents the information accurately and fairly, how can

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that several jurors introduced information about date rape drugs.

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it be determined that the juror recalled, understood, interpreted or communicated the information correctly? Moreover, what is the "mainstream media?" Is this network T.V., public broadcasting stations, real-life crime dramatizations, or police shows? This Court can certainly take judicial notice that information presented on television, whether through "mainstream" programs or otherwise, is not always accurate and unbiased. The State's suggestion that something on "mainstream" television becomes part of the juror's collective knowledge or wisdom which can be introduced under the common sense exception is simply absurd.

The State argues that the defense should have voir dired jurors about their knowledge of date rape drugs. It must be again stressed that the State conceded during the pretrial hearings that it had no evidence of date rape drugs. The defense had the right to assume that the jurors would honor their oath and decide the case only on the evidence. The defense could not have reasonably questioned jurors on their prior knowledge of date rape drugs without opening the door to the jurors assuming that date rape drugs were used. It would have been akin to ringing a bell and then telling the jury to disregard it, which would have been an impossibility.

Under no circumstances can jurors, who obtained their quasi-scientific knowledge from reality television or elsewhere, ever be justified in educating the jury under the "juror's common experience" exception. To do so, would effectively open the flood gates to all sorts of extraneous

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information that is not filtered, examined, considered, rebutted or otherwise permitted by the Court. *United States v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1991).

While courts recognize that a juror may in some cases utilize its past personal experiences, this is not without limitation. In fact, it is error for a juror to consider personal experiences "in the absence of any record evidence on a given fact." *Id.*, 926 F.2d at 822. Conversely, "personal experiences are relevant only for the purpose of interpreting the record evidence." *Id.*

In *Navarro-Garcia*, *id.*, a defendant charged with smuggling 350 pounds of marijuana in the back of her car claimed that she had no knowledge, presented the issue of whether she should have been aware of this due to the weight of the marijuana. As in the instant case, the court instructed the jury to decide the case only on the evidence presented at trial. One juror conducted an experiment and another talked about his personal experience in his own car when he had extra weight in the back. Information presented by these jurors was held to be potentially improper as extrinsic evidence requiring additional hearings because there had been no evidence presented as to the effect of this weight of drugs on the handling of this type of automobile.

Richards v. Overlake, while holding that a new trial was not required under the specific facts presented, in similarity with *Navarro-Garcia, supra*, nevertheless strongly affirmed that a new trial is required where extrinsic evidence is presented

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"which is outside the recorded evidence of the trial and not subject to the protections and limitations of open court proceedings." 59 Wn. App. 270. Extrinsic evidence is "not subject to objection, cross-examination, explanation or rebuttal by the defendant." *Halverson*, 82 Wn.2d at 752.

The credibility of the complaining witnesses was the crucial issue in this case in that there was no real corroboration and much contradiction. Jurors are never justified in considering matters outside the record in resolving credibility. *Arthur v. Iron Works*, 22 Wn. App. 61, 587 P.2d 626 (1978). Unfortunately this is what occurred here.

IV. CONCLUSION

While the foregoing cited cases make very strong statements about the protections that must be afforded a litigant against the use of extrinsic evidence by jurors, it must be emphasized that the majority of these were civil cases where the Sixth Amendment Confrontation Clause was not implicated. In criminal cases, defendants have additional rights as guaranteed by the United States Constitution and the Washington State Constitution, foremost among them is the right to confrontation. Defendant Wiatt was not able to confront this extrinsic evidence, which was akin to having expert witnesses or learned treatises brought into the jury room, without the opportunity of confrontation, cross-examination or rebuttal. Besides all the other legal grounds, Jerry Wiatt's right to confrontation, as guaranteed by the Sixth Amendment of

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the United States Constitution and Article 1, Section 21 of the Washington State Constitution, requires a new trial.

DATED this 12th day of December, 2002.

Allen, Hansen, & Maybrown, P.S.
Attorneys for Jerry Wiatt Jr.

DAVID ALLEN, WSBA # 500

TODD MAYBROWN, WSBA # 18557

CASSANDRA L. STAMM, WSBA #29265

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HH. Declaration of Charles H. Williams in Support of Defendant's Motion for New Trial, December 5, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

Copy Received

Clerk's Stamp

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT, Defendant.	No. 01-1-01136-1 **DECLARATION OF CHARLES H. WILLIAMS IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL**

CHARLES H. WILLIAMS declares under penalty of perjury pursuant to the laws of the State of Washington as follows:

1. Identity. I am an attorney licensed to practice law in the State of Washington (WSBA No. 11674) since May 1981. My offices are located at 204 Custer Way, in Olympia, Washington. For the last fifteen years my practice has been limited to criminal defense and litigation of tort and civil-rights claims.

2. Purpose of declaration. I have been asked by the attorneys representing the defendant in this case—namely, David Allen and Todd Maybrown—to recall certain remarks of jurors made during a brief session with them after they had delivered verdicts in the instant case. To facilitate the court's taking of verdicts, I had agreed as a local attorney to stand in for defense counsel, whose offices are located in Seattle. When the jury came back on November 13, 2002,

CHARLES H. WILLIAMS
Attorney at Law, P.S.
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after deliberating for nearly four days, I joined the defendant in the courtroom, took notes of the proceeding and, with the Court's permission, met with jurors afterward. After this, I spoke with the defendant's father in person and his defense counsel by telephone.

3. Discussion with jurors. After the jury was released I accompanied the prosecuting attorneys, Jon Tunheim and Christy Peters, and Thurston County Sheriff's Detective Louise Adams, into the jury room to speak with jurors. This session, which lasted for some fifteen to twenty minutes, appeared to include all jurors, although I recall at least two jurors leaving before the end of the session. The discussion started with Mr. Tunheim asking jurors what factors most influenced their verdicts. After brief discussion of other matters, one juror asked whether date-rape drugs were involved. Another juror affirmed that this issue had been discussed during deliberations. Someone thought that a complainant named Alvina might have been drugged. I never learned the names of these jurors. None of the other jurors present disagreed with or contradicted these jurors about the discussion of date rape drugs during deliberations. Mr. Tunheim stated that date-rape drugs had been an issue in the case but that this evidence had been excluded from the trial by the court. He asked jurors whether they had noticed his asking complainants the question, "How did your body feel?" Several answered yes. The discussion then proceeded on to different matters.

4. Affirmation. The foregoing declaration truly and correctly states matters of which I have personal knowledge.

SIGNED this 5th day of December, 2002, in Olympia, Washington.

CHARLES H. WILLIAMS, Declarant

CHARLES H. WILLIAMS
Attorney at Law, P.S.
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II. Supplemental Declaration of Larry Freeman in Support of Motion for New Trial, December 12, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff, v. JERRY WIATT JR., Defendant.	NO. 01-1-01136-1 SUPPLEMENTAL DECLARATION OF LARRY FREEMAN IN SUPPORT OF MOTION FOR NEW TRIAL

I, Larry Freeman, do hereby declare:

1. I am an investigator licensed in the State of Washington. My qualifications are set forth in my prior declaration filed in this case.

2. On Monday, December 9, 2002, juror Lisa Rosseels returned my December 4, 2002 call and I interviewed her over the phone.

3. Ms. Rosseels told me that in her view some of the victims in this case were drugged.

4. Ms. Rosseels said she recalled the discussion in the jury room about whether it would be proper to factor date rape drugs into their deliberations. She said the jury decided they could consider date rape drugs as circumstantial evidence. She said she believed it was also proper to consider the possibility

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that date rape drugs had been used because of the women's testimony about how their bodies felt.

5. Ms. Rosseels confirmed that a male juror provided specific information about date rape drugs. She recalled him saying that date rape drugs dissolve in a drink such that they cannot be seen or tasted.

6. Ms. Rosseels said she provided information to jurors about how long date rape drugs remain in a person's system. She said she told the jury that a blood test is required to detect date rape drugs and that the fact that such drugs do not stay in a person's system very long, combined with the amount of time that passed from the date of the incidents until they were reported, would have prevented testing from being done in this case. She said that she knew this information from hearing about workplace drug tests and from watching programs like "60 Minutes".

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE.

DATED at Seattle, Washington this 12th day of December, 2002.

LARRY FREEMAN
Investigator

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JJ. Minute Entry, Hearing Re: Motion for New Trial, December 16, 2002, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	NO. 01-1-01136-1
	GARY R. TABOR
STATE OF WASHINGTON, Plaintiff(s),	CT REPORTER PAM JONES
vs.	CLERK SUE ROBINSON
JERRY WIATT, Defendant(s).	DATE: DECEMBER 16, 2002

Plaintiff Appearing: ☒Yes ☐ No

Attorney for Plaintiff: J. Tunheim, C. Peters
Present: ☒ Yes ☐ No

Defendant Appearing: ☒Yes ☐ No

Attorney for Defendant: D.Allen, T. Naybrown
Present: ☒ Yes ☐ No

THIS MATTER CAME ON BEFORE THE COURT FOR: Motion for New Trial

1:31 Court in session.
All parties present.
Mr. Allen addressed the Court.

1:58 Argument in response, Mr. Tunheim.

2:13 Rebuttal by Mr. Allen

2:27 Ruling by the Court:
The Court denied the Motion for new Trial finding that anyone on this jury could be expected to have some knowledge of date rape drugs. The Court is convinced that the central issue of the trial was credibility and will not go beyond the fact that the jury was weighing credibility, nor will it go behind their thought processes as to how they evaluated the testimony that they heard.

2:43 The Court heard motions as to other aspects of the case.

2:45 Court and Counsel adjourned to chambers for conference.
Court in recess.

☐ ORDERS SIGNED AND ENTERED BY THE COURT:

KK. Complaint for Damages, January 31, 2003, *Z.V. Hawkins v. Jerry D. Wiatt, Jr.,* Thurston County Superior Court No. 03-2-00199-3

☐ **EXPEDITE** (if filing within 5 court days of hearing)
☐ Hearing is set:
Date: _____
Time: _____
Judge/Calendar: _____

FILED
JAN 3 1 2003
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

ZOE VERONICA HAWKINS, a single person, **Plaintiff,** **vs.** **JERRY D. WIATT, a single person,** **Defendant.**	**No.** 03 2 00193 3 **COMPLAINT FOR DAMAGES**

COMES NOW the Plaintiff, ZOE V. HAWKINS, by and through her attorney, G. Saxon Rodgers of Ditlevson Rodgers Dixon, P.S., and alleges and avers as follows.

I. PARTIES

1.1 Plaintiff, ZOE VERONICA HAWKINS, a single woman, is and at all times material hereto was a resident of Olympia, Thurston County, Washington.

1.2 Defendant, JERRY D. WIATT, a single man, is and at all times material hereto was a resident of Olympia, Thurston County, Washington.

II. JURISDICTION AND VENUE

2.1 **Jurisdiction**. The Superior Courts of the State of Washington have jurisdiction over the parties and the subject matter of this litigation.

2.2 **Venue**. Venue is proper in Thurston County.

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ATTORNEYS AT LAW
204 Pear Street NE
Olympia, WA 98506
360 / 352-8311, FAX: (360) 352-8501

III. FACTS

3.1 On February 12th, 2000, ZOE HAWKINS was at the residence of Defendant, JERRY WIATT, located in Olympia, Thurston County, Washington. Ms. HAWKINS, a minor, was 17 years of age at the time, while Defendant WIATT was 26 years of age.

3.2 While at the WIATT residence, Ms. HAWKINS was furnished with alcohol, even though she was not of legal age to consume alcohol.

3.3 During the course of the evening on February 12th, 2000, while at the WIATT residence, ZOE HAWKINS consumed alcohol and became incapable of consenting to the actions of Defendant WIATT.

3.4 ZOE HAWKINS was under the influence of alcohol and/or drugs when JERRY WIATT took her upstairs to his bedroom. JERRY WIATT was a 26 year old adult who assaulted ZOE HAWKINS, a minor aged 17, while she was incapable of consenting, and he raped her and Plaintiff was damaged thereby.

IV. CLAIM FOR RELIEF

4.1 The actions of Defendant, JERRY WIATT, constitute an intentional and unlawful assault upon the person of ZOE V. HAWKINS.

V. PRAYER FOR RELIEF

Plaintiff, ZOE V. HAWKINS, having fully stated her Complaint for Damages against Defendant, JERRY D. WIATT, PRAYS FOR JUDGMENT as follows:

5.1 For special damages in an amount to be proved at trial;

5.2 For general damages in an amount to be proved at trial;

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5.3 For reasonable attorneys fees and costs; and

5.4 For such other relief as the court deems just and equitable.

DATED this 15th day of January, 2003.

G. SAXON RODGERS, WSB #5798
Attorney for Plaintiff

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LL. Judgment and Sentence, March 31, 2003, *State v. Jerry Wiatt*, Thurston County Superior Court No. 01-1-01136-1

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
03 MAR 31 PM 2:08
BETTY J. GOULD, CLERK
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF THURSTON

STATE OF WASHINGTON, Plaintiff, v. JERRY D. WIATT, JR., Defendant. DOB: 12/10/73	No.01-1-1136-1 **JUDGMENT AND SENTENCE (JS)** Prison

I. HEARING

1.1 A sentencing hearing was held on March 31, 2003 and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on November 13, 2002 by jury-verdict OF COUNTS II, III, IV, V, VI, VII, VIII, IX, X(lesser included), XI, XII, XIII, XIV, XV, XVI, XVII, XVIII of the 4th Amended Information and guilty on January 3, 2003 by guilty plea to counts XXIII and XXIV of the 5th Ameded Information:

	CRIME	RCW	DATE
II	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	June 29, 2001 and June 30, 2001
III	SEXUAL EXPLOITATION OF A MINOR	9.68A.040(1)(b) and 9.68A.011(3)	June 29, 2001 and June 30, 2001
IV	SEXUAL EXPLOITATION OF A MINOR	9.68A.040(1)(b) and 9.68A.011(3)	June 29, 2001 and June 30, 2001
V	VOYEURISM	9A.44.115	June 29, 2001 and June 30, 2001
VI	VOYEURISM	9A.44.115	June 29, 2001 and June 30, 2001
VII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	June 29, 2001 and June 30, 2001
VIII	RAPE IN THE THIRD DEGREE	9A.44.060(1)(a)	August 1, 2000
~~IX~~	~~FURNISHING LIQUOR TO A MINOR*~~	~~66.44.270(1)~~	~~August 1, 2000~~
X	ATTEMPTED RAPE IN THE THIRD DEGREE (Lesser included offense)*	9A.28.020 and 9A.44.060(1)(a)	September 1, through September 30, 2000

COPY TO SHERIFF

COPY TO DOC JASS

03-9-10743-6

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XII	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	December 19, 2000
XIII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	December 19, 2000
XIV	RAPE IN THE SECOND DEGREE	9A.44.050(1)(b)	February 12, 2000
XV	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	February 12, 2000
XVI	RAPE IN THE THIRD DEGREE	9A.44.060(1)(a)	May 1, 2000 through October 1, 2000
XVII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	May 1, 2000 through October 1, 2000
XVIII	FURNISHING LIQUOR TO A MINOR*	66.44.270(1)	May, 2000
~~XVIII~~ XVII	VOYEURISM	9A.44.115	January 1, 2000 through July 31, 2001
XXIV	COMMUNICATION WITH A MINOR FOR IMMORAL *PURPOSES	9.68A.090	February 1, 1999 through March 31, 1999

*** GROSS MISDEMEANORS**

2.2 CRIMINAL HISTORY (RCW 9.94A.360): NONE KNOWN

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME
1						
2						
3						
4						
5						

2.3 SENTENCING DATA:

	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE	PLUS ENHANCEMENTS*	TOTAL STANDARD RANGE	MAXIMUM TERM
II.	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
III.	9	IX	120 mo.	N/A	120 mo.	10 yrs
IV	9	IX	120 mo.	N/A	120 mo.	10 yrs
V	23	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
VI	23	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
VII	N/A	G.M.				

VIII	23	V.	5 yrs	N/A	60 mo.	5 yrs
IX	N/A	G.M.				12 mo.
X	N/A	G.M.				12 mo.
XII	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
XIII	N/A	G.M.				12 mo.
XIV	23	XI	210-280 mo.	N/A	210-280 mo.	LIFE
XV	N/A	G.M.				12 mo.
XVI	23	V	60 mo.	N/A	60 mo.	5 yrs
XVII	N/A	G.M.				12 mo.
XVIII	N/A	G.M.				12 mo.
XIX	~~23~~ 22	UNRANKED	0-12 mo.	N/A	0-12 mo.	5 yrs
XXIV	N/A	G.M.				12 mo.

2.4 [X] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above the standard range for Count(s) II, XII, XIV. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did recommend an exceptional sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows: _____

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts I without Prejudice and Counts XIX, XX, XXI, XXII, XXV with prejudice

The defendant is found NOT GUILTY of Counts XI.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

	$ TBD	Restitution to: V's or Families for Any Counseling	
JASS CODE	$ _____	Restitution to: Costs Reasonably Related to These	
RTN/RJN	$ _____	Restitution to: Offenses (Name and Address--address may be withheld and provided confidentially to Clerk's Office).	RCW 7.68.035
PCV	$ 500-	Victim assessment	
CRC	$ 110-	Court costs, including	RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190
		Criminal filing fee $ 110-	FRC
		Witness costs $ _____	WFR
		Sheriff service fees $ _____	SFR/SFS/SFW/WRF
		Jury demand fee $ _____	JFR
		Other $ _____	
PUB	$ _____	Fees for court appointed attorney	RCW 9.94A.030
WFR	$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM/MTH	$ _____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/FCD NTF/SAD/SDI	$ _____	Drug enforcement fund of _____	RCW 9.94A.030
CLF	$ _____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
EXT	$ _____	Extradition costs	RCW 9.94A.120
	$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)	RCW 38.52.430
	$ 100 -	Other costs for: DNA FEE	RCW 9.94A.145
	$ _____	TOTAL	

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing:

[X] shall be set by the prosecutor

[ ] is scheduled for _____

[ ] RESTITUTION. Schedule attached, Appendix 4.1.

[ ] Restitution ordered above shall be paid jointly and severally with:. _____

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-$)
RJN			

[X] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[X] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $\_\_\_\_\_$ per month commencing $\_\_\_\_\_$. RCW 9.94A.145.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[X] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [X] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not have contact with those person listed below including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE.

4.4 **OTHER:** $\_\_\_\_\_$

4.5 **JAIL ONE YEAR OR LESS.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

328	months on Count	II	328	months on Count	XII
120	months on Count	III	12	months on Count	XIII
120	months on Count	IV	328	months on Count	XIV
12	months on Count	V	12	months on Count	XV
12	months on Count	VI	60	months on Count	XVI
12	months on Count	VII	12	months on Count	XVII
60	months on Count	VIII	12	months on Count	XVIII
12	months on Count	IX	12	months on Count	~~XIX~~ XXII
12	months on Count	X	12	months on Count	XXIV

Actual number of months of total confinement ordered is: _____

All counts shall be served concurrently, except for the following which shall be served consecutively: **The sentences imposed on the gross misdemeanor counts shall be served concurrently with each other but consecutively to the sentences imposed on the felony counts.** ✓

The sentence herein shall run consecutively with the sentence in cause number(s) _____

_____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. **The time served shall be computed by the jail. The credit for time served in the Thurston County Jail shall be first applied to the Gross Misdemeanor counts and any remainder to the Felony counts.** The defendant shall recieve credit for all time on electronic home monitory. ✓

4.6 **COMMUNITY CUSTODY.** RCW 9.94A.120. Defendant shall be placed on community custody for **LIFE** as part of the exceptional sentence imposed. Defendant shall report to DOC after release from custody; and the defendant shall perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC and shall comply with the instructions, rules and regulations of DOC for the conduct of the defendant during the period of community custody and any other conditions of community custody stated in this Judgment and Sentence or other conditions imposed by the court or DOC during community custody. The defendant shall:

While on community community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: Any Victims or immediate family Members ✓

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

_____

[ ] The defendant shall participate in the following crime-related treatment or counseling services:

_____

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

[X] **Abide by all requirements in the attachement incorporated herein.**

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

_____

Other conditions: _____

_____

_____

_____

The community custody imposed by this order shall be served consecutively to any term of community supervision or community custody in any sentence imposed for any other offense, unless otherwise stated. The maximum length of community supervision or community custody pending at any given time shall not exceed 24 months, unless an exceptional sentence is imposed. RCW 9.94A.400.

The conditions of community supervision or community custody shall begin immediately unless otherwise set forth here: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4 **RESTITUTION HEARING.**

[X] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.7 **SEX OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the

sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.8 **BAIL:** Bail previously posted, if any, is hereby exonerated and shall be returned to the posting party.

5.9 **OTHER:** _____

_____

_____.

DONE in Open Court and in the presence of the defendant this date: _____.

JUDGE Gary R. Tabor

Deputy Prosecuting Attorney
Jon Tunheim, WSBA #19783

Attorney for Defendant
David Allen, WSBA #500

Defendant
JERRY D. WIATT, JR.

Deputy Prosecuting Attorney
Christen Peters, WSBA #23559

Attorney for Defendant
Todd Maybrown, WSBA #18557

Interpreter signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

CERTIFICATION

CAUSE NUMBER of this case: 01-1-1136-1

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF DEFENDANT

SID No. (If no SID take fingerprint card for State Patrol)

Date of Birth 12/10/73

FBI No.

Local ID No. C104581

PCN No. **008076928**

Other _____

Alias name, SSN, DOB: _____

Race:

[X] Asian/Pacific Islander [ ] Black/African-American [X] Caucasian [ ] Native American [ ] Other: _____

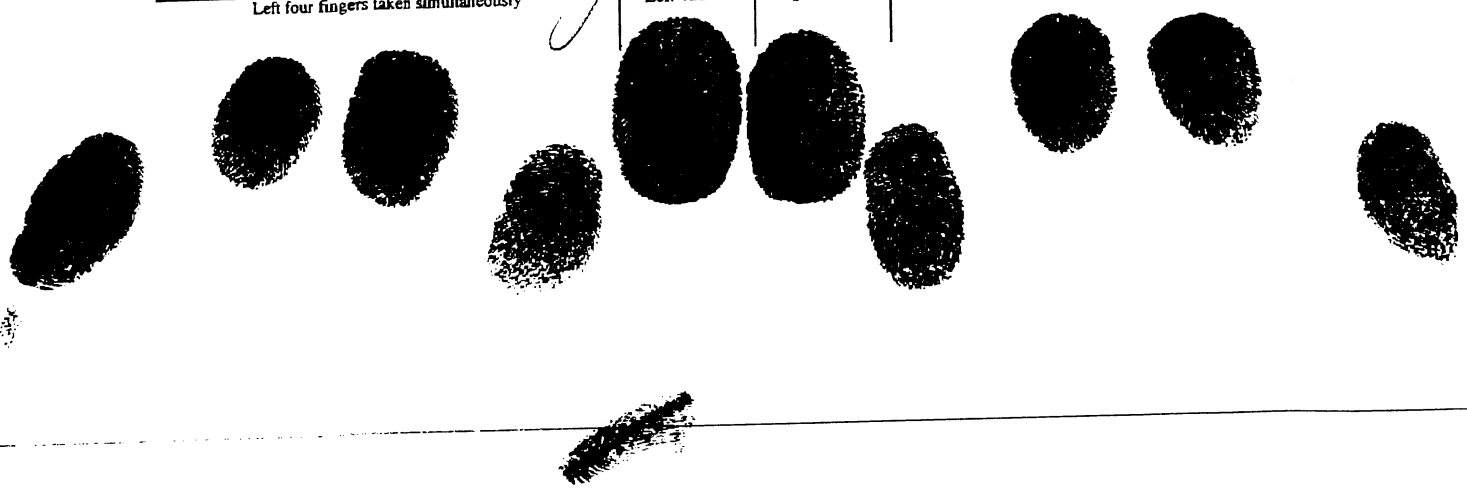
Ethnicity: [ ] Hispanic [X] Non-Hispanic

Sex: [X] Male [ ] Female

FINGERPRINTS I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. Clerk of the Court:, Deputy Clerk. John O Buck Dated: 3-31-03

DEFENDANT'S SIGNATURE: _____

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff,

vs.

Jerry D. Wiggs Jr, Defendant.

No. 01-1-01136-1

CONDITIONS OF COMMUNITY CUSTODY/~~PLACEMENT/SUPERVISION~~
Attachement to Judgment and Sentence

The court orders the following conditions of the Community Custody/Placement/Supervision:

- [X] NO CONTACT WITH VICTIM(S) FOR LIFE
- [X] No criminal law violations;
- [X] Obey all rules of D.O.C.;
- [ ] No contact w/ minors unless supervised by an adult who has been approved by your CCO/Therapist;
- [ ] Do not enter into a relationship with any person who has minors in their care or custody without approval of your CCO/Therapist;
- [ ] Hold no position of authority or trust involving minors or participate in any youth programs;
- [ ] Drug /Alcohol abuse treatment as required by CCO;
- [ ] Domestic Violence treatment as required by CCO;
- [X] Sexual Deviancy Treatment as required by CCO;
- [ ] Not possess or peruse any sexually explicit material as defined by therapist/CCO;
- [ ] Stay out of business establishments offering sexually explicit material or entertainment;
- [ ] Not frequent or loiter in areas where children congregate;
- [ ] Do not access the Internet or make use of any computer modem;
- [X] No Possession or Consumption of controlled substances unless by Lawful Prescription. Submit to random urinalysis and reasonable searches as required;
- [ ] Not consume alcohol, and random breath testing as required;
- [X] Notify any employer of your conviction and rules of supervision and/or treatment;
- [X] Mandatory HIV Test;
- [X] Mandatory DNA Testing;
- [X] Mandatory Sex Offender Registration;
- [X] Submit to polygraph as required by therapist or CCO to monitor compliance with sentence;
- [ ] Submit to Plethysmograph testing as required by therapist or CCO
- [X] Living conditions to be approved by CCO;
- [X] Geographical Restrictions as ordered by CCO;
- [X] Abide by all other reasonable rules of supervision imposed by your CCO.
- [X] Other: IF D IS IN THERAPY, HE MUST ABIDE BY ALL RULES OF THERAPY AS REQUIRED BY THE THERAPIST.

DATED: 8-31-03

I acknowledge that I have read and understand the conditions listed above.

DEFENDANT

JUDGE

SUPERIOR COURT OF WASHINGTON
THURSTON COUNTY

STATE OF WASHINGTON, Plaintiff,	No. 01-1-1136-1
vs.	**WARRANT OF COMMITMENT**
JERRY D. WIATT, JR., Defendant	

DOB: 12/10/73
SID:
BOOKING # _C104581

SEX: Male
RACE: White/Asian

THE STATE OF WASHINGTON TO:

The Sheriff of Thurston County and to the proper officer of the Department of Corrections,

The defendant herein has been convicted in the Superior Court of the State of Washington for the crime(s) set forth in the judgment and sentence under the above entitled cause and the court has ordered that the defendant be sentenced to a term of imprisonment as set forth in the aforementioned Judgment and Sentence.

YOU, THE SHERIFF, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence.

DATED: 3-13-03.

By direction of the Honorable:

BETTY J. GOULD, CLERK

By: _____
Deputy Clerk

MM. Unpublished Opinion, April 26, 2005, *State v. Jerry Wiatt*, Court of Appeals (Division II) No. 30168-7-II

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Jerry D. WIATT, Jr., Appellant.
No. 30168-7-II.

April 26, 2005.

Appeal from Superior Court of Thurston County; Hon. Gary R. Tabor, J.

Lenell Rae Nussbaum, Attorney at Law, Seattle, WA, for Appellant.

Steven Curtis Sherman, Thurston County Pros Ofc, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

BRIDGEWATER, J.

*1 Jerry D. Wiatt, Jr. appeals his 18 convictions that include second and third degree rape, sexual exploitation of a minor, voyeurism, and furnishing liquor to a minor. He also appeals his exceptional sentence. We reverse and remand five counts based upon an unlawful search, and we affirm the remainder of the convictions. Because we have reversed and remanded, we do not address the sentencing issue.

FACTS [FN1]

> FN1. Because Wiatt has raised sufficiency of the evidence as to the counts involving Ms. Cruz and Ms. Rankis, we have set forth in detail the facts underlying these counts.

In December 1999, Wiatt purchased a house in Olympia, Washington. Wiatt was 26 years old. Wiatt shared his house with roommates to help pay the mortgage. Parties were held regularly at the house, and Wiatt and his roommates frequently provided alcohol to underage guests.

I.A. Cruz

On July 9, 2001, A. Cruz contacted police and reported that she had been raped by Wiatt. She stated that she had not reported the incident earlier because she did not want any 'drama' in her life and because she would soon be leaving Olympia to attend college. Clerk's Papers (CP) at 219. But the previous day, her friend, Nicole Smith, informed Ms. Cruz that she was on a videotape being 'tag teamed' by two guys. CP at 219. Ms. Smith had learned this information from Nick Deor. Ms. Cruz stated that she was shocked. Later that evening, Ms. Cruz's friend, Huyn Thoong, called her and informed her that she had also heard about the videotape. Thoong told Ms. Cruz that an individual named Barry had viewed a videotape of her having intercourse 'dogg {y} {style}.' CP at 219. At trial, Ms. Cruz testified that she then confided in her aunt, who took her to the emergency room and encouraged her to notify the police. Ms. Cruz further testified that she had not had consensual intercourse, was unaware that she had been videotaped, and had not granted anyone permission to tape her.

During separate pre-trial police interviews, Ms. Cruz, Thoong, and Annlee Hoy, another of Ms. Cruz's and Thoong's friends, provided information about the videotape. Each of them told police that their friends had informed them that Wiatt had either shown the tape to, or discussed it with, an individual named Barry. Based on this information, the police filed an application and affidavit for a search warrant to search Wiatt's home. The affidavit stated that Ms. Cruz informed police that Thoong told her that 'Barry' had viewed a videotape of her having sexual intercourse; Hoy informed police that her friend, Ryan Carlson, told her that 'Barry' had discussed the video with Wiatt; and Thoong informed police that she had 'heard' that an individual named 'Barry' had seen the video.

The court granted the search warrant, permitting police to search for and seize, bedding, clothing, lubricant, video recording equipment, videotapes, photographs, and any other evidence that a crime was committed. Detective Kenneth Clark executed the warrant and found a video camera inside a dresser in Wiatt's bedroom. A videotape was inside the camera. Detective Clark turned the camera on and observed a video recording of Wiatt and Ms. Cruz engaged in intercourse. Detective Clark also found other videotapes and a jar of lubricant in Wiatt's bedroom.

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Detective Clark seized all of these items.

***2** Prior to trial, Wiatt moved to suppress the evidence obtained from the search of his residence. He argued that the affidavit did not establish probable cause for the search because the information about the videotape provided by Ms. Cruz, Thoong, and Hoy was based on hearsay and not first-hand knowledge. In addition, none of the women had provided Barry's last name, Specht. The court denied the motion, holding that, when taken as a whole, the information provided by the informants was reliable because each of their statements regarding the videotape corroborated the others' statements.

At trial, Ms. Cruz testified that on the evening of June 29, 2001, she and Thoong went to a party at Wiatt's home. At the time, Ms. Cruz was 17 years old and Thoong was 18 years old. Wiatt's younger brother, Jeff Wiatt, had invited them to the residence. Wiatt was not home when Ms. Cruz and Thoong arrived. Jeff, Ms. Cruz, and Thoong began playing a 'drinking game.' CP at 7. Thoong told detectives that over the course of the evening, Ms. Cruz consumed at least 10 shots of vodka and a mixed alcoholic drink. Thoong also saw Ms. Cruz taking a drink directly from a bottle of vodka. Ms. Cruz told detectives that she had eaten very little during the day before the party and that she was taking medications with warnings not to consume alcohol.

Around 2:00 a.m., Wiatt; his sister, Tammy Wiatt; his cousin, Johan Lo; and several others arrived at Wiatt's residence. At trial, Ms. Cruz testified that when Wiatt returned home, she was 'heavily intoxicated.' 1 Report of Proceedings (RP) (Oct. 23, 2002) at 81. Shortly thereafter, Tammy, Ms. Cruz, and Thoong decided to go into Wiatt's hot tub. Ms. Cruz testified that after that point, her memory of the evening is 'blurry.' 1 RP at 81. Thoong testified that Ms. Cruz entered the hot tub wearing all of her clothing. They remained in the hot tub for approximately 15 minutes. Thoong got out of the hot tub first and then went to Ms. Cruz's car to check her cell phone messages and make some calls. A short time later, Tammy and Ms. Cruz left the hot tub. By then, Ms. Cruz was wearing only a shirt and bra. Wiatt brought her a white robe to put on. Ms. Cruz testified that she did not remember taking off her pants in the hot tub.

When Thoong returned, she did not see Ms. Cruz. Thoong asked where Ms. Cruz had gone and was told that she was upstairs in Wiatt's bedroom. Thoong went upstairs and found Wiatt's door locked. She began knocking on the door, yelling that Ms. Cruz was only 17 years old and demanding that Ms. Cruz leave the room. Thoong heard Ms. Cruz say her name twice, but Ms. Cruz did not come out of the room. Ms. Cruz testified at trial that she did not remember anything that occurred while she was in Wiatt's bedroom. After 20 minutes had passed, Thoong became very upset and called Hoy for help.

Hoy informed detectives that she was awakened by Thoong's call at 3:00 a.m. Thoong was 'crying hysterically.' 4 RP (Oct. 28, 2002) at 664. Thoong told her that Ms. Cruz was drunk and would not come out of Wiatt's bedroom. Thoong wanted to leave and she '{didn't} know what to do.' CP at 225. Hoy informed Thoong that she would come pick them up. When Hoy arrived at Wiatt's residence, she saw Ms. Cruz standing outside in a white robe. Hoy went into the house to confront Wiatt. She told him that Ms. Cruz was only 17, that he had raped her, and that he was a 'sick perverted f---.' CP at 227. During the confrontation, Wiatt's female friends began threatening to 'beat' her up if she did not leave. CP at 227. She left the residence and went back outside to meet Ms. Cruz and Thoong. She told Ms. Cruz to get into her car, but Ms. Cruz refused to do so and went back into the house.

***3** Hoy and Thoong waited in Hoy's car for approximately 15 minutes. They called Ms. Cruz's cell phone several times, asking her to leave the house and meet them outside. Each time Ms. Cruz told them that she was coming. Eventually they saw Wiatt's sport utility vehicle (SUV) pull up behind them. The SUV drove a short distance and then returned back to the house. Moments later, they saw Ms. Cruz drive past them in her Honda Accord. Hoy called Ms. Cruz and asked her to pull over, but Ms. Cruz continued driving. At trial, Hoy testified that Ms. Cruz was 'swerving all over the road' and Thoong testified that her driving 'was really scary.' 4 RP at 676; 2 RP (Oct. 23, 2002) at 251. Hoy followed Ms. Cruz on I-5 until they reached Ms. Cruz's exit. They continued to talk on their cell phones during the drive. Ms. Cruz's home is approximately 20 minutes from the Wiatt residence.

Hoy testified that as they approached Ms. Cruz's exit, Ms. Cruz called her and asked her not to pull into her driveway because she was worried that her mother would be 'suspicious' if two cars pulled up. 4 RP at 676. Hoy left Ms. Cruz at her exit and drove back to her own home with Thoong. Ms. Cruz testified that she only vaguely remembered driving to her exit. She further testified that she remembers

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taking her off-ramp and someone calling her on her cell phone, telling her that she could not go into her home wearing a robe with no pants on.

The next thing Ms. Cruz remembered was waking up naked in Wiatt's bed, with Wiatt lying next to her. She testified that she had one memory of the previous evening: she remembered someone on top of her having sexual intercourse. She indicated to the person that she was in pain, and he mentioned something about using lubricant. Ms. Cruz also told detectives during an interview that she vividly remembered being 'in so much pain' and that it 'hurt so bad.' CP at 217. Ms. Cruz testified that when she woke up, she felt 'numb' and that she was still slightly feeling the effects of the alcohol she had consumed the previous evening. 1 RP at 93. She got up, found her clothes and keys, and left.

Thoong told detectives that Ms. Cruz called her the following morning at about 8:30 a.m. Ms. Cruz told her that she had fallen asleep in her driveway. But Thoong and Hoy soon learned from another friend that Ms. Cruz had returned to Wiatt's residence. Thoong stated that she believed that Ms. Cruz 'was scared to tell {them} ... she went back.' CP at 238. Later that afternoon, Ms. Cruz told Hoy that she woke up in Wiatt's bed and that she remembered someone having intercourse with her. She said that it hurt 'really bad' and that she kept blacking out. CP at 231.

Wiatt testified that throughout the evening on June 29, 2001, he and Ms. Cruz were kissing and hugging each other. Wiatt further testified that after Ms. Cruz got out of the hot tub, they both agreed to go into his bedroom. He entered the bedroom before Ms. Cruz. Lo was in the bedroom. Lo testified that Wiatt handed him a video camera, indicated that he wanted Lo to tape him and Ms. Cruz, and told Lo to get down on the floor. Ms. Cruz entered the bedroom. She and Wiatt began kissing, and Wiatt engaged in foreplay and performed oral sex on Ms. Cruz. Lo taped their interaction. Wiatt believed that she understood what they were doing in the bedroom because she was interacting with him and kissing him. Wiatt and Ms. Cruz left the bedroom when Ms. Cruz's friends began knocking at the bedroom door.

***4** Wiatt testified that Ms. Cruz did not want to leave his house. And while Hoy and Thoong waited outside for her, Ms. Cruz and Wiatt began planning how to 'allude {sic} her friends so she could somehow trick them' and return to the house. 10 RP (Nov. 4, 2002) at 1940. Wiatt and Ms. Cruz got into Wiatt's SUV to give the impression that Ms. Cruz was leaving. When Ms. Cruz's friends continued to call her, she decided to drive home in her own vehicle. Wiatt stated that Ms. Cruz's driving was 'fine' and that she told him she would come back. 10 RP at 1946.

Wiatt testified that Ms. Cruz was gone for about an hour, and then she called him and asked if she could return. She returned and they began kissing. Ms. Cruz then went up to Wiatt's room while he went to get a drink. When Wiatt came into his bedroom, he saw Ms. Cruz and Lo talking on his bed. Wiatt testified that Ms. Cruz was 'putting the moves' on Lo. 10 RP at 1951. He came onto the bed and he and Ms. Cruz began having sexual intercourse. Lo remained on the bed and taped the interaction. Wiatt stated that Lo was approximately one foot away from them on the bed, and he believed that Ms. Cruz was aware that Lo was taping them. Wiatt also testified that he believed Ms. Cruz consented to their intercourse and that she had moved her body with his while they were engaging in intercourse. Lo testified that when Ms. Cruz entered the bedroom she saw him on the bed, and he believed that she was aware of what was happening when she and Wiatt engaged in sexual intercourse.

Wiatt testified that he could tell that Ms. Cruz had been drinking and was not entirely sober, but her motor skills and speech were normal. Lo's testimony was similar to Wiatt's. He testified that Ms. Cruz and Wiatt were 'flirting' all evening and that, when he spoke with Ms. Cruz while she was in the hot tub, Ms. Cruz was coherent and could 'hold a conversation.' 2 RP at 371, 3 RP (Oct. 24, 2002) at 429. However, Ms. Cruz told detectives that at the party, she was 'the most intoxicated {she'd} ever been,' and at trial, she testified that she was 'heavily intoxicated' that evening. CP at 221; 1 RP at 81. Thoong testified that she had never seen Ms. Cruz that intoxicated before and that it was the most she had seen Ms. Cruz drink. In addition, Hoy testified that when she arrived at Wiatt's residence, Ms. Cruz was extremely intoxicated and appeared to be in an 'extremely different' state of mind. 4 RP at 670. Hoy also told detectives that Ms. Cruz 'didn't look like {her} friend at all,' her speech was slurred, and she was using expressions that she had never used before. CP at 230.

During the trial, the jury also viewed the videotape, which had been converted to digital video disk (DVD). The DVD depicted both incidents that occurred while Ms. Cruz was in Wiatt's bedroom.

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Wiatt was charged with two counts of second degree rape for engaging in sexual intercourse when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; two counts of sexual exploitation of a minor with sexual motivation; and two counts of voyeurism. After Ms. Cruz reported the incident, the news media reported that there may have been another video. Several additional young women came forward and reported that they, too, had been raped by Wiatt. One of these women, R. Rankis, reported an incident that occurred in 2000.

II. R. Rankis

***5** In late July or early August 2000, at 10:00 p.m., R. Rankis, a 17-year-old female, went to a party at Wiatt's house with her friend, Alicia Cochran. Wiatt was serving drinks. Over a period of about two hours, Ms. Rankis consumed two to three mixed alcoholic drinks and four shots of liquor. In addition, Ms. Rankis and Cochran ingested a few lines of cocaine. Ms. Rankis testified that she and Cochran ingested the cocaine in Wiatt's bathroom so that no one at the party would see them using the drug.

Ms. Rankis testified that throughout the evening, Wiatt flirted with her and told her that she was pretty. She felt flattered. At one point, Wiatt asked her if she would like to see something in his bedroom. Ms. Rankis agreed and they went upstairs to his room. They laid down on his bed and he began kissing her. Ms. Rankis testified that she did not think that she had any reaction when Wiatt kissed her and did not know whether the kissing was mutual. She further testified that she did not feel 'normal' and that she felt relaxed and uninhibited. 4 RP at 734. She vaguely remembered Wiatt taking off her clothes and she may have giggled. Wiatt then began engaging in sexual intercourse with her, and she became alert. Ms. Rankis testified that when Wiatt 'started having sex with {her} {she} said no, no, no,' but Wiatt continued penetrating her and said 'something like you want to do this, you like it.' 4 RP at 735. Ms. Rankis stated that she felt like she could not move her body and that she felt 'more intensely drunk' than she usually felt after consuming alcohol. 4 RP at 735.

Ms. Rankis next remembered someone 'banging' on Wiatt's door. 4 RP at 735. She saw Cochran standing over her. Cochran helped her find her clothes and they left Wiatt's house. Ms. Rankis had no memory of walking to Cochran's car, and felt 'dazed' while Cochran was driving. 4 RP at 737. Ms. Rankis testified that she did not believe that she was coherent when she and Wiatt were engaging in sexual intercourse. She did not contact police to report the incident until she learned that similar charges had been filed against Wiatt because she felt that it was 'maybe ... {her} fault' for not 'fight {ing} it off' and because she '{went} upstairs in the first place.' 4 RP at 785, 738-39.

After Ms. Rankis and Cochran left Wiatt's residence, Cochran drove to a party at another friend's home. Ms. Rankis testified that she realized that Cochran wanted to use more cocaine, and that once she was inside the house, she went upstairs to lie down. Ms. Rankis does not remember whether she ingested more cocaine at the second party. Wiatt testified that Ms. Rankis had been to his house several times prior to the night in question. On that night, Wiatt and Ms. Rankis were on his couch kissing, when they decided to go up to his bedroom. Inside the bedroom, they started undressing and Ms. Rankis asked him to put on a condom. Wiatt testified that they engaged in consensual intercourse and that Ms. Rankis never expressed that she did not want to participate.

***6** During intercourse, Cochran came to the door and asked Ms. Rankis if she wanted to leave. Ms. Rankis replied that she was 'fine' and did not want to leave. 10 RP at 1964. Additionally, Wiatt testified that Ms. Rankis was giggling 'like it was funny.' 10 RP at 1964. After Wiatt and Ms. Rankis finished, Cochran came in and helped Ms. Rankis find her clothes. Wiatt asked Ms. Rankis why she was leaving so fast, and she replied that she wanted to go get more cocaine.

Wiatt testified that he was aware that Ms. Rankis had used cocaine during the evening and that she was acting like 'Superwoman running around.' 10 RP at 1965. He further testified that she did not appear to be incapacitated and that she had no trouble moving or understanding what was happening. In addition, Wiatt stated that he and Ms. Rankis engaged in consensual sexual intercourse after that evening once more in his bedroom and once in his vehicle. She consented each time.

Crystal Phillips, a friend of Ms. Rankis, also testified. She stated that she had seen Ms. Rankis at Wiatt's house approximately four different times. On one of these occasions, Ms. Rankis told Phillips that Wiatt was 'hot' and that she wanted to 'sleep' with him. 10 RP at 1986. Phillips testified that when Ms. Rankis told her this, Ms. Rankis appeared clumsy and her speech was slurred. Additionally, Justin Allison, a friend of Wiatt, testified that Ms. Rankis told him

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that she was interested in having sexual relations with Wiatt.

Wiatt was ultimately charged with five counts of second degree rape, one count of third degree rape of a child, two counts of third degree rape, four counts of sexual exploitation of a minor, four counts of voyeurism, one count of communication with a minor for immoral purposes, one count of unlawful imprisonment with sexual motivation, and eight counts of furnishing liquor to a minor. These charges involved 10 different women. The court severed 18 counts from the others for trial. These 18 counts, which are the subject of this appeal, involve four women H. Kalmikov, K. Hoskins, Z. Hawkins, and J. Bowles in addition to Ms. Cruz and Ms. Rankis. Wiatt pleaded guilty to one count of voyeurism and to the count of communication with a minor for immoral purposes. The remaining charges were dismissed.

Johan Lo was also charged with two counts of sexual exploitation of a minor and two counts of voyeurism. Lo pleaded guilty to one count of attempted voyeurism in exchange for his testimony against Wiatt.

III. Trial Motions

During Wiatt's trial, the State moved to prohibit the defense from asking Lo any questions regarding whether he also had sexual contact with Ms. Cruz or whether he had erased any portion of the videotape showing that contact. The court granted the motion, holding that no evidence existed to show that Lo engaged in sexual contact with Ms. Cruz and that such a line of questioning would be irrelevant as to whether Wiatt raped Ms. Cruz.

***7** In addition, Wiatt moved to prohibit the State and any witness from referring to or suggesting that Wiatt had possessed or used 'date rape drug {s}.' CP at 54. Wiatt argued that the State did not discover any evidence that he had ever possessed or provided date rape drugs. The State agreed not to present any evidence of or question any witnesses about date rape drugs.

IV. Closing Arguments

Near the end of the trial, the jury again viewed the DVD of Wiatt and Ms. Cruz. Both the State and the defense made closing arguments to the jury regarding the DVD. During the State's argument, the prosecutor made the following argument:

> {A}t any point if she loses consciousness, if she passes out, then what might have even been a consensual act to start with becomes a rape because she no longer has the ability to make the decision, to make the choice, and to articulate that.

12 RP (Nov. 5, 2002) at 2369.

After the arguments, defense counsel moved the court to instruct the jury that the prosecutor's statements were improper. Defense counsel argued that the prosecutor had misstated the law by arguing that, if a sexual partner consents to having sex and then falls asleep during intercourse, the other partner is guilty of rape. The court declined to give a jury instruction, finding that it might be commenting on the evidence if it instructed the jury to decide anything regarding Ms. Cruz's mental capacity to consent based on the DVD. Rather, the court ruled that the State was prohibited from repeating its argument during closing arguments and that the defense could argue that the prosecutor had misstated the law.

During closing arguments the prosecutor also argued:

> So let's say you were to come out from your deliberation and say, well, we've found that we believe these girls, we believe what they said, but we had reasonable doubt. Well, I submit to you, that those are legally incompatible statements, they are legally incompatible statements because if you believe these girls, then you believe the truth of the charge.

13 RP (Nov. 6, 2002) at 2415-16. Defense counsel did not object to these remarks.

V. Jury Deliberations

During deliberations, the jury sent the court the following inquiries:

> Question re: Instruction No. 11 'Freely given'
> If when a person of age enters into an agreement, and it can be demonstrated that this same person is in an altered state of mind at the time of said agreement;
> Does this meet the test, i.e. legal definition of having FREELY entered into the agreement?

CP at 95.

In the definition of 'physically helpless' a person is deemed helpless if they are physically unable to communicate unwillingness to act.

> Question 1: Does this mean that at any point in time during an incident if a person becomes unconscious than {sic} they meet the criteria of

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being 'physically helpless' {?}
Question 2: Same question as above except apply it to the definition of 'mental incapacity.' If a person meets the definition of 'mental incapacity' at any point in time during an incident, is that all that is required in finding a person guilty of rape in the second degree {?}
***8** CP at 94.

In response to the jury's questions, Wiatt requested that the court give the jury additional instructions that helplessness or incapacity must exist at the time an interaction begins and that, as to the meaning of 'freely given,' the jury re-read instructions 9 and 10. Clerk's Minutes (11/12/02) (see spindle). The court denied Wiatt's request and instructed the jury to re-read the jury instructions.

Also during deliberations, members of the jury discussed date-rape drugs. After Wiatt's trial had concluded, juror no. 6 informed Larry Freeman, an investigator for Wiatt's defense counsel, that the 'subject of date rape drugs came up' during deliberations because he and other members of the jury felt there 'must be another reason to explain the physical condition of the victims, given the fact that if they only had a few drinks they would not have been incapacitated as they described.' CP at 133. Juror no. 6 stated that he had seen shows describing date-rape drugs on various television programs, including 'America's Most Wanted,' 'The New Detectives,' and a program on The Learning Channel. CP at 133. He informed the jury about information he had learned from the programs: date-rape drugs dissolve completely in drinks, they do not have an aftertaste or leave a film or milkiness in a drink, and some date-rape drugs do not 'show up' in blood tests. CP at 134. He also told the jury that 'it was possible for someone to have put a date {-}rape pill in a victim's drink without the victim's knowledge.' CP 134.

In addition, juror no. 10 informed Mr. Freeman that the jury had considered date-rape drugs. She told the jury that she thought date-rape drugs might have been involved because 'some of the girls ... testified that they had drunk alcohol before but had never felt the way that they did at the Wiatt house.' CP at 134. She also stated that Wiatt might have had a 'system' and that it would only take a second to put a drug into a drink. CP at 134. Juror no. 3 informed Mr. Freeman that the jury had discussed the fact that a drink the girls described, called 'Sex on the Beach,' was a 'colorful drink that could mask any milky appearance' and that the drink had a 'fruity taste that could hide a date rape drug.' CP at 135.

Other jurors confirmed these discussions, and most expressed a belief that at least some of the victims had been given date-rape drugs. The jury discussed whether it could consider the possibility that date-rape drugs were involved, given that there had been no evidence of any date-rape drugs at trial. The jury concluded that information regarding the use of date-rape drugs was circumstantial evidence that it was permitted to consider in determining Wiatt's guilt.

Upon discovering this information, Wiatt moved for a new trial based on juror misconduct. He argued that the jury had improperly considered extrinsic evidence in determining its verdict. The court denied the motion, holding that information about date-rape drugs is within common knowledge, and the jury could infer the use of these drugs based upon common experience.

***9** The jury convicted Wiatt on all counts but count I, second degree rape of Ms. Cruz (the first incident between Wiatt and Ms. Cruz), and count XI, unlawful imprisonment with sexual motivation of H. Kalmikov. In addition, the jury found Wiatt not guilty of count X, third degree rape of H. Kalmikov, but it convicted him of the lesser included charge of attempted third degree rape of H. Kalmikov.

VI. Sentencing

In Wiatt's plea agreement on counts XXII, voyeurism, and XXIV, communication with a minor for immoral purposes, the State agreed to dismiss the remaining five charges against Wiatt. Additionally, the State agreed to recommend no more than 12 months incarceration to run concurrently with sentences on all other counts. In total, Wiatt was convicted of, or pleaded guilty to, 10 felonies and 8 gross misdemeanors.

At sentencing, the prosecutor recommended that the court impose an exceptional sentence under former RCW 9.94A.390(2)(i) (2000), recodified as RCW 9.94A.535(2)(i) (2001), [FN2] arguing that most of Wiatt's sex offenses could not be considered in calculating his standard range and would essentially constitute 'free crimes.' RP (March 31, 2003) at 21. Additionally, the prosecutor argued that, because misdemeanor convictions are not counted in determining a defendant's offender score, Wiatt's gross misdemeanor convictions would also become 'free crime {s}.' RP (Mar. 31, 2003) at 14. The prosecutor further recommended that the court run

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Wiatt's sentence for the gross misdemeanor convictions concurrently with his sentence for the felony convictions and that it impose a sentence of 560 months incarceration.

> FN2. Under former RCW 9.94A.390(2)(i) (2000), a court may impose an exceptional sentence if the operation of the 'multiple offense policy' of former RCW 9.94A.400, recodified as RCW 9.94A.589 (2001), results in a presumptive sentence that is 'clearly too lenient.'

The court sentenced Wiatt to one year for each of his eight gross misdemeanor convictions, to run consecutively with his felony convictions. In addition, the court imposed an exceptional sentence, finding that the operation of the SRA's 'multiple offense policy' would result in a sentence that is 'clearly too lenient.' CP at 292. The court reasoned that, under the maximum standard range possible under the SRA, only Wiatt's first four felony sex convictions would be punished; thus, an exceptional sentence was justified. In its findings of fact, the court indicated that it had only considered Wiatt's felony sex charges in imposing an exceptional sentence. Further, the court stated at the sentencing hearing that it had disregarded count XXII, voyeurism, in imposing an exceptional sentence because Wiatt had pleaded guilty to this offense. Wiatt's timely appeal follows.

ANALYSIS

I. Motion to Suppress

Wiatt first contends that the trial court erred in denying his motion to suppress evidence obtained during the search of his home. Specifically, he argues that the videotape depicting Ms. Cruz and him was improperly admitted because neither Ms. Cruz, Thoong, or Hoy had any basis of knowledge that the tape existed. In response, the State argues that the warrant was properly issued because each of the informants provided the same ultimate source of the information: Wiatt. Wiatt is correct.

***10** We review the validity of a search warrant for abuse of discretion, giving great deference to the issuing magistrate. *State v. Jacobs,* 121 Wn.App. 669, 676, 89 P.3d 232, *review granted in part,* 152 Wn.2d 1036 (2004). Abuse of discretion is shown where a court's decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Richards v. Overlake Hosp. Med. Ctr.,* 59 Wn.App. 266, 271, 796 P.2d 737 (1990), *review denied,* 116 Wn.2d 1014 (1991). Generally, a warrant is valid if a reasonable, prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched. *State v. Wible,* 113 Wn.App. 18, 21, 51 P.3d 830 (2002). As long as the basic requirements are met, we review an affidavit in a commonsense, not hyper-technical manner. *Wible,* 113 Wn.App. at 21. Doubts should be resolved in favor of the warrant. *Wible,* 113 Wn.App. at 21-22.

Washington applies the two-pronged Aguilar-Spinelli test to determine whether information provided by an informant establishes probable cause to issue a search warrant. *Jacobs,* 121 Wn.App. at 677; *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). The affidavit must sufficiently identify the basis for the informant's information and establish the informant's credibility. *Jacobs,* 121 Wn.App. at 677. If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. *State v. Bauer,* 98 Wn.App. 870, 875, 991 P.2d 668, *review denied,* 140 Wn.2d 1025 (2000). Here, Wiatt concedes that Ms. Cruz, Thoong, and Hoy, all named, citizen informants, are credible. But he contests the reliability of the persons these three mentioned: Nicole Smith, Nick Deor, Ryan Carlson, 'Barry', and Wiatt, because they did not inform the police about the videotape nor did they permit their identities to be disclosed. Therefore, Wiatt argues that their veracity is not established, and they are not reliable as citizen informants, citing *State v. Tarter,* 111 Wn.App. 336, 340, 44 P.3d 899 (2002).

We must determine whether a sufficient basis exists to support the statements made by Ms. Cruz, Thoong, and Hoy regarding the videotape. To satisfy the 'basis of knowledge' prong, an informant must declare that he or she personally has seen the facts asserted and is passing on first-hand knowledge. *State v. Jackson,* 102 Wn .2d 432, 437, 688 P.2d 136 (1984). In addition, where an informant's information is based on hearsay, this hearsay-upon-hearsay is acceptable so long as both levels of hearsay satisfy the Aguilar-Spinelli test. 2 Wayne R. La Fave, Search and Seizure sec. 3.3(d) (1978).

Here, each of the informants' information regarding the videotape was hearsay. Ms. Cruz told detectives

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that Nicole Smith told her that she had been informed by Nick Deor that Ms. Cruz was 'caught on video {}tape and ... was tag teamed by two guys.' CP at 219. In addition, Ms. Cruz informed detectives that Thoong told her that she had heard that Wiatt had showed 'Barry' a videotape of himself and a girl doing it 'dogg {y} {style}' and that 'they' had figured out that it was Ms. Cruz. CP 219. Thoong told detectives 'some guy named Barry' had seen a videotape of Ms. Cruz and Wiatt doing it 'doggy style.' CP at 240. Hoy told detectives that her friend, Ryan Carlson, had informed her that he spoke with 'Barry Speck,' [FN3] and 'Barry' had told Ryan that Wiatt told him about a video that Wiatt filmed of himself and Ms. Cruz. CP at 232. Hoy further told detectives that 'Barry' had not actually seen the video. CP at 233. In the affidavit for search warrant, Detective Louise Adams restated the information given to her from each of the informants.

> FN3. Hoy told detectives that she thought 'Barry's' last name was Speck, but she was not really sure.

***11** This information is insufficient to demonstrate that any of the three informants (Ms. Cruz, Hoy, or Thoong) had a basis of knowledge that such a tape existed. None of them had first-hand knowledge of a videotape; none of them professed to have seen the tape or even to have seen video equipment at Wiatt's home. Additionally, none of them had first-hand knowledge of Ms. Cruz having sex with two men, or in the positions described. Further, the hearsay itself that an individual named 'Barry' had either seen the video or discussed it with Wiatt lacks a sufficient basis of knowledge. Thoong simply 'heard' that a 'guy named Barry' had seen a video of Ms. Cruz and Wiatt having intercourse; Ms. Cruz was simply told by Ms. Smith that such a video may exist. And while Hoy was told by her friend, Ryan, that he had been told by Barry that Barry had discussed the video with Wiatt, Ryan lacked any personal, first-hand knowledge that the video existed. Moreover, none of the information given by the informants could lead a reasonable person to believe that the videotape would be found at Wiatt's house. None of the informants had heard where Barry had viewed the video or that the video and other video equipment was being stored at Wiatt's residence.

In addition, the affidavit contains no facts showing how a detached magistrate could conclude that each level of hearsay was reliable. An informant's veracity is established when the informant provides firsthand details and is a named citizen. *Tarter,* 111 Wn.App. at 340. Even conceding that Ms. Cruz, Hoy, and Thoong were reliable as citizen informants, their naming of individuals does not imbue those named with veracity or reliability. One of the primary purposes for the Court's ruling in Spinelli was to ensure that the issuing magistrate is 'relying on something more substantial than a casual rumor circulating in the underworld.' *Spinelli,* 393 U.S. at 416. Without any showing of first-hand knowledge or reliability for each of the persons who passed on information about the video, the affidavit established nothing more than a rumor that Wiatt either showed or discussed with Barry a video involving him and Ms. Cruz. Thus, the reliability prong requirement of Aguilar-Spinelli is also not satisfied for the chain of information provided to Ms. Cruz, Hoy, and Thoong.

Furthermore, although Detective Adams clearly did some independent investigation, as she correctly identified Barry's last name, Specht, in her affidavit, she provides absolutely no information to the court as to how she obtained this information. And there is no other evidence that Detective Adams conducted any further investigation regarding whether Wiatt had taped Ms. Cruz or even possessed video equipment. Thus, the informants' information lacks a sufficient basis of knowledge regarding the existence of the videotape, and the affidavit fails to demonstrate the reliability of the persons named by three informants or a nexus between the tapes and Wiatt's home. The trial court erred in granting the police a warrant to search for video equipment and tapes at Wiatt's house.

***12** But as the State correctly points out, the affidavit did establish probable cause to search Wiatt's bedroom for evidence of the rape of Ms. Cruz, irrespective of the information about the videotape, because Ms. Cruz reported that she had been raped in Wiatt's bedroom and that he had mentioned using a lubricant. See *State v. Johnson,* 104 Wn.App. 489, 501, 17 P.3d 3 (2001) (holding that where a warrant validly permitted police to search for evidence of a rape, but invalidly permitted police to search for videotapes, the warrant was severable it was valid as to evidence of the rape but invalid as to the videotapes). The State contends that, even if the affidavit lacked probable cause to permit a search for video equipment and tapes, the police properly seized the videotape under the doctrines of plain view and inevitable discovery.

First, the State argues that in searching Wiatt's room for evidence of a rape and lubricant, the police validly discovered and seized the video camera and

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tapes under the plain view doctrine. At trial, Detective Clark testified that upon entering Wiatt's bedroom, he began searching for a video camera, lubricant, and other evidence of a rape. Inside Wiatt's dresser drawers, Detective Clark found a video camera and 'Slippery Stuff' lubricant. 3 RP at 492. Detective Clark seized the video camera and discovered that it contained a videotape. He turned the camera on and observed a recording of Wiatt and Ms. Cruz engaging in sexual acts. When asked whether he had photographed the camera inside the dresser, Detective Clark responded, 'Yes. I eventually, once I discovered it was evidence, I then placed it back where I found it and then took a picture of it.' 3 RP at 485.

The plain view doctrine allows officers to seize an item without a warrant, if while acting in the scope of an otherwise authorized search, they acquire probable cause to believe that the item is evidence of a crime. *Johnson,* 104 Wn.App. at 501. The doctrine does not allow an additional, unauthorized search; police must have "immediate knowledge" that they have incriminating evidence before them. *Johnson,* 104 Wn.App. at 501 (quoting *State v. Murray,* 84 Wn.2d 527, 534, 527 P.2d 1303 (1974), *cert. denied,* 421 U.S. 1004 (1975)). Johnson is instructive.

In that case, two minors reported that the defendant had raped them, and one of the victims stated that the defendant had used a vibrating massager to sexually assault her. *Johnson,* 104 Wn.App. at 492. A magistrate granted a warrant permitting police to search inside the defendant's home for evidence of 'sex toys,' including a vibrating massager and 'movies ... depicting nudity and/or sexual activity.' *Johnson,* 104 Wn.App. at 493. During the search, the police discovered an unmarked videotape in the defendant's bedroom, placed the tape into a video cassette recorder to view, and watched what appeared to be a male hand fondling a sleeping child's genitalia. *Johnson,* 104 Wn.App. at 495. The police seized the tape and other tapes, and the defendant was ultimately convicted of unlawfully possessing pictures of a minor engaged in sexually explicit conduct. *Johnson,* 104 Wn.App. at 496.

***13** We held that the warrant improperly authorized the police to search for videotapes and that the police had illegally seized and viewed the video unless the evidentiary nature of the tape appeared in plain view during a search for the massager. *Johnson,* 104 Wn.App. at 501. We found that, even though the police were legally in the defendant's home under the warrant, and even if they had discovered the videotapes while they were searching for the massager, the plain view doctrine did not justify their conduct in seizing and viewing the tape because they did not have immediate knowledge that the videotape was evidence of a crime. *Johnson,* 104 Wn.App. at 501-02. The exterior of the unmarked videotapes did not give probable cause to believe that the tapes might be evidence of a crime, and when the police viewed the incriminating tape to acquire probable cause, they engaged in an additional unauthorized search. *Johnson,* 104 Wn.App. at 502.

Similarly, in this case, the video camera, while properly discovered in Wiatt's dresser along with lubricant, did not give probable cause to believe that it was evidence of a crime. As stated by the trial court during Wiatt's suppression hearing, 'simply having a video camera is not illegal.' RP (Oct. 4, 2002) at 112. But the State argues that this case is distinguishable from Johnson because here, Ms. Cruz, Thoong, and Hoy made statements to detectives that they had heard that Wiatt had shown or discussed taping Ms. Cruz with Barry Specht. The State contends that based on these statements, Detective Clark could immediately recognize the video camera as evidence of a crime. This argument fails in two respects. First, no one, including the informants, suggested to the police that Wiatt actually owned video equipment that he stored in his home. [FN4] Second, the police did not have probable cause based on the informants' statements to believe that Wiatt had taped himself and Ms. Cruz engaging in sexual activity.

> FN4. During a police interview that occurred after the police had searched Wiatt's home, Barry Specht informed detectives that Wiatt owned a video camera that he used to tape parties and his vacations.

As in Johnson, Detective Clark did not have probable cause to seize the video camera and the unlabeled videotape [FN5] contained inside of it until he viewed the tape. Detective Clark testified at trial that 'once {he} discovered it was evidence,' he took a picture of the camera. 3 RP at 485 (emphasis added). Presumably then, Detective Clark did not immediately know that the camera was evidence of a crime, but discovered that it was after viewing its contents. And in doing so, Detective Clark engaged in an additional unauthorized search. Thus, Detective Clark's illegal search and seizure of Wiatt's video camera and videotape does not fall under the plain-view exception to the warrant requirement, and these items should have been suppressed at trial.

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FN5. None of the evidence in the record shows that the tape was unlabeled. However, during the hearing on Wiatt's motion to suppress, the court accepted as an offer of proof Wiatt's argument that the tape was unlabeled. The State did not object.

In addition, the State contends that the video camera and videotapes were properly admitted by the trial court because police would have inevitably discovered these items during the course of their investigation. But the State provides no argument on appeal to support this contention. At the suppression hearing, the State argued that even if the warrant had not permitted the police to search for video equipment and videotapes, they would have inevitably discovered the camera while searching for lubricant in Wiatt's dresser. This argument also fails.

***14** Evidence obtained through illegal means is admissible under the inevitable discovery doctrine if the State proves by a preponderance of the evidence that the police did not act unreasonably or in an attempt to accelerate discovery and that the evidence would have been inevitably discovered under proper and predictable investigatory procedures. *State v. Avila-Avina,* 99 Wn.App. 9, 17, 991 P.2d 720 (2000). The State must show that the legal means of obtaining the evidence would have been "truly independent" of the illegality and that the discovery by those means would have been "truly inevitable." *Avila-Avina,* 99 Wn.App. at 18 (quoting *United States v. Silvestri,* 787 F.2d 736, 744 (1st Cir.1986)). The rule allows neither speculation as to whether the evidence would have been discovered nor speculation as to how it would have been discovered. *Avila-Avina,* 99 Wn.App. at 18.

Here, at the suppression hearing, the State merely argued that police would have discovered the video camera and tapes in the same illegal manner that the camera and videotapes were actually discovered. As previously discussed, the police were not permitted to seize the video camera under the plain view doctrine. Moreover, the State provided no evidence that, regardless of the defective warrant, the police were in the process of conducting investigations that likely would have given them probable cause to search and seize Wiatt's video equipment and videotapes. Thus, the State has failed to prove by a preponderance of the evidence that the police would have inevitably discovered Wiatt's video camera and videotapes through constitutional means independent of the illegal search of these items.

In conclusion, the search warrant was erroneously issued as to the video recording equipment and videotapes, and the trial court erred by admitting these items into evidence at trial. We must remand counts II through VI [FN6] for re-trial without this evidence . [FN7] Wiatt argues that this court must also reverse all remaining counts due to the 'prejudice inherent in trying the multiple counts together.' Br. of Appellant at 94. This argument is without merit, as the videotape only depicted Ms. Cruz and was not associated with the counts involving the other victims. Moreover, the jury acquitted Wiatt of count I, second degree rape of Ms. Cruz, despite having viewed the incident on the tape. Thus, it is not probable that the jury convicted Wiatt for the crimes against any other victim based on this videotape.

FN6. These counts are as follows: count II, second degree rape of Ms. Cruz; counts III and IV, sexual exploitation of a minor with sexual motivation involving Ms. Cruz; and counts V and VI, voyeurism involving Ms. Cruz.

FN7. Where we reverse a conviction and remand for a new trial, the double jeopardy clause is ordinarily not offended. *State v. Anderson,* 96 Wn.2d 739, 742, 638 P.2d 1205, *cert. denied,* 459 U.S. 842 (1982). If the reversal is not for insufficiency of evidence, the defendant may be retried for the convicted offense and any lesser included offenses. *Anderson,* 96 Wn.2d at 742. As noted later in this opinion, we do not reverse the counts involving Ms. Cruz for insufficiency of the evidence.

II. Juror Misconduct

Wiatt next asserts that he is entitled to a new trial due to juror misconduct. He argues that no evidence of date-rape drugs was presented at trial and, in discussing date-rape drugs, the jury impermissibly injected extrinsic evidence into its deliberations. The State responds that knowledge about date-rape drugs is within common knowledge and that, based on some of the victims' testimony, it was reasonable for jurors to infer from their common experience the possibility of date-rape drugs being used in the commission of the rapes. In addition, the State argues that Wiatt invited the jury to consider the possibility of date-rape drugs. We agree.

***15** Here, although neither party presented direct

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evidence that date-rape drugs may have been involved in the rapes, the jury could reasonably infer, based on common knowledge about alcohol and date-rape drugs, the possibility of these drugs as circumstantial evidence. K. Hoskins testified that, despite having consumed one alcoholic beverage at Wiatt's home, she had no memory of having sexual intercourse with Wiatt. And Z. Hawkins testified she had only consumed two to three alcoholic beverages and that, although she was cognizant of what was happening, she could not move her body while Wiatt engaged in sexual intercourse with her. Based on this testimony, the jury could rationally infer that the use of date-rape drugs may have been an alternative reason for some of the victims' sudden incapacitation.

Moreover, during closing arguments Wiatt invited the jury to consider alternate explanations for the victims' incapacitation. In discussing the charges involving Ms. Cruz, Wiatt challenged her inability to recall certain details, referring to it as 'selective blackouts,' and invited the jury to 'consider this selective loss and question whether alcohol works that way.' 13 RP at 2503 (emphasis added). Similarly, in discussing Ms. Hoskins' testimony that she was incapacitated after having only one drink, Wiatt argued, '{t} here's absolutely no explanation about her lack of memory.' 13 RP at 2552 (emphasis added). Wiatt also challenged the credibility of Ms. Hawkins' testimony that she was incapacitated after consuming only two to three bottles of beer. Finally, in reference to several of the victims, Wiatt argued, 'how can we have the selective memory as these women have?' 13 RP at 2566. In short, while Wiatt urged the jury to question the credibility of these women, he also invited it to inquire into the possible effects of alcohol and to consider whether something else might have caused the victims' memory loss and incapacitation. Having invited the jury to so inquire, Wiatt is now barred from complaining of that inquiry on appeal.

III. Sufficiency of the Evidence

Wiatt contends that insufficient evidence supports the jury's finding that he committed rape in the second degree of Ms. Cruz as charged in count II and rape in the third degree of R. Rankis as charged in count XVI. We address sufficiency as to count II, even though we reversed the conviction, because we remand the issue for trial, which is appropriate under *State v. Anderson,* 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982). Sufficient evidence exists to support both Wiatt's conviction of second degree rape and his conviction of third degree rape.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton,* 149 Wn.2d 775, 786, 72 P.3d 735 (2003). 'A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom.' *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact regarding a witness's credibility or conflicting testimony. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. Count II

***16** Wiatt was charged with second degree rape pursuant to RCW 9A.44.050(1)(b), which requires the State to prove that, under circumstances not constituting rape in the first degree, the defendant engaged in sexual intercourse with another person when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. 'Mental incapacity' is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by the influence of a substance, illness, defect, or from some other cause. RCW 9A.44.010(4). 'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act. RCW 9A.44.010(5).

Here, Thoong testified at trial that over the course of the evening of June 29, 2001, Ms. Cruz consumed at least 'six or more' shots of vodka and a mixed alcoholic drink. 2 RP at 235. Ms. Cruz testified that she has very little memory of what occurred that evening; however, she remembers a person on top of her, having sexual intercourse at one point during the evening. She indicated to the person that she was in pain and he said something about using lubricant. She next remembers waking up in Wiatt's bed, completely naked. In addition, Ms. Cruz testified that she was 'heavily intoxicated' on the evening she was raped, 1 RP at 81; Thoong testified that she had never seen Ms. Cruz this intoxicated before and that it was the most she had seen Ms. Cruz drink; and Hoy testified that when she arrived at Wiatt's residence, Ms. Cruz was extremely intoxicated and appeared to be in an 'extremely different' state of mind. 4 RP at 670.

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In contrast, Wiatt testified that he could tell that Ms. Cruz had been drinking and was not entirely sober but that her motor skills and speech were normal. Lo testified that Ms. Cruz and Wiatt were 'flirting' all evening and that, when he spoke with Ms. Cruz while she was in the hot tub, Ms. Cruz was coherent and could 'hold a conversation.' 2 RP at 371, 3 RP at 429. In addition, Wiatt testified that he believed that Ms. Cruz consented to having sexual intercourse and that she had moved her body with his while they were engaging in intercourse. Lo testified that, based upon his observation of Wiatt and Ms. Cruz, he believed Ms. Cruz was aware of what was happening when she and Wiatt engaged in sexual intercourse.

Wiatt argues that that Ms. Cruz's behavior during their first encounter in his bedroom shows that she understood the nature and consequences of her actions. But Wiatt was not convicted on count I involving this initial incident, and Ms. Cruz's statements or actions at that time are irrelevant as to whether the evidence is sufficient to support a finding that Wiatt raped her during their second encounter. Wiatt further argues that Ms. Cruz's actions in driving 20 minutes to her home to 'appease or deceive' her friends and then driving back to Wiatt's home, making numerous cell phones during the trip, demonstrated her physical ability and mental willingness to rejoin him. Br. of Appellant at 64. This argument is without merit.

***17** Here, there was a direct conflict in the evidence regarding Ms. Cruz's state of mind and ability to consent to sexual intercourse; credibility was thus the central question. Despite hearing testimony that Ms. Cruz was a coherent and willing sexual partner, the jury ultimately found Ms. Cruz's testimony that she was heavily intoxicated and remembered very little about her evening including having sexual intercourse with Wiatt to be more credible. This determination is not reviewable. See *Camarillo,* 115 Wn.2d at 71. Ms. Cruz's testimony alone, without consideration of the videotape, is sufficient to support Wiatt's conviction of second degree rape. Even if Ms. Cruz made a 40-minute, round-trip drive, made several phone calls, and returned to Wiatt's home, her testimony supports a reasonable inference that she was so intoxicated, she did not and could not truly understand the nature and consequences of either her own or Wiatt's actions.

B. Count XVI

Wiatt was charged with third degree rape pursuant to RCW 9A.44.060(1)(a). Under that statute, a person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degree, such person engages in sexual intercourse with another person, and the victim did not consent to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a). 'Consent' means that, at the time of the sexual contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse. RCW 9A.44.010(7).

Wiatt argues that Ms. Rankis did not express a lack of consent by words or conduct until after they were engaged in sexual intercourse. He further argues:

> Once intercourse is begun without saying 'no,' merely saying 'no' does not clearly express a lack of consent. In the throes of sexual intercourse, 'no' becomes ambivalent at best. It may be an exclamation, or feedback as passion builds to the 'yes' of climax.
>
> Br. of Appellant at 81.
>
> In addition, Wiatt contends that once Ms. Rankis expressed her lack of consent, he was not committing rape by continuing intercourse because the law must permit an 'appreciable amount of time in which a sexual partner can perceive and understand such a communication, and physically respond.'

Br. of Appellant at 82. These arguments are entirely without merit.

First, as previously discussed, RCW 9A.44.010(7) requires that, for an individual to consent to sexual intercourse, he or she must use actual words or conduct indicating freely given agreement at the time of the sexual contact. There is no language in the statute indicating that consent, or lack thereof, must be communicated prior to commencement of sexual intercourse, and Wiatt offers no legal authority for this proposition. Second, Ms. Rankis testified that she said 'no' when Wiatt 'started having sex' with her; thus, she and Wiatt were not in the 'throes of sexual intercourse,' such that it might be difficult for Wiatt to determine whether she truly meant to express a lack of consent. 4 RP at 735 (emphasis added); Br. of Appellant at 81. Finally, Ms. Rankis testified that when she told Wiatt 'no,' he responded by staying 'something like you want to do this, you like it.' 4 RP at 735. This evidence demonstrates that Wiatt perceived and understood Ms. Rankis' communication that she did not want to have sex, and he chose to continue having intercourse with her despite her clearly expressed lack of consent.

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***18** Here again, the jury was presented with conflicting testimony. Ms. Rankis testified that Wiatt continued engaging in sexual intercourse with her after she clearly expressed a lack of consent to him, while Wiatt testified that he and Ms. Rankis had engaged in consensual intercourse and that Ms. Rankis never expressed that she did not want to have sex. The jury ultimately found Ms. Rankis to be more credible, and this determination is not reviewable. See *Camarillo,* 115 Wn.2d at 71.

IV. Trial Court Error

Wiatt next asserts that the trial court committed several reversible errors. He argues that the trial court erred when it (1) failed to correct the prosecutor's misstatement of law; (2) commented on the evidence in its jury instructions; (3) instructed the jury as to uncharged alternative means of committing sexual exploitation of a minor; and (4) gave erroneous jury instructions regarding 'FREELY GIVEN' consent. Br. of Appellant at 75. We address each argument in turn.

Wiatt first contends that the prosecutor misstated the law during closing arguments prior to the jury's second viewing of the DVD when he essentially stated that, even if an individual initially consents to sex, if he or she loses consciousness at any point during intercourse, the other partner begins committing rape. Because this issue only pertains to the count involving Ms. Cruz and because we reverse all convictions regarding Ms. Cruz, we do not address this argument.

Second, Wiatt argues that the court impermissibly commented on the evidence in its instructions to the jury. Specifically, he objects to the term 'offense' in instructions 9, 13, and 22; the term 'victim' in instructions 6 and 29; and the term 'perpetrator' in instruction 29. Wiatt argues that by instructing the jury in this language, the court conveyed an opinion that a crime had occurred: there was an 'offense,' a 'perpetrator,' and a 'victim.' Br. of Appellant at 75. Because these instructions may be used in a subsequent trial, we analyze the issue. The instructions are as follows:

INSTRUCTION NO. 6
> A person commits the crime of rape in the second degree when that person engages in sexual intercourse with another person when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

CP at 104 (emphasis added).

INSTRUCTION NO. 9
> Mental incapacity is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse....

CP at 105 (emphasis added).

INSTRUCTION NO. 13
> It is a complete defense to a charge of rape in the second degree as charged in counts I, II, XII, and XIV, that at the time of the offense the defendant reasonably believed that the complainant was not mentally incapacitated or physically helpless.

CP at 106 (emphasis added).

INSTRUCTION NO. 22
> It is not a defense to the charge of sexual exploitation that the defendant did not know the alleged victim's age. However, it is a complete defense to a charge of sexual exploitation as charged in counts III and IV, that at the time of the offense, the defendant made a reasonable {,} bona fide attempt to ascertain the true age of {A.} Cruz.

***19** CP at 110 (emphasis added).

INSTRUCTION NO. 29
> A person commits the crime of rape in the third degree when that person engages in sexual intercourse with another person not married to the perpetrator when the victim did not consent to sexual intercourse with the perpetrator, and such lack of consent was clearly expressed by the victim's words or conduct.

CP at 114 (emphasis added).

The Washington Constitution forbids a judge from conveying to a jury the court's opinion about the merits or facts of a case. Wash. Const. art. 4, sec. 16. But an instruction that states the law correctly and is pertinent to the issues raised in the case is not a comment on the evidence. *State v. Johnson,* 29 Wn.App. 807, 811, 631 P.2d 413, *review denied,* 96 Wn.2d 1009 (1981). Wiatt's claims regarding jury instructions 9, 13, and 22 fail because he proposed similar jury instructions using the term 'offense.' CP at 273, 274, 277. Under the doctrine of invited error, even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording. *State v. Bradley,* 141 Wn.2d 731, 736, 10 P.3d 358 (2000); *In re Detention of Gaff,* 90 Wn.App. 834, 845, 954 P.2d 943 (1998); *State v. Alger,* 31 Wn.App. 244, 249, 640 P .2d 44, *review denied,* 97

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Wn.2d 1018 (1982).

Jury instructions 6 and 29 are the definitions of second and third degree rape. Nothing in the language of these instructions suggests that the jury should assume that a crime was committed. In giving these instructions, the court was not commenting on the evidence, but was merely defining the elements of these crimes.

Third, Wiatt contends that the trial court erred in giving jury instructions 15, 16, and 21, regarding the crime of sexual exploitation of a minor. Counts III and IV of the information charge Wiatt with 'aid {ing}, invit {ing} or caus {ing} a minor to engage in sexually explicit conduct knowing that such conduct could be photographed.' CP at 18. Wiatt claims that the jury instructions permitted him to be convicted under uncharged alternatives: that he committed the crime of sexual exploitation of a minor by 'aid {ing}, invit {ing}, employ {ing}, authoriz {ing}, or caus {ing} a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed.' Br. of Appellant at 70; CP at 107 (emphasis added). The State concedes the errors but argues they were harmless. These errors are of constitutional magnitude and may be challenged for the first time on appeal. *State v. Doogan,* 82 Wn.App. 185, 188, 917 P.2d 155 (1996).

When a charging document alleges a statutory alternative means of committing a crime, it is error to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence. *State v. Chino,* 117 Wn.App. 531, 540, 72 P.3d 256 (2003). A defendant cannot be tried for an uncharged offense. *Chino,* 117 Wn.App. at 540. Where the instructional error favored the prevailing party, we presume it is prejudicial unless it affirmatively appears that the error was harmless. *Chino,* 117 Wn.App. at 540. Error may be harmless if other instructions 'clearly and specifically define the charged crime.' *Chino,* 117 Wn.App. at 540. In addition, courts have found harmless error where there was no possibility that the defendant was impermissibly convicted on an uncharged alternative. See *State v. Nicholas,* 55 Wn.App. 261, 273, 776 P.2d 1385, *review denied,* 113 Wn.2d 1030 (1989) (finding harmless error where the jury returned a special verdict finding that the defendant was 'armed with a deadly weapon' at the time of the commission of the crime, the charged means of committing the crime). We have recently held in *State v. Spiers,* 119 Wn.App. 85, 94, 79 P.3d 30 (2003), that where no evidence was admitted regarding an alternative method of conviction, instructional error in the 'to convict' instruction was mere surplusage, and the conviction did not need to be reversed.

***20** Here, no evidence was offered at trial to show either that Wiatt employed Ms. Cruz to be in the video or that Wiatt had some type of authority that would permit him to authorize Ms. Cruz's appearance in the video. Thus, there was no possibility that the jury convicted Wiatt based on alternative means of committing sexual exploitation of a minor and the error was harmless.

Finally, Wiatt contends that the trial court erred in giving instruction 11. The instruction states: ' 'Consent' means that at the time of the sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.' CP at 105. Wiatt argues that it was error to give this instruction because '{f}reely given consent' was not at issue in his charges of second degree rape and because the instruction misled the jury regarding his charges of third degree rape. Br. of Appellant at 76, 78. Defense counsel objected to the instruction at trial, arguing that the instructions for second degree rape adequately addressed the issue of consent by defining mental incapacity and physical helplessness.

We review jury instructions in their entirety and find them sufficient if they permit each party to argue its theory of the case, are not misleading, and when read as a whole, properly inform the trier of fact of the applicable law. *Capers v. Bon Marche,* 91 Wn.App. 138, 142, 955 P.2d 822 (1998), *review denied,* 137 Wn .2d 1002 (1999). Here, Wiatt was charged with second degree rape by engaging in sexual intercourse when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated. Additionally, Wiatt was charged with third degree rape by engaging in sexual intercourse with another who did not, in words or conduct, indicate freely given agreement to have sexual intercourse and such lack of agreement was clearly expressed by the victim's words or conduct. Thus, the State was required to prove, as an element of these crimes, that each victim was incapable of consenting or did not freely consent to sexual intercourse, respectively. RCW 9A.44.050, .060. In giving an instruction on the meaning of 'consent' as that term is defined in RCW 9A.44.010, the trial court was properly informing the jury of the applicable law regarding Wiatt's charges of second and third degree rape.

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V. Right to Confrontation

Wiatt contends that the trial court violated his right to confrontation by limiting his cross-examination of Lo. At trial, the State moved to prohibit the defense from asking Lo any questions about whether he also had sexual contact with Ms. Cruz or whether he had erased any portion of the video showing that contact, and the court granted the motion. Wiatt argues that the court denied him the ability to question Lo regarding his 'greater involvement' in the case and, thus, 'the extent of his need to cooperate with the {S}tate to convict Mr. Wiatt.' Br. of Appellant at 96. This argument is without merit.

***21** The Sixth Amendment to the United States Constitution and article I, section 22, of the Washington Constitution, guarantee criminal defendants the right to confront and cross-examine witnesses against them. But the right to cross-examine adverse witnesses is not absolute. *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). A court may, within its sound discretion, deny cross-examination if the evidence sought is vague, argumentative, speculative, or irrelevant. *Darden,* 145 Wn.2d at 620-21. Here, there is no evidence in the record showing either that Lo engaged in sexual contact with Ms. Cruz or that he erased portions of the videotape depicting such contact. Moreover, such a line of questioning would be irrelevant and highly prejudicial to the question of whether Wiatt raped Ms. Cruz. The court did not err.

VI. Prosecutorial Misconduct

Wiatt next asserts that the prosecutor committed misconduct during closing arguments when he essentially argued that 'believing these girls' is 'legally incompatible' with having a reasonable doubt as to Wiatt's guilt. Br. of Appellant at 87-88. Wiatt is in error.

In order to establish prosecutorial misconduct, Wiatt must prove that the prosecutor's conduct was improper and that the prosecutor's conduct prejudiced his right to a fair trial. *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.' *Dhaliwal,* 150 Wn.2d at 578(citing *State v. Pirtle,* 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied,* 518 U.S. 1026 (1996)). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal,* 150 Wn.2d at 578; *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007 (1998). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman,* 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

Wiatt did not object to the prosecutor's statements below. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so 'flagrant and ill intentioned' that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell,* 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129 (1995). Here, the prosecutor's remarks were not 'flagrant' or 'ill intentioned,' and a curative instruction could have remedied any prejudice to Wiatt.

VII. Violation of Plea Agreement

Wiatt also contends that the prosecutor violated the terms of their plea agreement and, consequently, this court must remand for him to choose whether to withdraw his guilty plea or to enforce the State's agreement. Specifically, Wiatt argues that, contrary to the plea agreement, the prosecutor recommended that the court run his misdemeanor sentences consecutively to his felony sentences. The record does not support this claim. Although the prosecutor argued that the court had the option of running Wiatt's misdemeanor sentences consecutively to his felony sentences, the prosecutor recommended that the misdemeanor charges be sentenced concurrently and that the court impose an exceptional sentence because those charges would not be included in his offender score.

VIII. Exceptional Sentence

***22** Finally, Wiatt contends, both through counsel and pro se in a statement of additional grounds for review (SAG), [FN8] that his exceptional sentence is unconstitutional under *Blakely v. Washington,* U.S., 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Specifically, he argues that the court issued an exceptional sentence based on a judicial finding of fact not charged nor found by a jury beyond a reasonable doubt. Because we reverse five counts and remand for trial, the matter of sentencing is not ripe.

FN8. RAP 10.10.

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IX. Statement on Additional Grounds for Review

Wiatt raises two issues in his SAG. His claims are meritless.

A. Jury Instructions

Wiatt first contends that the trial court erred in giving jury instructions 13, 14, and 33. He argues that instructions 13 and 14 'shift {} the burden of proof as to the state of mind of the plaintiffs at the time of the alleged Rape, from the State to the defendant.' SAG at 1. The court's instructions are as follows:

> No. 13
>
> It is a complete defense to a charge of rape in the second degree as charged in counts I, II, XII, and XIV, that at the time of the offense the defendant reasonably believed that the complainant was not mentally incapacitated or physically helpless. This defense must be established by a preponderance of the evidence. If you find that the defendant has established this defense, it will be your duty to return verdicts of not guilty.
>
> CP at 106-107.

> No. 14
>
> When it is said that the defendant has the burden of proof on any proposition by a 'preponderance' of the evidence, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which the defendant has the burden of proof is more probably true than not true.
>
> CP at 107.

Instructions 13 and 14 did not impermissibly shift the burden of proof as to the victims' state of mind. In order to obtain a conviction for second degree rape, the State, not Wiatt, was required to prove that Wiatt engaged in intercourse when the victims were 'incapable of consent by reason of being physically helpless or mentally incapacitated.' CP at 104. Instructions 13 and 14 define an affirmative defense to this charge, which requires the defendant to prove his, not the victims', state of mind at the time of the offense.

Wiatt also challenges instruction 33. He argues that the court improperly instructed the jury that it could find him guilty of a crime 'in which {he} had not been charged.' SAG at 2. The instruction states:

> INSTRUCTION NO. 33
>
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.
>
> CP at 117.

In general, the crimes charged in an information are the only crimes for which the defendant may be convicted and on which a jury may be instructed. *State v. McJimpson,* 79 Wn.App. 164, 171, 901 P.2d 354 (1995), *review denied,* 129 Wn.2d 1013 (1996). However, the defendant may be convicted of, and the jury instructed on, a crime that is an inferior degree to the one charged. *McJimpson,* 79 Wn.App. at 171. Here, Wiatt was charged with count X, second degree rape, or in the alternative, third degree rape of H. Kalmikov. Instruction 33 pertained to these charges and properly instructed the jury that it could find Wiatt guilty of the lesser-included crime of attempted third degree rape. The trial court did not err.

B. Sufficiency of the Evidence

***23** Wiatt also contends that insufficient evidence supports his convictions of counts XII, second degree rape of K. Hoskins; count XIV, second degree rape of Z. Hawkins; count XVI, third degree rape of R. Rankis; and count VIII, third degree rape of J. Bowles.

As to counts XII and XIV, Wiatt argues that K. Hoskins and Z. Hawkins were not mentally incapacitated because they had graduated from high school and were not 'mentally retarded or severely mentally ill.' SAG at 4. Additionally, Wiatt argues that these victims were previously acquainted with him and had accepted an invitation into his home. These claims are entirely without merit. RCW 9A.44.050(1)(b) does not require any showing of the victim's relation to the defendant or how the victim came to be in proximity to the defendant at the time of the rape. Nor does it require a showing that the victim is mentally ill or handicapped; under RCW 9A .44.010(4), '{m}ental incapacity' may be caused by the influence of a substance, illness, defect, or from some other cause.

Wiatt further contends that the evidence was insufficient to support a finding that K. Hoskins and Z. Hawkins were mentally incapacitated because they testified that they had only consumed one to three alcoholic beverages prior to the alleged rapes and other witnesses testified that these two possessed mental capacity throughout the evening.

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Nevertheless, K. Hoskins and Z. Hawkins each testified that they were mentally incapacitated and physically helpless at the time of the rapes K. Hoskins testified that she consumed one drink and then only remembers waking in Wiatt's bed the following morning and Z. Hawkins testified that she was aware that Wiatt was raping her, but she was unable to physically resist him due to the effects of the alcohol. As noted, we defer to the trier of fact on issues of witness credibility and conflicting testimony. See Camarillo, 115 Wn.2d at 71.

Finally, because Wiatt fails to inform the court of the nature and occurrence of the errors involving counts XVI and VIII, we need not address this issue. See RAP 10.10(c).

Reversed and remanded as to counts II through VI. Affirmed as to all other counts.

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

We concur: HOUGHTON, P.J.

QUINN-BRINTNALL, C.J. (concurring in part and dissenting in part).

I respectfully dissent from that portion of the majority's opinion which reverses counts II through VI based on the conclusion that the videotape found in Wiatt's bedroom must be suppressed. In my opinion, while the portion of the warrant authorizing seizure of the videotape was invalid, the tape was properly seized under the 'plain view' rule.

If Washington applied the 'totality of the circumstances' test set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), it would be clear that the search warrant in this case validly authorized the seizure of the videotape found in Wiatt's dresser. The Gates test requires the issuing magistrate to make 'a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.' *Gates,* 462 U.S. at 238. Here, the affidavit in support of the warrant contained the following: Cruz reported being raped by Wiatt in his bedroom; Cruz reported that, a week after the rape, she was 'confronted' by friend Smith who had been told that Cruz was caught on videotape being 'tag teamed' by two guys; at the time that Smith 'confronted' Cruz, Cruz had disclosed the rape only to an aunt; Thoong reported that on the night of the rape, she was told when looking for Cruz, that Cruz had gone into a bedroom with Wiatt and another male; Thoong reported that 'she had heard that a guy named Barry said there was a video of {Cruz and Wiatt} doing it 'doggy style;' ' [FN9] and Hoy reported that 'Ryan CARLSON told her a couple days after the incident that Jerry WIATT had told another friend, Barry SPECHT, that he had made a video ... show {ing} WIATT and another male having sexual intercourse with CRUZ.' [FN10] Each of these pieces, when considered together, more than provided a fair probability that a videotape might be found in Wiatt's home.

FN9. CP at 190.

FN10. CP at 187-88.

***24** But Washington follows the Aguilar-Spinelli11 test to determine whether an informant's information establishes probable cause to issue a search warrant. *State v. Jackson,* 102 Wn.2d 432, 688 P.2d 136 (1984). This test requires that the affidavit sufficiently establish each informant's credibility and the basis for that informant's information. *Jackson,* 102 Wn.2d at 435.

Under the Aguilar-Spinelli test, the affidavit was insufficient to support the portion of the warrant authorizing the seizure of the videotape. The information in the affidavit concerning the videotape was through hearsay chains reported by Cruz, Thoong, and Hoy. An informant's information is satisfactory when based on hearsay or several layers of hearsay only if both prongs of the Aguilar-Spinelli test are met at every link in the hearsay chain. *People v. Ketcham,* 93 N.Y.2d 416, 421, 712 N.E.2d 1238 (N.Y.1999); 2 Wayne R. LaFave, Search and Seizure sec. 3.3(d), at 151-52 (2004). As the majority correctly concludes, the affidavit failed to set forth information which would validate each link in any of the hearsay chains upon which Cruz, Thoong, or Hoy's respective knowledge of a videotape was based.

But, in my opinion, the warrant's invalidity does not require suppression of the videotape. Under the 'plain view' rule, items not listed in a search warrant may be seized if the officer has probable cause to believe the item is evidence of a crime. *Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). Thus, an item not named in the warrant may be seized when, 'considering the surrounding

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circumstances, the police can reasonably conclude that the substance before them is incriminating evidence.' *State v. Hudson,* 124 Wn.2d 107, 118, 874 P.2d 160 (1994); see also *United States v. Castorena-Jaime,* 285 F.3d 916, 924 (10th Cir.2002) ('A seizing officer need not 'know' or have an 'unduly high degree of certainty' as to the incriminatory character of the evidence under the plain view doctrine;' '{a} [FN11] that is required is a 'practical, nontechnical probability that incriminating evidence is involved.' ') (quoting *Texas v. Brown,* 460 U.S. 730, 741-42, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality)). [FN12]

> FN11. *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).
>
> FN12. The requirement that the officer have probable cause to believe that an item is evidence has also been called, as the majority does, the 'immediate knowledge' or 'immediately apparent' requirement. See *Coolidge v. New Hampshire,* 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (The 'plain view' doctrine 'is legitimate only where it is immediately apparent to the police that they have evidence before them.'). But as the United States Supreme Court has explained: ' {T}he use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine.' *Brown,* 460 U.S. at 741. The Court has repeatedly explained that the 'plain view' rule requires only a showing of probable cause. *Minnesota v. Dickerson,* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993); *Brown,* 460 U.S. at 742.

The issuing magistrate, the trial court, and the reviewing members of this court all agree that probable cause supported the warrant's authorization to search Wiatt's home and bedroom for evidence of Cruz's rape. This evidence included bedding, clothing, and the lubricant which Wiatt told Cruz he was using as he raped her. When the police executed the warrant and searched the room where Cruz reported being raped, the police opened a dresser drawer where they discovered the lubricant. Next to the lubricant was a video camera. The question at this point is whether the police, at that moment, had probable cause to believe that the camera, and the tape lying inside, could be evidence of Cruz's rape. Or, to put it another way, could the police have obtained a warrant to seize the video camera and videotape in light of (1) where they found it; (2) what it was in close proximity to; and (3) the hearsay chains reported by Cruz, Thoong, and Hoy. I think the answer to this question is very clearly yes.

***25** What undermined the warrant's authorization to seize the video camera and videotape was the police's inability to set forth the reliability and basis of knowledge for each link in either Cruz, Thoong, or Hoy's reported hearsay chains. But, in such circumstances, the informant's information may still be considered if independent police investigation corroborates the tip to such an extent that it supports the missing elements of the Aguilar-Spinelli test. *Jackson,* 102 Wn.2d at 438. The independent police work is sufficient if it 'tends to give substance and verity to the report that the suspect is engaged in criminal activity.' *Jackson,* 102 Wn.2d at 438. This corroboration may be through incriminating or innocuous activity: '{T}he relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts.' *Gates,* 462 U.S. at 245 n. 13.

The majority and the trial court correctly stated that 'simply having a video camera is not illegal.' Majority at 23 (quoting RP (Oct. 4, 2002) at 112). But innocuous activity may ripen to probable cause when the surrounding circumstances are considered. *Gates,* 462 U.S. at 245 n. 13; *Hudson,* 124 Wn.2d at 118. Here the police discovered the video camera lying in the room where Cruz reported being raped, next to the lubricant Wiatt told Cruz he used as he raped her. And three separate hearsay chains each indicated that Wiatt had made a video recording of his sexual encounter with Cruz. These reports, while failing the Aguilar-Spinelli test, need not be ignored by the investigating officer when given 'some further support.' *Spinelli,* 393 U.S. at 418. The further support in this case was the presence of a camera reportedly used to film the alleged crime, sitting next to an item which the police undisputedly had probable cause to seize as evidence of that crime.

In this respect, the facts of this case are quite like those in *State v. Bussard,* 114 Idaho 781, 787-88, 760 P.2d 1197 (Idaho Ct .App.1988). There, officers were executing a search warrant in a burglary case when they came across jewelry which the warrant did not

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lawfully authorize them to seize. Although the jewelry was nondistinctive, the officers could believe that it was 'probably related to criminal activity' because it was sitting next to other stolen property listed in the warrant and the officers had reason to believe that jewelry was taken in the burglary. *Bussard,* 114 Idaho at 788.

The surrounding circumstances of a crime and the search for evidence of it may be considered in assessing the suspicion that attaches to an otherwise innocuous item. The majority relies on this court's decision in *State v. Johnson,* 104 Wn.App. 489, 17 P.3d 3 (2001). While Johnson may be 'instructive,' I do not believe it compels the result the majority reaches.

In Johnson, an officer obtained a warrant to search the defendant's home after two children reported that they had been sexually abused by the defendant. The warrant authorized a search for a vibrator, which the defendant had allegedly used on one of the children. But the warrant also authorized a search for pornographic materials, even though the children's allegations made no reference to such materials. The officer sought these materials because, in her experience, pornography was often used as an aid in committing sex crimes against children.

***26** This court suppressed two unmarked tapes found in the defendant's home which contained child pornography. In so ruling, we first concluded that the warrant lacked probable cause to search the defendant's home for pornographic materials. This was so because there had been no reference to such material in the case and the officer's general statements regarding the common habits of child abusers was insufficient to establish probable cause. *Johnson,* 104 Wn.App. at 500. We then declined to apply the 'plain view' rule because 'nothing about the exterior of the tapes gave probable cause to believe the tapes were evidence of a crime.' *Johnson,* 104 Wn.App. at 502.

Johnson does not require that probable cause must be established solely on the item's face. Such a holding would be contrary to controlling authority mandating that we consider the items' 'surrounding circumstances.' *Hudson,* 124 Wn.2d at 118. In Johnson, there was no information in the case (other than the officer's generalized predictions about child abusers) which would lead the police to believe that the tape was evidence before they viewed it. The police in this case, however, were aware that Cruz, Thoong, and Hoy reported the existence of a video of the crime. In my view, they had probable cause to believe the tape was evidence when they discovered it sitting next to the lubricant.

The majority cites only Detective Clark's testimony that he was not certain that the tape was evidence until he viewed it. But probable cause, which is the predicate for invoking the 'plain view' rule, does not require certainty that an item is evidence. *Brown,* 460 U.S. at 741-42. More importantly, whether an officer subjectively believes that he did or did not have probable cause is irrelevant. The determination of whether probable cause exists is not governed by the officer's subjective intent, but by an objective review of the facts. *State v. Harrell,* 83 Wn.App. 393, 400, 923 P.2d 698 (1996); *State v. Brantigan,* 59 Wn.App. 481, 486, 798 P.2d 1176 (1990).

Under Aguilar-Spinelli, Cruz, Thoong, and Hoy's hearsay chains were insufficient to support the warrant's authorization to search Wiatt's home for a video camera. But they ripened to create probable cause when they were corroborated by what the officer found when they discovered the videotape. Finding that a videotape, which had been described in three separate reports, sitting at the scene of a crime and next to an item which had been used in the commission of that crime, corroborated the informant's accounts and they ripened into probable cause to believe that videotape was evidence of the crime described in the search warrant. It can surely be said that the police seized the tape 'relying on something more substantial than a casual rumor circulating in the underworld.' *Spinelli,* 393 U.S. at 416. Because I would affirm Wiatt's convictions on counts II through VI, I dissent.

Not Reported in P.3d, 127 Wash.App. 1008, 2005 WL 950673 (Wash.App. Div. 2)

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