

Court of Appeals No. 35690-2-II
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.

PETITIONER'S REPLY BRIEF
FILED UNDER SEAL

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I. STATUS OF PETITIONER/PROCEDURAL HISTORY

Prior to filing his Personal Restraint Petition With Legal Argument and Authorities (PRP), undersigned counsel contacted the trial prosecuting attorneys to seek their views on whether any portions of the PRP or appendix should be filed under seal. The parties agreed that Wiatt would initially file all of his materials under seal so that the State could review them before they were made public. The State would then “file within a reasonable time a motion specifying the portions of these pleadings that it believes should be sealed.” See Stipulation re: Filing Under Seal (12/13/06). On February 6, 2007, the Court Clerk sent the parties a letter that included the following: “If either party wishes to have the appellate file sealed, the party must file a motion to do so, which this court may grant upon a proper showing.” The State has not yet filed such a motion. In the interest of complying with his stipulation, Wiatt has indicated “File Under Seal” in the caption of this pleading.

On January 5, 2007, this Court granted Wiatt’s motion to transfer the record from his direct appeal. In a letter dated January 29, 2007, the Court informed counsel that the transferred record does not contain the clerk’s papers or exhibits. Wiatt then filed on February 1, 2007, a Supplemental Appendix with relevant clerk’s papers.

II. ARGUMENT

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

1. Legal Standards

The State does not appear to dispute Wiatt's recitation of the standards for sufficiency of the evidence.

2. Analysis

As discussed in the PRP at 7-11, there was simply no evidence that K. Hoskins was incapable of consent at the time she and Jerry Wiatt engaged in sexual intercourse. At most, the evidence showed that she did not recall the act. She offered two explanations for that: alcohol intoxication and the desire to block out memories of her interactions with Wiatt.

In its Response, the State argues as follows: if Hoskins was too intoxicated to remember the intercourse, the jury could infer that she was mentally incapacitated or physically helpless at the time of the act. The State concedes that "[t]he issue is whether such a condition existed at the time of the alleged offense, as opposed to any other time." Response at 16, citing State v. Ortega-Martinez, 124 Wn.2d 702, 711, 881 P.2d 231 (1994). It does not suggest that there was any other evidence besides amnesia to support incapacity or helplessness. The State relies solely on State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001), rev. denied, 148 Wn.2d 1004, 60 P.3d 1211 (2003), in arguing that amnesia due to intoxication is all it need prove. It suggests that Wiatt has tried to

distinguish Al-Hamdani only by the fact that the victim in that case consumed more alcohol than Ms. Hoskins.

In fact, Al-Hamdani is distinguishable because there was considerable evidence that the victim was incapacitated and helpless. An expert witness testified that someone with the victim's blood alcohol level could not appreciate the consequences of her actions. Id. at 609. An eyewitness confirmed that the victim was stumbling and passing in and out of consciousness shortly before the sexual intercourse took place. Id. The victim herself testified that she "woke" to find the defendant on top of her, and then refused further sexual advances. id. at 608, thereby confirming that she was unconscious when the intercourse took place. Based on this testimony, the Court found the evidence sufficient *even though* the victim could not recall the events leading up to the intercourse. Id. The Court never suggested that retrograde amnesia due to intoxication could, in itself, support a conviction.

Here, by contrast, no witness testified that K. Hoskins was unconscious, helpless, or unable to think clearly at any time before or during the sexual act. Not even K. Hoskins made such a claim. The State's case was based solely on her lack of memory.

Upholding a conviction under these circumstances would set a disturbing precedent. It is not unusual for people to be unable to remember some of their conduct after a night of drinking alcohol, but generally they are responsible for their conduct at the time it takes place. If that conduct includes sexual intercourse, one party should not be guilty

of a felony simply because the other party cannot remember how it happened.

The State also argues that Wiatt should be barred from raising this claim under RAP 2.5(c)(2) because it was raised on direct appeal. That rule, however, applies to second appeals following a remand. A personal restraint petitioner may raise an issue decided on direct appeal if the “interests of justice require relitigation.” Personal Restraint of Taylor, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). The Washington courts have never precisely defined the “interests of justice” standard. Rather, they have adopted the intentionally loose test originally set out by the U.S. Supreme Court in Sanders v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963). See Taylor, 105 Wn.2d at 688-89, quoting Sanders, 373 U.S. at 17 (“ends of justice” standard “cannot be too finely particularized”). The “ends of justice” standard “is clearly not a ‘good cause’ standard.” Personal Restraint of Holmes, 121 Wn.2d 327, 330, 849 P.2d 1221 (1993).

Certainly, the “ends of justice” are satisfied whenever appellate counsel was ineffective in the direct appeal. See Personal Restraint of Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997). The Washington courts, however, have never held that a petitioner must make such a strong showing to satisfy the ends of justice. Rather, they have re-examined claims whenever a petitioner raises “new points of fact and law that *were not* or could not have been raised in the principal action, to the prejudice of the defendant.” Personal Restraint of Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (emphasis added). There does not appear to be any

Washington case in which an appellate court found that the petitioner had established that he was otherwise entitled to relief, yet refused to entertain the claim because the ends of justice did not favor relitigation. In fact, Taylor explains that the ends of justice will always be satisfied whenever a petitioner “is actually prejudiced by the error.” Taylor, 105 Wn.2d at 688.

For example, in Personal Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001), the Supreme Court found trial counsel ineffective in failing to present expert testimony concerning the defendant’s medical and mental conditions. Brett had previously argued on direct appeal that trial counsel were ineffective, and had specifically relied on counsel’s failure to explore Brett’s fetal alcohol syndrome. Id. at 883 (conc. op. of Talmadge, J.) citing State v. Brett, 126 Wn.2d 136, 202-04, 892 P.2d 29 (1995). See also, State v. Brett, 126 Wn.2d at 198-200. Nevertheless, the stronger evidence of ineffectiveness presented in the PRP justified revisiting the issue and granting relief.

In Maxfield, petitioner challenged the same search and seizure as on direct appeal, and alleged no new facts. The court addressed the issue, and reversed itself, because of the stronger constitutional analysis presented. In Personal Restraint of Percer, 111 Wn. App. 843, 47 P.3d 576 (2002), the Court of Appeals permitted the petitioner to relitigate an issue simply because the Court was convinced it had made a mistake in the direct appeal. The Washington Supreme Court reversed on the merits, but confirmed that the Court of Appeals properly reviewed the claim. Personal Restraint of Percer, 150 Wn.2d 41, 54, 75 P.3d 488 (2003).

In any event, the claim raised here was neither clearly raised nor clearly decided in the direct appeal. Appellate counsel raised no claim whatsoever regarding the sufficiency of the evidence on the K. Hoskins count. See Brief of Appellant at 1-3, Ex. A to this brief (Assignments of Error). In his *pro se* Statement of Additional Grounds for Review, Wiatt broadly argued that the evidence was insufficient to support conviction as to four of the alleged victims, including K. Hoskins. For the most part, his arguments were not closely tied to the relevant legal standards. For example, he argued that the alleged victims could not be mentally incapacitated because they had graduated from high school and were not “mentally retarded or severely mentally ill.” He also argued that the evidence was insufficient because the alleged victims voluntarily came to his home. See Unpublished Opinion at *66-67. The closest he came to the claim raised here was an argument that K. Hoskins and Z. Hawkins could not have been incapacitated since they did not have very much to drink and some witnesses said they seemed fine. Id. at *67. This argument is contained in a single paragraph of Wiatt’s pleading in which he never cites to the trial court record. See Ex. B (Statement of Additional Grounds for Review at 4-5). Not surprisingly, this Court summarily dismissed his arguments, noting that witness credibility is a matter for the jury. See App. MM to PRP (Unpublished Opinion) at *68. The Court suggested in passing that “K. Hoskins and Z. Hawkins each testified that they were mentally incapacitated and physically helpless at the time of the rapes.” Id. at *67. That may have been true as to Z. Hawkins, but it was

not true as to K. Hoskins. She never claimed to be physically helpless or mentally incapacitated at *any* time – much less at the time of the intercourse. She simply could not remember what happened.

Mr. Wiatt never made the argument advanced here: that even if K. Hoskins' claim of amnesia were fully believed, it did not prove the elements of the offense. This Court cannot be faulted for failing to address a claim not made. By the same token, the "interests of justice" favor addressing the issue now. Mr. Wiatt's ill-advised pro se arguments on direct appeal should not bar him from raising a meritorious claim through counsel in this PRP, simply because both pleadings fall under the general category of "sufficiency of the evidence." Because he has raised "new points of fact and law" this Court should address the claim. See In re Gentry, supra.

Although it seems unnecessary here, the Court could reach the same result by finding Wiatt's appellate counsel ineffective. See Maxfield, supra. When a state grants a defendant an appeal as of right, as Washington does, the federal due process clause guarantees him the right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Here, counsel's failure to raise this meritorious issue could not have been based on any reasonable strategy. It is always to the defendant's advantage to obtain a reversal based on insufficiency since the count cannot be retried. Further, even if the claim is unsuccessful, pointing out weaknesses in the evidence can only help the defendant prevail on other claims of error.

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

The State does not dispute that it is a violation of due process to mislead the defense about the evidence it will present. It maintains, however, that the defense was not misled because the prosecutors “scrupulously avoided” references to date rape drugs. As Wiatt explained in the PRP, however, the State carefully led the witnesses through testimony that suggested that they had been drugged. See PRP at 11-12.

For example, the prosecutor had E. Gundlach explain how Wiatt mixed her a drink and put some “red juice or something in it.” RP 847. He then asked her to explain in detail how Wiatt went about mixing the drink, and she responded:

He was standing with . . . his back to me, and I was sitting at the counter with my other friends and he was mixing drinks, and I couldn't see what he was doing except I saw what he put in it, like what kind of alcohol it was, and then for the rest I couldn't see what he was doing.

Id. Although she consumed only about half of the single drink Wiatt gave her, Gundlach claimed a loss of memory for much of the evening after that. RP 850-53. Although she claimed to have drunk no other alcohol that day, she testified that the drink Wiatt gave her made her feel “incapacitated.” RP 855. “I didn't have very good memory, I didn't have my senses, I felt like I couldn't move. I never felt like that before.” RP 855. The prosecutor then asked how she felt the next day, and she responded:

I was sick all day. I was puking, I couldn't get up, I [sic] my head hurt, my body hurt. I was sick for the next two days.

Id.

Clearly, these questions and answers went far beyond what was needed to convict Wiatt of the only charge involving Gundlach – furnishing alcohol to a minor. They also went beyond anything needed to show a common scheme or plan, unless that plan was to use date rape drugs.

The defense reasonably believed that “winning” a motion in limine to prohibit evidence and argument concerning date rape drugs meant that the jurors could not properly consider such evidence. Instead, the jurors were permitted to combine the testimony of several girls with information they had learned from various sources about date rape drugs to conclude that Wiatt had in fact drugged the girls. As Wiatt argued in the trial court and on direct appeal, the remedy for such conduct by the jurors should have been a new trial. If the jurors’ conduct was proper, however, then the trial court and the prosecutor should have made it clear at the outset that the jurors were free to interpret the evidence as a circumstantial case of drugging. As discussed in the PRP at 15-18, the defense would have handled the trial quite differently under those circumstances.

The attached declaration of Lindsey Kist (formerly Howard) contains additional evidence that the defense could have presented to counter a date rape drug theory. Ms. Kist was the girlfriend of Wiatt’s roommate, Barry Specht. She typically spent the night at Wiatt’s house.

She never saw or heard any indication that date rape drugs were available to anyone in that house. See Ex. G.¹

C. DEFENSE COUNSEL WERE INEFFECTIVE

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

The State's arguments on this issue are inconsistent. It contends that, in view of the motion in limine "it was logical for defense counsel to expect that the jury would not seriously consider that theory [of date rape drugs]." Response at 26. In responding to defendant's motion for a new trial, however, the State argued that there was an "obvious inference of the possibility of drugs being used." See PRP at 20. Further, this Court found on direct appeal that defense counsel actually invited the jury to speculate about date rape drugs. The State now contends that this was a good strategy because it "derived from a necessary challenge by the defense to the credibility of the victims." Response at 29.

The State cannot have it both ways. If defense counsel had good reason to believe that the jurors would not consider a date rape drug theory, they should not have invited the jurors to do so. On the other hand, if such an invitation was necessary in order to attack the credibility of the State's witnesses, then defense counsel should have made their case for why date rape drugs were *not* involved. As discussed above, the defense could have presented considerable evidence tending to exclude the drug

¹ The exhibit contains a faxed copy of the signature page. I will submit the original signature page as soon as I receive it in the mail.

theory. That could only have strengthened counsel's closing argument that the complainants were exaggerating the effects of the small amounts of alcohol they consumed.

2. Defense Counsel were Ineffective in Other Ways
Lindsey Howard

Wiatt has explained that defense counsel could have brought out considerable exculpatory evidence concerning the R. Rankis incident from Rankis' close friend, Lindsey Howard. See PRP at 21-23. First, Rankis told Howard about having sex with Wiatt shortly after it happened, but gave no indication that she was upset or that the sex was not consensual. The State's response is that Rankis did not wish to accuse Wiatt of rape because she felt she should have done more to prevent it from happening. Response at 30. While the State was entitled to present such a theory to the jury, Ms. Howard's testimony would have made it considerably less credible.

The State also contends that Howard would have been prohibited from "speculating" as to what Rankis would have told her. But it is entirely appropriate for a witness to explain that a complainant was in the habit of discussing sensitive matters with her, and that she would normally confide her troubles to the witness. In fact, the State elicited similar testimony from several witnesses, that is, that they were on close terms with a complainant and that the complainant seemed upset following her interaction with Wiatt. See PRP at 31.

Undersigned counsel recently located Ms. Howard (now married and named "Kist"). She has provided a declaration explaining why her testimony would not have been speculation.

6. As I explained to Det. Adams, I spoke with Raminta shortly after she had sex with Jerry and she gave no indication that there was anything negative about the experience. I can give some further details about why I would have known if anything was wrong.

7. Raminta and I met during our freshman year at Black Hills High School in Tumwater, Washington. She was new to the school and didn't know anybody. We soon became friends and our relationship became closer and closer over the years. During my freshman year, I began dating a boy name Brian (and continued dating him for about three years). Raminta then started dating Brian's best friend Eric. This meant that our social lives were intertwined. We would see each other during school and then also at night and on weekends when we hung out with our boyfriends. Some time after we got our drivers' licenses, Raminta crashed her car so she often depended on me for transportation. During our sophomore or junior year, I had a fight with my mother and moved in with Raminta for about a month. She let me stay in her room.

8. During our relationship, Raminta would tell me when she was upset about something, such as when she had argued with her mother or with her boyfriend. The few times she didn't tell me right away, I could tell that something was wrong because she would be short with me or want to be left alone. I would always find out pretty soon what the problem was.

Ex. G.

Howard could also have explained how she knew that Rankis wanted to have sex with Jerry. "After meeting Jerry a few times at his house, Raminta told me that she was attracted to Jerry. Raminta made an

effort to hang out at Jerry’s house after that because of her interest in him.” Id. at para. 4. It is true, as the State points out, that other witnesses testified that Rankis wished to have sex with Wiatt. Response at 31. The jury would have been more likely to believe Rankis’ best friend, however, than witnesses who might be seen as allied with Wiatt. Howard also had reason to believe that Rankis was fabricating her allegation against Wiatt because she believed she could get money out of him. Ex. G at para. 5.

The State does not suggest that Wiatt’s attorneys could have had any strategic reason for failing to recall Howard to the witness stand. It never addresses one of the main reasons that counsels’ failure was so prejudicial: counsel repeatedly suggested during cross-examination of Rankis that Howard would contradict her. The failure to follow up with Howard implied that the cross-examination was not made in good faith. See PRP at 22-23.

Z. Hawkins

The State concedes that the defense could have cross-examined Ms. Hawkins about her desire to sue Wiatt because that would be evidence of bias. Response at 32-33. It argues, however, that a desire to sue would be consistent with her account of victimization. Id. at 33. Certainly the State would have been free to make such an argument to the jury. But it is reasonably likely that the jury would instead have inferred that Hawkins might be stretching the truth in an effort to secure money damages in a civil suit.

Kevin Barlow

Kevin Barlow could have testified, among other things, that Z. Hawkins did not appear intoxicated when she convinced him to drive her home. PRP at 23. The State responds that Barlow's observations are "after the fact and cumulative." Hawkins testified, however, that she obtained the ride home shortly after leaving Wiatt's room. RP 1337. A juror could reasonably infer that she would not have sobered up significantly in such a short time. It is true that other witnesses testified that Hawkins was not intoxicated. This demonstrates the weakness of the State's case. Nevertheless, the jurors apparently believed Hawkins. The testimony of an additional defense witness could well have tipped the balance. Cf. Benn v. Lambert, 283 F.3d 1040, 1057-58 (9th Cir. 2002) (prosecutor cannot withhold some evidence and then claim that it would have been cumulative of other evidence).

H. Kalmikov

Wiatt has pointed out that defense counsel unnecessarily opened the door to the testimony of witnesses Luke and Erik Nelson by incorrectly suggesting that Kalmikov did not report a rape for over a year after it allegedly took place. PRP at 24. In response, the State argues that the testimony of the Nelsons would have been admissible regardless under the "fact of complaint doctrine." Response at 34, citing State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980). In fact, Fleming explains that this testimony is admissible "for the sole purpose of rebutting an inference that the complaining witness was silent following the attack." Id. "Details

and particulars of the complaint, including the identity of the alleged offender, are not admissible.” Id.

Here, the State had already brought out that Kalmikov complained about an alleged “attack” to Richard Phillips shortly after it took place, albeit a somewhat different offense than the one to which she testified. The State could not have used the “fact of complaint” doctrine to bring out the details provided to the Nelsons had not defense counsel opened the door through his cross-examination of Kalmikov.

J. Bowles

The State does not respond to Wiatt’s claim that defense counsel were ineffective in failing to rebut certain testimony of J. Bowles. See PRP at 24.

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

This issue is addressed in the PRP at 25-36.

Three witnesses could have testified 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. See PRP at 26-27. The State responds that Ms. Rankis’ desire to have sex with others could not be relevant to her desire to have sex with Wiatt. Response at 37.

But that misses the point. Ms. Rankis planned to have sex with *everyone* in the house, which included Mr. Wiatt.²

The State further argues that there was no prejudice because one witness was permitted to testify that Rankis expressed a desire to have sex with Wiatt. This leaves out a critical piece of information, however: Rankis had actually begun acting on her plan to have sex with everyone in the house. Without that information, the jury might have believed that Rankis had just made some offhand, flirtatious comment about Wiatt that she did not mean to be taken seriously.

Wiatt also sought to introduce evidence that, shortly after having sex with Wiatt, Rankis went to another party and had consensual sex there with another man. PRP at 30-31. In Wiatt's view, the jury could properly infer that such behavior was inconsistent with having been raped. The State responds that such testimony is precluded by State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). It apparently reads Black as holding that, because rape victims may respond in different ways, no testimony about their subsequent behavior can have any relevance. Response at 38-39. In fact, Black merely held that an expert witness could not properly testify that a particular alleged victim suffered from "rape trauma syndrome."

We do not mean to imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape

² In her current declaration, Lindsey Kist (formerly Howard) says she is not sure that Rankis expressed a desire to have sex with everyone in the house. Ex. G. She is sure, though, that Rankis wished to have sex with Wiatt. Id.

prosecution. The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence. We simply hold that the State may not introduce expert testimony which purports to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome.

Black, 109 Wn.2d at 349.

In fact, the State concedes that it introduced evidence that “several victims showed signs of emotional trauma after the alleged incident.” Response at 39. It maintains that this was admitted solely to show that “something had occurred out of the ordinary which had created an unusual emotional impact.” Id. Even if that were the true basis for admission of the evidence, the same reasoning must apply to the defense. In other words, the defense must be permitted to show that an alleged victim did *not* exhibit signs of emotional trauma following her interaction with Wiatt, and therefore the jury could infer that *nothing* out of the ordinary had happened.

The State’s now maintains that “victims of rape display a wide-ranging variety of symptoms.” See Response at 38. But the State’s evidence that some alleged victims appeared upset was not excluded on that basis. By the same token, the defense evidence should not have been excluded simply because it is conceivable that a woman who had just been raped might respond by seeking out consensual sex.

The trial court also excluded testimony that J. Bowles had performed a striptease at Wiatt’s house in front of several people. As one basis for admissibility of this evidence, Wiatt argues that he had a due

process right to rebut the State's contentions. During cross-examination of defense witness Tony Grant, the trial prosecutor ridiculed his testimony that Bowles and Wiatt began passionately kissing while others were present in the room, and that after having sex with Wiatt, Bowles sat around in her underwear comfortably chatting with others who re-entered the room. PRP at 33-35.

The State does not now dispute that this was the purpose of the cross-examination. It seems to argue, however, that Wiatt was trying to admit character evidence, which could be introduced only through reputation. Response at 43-44. If that were true then the trial prosecutor's questioning was improper. He should have been limited to asking: "Mr. Grant, are you aware of Ms. Bowles' reputation for modesty?"

But of course that would miss the point. The prosecutor did not wish to ask whether Ms. Bowles had a reputation for modesty because he knew she did not. Rather, his questioning was calculated to suggest that it would be very unusual for *anyone* to exhibit the sort of immodest behavior that Tony Grant attributed to J. Bowles, and therefore that Grant must be lying. Once the State opened this door, the defense had a due process right to rebut that inference with evidence that Bowles was in fact quite comfortable undressing and acting provocatively in front of others. Contrary to the State's current contentions, the fact that Bowles happily disrobed in front of others at Wiatt's house on a prior occasion makes it far more likely that she would not mind being seen in her underwear at the same house on another occasion.

E. NEWLY DISCOVERED EVIDENCE SUPPORTS A NEW TRIAL

1. Legal Standards

As to certain witnesses, the State argues that the evidence cannot be “newly discovered” because the witness was known to defense counsel prior to trial.

The State's contention ignores the interrelatedness of the Williams “newly discovered” and “due diligence” factors. A previously known witness' testimony can be newly discovered when that witness could not be located before trial with the exercise of due diligence.

State v. Slanaker, 58 Wn. App. 161, 166, 791 P.2d 575, review denied, 115 Wn.2d 1031, 803 P.2d 324 (1990) (citations omitted).

The State further argues that various new evidence is “cumulative” because the defendant, and perhaps a roommate of his, testified to the same thing at trial. Once again, Slanaker rejected such reasoning. In that case, “only Slanaker and his roommate, Hall, gave testimony on Slanaker's alibi defense.” Id. at 168. Both men had an arguable motive to lie, however, while the State's witnesses did not. Therefore, the “apparently impartial alibi testimony” of the new witnesses “could be extremely significant.” Id. The “cumulative evidence” rule does not apply when the new witness is disinterested and the only similar evidence at trial came from a party or other interested witness. Id. at 168-69, citing State v. Wilson, 38 Wn.2d 593, 622-23, 231 P.2d 288, cert. denied, 342 U.S. 855, 72 S.Ct. 81, 96 L.Ed. 644 (1951), and Amos v. United States, 218 F.2d 44 (D.C. Cir. 1954).

2. Justin Allison

The State claims that Allison's testimony is not new because defense counsel had access to him at the time of trial. Allison was unwilling to speak about K. Hoskins, however, because of threats to his life. That surely made his information as unavailable as if he had gone into hiding.

3. Joel Hawkins

The State concedes that Hawkins' information could not have been discovered before trial by the exercise of due diligence. The State argues that Hawkins cannot provide a "time frame" when he overheard Hoskins say she had her first orgasm the first time she had sex with Wiatt. It is irrelevant, however, exactly when Hoskins made this statement because it refers to the *first* time that she and Wiatt had sex – which by all accounts was on the night of the incident for which Wiatt was charged with rape. Her statement that she had her first orgasm on that night contradicts her trial testimony that she could not remember what happened and is certainly inconsistent with being raped.

The State also seems to argue that Hawkins should not be believed. This Court is in no position, however, to make credibility determinations. The ultimate question is how Hawkins' testimony could affect a jury. To the extent that his credibility affects that issue, it could be determined only at a reference hearing.

4. Kevin Murphy

The State argues that Murphy's information may have been known to defense counsel prior to trial. The most reasonable inference from the Declaration of David Allen, however, is that the defense did not learn in any detail what Murphy would have said about most of the complainants because they initially ruled out presenting him as a witness. When the trial court's severance order changed their analysis, they diligently pursued an interview but Murphy would not respond to them because he was afraid of Jared Trigg. See PRP at 38-39.

Murphy's testimony would have refuted, among other things, Z. Hawkins' claim that she came to Wiatt's house only once. The State contends that this would not have been helpful because it would contradict Wiatt's testimony that Hawkins was at his house only once. But Wiatt said only that Hawkins was not welcome in his house *after* the incident to which she testified. RP 2076. Murphy likely saw her at the house on previous occasions.

5. Alisha Cochran

The State suggests that there is no evidence of what became of Ms. Cochran after the trial court issued a material witness warrant. Response at 50. In fact, attorney David Allen has submitted a sworn declaration that Cochran accepted service, cashed the check for the travel expenses, and then disappeared. See PRP at 40. While her information was known to the defense, her location was not. Thus, the situation is the same as in the Slanaker case discussed above. Defense counsel knew the witness had

helpful testimony and made diligent but unsuccessful efforts to bring her into court.

6. Ian Klotz

As with other witnesses, the State argues that Klotz's testimony would be cumulative because the defendant testified to the same thing. As discussed above, Slanaker rejected such reasoning.

In any event, as Wiatt made clear in the PRP, he is arguing in the alternative that defense counsel were ineffective in failing to present the witnesses discussed in the "Newly Discovered Evidence" section. See PRP at 24. It is reasonably likely that corroboration of a defendant's testimony would change the result of a trial. See, e.g., Riley v. Payne, 352 F.3d 1313, 1319-20 (9th Cir. 2003), cert. denied, 543 U.S. 917, 125 S. Ct. 39, 160 L. Ed. 2d 200 (2004).

7. Natalie Van Brunt

The State argues that Van Brunt's information was likely available to defense counsel at the time of trial, and that she had no basis for believing that J. Bowles seemed "proud" of having sex with Wiatt. Ms. Van Brunt has provided a supplemental declaration explaining that her mother became terminally ill during Wiatt's trial and she was unreachable after that. Ex. D at para. 1. She has also provided additional details concerning Bowles' demeanor. "I could tell she was proud because she said it in an upbeat, positive, bragging tone of voice. She looked happy when she said this." Id. at para. 2.

8. Diane Moyer

The State concedes that her information is newly discovered. It is discussed in section F, below.

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

The State concedes that Det. Adams told witnesses that their testimony differed from that of other prosecution witnesses and then questioned them about whether they were sure of their statements. Response at 61. Such tactics destroy the independence of witness recollection. The appendices submitted by the State confirm the impropriety of the detective's actions. For example, when questioning E. Gundlach about Z. Hawkins, Adams said "when I talked to [Z], she pretty much tells the same story you do" except that Hawkins had a different account of how and when people arrived at the house. State's App. E at 7. Adams then asked Gundlach whether that version made sense to her and Gundlach changed her testimony. Adams then repeatedly told Gundlach statements Hawkins had made and asked Gundlach whether she would confirm them. *Id.* at 8. Adams then questioned Gundlach closely about whether she was really sure she saw Hawkins go up the stairs with Wiatt and ultimately got her to admit that she was not sure. *Id.* at 9. Clearly, Adams was determined to make Gundlach's testimony consistent with Hawkins' and she had a witness quite willing to follow her suggestions.

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. The State concedes that no such tape exists but denies that Adams made the statement. The credibility contest between Adams and Bowles can be decided only at a reference hearing. Even if the State were correct, however, that Bowles is lying or mistaken about this matter, that would itself be a frightening thought. Wiatt's conviction for raping Bowles was based *solely* on her testimony. If Bowles could be wrong about such a dramatic point as the videotape, how can she be trusted to send a man to prison?

The State suggests that Adams' statement about the videotape could not have prejudiced Wiatt because the State never claimed at trial that such a videotape existed. Response at 63. That is hardly the point. If Adams was making such extravagant, false statements to potential complainants, that could easily have led to charges that would otherwise never have existed. As discussed in the PRP, Adams made similar false statements to several potential witnesses, including telling them that she had actually found traces of date rape drugs in Wiatt's house. See PRP at 44-46. The young women may have felt equivocal about their decision to have sex with an older man like Jerry Wiatt at a party, and their memories of the events may have been somewhat dimmed from drinking alcohol. Hearing an authority figure such as Det. Adams portray Wiatt as a calculating serial rapist could easily lead them to interpret the interaction as rape. After all, none of the counts involved any of the clear-cut

hallmarks of rape such as force, threats or weapons.³ Each count turned on the complainant's belief that she was helpless or that she indicated in some way that she did not wish to have sex. Such claims can be influenced by aggressive suggestions.

Diane Moyer, the mother of the one of the alleged victims, has submitted a sworn declaration indicating that Det. Adams helped to set up a parents' support group and shared her false allegations about Wiatt with that group. The State responds that there is no proof that anyone other than Moyer relayed information to or from her daughter. Response at 64. Although Wiatt believes that is the most reasonable interpretation of Moyer's original declaration, he has obtained a supplemental declaration from Ms. Moyer that clarifies this point:

2. I was not the only one in the parents' support group who shared information with her daughter. All of us discussed what our daughters were saying about their experiences with Jerry Wiatt, and the other parents told me that they were passing on some or all of the information to their daughters.

3. Teri Hoskins and I discussed how the experiences of our daughters with Jerry Wiatt were similar. We arranged for Magen and Krystal to get together so that they could talk about the case and their situation.

Ex. E (Supplemental Declaration of Diane Moyer).

³ Wiatt is not suggesting that such factors are necessary for a charge of rape, but only that it would be much more difficult to convince a witness that such factors were present if they really were not.

The State says that “there is no evidence [Joel] Hawkins ever declined to testify for the defense” because of Det. Adams’ threats. Response at 65. In fact, Hawkins admits he was not forthcoming when interviewed by a defense investigator after Adams told him his connection to Wiatt could cause employment problems. App. G to PRP at paras. 2-3.

In her declaration accompanying the PRP, Natalie Van Brunt said she saw a woman coaching the complainants to cry during their testimony. App. O to PRP. The State suggests that Ms. Van Brunt may have been referring to someone other than the prosecutor’s victims’ advocate. Response at 66. Ms. Van Brunt has now submitted a supplemental declaration that includes the following:

I understood this woman to be associated with the prosecutors because she would generally arrive when they did and sometimes talk with them before court started or during breaks. As far as I could tell, she was the only woman who would meet with each of the alleged victims in the hallway before they testified.

Ex. D to this brief at para. 3.

G. THE JURORS RECEIVED EXTRINSIC EVIDENCE

In her declaration attached to the PRP, Diane Moye stated that Jeannette Hawkins said she would use her connections to get an article about date rape drugs into the jury room. App. L to PRP. The State responds that “[n]o further information is provided concerning the context of this alleged statement in order to gauge the seriousness of it.” Response at 70. Ms. Moye’s supplemental declaration includes the following:

As I explained in my previous declaration Jeannette Hawkins told me that she would get an article concerning date rape drugs into the jury room. She also said she knew some people on the jury. She was dead serious when she said these things. She had a determined look on her face. She seemed determined to follow through on that plan.

Ex. E to this brief at 4. This makes it clear that Hawkins' statement was not made in jest. It also raises the issue of bias stemming from the jurors' familiarity with Hawkins. The State has not submitted a contrary declaration from Ms. Hawkins.

Moye's sworn statements are sufficient, at least, for a reference hearing on this issue. It is not surprising that the jurors did not voluntarily disclose this information when approached by the defense after trial, since some of them apparently knew Ms. Hawkins.

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

The State maintains that it is only "speculation" that Judge Tabor might know of his daughter's connection to this case. Undersigned counsel has refrained from asking Judge Tabor about this, however, at the urging of the trial prosecutors. They expressed concern that bringing the issue to Judge Tabor's attention could give rise to grounds for recusal where none would otherwise exist. The issue arose during discussions about setting a new sentencing hearing, which was required in view of this Court's decision on direct appeal. Petitioner attempted to set a re-sentencing hearing well before the due date for the PRP, but the superior court's and prosecutors' schedules made that impossible.

The State cannot have it both ways. If the Court finds that the current record is insufficient to prove judicial bias, it should remand for a reference hearing at which Judge Tabor and others can testify.

I. WIATT’S RIGHTS TO BE PRESENT AND TO A PUBLIC TRIAL WERE VIOLATED

The State maintains that there was no violation of the right to a public trial because “there is nothing in the record to suggest that the court ever excluded the public from the courtroom.” Response at 78-79. In fact, the transcript of October 4, 2002, indicates that the relevant proceedings were “held in closed session.” RP (10/4/02) at 9. To remove any doubt, Wiatt has attached the declarations of Tracy Wiatt and Jerry Wiatt, Sr., who confirm that people were present in the courtroom and were ordered to leave. Exs. F and C.

As Wiatt noted in the PRP, his claim that he was denied the right to be present requires no showing of prejudice. State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). The State contends that because this claim is raised in a PRP, Wiatt must prove actual and substantial prejudice. Response at 83-84. As Wiatt explained in the PRP, however, he maintains that appellate counsel was ineffective in failing to raise this issue in the PRP. See Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (fourteenth amendment due process clause guarantees right to effective assistance of counsel on an appeal as of right). There can be no strategic reason for failing to include such a claim on direct appeal when it requires relief with no showing of prejudice. Personal Restraint of

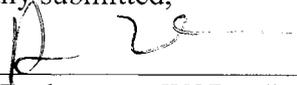
Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Because appellate counsel was ineffective, the remedy is to apply the same standard of prejudice on collateral review, and remand for a new trial. Id.

III. CONCLUSION

The Court should reject the State's arguments and grant the relief requested in the PRP.

DATED this 16th day of July, 2007.

Respectfully submitted,



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

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 exhibits on the following:

Mr. James C. Powers
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

7/10/07
Date

Emily Knudsen
Emily Knudsen

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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INDEX TO EXHIBITS
FILED UNDER SEAL

- A. Excerpt of Brief of Appellant, December 15, 2003, *State v. Jerry D. Wiatt*, Court of Appeals (Division II) N o. 30168-7-II
- B. Excerpt of Statement of Additional Grounds for Review, April 16, 2004, *State v. Jerry D. Wiatt*, Court of Appeals (Division II) No. 30168-7-II
- C. Declaration of Jerry Wiatt, Sr., June 28, 2007
- D. Supplemental Declaration of Natalie Van Brunt, July 3, 2007
- E. Supplemental Declaration of Diane Moye, July 10, 2007
- F. Declaration of Tracy Wiatt, July 11, 2007
- G. Declaration of Lindsey Kist (Formerly Howard), July 13, 2007

- A. Excerpt of Brief of Appellant, December 15, 2003, *State v. Jerry D. Wiatt*, Court of Appeals (Division II) N o. 30168-7-II

NO. 30168-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY D. WIATT, JR.,

Appellant.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Appellant

Market Place Two, Suite 200
2001 Western Ave.
Seattle, WA 98121
(206) 728-0996

A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the Motion for New Trial based on juror misconduct.

2. There was insufficient evidence to support the conviction of rape in the second degree, Count II.

3. Appellant was denied due process by the prosecutor's improper argument and the court's failure to give a curative instruction.

4. Appellant assigns error to Instruction No. 15 (CP 108, quoted in full below).

5. Appellant assigns error to Instruction No. 16 (CP 108-09, quoted in full below).

6. Appellant assigns error to Instruction No. 21 (CP 110, quoted in full below).

7. The court violated due process by instructing the jury on alternative means of committing sexual exploitation of a child that were not charged. U.S. Const., amends. 6, 14; Const., art. 1, §§ 3, 22.

8. Appellant assigns error to Instruction No. 6 (CP 105, quoted in full below).

9. Appellant assigns error to Instruction No. 9 (CP 106, quoted in full below).

10. Appellant assigns error to Instruction No. 13 (CP 107-08, quoted in full below).

11. Appellant assigns error to Instruction No. 22 (CP 111, quoted in full below).

12. Appellant assigns error to Instruction No. 29 (CP 115, quoted in full below).

13. Appellant assigns error to the giving of Instruction No. 11 (CP 106, quoted in full below).

14. The court erred by failing to respond to a jury inquiry with additional instructions regarding "freely given" consent.

15. There was insufficient evidence to support a conviction of rape in the third degree, Count XVI.

16. Appellant was denied due process by the state's breach of the plea agreement.

17. Appellant was denied due process by prosecutorial misconduct during closing argument.

18. The trial court erred by admitting into evidence the fruits of an unconstitutional search and seizure. U.S. Const., amends. 4, 14; Const., art. I, § 7.

19. The court violated appellant's right of confrontation by prohibiting questions regarding the co-defendant's involvement in the alleged

crimes. U.S. Const., amends. 6, 14; Const., art. I, § 22.

Issues Pertaining to Assignments of Error

1. Where the state had no evidence whatsoever that any drugs had been given to the complaining witnesses, and, because of this lack of evidence, concurred in a motion in limine to prohibit any speculative testimony or argument about such "date rape" drugs, was it misconduct for the jury to consider and discuss that such drugs had been used, based on information some had obtained from entertainment programs on television?

2. Was there sufficient evidence to support a finding that the complaining witness was "physically helpless or mentally incapacitated" when the undisputed evidence was that she left the defendant's bed, drove 20 miles to her home to appease her friends, then turned around and drove 20 miles back to the defendant's home and bed?

3. If two people are having consensual sex, and one falls asleep during intercourse, does the other thereupon become guilty of rape?

4. If falling asleep during intercourse does not make it rape, was the court required to

- B. Excerpt of Statement of Additional Grounds for Review, April 16, 2004, *State v. Jerry D. Wiatt*, Court of Appeals (Division II) No. 30168-7-II

PRO SE SUPPLEMENTAL BRIEF

STATE OF WASHINGTON)	
Respondent,)	
)	No. <u>30153-7-II</u>
v.)	
)	STATEMENT OF ADDITIONAL
<u>Jerry Dale Wiatt, Jr.</u>)	GROUND FOR REVIEW
Appellant.)	
)	

I, Jerry Dale Wiatt, Jr., have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on its merits.

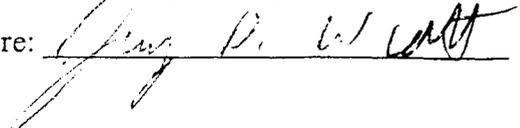
Additional Ground 1

See Attached Sheets.

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 04/15/04

Signature: 

Therefore, the Appellant's exceptional sentence must be vacated and remanded for a sentence within the standard range.

4) There was insufficient evidence to support a conviction on count XII & XIV, rape in the second degree.

When reviewing the sufficiency of the evidence on appeal,

the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis of the Court); Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

Count XII charged rape in the second degree:

and XIV

(1) A person is guilty of rape in the second degree when ... the person engages in sexual intercourse with another person:

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated; RCW 9A.44.050(1) (b).

a. Mentally incapacitated

The state prosecutes mentally capable individuals for having sex with people who are mentally retarded or severely mentally ill, under these statutes. In this case all the complaining witnesses in this case had graduated from high school and most attended college, implying they were above average mental capacity. RP 156-57, 542-43, 712, 808-09, 939, 1136, 1308.

In addition to their disabilities, the complainants in State v. Ortega-Martinez, 124 Wn. 2d 702, 881 P.2d 231 (1994) & State v. Summers, 70 Wn. App. 424, 853 P.2d 953 (1993) had no prior acquaintance or interaction with the defendants; they didn't meet through mutual friends or in a social context. Here Ms. Hoskins and Ms. Hawkins all met Mr. Wiatt by coming to his home at his invitation, by roommates, or by mutual friend.

Mental incapacity due to alcohol and drugs was at issue in State v. Alhamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001), review denied sub nom. State v. Alhamdani, 148 Wn.2d 1004 (2003). Where the complaining witness, N.J. testified that she had at least 10 drinks during the evening & possibly more.

Those facts differ completely from Ms. Hawkins and Ms.

Hoskins where they said they drank from one to three drinks. Testimonies by Lindsay Howard, Barry Specht, Kevin Barlow, Erin Gunlach, Anthony Grant, and Justin Allison show that Ms. Hawkins and Ms. Hoskins had mental capacity throuout the evening.

b. Physically helpless

When reviewing this circumstance the record will show that there was insufficient evidence to support a conviction as a result of being physically helpless.

5) There was insufficient evidence to support a conviction on counts XVI & VIII, rape in the third degree.

Due to insufficient evidence counts, XVI, VII, XIV & XII should be reversed and dismissed.

C. Declaration of Jerry Wiatt, Sr., June 28, 2007

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JERRY D. WIATT, JR.

Defendant/Petitioner.

No. 35690-2-II

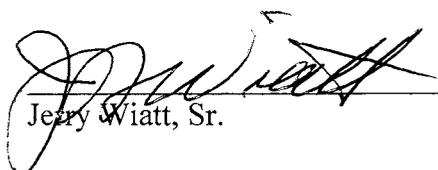
DECLARATION OF JERRY WIATT, SR.

Jerry Wiatt, Sr. declares as follows:

1. I am the father of the petitioner Jerry Wiatt, Jr.
2. My wife Lina and I attended, or at least attempted to attend, every court hearing in our son's case. I recall an occasion when the judge cleared the courtroom for a closed hearing. If not for that order, Lina and I would have stayed in the courtroom.
3. I cannot specifically remember who else may have been in the courtroom when we were ordered to leave. To the best of my recollection, however, Lina and I were never the only ones present as spectators. Generally, other friends and relatives of Jerry would be present, as well as various friends and relatives of the witnesses and alleged victims.

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

6-28-07
Date
Olympia, Washington


Jerry Wiatt, Sr.

D. Supplemental Declaration of Natalie Van Brunt, July 3, 2007

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

STATE OF WASHINGTON,

Plaintiff,

vs.

JERRY D. WIATT, JR.

Defendant.

Court of Appeals No. 35690-2-II

SUPPLEMENTAL DECLARATION OF
NATALIE VAN BRUNT

Natalie Van Brunt declares as follows:

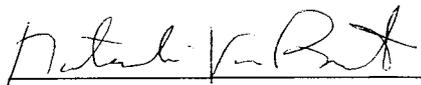
1. I attended a portion of Jerry Wiatt's trial. During the trial, however, my mother was diagnosed with a terminal illness. I was very upset about this and did not wish to deal with other people. I dropped out of sight for several months. During that time I did not stay in touch with the Wiatts or their friends and would not have responded had they tried to contact me.
2. In my previous declaration I explained that Jennifer Bowles seemed proud when she told me she had slept with both Jeff and Jerry Wiatt. I could tell she was proud because she said it in an upbeat, positive, bragging tone of voice. She looked happy when she said this.
3. In my previous declaration, I said that I saw a woman telling some of the witnesses to cry when they testified. I understood this woman to be associated with the prosecutors because she would generally arrive when they did and sometimes talk with them before court started

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or during breaks. As far as I could tell, she was the only woman who would meet with each of the alleged victims in the hallway before they testified.

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

July 3, 2007
Date
Lacey, Washington


Natalie Van Brunt

E. Supplemental Declaration of Diane Moye, July 10, 2007

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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

SUPPLEMENTAL DECLARATION OF
DIANE MOYE

Diane Moyer declares as follows:

1. I am the mother of Magen Blevins, one of the victims in this case. I previously signed a declaration in this case on December 6, 2006. I am submitting this supplemental declaration in response to some points raised in the prosecutor's response brief.
2. I was not the only one in the parents' support group who shared information with her daughter. All of us discussed what our daughters were saying about their experiences with Jerry Wiatt, and the other parents told me that they were passing on some or all of the information to their daughters.
3. Teri Hoskins and I discussed how the experiences of our daughters with Jerry Wiatt were similar. We arranged for Magen and Krystal to get together so that they could talk about the case and their situation. We thought it would be helpful for them to talk about what happened with someone who had been through the same thing.

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4. As I explained in my previous declaration, Jeannette Hawkins told me that she would get an article concerning date rape drugs into the jury room. She also said she knew some people on the jury. She was dead serious when she said these things. She had a determined look on her face. She seemed determined to follow through on that plan.

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

July 10, 2007
Date
Olympia, Washington


Diane Moye

F. Declaration of Tracy Wiatt, July 11, 2007

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4 IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
5 DIVISION II

6 STATE OF WASHINGTON,

No. 35690-2-II

7 Plaintiff/Respondent,

DECLARATION OF TRACY WIATT

8 vs.

9 JERRY D. WIATT, JR.

10 Defendant/Petitioner.

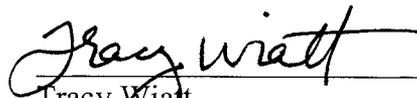
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12 Tracy Wiatt declares as follows:

- 13 1. I am the sister of the petitioner Jerry Wiatt, Jr.
14 2. I attended most of the court hearings in my brother's case. I recall an occasion when the
15 judge cleared the courtroom for a closed hearing. If not for that order, I would have stayed in
16 the courtroom.
17 3. Several other people were in the courtroom when this happened and they had to leave at the
18 same time that I did.

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

21 2/11/07

22 Date
23 Boise, Idaho


24 Tracy Wiatt

25
DECLARATION OF TRACY WIATT- 1

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

G. Declaration of Lindsey Kist (Formerly Howard), July 13, 2007

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6 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
7 DIVISION TWO

8 STATE OF WASHINGTON,

9 Plaintiff,

10 vs.

11 JERRY D. WIATT, JR.

12 Defendant.

Court of Appeals No. 35690-2-II

DECLARATION OF LINDSEY KIST
(FORMERLY HOWARD)

13
14 Lindsey Kist declares as follows:

- 15 1. My maiden name was Lindsey Howard.
- 16 2. I testified as a State witness at Jerry Wiatt's trial.
- 17 3. I recently contacted attorney David Zuckerman after receiving a message through my
18 mother. When I said I was having some difficulty remembering the details of events
19 concerning Jerry Wiatt, Mr. Zuckerman sent me two documents: a transcript of my interview
20 with Det. Louise Adams on August 28, 2001, and the notes of defense investigator Paula
21 Howell concerning my interview with her on October 1, 2002. This has helped to refresh my
22 memory.
- 23 4. I stand by almost everything I said in these interviews and would testify to the same things
24 under oath, except for two points. The first exception is that I am not sure that I heard
25 Raminta Rankis say that she wanted to sleep with every guy who lived at Jerry's house. I am

DECLARATION OF LINDSEY KIST- 1

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1 sure, though, that by the time that it happened Raminta wanted to have sex with Jerry. After
2 meeting Jerry a few times at his house, Raminta told me that she was attracted to Jerry.

3 Raminta made an effort to hang out at Jerry's house after that because of her interest in him.

4 5. The second exception is that when I read Ms. Howell's notes it appeared that I was saying
5 Raminta wanted to be involved with Jerry because of his money. I did not mean to say that.

6 I did mean to say that one of the reasons that Raminta was making up the allegation that Jerry
7 raped her was because she thought she could get some money out of him. I don't think it
8 occurred to Raminta to make that sort of accusation, though, until other girls started to make
9 them.

10 6. As I explained to Det. Adams, I spoke with Raminta shortly after she had sex with Jerry and
11 she gave no indication that there was anything negative about the experience. I can give
12 some further details about why I would have known if anything was wrong.

13 7. Raminta and I met during our freshman year at Black Hills High School in Tumwater,
14 Washington. She was new to the school and didn't know anybody. We soon became
15 friends and our relationship became closer and closer over the years. During my freshman
16 year, I began dating a boy name Brian (and continued dating him for about three years).
17 Raminta then started dating Brian's best friend Eric. This meant that our social lives were
18 intertwined. We would see each other during school and then also at night and on weekends
19 when we hung out with our boyfriends. Some time after we got our drivers' licenses,
20 Raminta crashed her car so she often depended on me for transportation. During our
21 sophomore or junior year, I had a fight with my mother and moved in with Raminta for about
22 a month. She let me stay in her room.

23 8. During our relationship, Raminta would tell me when she was upset about something, such as
24 when she had argued with her mother or with her boyfriend. The few times she didn't tell
25

1 me right away, I could tell that something was wrong because she would be short with me or
2 want to be left alone. I would always find out pretty soon what the problem was.

3 9. Raminta and I started hanging out at Jerry's house in the Cedrona neighborhood when I
4 began dating Barry Specht. I was about 16 at the time. Barry was a roommate of Jerry's.
5 For several months, at least, my typical day involved going to school, then going to work at a
6 restaurant, then going over to Jerry's house and spending the night with Barry. Raminta
7 would come over there too because we were best friends, and she got to know the other
8 people who lived there and hung out there.

9 10. One morning when I was talking with Raminta she told me that she had had sex with Jerry
10 Wiatt the night before. There was nothing in her manner, mood, or tone of voice to suggest
11 that there was anything wrong or unpleasant about the experience. As I said before, it would
12 be very unusual for Raminta to have a problem with someone and not tell me about it. It was
13 only after all the allegations against Jerry came to light that Raminta told me she too was
14 accusing him of rape.

15 11. When I was interviewed by Det. Adams I felt bad that I was contradicting Raminta since we
16 were still best friends. But I felt that I had to tell the truth.

17 12. At some point, either Det. Adams or the female prosecutor got mad at me because I wasn't
18 helping their case. She said something like: "Whose side are you on?" She was annoyed
19 that I wasn't taking a strong enough stand against Jerry Wiatt. This conversation may have
20 taken place during my interview with Det. Adams when the tape deck wasn't rolling.

21 13. Because I spent so much time at Jerry's house I was very familiar with the sort of parties they
22 had there. Alcohol was always available and the guys knew that some of the people drinking
23 it were underage. It was also obvious to everyone that this was a "bachelor pad" and that the
24 guys who didn't have steady girlfriends were looking to meet girls and have sex with them.

25 But I never saw any sign that a girl was forced to have sex with anyone, or that any girl was

1 taken advantage of when she was too drunk to know what she was doing. I never saw or
2 heard anything to suggest that there might be date rape drugs at the house. In fact, illegal
3 drugs were absolutely banned from the house.
4
5

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

8 7.13.07

Lindsey Kist
Lindsey Kist

9 Date
10 Tumwater, Washington

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