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COURT OF APPEALS

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STATE OF WASHINGTON

CLERK OF COURT  
CLARK COUNTY

NO. 39790-1-II

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

---

STATE OF WASHINGTON, Respondent

v.

KRYSTA MARIE USKOSKI, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE DIANE M. WOOLARD  
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01148-8

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BRIEF OF RESPONDENT

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## I. STATEMENT OF FACTS

The State accepts the detailed statement of facts as set forth by the defendant. Where additional information is needed it will be supplemented in the argument section of the brief.

## II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the evidence was insufficient to prove that the defendant caused or attempted to cause Officer Janisch to be arrested or proceeded against for the felony crime of either Rape in the Third Degree or Indecent Liberties. A copy of the Court's Instructions to the Jury (CP 4) is attached hereto and by this reference incorporated herein.

The State submits that in the detailed statement of the case given by the defense, all of the elements are met to allow this question to go to the jury.

There's no question that the defendant was highly intoxicated. When the officer came upon her, she was not wearing pants and had apparently just urinated on a porch. (RP 43-44). It's also obvious that she became angry with the officer and physically resisted him. (RP 47). The officer arrested her based on probable cause for urinating in public and indecent exposure. He wasn't really interested in pursuing that action all

the way through to throwing her in the “drunk tank”. Instead, it appeared that he was trying to find someone to care for her. For example, he found her identification and made efforts to contact her mother. The defendant did not want him to do this. (RP 48-51). Even though she was already angry with the officer she became more belligerent and, as the officer indicated, went “berserk”. (RP 51).

The detailed statement provided by the defense further indicates that she was very upset when her mother arrived and her mother took it upon herself to determine why her daughter was so upset. She pressed the daughter who finally told her that someone had held her down and tried to rape her. (RP 386-388). The mother began demanding to know who this was and the defendant finally said that it was the police officer that did this. (RP 287).

The mother wanted this matter pursued and so she called 911 and told them that her daughter was the victim of an attempted rape and it had been a police officer that had done so. (RP 388-389). They were instructed to go to the Clark County Sheriff’s Office and once they arrived there she was interrogated by two Deputy Sheriffs. During part of the interview she expressed desires to leave, sat on the floor, and slumped down in a corner rather than using a chair. (RP 75-77). One of the officers who questioned her (Deputy Koch) testified that she said that, “A police officer tried to

stick his penis in my butt. He tried – tried to penetrate my orifices.” (RP 116). She even gave a description of the police officer, describing him as a white male, five-nine to six foot, with hefty muscular build, age 30-37, with strawberry blonde hair. (RP 117-118). She further went on to indicate that the officer handcuffed her and pushed her against the back of the car and at that time again tried to rape her. (RP 118). She told the investigators that he pulled down his pants, pulled out his penis, and tried to put it in her orifices. (RP 119). She further indicated that her boyfriend was present for the entire event, standing across the street along with some other men. (RP 122, 130-131).

Admitted as Exhibit 1 was the written statement that she had given to the officers. That was read for the jury. In the body of that document she claims that “The other officer asked me to step out and asked to see my breasts.” Further, Deputy Koch indicated that she was highly emotional during this time and obviously highly intoxicated. (RP 125-128).

After the taking of the statement, the sheriff’s deputies went to the Vancouver Police Department to meet with Officer Janisch at around 5:30 in the morning. They testified for the jury that they were looking for signs of a struggle such as torn clothing or “unusual stains”. (RP 81). It is

obvious from this line of questioning that the police departments were taking this extremely seriously.

The next day Detective Kevin Harper from the Sheriff's Office interviewed her. She indicated at that time that the officer had not tried to rape her, did not expose himself to her, and did not ask to see her breasts. (RP 205-206). She said she was unsure of why she was accusing Officer Janisch of raping her, but later said she accused Officer Janisch because his was the last face she had seen. (RP 207).

The defendant then went on to describe a totally different incident that she maintained had happened that early morning. Detective Harper went over it four or five times with her and partially recorded the interview. She was adamant that someone had accosted her but she clarified that it was not Officer Janisch. (RP 216-254).

Evidence is sufficient to 'support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (*quoting State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), cert. denied, 127 S. Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it.

Luther, 157 Wn.2d at 77-78 (*citing* State v. Alvarez, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)).

In considering the sufficiency of evidence, the Appellate Court gives equal weight to circumstantial and direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (*citing* State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). It does not substitute its judgment for that of the jury on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (*citing* State v. Farmer, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)), review denied, 149 Wn.2d 1013 (2003). “In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999). Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 112, 937 P.2d 154, 943 P.2d 1358 (1997), cert. denied, 522 U.S. 1077, 139

L. Ed. 2d 755, 118 S. Ct. 856 (1998); World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 387, 816 P.2d 18 (1991).

§ 9.62.010. Malicious prosecution.

Every person who shall, maliciously and without probable cause therefore, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:

(1) If such crime be a felony, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and

(2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

(See Court's Instructions to the Jury (CP 4) Elements Instruction #8)

The State submits that there is ample evidence and information supplied to this jury to allow the question of guilt or innocence to go to the jury.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim of repeated instances of prosecutorial misconduct, which deprived the defendant of a fair trial.

It is difficult from the defendant's brief to ascertain just what areas the defendant is claiming constitute prosecutorial misconduct. Clearly, the majority of suggested areas were never objected to at the trial court level

nor addressed in any way at the trial court level. For example, the defendant attempts to show inappropriate questioning of Detective Harper. It's hard to ascertain exactly what the defendant is trying to state. For example, on pages 27 and 28 going through some of the factors for a manifest injustice, much of what's discussed would be indicative of the sufficiency of evidence that the defendant is also arguing wasn't there. For example, the defense attorney indicates that there was no penetration of any kind. Yet, there was certainly testimony of the sexual allegations. Further, this was put forth to the jury in the alternative of either an indecent liberties by force or a completed penetration constituting Rape in the Third Degree.

The defense claims that she was not acting with malice (Defendant's Brief page 28), yet the recitation of facts set forth by the defense would clearly indicate that she was acting belligerently towards the officer, and in particular towards Officer Janisch. Finally, there's a claim that the only evidence that the jury really had dealt with the defendant's credibility, which had been destroyed by Detective Harper's expression of his personal opinion that she lacked credibility. Yet, she does not supply any basis in the record to support this type of allegation. In fact, questions of credibility are always for the jury and as such are not really amenable to the appeal process.

The defendant, in her brief, discusses the closing argument. Yet in reviewing the closing argument by the State, there are no objections to any of the arguments being made by the State, and in rebuttal the only objection was sustained. The areas of objection are as follows:

[Part of closing argument by Deputy Prosecutor]: Saying you were drunk is not a defense. Saying you were intoxicated while you did what you did is not a defense. It's something you can consider; but what you also consider is all of the evidence that's been presented to you throughout this trial as to the facts the defendant was able to give while she was drunk, while she was sober, how intoxicated was she, how did that relate to levels of intoxication she described in her past, where she couldn't remember anything –

MR. ANDERSON (Defense Counsel): Your Honor –

MS. HURD (Deputy Prosecutor): -- in the past.

MR. ANDERSON: -- I'd object. I think counsel's confusing the law. The State still has the burden of proving malice beyond a reasonable doubt.

THE COURT: And – and that's true and there's a jury instruction on reasonable doubt and the jurors will note that a closing argument, like opening argument is not evidence and the law is as stated in the instruction. Thank you.

MS. HURD: Thank you, Your Honor. Thank you, counsel.

-(RP 479, L8 – 480, L4)

[Part of closing argument by Deputy Prosecutor]: I'm asking you to hold the defendant accountable for the choices she made, choices that could have ruined an

officer's career, choices that will still affect that officer for the rest of his life. This allegation is out there –

MR. ANDERSON: Objection.

THE COURT: You're not to consider the consequences of the litigation.

MS. HURD: We make choices. Not the best choices when we're intoxicated, but choices nevertheless. I'm asking you to hold the defendant accountable and find her guilty. Thank you.

-(RP 482, L17 – 483, L3)

The State submits that a lot of these matters were never raised at the trial court level, or if they were, and objections were sustained, then the jury was not to consider them. The jury is presumed to follow the court's instructions. State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557 (1999).

As spelled out in State v Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009):

Anderson raises several claims of prosecutorial misconduct. Where the defense claims prosecutorial misconduct, it bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

We review a prosecuting attorney's allegedly improper remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d

24, 85-86, 882 P.2d 747 (1994). In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecutor's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper and an objection was lodged, we then consider whether there was a substantial likelihood that the statements affected the jury. Reed, 102 Wn.2d at 145. Absent a proper objection and a request for a curative instruction, however, the defense waives the issue of misconduct unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (*citing State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995)). The State is entitled to comment upon the quality and quantity of evidence the defense presents. Gregory, 158 Wn.2d at 860. Such argument does not necessarily suggest that the burden of proof rests with the defense. Gregory, 158 Wn.2d at 860.

Furthermore, a prosecutor's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. State v. Dhaliwal, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, we view the challenged comments in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

Moreover,

“[i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, ... it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial

error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.”

McKenzie, 157 Wn.2d at 53-54 (*quoting State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)). Finally, we presume the jury follows the trial court's instructions. State v. Hopson, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989).

-(State v Anderson, 153 Wn App at 428-429)

Defense counsel did not object to any of the prosecutor's questions or argument. Thus, the alleged misconduct is deemed waived unless the misconduct is 'so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.' State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). A party's failure to object to testimony at trial generally precludes appellate review as to whether that testimony should have been excluded. State v. Perez-Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000) (*citing State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). A party may assign error in the appellate court only on the specific ground given at trial. State v. Koepke, 47 Wn. App. 897, 911, 738 P.2d 295 (1987) (*citing State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985)). If a specific objection is overruled and the evidence admitted, the Appellate Court will not reverse on the basis of a different rule that could have been argued but was not.

State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (*citing* 5 K. Tegland, Wash. Prac., Evidence § 10, at 25 (2d ed. 1982)).

The defendant may argue different grounds for excluding the evidence if the error is manifest and affects a constitutional right. RAP 2.5(a)(3); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004) (*citing* State v. Roberts, 142 Wn.2d 471, 500-01, 14 P.3d 713 (2000)). The defendant in our case has not, however, provided a manifest constitutional error analysis in her brief. Accordingly, the Court should decline to review the issue. RAP 10.3(a)(5); Thomas, 150 Wn.2d at 868-69 (*citing* State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

#### IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that her right of confrontation was violated when the State elicited testimony that unnamed witnesses gave statements which contradicted her belief that she was assaulted.

Again, it is extremely difficult to ascertain exactly what she's talking about in the brief. All that Officer Janisch was discussing with this jury was his observations in the field and what steps he took to try to get her some help. The officers that interviewed her that evening testified about their interviews with her. It's obvious that that information was then

imparted to Detective Harper for follow up and Detective Harper was doing nothing more than explaining to the jury the procedures he took in following an investigation where the defendant had, basically, already committed a crime the evening before but now was changing her story and coming up with a totally different scenario. Further, none of these matters were addressed at the trial court level by way of objection, motion in limine, or offers of proof. This simply was never raised at the trial court level.

As explained in State v Kirkman and Candia, 159 Wn.2d 918, 155 P.3d 125 (2007):

Detective Kerr

Kerr testified about the competency protocol he gave to A.D., relating to her ability to tell the truth. “Yes ... it's kind of a competency.” 2 RP at 73. When asked why, Kerr responded, “[b]ecause I'm—I'm interested in—in this person being able to distinguish between truth and lies.” Id. at 74. Kerr testified that A.D. was able to distinguish between the truth and a lie and that A.D. expressly promised to tell him the truth. Kerr then related what A.D. said in her interview.

The Court of Appeals' majority conceded that “Detective Kerr did not offer his direct opinion on A.D.'s credibility.” Kirkman, 126 Wn. App. at 105. The court nonetheless ruled that because Kerr told the jury that he “tested A.D.'s competency and her truthfulness,” id., that he “[i]n essence” told the jury that A.D. told him the truth in providing her account of events. Id. The Court of Appeals cited Demery for the proposition that “a police officer's testimony may particularly affect a jury because of its

‘special aura of reliability.’” Id. (*quoting State v. Demery*, 144 Wn.2d 753; 30 P.3d 1278; 2001).

The challenged portion of Kerr's testimony is simply an account of the interview protocol he used to obtain A.D.'s statement. Kerr did not testify that he believed A.D. or that she was telling the truth. Therefore, no manifest error occurred that could relieve Kirkman of his duty to object.

By testifying as to this interview protocol, Kerr “merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses.” *Demery*, 144 Wn.2d at 764. Detectives often use a similar protocol in all child witness interviews, whether they believe the child witness or not.

An interview protocol as employed by Kerr does not carry a “special aura of reliability” beyond the “special aura of reliability” conferred upon a witness when a judge swears him or her to tell the truth in front of the jury at trial. See RCW 5.28.020. A jury must still determine credibility and truthfulness of each witness. Kerr's testimony was not a manifest error of constitutional magnitude.

- *State v Kirkman and Candia*, 159 Wn.2d at 931

#### B. Manifest Constitutional Error

RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of “manifest” constitutional magnitude. *State v. Scott*, 110 Wn.2d 682; 757 P.2d 492; 1988. This court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that “[t]he exception actually is a narrow one, affording review only of ‘certain constitutional questions.’” Id. at 687 (*quoting* Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). Exceptions to RAP 2.5(a) must be construed narrowly. *The State of Washington, Respondent*,

v. WWJ Corporation, et al., Petitioners, 138 Wn.2d 595; 980 P.2d 1257; 1999

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Scott, 110 Wn.2d at 685. Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. State v. Madison, 53 Wn. App. 754, 762-63, 770 P.2d 662 (1989).

“Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. State v. Walsh, 143 Wn.2d 1; 17 P.3d 591; (2001); State v. McFarland, 127 Wn.2d 322; 899 P.2d 1251; (1995). “Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” WWJ Corp., 138 Wn.2d at 603 (*quoting State v. Lynn*, 67 Wn. App. 339; 835 P.2d 251; (1992)). This reading of “manifest” is consistent with McFarland's holding that exceptions to RAP 2.5(a) are to be construed narrowly. WWJ Corp., 138 Wn.2d at 603. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted. *Id.* at 602; McFarland, 127 Wn.2d at 333 (*citing State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

#### 1. Manifest Constitutional Error and Improper Witness Opinion

No case of this court has held that a manifest error infringing a constitutional right necessarily exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial. Prior decisions in the Court of Appeals have found alleged improper witness opinion testimony not to constitute “manifest” error.

- State v Kirkman and Candia, 159 Wn.2d at 936

The State submits that there has been no showing in this record by the defense that there was any inappropriate questioning or comments made either by the prosecutor or by any of the officers who testified. No one was asking for their personal opinions (and if they were, it was objected to and sustained, see RP 255). The testimony that was provided by the officers was giving the necessary context to the jury to allow them to assess the reasonableness of the situation and whether or not any of the activities of the defendant that evening constituted the crime.

V. CONCLUSION

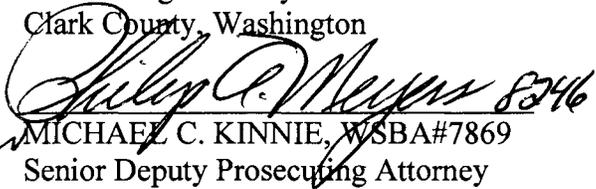
The trial court should be affirmed in all respects.

DATED this 23 day of August, 2010.

Respectfully submitted:

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Clark County, Washington

By:

  
MICHAEL C. KINNIE, WSBA#7869  
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**FILED**

AUG 12 2009

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Sherry W. Parker, Clerk, Clark Co.

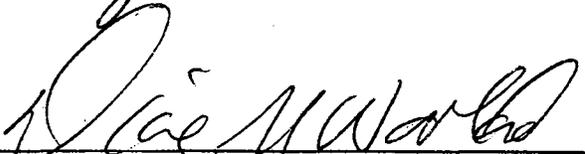
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,  
Plaintiff,  
v.  
KRYSTA MARIE USKOSKI,  
Defendant.

No. 08-1-01148-8

**COURT'S INSTRUCTIONS  
TO THE JURY**

DATED this 12 day of August, 2009.

  
\_\_\_\_\_  
SUPERIOR COURT JUDGE

Received by clerk  
M. McEachern @10:50

lele

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's

testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

A person knows or acts knowingly or with knowledge with respect to a fact circumstance or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 4

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

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INSTRUCTION NO. 5

A person acts willfully as to a particular fact when he or she acts knowingly as to that fact.

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INSTRUCTION NO. 6

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with malice.

INSTRUCTION NO. 7

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

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INSTRUCTION NO. 8

To convict the defendant of the crime of Malicious Prosecution of a Felony, each of the following six elements of the crime must be proved beyond a reasonable doubt:

- (1) On or about April 8, 2008, the defendant
- (2) maliciously and
- (3) without probable cause.
- (4) Did cause or attempt to cause another to be arrested or proceeded against for any

Felony crime of which he or she is innocent

(5) To-wit:

(a) Rape in the Third Degree

or

(b) Indecent Liberties

and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4) and (6), and either of alternative elements (5)(a) or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a) or (5)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.

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INSTRUCTION NO. 10

Probable cause exists when facts and circumstances within a person's knowledge are sufficient to warrant a person of reasonable caution to believe that the accused has committed an offense.

INSTRUCTION NO. 11

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

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INSTRUCTION NO. 12

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

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INSTRUCTION NO. 13

A person (the accused) commits the crime of Rape in the Third Degree when:

- (1) the accused engages in sexual intercourse with another person;
- (2) the accused is not married to that person;
- (3) that person did not consent to sexual intercourse with the accused and such lack of consent was clearly expressed by words or conduct.

INSTRUCTION NO. 14

A person (the accused) commits the crime of Indecent Liberties when:

(1) the accused knowingly causes another person to have sexual contact with him/her,

and

(2) that this sexual contact occurred by forcible compulsion.

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INSTRUCTION NO. 15

Forcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped.

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INSTRUCTION NO. 16

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

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INSTRUCTION NO. 12

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

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INSTRUCTION NO. 18

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

INSTRUCTION NO. 19

As a matter of law, the crimes of Rape in the Third Degree and Indecent Liberties are each classified as felonies in the State of Washington.

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INSTRUCTION NO. 20

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 2/

When you begin deliberating, you should first select a Presiding Juror. The Presiding Juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The Presiding Juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The Presiding Juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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COURT OF APPEALS

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STATE OF WASHINGTON

BY [Signature]

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

STATE OF WASHINGTON,  
Respondent,

v.

KRYSTA MARIE USKOSKI,  
Appellant.

No. 39790-1-II

Clark Co. No. 08-1-01148-8

DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On Aug 23, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Anne Mowry Cruser  
Attorney at Law  
PO Box 1670  
Kalama WA 98625-1500

KRYSTA MARIE USKOSKI  
DOC # 333771  
c/o Appellate Attorney

DOCUMENTS: Brief of Respondent

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

[Signature]  
Date: Aug 23, 2010.  
Place: Vancouver, Washington.