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NO. 40047-2-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

LOGAN L. GORE,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Anne Hirsch, Judge
Cause No. 08-1-01436-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Gore's motion for a mistrial.
02. The trial court erred in permitting Gore to be represented by counsel who provided ineffective assistance by failing to request an instruction on the inferior degree offense of rape in the third degree.
03. The trial court erred by failing to conduct an interrogation of the jury after it was brought to the court's attention during the third day of trial that several members of the jury had complained about actions attributed to Gore that made them feel uncomfortable.
04. The trial court erred in not taking count I from the jury for lack of sufficiency of the evidence.
05. The trial court erred in not taking count II from the jury for lack of sufficiency of the evidence.
06. The trial court erred in failing to dismiss Gore's convictions where the cumulative effect of the claimed errors materially affected the outcome of the trial.
07. The trial court erred in calculating Gore's offender score by counting his two current convictions for rape in the second degree as separate offenses.
08. The trial court erred in permitting Gore to be represented by counsel who provided ineffective assistance by failing to argue that his two current convictions for rape in the second degree encompassed the same criminal conduct for

purposes of calculating his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in denying Gore's motion for a mistrial based on prosecutorial misconduct during closing argument? [Assignment of Error No. 1].
02. Whether Gore was prejudiced as a result of his counsel's failure to request an instruction on the inferior degree offense of rape in the third degree? [Assignment of Error No. 2].
03. Whether the trial court denied Gore his constitutionally protected right to an impartial jury and a fair trial by failing to conduct an interrogation of the jury to determine the extent and possible prejudicial impact relating to information brought to the court's attention during the third day of trial that several members of the jury felt uncomfortable having to pass Gore at close proximity almost every time they entered and left the courthouse, describing this as a conscious tactic or staging on Gore's part? [Assignment of Error No. 3].
04. Whether there was sufficient evidence that Gore committed the two offenses of rape in the second degree as alleged in counts I and II? [Assignments of Error Nos. 4 and 5].
05. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Gore's convictions? [Assignment of Error No. 6].
06. Whether the trial court erred in calculating Gore's offender score by counting his two current convictions for rape in the second degree as

separate offenses? [Assignment of Error No. 7].

07. Whether the trial court erred in permitting Gore to be represented by counsel who provided ineffective assistance by failing to argue that his two current convictions for rape in the second degree encompassed the same criminal conduct for purposes of calculating his offender score? [Assignment of Error No. 8].

C. STATEMENT OF THE CASE

01. Procedural Facts

Logan L. Gore (Gore) was charged by first amended information filed in Thurston County Superior Court on November 2, 2009, with two counts of rape in the second degree, contrary to RCW 9A.44.050(1)(b). [CP 21].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced on November 2, the Honorable Anne Hirsch presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 883].¹ The jury returned verdicts of guilty as charged, Gore was sentenced within his standard range and timely notice of this appeal followed. [CP 49-50 60, 79-93].

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¹ Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled VOLUMES I-V.

02. Substantive Facts

On June 28, 2008, around 9:00 p.m., then 16-year-old J.L.C., while visiting from Kentucky, attended a party with some friends in Lacey, Washington, where she was introduced to then 20-year-old Gore. [RP 31, 34, 153, 343, 506, 527, 851-52].

When one of her friends had to leave about 10:30, J.L.C. insisted on staying at the party. [RP 55-56, 507]. She was attracted to Gore [RP 595] and “was having fun with him.” [RP 532].

It is indisputable that there was alcohol at the party, and it is equally indisputable that there is no agreement as to the amount consumed by J.L.C. prior to her sexual encounter with Gore or as to its effect on her. According to J.L.C. and her friend T.G., J.L.C. had drank two less than half full cups of a fruit drink containing what was thought to be vodka [RP 522-25], between five and six quarter full cups of beer during a drinking game [RP 530-31] and “(p)robably three” more beers and three or four shots of vodka. [RP 535-36, 542].

I remember having to hold myself up. I was like - -
I was like leaning up against the wall, and that was
holding me up. I felt really dizzy.

[RP 537].

Other witnesses who had attended the party offered a less extensive account. According to Malcolm Moore, who was dating one of

J.L.C.'s friends who had come to the party with her, J.L.C. had initially shared two fruit drinks with T.G., each drink containing one-half ounce of rum, not vodka. [RP 757-760, 768-69]. And during the beer pong game, J.L.C. and Gore had each consumed what amounted to somewhere between a beer and a beer and a half. [RP 705, 763, 771-72]. Gore remembered that during the drinking game the two shared two 12 ounce cans of beer, with him drinking the majority of what was poured into the cups used in the game. [RP 817-19, 852]. He denied J.L.C.'s claim that the two had also taken shots of vodka [RP 824]. On this point, Aaron Ormrod, who was renting house with his twin brother Nick, didn't see any hard alcohol at the party other than a bottle of rum that he and his brother owned. [RP 805]. Both Moore and Ormrod said J.L.C. did not appear intoxicated at the party [RP 765, 807], with Ormrod adding that J.L.C. "appeared to just be hanging out, pretty much I guess having a good time, you know." [RP 807].

The two versions of the eventual sexual encounter are also at odds, and disturbingly so by degree. According to J.L.C., when she had to use the bathroom, Gore told her he knew where it was at before leading her to a bedroom, where J.L.C. immediately laid on the bed due to the level of her intoxication. [RP 550]. She explained in detail how Gore then locked the door. [RP 607-08].

I laid on the bed really - - I was closing my eyes. I was really dizzy. I just kind of wanted to sleep, you know. I was just really tired.

[RP 550].

“...I don’t remember what he did, but something made me think that he was gonna have sex with me, so I just kept saying I’m a virgin, don’t have sex with me.” [RP 552]. After Gore had digitally penetrated her, he took her clothes off and then had oral sex with her. [RP 553-54].

Beyond that,

there was like points where I was kind of going in and out of like knowing what was going on, and then, you know, it seemed like I would just kind of black out and then something else would be happening, but I didn’t know how I was, how I got in a certain position or - - I don’t know. Like everything would go - - it was like I was asleep for a little bit and then I’d wake up and I’d be like on my stomach or on my back or something but I don’t know how I got there. Like I didn’t feel like I was in control at all.

[RP 555].

Gore then dressed J.L.C. and the two left the room. [RP 558]. “I was behind him and he was in front of me leading, and I was holding his hand. I was stumbling. I was having a hard time.” [RP 558].

A different look. Nick Ormrod had observed Gore and J.L.C. walk down the hallway and into his bedroom before returning 15 to 25 minutes later. [RP 728, 733-334, 743].

It looked to me like they came out pretty much the same way. They walked out - - I think (J.L.C.) may have walked out first with (Gore) behind her, and then they picked up where they left off it looked like, arms around one another, kind of, you know, side by side, walking, quietly talking as they came back out.

[RP 729].

I saw them walk out into the front room, and after that then I walked out on the back porch for a minute.

[RP 743].

Nick's brother Aaron added that "they walked out (of the hallway) still appearing both, you know, I guess comfortable, you know. They appeared to just - - basically in stride, similarly to the way they had left and gone down the hallway." [RP 793].

According to Gore, J.L.C., who said she was 18 or 19 and attending college in Kentucky, made it apparent during the party that she would like more privacy. [RP 828-29]. The two then went down the hallway and into Nick Ormrod's bedroom. [RP 833-34]. Testimony by a private investigator and Nick and Aaron Ormrod that there was no lock on the door to this room appears to strip J.L.C.'s detailed claim that Gore had locked the door of any veneer of credibility. [RP 677, 679, 699-700, 788, 799].

They began kissing before taking off their clothes and engaging in oral, vaginal and anal sex, the last of which J.L.C. said she wanted to have. [RP 835-39]. When she indicated during anal sex that it hurt, Gore stopped. [RP 840-41]. He asserted that J.L.C. was not intoxicated and was a willing participant [RP 841], noting that “(i)t had turned into a fairly awkward situation for both of us, and we just kinda put our clothes on and left.” [RP 842]. They had been in the room for “about 25, 30 minutes.” [RP 843]. When they left the room, they “were holding hands, kissed a couple more times. That was it.” [RP 843].

Unbeknownst to Gore or J.L.C., Casey Jones, a true voyeur, testified that he had observed Gore and J.L.C. having sex through the open window in Nick Ormrod’s bedroom. [RP 873, 876]. Jones heard what he described as “sexual sounds” in addition to J.L.C. talking in a “seductive” voice. [RP 874-75]. “So seductive, kind of like a lower tone of voice, but like an ooh, ah, sort of sound I should say. I don’t know how to really describe it. Sexual.” [RP 876]. He saw them in various positions and said J.L.C. gave no indication that she did not want to have sex. [RP 877]. He later saw them walk out from the room, explaining that J.L.C. was not stumbling and “kind of had her arm around him like, you know, kind of flirty.” [RP 877-78].

When they eventually went outside, J.L.C. walked out to the middle of the yard and fell down on the front lawn. [RP 845, 861]. Gore did not know why she had fallen, and when asked by her friends what had happened between the two, he responded that “nothing pretty much, none of your business.” [RP 845].

...I wasn't gonna tell her friends that we just had sex. That's in my experience a pretty private thing, especially if (T.G.) was there and her other friends were there.

[RP 846].

J.L.C., who was crying, was then carried by Gore to a friend's truck. [RP 206-07, 433, 610]. It was later determined that that there was trauma to her vaginal opening and anus. [RP 265-270]. Semen found on J.L.C.'s body matched Logan's DNA profile. [RP 329, 335].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN DENYING GORE'S MOTION FOR A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT.

01.1 Procedural History

01.1.1 Evidence Elicited and Ruling at Trial

Dr. Daniel Gilday testified that the term retrograde extrapolation means “you're drawing conclusions based

on historical events and looking back based on the events you have.” [RP 306]. With reference to applying the concept to alcohol consumption, he cautioned that “it’s an inexact science” because “(e)veryone metabolizes differently based on our livers and our general metabolism and our bodies....” [RP 307]. When questioned if one could estimate the amount of consumption of alcohol by a person using a quantifiable method, he again cautioned that it was “difficult because there’s so many underlying factors....” [RP 307]. “I think it’s referred to as a common sense guideline, not something that’s necessarily scientifically supported in the emergency room.” [RP 308]. Shortly thereafter the prosecutor asked Dr. Gilday the following question:

Okay. So hypothetically speaking, if you had that and we calculated seven drinks at .025 and it puts us at a .175 – if you check my math on that and correct me if I’m wrong – and say it’s even over the course of two hours - -

[RP 308].

When Gore objected to the above, there was a side bar conference followed by the prosecutor’s abandonment of the question. [RP 308-09].

01.1.2 Prosecutor’s Closing Argument and Rulings

Prosecutor: Lets assume that there’s only six (drinks) in her at the time of the sexual intercourse, Well, folks, if you take the retrograde extrapolation

– that’s why we had testimony on that, so you could figure it out – it’s .25, .025.

Defense: Objection. No testimony about retrograde extrapolation. That was stricken from the record.

Court: Sustained.

[RP 906].

Prosecutor: But even again going to the lowest amount, right, not assuming that she’s (J.L.C.’s) ever exaggerating, just going with the lowest amount we’re certain she’s had - - we get eight to ten drinks in her. We’re up to a .20 now, folks.

Defense: Objection.

Prosecutor: If you believe it’s a ten - -

Court: Sustained.

[RP 907].

Prosecutor: If we go with his (Malcolm Moore’s) estimate of one and a half beers during beer pong, we’ve got three and a half drinks. Still, folks, if you add it up it’s a .0875.

Defense: Objection.

Court: Sustained.

[RP 908].

Prosecutor: And then (T.G.) gets in his face,

what did you do to my friend? And he gets right up there, pushes her right in the chest, nothing. We kissed. I didn't have sex with her. He even admitted it on the stand. He said nothing. He lied.

Defense: Objection.

Court: Sustained.

Prosecutor: He admitted to lying to everyone.

Defense: Objection.

Court: Sustained.

[RP 915-16].

Prosecutor: In fact, he says I didn't ejaculate. That's his testimony to you. I knew I was hurting her, so I stopped. I didn't ejaculate. What do we know? Well, that's a big fact lie.

Defense: Objection.

Court: Sustained.

Prosecutor: ...Why lie about that?

Defense: Objection.

Court: Sustained.

[RP 918-919].

Prosecutor: Now, Casey Jones, he wants to tell you oh, I was peeping in there; I was voyeuring (sic) on these people. Folks, he had four beers this night.

He's good friends with the defendant. He was probably mistaken. I'll probably draw another objection if I call him a liar, but the point is - - (Emphasis Added).

Defense: Objection.

Court: Sustained.

[RP 921-22].

Prosecutor: So when you consider whether he thinks it's reasonable to claim that she was just fine to consent and have sex with, look at all the inconsistencies in his story. Look at the fact that he's not telling the truth and he's a proven - -

Defense: Objection.

Court: Sustained.

[RP 923].

01.1.2 Trial Court's Ruling

Following Gore's motion for a mistrial based on prosecutorial misconduct because of the prosecutor's comments on retrograde extrapolation and her repeated allegation of "liar" as set forth above [RP 924-25, 935,-36], and after informing the prosecutor that that she couldn't "believe the number of times that (the prosecutor) said what you said after the Court sustained that objection [RP 926]," and that she was "troubled – I am trying to use my words carefully

– by your argument [RP 926],” the court denied the motion, and instructed the jury as follows:

I want to give you one more cautionary instruction at this point. I am not going to give it to you in writing. It is already in your instructions. (See Court’s Instruction 1; CP 33). That is this: You are the sole judges of the credibility of the witnesses. The lawyers’ statements and arguments are not evidence.

[RP 944].

01.2 Argument

A trial court’s decision whether or not to grant a mistrial is reviewed for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In making this determination, this court applies a three-step test to determine if the trial irregularity may have influenced the jury: “(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction.” State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

A criminal defendant’s right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial

likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). In this state, prosecutors are held to the highest professional standards.

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial (citation omitted).

State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). In Reed, where the prosecutor had argued that the defendant was a liar, and that the jury should not believe defense witnesses because they were from out of town and drove fancy cars, the court held such comments improper and reversed because there was a substantial likelihood the comments affected the jury. Id. at 145-48.

In State v. Adams, 76 Wn.2d 650, 660, 458 P.2d 558, rev'd on other grounds, Adams v. Washington, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971), however, the court found no reversible issue even though the prosecutor had called the defendant a liar on several occasions, where on each occasion the prosecutor referred to specific evidence that

“clearly demonstrated that in fact (the) defendant had lied.” State v. Adams, 76 Wn.2d at 660.

Here, as set forth in detail above, during closing argument the prosecutor not only attempted to argue retrograde extrapolation on three separate occasions, even though the application of the concept was not permitted at trial, but also referred to the defendant as a liar on five occasions and defense witness Jones on one occasion, musing that she, the prosecutor, would “probably draw another objection if I call him a liar, but the point is - -” [RP 922]. On each occasion, the objection to the specific argument was sustained. And on each occasion the prosecutor turned a blind eye and deaf ear to the court’s ruling, deciding instead to intentionally and deliberately defy and disregard the court’s authority. It strains credulity to argue otherwise, especially in light of the telling awareness of the “I’ll probably draw another objection if I call him a liar” comment. The prosecutor was serenely impervious to the court’s rulings, and the relationship of all of this to prosecutorial misconduct appears intuitively obvious.

Nor can the State claim that the prosecutor was simply drawing reasonable inferences from the evidence, which is a permissible tactic under State v. Adams, 76 Wn.2d at 660. Almost certainly such an argument is of no assistance concerning the three comments relating to the

application of the concept of retrograde extrapolation, and falls short in other instances where the prosecutor's liar claims were not limited to specific testimony that clearly demonstrated that the defendant or witness Jones had lied. Consider: The prosecutor offered no evidence that Jones had lied. And her numerous claims that Gore was a liar because he didn't announce to J.L.C.'s friends that he and J.L.C. just had sex, or that he lied—"a big fat lie"—when he said he didn't ejaculate, or her bald assertion that it wasn't reasonable to believe his claim that J.L.C. was a willing participant because "he's not telling the truth [RP 923]," were individually and collectively presented as false choices. Gore felt no obligation, nor should he have, to tell J.L.C.'s friends what he and many others consider "a pretty private thing." [RP 846]. And while he was aware when he testified that semen taken from J.L.C. matched his DNA profile, this does not necessarily mean that he was aware that he had ejaculated during his encounter with J.L.C. And the bald claim that "he's not telling the truth" is just that, a bald claim; that simple.

In denying the motion for mistrial, the trial court abused its discretion in ignoring the obvious and inescapable prejudice inherent in the prosecutor's closing argument by reasoning that this prejudice was somehow expunged by the court's instruction to the jury that it was the sole judge "of the credibility of the witnesses" and "lawyers' statements

and arguments are not evidence.” [RP 944]. The error committed here was not harmless. Without doubt the State presented evidence of the consumption of alcohol and a sexual encounter involving Gore and J.L.C. But the issue was always whether J.L.C. was a willing participant to the encounter. And on this critical issue, the jury had to decide whether to believe Gore or J.L.C. The prosecutor’s improper arguments unfairly persuaded the jury to believe J.L.C., with the result that this court must reverse and remand for a new trial.

02. GORE WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO REQUEST AN INSTRUCTION ON THE INFERIOR DEGREE OFFENSE OF RAPE IN THE THIRD DEGREE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below.

State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Gore proposed no inferior degree instructions. A defendant is entitled to an instruction on an inferior degree offense if:

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

State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (citing State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) and State v. Daniels, 56 Wn. App. 646, 651, 784 P.2d 579 (1990)). The first two factors comprise the legal component of the test, while the third factor is the factual component. See State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Rape in the third degree is not a lesser included offense of rape in the second degree; rather it is an inferior degree offense. State v. Wright, 152 Wn. App. 64, 214 P.3d 968, reviewed denied, 168 Wn.2d 1017

(2010). See RCW 10.61.003.² Thus the legal test for entitlement to the instruction at issue is satisfied.

As noted above, a defendant is entitled to an instruction on an inferior degree offense where the evidence supports an inference that only the inferior offense was committed. State v. Ieremia, 78 Wn. App. 746, 754-55, 899 P.2d 16 (1995). Not to put to fine a point on it, the evidence must allow a rational juror to find a defendant guilty of the inferior offense and acquit him or her of the greater. State v. Fernandez-Medina, 141 Wn.2d at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

To prove rape in the second degree as charged in this case, the State was required to present evidence that Gore had sexual intercourse with J.L.C., who was incapable of consent by reason of being physically helpless or mentally incapacitated. See RCW 9A.44.050(1)(b). On the other hand, to prove rape in the third degree the State must present sufficient evidence that the defendant, under circumstances not amounting to rape in the first or second degree, had sexual intercourse with a person who was not the defendant's spouse, who did not consent to the act, and

² RCW 10.61.003 provides:

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

who clearly expressed her lack of consent by words or conduct. RCW 9A.44.060(1)(a).

Here, the record supports an inference that only rape in the third degree was committed, which would allow a rational juror to find Gore guilty of this inferior offense and acquit him of rape in the second degree. J.L.C.'s testimony could be consistent with only third degree rape because her testimony did not involve force other than necessary or usual in the commission of the acts described to achieve penetration. Her testimony clearly supports an unforced, nonconsensual rape. She alleged that she repeatedly told Gore that she was a virgin and "don't have sex with me." [RP 552]. And since the inference necessary for the instruction on the inferior offense of rape in the third degree may turn on evidence presented by either party, and since a defendant may argue for acquittal and yet also be entitled to an instruction on an inferior offense, State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998) and State v. Fernandez-Medina, 141 Wn.2d at 460-61, Gore was entitled to an instruction on rape in the third degree.

While the State may contend that counsel's failure to request the instruction was legitimate trial strategy—an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser—an examination of the record

does not support such a claim. The potential jeopardy for Gore included sentencing on two class A felonies with an offender score of four and a standard range of 111-147 months. [CP 81]. By contrast, sentencing on rape in the third degree, a class C felony, under the same offender score is 22-29 months. RCW 9.94A.525(16).

Under these circumstances, the record does not reveal any tactical or strategic reason why trial counsel failed to request an instruction on the inferior degree offense of rape in the third degree. The all or nothing strategy exposed Gore to the substantial risk that the jury would convict on the only option presented, rape in the second degree. It was objectively unreasonable to rely on such a strategy. As the United States Supreme Court has stated:

(I)t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d. 844 (1973).

As shown, the prejudice here is self evident. If the jury had a reasonable doubt as to which of the two crimes Gore committed, it was obligated to convict of the less serious. See K. Tegland, 5 Washington Practice, Evidence sec. 301.5, at 171 (1999). Gore was entitled to have the jury consider whether he committed only the less serious offense.

Counsel's performance was deficient, with the result that Gore was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions for rape in the second degree.

03. THE TRIAL COURT DENIED GORE HIS CONSTITUTIONAL Y PROTECTED RIGHT TO AN IMPARTIAL JURY AND A FAIR TRIAL BY FAILING TO CONDUCT AN INTERROGATION OF THE JURY TO DETERMINE THE EXTENT AND POSSIBLE PREJUDICIAL IMPACT RELATING TO INFORMATION BROUGHT TO THE COURT'S ATTENTION DURING THE THIRD DAY OF TRIAL THAT SEVERAL MEMBERS OF THE JURY HAD COMPLAINED ABOUT FEELING UNCOMFORTABLE HAVING TO PASS GORE AT CLOSE PROXIMITY ALMOST EVERY TIME THEY ENTERED AND LEFT THE COURTHOUSE, DESCRIBING THIS AS A CONSCIOUS TACTIC OR STAGING ON GORE'S PART.

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03.1 Trial Record

On the third day of trial, in the middle of the State's case-in-chief, the bailiff brought to the court's attention that several jurors were uncomfortable entering and leaving the courthouse because they had to walk by the defendant. [RP 349]. The bailiff was placed under oath and stated:

As your Honor has noted, four jurors independently and privately had brought to my attention that they were uncomfortable that the defendant had to be passed at very close proximity almost every time that they entered and left the courthouse. One of them used the term tactic, felt that it was a conscious tactic. Another one of the jurors used the term staging.

[RP 351].

And all I did was assure them that I would bring it to the Court's attention.

[RP 351].

When asked by the State whether there was any indication that the jury had been sharing this information "amongst themselves," the bailiff responded that "the third one said it before I could - - the previous two had seen me individually outside, but she (the third juror to approach the bailiff) did it in the presence of the others." [RP 351-52].

On the way out at lunch time was when the fourth one just re-confirmed what the third had said, that it had been a problem for her as well.

[RP 352].

Gore motioned the court in the following manner:

I believe it is appropriate to ask the bailiff to identify the four jurors who have concerns, to bring them in, and to question them individually. It might also be appropriate to bring the other jurors in and see if they are aware of it, if there's been any discussions amongst the panel, because if in fact these jurors - - even if one of these jurors feels intimidated by Mr. Gore my concern is - - my legitimate concern is that he's not going to get a fair trial.

[RP 356].

The State argued that nothing should be done:

I think we'd be basically opening a Pandora's box by questioning each juror about whether they felt intimidated because it's going to put in their head(,) well, I'm intimidated by this defendant, and it's going to create the issue of it, so I ask that not to occur.

[RP 356-57].

Gore was short is his response: "More information is better than not enough information, Your Honor, especially in an instance like this."

[RP 357].

The court declined to voir dire the jurors or take any further action: “I don’t think there has been anything close to a showing of any kind of misconduct or any basis that the jury is tainted in any way.” [RP 357].

Gore then moved for a mistrial, arguing that it was error for the court “not to do some exploration or investigation into what’s going on inside each individual, at least the four jurors who have raised a concern.” [RP 358-59]. The court noted this for the record. [RP 359].

03.2 Argument

Both the Washington and United States constitutions guarantee a defendant the right to trial by an “impartial jury.” Wash. Const. art I, § 22 (amend. 10); U.S. Const. amend 6. Failure to provide a fair and impartial jury violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994). The right to an impartial jury is of constitutional magnitude and is not waived by any failure to object at trial. State v. Johnson, 90 Wn. App. 54, 72, 950 P.2d 981 (1998) (citing State v. Cuzick, 85 Wn.2d 146, 149, 530 P.2d 288 (1975)).

An impartial jury is a jury capable and willing to decide a case solely on the evidence before it. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989) (citing McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 78 L. Ed. 2 663 (1984)). If only one

juror is unduly biased or improperly influenced, the defendant is denied a fair trial. State v. Parnell, 77 Wn.2d 503, 507-08, 463 P.2d 134 (1969), overruled on other grounds, State v. Fire, 145 Wn.2d 159, 34 P.3d 1218 (2001).

Additionally, during trial proceedings, the court has a continuous duty to monitor the fitness of a juror. See State v. Elmore, 155 Wn.2d 758, 768, 123 P.3d 72 (2005). RCW 2.36.110 provides that it is the duty of a judge

to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

Here, the essential question raised by the bailiff's disclosures was the extent and possible prejudicial impact of the jurors' concerns regarding what they perceived to be tactics and staging on the part of Gore, as set forth above, all of which manifested during the third day of the State's case-in-chief. At that point, the court had a duty to monitor the respective jurors, for the applicable authority cited herein must be interpreted in ways that advance fundamental fairness, which the court failed to do in this case, which is baffling, and then some, given that four jurors were openly complaining about Gore based solely on their respective perceptions of

activity attributed to him outside the courtroom. And the court's ameliorative action of having Gore sit in another place in the courthouse in order to avoid future contact with the jurors [RP 349], completely fails to address the concerns relating to the prejudicial impact of the various encounters between the jurors and Gore.

The court's failure to question the jury to determine the extent and possible impact of the events constituted fundamental error that violated Gore's right to trial by an impartial jury, and this failure to so act, and in the process deny Gore's motion for a mistrial, demands that Gore's convictions be reversed and the case remanded for a new trial.

04. THERE WAS INSUFFICIENT EVIDENCE THAT GORE COMMITTED THE TWO OFFENSES OF RAPE IN THE SECOND DEGREE AS ALLEGED IN COUNTS I AND II.³

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774

³ As the argument is the same for each count, the counts are addressed collectively for the purpose of avoiding needless duplication.

(1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The court instructed the jury that “(a) person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.” [CP 39]. The court also instructed the jury that “(m)ental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence, or some other cause.” [CP 44]. Finally, the jury was instructed that “(a) person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to act.” [CP 44].

Thus, as charged and instructed, Gore could only be convicted of rape in the second degree if the State proved beyond a reasonable doubt

that J.L.C. was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). It did not.

J.L.C. was not “physically helpless” or “mentally incapacitated” for purposes of rape in the second degree. She was not incapable of consent. “‘Physically helpless’ means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to act.” RCW 9A.44.010(5). J.L.C. was able to understand and to perceive information. She testified that she remembered thinking that Gore was going to have sex with her, “so I just kept saying I’m a virgin, don’t have sex with me.” [RP 552]. Clearly, she was mentally aware and understood the consequences of the act of sexual intercourse. She was able to speak and decided to communicate to Gore her unwillingness to have sex with him. Under these circumstances, she was not physically helpless or mentally incapacitated as contemplated in RCW 9A.44.050(1)(b). See State v. Bucknell, 144 Wn. App. 524, 528-530, 183 P.3d 1078 (2008).

05. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF GORE’S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been

several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Gore's convictions, the cumulative effect of these errors materially affected the outcome of his trial and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

06. GORE'S TWO CURRENT CONVICTIONS FOR RAPE IN THE SECOND DEGREE ENCOMPASSED THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

A challenge to the calculation of an offender score may be raised for the first time on appeal. State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994); State v. McCorkle, 137 Wn.2d at 495. Although a defendant generally cannot challenge a presumptive standard range sentence, he or she can challenge the procedure by which a sentence within the standard range was imposed. State v. Ammons, 105 Wn.2d 175, 183, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). A sentencing court's calculation of a defendant's offender score is a question of law and

is reviewed de novo. State v. Mitchell, 81 Wn. App. 387, 390, 914 P.2d 771 (1996).

In sentencing Gore, the trial court calculated his offender score on each count as four by including his prior theft offense and by counting his two current convictions as separate offenses with a multiplier of three. [CP 63-64].

If multiple crimes encompass the same objective intent, involve the same victim and occur at the same time and place, the crimes encompass the same course of criminal conduct for purposes of determining an offender score. State v. Dunaway, 109 Wn.2d 207, 217, 743 P.2d 1237 (1987).

“RCW 9.94A.400(1)(a) (now recodified as RCW 9.94A.589(1)(a)) requires multiple current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant’s offender score.” State v. Tresenriter, 101 Wn. App. 486, 496, 4 P.3d 145 (2000), reviewed denied, 143 Wn.2d 1010 (2001) (quoting State v. Tili, 139 Wn.2d 107, 118, 985 P.2d 365 (1999)). As used in this subsection, “same criminal conduct” is defined as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a).

Here, as previously set forth, given that the evidence demonstrated that Gore's two counts of rape in the second degree were not differentiated by time, location or intended purpose, the offenses encompassed the same course of criminal conduct for purposes of calculating Gore's offender score, with the result that matter must be remanded for resentencing based on an offender score of one, which does not include both current convictions. See State v. Tili, 139 Wn.2d at 124-25 (multiple acts of rape based upon continuous and uninterrupted multiple penetrations against the same victim at the same time and place constitute the same criminal conduct).

07. GORE WAS PREJUDICED BY HIS
COUNSEL'S FAILURE TO ARGUE
THAT HIS TWO CURRENT CONVICTIONS
FOR RAPE IN THE SECOND DEGREE
ENCOMPASSED THE SAME CRIMINAL
CONDUCT FOR PURPOSES OF
CALCULATING HIS OFFENDER SCORE.⁴

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating to the counting of Gore's two current convictions for rape in the second degree as separate offenses because he failed to object or agreed with or acknowledged the

⁴ While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

standard range [RP 12/03/09 14], then both elements of ineffective assistance of counsel have been established.⁵

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly make the argument for the reasons set forth in the preceding section.

Second, the prejudice is self-evident. Again, as set forth in the preceding section, had counsel properly made the argument, the trial court would not have imposed a sentence based on an incorrect offender score.

E. CONCLUSION

Based on the above, Gore respectfully requests this court to reverse and dismiss his convictions and/or to remand for resentencing.

DATED this 16th day of June 2010.

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⁵ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 16th day of June 2010.

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