

FILED  
10/12/10  
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No. 40680-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES J. DAVIS  
Appellant.

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

The Honorable, Judge Paula Casey and  
The Honorable, Judge Gary Tabor  
Cause No. 09-1-00963-9

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BRIEF OF RESPONDENT

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PM 12-22-10

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the appellant fail to preserve the ER 404(b) issue as he did not attempt to introduce this evidence at trial?
2. Was there sufficient evidence to support a finding of guilt beyond a reasonable doubt for the crime of rape in the first degree?

B. STATEMENT OF THE CASE.

1. Facts.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

On Sunday, September 23, 2001, Mrs. Patricia Caver dropped her 16 year old daughter K.C. at the Lacey Transit Center; the plan was that her daughter would take the bus downtown, meet her girlfriend, and then K.C. and her girlfriend would go the mall and shop. [RP 75-77]. Mrs. Caver testified that K.C. and the family in general were in turmoil at this time:

At that time, it was – she was a teenager, 16 years old. She was seeing someone that we did not agree with, and so of course teenagers know it all, and she felt that she knew better than we did. She didn't like the discipline, she didn't like being told no or not, she couldn't see this person, so it was a little iffy, you know, and plus, we had a son going through leukemia at the same time, so there was a lot of stress.

[78-79].

In fact, K.C.<sup>1</sup> was going to visit the boyfriend her parents did not approve of when her mom dropped her off at the Lacey Transit Center. [RP 28]. K.C.'s mom disapproved of K.C.'s boyfriend because he was much older than K.C.; in fact, he was "three years younger" than K.C.'s mother which put him in his fifties.<sup>2</sup> [RP 79 and RP 67]. When asked whether she thought her 16 year old daughter continued to see this older boyfriend in the time period leading up to the rape, Mrs. Caver answered:

I wasn't sure. I was hoping not, and so when she said she was going to meet her friend, I thought it was her girlfriend because her girlfriend would come from South Bay area and meet her at the bus center in Olympia and they would both go out to the mall together so I didn't question. I tried to be – not question all the time, you know, you can't.

[RP 79-80].

After her mother dropped her off at the transit center, K.C. described what happened next:

I was trying to find the bus schedule to see which bus I needed to take and then I was – I had turned around and there were these guys right there behind me, and

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<sup>1</sup> The victim in this case was sixteen years old when the crime occurred; her date of birth is May 26, 1985. As she was a minor at the time of the offense, the State is referring to her by her initials K.C. [RP 26].

<sup>2</sup> After Mr. Davis had raped K.C. she ran away from her home and lived with her older boyfriend; she and the boyfriend ultimately had two children together. [RP 42]. By the time of trial, these two children were seven and five years old respectively; K.C. also had two other children, by the time of trial, that were two and one year old respectively. [RP 26].

so I had asked if they knew which bus would take me to downtown and I was then told to shut up, and I was forced into the man's bathroom and that's when it took place.

[RP 29].

She described her assailants:

They were in blue, blue clothing, blue shirts, blue baggy pants, they had gold chains, blue bandanas and they were mixed, mixed race.

[RP 30].

K.C. testified that she was "scared" because she did not know if they were armed and she stated that she did not know if she was going to "come out of there alive". [RP 33-34].

In the following exchange, K.C. testified what happened next:

Q. What happened when – as you get pushed into the bathroom, what do you – how do you remember what happened next?

A. I remember being pushed all the way back to the last stall which is a handicapped. I remember that door flying open, flying in there, my arms being held, my legs being held, my back being pushed down, my head being pushed down.

Q. At this point, do you recall what was going on in your mind, what your thoughts or emotions were?

A. No.

Q. You described that your head's being pushed down. Are you able to see who's doing this to you at this point?

A. No.

Q. What happened at that point?

A. At that point, that's when there was more than one that took – that had raped me, and then that lasted maybe five

minutes. And then after they were done, I had waited till they had left and I had blood coming out, but I stayed there to make sure they were gone and I cleaned it up.

Q. Now, when you – and there's some questions I have to ask that I need you to be even more specific. When you say that you were raped, what specifically – what specifically in terms of biologically happened?

A. I was held down and ...

Q. You said you were bleeding form down there?

A. Uh-huh.

Q. Where were you bleeding from?

A. My vagina.

Q. And when you talk that you were held down and raped, were you talking that something, against your will, was put into your vagina?

A. Yes.

Q. Were you able to at any point see who was doing that to you?

A. (Shakes head.)

THE COURT: You need to answer –

THE WITNESS: No.

THE COURT: -- with your voice, thank you.

BY MR. SKINDER

Q. And do you know what object was going in you?

A. It was a penis.

Q. And your memory is that there was at least one but maybe more than one person who put their penis in you?

A. Yes.

Q. You said this went on for a period of time. During this approximate five minutes that you recall this happening, were you held that entire time?

A. Yes, till the very end.

Q. How, again, if you can recall, any of the emotions or felling that were going through you while this was occurring?

A. I was scared; I was numb.

[RP 31-33].

Dr. Pellicer, the current medical director of St. Peter's Hospital Emergency Department, graduated from the University of

Washington Medical School in 1983 and then practiced family medicine for four to five year; after that, he has practiced emergency medicine for approximately the past twenty years. [RP 134].

Dr. Pellicer testified that it was the normal practice at St. Peter's Hospital to have a sexual assault nurse examiner conduct the majority of a normal sexual assault exam. [RP 136]. However, in K.C.'s case, he became more involved because they had to do a "procedural sedation" because of the pain and discomfort that K.C. was suffering. [RP 136-138]. "Procedural sedation" for a sexual assault exam was "very unusual". [RP 138]. After the procedural sedation, Dr. Pellicer examined K.C. and observed a vaginal laceration that extended "from the vaginal fourchette approximately 8 to 10 millimeters into the floor of the vagina". [RP 139].

Based on this serious vaginal tear, Dr. Pellicer testified that, based on his training and experience, that this type of injury was not consistent with consensual sexual intercourse. [RP 143]. Dr. Pellicer explained the reasons for this as follows:

No. In my experience seeing many, many sexually active woman, this is not the kind of injury that you see associated with consensual intercourse. If a woman is resisting intercourse, it's the type of injury that you see. The muscles are very tight and the skin

around the vagina tears. It's not dissimilar from the type of injury you see a woman who's given childbirth that tears the bottom of the vagina. That's the other time you see this kind of injury. It would be very unlikely to see this without some kind of, you know, other instrument, shall we say, being placed in the vagina, something beyond normal vaginal intercourse to cause that kind of a tear that I saw and documented in my report.

[RP 143-144].

Assuming the tear did not become infected, Dr. Pellicer testified that this type of vaginal tear injury would normally heal in a "week or two". [RP 144-145].

The sexual assault nurse examiner, Ms. Werrett described K.C.'s emotional demeanor at the hospital as "quite scared, anxious and very uncomfortable". [RP 211]. Ms. Werrett obtained an oral history from K.C. regarding what happened to her:

She told me that she was at the Lacey Transit Center and was looking for the schedule, asked someone to point out where the schedule was, and said she was shown the schedule and that she was then forced into the restrooms by – I documented she said approximately seven males, and she was held up against a wall facing it and that she was assaulted vaginally from behind.

[RP 211].

Ms. Werrett testified to the vaginal tear and the need for the procedural sedation of K.C. [RP 212-213]. Ms. Werrett testified

that in the five years she had performed sexual assault exams, this was only the second time in her experience that a patient needed conscious sedation.<sup>3</sup> [RP 213]. Ms. Werrett also testified to gathering the forensic biological samples from K.C.'s body. [RP 218-219].

Mr. Dean, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that he examined K.C.'s biological samples collected by St. Peter's Hospital and located semen. [RP 155]. Mr. Dean developed a genetic profile from that semen in 2002 but no corresponding suspect was identified at that time. [RP 156]. In April of 2009, Mr. Dean testified a "match" was located; Mr. Dean contacted the Lacey Police Department with the name

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<sup>3</sup> Ms. Nancy Young, the coordinator of the sexual assault nurse examiner program, testified why the conscious sedation procedure is rare from a medical perspective:

Generally, our exams are not painful. We don't – we're looking at the outside of the area. Sometimes we will use a speculum for older adolescents and adults.

To have an injury that was so painful to the patient that they wouldn't really be able to tolerate the touching of that area to collect the forensic evidence, it's a fairly intense procedure to have to do conscious sedation because you have to put in an IV and you have to have medication administered, you have to be there watching the patient all the time to make sure that their vital signs are okay. And like I said, it just hasn't – we haven't had to do that but just a very small portion of times, a handful of times really.

I've actually done a couple of exams in the surgical suite where the patient was anesthetized so they were considerably asleep. Conscious sedation is a little – they're asleep but not really aware of what's going on but they're not, you know, quite as deep asleep.

[RP 243-244].

associated with the matching profile and requested that the police obtain a reference sample from that person to perform additional confirmatory testing. [RP 157-158]. According to Mr. Dean, he was supplied with a reference genetic sample of Mr. Davis by the Lacey Police Department; he tested the genetic samples again and the genetic profile from K.C. genital swabs matched the genetic profile developed from the reference sample of Mr. Davis. [RP 158]. The match was to a very high degree of scientific certainty. [RP 160]. Mr. Dean testified that the samples he tested only contained the genetic profiles of K.C. and of Mr. Charles Davis. [RP 161].

Detective Reinhold, a twenty-one year veteran of the Lacey Police Department, was the assigned detective in this case. [RP 109]. She initially contacted K.C. at the St. Peter's Hospital on September 24, 2001. [RP 111]. According to Detective Reinhold, K.C. was "very distraught". [RP 111]. Detective Reinhold learned from Mrs. Patricia Caver that K.C. had an older boyfriend and this had an effect on her initial investigation:

Well, I think that, you know, when – because we didn't have a specific suspect at the time, you know, it was certainly an avenue that needed to be explored. We were looking at all possibilities as far as suspects in this case.

[RP 113-114].

After exhausting all investigative leads, Detective Reinhold testified that the case went on "hold". [RP 121]. Detective Reinhold learned that K.C. ran away from her home in Thurston County. [RP 121]. Detective Reinhold worked with law enforcement to locate K.C.; Detective Reinhold did find K.C. with her boyfriend in Tacoma. [RP 121-122]. Detective Reinhold returned K.C. safely to her mother's home. [RP 123].

K.C. testified that she ran away from home because she felt that she was not believed as her parents disapproved of her relationship with her boyfriend because of his age and suspected him. [RP 41-42]. K.C. testified that she has had "a lot of counseling" regarding the rape in 2001 and has focused her energy on being a good mother to her four children. [RP 45-46].

In April 2009, Detective Reinhold testified that she received the information from Mr. Dean regarding Mr. Davis being a match. [RP 173]. Regarding Mr. Charles Davis, she learned that Mr. Davis had pawned a "gold bracelet" in Olympia on September 24, 2001 (the day after the rape); this was important to the detective because it placed him in the vicinity of the crime scene and the K.C. had remembered a lot of gold jewelry on her assailants. [RP 173-174].

Detective Reinhold, through additional investigation, was able to locate Mr. Davis in Tacoma, Washington. [RP 175]. After meeting him, she told him that she was investigating a sexual assault that occurred at the transit center in Lacey in 2001. [RP 177]. Detective Reinhold advised him of his *Miranda* warnings which Mr. Davis waived but he declined to allow her to tape-record the interview. [RP 175-177].

Detective Reinhold testified as follows to the conversation she had with Mr. Davis regarding the sexual assault of K.C.:

Q. And what did he tell you?

A. He told me that he was in the – in the Olympia area at that time.

Q. Did he tell you – did he tell you anything else regarding the allegations?

A. He did. He told me that he remembered having sex with a female in the men's bathroom at the transit center, but indicated that it was consensual.

Q. Did he indicate whether he knew the victim prior to this?

A. He did not. He said they had just met, had a – had a brief conversation and – and talked about having sex, and then the bathroom was suggested as a place that they do that and they went in the bathroom and had sex for less than two minutes, and then she got on a bus and left.

Q. Did you ask him, -- did you ask him to describe where in the bathroom they had sex, what positions they had sex in?

A. He was not – didn't have a very clear memory of the circumstances surrounding it as far as, you know, what positions they were in, whether their clothes – how it was that their clothes came off, and made the comment that, you know; I should check the videotape that would show it. And I told him that there wasn't a videotape at that time, and then one of his next comments was that then he remembered it

was actually by the sink in the bathroom that they had sex, but again, didn't provide a lot of detail about positioning and clothing and that kind of thing.

Q. Did Mr. Davis tell you whether he knew the name of the victim?

A. He did not.

Q. Did he tell you whether there was anyone else in the bathroom at the time?

A. He said that was just the two of them.

Q. Did he indicate whether he had ever seen her prior, nor had he seen her after.

A. He said that he had not seen her prior, nor had he seen her after.

[RP 177-179].

Mr. Merrill, the Director of Operations at Intercity Transit, testified that after this incident in September 2001 the transit center installed a video camera outside the restrooms "so we can see who is going in and out and take shots of just around the building area of the restrooms" for security purposes. [RP 105-106]. At the time of this incident, there were no video cameras present at the Lacey Transit Center. [RP 106].

Ms. Young, an Advanced Registered Nurse Practitioner and the coordinator of the sexual assault nurse examiner program at St. Peter's Hospital, testified regarding follow-up care that was provided to K.C. three days after the rape because of the seriousness of the injury. [RP 239-240]. The vagina tear still looked "very raw" three days later; Ms. Young stated:

...And the injury that I saw was started here in the fourchette. Here is the anus here. So it was very red, had an almost concave appearance to it, it was not actively bleeding but looked very raw with a lot of erythema or redness and had started a little bit the process of granulation. You can kind of see where the edges of the tissue start to heal but was still very open, and I could see well into inside of it. There's a little bit more redness that extended up this direction...

[RP 246].

Ms. Young testified that K.C. was "still in considerable discomfort" from the injury. [RP 257]. Still describing the injury,

Ms. Young testified:

...There was –obviously, there were blood vessels that were – had drops, what looked like drops on them. It was not dripping blood, it was not soaking into the blanket that was under here, but it was clear that it was still an open wound with some vessels that were oozing.

[RP 264-265].

Mr. Davis testified on his own behalf that K.C. was a prostitute; he testified that this surprised him:

Oh, I knew what she meant but I just couldn't believe it. This young lady was – the way she was dressed and everything, she didn't seem to me like she was a prostitute or streetwalker, basically.

[RP 284].

He then testified to his version of an “agreement” to have sex in the following exchange during direct examination:

Q. What was the nature of that agreement, Mr. David?

A. Well, the agreement was that I gave her \$25 and I was – we was going to buy crack from her boyfriend once we got downtown. I was supposed to buy \$40 worth of crack from her boyfriend and split it with her because I didn’t smoke at the time.

Q. So this is the agreement that was struck between you and this person you met?

A. Yes.

Q. Now, what happened after this agreement was struck?

A. Well, we decided to – where we was going to go, where was we going to go to access because at the time I didn’t have a place, and evidently she was in an area that she didn’t know. So, I decided, well, let’s go in the men’s restroom, you know, and yeah.

[RP 284-285].

Mr. Davis then related that the sexual encounter lasted “about two minutes”. [RP 286]. Mr. Davis then testified that he and K.C. got on a bus together to buy crack from K.C.’s boyfriend:

Well, I decided not to buy crack from him, you know, ‘cause when I saw him, and I thought about how they – how he was treating her as far as her smoking crack, I didn’t agree with that.

[RP 287].

Cross-examination of Mr. Davis focused on how the story he provided Detective Reinhold in September 2009 was very different from the story he provided in court in March 2010:

Q. So today you remember things that you did not remember back when she spoke to you in 2009?

A. Well, I wouldn't say that I didn't remember, I didn't recall.

Q. So you didn't recall those things in 2009?

A. Say that again.

Q. You did not recall those items in 2009?

A. Which items are you referring to?

Q. All the things you testified to in court today. Sir, I don't think it's a funny matter.

A. No, I couldn't understand, I didn't think...

Q. Do you understand my question?

A. Not really.

Q. That you've stated things today that you did not state when you met with the detective in June, 2009, correct?

A. Correct.

Q. So you recall things today in court that you did not recall in 2009?

A. Correct.

Q. And now, the detective had told you that she was investigating a rape allegation, correct?

A. Correct.

Q. So you knew what the issue was?

A. Yes.

Q. And she advised you of your Miranda warnings, correct?

A. Yes.

Q. And you understood those warnings, correct?

A. Yes.

Q. And she told you, in fact, that this was a rape that occurred at the Lacey Transit Center in 2001, correct?

A. Correct.

Q. Just so I make sure I understand, the testimony that you offer today that you never told the detective about was that you entered into an agreement for money to have sex?

A. Yes.

Q. And again, you knew in 2009 that you were being investigated for rape?

A. You mean, yes, when I was at the Lacey Police Department, yes.

Q. And your testimony is you also made an agreement to buy crack cocaine?

A. Yes.

Q. And that was another thing that you did not recall in 2009 when you spoke to Detective Reinhold, correct?

A. Correct.

Q. Today in court you remember that there were two security guards. You didn't remember that back in 2009 when you spoke to Detective Reinhold, correct?

A. Correct.

Q. The order of how you and Ms.[K.C.] ended up in the bathroom, that is also new today in court and different than what you provided to the detective in 2009, correct?

A. Correct.

Q. Your testimony in, excuse me, your statement to Detective Reinhold in 2009 was that after what you described as the sexual encounter, the victim, who you do not know her name, she went on a bus by herself, correct?

A. I said she got on the bus. I did not say by herself, I'm not sure. I don't think I said by herself. I said she got on a bus.

Q. Isn't it true you told Detective Reinhold that you're unsure where the victim was going at that time?

A. Correct.

Q. So that, too, is remarkably different from today what you have said in court as to what you said to Detective Reinhold in 2009?

A. Are you asking me a question?

Q. That's a question.

A. Correct.

Q. Now you described today a conversation of 15 to 20 minutes, correct?

A. Correct.

Q. Where you talked about all sorts of details about each others life, correct?

A. Correct.

Q. In 2009 when you met with Detective Reinhold, you indicated that didn't even know this person's name, correct?

A. I'm not sure. I'm not sure. I maybe told her that I couldn't remember her name.

Q. Do you remember describing how you thought she looked over 18?

A. Correct.

[RP 293-296].

Mr. Davis also agreed that he had pawned a piece of jewelry on September 24, 2001 at City Pawn in Olympia, Washington. [RP 296-297].

## 2. Procedure.

On June 3, 2009, Mr. Davis was charged by original Information with one count of rape in the first degree. [CP 3]. A First Amended Information was filed on February 10, 2009 alleging one count of rape in the first degree and alleging, in the alternative, the lesser included crime of rape in the second degree. [CP 25].

On February 8, 2010, the Honorable Judge Gary Tabor heard a pre-trial defense motion to admit testimony from a proposed defense witness by the name of Ms. Anderson. [2/8/10 RP 11-27]. The offer of proof in support of the defense motion was a Declaration of Jenny Anderson which stated the following:

In October of 2001, when I was fourteen or fifteen, I ran away from home with [K.C.]. Both of us went to the "Hilltop" area of Tacoma, WA and stayed, for the most part, with [K.C.]'s boyfriend, Curtis. He lived with another man named Darryl. I was there less than a month before I called a social services agency because I wanted to come home. Shortly after I returned home, the police found [K.C.] in the Hilltop area and returned her to her family.

[K.C.] was involved in a sexual relationship with Curtis at this time. I know this from living in close proximity to them in Tacoma. In particular, I overheard them having sex on more than one

occasion at the residence. She further abused alcohol and drugs with him – in particular, crack cocaine. This, I personally observed. While in Tacoma, I did not use illegal drugs, but I did drink alcohol.

Certain facts persuade me that [K.C.] prostituted herself when we both lived in Tacoma, though I can't say this for certain. I recall several times when [K.C.], in public, would walk up to cars, speak with the occupants, and then climb inside and leave the area in the company of the people she had spoken with. I was not close enough to these interactions to overhear any specific conversations, but it did not appear to me that [K.C.] knew the occupants of these cars before leaving with them. I also recall that [K.C.]'s choice of clothing made me think she was working as a prostitute, and that she frequently had money to spend, though she didn't have a job. The source of this money, to the best of my knowledge, was her boyfriend, Curtis. This last fact, along with the large difference in age between [K.C.]'s and her boyfriend, further makes me think that Curtis may have been acting as [K.C.]'s pimp during the time [K.C.] and I stayed in Tacoma.

I recall one incident at a 7-11, in Tacoma, in particular. [K.C.] and I were there to use the phone, to arrange for Curtis to pick us up. It was late at night. While we were there, [K.C.] approached a car that had pulled into the parking lot and began talking with the car's occupants – at least two men. After a short conversation, [K.C.] got into the car with these men and left the area. I did not see her again until the next morning, back at Curtis' house. Later, [K.C.] asked me to lie about this incident and to tell Curtis, if he asked, that the men in the car had raped her. I believe she asked me to say this because she was worried that Curtis would be upset if he learned that she had gone with the men willingly.

[K.C.], in fact, asked me to "cover" for her with Curtis on more than one occasion. Most of these requests from [K.C.] concerned her behavior involving

men besides Curtis. I believe she did not want Curtis to know that she was spending time with other men besides him when we both lived in Tacoma.

When we were in Tacoma, [K.C.] never mentioned being raped in September of 2001, in Lacey. I did not learn of this incident until I was contacted by Paula Howell, a private investigator retained by Mr. Kaufman to investigate this case, in 2009. Given her behavior as I recall it in 2001, I don't believe that [K.C.] was raped at that time. Instead, I believe that [K.C.] lied to police investigators so that Curtis would not know she had willingly had sex with another man.

[CP 22-24].

This pre-trial defense motion was heard by the Honorable Judge Tabor. The jury trial was presided by the Honorable Judge Casey. Judge Tabor made the following preliminary pre-trial ruling regarding the proposed testimony of Ms. Anderson:

Weighing the facts in these cases I'll indicate first of all that there is no affidavit that would indicate that an act of prostitution was the basis for any consent in the present case. Mr. Kauffman has candidly told me that that's a matter of tactic that he's going to have to discuss with his client as this case unfolds. He suggests that absent such an affidavit or statement by the defendant in this case this court can still consider the impact of such information on the issue of relevance. He concedes that it would be less relevant, but apparently maintains that it would nevertheless be relevant.

I'm finding first of all that I find no relevance to the facts in the present case, and that is the issue of consent in the posture of the case at the present time, there being no allegation that prostitution was involved. I'll further indicate that were that not the

case, had an act of prostitution in the current matter been alleged, I would still have to weigh the value, of having sex with others as acts of prostitution in Tacoma at a future time, approximately a month or so later. As to that, I'll indicate that while Miss Anderson has expressed her opinion, that is a subjective opinion and that that opinion is outside her personal knowledge and for those reasons would not be a sufficient basis for my finding relevance, even in a case that there was an allegation that rape took place in the charged situation here in the city of Olympia.

Secondly, as to the probative value versus the prejudicial effect, it is clear that the actions of a 16-year-old girl running away and prostituting herself, if believed by the jury, would be very prejudicial. Whether or not there's prejudicial value one might ask is it a common thing for victims of sexual abuse to act out and to often act out in sexual ways. I don't have any expert testimony one way or the other in this case, but it seems to this court that the prejudicial effect would far outweigh any probative value as to whether or not there was consent in this particular case.

Finally, I do not find that exclusion of this information would result in the substantial denial of justice, or the denial of substantive justice, however that should be phrased, in light of the subjective nature of Miss Anderson's testimony. For those reasons I'm denying the defense motion to allow this testimony to be presented to a trier of fact. Absent more information – I'm not fishing for more information, but I'm indicating that my ruling today is based on the posture of the case before me at this time. If circumstances change, could the matter be brought back? Well, there could at least be an argument that I should consider additional facts if that were the case, but I'm not going to speculate as to whether or not that might or would occur. In any event, based on the information before me today I am denying the defendant's motion, and this information will not be presented to the jury.

[2/8/10, RP 25-27].

When jury trial began on March 15, 2010, the trial court granted the State's motion in limine regarding Judge Tabor's above ruling in the following exchange:

MR. SKINDER: I think the one that I'm the most – I just want to make sure that we all are on the same page on is the evidentiary ruling that Judge Tabor ruled on. I notice Mr. Kauffman made mention of a witness who up to this point has been excluded from providing testimony so, which is fine, because I understand he might renege or try to reargue to the court to reopen that issue. But I would ask that no mention of her be made or her proposed testimony be made unless there's first a showing before Your Honor outside the presence of the jury.

MR. KAUFFMAN: Your Honor, I concur. I think it would be improper for me to put on in front of the jury anything with regards to Ms. Anderson. I simply sought to give them the possibility that she may be called. I will not elaborate on the contents of her testimony unless there's been a further hearing before the court.

THE COURT: And I have had an opportunity to review Judge Tabor's ruling and he has at this point excluded her testimony, so there should be no mention of – no further mention of Jenny Anderson without the Court's permission.

[RP 17-18].

Defense counsel did not offer the testimony of Ms. Anderson during the course of the jury trial. The defense called a private

investigator Ms. Howell and the defendant Mr. Davis before resting their case. [RP 267-298].

On March 18, 2010, the jury deliberated and returned a verdict of guilty to the crime of rape in the first degree. [RP 368-371]. The trial court ordered a Pre-Sentence Investigation as required by law. [RP 373]. On May 6, 2010, Mr. Davis was sentenced. [5/6/10, RP 9-26]. This appeal timely followed.

### C. ARGUMENT.

1. The appellant failed to preserve the ER 404(b) issue as he did not attempt to introduce this evidence at trial.

On February 8, 2010, the Honorable Judge Tabor made a preliminary ruling on the defense pre-trial motion to admit evidence of alleged prior sexual misconduct on the part of K.C. under RCW 9A.44.020.<sup>4</sup> Judge Tabor ruled that the offer of proof was not

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<sup>4</sup> Washington's "rape shield" statute; subsection (2) of that statute reads as follows:

Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section...

Subsection (3) provides a procedure for offering such evidence and requires a written motion and offer of proof by the defendant followed by a closed hearing on the issue:

In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not

sufficient as the declaration of Ms. Anderson was based on speculation and hearsay and that Ms. Anderson had a lack of personal knowledge to support her negative opinions of K.C. Clearly, as outlined above, the offer of proof submitted by the defense at the pre-trial hearing on February 8, 2010 was not relevant under ER 401, ER 402 as it was based on speculation and inadmissible hearsay.<sup>5</sup>

However, Judge Tabor specifically included in his ruling that the defense could raise this issue again if there was more evidence; specifically, Judge Tabor mentioned, for example, if the defendant decided to testify or if there was some other evidence.

This preliminary ruling from Judge Tabor was tentative and

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admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure...

Subsection (3)(d) states that at the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted.

<sup>5</sup> In *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Court concluded that the victim's verified acts of prostitution from one to three years prior to the charged incident were too remote and not relevant and were properly excluded under the rape shield law; the Court further held that a defendant has no constitutional right to present irrelevant evidence. *Id.*, at 790. In the present case, K.C., when interviewed by defense counsel prior to trial, K.C. explicitly denied ever prostituting herself. [CP 12, lines 9-10, Defendant's Brief in Support of Admitting Evidence of Prior Sexual Conduct on the Part of the Alleged Victim under RCW 9A.44.020(3)].

advisory on the defense evidentiary issue as he stated that his ruling was only based on the offer of proof made by the defense on February 8, 2010 which consisted solely of the declaration of Ms. Anderson.

This advisory ruling was revisited by Judge Casey, outside the presence of the jury, when the trial began on March 15, 2010. [RP 17-18]. The defense did not attempt at jury trial to introduce the testimony of Ms. Anderson and, therefore, did not preserve this issue for appeal. No questions were asked of K.C. at trial regarding whether she had ever engaged in prostitution; K.C. had been asked during her defense interview before trial if she had ever engaged in prostitution and she had denied ever prostituting herself. [CP 12, lines 9-10, Defendant's Brief in Support of Admitting Evidence of Prior Sexual Conduct on the Part of the Alleged Victim under RCW 9A.44.020(3)].

The standard of review for a trial court's evidentiary rulings is the abuse of discretion standard. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

A party may not raise an issue for the first time on appeal unless it amounts to “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Evidentiary errors under ER 404(b) are not of constitutional magnitude and are harmless unless the outcome of the trial would have differed had the error not occurred. *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

To preserve an issue, a party must bring a specific objection at trial to allow the trial court “an opportunity to correct any error.” *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). For appeals arising from a trial court’s rulings on motions in limine, a waiver of the right to appeal depends on whether the trial court made a final ruling. If the trial court makes a final ruling, “the losing party is deemed to have a standing objection...’[u]nless the trial court indicates that further objections at trial are required.’” *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (alteration in original) (*quoting State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)); *Fenimore v.*

*Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976).<sup>6</sup>

In this case, Judge Tabor made a tentative ruling based on the offer of proof as presented by the defense at the pre-trial hearing on February 8, 2010. As outlined in the procedural history of the case above, Judge Tabor specifically stated: “[A]bsent more information – I’m not fishing for more information, but I’m indicating that my ruling today is based on the posture of the case before me at this time.” [2/8/10, RP 26-27]. And the preliminary ruling of Judge Tabor was based on the fact that Ms. Anderson’s proposed testimony was filled with rank speculation, inadmissible hearsay and the unsupported opinions of Ms. Anderson regarding her negative opinions of K.C.<sup>7</sup> As the defense did raise this issue at trial, the issue was not preserved for appellate review.

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<sup>6</sup> “Although orders on motions in limine are sometimes characterized as tentative and advisory, it has been held that, when the trial court enters a pretrial order regarding the admissibility of evidence, and the order appears to be a final ruling and on a complete record, the fact that the defendant does not renew his objection to the ruling at trial does not preclude review by the appellate court.” 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5, author’s cmts. At 230 (6<sup>th</sup> ed. 2004).

<sup>7</sup> Indeed, the rape shield statute clearly limits the ability of either party to introduce at trial evidence of the past sexual behavior of the complaining witness. RCW 9A.44.020(2). Although, Mr. Davis does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-3 (March 2010); *State v. Otis*, 151 Wn.App. 572, 578, 213 P.3d 613 (2009) (citing *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004)). The admissibility of evidence under the rape shield statute, in turn, “is within the sound discretion of

2. There was sufficient evidence to support a finding of guilt beyond a reasonable doubt for the crime of rape in the first degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, 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*. (Cite omitted, emphasis in original.)

*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn

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the trial court.” *State v. Aguirre*, at 363; *State v. Hudlow*, 99 Wn.2d 1, 17, 659 P.2d 514 (1983). Mr. Davis did testify to his version of events at trial; after weighing the evidence and the credibility of the witnesses, the jury disbelieved Mr. Davis and found that the State had proved the charge of rape in the first degree as alleged beyond a reasonable doubt.

therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

A person commits the crime of rape in the first degree when he or she engages in sexual intercourse with another person by forcible compulsion when he or she inflicts serious physical injury, or kidnaps the person. [CP 46, Jury Instruction No. 5 and RCW 9A.44.040(1)(b),(c)].

In this case, there was compelling evidence that Mr. Davis brutally raped K.C. causing a vaginal tear that Dr. Pellicer testified was “not dissimilar from the type of injury you see a woman who’s given childbirth that tears the bottom of the vagina”. Nearly nine

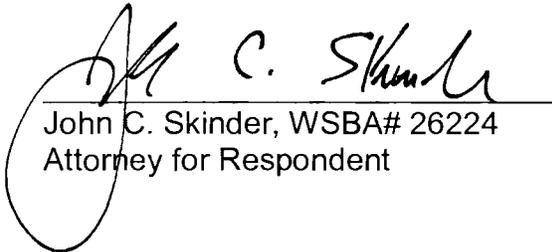
years after being brutally raped, K.C. was able to testify as to what happened to her in 2001; she was questioned thoroughly regarding her troubled teen-age years during both direct examination and cross-examination. K.C. testified to the horror of a number of men shoving her into an isolated bathroom. K.C. testified that she did not know if they were armed and she did not know if she was going to “come out of there alive”. [RP 33-34]. K.C. testified how she did not feel believed because everyone was focused on her older boyfriend; she testified that after the rape she ran away from home and lived her boyfriend and subsequently they had two children together. Detective Reinhold testified as to how the investigation was placed on “hold” until she was contacted by Mr. Dean of the Washington State Patrol Crime Lab in 2009 that a “match” had been found to the DNA profile of K.C.’s attacker.

Mr. Davis provided a version of events to Detective Reinhold when she interviewed him in 2009 and then another version of events during his trial; clearly, the jury did not find his testimony credible based on the totality of the evidence in this case. Based on the testimony of K.C., the medical testimony, the scientific testimony and the law enforcement investigation, there were sufficient facts to support the jury’s finding of guilt.

D. CONCLUSION.

Based on the above arguments and the evidence adduced at trial, the State respectfully requests that this Court affirm the defendant's conviction for rape in the first degree.

Respectfully submitted this 21<sup>st</sup> day of DECEMBER, 2010.

  
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John C. Skinder, WSBA# 26224  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

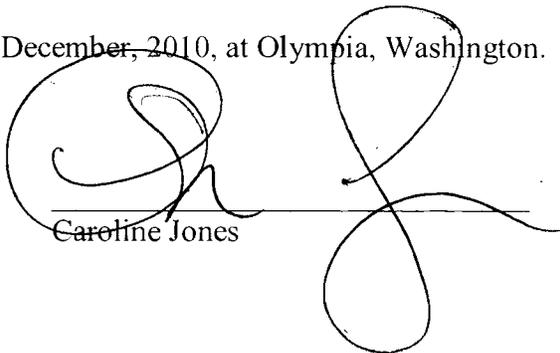
TO: DAVID C. PONZOHA, CLERK  
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950 BROADWAY, SUITE 300  
MS-TB-06  
TACOMA, WA 98402-4454

--AND--

PATRICIA A. PETHICK  
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TACOMA, WA 98417

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

Dated this 22 day of December, 2010, at Olympia, Washington.

  
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Caroline Jones