

NO. 47432-8-II

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

STATE OF WASHINGTON, Respondent

v.

LAWRENCE E DIESE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00407-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I. The trial court properly refused to give an inferior degree instruction on Rape in the Third Degree.	1
II. The trial court properly admitted the recording N.B. obtained via her cell phone.	1
III. The trial court properly admitted evidence of instances of prior abuse by Diese under ER 404(b).	1
IV. The trial court properly excluded evidence of N.B.'s sexual behavior.	1
V. The trial court did not err in denying Diese's motion for a mistrial.	1
VI. The trial court properly allowed the jury to hear the audio CD during deliberations.	1
VII. Diese received effective assistance of counsel.	1
VIII. The trial court properly allowed the jury to continue deliberations.	1
IX. Cumulative error did not deny Diese a fair trial.	1
STATEMENT OF THE CASE.....	1
ARGUMENT.....	14
I. The trial court properly refused to give an inferior degree instruction on Rape in the Third Degree.	14
II. The trial court properly admitted the recording N.B. obtained via her cell phone.	24
III. The trial court properly admitted evidence of instances of prior abuse by Diese under ER 404(b).	31
IV. The trial court properly excluded evidence of N.B.'s sexual behavior.	40
V. The trial court did not err in denying Diese's motion for a mistrial.	45
VI. The trial court properly allowed the jury to hear the audio CD during deliberations.	48

VII. Diese received effective assistance of counsel.....	51
VIII. The trial court properly allowed the jury to continue deliberations.	57
IX. Cumulative error did not deny Diese a fair trial.....	61
CONCLUSION.....	62

TABLE OF AUTHORITIES

Cases

<i>Arizona v. Washington</i> , 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978).....	58, 59
<i>Connors</i>	58
<i>In re Pers. Restraint of Lord</i> , 123 Wn.2d 296, 868 P.2d 835 (1994)	61
<i>Maehren v. City of Seattle</i> , 92 Wn.2d 480, 599 P.2d 1255 (1979).....	48
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 108 P.3d 768 (2005).....	32
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	54
<i>Seeley v. State</i> , 132 Wn.2d 776, 940 P.2d 604 (1997).....	15
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	53
<i>State v. Babcock</i> , 168 Wn.App. 598, 279 P.3d 890 (2012)	26
<i>State v. Bacotgarcia</i> , 59 Wash. App. 815, 801 P.2d 993 (1990), <i>review</i> <i>denied</i> , 116 Wash.2d 1020, 811 P.2d 219 (1991).....	38
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	32
<i>State v. Bergeson</i> , 64 Wn.App. 366, 824 P.2d 515 (1992).....	17
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997).....	15
<i>State v. Bernson</i> , 40 Wn.App. 729, 700 P.2d 758 (1985).....	33
<i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	16
<i>State v. Bobic</i> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	26
<i>State v. Bonilla</i> , 23 Wn.App. 869, 598 P.2d 783 (1979)	25
<i>State v. Boogaard</i> , 90 Wn.2d 733, 585 P.2d 789 (1978).....	58, 59
<i>State v. Boulet</i> , 5 Wn.2d 654, 106 P.2d 311 (1940).....	57
<i>State v. Bowerman</i> , 115 Wn.2d 794, 802 P.2d 116 (1990).....	17
<i>State v. Brunn</i> , 22 Wn.2d 120, 154 P.2d 826 (1945).....	58
<i>State v. Bryant</i> , 97 Wn.App. 479, 983 P.2d 1181 (1999)	26
<i>State v. Caliguri</i> , 99 Wn.2d 501, 664 P.2d 466 (1983).....	26, 27
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	33
<i>State v. Castellanos</i> , 132 Wn.2d 94, 935 P.2d 1353 (1997) ...	32, 45, 48, 51
<i>State v. Charles</i> , 126 Wn.2d 353, 894 P.2d 558 (1995)	19, 20, 59, 60
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2011).....	52
<i>State v. Clark</i> , 129 Wn.2d 211, 916 P.2d 384 (1996).....	26
<i>State v. Cole</i> , 74 Wn. App. 571, 874 P.2d 878 (1994).....	15
<i>State v. Connors</i> , 59 Wn.2d 879, 371 P.2d 541 (1962)	58
<i>State v. Cosden</i> , 18 Wash.App. 213, 568 P.2d 802 (1977).....	41
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	45
<i>State v. Cummings</i> , 44 Wn.App. 146, 721 P.2d 545, <i>rev. denied</i> , 106 Wn.2d 1017 (1986).....	32

<i>State v. Daniels</i> , 56 Wn.App. 646, 784 P.2d 579, <i>rev. denied</i> , 114 Wn.2d 1015, 791 P.2d 534 (1990).....	17
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	34, 36
<i>State v. Early</i> , 70 Wn.App. 452, 853 P.2d 964 (1993)	46
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	33, 34
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	15, 16, 17, 18, 20
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979).....	16
<i>State v. Fowler</i> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	16
<i>State v. Frazier</i> , 99 Wn.2d 180, 661 P.2d 126 (1983).....	49, 50, 51
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	53, 54
<i>State v. Gosser</i> , 33 Wn.App. 428, 656 P.2d 514 (1982).....	46
<i>State v. Grant</i> , 83 Wn.App. 98, 920 P.2d 609 (1996).....	40
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	61
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014)	33
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	46
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983)	40
<i>State v. Huelett</i> , 92 Wn.2d 967, 603 P.2d 1258 (1979)	48
<i>State v. Hurchalla</i> , 75 Wn.App. 417, 877 P.2d 1293 (1994).....	17
<i>State v. Huynh</i> , 107 Wn.App. 68, 26 P.3d 290 (2001).....	26
<i>State v. Ieremia</i> , 78 Wn. App. 746, 899 P.2d 16 (1995).....	14, 16, 22
<i>State v. Jensen</i> , 149 Wn. App. 393, 203 P.3d 393 (2009)	15
<i>State v. Jones</i> , 97 Wn.2d 159, 641 P.2d 708 (1982).....	57, 58, 59, 60
<i>State v. Kennealy</i> , 151 Wn. App. 861, 214 P.3d 200 (2009)	35
<i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002).....	33
<i>State v. Koontz</i> , 145 Wn.2d 650, 41 P.3d 475 (2002).....	49, 50, 51
<i>State v. Krause</i> , 82 Wn.App. 688, 919 P.2d 123 (1996).....	35, 38, 39
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	53, 54
<i>State v. Lane</i> , 125 Wash.2d 825, 889 P.2d 929 (1995).....	38
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	45
<i>State v. Lough</i> , 125 Wash.2d 847, 889 P.2d 487 (1995)...	34, 36, 37, 38, 39
<i>State v. Lucky</i> , 128 Wn.2d 727, 912 P.2d 483 (1996).....	15
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986)	46
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	53
<i>State v. McNight</i> , 54 Wn.App. 521, 774 P.2d 532 (1989).....	23
<i>State v. Medcalf</i> , 58 Wn.App. 817, 795 P.2d 158 (1990).....	33
<i>State v. Michael</i> , 160 Wn. App. 522, 247 P.3d 842 (2011).....	55
<i>State v. Perrett</i> , 86 Wn. App. 312, 936 P.2d 426, <i>review denied</i> , 133 Wn.2d 1019 (1997)	15
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997).....	16, 17, 41

<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	32
<i>State v. Posey</i> , 130 Wn.App. 262, 122 P.3d 914 (2005), <i>aff'd in part</i> , <i>reversed in part on other grounds</i> , 161 Wn.2d 638, 167 P.3d 560 (2007)	43
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	32
<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	33
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	53
<i>State v. Renfro</i> , 96 Wn.2d 902, 639 P.2d 737 (1982)	53
<i>State v. Robinson</i> , 38 Wn.App. 871, 691 P.2d 213 (1984).....	27, 28
<i>State v. Roden</i> , 179 Wn.2d 893, 321 P.3d 1183 (2014).....	25
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	45, 47
<i>State v. Sawyer</i> , 60 Wn.2d 83, 371 P.2d 932 (1962)	46
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 157 P.3d 901 (2007)	36
<i>State v. Smith</i> , 85 Wn.2d 840, 540 P.2d 424 (1975)	28, 29, 30
<i>State v. Stenson</i> , 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).....	32
<i>State v. Stevens</i> , 58 Wn. App. 478, 794 P.2d 38 (1990)	61
<i>State v. Taylor</i> , 60 Wash.2d 32, 371 P.2d 617 (1962).....	41, 57, 58, 60
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	32
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	52
<i>State v. Thorne</i> , 43 Wn.2d 47, 260 P.2d 331 (1953).....	34
<i>State v. Townsend</i> , 147 Wn.2d 666, 57 P.3d 255 (2002).....	26
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	15
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997)	16
<i>State v. Weber</i> , 99 Wn.2d 158, 659 P.2d 1102 (1983).....	47
<i>State v. Wermerskirchen</i> , 497 N.W.2d 235, 243 n. 3 (1993).....	38
<i>State v. Williams</i> , 94 Wash.2d 531, 617 P.2d 1012 (1980)	27
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	52, 53, 54, 55
<i>U.S. v. Ross</i> , 626 F.2d 77, 81 (9th Cir. 1980)	58

Statutes

RCW 10.61.003	15, 16
RCW 403	40
RCW 9.44.020	40, 43
RCW 9.73.030(1)(b).....	25
RCW 9.73.030(2).....	4, 25, 26
RCW 9.73.030(2)(b).....	27
RCW 9A.44.010(6).....	21
RCW 9A.44.020.....	6
RCW 9A.44.020(2).....	41
RCW 9A.44.050.....	20

RCW 9A.44.060..... 21

Rules

CrR 6.10..... 57
ER 403 43
ER 404(b)..... 5, 31, 32, 33, 35, 36, 37
ER 608 43
ER404(b)..... 31
RAP 2.4(a) 26

RESPONSE TO ASSIGNMENTS OF ERROR

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- VIII. The trial court properly allowed the jury to continue deliberations.**
- IX. Cumulative error did not deny Diese a fair trial.**

STATEMENT OF THE CASE

Lawrence Diese (hereafter 'Diese') was charged by information with Rape in the Second Degree-Domestic Violence. CP 5, 106. The charges stemmed from an alleged that he engaged in sexual intercourse by forcible compulsion with N.B., his girlfriend's daughter, a 20-year old woman who lived with Diese. CP 2. This rape occurred on February 23, 2014. CP 2. N.B. had lived with Diese previously, during which time Diese had raped and physically assaulted N.B. CP 2. On the February 23,

2014 occasion, N.B. caused her cell phone to record her and Diese's interaction, in the minutes before and during the rape. CP 2.

Prior to trial, Diese moved to suppress the evidence of the cell phone recording claiming the Privacy Act was violated and thus the recording was inadmissible under RCW 9.73.030 and RCW 9.73.050. RP 32-57. The trial court held a hearing on the admissibility of a recording of communication between the victim, N.B. and the defendant. RP 32-55. The recording was played for the court and consisted of the following between N.B. and the defendant:

DETECTIVE ALDRIDGE: It is approximately 2:30 p.m. I'm going to do a recording of a recording from a cell phone taken from the -- Natasha Braaten. The recording will be conducted at the Vancouver West Precinct in the DECU office in the evidence room. The recording is from her phone. She has signed a written consent to have the phone examined. The only person present is myself, Detective Sandra Aldridge. The recording is approximately five and a half minutes.

MR. DIESE: (Inaudible).

MS. BRAATEN: What do you mean? (Inaudible).

MR. DIESE: What's that?

MS. BRAATEN: (Inaudible).

MR. DIESE: (Inaudible).

MS. BRAATEN: I believe so. (Inaudible).

MR. DIESE: (Inaudible) talk about it. No.

MS. BRAATEN: (Inaudible).

MR. DIESE: (Inaudible). Drop them. Let's go. (Inaudible).

MS. BRAATEN: I don't want to.

MR. DIESE: (Inaudible).

MS. BRAATEN: No, not that.

MR. DIESE: (Inaudible).

MS. BRAATEN: (Inaudible) and stuff.

MR. DIESE: (Inaudible).

MS. BRAATEN: No, not (inaudible).

MR. DIESE: (Inaudible) without question.

MS. BRAATEN: Okay. Well, I'll leave because I ain't doing that. You're my mom's boyfriend. You should be doing that with Mom, not me.

MR. DIESE: I can do whatever I want how I want.

MS. BRAATEN: Not with me.

MR. DIESE: So I got to tell your mom now (inaudible) and get you out of here?

MS. BRAATEN: I guess, because I'm not (inaudible).

MR. DIESE: We shall see. You know you have nowhere to go. You have no one to help you.

MS. BRAATEN: (Inaudible).

MR. DIESE: Say again? Stand up.

MS. BRAATEN: No.

MR. DIESE: Come on. Get up. Let's go. Your pants are already halfway off. Let's go. Right now. Stand up. Come on. (Inaudible). Come on. (Inaudible). Come on. I'll hold your hand. Let's go. (Inaudible).

MS. BRAATEN: (Inaudible).

MR. DIESE: I'm going to count to three. One, two. Come on. (Inaudible).

DETECTIVE ALDRIDGE: That was the end of the recording.

RP 34-36. The trial court found that RCW 9.73.030(2) does provide an exception to the general rule of dual consent to record, and allows admission of a private recording that conveys threats of extortion, blackmail, and bodily harm, or unlawful requests or demands. RP 54. The court listened to the tape and reviewed the transcript, and found that in the context of the entire conversation there were threats, and extortion of sexual activity of some sort. RP 55. The trial court further found that the defendant's demands during the taped conversation were unlawful and constituted threats. RP 55. Based upon this finding, she ruled the tape admissible under RCW 9.73.030(2). The trial court also ruled the second half of the tape, when no words are recorded, is independently admissible under RCW 9.73.030(2) as no private conversation was recorded. RP 55.

The trial court further noted that N.B. was “crying and upset throughout” the tape. RP 55.

Prior to trial, the State moved, pursuant to ER 404(b), to admit Diese’s prior acts of raping and assaulting N.B. in 2008 or 2009 to show his lustful disposition toward N.B., as part of a common scheme or plan, and to prove the element of forcible compulsion. CP 54-65. The trial court held a hearing on this matter on January 15, 2015 and ruled the evidence of Diese’s rapes of N.B. in 2008 and 2009 were admissible to prove his lustful disposition toward N.B. and to prove common scheme or plan. RP - 1137-39. The trial court found by a preponderance of the evidence that the prior acts occurred. RP 1138. The trial court identified the purposes for this evidence: lustful disposition and common scheme or plan. RP 1138-39. The trial court found that the prior acts were “very relevant and probative to establishing that the charge did indeed happen.” RP 1141. The trial court also balanced the probative value against the prejudicial effect of admitting the evidence and found that the probative value outweighed the prejudicial effect. RP 1141. The trial court gave a limiting instruction to the jury regarding this evidence. CP 230.

The State also moved to admit evidence of an assault Diese perpetrated on N.B. that was referred to at the trial court as the “fat lip incident.” RP 197-203. The trial court found this event occurred by a

preponderance of the evidence, that the evidence was relevant to proving forcible compulsion of the current rape charge, and the evidence was highly probative and any prejudicial effect could be mitigated by a limiting instruction. RP 203-04. The court thereby allowed this evidence to be admissible. RP 204. The trial court gave a limiting instruction to the jury regarding this evidence. CP 230.

The trial court also ruled pretrial on the admissibility of evidence of text messages N.B. had sent to others that had a sexual component to them. RP 109-26. Diese had filed a notice of its intent to introduce evidence of N.B.'s sexual behavior pursuant to RCW 9A.44.020. CP 168-173. The State also moved to suppress this evidence. RP 109. Diese was seeking to admit text messages that were recovered from N.B.'s cell phone as follows:

- January 11, 2015, message from N.B. to "Adam" stating, "God bad news, I am pregnet"
- January 12, 2015, message from N.B. to "Jacob Johson" including photographs of N.B.'s vagina with her fingers inserted, and a topless photo of her; message from "Jacob Johson" to N.B. of a picture depicting a penis.
- January 13, 2015, message from N.B. to "Gordo" including a photograph of her topless.
- January 17, 2015, message from N.B. to "Jake P." including a photograph of her topless and a message saying "no that shit hurts I am good and I don't want to be lose like being so tought maybe one day u can find out agine."

- January 19, 2015, message from N.B. to “Jordon” stating, “it is ok me and my friend will have fun fucking one another with her two head bobb.”
- January 21, 2015, message from N.B. to “Normen” that “we can make out and shit but I dont make the first move,” and including a photograph of her topless.
- February 16, 2015, message from N.B. to “Chris” including a photograph of her topless and a message saying “so horney.”
- February 18, 2015, message from N.B. to “Danial” stating “Idk I like u and always wanted to fu, u,” with “Danial’s” reply of “I see,” to which N.B. texted, “Ya u still want to” and “Danial” replied, “why not”
- February 25, 2015, message from N.B. to “kkharpole@outlook” including a topless photograph of herself and the message “here u go baby.”
- February 25, 2015, message from N.B. to “Colt” indicating “k bye then why u keep talk I now u still like me u lost ur chance so when she dump u don’t come to me” and “Colt’s” reply of “ha oka ur pretty full of urself for being the one that wanted to be fuck buddyss knowing I liked josie and iidnt”
- February 26, 2015, message from N.B. to “Marusa” saying “I will tomorroee my bf is here and yes” and “cant my bf is with me and I am talking to him about it.”

CP 169-71. Upon hearing argument and discussing legal authority, the trial court excluded evidence of these text messages. RP 124-25. The trial court found these messages were irrelevant, and did not include any

admission that N.B. had engaged in sexual intercourse or some other type of penetration that would explain her vaginal injury. RP 125.

At trial, the evidence showed that Diese was in a romantic relationship with Juline Dual, N.B.'s mother, starting in 2008. RP 343. Ms. Dual and N.B. moved in with Diese in 2008 or 2009, when N.B. was 14 years old. RP 344-45. In 2009, Ms. Dual's and Diese's relationship was rocky and came to an end (which ended up being temporary). RP 347. During an incident at this time, Diese grabbed N.B. by either the "scruff of the neck" or the hood of her jacket" and threw her out the front door and then physically threw Ms. Dual out the door. RP 231, 347. N.B. and Ms. Dual then moved in with a friend for a while, and then lived in Portland, Oregon from 2009 until 2012. RP 232, 348, 414. Then, N.B. moved to Longview to live with her cousin. RP 415; N.B. also lived for a time with her father in 2012, and then Ms. Dual began to again date Diese. RP 233-34, 350, 415. In May 2013, Ms. Dual moved back in with Diese. RP 353. N.B. was not happy that her mother rekindled her relationship with Diese. RP 234, 350. N.B. had previously told her mother that Diese had raped her while they lived with him in 2009, but her mother had not believed her. RP 235. N.B. testified that Diese would take her clothes off and touch her breasts and penetrate her vagina with his fingers and his penis when she lived with him in 2009, and that this occurred on many occasions. RP 217-

19. On one occasion Diese threw N.B. up against a wall and caused her to have a fat lip. RP 223-24.

In December 2013, N.B. asked if she could move back in with her mother and Diese. RP 354. Diese was “adamantly against it,” but that he eventually relinquished and N.B. moved in. RP 239, 354. As part of the conditions for allowing N.B. to stay, Diese wanted her to help with chores, get a job, go to counseling, and only be at the house when her mother was home. RP 238, 354.

On February 23, 2014, Ms. Dual and Diese were fighting. RP 243-44. They brought N.B. into a conversation about housework. RP 244.

Diese was mad and upset about the house being dirty and N.B. not having been home earlier to clean the house. RP 244. Diese told N.B. that if he ever saw her in the street she should be worried. N.B. took this as a threat. RP 244. Diese and N.B. then went for a walk and Diese told N.B. that she needed to do everything he said when he said it and without an argument. RP 245. After N.B. and Diese returned from their walk, Ms. Dual was gone from the house. RP 246. She had gone to rent movies from Redbox. RP 246. N.B. was sitting on the couch and decided to record what was happening because she was uncomfortable being alone with Diese. RP 247-48. She set the phone down next to her. RP 248. Diese came up to N.B. and told her that now it was time to live up to her word; N.B. told

him she had done all the housework her mom told her to do. RP 251. Diese continued telling her she wasn't living up to what he was deciding and what he wanted. RP 252. N.B. realized he was not talking about housework. RP 252. Diese grabbed her by the hand and counted down. RP 253. It hurt when Diese grabbed her by the hand as he grabbed her tightly. RP 253. N.B. was terrified and in shock. RP 253. She believed Diese was going to rape her again. RP 253-54. N.B. tried to pull her hand back because she did not want to go with him. RP 254. But she was unable to get her hand away from his grip. RP 254. Diese was standing between N.B. and the door and she feared that he would get violent if she tried to leave. RP 254-55. N.B. got up from the couch because she was scared of Diese, scared it would get worse. RP 257. They walked to the bathroom, and N.B. used her hand to cover her face; she was crying really badly. RP 256.

Inside the bathroom, Diese told N.B. to pull down her pants. RP 259. She did not, so Diese pulled them down. RP 259. N.B.'s pants were around her ankles and Diese bent her over and started touching her. RP 260. He bent her over by pushing her with his hand on her back. RP 260. N.B. used her elbows to try to push Diese away, but that did not stop him from doing what he was doing. RP 280. Diese touched N.B. on her vagina and then put his penis inside her vagina. RP 262. After a short time, Diese

was done, and turned around toward the bathtub and turned on the water. RP 262. N.B. believed Diese ejaculated into the bathtub. RP 262-63. Afterwards, Diese pulled up N.B.'s pants. RP 264.

The recording was played to the jury during N.B.'s testimony. RP 270-71.

On February 26, 2014, N.B. told her mom, "I told you he was raping me" and played the recording for her. RP 363. The next morning N.B. and her mom went to a counseling session where they played the tape for the counselor; the counselor contacted the police. RP 289-90. N.B. and Ms. Dual then went to the police department and then the hospital. RP 365. N.B. underwent a rape examination at the hospital and evidence was collected. RP 545. The nurse found N.B. had a hematoma near the entry to her vagina. RP 537.

Detective Erik Anderson of the Vancouver Police Department investigated this case. RP 654. He collected articles of clothing that N.B. wore on February 23, 2014 and submitted them to the crime lab. RP 663-64. Det. Anderson obtained N.B.'s cell phone and a fellow officer made a recording of the original recording from N.B.'s cell phone. RP 691.

The DNA analyst from the crime lab examined N.B.'s clothing and found no male DNA and could not create a sample. RP 579-81. The analyst did find a small amount of male DNA on the rape kit that was

collected at the hospital, but the amount was too small to create a DNA profile. RP 633-36.

Diese testified in his defense. He admitted to physically assaulting N.B. in 2009 by grabbing her and throwing her and her mother out of the house. RP 829. Diese denied any sexual contact or intercourse with N.B. RP 827. Diese indicated that on February 23, 2014, N.B. was not doing the chores she was required to do, and was sitting on the couch with her pants so low her rear end was exposed. RP 809. Diese explained the contents of the cell phone recording and his statements to mean that N.B. had agreed to do chores and he wanted her to do them as agreed. RP 810. His mention on the recording of N.B.'s pants was because they were sagging too low and he wanted her to pull them up. RP 810. Diese was frustrated that N.B. was not doing what she was supposed to do and so did a "military tone" and counted down to try to get her to do her chores. RP 810-57. Diese also testified that N.B. cries frequently. RP 812. Diese believed N.B. wanted to break him and her mother up and that N.B. was jealous. RP 821.

During Ms. Dual's testimony she briefly mentioned having received a letter from Diese while he was in jail. RP 366. Upon this testimony, Diese moved for a mistrial, which was denied. RP 373.

Diese requested an inferior degree instruction on Rape in the Third Degree, but the trial court denied his request. RP 897. The jury began

deliberating at 1:28pm on February 13, 2014. At 1:50pm the jury requested to have a transcript of the cell phone recording, which was denied, and then requested to hear the recording again. RP 972-76. The trial court played the recording for the jury in the courtroom, without objection from Diese. RP 982. At 4:15pm the jury asked if a divided jury meant not guilty; the court responded no. RP 982-87. After an additional 30 minutes the jury asked what their options were on a split jury. RP 987. The trial court inquired of the jury if there was a reasonable probability of reaching a verdict. RP 988. Two jurors thought additional deliberations could result in reaching a verdict; ten jurors thought there was no reasonable probability of reaching a verdict. RP 989. Diese asked the court to declare a mistrial. RP 989. Instead, the court told the jury to continue to deliberate. RP 990. At 6pm, the jury indicated that juror #3 had a hard time hearing the recording and asked if he could have an amplified version of the recording. RP 990. After lengthy discussion with the parties, including the potential of bringing in the alternate juror, the court replayed the recording for the jury again. RP 995. The jury continued deliberating until almost 7pm at which time it was released until the next judicial day, which was Tuesday February 17, 2014. RP 998. On February 17, 2014, the jury reached a verdict and this was announced at 11:46am.

The jury convicted Diese of Rape in the Second Degree and found it was a domestic violence offense, it was part of an ongoing pattern of abuse, and the conduct manifested deliberate cruelty or intimidation of the victim. RP 998-99; CP 247-49. The trial court sentenced Diese to an exceptional sentence of 129 months. RP 1014; CP 276. Diese timely appealed. CP 207.

ARGUMENT

I. The trial court properly refused to give an inferior degree instruction on Rape in the Third Degree.

Diese argues the trial court erred in failing to grant his request for an inferior degree instruction on Rape in the Third Degree. The trial court's denial of his request was appropriate given the facts presented at trial and the evidence that supported either a finding of Rape in the Second Degree or an acquittal. The trial court did not abuse its discretion. Diese's claim fails.

Diese was charged with Rape in the Second Degree. CP 5, 106. Rape in the third degree is an inferior degree offense of rape in the second degree. *State v. Ieremia*, 78 Wn. App. 746, 753, 899 P.2d 16 (1995). At trial, Diese requested the court give an inferior degree instruction on Rape in the third degree. RP 894-95. After hearing argument and considering *State v. Ieremia, supra*, the trial court denied this request finding that

given the factual situation presented in Deise's case it was not proper to give an inferior degree instruction. RP 897.

This court reviews a trial court's decision to give an instruction that rests on a factual determination for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997)). When determining whether the evidence was sufficient to support giving an instruction, this court views the evidence in the light most favorable to the party requesting the instruction, here, Diese. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)). Only when a trial court's decision is manifestly unreasonable or based upon untenable grounds will this court find it abused its discretion. *State v. Jensen*, 149 Wn. App. 393, 399, 203 P.3d 393 (2009) (citing *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997)).

It may be appropriate for a trial court to instruct the jury on inferior degree offenses pursuant to RCW 10.61.003. This statute allows a defendant charged with an offense that is divided into degrees to be found not guilty of the charged degree and guilty of any inferior degree instead.

RCW 10.61.003. An inferior degree offense instruction is appropriate if “1) the statutes 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. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979))). For an inferior degree instruction to be proper to give to a jury, the evidence must have been sufficient to permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). Such evidence must be affirmative; it is not enough that the jury might disbelieve the evidence pointing to the defendant’s guilt. *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

State v. Ieremia, 78 Wn.App. 746, 899 P.2d 16 (1995), Division I of this Court discussed that an inferior degree offense instruction is only proper if there is evidence that the defendant committed *only* the lesser degree offense. *Ieremia*, 78 Wn.App. at 754 (citing *State v. Daniels*, 56

Wn.App. 646, 651, 784 P.2d 579, *rev. denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990)). It is not enough that the jury disbelieve the State's evidence supporting the charged crime, but "the evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one." *Id.* (emphasis original) (citing *State v. Hurchalla*, 75 Wn.App. 417, 423, 877 P.2d 1293 (1994) and *State v. Bergeson*, 64 Wn.App. 366, 369, 824 P.2d 515 (1992)). Diese was only entitled to an inferior degree instruction if the jury could have concluded that he committed Rape in the Third Degree instead of Rape in the Second Degree. *See id.* The evidence shows no jury could have concluded Diese committed Rape in the Third Degree instead of Rape in the Second Degree.

In *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000), the Supreme Court held that a party is entitled to an inferior degree offense instruction if the evidence raises an inference that *only* the inferior degree offense was committed to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455 (citing *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) and *State v. Peterson*, 133 Wn.2d 885, 948 P.2d 381 (1997)). In *Fernandez-Medina*, the defendant was initially charged with Assault in the First degree and the trial court refused to instruct the jury on the inferior degree offense of Assault in the Second Degree. *Fernandez-Medina*, 141 Wn.2d at 449. The evidence presented at

trial showed the defendant pointed a gun at the victim's head while she was lying on the floor, she closed her eyes and heard a clicking sound, but no bullet exited the gun and she was not harmed. *Id.* at 451. No witness saw the defendant pull the trigger. *Id.* Two ballistics experts testified that guns can make various noises, including clicking sounds, even when the trigger is not pulled. *Id.* at 451-52. The defendant alleged general denial, yet requested an inferior degree instruction on Assault in the Second Degree as the evidence affirmatively supported a finding of only the inferior offense. *Id.* The Supreme Court held that it was error for the trial court to refuse to give this instruction because evidence presented at trial that affirmatively raised the inference that the defendant was guilty of only second degree assault instead of first degree assault. *Id.* at 462. Pointing the gun at the victim, without pulling the trigger, would support a conviction for the inferior offense of Assault in the Second degree to the exclusion of the greater, Assault in the First Degree. This evidence constituted affirmative evidence to support a verdict of the inferior offense *instead of* the greater offense. At Diese's trial there was no affirmative evidence that would support a verdict on the inferior offense *instead of* the greater offense.

Thus, as in *Fernandez-Medina, supra*, where evidence at trial supports an inference that the inferior degree offense was committed

instead of the greater degree offense, it is appropriate to give the inferior degree instruction. However, if no affirmative evidence is presented at trial to lead to a reasonable inference that the defendant committed the inferior offense instead of the greater offense, giving an inferior degree instruction is improper. In *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995), a rape trial, the victim alleged the defendant held her down, removed her clothes and forced her to have intercourse. *Charles*, 126 Wn.2d at 354. The defendant claimed the intercourse was consensual. *Id.* at 354-55. The defendant was tried and convicted of Rape in the Second Degree. *Id.* The defendant requested an inferior degree offense instruction on Rape in the Third Degree, but the trial court denied giving this instruction. *Id.* at 355. On review, the Supreme Court ruled that there was no evidence of unforced nonconsensual intercourse and therefore insufficient evidence to support giving a third degree rape instruction. *Id.* at 355-56. The Supreme Court explained that if the jury believed the victim's testimony, the defendant was guilty of Rape in the Second Degree, and if the jury believed the defendant's version, he was not guilty of any crime. *Id.* There was no affirmative evidence that the intercourse *was unforced but still nonconsensual*, therefore an instruction on Rape in the Third Degree would have been inappropriate. *Id.* As in *Charles*, there was no affirmative evidence in Diese's trial of *unforced but still*

nonconsensual intercourse. If the jury believed N.B., then Diese was guilty of Rape in the Second Degree. If the jury believed Diese's version, he was not guilty of any crime. No affirmative version of the facts presented to the jury supported a conviction for Rape in the Third Degree instead of Rape in the Second Degree.

A defendant is not entitled to an inferior degree instruction on the ground that the jury may disbelieve the testimony of the victim or both the victim and the defendant. *Charles*, 126 Wn.2d at 355; *Ieremia*, 78 Wn.App. at 755. The jury may not view the evidence between the extremes presented: N.B.'s version of forcible rape compared to Diese's version of no rape at all. A defendant is not entitled to the instruction simply based on a juror's potential disbelief that the greater offense was committed; the evidence must affirmatively establish the defendant committed the inferior offense. *Fernandez-Medina*, 141 Wn.2d at 456. A finding of Rape in the Third Degree would have been a middle ground that would have been wholly unsupported by the facts of the case as presented at trial.

Rape in the Second Degree is committed when someone has sexual intercourse with another by forcible compulsion. RCW 9A.44.050. "Forcible compulsion" means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or

physical injury to herself or himself or another person....” RCW 9A.44.010(6). Third degree rape does not require proof of forcible compulsion. RCW 9A.44.060. The State’s theory of the case, and consistent with the evidence presented at trial, was that Diese achieved sexual intercourse by using physical force against N.B., and that he impliedly threatened physical injury to accomplish the sexual intercourse.

The State argued to the jury:

First off, there’s two ways to get to forcible compulsion. Okay. There’s physical force that overcomes resistance or there’s a threat. Two ways to get to it. You don’t have to do both. Okay. It’s not a requirement to do both, just one. Physical force, how much physical force to use? Physical force, that’s all it requires, physical force. That’s all it requires, not substantial physical forces, not great physical force, just physical force.

RP 938. The prosecutor then went on to describe the evidence of physical force the jury heard, including grabbing and pulling N.B., and pushing her, and her attempts at resisting. RP 939. The prosecutor also argued,

The second way to get to forcible compulsion is a threat, expressed or implied. With words, “I’m going to do blankety-blank to you,” or implied, “One, two, three. What do I got to do, throw you out of here?”

‘Injury that places a person in fear of death or physical injury.’ Okay. Doesn’t have to be death, just has to be physical injury. She testified, [N.B.], did she testify that she was terrified when he grabbed her arm and was pulling her? She testified she was terrified, because she’s seen him get violent before. She knew what he could do. She’d been the direct victim of it and she’d seen her mom be the direct

victim of it. She'd been the direct victim of it twice. Once with the fat lip when she resisted him when she said, 'No, you're not going to rape me,' back in 2008, 2009. A second time when he threw her out of the house. And remember 50 more pounds on him. This isn't the same—the man here is not the man that was back in February 2014, bigger man. And she was scared of injury. That's forcible compulsion.

RP 939-40. It was clear the State's argument was that the element of forcible compulsion was found both by physical force which overcomes resistance, and by an implied threat that placed N.B. in fear of physical injury to herself.

There was no affirmative evidence presented at trial to show unforced nonconsensual intercourse. Diese's defense was general denial. The determination for the trial court here was whether there was affirmative evidence that N.B. did not consent to penile penetration without any forcible compulsion from Diese. The jury heard no such evidence. No one testified or inferred that the intercourse was nonconsensual and unforced. If the jury believed N.B., it would have found, and did find, forcible compulsion. If the jury believed Diese, it would have acquitted. There was no evidence from which a jury could have properly convicted Diese of Rape in the Third Degree.

In *Ieremia*, no affirmative evidence was presented that the sexual intercourse was nonconsensual yet unforced. *Id.* at 756. The trial court found that the victim's failure to struggle or yell as she was pulled out of

the car and absence of injury were not evidence of nonconsent, but rather was evidence of Ieremia's defense of consent. *Id.* N.B.'s lack of significant resistance, her lack of screaming, hitting, or scratching Diese does not negate forcible compulsion. A victim's actual resistance is not an element of Rape in the Second Degree. Forcible compulsion means that "the force exerted was [1] directed at overcoming the victim's resistance and [2] was more than that which is normally required to achieve penetration." *State v. McNight*, 54 Wn.App. 521, 528, 774 P.2d 532 (1989). Diese indicates in his brief that his attorney developed evidence through N.B.'s cross-examination that tended to show absence of forcible compulsion. Br. Of Appellant at p. 31-32. However, the page Diese cites to is during the State's direct examination and does not establish a lack of forcible compulsion. See RP 260-62. In fact, N.B. testified that Diese pushed her forward, so she was bent over. RP 260-61. N.B. further testified that she used her elbows to attempt to push Diese away from her, but was unsuccessful. RP 280. N.B. also testified that Diese grabbed her by the hand and pulled her off the couch. RP 253. These facts clearly establish sufficient evidence to support a finding of forcible compulsion. Further, forcible compulsion via an implied threat of bodily harm was established through N.B.'s testimony regarding her prior abuse by Diese, and the statements Diese made to N.B. about complying with the rape and

him asking her what was he going to have to do, and counting to three, coupled with grabbing her and pulling her off the couch. The evidence affirmatively established forcible compulsion and there was no affirmative evidence that the intercourse was nonconsensual and nonforced.

Based on the specific facts and evidence presented at trial and the case law discussed above, the trial court properly declined to give an instruction on the inferior degree offense of Rape in the Third Degree. The trial court correctly apprehended Washington case law when it refused to instruct the jury on third degree rape. As this decision was purely based on the facts as presented at trial, this Court's review is for an abuse of discretion. The trial court was within its sound discretion to find there was no affirmative evidence to support a verdict on Rape in the Third Degree instead of Rape in the Second Degree. The trial court properly instructed the jury and Diese's conviction should be affirmed.

II. The trial court properly admitted the recording N.B. obtained via her cell phone.

Diese claims the trial court erred by admitting a recording of his private conversation with N.B. in violation of the Privacy Act. The trial court properly concluded that the recording was admissible because a conversation during which one party conveys threats may be recorded with the consent of only one party to the conversation. Diese's consent to

the recording was not needed in order for the recording to be properly admitted at trial under the Privacy Act. Diese's claim fails.

Washington's Privacy Act makes it unlawful "...for any individual...to intercept or record any:... (b) Private conversation, by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;...." RCW 9.73.030(1)(b). However, the statute provides an exception to the two party consent rule laid out above. The statute further allows,

(2) Notwithstanding subsection (1) of this section, wire communications or conversations...(b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands...may be recorded with the consent of one party to the conversation."

RCW 9.73.030(2). This provision establishes a specific exception to the statutory prohibition against recording a conversation with only one party's consent. *State v. Bonilla*, 23 Wn.App. 869, 874, 598 P.2d 783 (1979).

A trial court's legal conclusions following a motion to suppress based on an alleged violation of the Privacy Act are reviewed de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). While the issue of whether a communication or conversation is private under the

Privacy Act is a question of fact, it may be reviewed as a question of law where the facts are not in dispute. *State v. Townsend*, 147 Wn.2d 666, 673, 57 P.3d 255 (2002) (citing *State v. Clark*, 129 Wn.2d 211, 225, 916 P.2d 384 (1996)). In addition, a reviewing court “can affirm on any grounds supported by the record.” *State v. Huynh*, 107 Wn.App. 68, 74 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)); *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d).

In *State v. Babcock*, 168 Wn.App. 598, 279 P.3d 890 (2012), this Court specifically found that in adopting RCW 9.73.030(2), “the legislature did not intend to limit the threat exclusion to conversations where the defendant expressly states the threat of bodily harm.” *Babcock*, 168 Wn.App. at 609. Any conversation which conveys a threat of bodily harm may be recorded. *Id.* And the Court in *Caliguri* broadly construed the word “convey.” *State v. Caliguri*, 99 Wn.2d 501, 507-08, 664 P.2d 466 (1983). The word “convey” within this exception is broadly defined, and courts should apply its common meaning. *Id.* To “convey” means to “impart or communicate either directly by clear statement or indirectly by suggestion, implication, gesture, attitude, behavior, or appearance.” *Id.* (quoting Webster's New International Dictionary, at 499 (3d ed. 1966)). The phrase, “unlawful requests or demands,” applies to communications

that convey matters similar to “extortion, blackmail, [or] bodily harm.”

State v. Williams, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980).

In *State v. Robinson*, 38 Wn.App. 871, 691 P.2d 213 (1984), the Court properly found that a defendant’s message on an old-style answering machine conveyed a threat of bodily harm when the defendant stated:

This is John Robinson. Would you tell Mildred to get in touch with me with those kids right away or I will go into my drastic act and whoever has to suffer the consequences—whoever wants to have to suffer for it are the ones I can find like you, her sister, and anybody else that is related to her. Get the kids here in the morning.

Robinson, 38 Wn.App. at 873, 885. The *Robinson* Court based its decision that this statement conveyed a threat on the definition of “convey” set by our Supreme Court in *Caligari*, *supra*. The *Robinson* Court found that this message “at the very least implies Mr. Robinson will inflict bodily harm on Mr. Pruitt and his relatives if he does not see his children.” *Robinson*, 38 Wn.App. at 885. Thus the Court on appeal found this recording was admissible even though the defendant did not consent to the recording because it conveyed a threat and thus fell under the provision of RCW 9.73.030(2)(b) that only required one party consent to the recording.

The recording admitted below clearly conveyed threats of bodily harm and unlawful demands. The recording, coupled with N.B.’s

testimony on the subject, shows that Diese demanded N.B. submit to sexual intercourse or else he was going to kick her out of her home, and his words and actions contained implied threats to do bodily harm. The threats exception does not cover only direct threats of harm, as discussed above. In *Robinson, supra*, the Court affirmed that the defendant's statement that others would "suffer the consequences" was a threat to inflict bodily harm.

Also, the substance of what N.B. recorded was not a "conversation" within the meaning of the Privacy Act, and thus its admission was not improper. *State v. Smith* is instructive as to whether the recording at issue here was of a "private conversation." 85 Wn.2d 840, 540 P.2d 424 (1975). There, the victim in the case received a phone call to meet a person in an alley in the evening. *Id.* at 842. He then purchased a tape recorder, which he concealed under his clothing and attached the microphone to his shirt. *Id.* at 843. The victim asked his next-door neighbor to accompany him. *Id.* The victim parked his car near the alley, exited his car, and walked towards the alley while his neighbor remained near the car. *Id.* The victim met the defendant, who was in the alley parked in a truck, and the defendant shot the victim several times, killing him. *Id.*

The tape recording of the events was found on the victim's body during an autopsy. *Smith*, 85 Wn.2d at 843. The recording contradicted the

defendant's statement and testimony. *Id.* 843-44. The recording contained the following:

The tape begins with remarks by [the victim], introducing [his neighbor] and stating his destination. The two men discuss the walkie-talkies and other arrangements, and [the victim] starts toward the designated alley. As he walks he narrates, describing the scene around him and describing with particular care each person in the vicinity. Remarking, 'Everything looks quite normal,' he says he is turning into the upper part of the alley. Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!', [the victim] saying 'Dave Smith,' and a sound resembling a gunshot. The running stops, and Smith tells [the victim] to turn around. [The victim] asks, 'What's the deal?' Smith replies, 'You know what the deal is. I'll tell you one thing baby, you have had it.'

Several more words are exchanged, not all of which are clearly intelligible, about whether Smith has 'a charge.' Then [the victim] asks, 'If you wanted me, why didn't you come to see me?' Smith replies, 'I'll tell you why.' A moment later, another shot is heard. The quality of the recording becomes 'tinny.' (There was expert testimony that this shot damaged the microphone.) Then [the victim], screaming, repeatedly begs for his life. More shots are fired. There is a slight pause, two more shots are heard, then certain unclear sounds, then silence. After a period of nearly complete silence, a voice is heard to say, 'We've already called the police.' Another voice says, 'Hey, I think this guy's dead, man.' Afterward, the tape records police sirens and the sounds of the officers investigating.

Id. at 844-45. *Smith* held that the recording was not of a "private conversation" under the Privacy Act stating "[w]e are convinced that the events here involved do not comprise 'private conversation' within the meaning of the statute. Gunfire, running, shouting, and [the victim's]

screams do not constitute ‘conversation’ within *that term's ordinary connotation of oral exchange, discourse, or discussion.*” *Id.* at 846 (emphasis added). Notably, however, the court did not attempt to definitively define “private conversation” and did note that its holding was based on the “bizarre facts” of the case. *Id.* at 847. That said, the facts of this case regarding how the recording was made and what was captured are legally indistinguishable from *Smith* and equally unique.

Here, the victim felt threatened by Diese and began recording. The substance of what she recorded was not a “conversation” during which she and Diese had a meaningful discourse or discussion, but was a demand for sex, followed by resistance, and ultimately, sounds of a victim being raped. This is not a “conversation” of which both parties to it intended to discuss something in a private way. Not all words are “conversations.” Diese’s commands to N.B. to get up, come on, let’s go, and counting down do not constitute a “conversation” as that term is generally understood or contemplated by the Privacy Act. Furthermore, the second half of the tape which comprised no words and only sounds of water running and the victim sobbing, clearly was not a “conversation” and this portion of the tape did not invoke the protections of the Privacy Act. The trial court properly admitted this recording. Diese’s claim fails.

III. The trial court properly admitted evidence of instances of prior abuse by Diese under ER 404(b).

Diese argues the trial court improperly admitted evidence of prior times when he raped and molested N.B. and physically hurt her at trial. The trial court properly admitted these instances to show Diese's lustful disposition toward N.B., to show his common scheme or plan to rape her, and to show N.B. was reasonably placed in fear by Diese's statements to her on the day of the instant rape. The trial court did not abuse its discretion in admitting this evidence and should be affirmed.

ER 404(b) governs the admissibility of other crimes or misconduct into evidence. This rule allows admission of other crimes, wrongs or acts as long as it is not admitted to show character of a person in order to prove action in conformity therewith. ER404(b). The rule itself lists some, but not all, permissible purposes for admission of the evidence. The rule states that such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. ER 404(b). In order to admit evidence of other acts under ER 404(b), the trial court must 1) find by a preponderance of the evidence that the act occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the

probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* at 648. A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). On review, an appellate court may consider proper bases for admission of evidence at trial, even if the trial court's purported reason for admitting the evidence differed. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); *State v. Cummings*, 44 Wn.App. 146, 152, 721 P.2d 545, *rev. denied*, 106 Wn.2d 1017 (1986).

Prior act evidence offered under ER 404(b) must be proved to the court by a preponderance of the evidence. *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993) (citing *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). A trial court's finding will be upheld if it is supported by substantial evidence. *Id.* (citing *Tharp*, 96 Wn.2d at 594). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the

asserted premise. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The trial court decides issues of fact and makes credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court will not disturb a trial court's credibility determination on appeal. *Id.* Further, our Supreme Court has previously stated, “[w]e believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.” *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

Evidence showing a lustful disposition towards an offended female may be admissible under ER 404(b). *See State v. Medcalf*, 58 Wn.App. 817, 823, 795 P.2d 158 (1990) (citing *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983) and *State v. Bernson*, 40 Wn.App. 729, 737-38, 700 P.2d 758 (1985)). In *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991), our Supreme Court stated, “[t]his court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female.” *Ray*, 116 Wn.2d at 547 (citing to *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990), *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983), and *State v. Medcalf*, *supra* at 822-23). The Supreme Court discussed its prior holding in *Ferguson*

wherein it stated that evidence admitted for the purpose of showing lustful inclination of the defendant towards the offended female makes it more probable that the defendant committed the charged offense. *Id.* (quoting *Ferguson*, 100 Wn.2d at 134 (quoting *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))). Further, “[t]he important thing is whether it can be said that it evidences a sexual desire for the particular female.” *Id.* Here, the evidence of Diese’s prior sexual acts against N.B. clearly show his lustful disposition toward this particular person. The trial court properly admitted this evidence for the purpose of showing his lustful disposition.

Another purpose for which such evidence may be admitted is to show common scheme or plan. *State v. Lough*, 125 Wash.2d 847, 862, 889 P.2d 487 (1995). In cases where the defendant is charged with a sexual offense, evidence of the defendant’s prior sexual contacts may be admissible simply because the prior crime and the present crime were committed in a similar way and under similar circumstances. *State v. DeVincentis*, 150 Wn.2d 11, 13, 74 P.3d 119 (2003). There is no requirement that the prior evidence show an overarching plan or a “signature” characteristic of the defendant’s. *Id.* at 21. In *DeVincentis*, the defendant was charged with rape of a child and child molestation. *Id.* at 14. The court held that the trial court properly admitted evidence that the

defendant had been convicted of a similar crime under similar circumstances 15 years earlier. *Id.* at 21. The Court held that though the degree of similarity of the prior act evidence must be substantial, “the trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the case before it.” *Id.* at 13. The Court specifically found it is not necessary for the State to point to some unusual procedure or technique that was the defendant’s “signature” characteristic in order for the prior act evidence to be admitted under ER 404(b). *Id.* at 21. Courts generally admit evidence of prior sexual misconduct in child sexual abuse cases. *Kennealy*, 151 Wash. App. at 887.

In *State v. Krause*, 82 Wn.App. 688, 919 P.2d 123 (1996), the trial court allowed evidence in a rape and child molestation case of the defendant having previously sexually abused other children. *Krause*, 82 Wn. App. at 697. The Court of Appeals upheld the trial court’s reasoning that the evidence was admissible to show the defendant had a scheme of getting himself in a position where he had access to children and that he was grooming the children for sexual contact. *Id.*

In *State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (2009), in a prosecution for rape of a child, the Court held evidence of the defendant sexually abusing children other than the victim was admissible. *Kennealy*, 151 Wn. App. at 868. During the trial, the State introduced evidence that

the defendant had previously molested children. The Court of Appeals held this evidence demonstrated a design to molest young children and therefore was admissible as part of a common scheme or plan. *Id.* at 888. Even though the Court recognized that Kennealy's behavior in each bad act was not identical to the crime for which he was on trial, the prior acts were still admissible to show a design to molest young children and was therefore part of a common scheme or plan. *Id.* at 887-89.

Evidence of prior acts may be admissible to show common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. *State v. Sexsmith*, 138 Wn. App. 497, 504-05, 157 P.3d 901 (2007) (citing *Lough*, 125 Wn.2d at 19). Where the past act or acts and current act are substantially similar to the current allegation, the evidence is relevant and admissible under ER 404(b) as a common scheme or plan. *Id.* at 505. In *Sexsmith*, the Court on appeal held that the defendant's prior conduct was by design each time he molested a child because he was in a position of authority over them as a father or caretaker and he isolated each child when he abused them. *Id.* at 505. The court held that the existence of a "design to fulfill sexual compulsions evidenced by a pattern of past behavior" is probative of the defendant's guilt. *Id.* at 504 (quoting *DeVincentis*, 150 Wash.2d at 17-18). The court in *Sexsmith* found that "while the individual features of the prior and charged

acts of abuse are not in themselves unique, the cumulative similarity between the two suggests a common plan rather than coincidence.” *Id.* at 505.

Diese’s prior sexual acts against N.B. showed his common scheme or plan to get her alone, impliedly or overtly threaten to kick her out of the house, and exploit his power over her to rape her. This last rape of N.B. was not an isolated incident, but part of Diese’s overarching plan to abuse N.B. The trial court properly admitted this evidence as a common scheme or plan.

In applying the four factors the court is required to consider in admitting prior acts evidence under ER 404(b), the evidence in Diese’s case clearly gives way to admissibility of the evidence. First, the prior acts were proven by a preponderance of the evidence. *See Lough*, 125 Wn.2d at 852. The trial court’s belief of N.B. through her testimony is sufficient to support a finding by a preponderance of the evidence. The trial court properly found the prior incidents occurred by a preponderance of the evidence. RP 1138.

The second factor is whether the purpose of the admission of the evidence is to show a common scheme or plan. *See Lough*, 125 Wn.2d at 852. The evidence is clear that there are significant similarities between the acts Diese perpetrated on N.B. in 2009 and in 2014. N.B. was isolated

and pressured; the sexual abuse occurred for punishment and under threat of losing her home. RP 1140. As the trial court found, “it’s simply the repeated action of control over this victim...” RP 1140.

The third factor is whether the evidence is relevant to prove an element of the crime charged. *See Lough*, 125 Wn.2d at 852. The issue of relevance is generally left to the trial court to determine with review limited to whether the trial court abused its discretion. *Id.* at 861 (citing *State v. Lane*, 125 Wash.2d 825, 834-835, 889 P.2d 929 (1995); *State v. Bacotgarcia*, 59 Wash. App. 815, 824, 801 P.2d 993 (1990), *review denied*, 116 Wash.2d 1020, 811 P.2d 219 (1991); *State v. Wermerskirchen*, 497 N.W.2d 235, 243 n. 3 (1993)). Relevant evidence is evidence which tends to make the existence of any fact more probable or less probable. ER 401. In this case, Diese denied the charges occurred. In *Krause*, *supra*, the trial court concluded, and the Court of Appeals affirmed, that the evidence of prior acts was relevant because the defendant denied the charges. *Krause*, 82 Wash. App. at 695. The courts in *Krause*, *supra* and *Lough*, *supra* note the Minnesota court’s opinion in *Wermerskirchen*, *supra* with approval in that the court in *Wermerskirchen* concluded that prior acts evidence was relevant because it tended to disprove the defense that the victim fabricated or imagined the sexual contact. *See Krause*, 82 Wash. App. at 695; and *Lough*, 125 Wash.2d at 493. The trial court specifically

found that evidence of Diese's prior acts was relevant to prove an element of the crime charged or to rebut a defense. RP 1141.

The fourth factor to consider is whether evidence of the prior acts was more probative than prejudicial. *Lough*, 125 Wash.2d at 852. In determining whether evidence is more probative than prejudicial, the courts have considered such factors as whether there is a need for this type of evidence, whether a limiting instruction is given, and how probative the evidence is. *See Lough*, 125 Wash.2d at 864; *see also Krause*, 82 Wash. App. at 697. In *Krause*, the court noted that it was reasonable for the trial court to conclude there was a heightened need for showing the defendant's plan to abuse children given the factors present in child abuse cases. *Id.*

The trial court here underwent the required balancing test for the acts of prior abuse on N.B. and found that the admitted evidence is more probative than prejudicial. RP 1141. This court's decision should not be disturbed.

The trial court properly admitted evidence of the 2009 assault, the "fat lip" incident to establish forcible compulsion. RP 1141. The trial court went through the four step process for this evidence as well, finding this incident occurred by a preponderance of the evidence, it was admissible to show forcible compulsion, it was "definitely relevant" to prove an element of the crime and that the probative value outweighed its prejudicial effect.

RP 1141-42. Evidence of a defendant's previous assaults on a victim can be admissible as relevant to the victim's credibility if it helps to explain inconsistencies between the victim's conduct and her statements. *State v. Grant*, 83 Wn.App. 98, 106-07, 920 P.2d 609 (1996). This reasoning applies here. The evidence of Diese's prior assault on N.B. was properly admitted to explain N.B.'s state of mind and why she did not resist the rape more than she did, and why she felt so threatened by Diese's statements and actions that day.

IV. The trial court properly excluded evidence of N.B.'s sexual behavior.

Diese argues the trial court improperly excluded evidence of N.B.'s sexual behavior. The trial court properly excluded this evidence pursuant to RCW 9.44.020 and RCW 403. The trial court should be affirmed.

This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *State v. Hudlow*, 99 Wn.2d 1, 17, 659 P.2d 514 (1983). This Court also reviews a trial court's determination of the danger of unfair prejudice versus probative value for an abuse of discretion. *Id.* A trial court's decision to exclude evidence should only be overturned if no reasonable person could take the view adopted by the trial court. *Id.* A trial judge, and not an appellate court, is in the best position to evaluate the

dynamics of a jury trial and therefore the prejudicial effect of a piece of evidence. *State v. Taylor*, 60 Wash.2d 32, 40, 371 P.2d 617 (1962). Evidence of a victim's past sexual behavior is inadmissible on the issues of credibility and consent. RCW 9A.44.020(2). The purpose of the rape shield statute is to prevent prejudice arising from promiscuity and by suggesting a “logical nexus between chastity and veracity.” *State v. Peterson*, 35 Wash.App. 481, 485, 667 P.2d 645 (1983). Additionally, the statute is designed to encourage rape victims to prosecute and also to eliminate prejudicial evidence which has little, if any, relevance. *State v. Cosden*, 18 Wash.App. 213, 218, 568 P.2d 802 (1977). The statute, however, does not establish a blanket exclusion where the purpose of the evidence is highly relevant. *Id.*

Diese argues the graphic photograph of N.B. inserting fingers into her vagina, and her reference to a double-headed bob should have been admissible to prove “that the hematoma was inflicted by sexual activity that occurred before February 23-27, 2014.” Br. of Appellant, p. 49. The text messages did not establish that N.B. had sexual intercourse within even a month prior to the rape. RP 113. Further, the offer of proof regarding the testimony of the sexual assault nurse examiner established that she would be surprised a hematoma would have lasted four days (the length of time between the rape and N.B.’s sexual assault exam). Diese’s

current argument that this evidence should have been admitted to show she had penetration of her vagina before February 23, 2014 flies in the face of the argument he made to the trial court, wherein he argued the evidence was admissible to show sexual activity and penetration after February 23, 2014, which could have explained the victim's vaginal injury. RP 112-13. Furthermore, there was no evidence from the text messages or that Diese presented, that at all established the date these photographs were taken, only the date they were sent. Nothing connected these photographs to having been taken on a certain date. Diese offered no expert witness to testify that the victim's vaginal injury could have lasted since January 11, the most recent date the text messages would have supported an inference N.B. had sexual intercourse, and the State's expert was surprised the injury would be even four days old. RP 117.

Also, the text messages have little to no relevance to N.B.'s actual actions, only things she was willing to say via text message. Our Courts have recognized that "[p]eople might talk about doing something, but it is very different talking about it than actually doing it. Anybody who's had an e-mail correspondence with anybody knows it's easy to say things during that correspondence that you wouldn't necessarily say to their face." *State v. Posey*, 130 Wn.App. 262, 277, 122 P.3d 914 (2005), *aff'd in part, reversed in part on other grounds*, 161 Wn.2d 638, 167 P.3d 560

(2007). In *Posey*, the Court on appeal found the trial court was within its discretion to exclude an e-mail the victim sent the defendant saying she might enjoy being raped. *Id.* This was an e-mail the rape victim sent the defendant prior to the rape occurring. *Id.* The Court found the email was excluded properly on the basis of unfair prejudice. *Id.* These text messages are also unfairly prejudicial in Diese's case. The evidence's value to Diese was simply in that it showed N.B.'s potential promiscuity and her lack of chastity. This is improper character evidence and specifically prohibited by RCW 9.44.020.

Diese also argues the sexual text messages should have been admitted to show N.B.'s credibility and willingness to lie about sexual matters. The text message Diese refers to simply said, "Got bad news, I'm pregnant," and then a later text said she was joking. RP 119; Ex. 10. This does not prove the victim lied on a prior occasion. But even if it was sufficient to prove the victim had previously lied, to the extent any prior statement a victim has ever made that may be shown later to have been false is somewhat relevant, the evidence of N.B.'s text messages of a sexual nature were clearly more prejudicial than probative under ER 403. Furthermore, extrinsic evidence of a victim's prior inconsistent statement is inadmissible under ER 608, and defense simply could have been allowed to ask N.B. during cross-examination if she had ever lied about

being pregnant and she would have said yes or no, and no matter what, the inquiry would have ended there. The trial court clearly exercised appropriate discretion in precluding this line of questioning and extrinsic evidence regarding this. With N.B. visibly 9 months pregnant at the time of trial, due to give birth any day, this evidence would have done nothing to discredit N.B. Any potential error on this ground is utterly harmless.

Diese argues the text messages of a sexual nature that N.B. exchanged with others should have been admissible to show that she showed “no sense of being distraught or otherwise traumatized by the alleged rape....” Br. of Appellant at p. 50. This argument has absolutely no support in the record or case law. Victims of sexual assault do not all act the same way. Some victims of sexual assault refrain from sexual activity, others may be promiscuous and still others may have a healthy “normal” sex life after the trauma. Some victims of sexual assault go into shock, some cry hysterically, and others pretend nothing happened and go about their lives. There is no one-size-fits-all reaction to sexual assault. Further, Diese offered no expert to testify that N.B.’s reaction was inconsistent with having been raped, nor did the court receive any such proffer. Diese’s belief that N.B. reacted inconsistently with having been raped is simply wild speculation and would have been nothing more than an opinion on N.B.’s credibility. Diese’s attempts to admit this evidence

were clearly to circumvent the Rape Shield statute and taint the jury's opinion of N.B. This admission of this evidence for this purpose is clearly prohibited. The trial court did not abuse its discretion in admitting this evidence. Diese's claim fails.

V. The trial court did not err in denying Diese's motion for a mistrial.

Diese argues the trial court erred in denying his motion for a mistrial after his girlfriend, Ms. Dual, referred to him being in jail. The trial court properly found insufficient grounds to declare a mistrial. An instruction telling the jury to disregard would have cured any potential prejudice to Diese. The trial court's denial of the motion for a mistrial was proper.

The granting or denial of a motion for a mistrial is reviewed by this Court for abuse of discretion. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court's denial of a motion for mistrial "will be overturned only when there is a 'substantial likelihood' the prejudice affected the jury's verdict." *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). To determine if an event at trial affected the

outcome, this Court looks to 1) the seriousness of the irregularity; 2) whether it involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard it. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court should only grant a mistrial “when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986).

Case law involving a jury seeing a defendant shackled, though even more extreme a situation than a witness fleetingly referring to having received letters from the defendant in jail, may be instructive in this Court’s analysis of the present issue. The mere fact that a jury sees an inmate wearing shackles does not mandate reversal. *State v. Gosser*, 33 Wn.App. 428, 435, 656 P.2d 514 (1982); *State v. Early*, 70 Wn.App. 452, 853 P.2d 964 (1993). In *Gosser*, the trial court properly denied a defendant’s motion for a mistrial even though several jurors saw him in shackles. *Gosser*, 33 Wn.App. at 436. In *State v. Sawyer*, 60 Wn.2d 83, 371 P.2d 932 (1962), the Court ruled that an instruction to the jury after they saw the defendant being handcuffed by a deputy cured the error and therefore the defendant’s motion for a mistrial was properly denied. *Sawyer*, 60 Wn.App. at 85-86. In these cases, the jury did not just hear that

a defendant was at some point in jail, but actually saw him being handcuffed or in shackles, which gives the inference of dangerousness and guilt, far more than a fleeting mention of him being in custody. Yet even in these cases, a curative instruction to the jury obviated any potential error. Here, Diese specifically rejected the trial court's offer to give a curative instruction to the jury on this issue. When an error can be obviated by a jury instruction, that error is waived by failing to request such an instruction. *State v. Russell*, 33 Wn.App. 579, 588, 657 P.2d 338 (1983).

“[T]he trial judge is best suited to judge the prejudice of a statement[.]” *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Here, the record supports the judge's conclusion that an instruction to disregard would have cured the irregularity. Because Diese expressly rejected the trial court's offer to instruct the jury, he has waived this error. Nothing from Ms. Dual's brief testimony that she received a letter from Diese in jail prejudiced him more than the juries' views of defendant in shackles did in the above-discussed cases. The trial court properly exercised its discretion to deny Diese's motion for a mistrial given all the surrounding circumstances of the evidence, the ability to cure the error, and Diese's rejection of such instruction. Diese's claim fails.

VI. The trial court properly allowed the jury to hear the audio CD during deliberations.

Diese argues the trial court improperly replayed the audio recording of the rape, which was an admitted exhibit, to the jury during deliberations. Diese further argues this Court should review this decision *de novo*. However, case law clearly dictates this issue should be reviewed for an abuse of discretion. The trial court was properly within its authority and its sound discretion when it replayed the admitted audio recording for the jury, in open court, at the jury's request. Diese's claim fails.

Decisions involving evidentiary issues lie largely within the trial court's discretion. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Such a decision will not be reversed absent an abuse of discretion. *Id.* (citing *Maehren v. City of Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979)). An abuse of discretion occurs if no reasonable person would take the view adopted by the trial court. *Id.* (citing *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979)).

In *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997), the Supreme Court found it was within the trial court's discretion to allow a jury to replay an admitted sound recording. In that case, the jury was allowed to have possession of audio tapes that had been admitted at trial that depicted the alleged drug transaction. *Castellanos*, 132 Wn.2d at 97.

In *State v. Frazier*, 99 Wn.2d 180, 661 P.2d 126 (1983), the Court on appeal found that the trial court properly admitted the defendant's tape recorded statement as an exhibit at trial and allowed the jury to review it during deliberations. *Frazier*, 99 Wn.2d at 188. In *Frazier*, the Supreme Court found that admitting the recording as an exhibit did not unduly emphasize that evidence and expressly noted, "[s]ince the jury could have refreshed its recollection of the contents of the taped statement by rehearing the tape in open court with the trial judge's permission ... we see no reason to automatically prevent the jury from taking such exhibits into the jury room." *Id.* at 190.

In Diese's trial, the audio recording was admitted as an exhibit. From the case law discussed above, it would have been within the sound discretion of the trial court to allow the jury unfettered access to the recording and a CD player in the jury room during deliberations. However, this is not what the trial court did. Instead, the trial court ensured additional protections for the jury by playing the recording only when requested and in open court while the judge maintained control over the proceedings. Case law firmly supports the trial court's actions here.

Diese cites to *State v. Koontz*, 145 Wn.2d 650, 41 P.3d 475 (2002) to support his contention that the trial court improperly replayed the admitted recording of the rape twice during deliberations. In *Koontz*, the

court considered whether replaying for a jury during deliberations video of a witness' in-court trial testimony was appropriate. *Koontz*, 145 Wn.2d at 657. The Supreme Court found that the trial court in this situation should consider how to limit the replay to the jury's request and how to protect the parties.

Protections to prevent undue emphasis in the manner of video replay may include replay in open court, court control over replay, and review by both counsel before presentation to the jury. Other protections may include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to answer a specific jury inquiry against the danger of allowing a witness to testify a second time. It's seldom proper to replay the entire testimony of a witness."

Id. at 657.

Even though *Koontz* is not on point, and the Supreme Court indicated additional protections are needed when it comes to replaying video testimony as opposed to admitted sound exhibits, the trial court here met the *Koontz* requirements. The Supreme Court specifically found that the issue of whether to replay trial testimony was a separate issue than the admission of a tape recording into evidence such as was seen in *State v. Frazier, supra*. Thus, the Supreme Court in *Koontz* found that its jurisprudence regarding admitted sound exhibits was inapposite to that

case, which posed the issue of replaying of trial testimony via a video to the jury. *Koontz*, 145 Wn.2d at 658. In Diese's case, the trial court employed many of the additional protections the Supreme Court discusses in *Koontz*, even though it dealt with evidence which squarely fell within the lesser protections of *Frazier, supra* and *Castellanos, supra*. The trial court was abundantly cautious in its approach; no one can reasonably claim this judge violated her discretion. The trial court took discretionary steps to limit the prejudicial effect of the tape.

Finally, Diese's claim of prejudice from the replaying of the tape rings hollow. Diese fails to mention in his brief that he played the recording during his closing argument. RP 943. Clearly this was evidence Diese, himself, found to support his argument that no rape occurred. The trial court clearly exercised sound discretion in replaying the recording to the jury during its deliberations. The trial court should be affirmed.

VII. Diese received effective assistance of counsel.

Diese claims he received ineffective assistance of counsel when his attorney failed to move for a mistrial after the jury wrote a note indicating juror #3's hearing did not allow him to hear a portion of the audio recording. Trial counsel clearly had reasonable tactical reasons for keeping a juror who, by any reasonable inference, was a not guilty vote, and for

not moving for a mistrial. Diese has not shown ineffective assistance of counsel and this court should deny his claim.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel’s performance is deficient if it falls “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney’s performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyлло*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on

the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should

be highly deferential to trial counsel's decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

Diese has not shown there is no conceivable legitimate trial tactic in failing to move for a mistrial upon hearing a juror had bad hearing and wanted the recording to be played again. First, simply because a juror had a hard time hearing a cell phone recording (which the court-appointed transcriptionist largely transcribed as "inaudible") does not indicate the juror had a general hearing difficulty or in any way suggest the juror did not hear the testimony of the witnesses at trial. Audio recordings can be difficult for any person to hear, but this recording in particular, as is evident from playing the exhibit, includes significant shuffling and ruffling near the microphone, multiple inaudible murmurings and was mostly the victim crying. Even defense counsel stated, "it's not like this is a great recording. So there's only going to be some degree that any individual is going to be able to hear it." RP 992. The defense attorney's discussion of the options in dealing with juror #3's hearing difficulty shows she was thinking strategically and acting tactically for Diese. She stated, "I mean, based on the level of questions and things that have been

coming back, I really don't want to throw an alternate into the mix at this point." RP 992-93.

Furthermore, the trial court remedied any potential issue with juror #3's ability to hear the audio recording by replaying the recording, with juror #3 sitting in the front row wearing amplification headphones to assist the hard of hearing. The trial court was satisfied after the jury returned to deliberate for an additional 30 minutes without indicating juror #3 continued to have difficulty hearing the recording. Based on this record, Diese cannot establish any prejudice from any action his counsel did or did not take with regards to juror #3's hearing. The record supports that defense counsel's decision to forego bringing in an alternate and keep juror #3 was strategic. It was a reasonable trial tactic to maintain the jury as composed given their known difficulties in deliberating. It was reasonable for Diese's counsel to hold out for a hung jury and to keep a juror who, by inference from the note, was not on the same page as the other jurors. As the recording was compelling evidence, given the victim's clear emotional distress on the recording, it was reasonable for defense counsel to believe a juror unable to understand or hear the recording would be beneficial to Diese. After all, Diese did argue this recording was "extremely prejudicial" to him. Br. of Appellant at p. 39. Trial counsel employed a reasonable tactic in deciding to keep juror #3 and replay the

recording as opposed to asking for an alternate. Diese has not shown his counsel was ineffective.

VIII. The trial court properly allowed the jury to continue deliberations.

Dieese argues the trial court violated his right to due process by requiring the jury to continue deliberations over a three-day holiday weekend. Given the length of the trial, the number of witnesses and amount of evidence presented, a total time of less than 8 hours deliberating was not coercive or improper. Diese's claim fails.

CrR 6.10 provides a trial court may discharge a jury "when it appears that there is no reasonable probability of their reaching an agreement." CrR 6.10. A trial judge has broad discretion in deciding if a jury is permanently divided. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). The trial court is in "the best position to determine whether a jury's stalemate is only a temporary step in the deliberation process or the unalterable conclusion to that process." *State v. Taylor*, 109 Wn.2d 438, 442, 745 P.2d 510 (1987). There is no standard that sets a "normal" length for jury deliberations and there is no authority that requires a mistrial when a jury deliberates beyond that period. *State v. Boulet*, 5 Wn.2d 654, 660, 106 P.2d 311 (1940). A jury's own assessment that it is deadlocked is not itself a sufficient ground upon which the trial court may find the jury is

deadlocked and declare a mistrial. *Taylor*, 109 Wn.2d at 443 (citing to *U.S. v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980)). The judge may consider progress in the deliberations as well as the length of the trial, the length of deliberations, and the complexity of the evidence presented to the jury. *Id.* (citing *Jones*, 97 Wn.2d at 164 and *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)).

In *State v. Connors*, 59 Wn.2d 879, 371 P.2d 541 (1962), our Supreme Court noted,

[I]t is universally recognized that a jury which, after a reasonable time, cannot arrive at a verdict, may be discharged and the defendant tried again. Even so, a too quick discharge of a hung jury would be held a violation of the defendant's right to a verdict of that jury.

Connors, 59 Wn.2d at 883. A trial judge is allowed broad discretion in deciding whether a jury should be discharged. *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982) (citing *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) and *State v. Brunn*, 22 Wn.2d 120, 145, 154 P.2d 826 (1945)). The U.S. Supreme Court summed up the dilemma well in stating,

On the one hand, if [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures

inherent in the situation rather than the considered judgment of all the jurors.

Arizona v. Washington, 434 U.S. at 509. A trial court is in a difficult position in determining whether an early declaring of a hung jury will deprive a defendant of his right to a fair verdict, or if waiting longer will unjustly pressure the jury into a verdict. Because of this difficult position the trial court may find itself in, its exercise of discretion should be honored and should not “lightly be upset.” *Jones*, 97 Wn.2d at 165. In determining how to exercise its discretion, the trial court should consider the length of time the jury has been deliberating in light of the length of the trial and the volume and complexity of the evidence. *Id.* at 164 (citing *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)). A judge may ascertain how the jury stands numerically and consider that in determining whether further deliberations would resolve a deadlock. *Id.*

When a jury had deliberated for only 2 hours on a felony flight charge, even though the jury foreman indicated a unanimous verdict was unlikely, the judge properly instructed the jury to continue deliberations. *State v. Taylor*, 109 Wn.2d 438, 444, 745 P.2d 510 (1987). In *State ex. rel. Charles v. Bellingham Municipal Court*, the trial court improperly declared a mistrial for a deadlocked jury after a jury deliberated only an hour and 15 minutes on a hit and run charge, even though foreman stated

they were unable to reach a verdict. *State ex. rel Charles v. Bellingham Municipal Court*, 26 Wn.App. 144, 149, 612 P.2d 427 (1980).

In *Jones, supra*, the Supreme Court found a jury deliberating for more than 11 hours on a rape case was “hardly extraordinary and striking,” noting that the trial had lasted almost 4 days. *Jones*, 97 Wn.2d at 165. Diese’s jury returned its verdict in under 8 hours of deliberation after trial started on Monday, February 9, 2015 and the jury began its deliberations on Friday February 13, 2015, the fifth day of trial. As in *Jones*, also a rape case, there were significant factual issues for the jury to discuss.

The trial judge, with her courtroom experience and having sat in this trial for five days, was “better able to assess whether the complexity of the evidence might require further discussion to produce unanimity.” *See Taylor*, 109 Wn.2d at 444. This Court should afford the trial court great deference in its exercise of its discretion to continue having the jury deliberate when two of the jurors indicated they thought they may still be able to come to a verdict. When the trial court first got notice the jury was divided, the judge noted, “[i]t is now 4:30. The jury went out to deliberate at 1:30. They have not been out a particularly long period of time on a four day trial.” RP 983. There is no evidence the trial court unduly influenced the jury or coerced the jury by having them deliberate longer. The trial

court should be afforded great deference and it is clear the trial court made a thorough and reasoned decision to continue deliberations. The trial court's decision not to declare a mistrial due to a deadlocked jury should be affirmed.

IX. Cumulative error did not deny Diese a fair trial.

Diese argues cumulative error denied him a fair trial. As discussed in each of the preceding sections, Diese has not shown any error below, let alone cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, Diese has failed to show error, or how each alleged error affected the outcome of his trial. Further, Diese has not shown how the combined error affected the outcome of his trial. Accordingly, Diese's cumulative error claim fails.

CONCLUSION

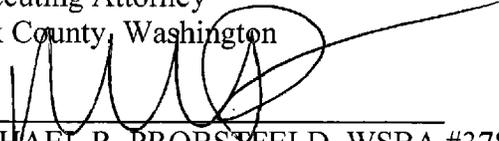
For the foregoing reasons, Diese's conviction for Rape in the Second Degree should be affirmed.

DATED this 22 day of April, 2016.

Respectfully submitted:

ANTHONY F. GOLIK
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By:



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CLARK COUNTY PROSECUTOR

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