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Court of Appeals
Division II
State of Washington
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NO. 49396-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

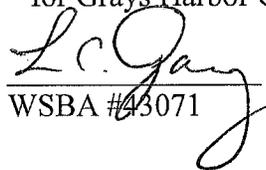
JOEL M. KREBS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN BROWN, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The appellant was originally charged by Information filed on March 8, 2016. CP 1. A hearing was held prior to trial on July 25, 2016 to address motions in limine and any other issues for trial. July 4, 2016 RP 4.

The trial commenced on July 26, 2016. Trial RP 18. The appellant was found guilty as charged on July 27, 2016. CP 77; Trial RP 222-23. The appellant was sentenced on September 9, 2016 to 90 months/7 and ½ years. CP 186.

b. Statement of Facts

On February 11, 2016, Deputy Wecker of the Grays Harbor Sheriff's Office was advised of a pending sex offense. CP 26; Trial RP 121. St. Peter's Hospital had called regarding a 19 year old female having a rape kit performed. CP 26; Trial RP 121. A nurse from St. Peter's Hospital had advised that S. C. had been sexually assaulted on February 9, 2016, by Tanner Birdsall and Joel Krebs. CP 26; Trial RP 121. S. C. was currently at her mother's residence on West Satsop Road. CP 26; Trial RP 122. Both S.C. and S.C.'s mother testified at trial.

Deputy Wecker responded to S.C.'s mother's location near Montesano. CP 26; Trial RP 122. S. C. stated that she had posted on Snapchat on February 9, 2016 that she was coming down from Tacoma for the weekend to stay with her mother. CP 26; Trial RP 42. S.C. had graduated from Montesano High School and had moved to Tacoma after graduation to attend school. CP 26; Trial RP 40. She stated that she and Krebs had previously been in a dating relationship, which ended in June 2015, but had remained friends. CP 26; Trial RP 39, 42-43. On her way from Tacoma to Montesano, S.C. had received a text, and later a voice call, from Krebs, asking if she wanted to hang out with him and Tanner Birdsall. CP 26-27; Trial RP 42, 43. S.C. agreed, having known both young men for several years and wanting to socialize with friends from home. CP 27; Trial RP 44. S.C.'s mother also stated that there had been multiple other times when either or both Krebs and Birdsall had been in her home and around her family so she had no concerns about S.C. hanging out with them. Trial RP 83.

S. C. reported she arrived sometime after 8:00 p.m., and that they went to Birdsall's residence after meeting at the 7-11 in Central Park. CP 27; Trial RP 44, 45. She said when they arrived at the residence, Birdsall handed her a "Mike's Hard Lemonade" from the fridge. CP 27; Trial RP

46. She stated that Birdsall and Krebs were playing beer pong, and eventually she joined in. S. C. advised when she started drinking her third alcoholic beverage, she started to feel really strange. CP 27; Trial RP 47, 49. S. C. stated that she had drunk “Mike’s Hard Lemonade” in the past, but that she had never been affected like that before. CP 27; Trial R.P. 38, 49. S.C. stated that Mike’s Hard Lemonade was the only thing that she really drank and she didn’t know where it had come from. Trial R.P. 46. S.C. testified that the Mike’s Hard Lemonade was already there and that Krebs and Birdsall were drinking beer. Trial R.P. 47. S. C. denied having taken any medications or drugs. CP 27; Trial RP 46. S.C. stated she got a tour of the house and then they were just all drinking and catching up. Trial RP 47. S.C. stated that Krebs and Birdsall had started playing beer pong, which had already been set up and it appeared they had been playing earlier. Trial RP 47-48. S.C. stated they eventually asked if she wanted to play, too. Trial RP 47. S.C. stated Birdsall had recently broke his hand and that they had a discussion about the medication he needed for that injury. Trial RP 49. When asked what the discussion was about, the Court sustained a hearsay objection. Trial RP 49.

S. C. stated that she started having a tough time keeping her balance, that she felt really dizzy, that she was falling down a lot, and it

got a “a little fuzzy” after having three or four Mike’s Hard Lemonades. CP 27; Trial RP 49. S. C. stated that when Krebs and Birdsall suggested they play strip beer pong, she said that she would play, but was only going down to her bra and underwear. CP 27; Trial RP 50, 51. S.C. remembered going to the bathroom, sitting down, and feeling really dizzy. Trial RP 49. S.C. stated she stood up to walk out of the bathroom and fell into the kitchen. Trial RP 49. S.C. had early stated she had reactions to medications, specifically Vicodin and most antibiotics. Trial RP 39. She talked about her reaction to Vicodin, describing that she gets very violently ill, throws up, and gets migraines. Trial RP 39. S.C. stated that she felt the effects of the alcohol were amplified from how she typically felt when she drank before, but she didn’t know why that would be. Trial RP 49.

S.C. stated she remembered being picked up by Krebs and carried into the bedroom. CP 27; Trial RP 50, 58. S.C. stated that she couldn’t stand and was unable to walk on her own. Trial RP 50. S.C. next remembered both Birdsall and Krebs were in the bedroom with her, laying down on each side of her. Trial RP 50. S.C. stated they were touching her and kissing her. Trial RP 50. S.C. reported that she was unable to move and that she couldn’t really talk all that much. CP 27; Trial RP 51. She

advised that they were both touching her, taking off her underwear, and starting to do things to her, but she couldn't do anything about it. CP 27; Trial RP 51. S.C. stated that she tried to say no and was asking what they were doing, but they said, "shhh, it's fine" and there was nothing she could do. Trial RP 51-52. S.C. stated that when Krebs and Birdsall were touching different parts of her body, kissing her neck and her body, she was panicking. Trial RP 52. S.C. stated that she didn't know what to do because she couldn't stop it. Trial RP 52. S.C. stated that she was trying to say no and that she didn't want those things to happen, but there was nothing she could do. Trial RP 52. S.C. stated that she was still feeling the effects of the alcohol and that she could barely keep her eyes open and couldn't move all that well. Trial RP 52-53. S.C. stated that she felt paralyzed. Trial RP 53.

S. C. stated the next thing she remembered was Birdsall forcing himself inside her vagina. Trial RP 53. S.C. stated she remembered Krebs trying to do other things to her at the same time, describing that Krebs was trying to put his penis in her mouth and other places. Trial RP 53. S.C. stated that she was just lying there, wanting it to stop, while this was happening. Trial RP 53. S.C. stated that she couldn't really move or go anywhere so she just kind of laid there, hoping it would be over. Trial

RP 54. S.C. recalled Krebs actually putting his penis inside of her mouth and saying to Birdsall, "We will be bros now." Trial RP 54. S.C. stated she remembered Birdsall saying he couldn't finish because Krebs was there and S.C. recalled that she was crying at that time. Trial RP 54, 77. S.C. stated Krebs asked, "Do you want me to leave?" and she went unconscious again. Trial RP 77. S.C. stated that she was coming in and out a lot and she was pretty sure Krebs left the room. Trial 54, 77.

S.C. stated that after Birdsall finished, Krebs came back and forced himself inside her vagina. Trial RP 54-55. S.C. stated that it was very painful and that Krebs was very violently angry about it. Trial RP 55. S.C. stated that she screamed and she was crying, asking him to stop and telling him that it was hurting, but that Krebs kept going. Trial RP 55. S.C. remembered hearing laughing while she was crying. Trial RP 55. S.C. stated that at this point she was really scared because there was nothing she could do. Trial RP 55. S.C. stated that she was really confused from the alcohol and wanting to get out and wondering what she could do to try to leave, but there was nothing she could do. Trial RP 55. S.C. clarified that she meant she was physically unable to move when describing why she was unable to leave or do anything. Trial RP 55-56.

S.C. stated that when Krebs finished, he pulled out and ejaculated on her face, then wiped it off with either a towel or a t-shirt. Trial RP 56.

S.C. stated that she went unconscious and recalled walking up again and trying to leave the bedroom. Trial RP 56. S.C. recalled falling down through the doorway and crawling to the living room to find one of them or her clothes. Trial RP 56. S.C. recalled she was crying and that Birdsall came over and asked if she need anything. Trial RP 56. S.C. stated she asked for her inhaler because she was hyperventilating and Birdsall gave it to her. Trial RP 56. S.C. stated that she passed out again and woke up in the bedroom again, but this time with her clothes on. Trial RP 56. S.C. recalled Birdsall helping her put her shirt on right before she passed out and that was the last thing she remembered before waking up again around 2:00 a.m. Trial RP 57. When she woke up around 2:00 a.m., S.C. stated she felt the effects of alcohol had kind of left her body and she walked into the living room where Birdsall and Krebs were both sleeping. Trial RP 57. S.C. stated she was really confused, hurting, and unsure of what was going on. Trial RP 57. S.C. stated she woke Birdsall up and he sent her back to bed after she got water. Trial RP 57. S.C. stated she fell asleep and the next time she woke up again, it was 8:00 a.m. and Birdsall and Krebs were telling her she needed to leave. Trial RP 57.

S. C. stated she was still unsure of what was going on and was really confused at that time. Trial RP 58. S.C. recalled that she was still pretty fuzzy in the morning and that she was still a little bit out of it when they had woken her up. Trial RP 60. S.C. stated that she was hurting down in her vaginal area and that she asked Krebs and Birdsall repeatedly what happened and whether anything sexual had happened between them. Trial RP 58. S.C. recalled Krebs asking her if she remembered what happened, which she did not because she had no memories at that time about what happened with regard to why her vagina was hurting. Trial RP 60. S.C. described Krebs and Birdsall's demeanor as really calm when she asked them about what happened or why her vagina was hurting. Trial RP 58. S.C. stated that Krebs and Birdsall told her that she had fallen and hit her crotch on the couch. Trial RP 59. S.C. stated that Krebs told her that she was really drunk and was falling over. Trial RP 60. S.C. stated that the couch was soft and it didn't really make a lot of sense what they were telling her had happened as an explanation for why her vagina was hurting. Trial RP 59. S.C. stated that at that point she gave them the benefit of the doubt and that she just wanted to leave and go home. Trial RP 58.

S.C. stated that she was feeling really sick when she woke up and left the house that morning and that she went to her mom's house after leaving. Trial RP 60, 61. S.C. stated that she got really sick and was vomiting for a number of hours afterward. Trial RP 61. S.C.'s mother also stated that she was in the bathroom vomiting the next morning and that she was surprised to see S.C. back so early. Trial RP 83. S.C. stated that after throwing up, she was finally able to sleep for a while and she slept for a few hours. Trial RP 61. S.C. stated that she was having nightmare flashes while she was sleeping and was starting to remember things. Trial RP 61, 62. S.C. stated her family had been home when she first got back and she had told her family that she had quite a few drinks and wasn't feeling really good. Trial RP 61-62. S.C. stated that she had told her mom that she was really hurting down there and that her mom had asked her why she was so sick and hurting so bad. Trial RP 62. S.C. stated that what they said happened didn't make sense, but that's what they said had happened so she was going to trust them at that point. Trial RP 62.

S.C. stated that Krebs called her while she was still throwing up and asked if she was okay and if she needed anything. Trial RP 62, 63. S.C. stated that she could hear Birdsall talking in the background and that

she asked Krebs multiple times if anything sexual happened between them. Trial RP 63. S.C. stated that he told her no. Trial RP 63. S.C.'s mother also contacted Krebs the next day because S.C. was still really sick and throwing up three hours later. Trial RP 84. S.C.'s mother stated Krebs didn't respond right away and when he did, he told her that S.C. had quite a bit to drink and that he had tried to cut her off after two drinks. Trial RP 84. S.C.'s mother stated that Krebs asked if there was anything he could do and S.C.'s mother said he could get her some ginger ale or saltines because she wasn't at home and she was concerned about how sick S.C. was so wanted someone to check on her as well. Trial RP 85. Krebs conversation with S.C.'s mother the next morning was admitted at trial as State's Exhibit 1. Trial RP 86. S.C. stated that when she started to have flashbacks, she started to panic. Trial RP 62. S.C. stated that her mom wasn't home when she started to remember things because she had left for a doctor's appointment. Trial RP 62.

S.C. stated that she called her mom and told her that she needed her to come home as soon as she could because she needed to talk to her because she was starting to remember some things. Trial RP 62. S.C.'s mother testified about S.C. calling her telling her that S.C. needed her to come home. Trial RP 87. S.C.'s mother stated S.C. didn't give her any

indication what was going on over the phone, but just had a mom feeling that something was really wrong. Trial RP 87. S.C. stated at that point all she could really remember was falling down, waking up, naked on the bed, alone. Trial RP 63. S.C. told her mother about these few things she could remember at that point and her mom said they should go to the hospital to get checked out to see if anything did happen. Trial RP 64, 88. S.C.'s mom stated that she had a very open relationship with S.C. and that S.C. would not have been embarrassed at all to talk to her if she had knowingly had sex. Trial RP 88.

S.C. stated that she didn't want to go at first because she was scared of finding out what had really happened and that she was still kind of in denial about it, hoping for the best. Trial RP 64. S.C.'s mother verified that it took some convincing to get S.C. to go to the hospital. Trial RP 89. S.C. relayed her experience in waiting hours in the hospital and the process of the sexual assault exam. Trial RP 64-65. S.C. stated that she was remembering more of what had happened and that more details were coming back to her during that period of time. Trial RP 65. S.C. stated that a pubic hair was found during the exam and that she was more confident about reporting to the police because of that since she

didn't have any public hair because she has a body hair phobia. Trial RP 66.

S.C. stated that she felt that Krebs and Birdsall were lying to her and she wanted to know the truth. Trial RP 66. S.C. stated she felt betrayed by Krebs and Birdsall because they had been friends and she didn't feel she could trust anybody anymore. Trial RP 66-67. S.C. also testified that she was concerned about something else and not just the alcohol. Trial RP 67. S.C. stated she had never been that violently ill before from that much alcohol and it just didn't make a lot of sense to her. Trial RP 67. When asked what her thoughts were on that on what was going through her mind, defense objected, stating that the question called for speculation. Trial RP 67. The Court sustained the objection, stating S.C.'s thoughts would not be relevant. Trial RP 67. Thereafter the police became involved and S.C. was asked to do a confrontation call during the investigation. Trial RP 68. S.C. stated that Krebs first told her that nothing happened, absolutely nothing. Trial RP 70. S.C. then stated that Krebs later said that if anything had happened sexually, it happened between her and Birdsall and that she needed to talk to him. Trial R.P. 70. S.C. stated that Krebs demeanor was very calm during her call to him, which she said was a little off for him. Trial R.P. 70. When asked what

agreement or consent she had given to either Krebs or Birdsall on February 9th to have sex with her, S.C. stated, “None.” Trial RP 71.

Deputy Beck testified at trial about his involvement with the case. Prior to his testimony, defense asked for the jury to be excused to address the decision in the trial court’s motions in limine the day before. Trial RP 91. Defense counsel stated that S.C. was allowed to testify about what she felt and what she thought as it related to the Vicodin that had been located in the home for Birdsall for his broken hand. Trial RP 91. Defense asked to have any information from Deputy Beck about the hydrocodone bottle from Birdsall being seized and entered into evidence excluded as it would be pure speculation to have that information be part of the trial at that point. Trial RP 91. The State stated it was not intending to ask Deputy Beck about the hydrocodone, only about his involvement in the case, how he initially took the report, and some interaction he had with Krebs, including statements Krebs gave to him. Trial RP 92. Deputy Beck stated that he had initially become involved with the case when he received a call from St. Peter’s Hospital in Olympia regarding a sex offense complaint on November 11, 2016. Trial RP 95. Deputy Beck spoke with S.C. briefly over the phone, but had another matter to attend to so passed the information he had so far onto Deputy Wecker. Trial RP 96. Deputy

Beck stated that he assisted with taking Krebs into custody a few days later on the 14th of November. Trial RP 96. While in Deputy Beck's patrol vehicle, Krebs stated to Deputy Beck, "Is this about [S.C]? I was in the other room." Trial RP 96. Deputy Beck stated that he also assisted in the search warrant of the residence where the alleged crime took place, but made no comment or statements about any evidence Trial RP 97.

Sergeant Wallace also testified at the trial. Sergeant Wallace testified that he supervises patrol deputies as part of his duties and he also described his extensive experience in investigations, particularly detailing his experience in investigating sex crimes. Trial RP 99, 100. Sergeant Wallace stated that he was familiar with the Krebs and Birdsall case because he was working the day the call came out and that Deputy Beck initially had the case, then it was transferred to Deputy Wecker. Trial RP 101. Sergeant Wallace stated that Deputy Wecker was then aspiring to be a detective and he coached him through the investigation process because Deputy Wecker did not have as much experience in dealing with sex crimes. Trial RP 101. The State asked Sergeant Wallace what information he had about the case before he became involved and he stated that Detective Wecker had told him that S.C. had given a statement saying Krebs and Birdsall raped her the night before. Trial RP 101. Sergeant Wallace

stated that S.C. had gotten highly intoxicated, so intoxicated that she blacked out and couldn't remember what had happened. Trial RP 101-102. Sergeant Wallace stated that S.C. woke up the next morning, was very sore down in her private parts, vagina area, and starting asking questions of Krebs and Birdsall and they completely denied anything that happened. Trial RP 102. Defense objected as to hearsay and the trial court sustained as to the answer that was given. Trial RP 102.

Sergeant Wallace went on to talk about his involvement in the case and stated that he drafted a search warrant to intercept a call with both Krebs and Birdsall. Trial RP 102. Sergeant Wallace explained that they were going to do a confrontation call with both Krebs and Birdsall and he secured an authorization to do that. Trial RP 102. Sergeant Wallace went through the steps of stepping up a confrontation call and what a confrontation call is. Trial RP 103, 104-105. During his explanation of how he specifically set up the equipment and went over the parameters with S.C., Sergeant Wallace was explaining that he would write S.C. notes during the call to kind of steer her in a direction of what questions to ask. Trial RP 105. The State asked why that was done, asking if "that was to help them so there's not dead silence, or..." Trial RP 105. Sergeant Wallace stated, "It's...maybe not to fill dead silence, but the victims are so

nervous and so...” Trial RP 105. Defense interrupted and stated, “Objection to the reference of “victim,” your honor. Trial RP 105. The trial court stated, “All right. If you could ask...ask another question.” Trial RP 105. The State stated okay and then the trial court stated, “I’ll sustain that.” Trial RP 105. The State stated okay again and then asked a new question. Trial RP 105.

The State next asked what issues or difficulties there were in either prepping S.C. or setting up the equipment for this particular confrontation call and Sergeant Wallace stated, “When you’re doing those calls, people doing the calls are very nervous. Nervous by being there, they’re nervous about what happened, they’re nervous about acknowledging what happened to them, so sometimes they get stuck on talking to the perpetrator and kind of just...” Trial RP 106. Defense interrupted again and stated, “Objection. Reference to “perpetrator.” The accused would be fine.” Trial RP 106. The trial court responded with, “Well, the witness is giving their answer, so I’m going to allow that. And so it’s ...go ahead. Let’s try to use better language. Go ahead.” Trial RP 106. The State then stated, “So if you want to complete your thought, if you remember now where you were at. It’s just to avoid some difficulties when you’re doing the call itself?” and Sergeant Wallace stated, “Yes.” Trial RP 106.

Sergeant Wallace then went on to describe that he was only able to hear S.C.'s side of the conversation and that they could kind of feed off of what she was saying to kind of direct her and what to ask. Trial RP 107.

Sergeant Wallace verified that the conversation was successfully recorded and that he had reviewed the confrontation call. Trial RP 107. When asked what, if anything, stood out to him in the conversation, Sergeant Wallace stated that Krebs made multiple denials, adamant denials that Krebs had any sexual contact, either vaginally or orally, with S.C. Trial RP 107. Sergeant Wallace stated that Krebs was adamant and told S.C. several times that he did not touch her in any way in a sexual fashion. Trial RP 107. Sergeant Wallace noted that when S.C. was confronting Krebs during the call, there were long pauses between her confrontation and Krebs' response. Trial RP 107. Sergeant Wallace stated to state, "Normal people that I've dealt with" when defense objected, citing speculation. Trial RP 107. The trial court sustained the objection and the State asked a new question about whether he was able to review a disk with the confrontation call between S.C. and Krebs prior to that day, which Sergeant Wallace stated he had. Trial RP 108. The disk of the confrontation call was identified and marked as State's Exhibit 3. Trial RP 108.

The state moved to admit the disk for the confrontation call and defense objected on the basis that the transcript of the call had already been admitted as State's Exhibit 2. Trial RP 109. The State intended to have the transcript as a listening aid and had mistakenly admitted it, rather than just having it marked. Trial RP 109. The State moved to withdraw State's Exhibit 2 and to have just the recording of the confrontation call, which was the best evidence, admitted in place of the transcript. Trial RP 110. The trial court agreed with that and admitted the recording to go back to the jury with the transcript just being admitted for illustrative purposes as a listening aid. Trial RP 111. Defense made no further objection once the issue was sorted out by the trial court. Trial RP 111-112. Before the jury was brought back in, defense objected to the presence of S.C. and her mother in the courtroom, stating that they were witnesses who could be recalled and if they were going to be recalled, they shouldn't be present in the courtroom. Trial RP 113.

The State argued the victim and her mother had the right to be present under the law and that the State did not anticipate either of them being recalled. Trial RP 113. The State did indicate if there was some concern, they could be excused, but the State wouldn't know whether they would be recalled or not unless defense's evidence had been heard. Trial

RP 113. The trial court ruled that once a witness has given their testimony, they're no longer excluded from the courtroom and that it's only prior to their testimony that witnesses are excluded. Trial RP 114. The trial court stated it would not make a ruling about whether or not somebody can testify in rebuttal unless and until that came up and defense stated, "Fair enough." Trial RP 114. The trial court continued, "Because I don't know what the issues are" and defense stated, "I raised my objection." Trial RP 114. Defense asked a few questions of Sergeant Wallace and then the State moved to publish the admitted State's Exhibit 3 for the jury with the transcript to be used for the jury to follow along with. Trial RP 116. The trial court later addressed the issue of S.C. and her mother being in the courtroom on the record on the second day of the trial. Trial RP 138. The trial court then quoted ER 615 regarding the discretion of the court to exclude witnesses and RCW 7.69 regarding the rights of crime victims. Trial RP 138. The trial court made it clear that the law required the court to allow the victim to be physically present at trial after testifying and that there was no issue whatsoever regarding S.C. being in the courtroom. Trial RP 139.

In the confrontation call that was played, S.C. stated to Krebs that she was still pretty confused about what happened the other night and that

she didn't really understand why she was so sore inside and out down there. State's Exhibit 2, Transcript Page 1. Krebs responded by stating, "I don't know." State's Exhibit 2, Transcript Page 1. S.C. then asked, "Like, are you sure?" State's Exhibit 2, Transcript Page 1. Krebs responded with, "I'm 100 percent sure that I didn't do anything." State's Exhibit 2, Transcript Page 1. S.C. asked again, "You're sure we didn't have sex. Are you positive?" and Krebs responded with, "Yeah. I'm dead positive me and you did not." State's Exhibit 2, Transcript Page 1. S.C. then asked if she and Birdsall had and Krebs responded that he didn't know and he didn't think so. State's Exhibit 2, Transcript Page 1. S.C. asked how it was that he didn't know because "You were there, weren't you?" State's Exhibit 2, Transcript Page 1. Krebs explained that he went to bed, but that he was pretty sure Birdsall didn't either, meaning have sex with her, because he and his girlfriend were working through everything. State's Exhibit 2, Transcript Page 1.

S.C. talked to Krebs about remembering that she was crying and screaming. State's Exhibit 2, Transcript Page 1. Krebs responded by repeating, "Crying and screaming?" and asking when she did that. State's Exhibit 2, Transcript Page 2. S.C. explained that she didn't know and that it was all coming back to her in bits and pieces. State's Exhibit 2,

Transcript Page 2. S.C. stated that it all still didn't make sense and that's why she was asking him because she trusted that he would tell her if anything happened. State's Exhibit 2, Transcript Page 2. Krebs stated, "I would tell you and I'm telling you that I – me and you – did not do anything." State's Exhibit 2, Transcript Page 2. S.C. stated that she just really wanted to know and that it was really upsetting because "why would I be in pain and that sick or just some stuff just doesn't make sense." State's Exhibit 2, Transcript Page 2. Krebs stated, "That doesn't make sense. I don't know what to tell you." State's Exhibit 2, Transcript Page 2. S.C. then asked Krebs if he was just worried about their girlfriend finding out if they did have sex and Krebs stated, "Not at all 'cause we didn't do anything." S.C. talked about feeling like she did have sex and compared what she was feeling and things that happened to her body that used to happen when they had sex before. State's Exhibit 2, Transcript Page 2. Krebs was silent for 34 seconds, which prompted S.C. to say, "Hello?" State's Exhibit 2, Transcript Page 2. Krebs then stated he was trying to think of when she and Birdsall could have done anything, but he didn't know. State's Exhibit 2, Transcript Page 2. S.C. then talked about how sick she was, that she had never been that sick from drinking that much before, and that she knew she never drank that much. State's

Exhibit 2, Transcript Page 2. Krebs stated, “You did drink a good bit.”

State’s Exhibit 2, Transcript Page 2.

S.C. then asked Krebs if he knew whether or not Birdsall had given her a Vicodin or anything like that and Krebs stated, “No. No, not at all.”

State’s Exhibit 2, Transcript Page 2. S.C. stated that “‘Cause I’ve never been that sick and it just didn’t make any sense even for being hungover.”

State’s Exhibit 2, Transcript Page 3. Krebs stated, “Well, I thought you were gonna call me and say, “Happy Valentine’s Day” or something” in response. State’s Exhibit 2, Transcript Page 3. S.C. responded by stating,

“Why would I say Happy Valentine’s Day when you have a girlfriend?”

and Krebs stated, “I don’t know. I just...I didn’t know why.” State’s

Exhibit 2, Transcript Page 3. There was brief conversation about a snap and S.C. brought the conversation back on topic by stating, “You’re being 100 percent honest with me, right?” State’s Exhibit 2, Transcript Page 3.

Krebs state, “Yeah. One hundred percent. I wouldn’t lie to you about something like that.” State’s Exhibit 2, Transcript Page 3. S.C. then

asked, “‘Cause are you...I remember waking up naked. How did my clothes get off?” and Krebs responded, “I have...I don’t know what to tell

you. I wasn’t even in the same room with you and Tanner. So I don’t

know.” State’s Exhibit 2, Transcript Page 3. Krebs stated, “If me and you

did do something I would tell you, but we didn't." State's Exhibit 2, Transcript Page 3. S.C. went on to state that some pieces were coming back and that she remember waking up in Birdsall's bed naked, not knowing how she got there. State's Exhibit 2, Transcript Page 3. S.C. explained that things were still pretty fuzzy, but stuff was coming back and not making sense. State's Exhibit 2, Transcript Page 3. S.C. stated that she was trying to piece it together and understand. State's Exhibit 2, Transcript Page 3. S.C. stated, "If nothing happened, why is it weighting so heavy on my conscience."

To that Krebs responded, "Good question. I don't know. Maybe it's because Tanner's my best friend." State's Exhibit 2, Transcript Page 3. When asked what he meant by that, Krebs stated, "So is Jacob and Jared was a little bit, too. I don't know. I don't know what to tell you." State's Exhibit 2, Transcript Page 4. Krebs was apparently referring to two of his friends that S.C. had dated at some point. S.C. then asked Krebs if he heard anything and he stated that if he had heard something, he would have just left and that he wasn't going to be around. State's Exhibit 2, Transcript Page 4. S.C. asked that he didn't hear her crying or screaming or anything and Krebs stated, "No. I didn't hear anything. I heard you scream when you hit the stool." State's Exhibit 2, Transcript

Page 4. S.C. stated that she was having flashes that didn't make sense and bad dreams. State's Exhibit 2, Transcript Page 4. S.C. stated that she trusted Krebs and Birdsall to take care of her that night. State's Exhibit 2, Transcript Page 4. S.C. stated that she didn't feel that Krebs was being honest with her because she felt like something happened. State's Exhibit 2, Transcript Page 4. S.C. stated that she couldn't get rid of the feeling and that she just wanted the truth. State's Exhibit 2, Transcript Page 4. Krebs stated, "You're saying I'm lying?" and S.C. responds that she wasn't saying he was lying, but that he just wasn't being honest. State's Exhibit 2, Transcript Page 4. S.C. stated that she wants the truth and an apology if anything did happen. State's Exhibit 2, Transcript Page 4. Krebs stated, "Nothing friggin' happened, [SC], with me anyway." State's Exhibit 2, Transcript Page 4.

Krebs goes on to say again, "If it did, I would tell you and it pisses me off that you're saying I'm lying." State's Exhibit 2, Transcript Page 4. S.C. stated that it didn't make sense because she remembered being in bed naked and that both of them were there. State's Exhibit 2, Transcript Page 4. Krebs responded, "Yeah. I don't know about that." State's Exhibit 2, Transcript Page 5. S.C. then stated she didn't think she would make these things up in her mind, especially if she was seeing them over and over

again. State's Exhibit 2, Transcript Page 5. S.C. stated that she's still sore and that a few falls wouldn't make her sore, especially inside. State's Exhibit 2, Transcript Page 5. S.C. stated that really didn't make sense. State's Exhibit 2, Transcript Page 5. S.C. stated it made sense on the outside if she really did trip and fall and it the tripod thing like he said, but then asked why would she hurt inside. State's Exhibit 2, Transcript Page 5. Krebs told her that she could look into his eyes next time they saw each other and then she would know he wasn't lying. State's Exhibit 2, Transcript Page 5. S.C. stated again that it doesn't make sense and Krebs responded, "You're right. It doesn't, but that doesn't mean I did anything." State's Exhibit 2, Transcript Page 5. S.C. then asked if he really didn't do anything, would Birdsall own up to it because she remembered him being on top of her. State's Exhibit 2, Transcript Page 5. S.C. stated she remembered hearing Birdsall's voice and hearing him asked if he was better than Jacob. State's Exhibit 2, Transcript Page 5.

Krebs asked if she knew all of that, why was she then trying to blame him and S.C. responded that he, meaning Krebs, was there. State's Exhibit 2, Transcript Page 5. Krebs claims that he wasn't in the same room. State's Exhibit 2, Transcript Page 5. S.C. stated that she heard his voice in the same room and Krebs stated, "I don't know about that" and

claimed she was wrong. State's Exhibit 2, Transcript Page 6. S.C. then asked why did she remember certain things, stating she remembered someone trying to put Krebs' dick inside her mouth. State's Exhibit 2, Transcript Page 6. Krebs responded by stating, "I'm getting tired of getting blamed for this 'cause I didn't do anything." State's Exhibit 2, Transcript Page 6. Krebs and S.C. talked about reaching out to Birdsall for some time and S.C. talked about just wanting to talk to him. State's Exhibit 2, Transcript Page 6. S.C. stated, "'Cause all I want is for just to have this feeling go away, like closure to make this feeling stop so I can sleep, so I can stop having anxiety attacks every time I close my eyes." State's Exhibit 2, Transcript Page 6.

S.C. stated that she wanted to make sure that Krebs knew how drunk she was and that she was not in any way able to give permission for anyone to have sex with her. State's Exhibit 2, Transcript Page 7. S.C. stated, "I was blacked out. I couldn't move. Do you guys understand that?" State's Exhibit 2, Transcript Page 7. Krebs responded, "You were pretty drunk. Of course." State's Exhibit 2, Transcript Page 7. S.C. then stated, "'Cause I wouldn't think people that I call friends and trusted would take advantage of me that way. 'Cause if neither of you are gonna give me answers and this feeling doesn't go away, I'm going to look for

answers. I'm going to go to the police because it's not making sense and if you guys are just gonna lie to me. I just want this feeling to go away. I want closure. I want an apology." State's Exhibit 2, Transcript Page 7. Krebs responded that he didn't know what happened to her and Birdsall, but that he would talk to Birdsall and would tell him to call her. State's Exhibit 2, Transcript Page 7. S.C. responded that she didn't really want Krebs to talk to him because for all she knew, they could make up a lie. State's Exhibit 2, Transcript Page 7. S.C. stated, "I know this kind of stuff happened" and Krebs responded, "It wasn't fucking me." State's Exhibit 2, Transcript Page 7.

When S.C. clarified that it wasn't him, Krebs stated, "It was not me. I don't know what happened at all with you and Tanner. I don't know, but quit blaming me." State's Exhibit 2, Transcript Page 8. S.C. then asked why would she remember him trying to do things to her and Krebs responded, "I have no idea 'cause I never did." When S.C. clarified that he had no idea, Krebs stated, "Maybe...I don't know, [S.C.]. I don't know why you think that I did." S.C. then stated, "I don't really feel like that's a good enough answer. Why – 'cause if Tanner's gonna cover for you then – I feel like I was completely taken advantage of because of the physical state that I was in. I was completely in and out of consciousness,

couldn't move, could barely walk on my own." State's Exhibit 2, Transcript Page 8. Krebs tells S.C. that he told her everything and encourages her to go to the police because he "didn't fucking do anything." State's Exhibit 2, Transcript Page 8. Krebs sears that he didn't do anything and claimed that if anything happened, it was Birdsall, not him. State's Exhibit 2, Transcript Page 8. S.C. asked Krebs if Birdsall had talked to him about it at all and Krebs stated, "Not at all." State's Exhibit 2, Transcript Page 9. S.C. stated that was bullshit, that they were best friends, and that they talked about stuff like that. State's Exhibit 2, Transcript Page 9. Krebs then stated that they didn't and told her to let him get off the phone and that he would tell Birdsall to call her. State's Exhibit 2, Transcript Page 9.

Detective Wecker next testified at trial. Detective Wecker testified that he was currently a detective, but that he was still a patrol deputy at the time this case was investigated. Trial RP 118. Detective Wecker stated that he was limited in his experience investigating sex offenses at that time so Sergeant Wallace kind of mentored him through the case investigation. Trial RP 118, 120. Detective Wecker went through his training, which included the Reid School of Interview and Interrogation and experience taking statement throughout his 12 years as an officer. Trial RP 117, 120.

The State asked Detective Wecker the same questions as Sergeant Wallace and Deputy Beck regarding how he became involved in the investigation and what information he had about the case prior to starting his investigation. Trial RP 121. Detective Wecker stated that he told over the case from Deputy Beck who had a hearing to go to and that Deputy Beck had told him he had talked to the nurse from St. Peter's, he had given him the name of the person reporting, and that there were two suspects or alleged suspects in the case and Deputy Beck gave him the two names. Trial RP 121. Detective Wecker stated that he understood the alleged rape had taken place on February 9th and he was notified of the case on the 11th. Trial RP 122. Detective Wecker stated he initially responded to S.C.'s residence and took a statement from her about what she remember. Trial RP 118. Detective Wecker described her demeanor as "kind of quiet, kind of solemn, upset, emotionally she upset to me." Trial RP 122.

Detective Wecker stated that he contacted Sergeant Wallace about doing the confrontation call and that Sergeant Wallace volunteered to work on the order for the confrontation call because he was going to be out for a scheduled vacation the next day. Trial RP 122. Detective Wecker advised that he was present for the confrontation call itself and he briefly described that part of the investigation. Trial RP 123. Detective

Wecker stated that he was present with Krebs was taken into custody and he described Krebs' demeanor as quiet. Trial RP 124. Detective Wecker talked about working on the search warrant for the house and being present during the search, but he did not talk about what was searched or seized. Trial RP 125. Detective Wecker stated he was present when Krebs was interviewed by Sergeant Johansson, who was the led on the questioning in this case. Trial RP 125. Detective Wecker stated that Krebs provided a written statement that he wrote out for Krebs and that Krebs went over and signed. Trial RP 125. Detective Wecker identified Krebs' initial statement, which was marked as State's Exhibit 4, and the State moved to admit it. Trial RP 126. State's Exhibit 4 was admitted. Trial RP 127. In his initial statement, Krebs talked about the initially planning of getting together with him and Birdsall. State's Exhibit 4, Page 1. Krebs stated after they got to the house, they started playing beer pong and drinking. State's Exhibit 4, Page 1. Krebs stated S.C. was drinking from a six pack of Mike's Hard alcoholic beverage and that he and Tanner were drinking Coors Light. State's Exhibit 4, Page 1. Krebs stated everyone was having fun. State's Exhibit 4, Page 1. Krebs stated that at some point S.C. suggested they play strip beer pong and she told them the rules and then they started to play. State's Exhibit 4, Page 1.

Krebs stated they all got down to their underwear and S.C. went to use the bathroom. State's Exhibit 4, Page 2. Krebs stated he heard S.C. hit the floor so he went to help. State's Exhibit 4, Page 2. Krebs stated he picked her up and carried her to Tanner's bed. State's Exhibit 4, Page 2. Krebs stated that prior to carrying her to the room, S.C. had puked in the bathroom. State's Exhibit 4, Page 2. Krebs stated that after he got her to the room, he laid her down and got her a puke bucket and some water. State's Exhibit 4, Page 2. Krebs stated that S.C. put her sweatshirt back on and he and Tanner continued playing beer pong, checking on S.C. periodically. State's Exhibit 4, Page 2. Krebs stated Tanner went into the room with S.C. while he cleaned up. State's Exhibit 4, Page 2. Krebs stated he checked on Tanner and S.C. and asked if they needed anything. State's Exhibit 4, Page 2. Tanner told him no and Krebs stated Tanner and S.C. were cuddling when he checked on them. State's Exhibit 4, Page 2. Krebs stated he walked out of the room and feel asleep on the couch. State's Exhibit 4, Page 2-3. Krebs stated when he woke up, Tanner and S.C. were standing in the kitchen/living room and S.C. mentioned that she didn't remember anything that happened that night. State's Exhibit 4, Page 3. Krebs stated that S.C. said she was hurting all over, including her head and vaginal area. State's Exhibit 4, Page 3.

Krebs stated that they reminded her how drunk she was and that she was falling all over the place. State's Exhibit 4, Page 3. Krebs stated they told she had fallen down the stairs and landed on a stool. State's Exhibit 4, Page 3. Krebs stated S.C. left and drove home. State's Exhibit 4, Page 3. Krebs stated that he had no sexual contact with S.C. anytime during the night and that he had no idea if Tanner had sexual contact with S.C. that night. State's Exhibit 4, Page 3.

Detective Wecker stated that in his initial statement, Krebs denied any of the allegations against him. Trial RP 127. Detective Wecker stated that Sergeant Johansson told Krebs that they knew more than they had initially led him to believe and Krebs was told more facts that they knew, which then led to Krebs changing his statement. Trial RP 128. When asked how his statement changed, Krebs changed by stating that both he and Birdsall had sex with S.C. that night. Trial RP 128. Detective Wecker then identified Krebs' second statement, which was marked as State's Exhibit 5, and the State moved to admit it. Trial RP 129. The trial court admitted State's Exhibit 5 into evidence. Trial RP 129. In his second statement, Krebs stated that after giving his last statement, he decided to tell exactly what happened. State's Exhibit 5, Page 5. Krebs stated that at the point when they were playing beer pong, S.C. was flirting

with both Tanner and himself. State's Exhibit 5, Page 5. Krebs stated that after they put S.C. to bed the first time, S.C. came back out and wanted to play more beer pong. State's Exhibit 5, Page 5. Krebs stated that S.C. was still falling all over the place and that they had told her to go back to sleep. State's Exhibit 5, Page 5. Krebs stated that both he and Tanner walked S.C. back to the bedroom and when they got to the bedroom, S.C. was still flirting with them. State's Exhibit 5, Page 5.

Krebs stated that S.C. had said she hadn't had any dick in a long time. State's Exhibit 5, Page 5. Krebs stated that he and Tanner were both in their underwear and S.C. was wearing underwear with no bra. State's Exhibit 5, Page 5. Krebs stated that S.C. had taken her bra off during beer pong. State's Exhibit 5, Page 5. Krebs stated that they all started fooling around and that Tanner had sex with S.C. first. State's Exhibit 5, Page 5. Krebs stated that Tanner did asked S.C. if he was better than Jacob. State's Exhibit 5, Page 5-6. Krebs stated that while Tanner was having sex with S.C., she pulled his penis toward her mouth. State's Exhibit 5, Page 6. Krebs stated that his penis did go in S.C.'s mouth. State's Exhibit 5, Page 6. Krebs stated that at no point did S.C. tell them no or ask them to stop. State's Exhibit 5, Page 6. Krebs stated that S.C. was willing the whole time. State's Exhibit 5, Page 6.

Krebs stated that he later had sex with S.C. State's Exhibit 5, Page 6. Krebs stated he was lying on top of her and S.C. never said anything about it hurting. State's Exhibit 5, Page 6. Krebs stated that he remembered S.C. telling Tanner that it was starting to hurt when they were having sex. State's Exhibit 5, Page 6. Krebs stated that while he and S.C. were having sex, a song came on the radio that reminded her of us and she started crying because of the song. State's Exhibit 5, Page 6. Krebs stated he didn't know when the song, "My Kind of Crazy," had come on the radio. State's Exhibit 5, Page 6. Krebs stated that the reason they had denied it in the morning was because S.C. said she couldn't remember anything from last night. State's Exhibit 5, Page 6. Krebs stated they didn't want the story getting back to their girlfriends so they lied. State's Exhibit 5, Page 6. Krebs stated that S.C. never told them to stop and stated that there was never any force. State's Exhibit 5, Page 6.

The SANE Lisa Curt testified at trial this next day. Trial RP 137, 140. Ms. Curt stated that S.C. had told her about the events of the night in question during the evaluation and summarized S.C.'s statement. Trial RP 146. Ms. Curt stated that S.C. remembered stumbling to the bathroom and that her ex-boyfriend had caught her and carried her to the bedroom where she passed out. Trial RP 146. S.C. told her that she remembered coming

to off and on and that her ex was saying some things to her, but she couldn't exactly recall what they were. Trial RP 146. S.C. told her that later she woke up, crying and screaming, telling him to stop because it hurt. Trial RP 146.

S.C. told her that she woke up again really confused and noticed that she was naked and heard the door shut. Trial RP 146. S.C. told her that she went out of the bedroom and fell into the living room. Trial RP 146. S.C. recalled one of the guys carried her back into the bedroom and she woke up on the floor with a bowl by her head. Trial RP 146. S.C. told her when she called out for help, no one answered. Trial RP 146. S.C. told her that she climbed into the bed and woke up again around 2:00 a.m. to get water. Trial RP 146-147. S.C. told her that she woke up one of the other guys and he told her just to go back to sleep. Trial RP 147. S.C. told her that around 8:00 a.m., they asked her if she remembered anything and she said no. Trial RP 147. S.C. told her the following day she kept having flashes of things that she remembered going on, bits and pieces of what went on. Trial RP 147. S.C. told her that she told her mother what happened and told her everything she remembered. Trial RP 147. S.C. told her that all she remembered was falling a few times, but nothing that would make her hurt inside her vagina, deep inside. Trial RP 147. Ms.

Curt stated that she conducted a head to toe medical exam of S.C., including an examination of her vaginal area and collecting swabs in her vaginal and anal areas. Trial RP 148. Ms. Curt stated that she observed redness, swelling and irritation, in S.C. vaginal area where S.C. had complained of the pain and discomfort. Trial RP 148. Ms. Curt stated that her findings were consistent with some kind of activity. Trial RP 148.

The State rested after Ms. Curt's testimony and defense made a half time motion to dismiss on the basis that the State had not its burden of proof for the charge of Rape in the Second Degree. Trial RP 149, 150-151. Defense argued that S.C. wasn't incapable of understanding and that she actually testified that she knew what was going on and told him no. Trial RP 151. The trial court denied the motion, stating that the victim testified that she was in and out of consciousness so unless defense had a case citation that showed that if the sexual intercourse started when the person was unconscious and then when they woke up, that action took the crime out of the ambit of the statute, the ruling would stand. The trial court then asked defense if he had anything else at that time and defense stated no, nothing else and advised he was ready to present testimony. Trial RP 151. Defense then called Krebs to testify. Trial RP 152. Krebs stated that he was 18 years old and had just recently graduated from high

school. Trial RP 152. Krebs talked about his future plans to attend Universal Technical Institute in Arizona in September where he would study to be a diesel tech. Trial RP 153. Krebs talked about being in a programs called Sills USA for the past two years and how he had been doing quite well in that. Trial RP 153. Krebs talked about knowing S.C. and their dating relationship, including the fact that they lived together for a time at her parents' residence. Trial RP 154.

Defense asked Krebs to address that he wasn't initially truthful with S.C. and the police about what had occurred and why. Trial RP 155. Krebs stated that he was dating Dallas Trusty at the time and that after his breakup with S.C., he never thought he could fall in love again, but he did. Trial RP 155. Krebs stated he loved Dallas and he couldn't face that he had done something that would break her heard, that he had committed adultery, which was not something he would ever want to do. Trial RP 155. Krebs stated that if anyone was going to tell her that he checked on her, it was going to be him. Trial RP 155. Krebs then went back and talked about how he came into contact with S.C. on the night in question. Trial RP 156. Krebs talked about S.C. putting it up on her story that she was coming down for the week and he had napped her back and asked her when she was coming down. Trial RP 156. Krebs stated that S.C. had

said she was leaving Tacoma around 6:30 or 7:00 after she got down with dinner and right before she left, he called her and asked her if she wanted to hang out. Trial RP 156. Krebs stated that they had remained mutual friend since they broke up. Trial RP 156. Krebs stated that S.C. said yeah and asked if they were drinking, what they were doing. Trial RP 156. Krebs stated he told S.C that it was just him and Tanner and they were just hanging out. Trial RP 156. Krebs stated that he told S.C. they were drinking. Trial RP 156-157. Krebs stated she told to her about whether she still drink Mike's Hard and that he agreed to get it for her since she said she didn't have any money. Trial RP 157.

Krebs stated that S.C. texted him when she got to McCleary and they arranged to meet at the 7-11 in Central Park. Trial RP 157. Krebs stated S.C. followed them to Tanner Birdsall's house and they showed her around, gave her a tour of the house. Trial RP 157. Krebs stated they gave her a Mike's Hard and they started drinking. Trial RP 157. Krebs stated that he and Birdsall were playing beer pong and he described the game to the jury. Trial RP 157. Krebs stated that it was just him and Birdsall playing at first and that was something they always did. Trial RP 158. Krebs stated at some point S.C. had seen them having fun and she wanted to play. Trial RP 158. Krebs stated they were all just drinking,

catching up, and having a good time. Trial RP 159. Krebs stated S.C. was going back and forth between the two of them and was going on whoever side won the game. Trial RP 159. Krebs stated that this went on for several hours. Trial RP 159. Krebs stated that S.C. drank her first Mike's Hard within the first hour and then had another three within two or three hours. Trial RP 159. Krebs stated they were having a good time and drinking the whole time. Trial RP 159.

Krebs stated that it had not been the plan for everyone to stay there, but when S.C. had the first Mike's, she did the responsible thing and said she shouldn't drive if she drinks. Trial RP 160. Krebs stated that S.C. called her mother and told her that she would be spending the night. Trial RP 160. Krebs stated that after they had been playing normal beer pong for a couple of hours, everyone made a joint decision to play strip beer pong. Trial RP 160. Krebs stated, "we never really done anything like that before, so why not. Something to try." Trial RP 160. When defense asked if S.C. had at least initially said she was going to limit how far she would strip, Krebs stated, "Yeah. Yes. She – she said she would not go down past her bra and underwear, but as we all know it did get more than that." Trial RP 160. Krebs described the rules for strip beer pong and stated that after beer pong stopped, he and Tanner were in their

boxers and S.C. had taken off her bra and she was in her underwear. Trial RP 161. Krebs stated that when S.C. took her bra off, she raised her hands in the air and told them to come feel her breasts. Trial RP 161. Krebs stated that “us, being guys, we did.” Trial RP 162. Krebs talked about when S.C. had fallen down coming out of the bathroom, describing that near the end of the game when she was in her underwear, she went to the bathroom and had fallen down. Trial RP 162. Krebs stated that he went and picked her up and brought her to the bed. Trial RP 162. Krebs stated he gave her a puke bucket and some water. Trial RP 162. Krebs stated he asked S.C. if she needed anything and she said no and he went back to playing beer pong with Tanner. Trial RP 162.

Krebs stated that they got through like one game when S.C. came back out and wanted to keep playing. Trial RP 163. Krebs stated, “you know, we were all having fun and so ... why not.” Krebs stated that when S.C. came back out, she – they had kind of flirted and they started kissing and were just having more fun than they were having. Trial RP 163. Krebs stated they were flirting, having a good time. Trial RP 163. Krebs stated at that time they brought her back to the bed and the whole time S.C. was kissing them, kind of rubbing their backs and just flirting. Trial RP 163. When asked what he meant by “flirting” and what S.C. was

doing to make him believe she was a willing participant, Krebs stated that S.C. had said she hadn't had sex in a long time, little giggling, little poking and touching and things like they used to do when they would flirt. Trial RP 163-164. When asked that he obviously knew she had been drinking and was probably under the influence, Krebs stated, "Yeah, we all were." Trial RP 164. Krebs stated that his decision making was probably not the best and that his perception of S.C. was that she was willing, she liked it, and she wanted more. Trial RP 164. Krebs stated after they brought her to the bedroom, they had been kissing her. Trial RP 165. When asked if S.C. was kissing back, Krebs stated, "Yes. It's kind of hard to kiss someone when they don't kiss back." Trial RP 165.

Krebs stated, "She – Tanner had taken her underwear off and – you know, at – at no point did she ever say no. At no point did she ever say stop. You know, that's – that's not me or Tanner as people. We have better things to do than have sex with people who don't want to have sex. That's not us. And she – she was willing. She – she was into it. She liked it. And, you know, she was making the noises that a woman who's enjoying herself would make. That's all there is to it." Trial RP 165. Krebs confirmed that while Tanner was having sex with S.C., he asked her if he was better than Jacob. Trial RP 166. Krebs also verified that Tanner

and S.C. had sex first and then he and S.C. were second. Trial RP 166. Krebs also verified that he was present in the room when Tanner was with S.C. and that Tanner was present in the room when he was with S.C. also. Trial RP 166. When asked what led him to believe that S.C. was a willing participant when he had sex with her, Krebs stated that S.C. was kissing him and making the normal noises that a woman enjoying herself would make. Trial RP 167. Krebs stated that S.C. had her hands on his back and they were having sex like they used to. Trial RP 167. Krebs stated that he had not ejaculated on her face, stating that he did not finish. Trial RP 167. Krebs stated he was kind of self-conscious with Tanner sitting right next to them. Trial RP 167.

Krebs claimed that S.C. was not crying when they were having sex, but that she started crying after the song, "My Kind of Crazy" came on and they turned it up after they were sitting on the bed after. Trial RP 167-168. Krebs stated S.C. started crying and talking about them and the past and how great it was and that she loved him. Trial RP 168. Krebs stated that if he had any doubt that S.C. had not wanted to have sex with her, he would not have had sex with her. Trial RP 168. On cross, the State obtained concessions from Krebs that he had 5 days to tell his girlfriend about what happened, but he didn't and that he had at least 6

different opportunities to “tell the truth” about what had happened during that same time from, but that he hadn’t. Trial RP 169-170. The State also obtained concessions from Krebs that his testimony about S.C. allegedly taking her shirt off and telling them to touch her breast was never mentioned in any of his statements. Trial RP 171. The State further obtained concessions from Krebs about his own testimony about S.C. level of intoxication, i.e. how drunk she was, how much she feel down, that she threw up. Trial RP 171-172. The State further pointed out inconsistencies in Krebs’ testimony and his written statement about when S.C. had cried, i.e. that he testified she cried after they had sex and his written statement was that she was crying during sex. Trial RP 172-173.

Prior to closing defense argued against the inclusion of Rape in the Third Degree. Trial RP 175-180. The trial court heard argument on the point and evaluated the relevant case law and ultimately elected to include the instruction on Rape in the Third Degree. Trial RP 181-182. Defense noted his exception to the inclusion of Rape in the Third Degree. Trial RP 181. In closing, the State argued that S.C. was incapable of consent because she was physically helpless or mental incapacitated. Trial RP 196. The State pointed out that S.C. testified how she initially couldn’t remember anything, which went to her state the night before, how

intoxicated she was. Trial RP 197. The State pointed out that she talked about how she came to when Tanner was already on top of her and inside of her, that she wasn't conscious when it started. Trial RP 197. The State pointed out that S.C. talked about how she couldn't move, couldn't get up, couldn't stop it, which the State stated was incapacity. Trial RP 197. The State further pointed out that the jury also heard this same information from Krebs, from his own words, his statements. Trial RP 197. The State said he repeatedly told S.C. how drunk she was that night, that she was falling down, she fell on the couch, then later said she fell on the stool, fell down the stairs and he told the police the same things. Trial RP 197. The State pointed out that Krebs also told police about how S.C. didn't remember anything, that she had to be carried, and that she had vomited. Trial RP 198.

The State pointed out that common sense and experience would tell them that any person who is that drunk – to the point where they are falling down, that they have to be carried, that they are vomiting – is in no condition to consent. Trial RP 198. The State further pointed out that consent was the only issue in this case, the only issue since Krebs had finally admitted that he did, in fact, have sex with S.C. Trial RP 1998. The State reiterated S.C.'s testimony that she did not encourage, entice, or

invite Krebs to have sex with her and that she in no way consented. Trial RP 198. The State pointed out that while S.C. initially didn't have any real memory about what happened, she knew something was wrong. Trial RP 198. The State reminded the jury about S.C. trying to find out from Krebs and Birdsall what happened, but they told her nothing while her body was telling her what her mind didn't know yet, hadn't caught up with yet. Trial RP 198. The State pointed out that S.C.'s memory slowly came back to her with more information and more details and that she may have more memories later still because that is the way memory works. Trial RP 199. The State further pointed out how S.C. reacted normally to her feelings, her initial lack of memory, and to the memories coming back in that she didn't want to cause trouble in the beginning, didn't want to accuse anyone because she didn't really know...she just had a feeling. Trial RP 199. The State pointed out the S.C. was embarrassed and didn't think anyone would believe her and how that was normal. Trial RP 199.

The State made points about the confrontation call and S.C.'s desperation to get Krebs to tell her what happened, but that he just wouldn't do it. Trial RP 200. The State talked about how S.C.'s statements remained consistent throughout all of her contacts with the nurse, the police, and her mother, but that Krebs story did change. Trial

RP 200. The State pointed out that six separate times to four different people he claimed he did not have sex with S.C. and that, if it was truly consensual, he had so many opportunities to have gotten in front of it.

Trial RP 200. The State asked why wouldn't Krebs have just told the person he allegedly had consensual sex with in the morning when she asked him what happened. Trial RP 200. The State then went through all the reasons why Krebs may have been hesitant, but still could have and should told if the sex was truly consensual. Trial RP 200-2002. The State further pointed out Krebs' possible motivation in that he was still interested in her, still believed she belonged to him, which was evidenced in the confrontation call. Trial RP 203. The State also discussed his motivation in covering up what he did because he knew he made a mistake, primarily that he knew he had sex with someone who could not consent. Trial RP 203. Finally, the State pointed out Krebs' own words of "so why not," which he used to described his actions multiple times during his testimony. Trial RP 203. The State argued that "So, why not" is exactly what Krebs thought – that S.C. is lying there, mostly undressed and, so, why not, he had sex with her, regardless of her consent due to her physical incapacity or mental incapacity. Trial RP 203.

Defense argued that the case was about drinking and being dumb and being young. Trial RP 204. Defense also said the case wasn't about why Krebs didn't tell the truth. Trial RP 204. Defense went through the elements of both Rape in the Second Degree and Rape in the Third Degree, arguing the differences between the two crimes. Trial RP 205-206. Defense argued that S.C. could not have been physically unable to communicate and unwilling to act because she said she told them no, which defense claimed negated Rape in the Second Degree. Trial RP 207. Defense then talked about the history between S.C. and Krebs, including living with him and her parents' house in high school, that she planned to spend the night, that she started drinking right away, that she agreed to play strip beer pong, and that she stripped down to at least her bra and panties. Trial RP 209. Defense pointed out that the SANE exam should "some kind of activity" and that S.C. had testified that it hurt like it did when they used to have sex before. Trial RP 209. Defense talked about Krebs lying and that he admitted that he lied because he had done something stupid, cheated on his girlfriend, and he was embarrassed about it, hoping no one would find out. Trial RP 209.

Defense stated that the State was going to get up and say next that because defense said she got drunk and ran around in her underwear that

she deserved it, but claimed that wasn't what he was saying at all. Trial RP 210. Defense claimed that was not what Krebs was saying, but rather that the law says just being drunk isn't enough to find Rape in the Second Degree. Trial RP 210. Defense then went through specific instructions on being careful because there were serious consequences and that the burden was beyond a reasonable doubt. Trial RP 211. Defense pointed out what the State did not present – no DNA, no blood work, no blood alcohol content – and that the State has the burden. Trial RP 211. Defense went over the elements of Rape in the Third Degree and encouraged the jury to look to the direct and circumstantial evidence to factually decide whether the person did not consent and that the lack of consent was clearly expressed by the person's words or conduct. Trial RP 213. Defense talked about none of them knowing what happened and pointed out that Krebs said it was consensual and S.C. said it wasn't. Trial RP 214. Defense further stated Krebs' version of events on the stand was credible and that the circumstances supported the credibility of his testimony and asked the jury to find him not guilty. Trial RP 215.

In rebuttal, the State did argue that defense was blaming the victim – that because she went to hang out with some friends, who happen to be male, that because she started drinking, that because she was responsible

and decided to stay the night, that she's at fault. Trial RP 215. The State pointed out, however, that it was not about what she did, but about what he did. Trial RP 215. The State pointed out that defense was trying to direct away from S.C. being unconscious when it started and stated that there had to be consent when the act started. Trial RP 215-216. That State further pointed out that defense was trying to focus on the facts not meeting the definition because she woke up after it started. Trial RP 216. However, the State argued again that there had to be consent to begin with and that prior consent just didn't exist in the case. Trial RP 216. The State said that the jury should be careful, but that didn't mean that they should give Krebs a pass or that he should not be held accountable. Trial RP 216. The State encouraged the jury not to their emotions override logical fact and to consider what made sense. Trial RP 216. The State encouraged the jury to take all of the evidence and consider it all and that while the burden was on the State and it was beyond a reasonable doubt, it was not beyond all doubt. Trial RP 217. The State advised that they were all reasonable people and to put themselves in the place of a person who is reasonable to consider whether it was reasonable to believe that a person who was falling down, who couldn't walk on their own, who was

vomiting could give consent or if was okay for a person to be unconscious when you start to have sex with them. Trial RP 217.

The State pointed out that defense stated Krebs got on the stand, looked them in the eye and told them the truth, which was the same thing he told S.C. in the confrontation call when he was lying to her about having sex with her. Trial RP 218. The State said that it was the jury's job to listen to the testimony and make a determination on credibility. Trial RP 218. The State further asked who was more credible and who told a consistent story about what happened and who told six times a different story, six times saying, "I didn't do anything," even to law enforcement. Trial RP 218. The State closed by stating the defendant was guilty of rape in the second degree and that jury must find him so. Trial RP 218. During deliberations, the jury sent out a note that asked for a copy of the plaintiff's statement and the RCW law of rape 2 and rape 3. Trial RP 219. The jury was advised that the law is contained in the court's instructions and the instructions also refer to the evidence that the jury was to consider. Trial RP 221. The jury reached a verdict and found the defendant guilty of the crime of rape in the second degree. Trial RP 223.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Insufficient Evidence Allegation

First, when a defendant is charged with Rape in the Second Degree under the physically helpless and mentally incapacitated prong, it is not necessary to instruct the jury that those terms represent alternative means of committing the crime. *State v. Al-Hamdani*, 109 Wash.App. 599, 607, 36 P.3d 1103, (2001). Here, the jury was instructed correctly, as stated in *State v. Al-Hamdani* by the Court of Appeals, Division I. *Id.* Furthermore, the State is not required to prove sufficiency of the evidence under both physical helplessness and mental incapacity circumstances.

“The evidence is sufficient if ‘after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt’.” *Al-Hamdani*, 109 Wash.App. at 608 (citing *State v. Ortega–Martinez*, 124 Wash.2d 702, 708, 881 P.2d 231 (1994), (citing *State v. Rempel*, 114 Wash.2d 77, 82, 785 P.2d 1134 (1990)). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*,

94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

RCW 9A.44.010(5) states, “ ‘physically helpless’ means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.” RCW 9A.44.010(5). The state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness. *State v. Puapuaga*, 54 Wash.App. 857, 860, 776 P.2d 170 (1989). “A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.” *Ortega–Martinez*, 124 Wn.2d at 711.

To support a conviction of Rape in the Second Degree, the State had to prove beyond a reasonable doubt that Krebs engaged in sexual intercourse with S.C. when S.C. was incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). When viewed in the light most favorable to the State, sufficient evidence exists to convince the jury that when the

sexual intercourse occurred, S.C. was unconscious or for any other reason was physically unable to communicate a willingness to act or S.C.'s intoxication made her unable to understand the nature or consequences of sexual intercourse at the time it occurred.

Here, there is no question that Krebs engaged in sexual intercourse with S.C. so the only issue is whether there was sufficient evidence to support a finding that S.C. was unconscious or for any other reason was physically unable to communicate a willingness to act or that her intoxication made her unable to understand the nature or consequences of sexual intercourse at the time it occurred. The facts as outlined from the trial support a finding of both in this case.

The appellant points out testimony from S.C. about her physical limitations, but argues that her testimony established that she did not have an “inability to communicate.” The appellant, however, fails to take into account all of the evidence that was presented. S.C., through her direct testimony, her testimony with defense on cross, her statements in the confrontation call, and her statements to the SANE, all present evidence that she was “unable to walk”, she had “fallen”, and “could not stand on [her] own”, that she “could not move”, that she “could not really talk,” that she “tried to say no”, that she

“couldn’t do anything”, that she “felt paralyzed”, that she was “under the influence” and “could barely keep [her] eyes open”, that she “went unconscious again”, that she was “in and out a lot”, that she was “physically unable to move”, that she was “blacked out”, that she “couldn’t move”, that she was “completely in and out of consciousness”, that she “couldn’t move”, that she “could barely walk on her own”, that she had “passed out”, that she was “coming to off and on”, and that she later “woke up, crying and screaming, telling him to stop.” Furthermore, there was testimony and evidence from the appellant himself who talked about how drunk she was, he heard her hit the floor and had to pick her up off the floor and carry her to the bedroom, how she had vomited in the bathroom before she fell and he took her to the bedroom, and twice stated that she was falling all over the place.

When viewed in the light most favorable to the State, a rational fact finder could find that sufficient evidence existed to prove beyond a reasonable doubt that S.C. was both incapable of consent by reason of being physically helpless or mentally incapacitated and was debilitated by intoxicants at the time of sexual intercourse and was incapable of meaningfully understanding the nature or consequences of sexual

intercourse at the time it occurred because she was intoxicated. Based on the testimony and evidence presented at trial, sufficient evidence supports all the elements of rape in the second degree.

2) Prosecutorial Misconduct Allegation

An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wash.2d 438, 442, 258 P.3d 43 (2011). An appellant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Thorgerson*, 172 Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the prosecutor's statement is “ ‘so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’ ” *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict,” and (2) no curative instruction would have

obviated the prejudicial effect on the jury. *Thorgerson*, 172 Wash.2d at 454.

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wash.2d at 578.

Here, the appellant argues that the prosecutor committed misconduct by repeatedly telling the jury that S.C. had testified that she was unconscious when Krebs and Birdsall started having sex with her in closing arguments. The appellant again is not taking into account the totality of the testimony and evidence presented at trial, which not only included S.C. direct testimony, but also her testimony on cross with defense, the statements she made during the confrontation call, and her statements made to the SANE, all of which was presented at trial. There was no misstatement of facts, those were facts presented at trial. Even the trial court made this argument when defense made its motion to dismiss – “So her testimony was that she was in and out of consciousness.”

The appellant further argues that the prosecutor committed misconduct by arguing in closing that counsel was trying to distract jurors from the evidence or suggesting that counsel was somehow being dishonest. The appellant further argues that the prosecutor continued to misstate facts in order to show that the counsel was trying to distract jurors from the evidence. As stated previously, there was no misstatement of the evidence by the prosecutor and defense was, in fact, attempting to place blame on the victim for “putting herself” in the situation by being with male friends while drinking and playing strip beer pong. He acknowledged that fact in his closing argument and made some attempt to show that he wasn’t prior to the State even pointing it out.

Defense was also misstating the facts and ignoring, just as the appellant is doing here, the testimony and evidence that showed S.C. was unconscious when the sex began. Again, because there was ample and repeated testimony and evidence presented that she was unconscious when the sex with both Birdsall and Krebs started and because she was in and out during the sex, the prosecutor had every right to make those arguments. Defense was arguing that because, at some point later and at times during, after Krebs and Birdsall started having sex with her, S.C. was aware of what was happening and was telling Krebs to stop and that it

hurt, that she wasn't unconscious in the beginning and that was simply not true. The prosecutor also had every right to point out that error and to argue why defense's statements were not supported by the evidence.

Furthermore, assuming there was misconduct committed, as there was no objection to anything said by the prosecutor during closing arguments, the appellant would have to additionally show that the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. The argument by the appellant that the "misconduct" was so flagrant and ill-intentioned is solely based on the argument that the prosecutor misstated the testimony and evidence, which is not supported by the record. Certainly, the jury was advised in jury instructions that the attorneys' remarks were not evidence and they had the benefit of considering all of the testimony and evidence presented at trial. There is no reason, nor does the appellant cite to any reason, to believe that, even if this court found misconduct, the prosecutor's statements were so flagrant and ill-intentioned that the "misconduct" could not have been cured by instruction. There is simply no misconduct because there was no misstatement of facts.

3) Improper Opinion Testimony Allegation

Opinion testimony is that which is “based on one’s believe or idea rather than on direct knowledge of the facts at issue.” *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (internal quotations omitted). “[W]itnesses may not testify as the the guilty of the defendants, either directly or by inference. Such an improper opinion undermines a jury’s independent determination of the facts, and may invade the defendant’s constitutional right to a trial by jury.” *State v. Olmedo*, 112 Wn.App. 525, 530-31, 49 P.3d 960 (2002) (internal citation omitted). “Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Similarly, “[p]ermitting a witness to testify as to the defendant’s guilty raises a constitutional issue because it invades the province of the jury and the defendant’s constitutional right to a trial by jury. *Olmedo*, 112 Wn. App. at 533. An error of constitutional magnitude is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Spotted Elk*, 190 Wn.App. 253, 261, 34 P.3d 906 (2001). “A constitutional error is harmless only when the untainted

evidence provides an overwhelming conclusion of guilt.” *Olmedo*, 112 Wn. App. at 533.

“Whether testimony constitutes an impermissible opinion on the defendant’s guilt is determined from the circumstances of each case.” *Olmedo*, 112 Wn. App. at 531. We look to factors, including the types of witnesses involved, the nature of the testimony, the nature of the charges, the type of defense, and other evidence before the jury. *Kirkman*, 159 Wn.2d at 928. “Testimony that is not a direct comment on the defendant’s guilty or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence, is not improper opinion testimony.” *State v. Smiley*, 195 WnApp. 185, 190, 379 P.3d 149, *review denied*, 186 Wn.2d 1031 (2016).

The appellant cites to the following instances of alleged improper opinion testimony: testimony from Sergeant Wallace about his training and experience, including the investigation of sex cases, that he “coached” Deputy Wecker because “he didn’t have a bunch of experience dealing with sex crimes,” about being told that S.C. had stated “Joel Krebs and Tanner Birdsall had raped her the night before,” and that he used the term “victim” and “perpetrator” during his testimony. In the context of the other testimony and evidence that was presented to the jury, none of what

Sergeant Wallace stated constituted an impermissible opinion on Krebs' guilt. Sergeant Wallace's testimony about his training and experience naturally included the investigation of sex cases as that was part of his experience with the Grays Harbor County Sheriff's Office. Furthermore, it was necessary to explain to the jury why Deputy Wecker would have relied on Sergeant Wallace's experience given the allegations in the investigation. Sergeant Wallace testimony about the information he knew prior to his involvement in the investigation related to the facts of the investigation and were further testified to by S.C. As for the use of "victim" and "perpetrator," those are common terms used by law enforcement and there had been no prior order regarding excluding the use of any particular terms. Defense objected and the trial court asked Detective Wallace to use different language. Furthermore, Sergeant Wallace was describing the general principles of a confrontation call in using those terms and wasn't using them to characterize either S.C. or the appellant specifically.

Even if the appellant could show error, when viewed within the context of the other evidence presented at trial, the appellant cannot show actual prejudice. The case being investigated was a sex offense. Other evidence, including S.C. testimony, the confrontation call, the SANE

examination, and Krebs' own statement, established that the appellant was involved in the incident. None of the specified testimony was a direct or indirect opinion as to Krebs' guilty. Therefore, none of the cited testimony was either improper or manifest and there is no basis for a reversal.

4) Denial of Right to Present a Defense Allegation

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* “The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

These rights are not absolute, of course. Evidence that a defendant seeks to introduce “must be of at least minimal relevance.” *Darden*, 145 Wash.2d at 622. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State*

v. Gregory, 158 Wash.2d 759, 786 n. 6, 147 P.3d 1201 (2006). “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Darden*, 145 Wash.2d at 622. The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.” *Id.* We must remember that “the integrity of the truthfinding process and [a] defendant's right to a fair trial” are important considerations. *State v. Hudlow*, 99 Wash.2d 1, 14, 659 P.2d 514 (1983).

Here, the appellant is arguing that he was deprived on a defense because he was precluded from presenting testimony that would have rebutted S.C.'s claims that she “rarely” drank or got drunk. The appellant argued that if evidence could be shown that she drank far more often than she claimed, then she might be lying about her decisions about having sex as well. First and foremost, it is not a defense to the crime the appellant was accused of that the victim drank more often or got drunk on other occasions. Secondly, the appellant would never have been allowed, even if there had been testimony rebut her testimony that she was not an experienced drinker, to make the leap that if she possibly lied about

drinking in the past, then she might be lying about her decision to have sex. S.C. was available for cross-examination and was questioned by defense about her prior drinking experiences as was her mother.

The appellant further argues that the trial court abused its discretion in allowing S.C. to testify about her speculation that she might have been drugged. S.C. did not speculate or make any connection as to the possibility that she was drugged. S.C. merely testified about her allergies, including to Vicodine and other drugs and the reactions she has had in the past to those medications, the amount she recalled drinking of the Mike's Hard Lemonade provided by Krebs and Birdsall, and the way she felt while she was drinking and that night. While the appellant argues that at trial there was testimony or evidence that S.C. suggested she might have had a drink spiked with Vicodin or that she was intentionally drugged by Krebs and Birdsall, there simply was no such testimony or evidence presented.

5) Cumulative Error Allegation

The appellant argues that the accumulation of errors resulted in a fundamentally unfair trial. This argument is based on the sole proposition that there was error in the first place, which there was not. There is no

basis for reversal for the accumulation of errors as there were no errors committed.

6) Ineffective Assistance of Counsel Allegation

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland*, 466 U.S.at 687. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. An attorney's performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Deficient performance prejudices a defendant if there is a “reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this

presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33. If defense counsel's trial conduct is a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

Here, the appellant is arguing that defense's representation was deficient because he did not make an argument for an exceptional sentence below the standard range based on the mitigating factors of youth under *O'Dell*. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). The appellant was over the age of 18, had graduated from high school, had been in a scholarship program for two priors prior to that, and was scheduled to attend Universal Technical Institute in Arizona where he would study to be a diesel tech. Even if he weren't over the age of 18, there is nothing about the appellant that would have suggested that he was "particularly vulnerable" to "impulsivity, poor judgement, and susceptibility to outside influences" as was suggested in *O'Dell*. *Id.* at 690-91. The appellant is no more vulnerable to such things than is any other adult criminal currently incarcerated with him. To say otherwise is to make the argument that no one who makes a poor decision and commits

a crime should ever be fully held accountable for their crimes and punished accordingly. The appellant was properly sentenced within the standard range for his crime and defense was not deficient for not arguing otherwise.

7) Improper and Unconstitutional Conditions Allegation

A trial court only possesses the power to impose sentences provided by law. *In re Petition of Carle*, 93 Wash.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.505(8) authorizes crime-related prohibitions: “As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” Under RCW 9.94A.030(13), no causal link need be established between the prohibition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wash.App. 448, 456, 836 P.2d 239 (1992). Sentencing conditions, including crime-related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wash.2d 22, 36–37, 846 P.2d 1365 (1993).

Here, the condition the appellant is challenging is the substance abuse evaluation and treatment condition set by the trial court. CL 191. Substance abuse includes alcohol, which even the appellant concedes is crime-related by stating that “a condition

regarding alcohol consumption is clearly related to the crime.”

Therefore, there should not be any issue with the substance-abuse evaluation and treatment as it relates to alcohol or the condition that the appellant not consume or possess alcoholic beverages and that he submit to random testing to monitor his alcohol-free status. As to the conditions related to controlled substances, while alcohol was clearly a factor, there is also a factual relationship between the crime being punished and the condition being imposed under the facts and circumstances of the case. The appellant used alcohol, and perhaps prescription drugs, to further his crime so it is not without reason that the trial court impose the conditions that the appellant not possess drug paraphernalia and not consume or possess any controlled substances without a valid prescription and to have random urinalysis to ensure compliance. The conditions set by the trial court are not an abuse of discretion and are either crime-related or have at least a factual relationship between the crime being punished and the conditions being imposed. Therefore, the conditions set by the trial court should be upheld.

“The [Department of Corrections (DOC)] may not impose conditions that are contrary to those ordered by the court.” *In re*

Golden, 172 Wash.App 426, 431, 290 P.3d 168 (2012). A “crime-related prohibition” is defined as “an order of a *court* prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted,” *Id.* at 432, citing Former RCW 9.94A.030(13) (2006) (emphasis added). This definition does not apply to DOC, which is an agency and not a court. Instead, DOC's authority to impose conditions of community custody on the appellant come from RCW 9.94A, which directed DOC to perform a risk assessment and then impose “additional conditions of the offender's community custody based upon the risk to community safety.”

Here, the conditions set by DOC that the appellant is challenging do not need to be related to the crime charged. DOC's conditions are based on the risk to community safety and as a convicted sex offender, DOC apparently has concerns related to the appellant's access to children, the appellant's use and access to alcohol, and the need for sex-crime based testing to ensure compliance with the conditions of the appellant's community custody. Therefore, the conditions set by DOC should be upheld.

Our state constitution provides that “[j]ustice in all cases shall be administered openly.” Const. art. I, § 10. Although openness is presumed, it is not absolute. *Dreiling v. Jain*, 151 Wash.2d 900, 909, 93 P.3d 861 (2004). “The public's right of access may be limited to protect other significant and fundamental rights, such as a defendant's right to a fair trial.” *Id.* Although the right generally applies to court records, General Rule (GR) 15(a), it does not apply to all court documents. For example, our constitution “ ‘does not speak’ to the disclosure of information surfacing during pretrial discovery that does not otherwise come before the court because it ‘does not become part of the court's decision-making process.’ ” *Rufer v. Abbott Labs.*, 154 Wash.2d 530, 541, 114 P.3d 1182 (2005) (quoting *Dreiling*, 151 Wash.2d at 909–10, 93 P.3d 861).

A trial court's decision to redact or seal a court record is reviewed for abuse of discretion. *Indigo Real Estate Servs. v. Rousey*, 151 Wn.App. 941, 946, 215 P.3d 977 (2009). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Hundtofte v. Encarnacion*, 169 Wn.App. 498, 280 P.3d 513, 518 (2012) (citing *State v. McEnry*, 124 Wn.App. 918, 924,

103 P .3d 857 (2004)). GR 15 governs the general procedure to be used in sealing court records. GR 15 reads in relevant part:

(b)(4) Seal. To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.

(c)(1)...In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(c)(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

- (A) The sealing or redaction is permitted by statute; or
- (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
- (C) A conviction has been vacated; or
- (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record; or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

GR 15(b)(4),(c)(1) and (2)

It is the defendant's burden to "identif[y] compelling privacy or safety concerns that outweigh the public interest in access to the court record." *Dreiling v. Jain*, 151 Wash.2d 900, 903-04, 93 P.3d 861 (2004). 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). GR 15(c)(2) (emphasis omitted). In *Rufer v. Abbott Laboratories*, the court held that trial courts must apply the five-step analysis set forth in *Seattle Times Co. v. Ishikawa* to requests for sealing documents. *Id.*; *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640, 2d 716 (1982). When determining whether to seal a file, the trial court should (1) consider whether the proponent of sealing made a showing of the need for closure; (2) give anyone present the opportunity to object; (3) analyze whether the method from curtailing access is both effective and the least restrictive method; (4) weigh the competing interest of the parties and the public and consider alternative methods; and (5) make a decision that is no broader in application or

duration than is necessary to serve its purpose. *Dreiling v. Jain*, 151 Wash.2d at 903-04.

Here, the document being sealed is a sexual assault protection order, which is covered under GR 15(c)(2)(B). The victim clearly has compelling privacy or safety concerns that outweigh the public interest in access to the court record. Therefore, the seal for the sexual assault protection order should not be stricken. Furthermore, the appellant attorney's use of the victim's name in her briefing is improper for the same compelling privacy and safety concerns and the Court should order the appellant to submit replacement briefing using only the victim's initials with the appellant's initial briefing placed under seal.

CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the convictions and the sentence in this case.

DATED this 9th day of November, 2017.

Respectfully Submitted,

BY: 
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