

NO. 49482-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

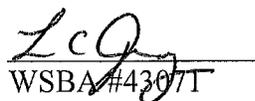
PATRICK JAMES EDWARD DOCKERY,
Appellant.

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

THE HONORABLE DAVID EDWARDS, 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 April 16, 2015. CP 1-2. The Defendant was originally charged with one count of Rape of a Child in the Second Degree. CP 1-2. When plea negotiations were exhausted, the State filed in Amended Information in preparation for trial. On February 8, 2016, the State filed an Amended Information, charging the Appellant with the additional charge of Child Molestation in the Second Degree with allegations on each count that the Appellant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance under RCW 9.94A.535(3)(b). CP 53-54. The aggravator was based on the victim being intoxicated at the time of the offenses against her by the Appellant. CP 49-51.

The trial commenced on August 30, 2016. The Appellant was found guilty on both charges with the

aggravator on both counts. CP 159-162. The Appellant was sentenced on the sole charge of Rape of a Child in the Second Degree with the aggravator on September 30, 2016. CP 185-199. As was discussed in the trial, the two counts merged and the lesser of the two counts, Child Molestation in the Second Degree, was not part of the Appellant's judgment and sentence.

b. Statement of Facts

On July 25, 2014, M.N., a minor female, was invited by her best friend, Madisyn Dockery, to go camping with the Dockery family and another friend. CP 23 and RP Vol. I 152, 158. The camping trip began on Friday, July 25, 2014 and ran through Sunday, July 27, 2014. CP 24 and RP Vol. I 156, 157 and RP Vol. II 318. M.N.'s date of birth is July 28, 2000 and she was 13 years old at the time of the camping trip. CP 23 and RP Vol. I 149, 157. The camping trip took place on a property off of the East Satsop Road in Grays Harbor County. CP 24 and RP Vol II 312. The property belongs to Gerald "Pat" Kelly, but there was a long-

standing relationship between Mr. Kelly and Mr. Dockery and the Dockery family was authorized to camp on the property. CP 24 and RP Vol. II 309.

On the first night of the camping trip, only the girls, which consisted of Lora Dockery, the Appellant's mother, Madisyn Dockery, the Appellant's sister and best friend of M.N., Veronica Rivera, an extended relative of the Dockery family and ex-girlfriend (romantic) of Madisyn Dockery, Savanna Higgins, the other friend of Madisyn Dockery, and the victim, M.N., were at the camp site. CP 24 and RP Vol. I 160, 164 and RP Vol. II 318. On the second day, Saturday, July 26, 2014, Savanna Higgins was taken home and four other members of the Dockery family arrived at the camp site in the late afternoon or early evening that day. CP 24 and RP Vol. I 165-166 and RP Vol. II 319. Those family members included Patrick Dockery, the Appellant's father, Craig Axtell, Lora Dockery's brother, and Mr. Axtell's girlfriend, Francesca Harris, and the Appellant. CP 24 and RP Vol. I 165-166 and

RP Vol. II 319. Photos were taken on Saturday, July 26, 2014 after the Appellant arrived at the camp site. RP Vol. I 167. The photos were later posted on Facebook and were admitted as Exhibits 15 and 16 at trial. CP Exhibits 4 and RP Vol. I 167. The photos on Facebook showed Madisyn Dockery, Veronica Rivera, M.N., and the Appellant together at the campsite and was date stamped as being Saturday. CP Exhibits 4 and RP Vol. I 167.

There was alcohol at the campsite and the girls, who were all well underage, between the ages of 13 and 14 years old, were drinking. CP 25 and RP Vol. I 170-171. M.N. was initially drinking Mike's Hard Lemonade and the girls were drinking in full view of the campsite where the adults were present. CP 25 and RP Vol. I 172. M.N. testified that there was also Fireball available at the campsite. RP Vol. I 172. Photos were also taken when the girls were drinking, which showed M.N. with a Mike's Hard Lemonade during the day on Saturday. CP 25 and RP Vol. I 172-173, 178. The

photos were admitted as Exhibits 17 – 19 at trial. CP Exhibits 4 and RP Vol. I 176. M.N. became intoxicated during the camping trip, stating that she had a lot to drink and estimated that she had approximately 2-3 Mike's Hard Lemonades, 1-2 Mike's Harder Lemonades, and at least one shot of Fireball whiskey. CP 25 and RP Vol. I 178. Madisyn Dockery testified that M.N. was "pretty drunk" and admitted that M.N. appeared intoxicated that night and that M.N. was drinking a lot more than either herself or Veronica. RP Vol. III 432. A recorded interview was played during the trial after Lora Dockery stated that she did not recall her description of the level of intoxication for those who were drinking. RP Vol. II 359. In the recording, Lora Dockery described everyone except herself, Francesca, Madisyn, and Veronica as being "crap-faced drunk." Lora Dockery also described that M.N. continued to drink throughout the night and had become belligerent and disrespectful by the evening. M.N. testified that she had very little experience with drinking at that time,

having only had alcohol one time before at the Dockery house. RP Vol. I 172. M.N. stopped drinking when she got sick and vomited. RP Vol. I 179.

When the rest of the Dockery family had arrived on Saturday, two additional tents had been set up for Mr. and Mrs. Dockery and Craig Axtell and Francesca Harris to sleep in. RP Vol. I 168. There was also a cot set up by the campfire, near the girls' tent. RP Vol. I 168. When it was time for bed that night on Saturday, the girls went to sleep in their own tent together, while the other adults went to their tents and the Appellant slept on the cot by the fire. CP 25 and RP Vol. I 180-181 and RP Vol. II 323. At some point thereafter, M.N. vomited in the tent and the other two girls, Madisyn and Veronica, left the tent to sleep in one of the vehicles. CP 26 and RP Vol. I 181 and RP Vol. II 323 and RP Vol. III 433. M.N. was then alone in the tent and passed out. CP 26 and RP Vol. I 181 and RP Vol. III 433. At some point thereafter, M.N. got up and left the tent for water. CP 26 and RP Vol. I 181. M.N. testified that she

had no interaction with anyone, including the Appellant, who she observed sleeping on the cot at that time. CP 26 and RP Vol. I 181, 182.

Madisyn and Veronica reported seeing M.N. naked and on top of the Appellant. CP 26 and RP Vol. II 324 and RP Vol. III 434. Veronica testified that she woke up because Madisyn was crying and saw that M.N. was laying chest to chest on top of the Appellant naked. Veronica testified that she thereafter laid down very quickly, making Madi laying down so that she couldn't see anymore. RP Vol. II 324. Veronica testified that this was the only time she looked and that they did not get out of the vehicle until sometime later when she had to go to the bathroom. RP Vol. II 325. By the time she and Madisyn left the vehicle, Veronica testified that M.N. was back in the tent and the Appellant was behind their vehicle throwing up. RP Vol. II 325. Veronica testified that she and Madisyn told Lora Dockery that "something" had happened between M.N. and the Appellant. RP Vol. II 328.

Veronica testified that they didn't really want to go into detail and it appeared to her that Lora Dockery understood and it was like she knew something went down. RP Vol. II 328. Veronica testified that she did not report what she had seen to anyone else and that there had been no police report made at that time. RP Vol. II 329.

Madisyn testified that while she was sleeping in the vehicle with Veronica, she heard the sound of the tent unzipping, which woke her up. Madisyn testified that she then saw M.N. on top of her brother. RP Vol. III 434. Madisyn testified that she saw her brother wake up and push M.N. off of him. RP Vol. III 435. Madisyn testified that she was scared and that she didn't understand really what was going on. RP Vol. III 435. Madisyn testified that she only looked until her brother pushed M.N. off and M.N. fell in the tent. RP Vol. III 437-438. Madisyn testified that after that she just laid down and woke back up and everyone was sleeping again. RP Vol. III 439. Madisyn testified that when she

looked up again, the Appellant was sleeping where he was before on the cot and M.N. was sleeping in the tent again. RP Vol. III 441. Madisyn testified that it had to have been at least 30 minutes from the one time she saw M.N. on top of the Appellant and from when she and Veronica got out of the truck so Veronica could go to the bathroom. RP Vol. III 442.

Madisyn testified that she confronted M.N. about what she had seen and that M.N. didn't say anything. RP Vol. III 443. Madisyn testified that she told M.N. that she would just rather M.N. not talk to her brother and that she would rather not see M.N. interact with her brother. RP Vol. III 443. Madisyn admitted in testimony that she had made M.N. pinkie promise that nothing else had happened between M.N. and her brother and that they both just decided to pretend like nothing happened because they were really good friends at the time. RP Vol. III 444. Madisyn further admitted in testimony that she knew it would sound wrong if it

did come out about what happened that weekend. RP Vol. III 447.

M.N. had no memory of being outside the tent with the Appellant or being on top of the Appellant while he was on the cot. M.N. testified that after she got sick and had gotten water, she went back in the tent and fell back asleep. CP 26 and RP Vol. I 182. M.N. testified that she still felt really sick and then was woken up by her tent being unzipped. RP Vol. I 182. M.N. testified that she was really confused and she initially thought it was the girls, Madi and Veronica, coming in the tent. RP Vol. I 182. M.N. testified that she was trying to see who it was and she then saw that it was the Appellant. RP Vol. I 182. M.N. testified that she was still feeling really sick and that she felt really heavy, her head hurt, and she felt nauseous. RP Vol. I 183-184. M.N. testified that the Appellant did not say anything to her and she recalled being undressed. RP. Vol. I 183, 185. M.N. testified that the sexual assault happened after the Appellant came into her tent, describing that he

put his penis inside her vagina. RP Vol. I 184. M.N. described feeling really heavy and kind of numb while the Appellant was inside her, sexually assaulting her. RP Vol. I 184. M.N. testified that she heard a shushing sound like when you're telling someone to be quiet, which she assumed was the Appellant, and then he left. RP Vol. I 186. M.N. testified that she just laid in the tent after and that she felt really heavy and like she couldn't move. RP Vol. I 186. M.N. described how she felt, testifying that it was kind of a scary situation and that she wasn't exactly sure what she was supposed to do – to go out there and say something or stay in the tent. RP Vol. I 187. M.N. testified that she wasn't sure exactly how to handle the situation. RP Vol. I 187.

M.N. testified about Madisyn confronting her in the morning and described how she felt Madisyn was putting the blame on her about what had happened. RP Vol. II 200. M.N. testified that she didn't want to say anything and that she was scared. RP Vol. II 200. M.N. testified that she didn't know what to do or what she

was supposed to say because it was all Madisyn's family there so she didn't exactly know how to handle the situation. RP Vol. II 200. M.N. testified that she kind of just put it aside and decided to just act normal, make [it through] the day, and go home. RP Vol. II 200, 201. M.N. testified that the conversation she had with Madisyn that morning changed things because it made M.N. put the blame on herself so she just thought there was no point in telling anyone and decided not to say anything about what had happened. RP Vol. II 204-205. M.N. testified that she and Madisyn stopped talking for a while after the camping trip and later they agreed they were just going to put it behind them. RP Vol. II 205, 206. M.N. went on to testify about later telling another friend about what happened, which eventually led to her mother finding text messages on her phone that indicated she had been sexually assaulted. That discovery led into the incident being reported to law enforcement. RP Vol. II 207-210.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Irregularly Admitted ER 404(b) Evidence Claim

Appellant counsel makes the argument that the State “abruptly altered its theory” following a halftime motion by trial counsel to dismiss the child molestation charge based on a claim of sufficiency of the evidence. RP Vol. III 546. The State argued to the court that the evidence supported that sexual contact occurred inside the tent as well as, by inference, outside the tent on the cot. The court asked for specific facts to support sexual contact between the parties outside of the tent and the State pointed out that two witnesses observed M.N. naked and on top of the Appellant, that one witness observed him awake when M.N. was on top of him and he pushed her off, and that the Appellant himself had stated that M.N. had her shirt off and her hands on him while he was on the cot, that he had pushed her off, and she then went back in the tent. RP Vol. III 548, 549. The court went on to ask about what had occurred inside the tent and asked if the jury would be permitted to find the Appellant guilty of both Rape of a Child in the Second degree and Child Molestation in the Second Degree for a single course of action. RP Vol. III 549. The State described that the jury would be permitted to consider both charges

for the events that occurred inside the tent and, if the Appellant was found guilty of both, the issue would then be a sentencing issue related to merger. RP Vol. III 549-550.

The court then found that there was insufficient evidence to support sexual contact as defined in the statute related to the contact between the Appellant and M.N. outside the tent since the testimony he had heard so far was that M.N. had initiated the contact, that the Appellant was asleep, and that as soon as he woke up, he pushed her off. RP Vol. III 550. Because the court ruled that there was insufficient evidence to support sexual contact outside the tent, the State was restricted from making any argument that any sexual contact occurred outside the tent in support of the child molestation charge so accordingly, did not make that argument in closing. The court agreed with the State that the jury could be allowed to consider both charges related to the actions that occurred inside the tent and that the issue of merger would come into play if the Appellant was convicted of both.

Here, the Appellant is apparently arguing that the observations made by Madisyn and Veronica, i.e. that M.N. was naked on top of the Appellant and that he pushed her off after waking up, which the

court had found not to be evidence of any wrong-doing, are now prior bad acts or “other bad acts” under ER 404(b). The Appellant’s arguments are based on the idea that what the Appellant did in that instance was a wrongful or criminal act. If anything, the testimony, if believed, would show that the Appellant did not commit a wrongful or criminal act at all. The testimony, in fact, appeared to show that the Appellant had been approached by M.N., who undressed herself and climbed on top of him naked while he was sleeping, and that as soon as he woke up and realized what was happening, he pushed her off of him. Given that there was no other testimony or further argument presented to the jury that contradicted this, it is unclear to the Respondent how the Appellant is now arguing that those actions were wrongful, criminal or otherwise qualify under ER 404(b).

While it is true that if prior crimes, wrongs, or acts of a defendant were admitted for a proper purpose, there should be a limiting instruction. However, this would only apply if there were prior crimes, wrongs, or acts admitted, which is simply not the case here. The arguments made and case law cited by the Appellant are, therefore, not relevant because there isn’t an issue of prior bad acts being admitted at trial that now need to be addressed.

2) Ineffective Assistance Claim

The Washington State Supreme Court adopted a two-prong test stated for analysis of the effectiveness of a defense counsel performance. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The Court stated that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *State v. Thomas*, 109 Wn.2d 222, 225; 743 P.2d 816 (1987). In order to maintain a claim of ineffective assistance of counsel, the defendant must show not only that his attorney’s performance fell below an acceptable standard, but also that his attorney’s failure affected the outcome of the trial.

Strickland v. Washington explains that the defendant must first show that his counsel’s performance was deficient. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689. In analyzing the first prong, the court must decide whether defense counsel’s actions constituted a tactical decision which was part of the normal

process of formulating a trial strategy. *See State v. Tarica*, 59 Wn.App. 368, 373, 798 P.2d 296 (1990).

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

If both prongs of the test are not met then the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Id.* at 687.

Here, the Appellant is arguing that the State’s theory “underwent an immediate metamorphosis” and the State suddenly alleged that the molestation occurred in the tent, which he again claims makes the testimony of Madisyn and Veronica evidence of prior bad acts. The Appellant goes on to argue that there was further error generated by the court not giving a limiting instruction, which he says should have caused trial counsel to move for a mistrial. This

argument is again premised on the misconception that the State, changed its own theory that sexual contact could be inferred from what happened on the cot, not because the court ruled against that idea, but instead just arbitrarily decided not to further that argument. Additionally, the argument is premised on the misconception that the Appellant's actions testified about constituted a criminal act. Trial counsel did not move for a mistrial based on the testimony suddenly becoming unchallenged ER 404(b) evidence simply because the testimony wasn't unchallenged ER 404(b) evidence. Furthermore, the court would not have been required to grant any such motion on the same basis. Because the testimony about the Appellant on the cot was not prior bad acts, there is no ER 404(b) challenge to be made by trial counsel or granted by the court.

If anything, the evidence presented, if believed, would have gone toward exonerating the Appellant. If the testimony was believed that the Appellant pushed M.N. off of him after finding her naked and on top of him uninvited, the jury could have easily found that M.N. may have been making up the sexual contact in the tent as revenge for being refused or that she was simply trying to get attention or any number of other theories in the Appellant's favor. In that case, trial

counsel would have made a valid trial decision not to challenge the testimony. The only error presented in this case was in the Dockery family being untruthful on the stand, which was pointed out and proven in closing with other evidence. The Dockery family's attempt to rewrite history and testify falsely on the stand damaged their credibility with the jury. Therefore, any inclination that the jury might have had to believe that the Appellant dismissed an unwanted advance by this young girl and had nothing to do with her that night, was crippled by the family lying about the camping trip beginning on Saturday, rather than Friday, and the Appellant arriving on Sunday, rather than Saturday, in order to "make" the victim older to secure a conviction on the less serious crimes of third degree rape and molestation, which was argued for by trial counsel.

3) Insufficient Evidence of Age Claim

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) "When the sufficiency of the evidence is challenged in a criminal case, all

reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).) “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005).)

Here, the Appellant has simply ignored testimony and evidence that was presented that proved beyond a reasonable doubt that the victim, M.N., was 13 years old at the time of the crime. M.N. testified that her date of birth is July 28, 2000 and M.N. testified that she was 13 years old at the time of the camping trip. CP 23 and RP Vol. I 149, 157. M.N. and Veronica both testified that the camping trip began on Friday, July 25, 2014 and ran through Sunday, July 27, 2014. CP 24 and RP Vol. I 156, 157 and RP Vol. II 318. Furthermore, testimony about the Appellant’s statements was

presented through the lead detective, Brad Johansson, in which the Appellant acknowledged that he arrived at the campsite on July 26th, which was a Saturday, and that his sister and mother had arrived the day before, which would have been Friday, July 25th. RP Vol. III 403. Furthermore, the State elicited testimony from the Appellant's father, Patrick Dockery, and submitted evidence through his time card that he had left work early, around 3:55 p.m., on Saturday, the 26th of July, which would have coincided with Mr. Dockery and the Appellant's arrival to the campground in the late afternoon/early evening on Saturday, the 26th, as testified to by M.N. and Veronica. RP Vol. III 418. Based on the other hours/work shifts listed on his time sheet, it was unusual for Mr. Dockery to leave at that time, so early in his shift.

While there was testimony from the mother, Lora Dockery, the father, Patrick Dockery, his sister, Madisyn Dockery, and their friend, Savanna Higgins, that the camping trip started on Saturday with the girls and that Patrick Dockery and the Appellant arrived on Sunday, this became a critical credibility issue in closing as indicated above. RP Vol. II 355, RP Vol. III 415, RP Vol. III 427, and RP Vol. III 553. It became clear to the State during the trial, which was a retrial from a

previous hung jury where no issue had been made in the first trial about the camping trip starting on any other day, but Friday, that trial counsel was attempting to set up a contingency plan for a conviction on the lesser charge of either Rape of a Child in the Third Degree or Child Molestation in the Third Degree, if an acquittal could not be achieved, based on the fact that M.N.'s birthday was on the 28th of July. Therefore, if the entire camping trip started a day later, the date of the incident could be pushed back a day and M.N. would have been fourteen, not thirteen years old at the time of the alleged sexual assault. Trial counsel successfully argued for and was granted jury instructions for the two lesser crimes. Trial counsel also made arguments to the jury in closing that the camping trip began on Saturday and, based on the family's testimony, the Appellant arrived on Sunday afternoon/evening so that M.N. was fourteen, not thirteen, in the early morning hours on Monday.

However, what trial counsel failed to realize, and what now the Appellant has also missed, was that the Facebook photos that had been admitted into evidence had a day indication posted on them for when they had been uploaded, which showed they were posted on "Saturday." The Appellant was in one of the Facebook photos that

had been uploaded on Saturday, which was strong, if not indisputable, evidence that the Appellant was on the camping trip beginning on Saturday. There was further submitted evidence with the father's time card that showed that Saturday was the 26th of July. Therefore, the Appellant arrived on Saturday with his father and any interaction between the Appellant and M.N. occurred between late night Saturday, the 26th, and early morning Sunday, the 27th, and she was still then 13 years old.

The testimony and evidence presented and submitted clearly established the timeline and the victim's age. The State proved every element of Rape of a Child in the Second Degree [and Child Molestation in the Second Degree for that that matter] and the evidence was more than sufficient to convict the Appellant so the conviction must stand.

4) Insufficient Evidence of "Particularly Vulnerable" Claim

Appellate courts "review a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard." *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144, 163 (2011) (citing *State v. Stubbs*, 170 Wash.2d 117, 123, 240 P.3d 143 (2010) and RCW 9.94A.585(4).) "Under this standard, we review the

evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Id.* (citing *State v. Yates*, 161 Wash.2d 714, 752, 168 P.3d 359 (2007).)

This issue was essentially argued by trial counsel at the time the jury instructions were being discussed. RP Vol. III 567, 573. Trial counsel argued that the State had not presented any evidence to establish that the Appellant came into contact with M.N. when she was drinking. RP Vol. III 567. The court addressed this by stating that there was testimony that the drinking took place out in the open, that all the adults saw it, everybody was running around puking all over the place, and that it would be pretty hard for everybody not to know that something was going on. RP Vol. III 574. While the court did not point this additional fact out, the photos admitted that showed M.N. with a Mike's Hard Lemonade in her hand and also drinking the Mike's Hard Lemonade were taken in the same place as and clearly within a few moments of the photo taken where the Appellant was included with the girls. There was also ample testimony from Veronica, Lora Dockery, and Madisyn that M.N. was drinking more than the other girls and was intoxicated, which included M.N. vomiting as a result of her drinking. RP Vol. II 322, 323, and 336-337, RP Vol. II 359,

369, 371, and 372, and RP Vol. III 432 and 436. Furthermore, M.N. herself testified about her drinking, how much she had to drink, how she became ill, how she was stumbling around, how she vomited, and how her body felt during the sexual assault, i.e. that she felt numb, heavy, and unable to move. RP Vol. II 215-217, 225, 229.

As the court put it, it is difficult to imagine that under all of these circumstances that anyone, including the Appellant who was present when she started drinking and was there for the entire night while she continued to drink, would not have known that M.N. was drinking during the day and that she was drunk by that evening. It is further difficult to imagine a more vulnerable victim than this very young girl who has only tried alcohol once before, who has conservatively drunk three Mike's Hard/Harder Lemonades and had at least one shot of Fireball whiskey, who is sick and has vomited, who has been left alone in her tent where an adult man was then able to come into her tent and have sex with her without any resistance, and she has no one there to turn to for help because everyone there is a member of that man's family.

The victim's particular vulnerability was known or should have been known to the Appellant and her vulnerability was certainly a substantial factor in the commission of the crime.

5) Imposition of Appellate Costs

The Respondent defers to the Court regarding any waiver of appellate costs for the Appellate as an indigent defendant. The trial court found the defendant to be indigent in this case and also waived all non-mandatory fees and costs at sentencing. CP 187, 191, 197. The Respondent has no information that the Appellant's financial situation has changed since the case was before the trial court.

CONCLUSION

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

DATED this 2nd day of October, 2017.

Respectfully Submitted,

BY: 
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