

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DAVID WHITTAKER,

Appellant.

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

The Honorable Scott Collier

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	2
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> ...	2
D. <u>STATEMENT OF THE CASE</u>	3
E. <u>ARGUMENT</u>	15
1. REVERSAL IS REQUIRED BECAUSE WHITTAKER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO PROPOSE A JURY INSTRUCTION ON THE STATUTORY AFFIRMATIVE DEFENSE THAT AT THE TIME OF THE ACT HE REASONABLY BELIEVED THE ALLEGED VICTIM WAS NOT MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS IN THE CAR.....	15
2. REVERSAL AND DISMISSAL OF THE SECOND COUNT OF RAPE IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT WHITTAKER COMMITTED RAPE IN THE SECOND DEGREE IN THE BEDROOM.	23
F. <u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)	20
<i>In re Personal Restraint Petition of Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007)	18, 19, 22, 23
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	19
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 124 (2007)	28
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	16
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998)	24
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993)	23
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991)	16
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	23
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	15
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009)	22, 23
<i>State v. Rich</i> , 184 Wn.2d 897, 365 P.3d 746 (2016)	24

TABLE OF AUTHORITIES

	Page
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	24
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	15, 19

FEDERAL CASES

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	15

RULES, STATUTES, OTHER

RCW 9A.44.030(1)	17
U.S. Const. Amendment VI	15
Wash. Const., art. I, section 22	15
WPIC 19.03	17
WPIC 41.02	16

A. INTRODUCTION

Jason David Whittaker was convicted of two counts of rape in the second degree, in which the State alleged that he engaged in sexual intercourse with Dylana Turner while she was incapable of consent by reason of being physically helpless or mentally incapacitated. The State alleged that after they left a strip club, Whittaker committed the crimes in the back seat of a car and in the bedroom of his home. Whittaker testified that Turner did not appear intoxicated and that the sexual contact in the car was consensual. He also testified that there was no sexual contact in the bedroom.

Defense counsel did not propose the jury instruction that states it is a defense to rape in the second degree that at the time of the act the defendant reasonably believed the victim was not mentally incapacitated or physically helpless. The conviction must be reversed because defense counsel's performance was deficient in failing to propose the instruction where there was evidence that Whittaker reasonably believed Turner was not incapacitated in the car and Whittaker was prejudiced by counsel's deficient performance.

Furthermore, the forensic evidence raised reasonable doubt where there was no semen detected on the vaginal endocervical swabs taken from Turner or anywhere on Turner or the bed that matched Whittaker's DNA

profile. Consequently, the conviction must be reversed because the State failed to prove beyond a reasonable doubt that Whittaker engaged in sexual intercourse with Turner in the bedroom.

B. ASSIGNMENTS OF ERROR

1. Whittaker was denied his constitutional right to effective assistance of counsel where defense counsel failed to propose a jury instruction for the affirmative defense that he reasonably believed that Turner was not physically incapacitated or mentally helpless in the car.

2. There was insufficient evidence to prove beyond a reasonable doubt that Whittaker committed rape in the second degree in the bedroom.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required because Whittaker was denied his right to effective assistance of counsel where counsel failed to propose the jury instruction for the affirmative defense that he reasonably believed that Turner was not physically incapacitated or mentally helpless given his testimony that she did not appear intoxicated in the car and Whittaker was prejudiced by counsel's deficient performance where the instruction was his sole available defense?

2. Is reversal required because there was insufficient evidence to prove beyond a reasonable doubt that Whittaker engaged in sexual

intercourse with Turner in the bedroom where the forensic evidence showed no trace of semen on the vaginal endocervical swabs taken from Turner or anywhere on Turner or the bed that matched Whittaker's DNA profile?

D. STATEMENT OF THE CASE¹

1. Procedure

On September 9, 2015, the State charged appellant, Jason David Whittaker, with one count of rape in the second degree. CP 1. The State filed an amended information on July 6, 2015, charging Whittaker with one count of rape in the second degree, one count of attempted rape in the second degree, and one count of indecent liberties. CP 27-28. On August, 8, 2016, the State filed a second amended information, correcting the dates of the alleged crimes. CP 82-83. The State filed a third amended information on August 10, 2016, charging Whittaker with one count of rape in the second degree and a second count of rape in the second degree under RCW 9A.44.050(1)(b). CP 122-23.

Following pretrial proceedings, trial testimony began on August 8, 2016, before the Honorable Scott Collier. 1RP 169. On August 11, 2016, the jury found Whittaker guilty as charged. 5RP 794-95. On September

¹ The record contains five volumes of verbatim report of proceedings: 1RP - 06/15/16, 08/04/16, 08/08/16; 2RP - 08/08/16, 08/09/16; 3RP - 08/09/16, 08/10/16; 4RP - 08/10/16, 08/11/16; 5RP - 08/11/16, 09/21/16, 09/30/16.

30, 2016, the court sentenced Whittaker to 116 months in confinement and imposed conditions. CP 198-216. Whittaker filed a timely notice of appeal. CP 217.

2. Facts

In September 2014, Jason Whittaker lived in Vancouver with his wife, stepdaughter, and Tony Strobel.² 2RP 294-95, 4RP 627-28. At that time, Strobel was dating Natasha Herd. Strobel knew Dylana Turner because she and Natasha were friends. 2RP 271-74, 293. Whittaker met Turner on September 11, 2014. 4RP 628. The four of them were hanging out at Whittaker's house while his wife and stepdaughter were visiting family in Utah. 2RP 297-98; 4RP 660-61.

a. Testimony of Jason Whittaker

On the day that Whittaker met Turner, the two of them along with Strobel and Herd played Truth or Dare. 4RP 629-30. Taking a dare, he kissed Turner on her breasts. He could not recall if her shirt was off or just pulled up. 4RP 630. After the game, Whittaker spent most of that evening outside with his neighbors while the others were in the house drinking. 4RP 630-31. Two days later, he had a barbeque at his house with Turner, Strobel, Herd, and his neighbors. 4RP 631-32. That night, when Turner,

² Tony Strobel is transgender and changed his name from Tonya to Tony. 1RP 118-19; 2RP 291-93.

Strobel, and Herd suggested going to a strip club in Portland, he decided to go with them. He let Strobel drive his car because he had been drinking. 4RP 632-33.

Upon arriving at the club, they ordered drinks. 4RP 633. While sitting next to Turner, Whittaker put his hands on her legs. 4RP 634. They stepped outside once or twice to smoke cigarettes. 4RP 635. Turner showed no signs of being intoxicated. It just seemed like she was having fun. 4RP 636, 645-46. After a couple of hours, they left the club. Whittaker sat in the back seat with Turner who had no problem getting into the car. 4RP 634, 636, 645-47. They were sitting apart until Turner leaned over and said, "I want you," and laid down in his lap. 4RP 637. Then she started rubbing his penis and he put his hand down her pants and started fingering her. 4RP 637, 668. When he thought he saw Strobel look back, he stopped. 4RP 637, 664-65. The sexual touching was consensual. 4RP 638-39, 646-47.

In less than twenty minutes, they arrived at his house. Turner appeared sick so Strobel and Herd helped her out of the car. As they entered the garage, Turner vomited. 4RP 638. He did not see how intoxicated she was until she began throwing up. 4RP 669. He carried her into the house to his stepdaughter's bedroom upstairs and laid her down on the bed. 4RP 638-40. Whittaker was going to leave the room but stayed because Strobel

and Herd asked him to watch Turner while they went outside to smoke. 4RP 642, 666. He sat down and began scrolling Facebook on his phone. 4RP 643. The bedroom light was on, a window was open, and the door was open. 4RP 640-644.

Within a few minutes, he heard Turner making sounds while stumbling to her feet and pulling down the side of her pants before laying back down. As he started to get up, Strobel and Herd came through the door and Strobel yelled an obscenity in bewilderment. He assured them that nothing was going on and tried to close the door but they came in the room. 4RP 647-48. He overreacted and told them to get out of his house because he knew what they were thinking even though nothing happened. 4RP 648-49. Strobel, Herd, and Turner left while he was outside hanging out with some neighbors. 4RP 650.

At around 5 a.m., an officer came to Whittaker's house while he was asleep. 4RP 650-51. He cooperated with the officer and showed him his stepdaughter's bedroom. 4RP 651. Within a week, a detective called him and he met with her for an interview. 4RP 652-53. In June 2015, while he had moved to Utah, the detective called again for a phone interview. 4RP 653-54, 656-57. He moved back to Vancouver in November 2015. 4RP 675.

b. Testimony of Tony Strobel

Strobel, Herd, Whittaker, and Turner were playing a game of Truth or Dare at Whittaker's house. 2RP 299. On a dare from Herd, Whittaker and Turner made out. 2RP 299. He did not know if Turner was romantically interested in Whittaker but she kissed him during the game. 2RP 300. A few days later, the four of them went to a strip club in Portland. 2RP 301, 337-38. The others drank and were having fun. He remained sober because he was driving. 2RP 302-04. When they left after two or three hours, Turner was drunk and needed help getting to the car. 2RP 304-07.

He drove with Herd in the passenger seat and Whittaker and Turner in the back seat. 2RP 308. Turner was laying on Whittaker's lap. 2RP 309. When they arrived home and got out of the car, Turner threw up all over herself. 2RP 312-13. He and Herd took Turner to the bathroom upstairs, gave her a bath, and he provided some clothes. 2RP 313-14. They helped Turner to a bed where he laid down a blue blanket. 2RP 315-17. While Turner laid down on the bed, he left the bedroom door open and went outside to smoke a cigarette. 2RP 317-19. He stayed outside for about five minutes. 2RP 355.

When Strobel went back upstairs to check on Turner, the bedroom door was closed. He opened the door but Whittaker shut the door on him.

2RP 319-20. He opened the door and asked Whittaker what was going on and told him to leave the room. At the same time, Herd came down the hallway so he told her “you need to deal with this.” 2RP 320. He saw Turner on the bed with her pants down. 2RP 321. He went in the room with Herd where Turner was crying and saying “her crotch hurt.” He asked her what happened but she did not know. 2RP 324-25. The three of them went to his room and smoked a cigarette to calm down. 2RP 325.

Then he told Turner and Herd to get in his car and he drove to Turner’s home which was about ten minutes away. 2RP 325-27. Turner seemed soberer and her mother took her upstairs to the apartment where they lived. 2RP 327-38. A friend drove Turner and her mother to the hospital. 2RP 329. Strobel and Herd also went to the hospital where he spoke with an officer. 2RP 329. Sometime later, at the request of law enforcement, he removed the blanket from the bedroom in Whittaker’s house and took it to the police station. 4RP 367-68. He “didn’t see anything that went on” in the bedroom. 2RP 368.

c. Testimony of Dylana Turner

In September 2014, her best friend, Herd, was dating Strobel who lived with Whittaker. 1RP 171-73. She met Whittaker when she went to his house with Herd and Strobel. 1RP 174. Once when she and Whittaker were alone, he put his hand on her thigh which made her comfortable. 1RP

180-82. On another day, she played a game of Truth or Dare with Herd, Strobel, and Whittaker. 1RP 182. On a dare, Whittaker kissed her foot. 1RP 184.

On September 13, 2014, Turner, Herd, Strobel, and Whittaker went to a strip club in Portland. 1RP 286-87. When they all ordered drinks, she ordered a “Sex on the Beach.” 1RP 188, 2RP 221-22. After having the drink, she blacked out, “I remember being put in the back seat with Jason and then blacking out and blacking back in with him pushing me into his lap.” 2RP 191-92. When she came out of the black out for a minute, she was laying on her side and she felt extremely drunk and dizzy. 2RP 193-94.

She blacked out again and woke up from the shock of being put in a cold bath. She told Herd and Strobel to let her out because the water was cold. 1RP 194-95. They dressed her in sweat pants and a T-shirt and took her to a bedroom. 2RP 195-97. When they put her in the bedroom, she blacked out again. 2RP 197.

Turner woke up with Whittaker on top of her. She felt pain in her vagina area, “like it was stinging – like someone was stabbing me.” She told him to stop. 2RP 200-02, 246-47. Then she blacked out again and awoke when she heard Strobel yelling at Whittaker when he was on top of her. 2RP 202-03, 231-32. She blacked out again until she was in the back

seat of Strobel's car and he and Herd took her home. 2RP 203. When she got home, her mother thought she was drunk so she put her in the shower. 2RP 203. She still felt the pain between her legs. 2RP 204-05.

She wanted to go to sleep, but her mother made her go to the hospital. 2RP 206-07. While at the hospital, she told her mother what happened. 2RP 204. She also told the nurse what happened and talked to a police officer. 2RP 208, 240-41.

d. Testimony of Turner's Mother, Stacy Smith

On the evening of September 13, 2014, Smith received a text message from Turner that she was at a club having lots of fun. Smith had sent a text to Herd earlier because she wanted Turner to come home. She was worried because Turner recently had several panic attacks. 2RP 273-74. When Strobel and Herd brought Turner home, she helped her out of the car and up the stairs to their apartment. 2RP 255-56, 276. Turner was screaming and acting like she was drunk so Smith put her in the shower. 2RP 256-57. Turner sat on a small stool in the shower and started crying. She kept moving back and forth in discomfort. 2RP 257, 267. She said it hurts down in her vagina area which was bright red and said "mom he raped me." 2RP 267. Smith dried her off, put her clothes on, and immediately took her to the hospital. 2RP 268.

e. Law Enforcement Testimony

Corporal Christopher LeBlanc of the Vancouver Police Department was dispatched to the hospital where he met the victim advocate, Turner, Herd, and Strobel. 3RP 399-400. He conducted interviews and obtained evidence from the hospital. 3RP 401-06. Thereafter, he went to Whittaker's house. Whittaker was cooperative and showed him the bedroom. 3RP 410. He denied that anything happened. 3RP 407-08, 412. LeBlanc did not collect any evidence from the house. 3RP 409.

On September 16, 2014, Officer Kendrick Suvada collected evidence that Strobel brought to the police station. 3RP 284-85. Strobel said Corporal LeBlanc asked her to bring in "some blankets or bedding material." 3RP 285. Suvada placed the evidence into a large paper bag, sealed the bag with evidence tape, and submitted it into the evidence system. 3RP 285-91.

Detective Carol Boswell met Whittaker on September 24, 2014, when he voluntarily provided a DNA sample. She interviewed him on October 6, 2014, and interviewed him again on June 17, 2015. 3RP 547, 597. The court admitted both recorded interviews, which were played for the jury. Ex. 1, 2, 36, 37. Whittaker told Boswell that he put his finger inside Turner while they were in the car. Ex.1, 36.

f. Forensic Testimony

Anne-Marie Summerhays, a sexual assault nurse examiner, conducted a physical examination and collected blood, urine, and DNA specimens which she provided to the police. 3RP 511-12. She took swabs from Turner's "external vagina and the inside of her vagina – down near the cervix and externally near the anus." 3RP 513. She took a vulva perianal swab, which is the area between the bottom of the vagina and anus, and an internal vaginal swab also called a cervical swab. 3RP 515-16. Summerhays also took a statement from Turner, which she wrote down as part of her duties. 3RP 517-18, 528-29. She did not document any injuries or redness. 3RP 531.

Forensic scientist, Andrew Gingras, received blood and urine samples collected from Turner for testing. 3RP 475. He found ethanol, a drinking alcohol, in both the blood and urine. 3RP 476-77. He explained the formula for calculating the blood alcohol level of a person, considering variables such as weight, gender, and the concentration of alcohol in the beverage that is consumed. 3RP 478-82. The correlation between alcohol concentration and intoxication depends on the tolerance of the person to the effects of alcohol. 3RP 482-84.

Forensic scientist, Laura Kelly, received a sexual assault evidence collection kit, a bag of clothing, comforter, blanket, towel, and a DNA

sample from Whittaker as evidence. 3RP 435. The bag of clothing contained a pair of sweat pants worn by Turner. 3RP 438-39. The sexual assault kit contained oral swabs, perianal vulva swabs, vaginal endocervical swabs, anal swabs, and a DNA sample from Turner. 3RP 437-38. The perianal swabs are collected from the area between the vagina and anus. The endocervical swabs are collected from inside the vagina. 3RP 438.

Kelly developed a DNA profile from the sweat pants which was a mixture originating from at least three people. The major component matched the DNA profile of Turner but she could not identify anyone else's DNA. 3RP 440-41. She detected semen on the blue comforter and developed a DNA profile from an unknown male source and Whittaker was excluded as the source. 3RP 441-42. She cut out two pieces of stained areas of the comforter that tested positive for the presence of amylase and semen. 3RP 443-44.³ From the semen positive stain, she performed a differential extraction and produced DNA from the sperm fraction and non-sperm fraction. Whittaker was excluded as being the source or contributor of the DNA. 3RP 444-45. She generated a DNA profile from the amylase stain which matched the combined DNA profiles of Turner and Whittaker. 3RP

³ The word amylase is incorrectly spelled "a molies" throughout the transcript of Kelly's testimony.

446-47. Body fluids that contain the protein amylase include saliva, feces, and vomit. 3RP 447-48, 452.

Kelly tested the perianal vulva swabs collected from the outer vaginal area using YSTR testing, where all the regions tested are located on the “Y” chromosome which allows targeting male DNA specifically. 3RP 433, 448-50. She obtained a YSTR profile from the swabs that matched the YSTR profile of Whittaker. 3RP 448-49. However, a YSTR profile is not unique to individuals because paternal male relatives have the same DNA profile and it is possible that someone not paternally related could also have the same DNA profile. The YSTR profile she obtained “is not expected to occur more frequently than one in eight thousand six hundred male individuals in the U.S. population.” 3RP 449. When she tested the vaginal endocervical swabs, amylase was detected but no semen was detected inside the vagina. 3RP 454.

DNA can transfer by touching a person or an item and it is possible for DNA to go through a secondary transfer which is DNA from a person onto an item and then from that item onto a second item. 3RP 457-58. Based on the amount of DNA she obtained from the comforter, it is not likely that was transferred DNA but it is possible because different people shed or transfer different amounts of DNA. 3RP 458-59.

E. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE WHITTAKER WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO PROPOSE A JURY INSTRUCTION ON THE STATUTORY AFFIRMATIVE DEFENSE THAT AT THE TIME OF THE ACT HE REASONABLY BELIEVED THE ALLEGED VICTIM WAS NOT MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS IN THE CAR.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). “The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” *Thomas*, 109 Wn.2d at 225.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251

(1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there “is no conceivable legitimate tactic that explains counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel’s conduct can be characterized as “legitimate trial strategy or tactics,” it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

Here, the court instructed the jury on the elements of rape in the second degree pursuant to WPIC 41.02:

To convict the defendant of the crime of rape in the second degree as charged in [count 1][count 2], each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 13, 2014 and September 14, 2014, the defendant engaged in sexual intercourse with Dylana Turner;

(2) *That the sexual intercourse occurred when Dylana Turner was incapable of consent by reason of being physically helpless or mentally incapacitated;* and

(3) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.

CP 164, 165 (Jury Instruction No. 11, 12)(emphasis added).

The Comment section of WPIC 41.02 provides:

Defense. RCW 9A.44.030(1) creates a defense to a charge of rape in the second degree if the defendant reasonably believed that the victim was not mentally incapacitated or physically helpless at the time of the incident. For a detailed discussion of the defense and burden of proof issues relating to it, see Comment to WPIC 19.03 (Rape-Second Degree or Indigent Liberties-Defense).

WPIC 19.03 provides:

It is a defense to a charge of rape in the second degree that at the time of the act the defendant reasonably believed that the (name of person) was not mentally incapacitated or physically helpless.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to the charge].

The Note on Use for WPIC 19.03 states:

Use this instruction with WPIC 41.02 (Rape-Second Degree-Elements) . . . only if it is alleged under RCW 9A.44.050(1)(b) . . . that the victim was incapable of consent and the statutory defense is in that the victim was incapable of consent and the statutory defense is in issue in that the defendant reasonably believed at the time of the offense that the victim was not mentally incapacitated or physically helpless.

The Comment for WPIC 19.03 cites RCW 9A.44.030(1):

The statute provides that in “any prosecution under RCW Chapter 9A.44 in which consent is based solely upon the victim’s mental incapacity or upon being physically helpless, it is a defense that the defendant must prove by a preponderance of the evidence that at the

time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.”

This Court’s decision in *In re Personal Restraint Petition of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) is instructive where the facts are similar to the facts here.

In *Hubert*, he met three women at a bar. Two of the women, Noel Wood and Sandy Sallee, were roommates. As they left the bar, Hubert accepted Sallee’s invitation to come over for another drink. Hubert, Shallee, and Wood shared a beer and then Wood retired to her bedroom to go to sleep. Eventually, Shallee also went to bed and invited Hubert to sleep on the couch. In the early morning, Hubert went to Wood’s bedroom. 138 Wn. App. at 926.

Hubert testified that Wood was flirtatious throughout the evening and seemed receptive to a sexual relationship. He knocked on the door, entered the bedroom, and laid down beside Wood. They took off their clothes and he anticipated that they would have sex, but before he penetrated her, she jumped out of bed. She said what they did was wrong because she had a boyfriend and left the house. Wood testified that she did not flirt with Hubert during the evening. After going to sleep, she awoke while Hubert was penetrating her and her clothes were removed. She told him she had a

boyfriend, pushed him off of her, got out of bed, and went to her boyfriend's. *Id.* at 926-97.

The State charged Hubert with second degree rape under the part of the statute which criminalizes sex with a person incapable of consent by reason of being physically helpless. Defense counsel did not propose a jury instruction on the reasonable belief defense under RCW 9A.44.030(1). *Hubert*, 138 Wn. App. at 927-29. The jury convicted Hubert of attempted rape in the second degree. 138 Wn. App. at 927-29. Recognizing that legitimate trial strategy cannot serve as a basis for ineffective assistance of counsel, this Court reasoned that an attorney's failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic:

Hubert's attorney had only to review the section headings of chapter RCW 9A.44 RCW, where the section is prominently labeled "Defenses to prosecution under this chapter," or the pattern jury instructions for the charged offense. Comments to the instruction defining second degree rape and the instruction outlining the elements of the crime explicitly reference the instruction on the statutory defense.

Id. at 929-30 (citing *State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999), *State v. Thomas*, 109 Wn.2d. 222, 743 P.2d 816 (1987)). Accordingly, this Court held that "[c]ounsel's failure to discover and advance the defense was plainly deficient performance. *Id.* at 930.

This Court also concluded that Hubert was prejudiced by defense counsel's deficient performance because without the instruction, the jury was "unaware that if Hubert reasonably believed Wood had capacity to consent, his belief constituted a defense to the charge." *Id.* at 932. "The jury thus had no way to understand the legal significance of the evidence supporting the reasonableness of Hubert's belief that Wood was awake and capable of consenting to his advances." *Id.*

This Court granted Hubert's personal restraint petition, vacated his conviction, and remanded for a new trial. *Id.* Significantly, this Court granted relief on collateral review where Hubert was required to "demonstrate by a preponderance of evidence that he was actually and substantially prejudiced by the error." *Id.* at 928 (citing *In re Personal Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004)).

Similar to *Hubert*, Whittaker testified that the sexual occurrence in the back seat of the car was consensual. 4RP 646-47, 657-58. Turner did not appear intoxicated:

- Q. Okay. When you got in the car at the club how in – how intoxicated were you?
- A. I was feeling pretty good. I mean – I drink a lot – I mean – I – I was feeling good.
- Q. Okay.
- A. - so I have a – a higher tolerance I guess you could say but –
- Q. Okay. So in terms of Dylana what was your – your appreciation of her intoxication level?

- A. At – the whole time at the club I – we were all just – her intoxication level – I – it just seemed like she was having fun.
- Q. Okay. So she didn't – her head didn't bob down or anything like that?
- A. Not that I remember.
- Q. Okay. When you went out and smoked did she have some trouble walking? Did you help her?
- A. - I didn't help her – not – not
- Q. Okay.
- A. I didn't help her, no.
- Q. Okay. So there weren't any outside clues to you that she was extremely intoxicated?
- A. No.

4RP 645-46.

When they were leaving the club, he did not see Turner having any problem walking or getting into the car. 4RP 636, 646. They were sitting apart until Turner leaned over and said, "I want you," and laid down in his lap. 4RP 637. Then she started rubbing him and he put his hands down her pants and started fingering her. 4RP 637, 668. Turner testified that she remembered "being put in the back seat with Jason and then blacking out and blacking back in with him pushing me into his lap." 2RP 192. Every time she would try to sit back up, she pushed her head back into his lap. 2RP 192. When she came out of the black out for a minute, she was laying on her side and she felt extremely drunk and dizzy. 1RP 193-94

For defense counsel's failure to request the reasonable belief instruction to amount to deficient performance, the defendant must show

that had counsel requested the instruction, the trial court would have given it. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). To warrant a reasonable belief instruction, the defendant must present evidence that at the time of the offense, he reasonably believed that the alleged victim was not mentally incapacitated and/or physically helpless. *Id.* The record substantiates that if defense counsel had proposed the instruction, the trial court would have given it based on the evidence. That other evidence may have shown that Turner was incapacitated does not necessarily disprove that Whittaker's belief was not reasonable. Instead, such evidence created weight and credibility issues for the jury to determine. *Powell*, 150 Wn. App. at 154. Like in *Hubert* and *Powell*, defense counsel's failure to propose the reasonable belief instruction constitutes deficient performance because failure to investigate the relevant law and propose the reasonable belief instruction where the evidence supported it cannot be characterized as a legitimate tactic. *Hubert*, 138 Wn. App. at 929-30, *Powell*, 150 Wn. App. at 155.

Furthermore, Whittaker was prejudiced by defense counsel's deficient performance because as in *Hubert* and *Powell*, without the reasonable belief instruction, the jury had no way of acquitting Whittaker even if it believed he had reasonably believed Turner was not mentally incapacitated or physically helpless in the car. "The absence of this

instruction essentially nullified” Whittaker’s defense. *Powell*, 150 Wn. App. at 157.

Reversal of one count of rape in the second degree is required where defense counsel’s performance was deficient and Whittaker was prejudiced by defense counsel’s deficient performance because “[w]here defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” *Hubert*, 138 Wn. App. at 132.

2. REVERSAL AND DISMISSAL OF THE SECOND COUNT OF RAPE IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT WHITTAKER COMMITTED RAPE IN THE SECOND DEGREE IN THE BEDROOM.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *In re Winship*, 397 U.S. 358, 362-63, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational juror could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). 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). If the evidence is insufficient, the conviction must be reversed and the case dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Here, the court instructed the jury on the definitions for rape in the second degree and sexual intercourse:

A person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.

CP 160 (Jury Instruction No. 7).

Sexual intercourse means that the sexual organ of the male penetrated the sexual organ of the female and occurs upon any penetration, however, slight, or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 161 (Jury Instruction No. 8).

The witnesses presented conflicting testimony. Whittaker testified that he was watching Turner while Strobel and Herd went outside to smoke a cigarette. She started making “vocal noises” but he could not understand what she was saying. She stumbled to her feet and pulled down one side of her pants before laying back down. 4RP 642, 647. Then Strobel and Herd

came down the hall and Strobel yelled out an obscenity in bewilderment. 4RP 647. He assured them that nothing was going on and tried to close the door but they entered the room. 4RP 647-49.

Turner testified that when Strobel and Herd put her in the bedroom, she blacked out. 2RP 196-97. She woke up with Whittaker on top of her. She felt pain in her vagina area and told him to stop. 2RP 200-02. Then she blacked out again and awoke when she heard Strobel yelling at Whittaker when he was on top of her. 2RP 202-03, 231-32.

Strobel testified that he saw Turner on the bed with her pants down. 2RP 321. He went in the room with Herd where Turner was crying and saying “her crotch hurt.” He asked her what happened but she did not know. 2RP 324-25. The three of them went to his room and smoked a cigarette to calm down. 2RP 325. He “didn’t see anything that went on” in the bedroom. 2RP 368.

In light of the conflicting testimony, the forensic evidence was critical to the State’s case. Laura Kelly, a forensic scientist, testified that she detected semen on the blue comforter and developed a DNA profile from an unknown male source and Whittaker was excluded as the source. 3RP 441-42. She cut out two pieces of stained areas of the comforter that tested positive for the presence of amylase and semen. 3RP 443-44. From the semen positive stain, she performed a differential extraction and

produced DNA from the sperm fraction and non-sperm fraction. Whittaker was excluded as being the source or contributor of the DNA. 3RP 444-45. She generated a DNA profile from the amylase stain which matched the combined DNA profiles of Turner and Whittaker. 3RP 446-47. Body fluids that contain the protein amylase include saliva, feces, and vomit. 3RP 447-48, 452.

Kelly explained that perianal swabs are collected from the area between the vagina and anus and endocervical swabs are collected from inside the vagina. 3RP 438. She tested the perianal vulva swabs collected from the outer vaginal area using YSTR testing, where all the regions tested are located on the “Y” chromosome which allows targeting male DNA specifically. 3RP 433, 448-50. She obtained a YSTR profile from the swabs that matched the YSTR profile of Whittaker. 3RP 448-49. However, a YATR profile is not unique to individuals because paternal male relatives have the same DNA profile and it is possible that someone not paternally related could also have the same DNA profile. The YSTR profile she obtained “is not expected to occur more frequently than one in eight thousand six hundred male individuals in the U.S. population.” 3RP 449.

Importantly, she tested the vaginal endocervical swabs:

Q. Okay. And what’s the definition of the swab taken from inside the vagina?

- A. So the swab taken from inside the vagina is usually called the vaginal endocervical swab.
- Q. Okay. And did you have an opportunity to perform your tests on those rape kit swabs in your lab?
- A. *I did test the vaginal endocervical swabs. And [amylase] was detected on the vaginal endocervical swabs. No semen was detected on those swabs and I processed them up through quantitation and no male DNA was detected on that sample. So I did not proceed forward with developing a DNA profile at that time.*
- Q. So you'll have to excuse me but in – in my parlance *does that mean there was no identifiable male DNA inside the vagina based on the swab that was used?*
- A. *That is correct. No male DNA was detected and no DNA profile was even attempted at that point.*

3RP 453-54. (emphasis added).

The jury was instructed on reasonable doubt:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 156 (Jury Instruction No. 3).

Based on Kelly's testimony, the forensic evidence and lack of forensic evidence raises reasonable doubt that penetration occurred. The fact that she detected amylase in the vagina but no semen in the vagina and no semen at all that matched Whittaker's DNA profile creates a reason for reasonable doubt. The amylase on the comforter and YSTR DNA from the perianal swabs do not prove penetration and therefore does not overcome

reasonable doubt. Importantly, Whittaker voluntarily provided a DNA sample to Detective Boswell. 3RP 547. When she told him during the first interview that “DNA doesn’t lie, he agreed that it does not lie and the results will show that the only thing that happened was in the car. Ex. 1, 36. The DNA evidence, which “doesn’t lie,” leads to reasonable doubt.

“The presumption of innocence is the bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 124 (2007). Even when admitting the evidence as true and drawing all reasonable inferences therefrom while viewing the evidence in the light most favorable to the State, no rational juror could have found beyond a reasonable doubt that Whittaker had sexual intercourse with Turner in the bedroom. When considering the forensic evidence and lack of forensic evidence fully, fairly, and carefully, no reasonable person would have an abiding belief in the truth of the charge.

Reversal and dismissal is required because there was insufficient evidence to prove the essential elements of rape in the second degree.

F. CONCLUSION

For the reasons stated, this Court should reverse one count of rape in the second degree and reverse and dismiss the other count of rape in the second degree.

DATED this 22nd day of May, 2017.

Respectfully submitted,

Valerie Marushige
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Attorney for appellant, Jason David Whittaker

DECLARATION OF SERVICE

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached to the Clark County Prosecutor's Office at CntyPA.GeneralDelivery@clark.wa.gov and by U.S. Mail to Jason David Whittaker, DOC # 392967, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326.

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

DATED this 22nd day of May, 2017.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

MARUSHIGE LAW OFFICE
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