

NO. 49687-9-II

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

STATE OF WASHINGTON, Respondent

v.

JASON DAVID WHITTAKER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01691-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Whittaker had the benefit of effective counsel.**
- II. **The State presented sufficient evidence to support the conviction for count 2, Rape in the Second Degree.**

STATEMENT OF THE CASE

Jason Whittaker (hereafter ‘Whittaker’) was ultimately charged and tried on two counts of Rape in the Second Degree. CP 122-23. The charges arose out of an incident wherein he was alleged to have digitally penetrated the victim’s vagina, D.T., while she was passed out in the back seat of a car, and then later that same night/morning, penetrated her vagina with his penis while she was passed out on a bed.

The evidence at trial showed that D.T. lives in Clark County with her mother, Stacy Smith and her sister. RP 171. At the time of the incident she was 21 years old. RP 174. During the time period surrounding September 2014, D.T. was close friends with a girl named Natasha. RP 171. Natasha’s partner is Tony Strobel.¹ RP 171. Around that time period, D.T. met Whittaker because Tony Strobel, her friend’s partner, lived with Whittaker. RP 173. D.T. was not sure how old Whittaker was, but she believed he was “much older” than she was. RP 175.

¹ Tony Strobel is referred to through the report of proceedings as both “Tonya” and “Tony.” During his testimony, he indicated he is “Tony,” so the State refers to him as such in this brief.

D.T. went to Whittaker's house, located in Clark County, with Natasha and Tony on two separate occasions. One time was a few days prior to the incidents of sexual assault pertaining to this case. RP 175. On that first occasion D.T. visited Whittaker's house, she went there to drink and hang out with Natasha. RP 177-78. During that visit, Whittaker made D.T. uncomfortable by touching her on her thigh repeatedly. RP 178. The touching of her thigh occurred when Natasha and Tony went upstairs and D.T. found herself alone with Whittaker in the living room. RP 181. D.T. was really uncomfortable as she was not romantically interested in Whittaker and had not expressed any interest in a relationship with him. RP 181-82.

During this first visit, Natasha, D.T., Tony, and Whittaker all played a game of Truth or Dare. RP 183. During the game, Natasha and Whittaker kept daring the others to kiss each other. RP 182. Natasha also took off her clothes during the game and Whittaker kissed D.T. on her foot. RP 184. The entire game made D.T. very uncomfortable. RP 183.

A few days later, on September 13, 2014, D.T. made plans to spend the evening with Natasha. RP 185. Natasha and Whittaker picked D.T. up from her house and they went to Whittaker's house and ate dinner. RP 186-87. It was decided that the group would go to a strip club in Portland. RP 187. Once they arrived, they all ordered drinks. RP 188. D.T.

was experienced with drinking alcohol to some extent; while she drank alcohol most weekends she had never drank to the point of feeling drunk, she had never vomited from drinking too much, nor had she ever blacked out from drinking too much. RP 188-89.

At some point while they were at the strip club, D.T. went outside to smoke with Natasha and Tony while Whittaker stayed inside to “watch [their] drinks.” RP 190. At the club, D.T. consumed one cocktail, a Sex on the Beach, and one shot. RP 190. D.T. blacked out while at the club and the next thing she remembered was coming to when she was being put in the car. RP 192. D.T. did not remember any conversations she had with Whittaker at the strip club, nor did she remember if he had touched her at the club. RP 191-92.

In the car, D.T. continued to black out. RP 192. She remembered being put in the back seat with Whittaker and blacking out, then coming to when he pushed her head into his lap while still in the backseat of the car. RP 192. D.T. would try to sit up, but Whittaker kept pushing her back down into a lying position. RP 192-93. The next thing D.T. remembers is waking up to being put in a cold bath. RP 194. D.T. felt extremely drunk – she was dizzy and felt as though she were going to vomit. RP 194. She asked the others to let her out of the bath because she was cold RP 195. D.T. was then put into some baggy clothes, a blue T-shirt and gray

sweatpants, and then they put her on a bed in Whittaker's daughter's bedroom. RP 195, 197. D.T. then blacked out again in Whittaker's daughter's bedroom. RP 197.

D.T. then woke up to Whittaker on top of her while she was lying on the bed. RP 200. D.T. felt pain in between her legs, in her vaginal area. RP 201. D.T. described the pain as a stinging pain, as though someone was stabbing her. RP 201. D.T., crying through this part of her testimony, described that the pain was due to Whittaker "putting his – his dick inside [her]." RP 201. D.T. told him no, and told him to stop, but she passed out again. RP 202. D.T. saw Tony by the door in the room and heard her screaming, but then she blacked out, so she's not sure what happened next. RP 203.

D.T. came to again in the back of Tony's car. RP 203. Natasha and Tony were in the front seats of the car and they were debating whether they should take her home or not. RP 203. They did take her home, and her mom came down to get her. RP 203. Her mom thought she was drugged or drunk and put her in a shower. RP 203. D.T. was in pain and she was crying. RP 204. Her mom then took her to the hospital where she was examined and talked to a nurse and an advocate. RP 205-07.

D.T.'s mom, Stacy Smith testified about the night D.T. was raped by Whittaker. Tony and Natasha drove D.T. to their home and Ms. Smith

came out to get her from the car. RP 254-55. D.T. stumbled out of the car and fell on the ground. RP 255. D.T. was wearing sweatpants and a T-shirt, which Ms. Smith knew wasn't what D.T. had been wearing that evening. RP 255. Ms. Smith asked Tony and Natasha why D.T. had those clothes on and they explained that D.T. had been vomiting. RP 255. D.T. was yelling at her mom that she didn't understand. RP 255. Ms. Smith was confused and helped her daughter stand up and get upstairs to their apartment. RP 255. The whole walk from the car to the apartment, D.T. kept saying "ow, ow, ow," and telling her mother she didn't understand. RP 256. Ms. Smith took D.T. to the bathroom so she could put her in a cold or lukewarm shower. RP 256. D.T. sat down on a stool inside the shower, but she was sitting on her side and moving back and forth, continuing to complain of pain and tell her mother she didn't understand. RP 256-57. D.T. was crying and told her mom "he raped me." RP 267. D.T. complained of pain in her vaginal area and Ms. Smith observed her vaginal area was bright red. RP 267. After that, Ms. Smith took D.T. to the hospital. RP 268-69. D.T. continued to cry and did not want to talk about it. RP 269. Ms. Smith described D.T. as "shut[ting] down." RP 269. After the examinations at the hospital, Ms. Smith took D.T. home and she curled up in bed and "shut down," not talking to anyone for a while and was scared to leave the apartment. RP 269.

Ms. Smith also described the impact the rapes had on D.T. Ms. Smith described how D.T. had daily panic attacks for the first month after she was raped by Whittaker. RP 252. D.T. also would often go into her room, sitting curled up in a ball, and cry. RP 252.

Tony Strobel testified that he lived with Whittaker in September 2014 and was dating Natasha at the time. RP 292-94. Tony knew D.T. through Natasha, but had only met her maybe 10 times before the date of the rape RP 294. At the time of trial, Tony still lived with Whittaker and they were good friends. RP 295.

Tony recalled the game of Truth or Dare that he, Whittaker, D.T., and Natasha played a few days before the rape. RP 299. Tony testified that D.T. had her shirt off at one point in the game, and that she and Whittaker were “making out” and that that had been Natasha’s idea. RP 299. On the day of the rape, D.T. came over to his and Whittaker’s house and at some point they decided to go to a strip club in Portland. RP 301. While at the strip club, Tony, Natasha, and D.T. went outside several times to smoke while they left Whittaker in charge of their drinks. RP 303.

When they left the strip club, Tony thought D.T. was drunk. RP 305-06. She had problems standing up and walking, and seemed “really drunk.” RP 306-07. Tony drove them all back to Whittaker’s house. RP 307-08. Whittaker and D.T. were in the back seat. RP 308. At one point,

Tony hit a bump in the road at a specific intersection in Vancouver, and he looked back and saw in his rearview mirror that D.T. was lying down with her head in Whittaker's lap. RP 308. Tony thought it was weird that D.T. was lying on Whittaker's lap. RP 308. At trial, Tony could not recall exactly how Whittaker's arms and hands had been positioned when he saw him with D.T. in the backseat of the car, but he testified that he had been interviewed about this case and had said that Whittaker's arm was around D.T. and his hand was touching her stomach. RP 311.

Once they arrived at Whittaker's house, D.T. got out of the car and it was obvious to Tony how drunk she was. RP 312. She had trouble walking and threw up all over herself soon after exiting the car. RP 313. They gave her a cold bath and then put her to bed in Whittaker's step-daughter's room. RP 314-16. Tony and Natasha then went outside to smoke, but Tony specifically left the door to the room where D.T. was at open so that they could hear her from outside if she threw up again. RP 317-18. After smoking, Tony came back inside to check on D.T. RP 318-19. Tony found the door to the bedroom closed; he opened it and Whittaker walked toward the door from inside the room and shut it on Tony. RP 319. Tony opened the door again and told him he needed to get out of there. RP 319. Tony saw D.T. on the bed with her head towards the window, her legs were half off the bed and her pants were down. RP 321.

Tony left the room to go call Whittaker's wife to tell her what happened. RP 321-23. Tony heard Whittaker yelling from the bathroom that he wanted them to get out of his house. RP 324.

Tony returned to the room where D.T. was and found her lying on the floor, crying and saying her crotch hurt. RP 324. After that, he and Natasha took D.T. home and her mom came and got her from the car. RP 327.

Two police officers testified at the trial to statements Whittaker made during their investigation. During his first interview with police, the day of the rapes, Whittaker denied touching D.T. in a sexual way. RP 407-08, 412, 673. Then, approximately three weeks later, when Whittaker was again interviewed, he admitted he had put his finger inside D.T.'s vagina in the backseat of the car on the way home from the strip club. RP 547, 674; Ex. 1. The court admitted recordings of the interviews Whittaker had with police on October 6, 2014 and June 17, 2015. Ex. 1, 2, 36, 37.

Whittaker testified in his own defense that he did not notice anything about D.T.'s sobriety or lack thereof while they were at the strip club or when they left the strip club. RP 636; 645-46. He testified she did not have any problems getting in the car or walking. RP 636. Whittaker said D.T. then laid her head down on his lap and said she wanted him as she began rubbing her thigh. RP 637. Per Whittaker, D.T. was awake the

entire time. RP 647. Whittaker admitted he put his hands down D.T.'s pants and started "fingering" her, getting his fingers wet. RP 637. He continued "fingering" D.T. until he saw Tony look back and he stopped because he did not want Tony to see what Whittaker was doing. RP 637. Whittaker defined "fingering" as putting his finger inside D.T.'s vaginal cavity. RP 668. Whittaker denied any sexual touching of any kind when D.T. was passed out on a bed in his stepdaughter's bedroom. RP 658.

The scientific evidence at trial showed that there was a mixture of Whittaker's and D.T.'s bodily fluids on the blanket that was on the bed where the second rape occurred. RP 446-47; 713. The evidence also showed that YSTR DNA consistent with Whittaker and any direct male descendants was found on the perianal vulva swabs collected from D.T. at the hospital. RP 448-54.

Following the presentation of the evidence, the jury deliberated and found Whittaker guilty of two counts of Rape in the Second Degree. CP 169-70. The trial court sentenced Whittaker to a standard range sentence. CP 198-216. Whittaker then submitted this appeal. CP 217.

ARGUMENT

I. Whittaker received effective assistance of counsel.

Whittaker claims his attorney was ineffective for failing to request a jury instruction for count 1 on the affirmative defense to Rape in the Second Degree by mental incapacitation or physical helplessness of his reasonable belief that the victim was not mentally incapacitated or physically helpless. Whittaker cannot show that his attorney's performance was deficient or that he was prejudiced by his attorney's performance. Whittaker's claim of ineffective assistance of counsel fails.

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

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

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

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

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

ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

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

acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel’s performance *Strickland*, 466 U.S. at 689-91.

Whittaker cannot show his attorney’s performance was deficient. Defense theory and strategies are often issues decided between the defendant and his attorney, weighing their options and considering the evidence and the likelihood of success with each potential strategy. *See generally, State v. Grier*, 171 Wn.2d 17, 31-44, 246 P.3d 1260 (2011). The evidence from trial, the way counsel approached the case, and the way Whittaker testified, show that Whittaker and his attorney tactically decided not to pursue the “reasonable belief” affirmative defense under RCW 9.94A.030(1).

It is clear from Whittaker's testimony and the questions his attorney asked him that the defense theory of the case was that the State could not prove the element of Rape in the second degree that D.T. was incapable of consent by reason of being physically helpless or mentally incapacitated. *See* RP 636-50. Defense counsel guided Whittaker through testimony showing D.T. was awake, coherent, making deliberate movements and taking deliberate action. RP 646-47. From this line of questioning it is clear that Whittaker did not agree D.T. actually was physically helpless or mentally incapacitated, and that was not his theory of the case. This agreement is a prerequisite to an assertion of the affirmative defense under RCW 9A.44.030(1).

It is undeniably a trial tactic to refuse to take on a burden for a client. Defense counsel are careful in asserting affirmative defenses because the nature of an affirmative defense is that a defendant agrees he *committed the crime*, thus relieving the State of the burden of proving the elements of the crime. The defendant relieves the State of this great burden, and then puts a burden on his own shoulders of showing he believed the victim was capable of consent and that his belief was reasonable. Tactically, this is a risk. This strategy would have been especially risky in Whittaker's case as there was a witness who was a good friend of the defendant's who described the victim's behavior and

how she appeared, as well as the victim's recounting of it, that would have shown any belief Whittaker could have had that the victim was not incapacitated was not reasonable. Therefore if counsel had asserted this defense and requested the court instruct the jury on it, he would have conceded the elements of the crime without a likelihood of succeeding on the affirmative defense. That would have amounted to ineffective assistance of counsel. Whittaker's attorney's strategic choice not to pursue that defense and instead to attack whether the victim actually was incapable of consent and whether the State could prove that the event occurred in Washington was a reasonable tactical decision.

Defense attorneys also have the difficulty of trying to obtain acquittals for defendants who made damning statements to police prior to trial, or who engaged in behaviors that are inconsistent with innocence. Here, Whittaker made many statements to police, initially denying any sexual touching with D.T., and then claiming consensual touching on one of the occasions, and then obviously being trapped, not knowing what to say, when the detective told him the crime lab found a mixture of his and D.T.'s DNA on the blanket that had been on the bed. Whittaker's defense attorney had to deal with the case he was given, that had been created by Whittaker's actions long before the attorney was on the scene. Whittaker already destroyed his credibility long before trial began. The defense of

“reasonable belief” depends entirely on the defendant’s credibility as it requires the jury to believe what the defendant says and believe he is truthful in saying he reasonably believed the victim was awake, with it, and capable of consenting. It is evident from the jury’s verdict on count 2, that they did not find Whittaker credible. In order to find him guilty on count 2 they had to entirely dismiss his version of events and accept D.T.’s version of events. These credibility determinations are for the jury to make alone. Whittaker’s experienced defense counsel understood these potential issues and decided that the best tactic in this trial was to force the State to meet its high burden instead of relieving the State of that burden and hoping the jury would be forgiving of his client’s many lies and inconsistent behaviors and find him credible enough to warrant relief from the crime he admitted committing. This tactic was entirely reasonable. It is clear from the jury’s verdict on count 2 that they would not have found any reasonable belief defense Whittaker put forth credible.

Whittaker also must show that had his attorney requested the instruction, the trial court would have given it, in order to show the prejudice prong of his ineffective assistance of counsel claim. A defendant is entitled to a jury instruction supporting his theory of the case only if there is substantial evidence in the record supporting his theory. *State v. Washington*, 36 Wn.App. 792, 793, 677 P.2d 786, *rev. denied*, 101 Wn.2d

1015 (1984). In order to warrant the “reasonable belief” instruction, Whittaker “had to present evidence supporting his theory that at the time of the offense, he reasonably believed that [the victim] was not mentally incapacitated and/or physically helpless.” *State v. Powell*, 150 Wn.App. 139, 154, 206 P.3d 703 (2009). Whittaker did not present any such evidence and therefore he has not shown that his attorney’s actions prejudiced him.

Whittaker relies upon *Powell*, *supra* to support his argument that he was denied ineffective assistance of counsel when his attorney failed to request a jury instruction pursuant to the affirmative defense set forth in RCW 9A.44.030(1). However, the facts in *Powell* are significantly different and therefore Whittaker’s reliance on it is misplaced. In *Powell*, no witnesses testified that the victim appeared too drunk or otherwise incapacitated, and the victim testified that soon after the sexual activity began she acted like a willing participant as she was too afraid of what would happen if she did not. *Powell*, 150 Wn.App. at 154. The Court there specifically held that “This evidence, that [victim] pretended to be a willing sexual participant, entitled Powell to a ‘reasonable belief’ instruction.” *Id.* There is no such evidence in Whittaker’s case, or anything coming close to sufficient evidence to support this claim. The independent witnesses in Whittaker’s case discuss the victim as being unable to walk or

stand, and that within 20 minutes of that observation she was throwing up all over herself, unable to stand or walk, the defendant carried her inside, and that she remained passed out on the bed. Further, Whittaker himself testified he had no opinion on the victim's intoxication or lack thereof as they left the strip club. The evidence did not support giving this instruction and therefore Whittaker would not have been entitled to this instruction at trial. Whittaker cannot show he suffered any prejudice from his counsel's actions.

Whittaker cannot show his counsel's actions in deciding not to offer an affirmative defense to the first count of Rape in the Second Degree was not a reasonable tactical decision. Further, Whittaker cannot show that had he requested this instruction that the trial court would have given it. Whittaker's claim of ineffective assistance of counsel fails.

II. There is sufficient evidence to support count 2, Rape in the Second Degree.

Whittaker alleges that his conviction for count 2, Rape in the Second Degree, should be reversed because the State presented insufficient evidence to support this conviction. Specifically, Whittaker argues that because the DNA swab taken from D.T.'s cervix did not show the presence of his DNA, that it was impossible that he penetrated her with his penis and therefore his conviction is not supported by sufficient

evidence. Whittaker's argument does not take into consideration all of the State's evidence, as an insufficiency analysis must do, and argues simply this lack of evidence precludes a finding of guilt. Whittaker's argument is without any merit.

In reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence. *State v. Pacheco*, 70 Wn.App. 27, 38-39, 851 P.2d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

Whittaker's argument that there was insufficient evidence to support the conviction for Rape in the Second Degree focuses on the lack of his DNA found on the endocervical swab from the rape exam. However, Whittaker ignores other substantive evidence presented at trial that supports his conviction for Rape in the Second Degree. Namely, Whittaker completely ignores the victim's testimony that she was passed out on the bed and woke to Whittaker on top of her, his penis inside her vagina, and her feeling of significant pain, as though someone were stabbing her in her vagina. D.T. testified she had no doubt that Whittaker's penis was inside her vagina. It was undisputed that D.T. was incapacitated and incapable of consent at this time due to being passed out on the bed. When this evidence alone is taken in the light most favorable to the State, there is sufficient evidence to support his conviction for Rape in the Second Degree.

However, that is not all of the evidence introduced to support this conviction for count 2 of Rape in the Second Degree. The State also showed that there was a mixture of the Whittaker's and victim's DNA found on the blanket that the victim was lying on top of when Whittaker raped her. The State also presented evidence that Tony saw the victim lying on the bed, with her pants halfway down, and Whittaker trying to keep the door to the room closed against him. Additional evidence showed

the victim, crying immediately after she was rescued by Tony, curling up, and complaining of pain. The State also presented evidence from the victim's mother, saying D.T. came home, drunk, and complained of pain, could barely sit down for the pain to her vagina, and that her vagina was bright red, and that she told her mother, while sobbing, that "he raped me." All of this evidence, when taken in the light most favorable to the State, shows that any rational juror would have found Whittaker committed the crime of Rape in the Second Degree for count 2.

Furthermore, Whittaker's argument centers on the absence of semen found in D.T.'s vagina during the rape exam. Semen is not a prerequisite to rape. There are many reasons why semen may not have been found during the rape exam, most reasonably, that the evidence showed Whittaker was interrupted during the course of the rape and it's a reasonable inference he did not ejaculate or "finish." Another reasonable inference is that he used a condom. An additional reasonable conclusion could be that he has some medical issue with ejaculation, or that his use of alcohol that night impaired his ability to ejaculate. This argument, that no conviction for rape could follow as there was no semen found on the endocervical swab from the victim's rape exam is preposterous. We can safely presume that rapists have heard of condoms, a barrier method of

birth control with the sole intent to prevent semen from entering a woman's vagina.

There are many potential reasons why Whittaker's semen was not found on this particular endocervical swab. But most importantly, the presence of semen is not an element of rape. The State had no burden to show that semen was found in D.T.'s vagina, and proof of sexual intercourse by a penis does not require semen being found. The evidence credibly and conclusively showed that Whittaker took advantage of D.T.'s condition and her helplessness and raped her. When all the evidence the State presented is taken in the light most favorable to the State, it is clear any rational juror would have convicted him. Whittaker's claim fails.

CONCLUSION

Whittaker has not shown he was denied ineffective assistance of counsel, and the State proved the elements of Rape in the Second Degree beyond a reasonable doubt. Whittaker's convictions should be affirmed.

DATED this 1 day of September, 2017.

Respectfully submitted:

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