

No. 49687-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON DAVID WHITTAKER,

Appellant.

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

The Honorable Scott Collier

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL OF COUNT ONE IS REQUIRED BECAUSE WHITTAKER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND DISMISSAL OF COUNT TWO IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

First and foremost, respondent's statement of the case fails to comply with RAP 10.3(a)(5), which requires:

A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

RAP 10.3(b) requires respondent's brief to conform to RAP 10.3(a).

After the first sentence in the statement of the case, the State makes a statement without reference to the record, which is an improper characterization of the charges. Thereafter, the State refers to the testimonies of D.T. and her mother on pages 1 to 6, but only summarizes Whittaker's testimony in one paragraph on pages 8-9. Also on page 9, the State refers only to forensic evidence which may support the State's case.

The State's selective statement of the facts does not constitute a "fair statement of the facts." Appellant urges this Court to carefully review the record to ascertain the relevant facts.

Furthermore, after referencing Whittaker's testimony on page 14 of its brief, the rest of the State's argument contains no citations to the record.

*See* Brief of Respondent at 15-18, 20-21. The State's argument should consequently be disregarded because this Court and appellant should not be tasked with searching the record to determine if the facts support respondent's argument.

In any event, the State's arguments are misguided and misleading. The State claims that it is "clear" from Whittaker's testimony that he did not agree to assert the affirmative defense. Brief of Respondent at 14, citing RP 636-50. To the contrary, Whittaker's testimony supports the affirmative defense that he reasonably believed that Turner was not mentally incapacitated or physically helpless at the time of the incident. RP 645-47.

Furthermore, the State misrepresents appellant argument, claiming that appellant relies on *State v. Powell* "to support his argument that he was denied effective assistance of counsel." Brief of Respondent at 17. A review of appellant's brief reveals that appellant argued that the facts here are similar to *In re Personal Restraint Petition of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007). *See* Brief of Appellant at 18-23. Unable to distinguish *Hubert*, the State cites *Powell* to argue that Whittaker would not have been entitled to the affirmative defense instruction because of the conflicting testimony and his lack of credibility. Brief of Respondent at 15-18. The State's argument fails where this Court concluded in *Powell*, "That other evidence may have established that PLM was highly intoxicated does

not necessary disprove that she reasonably appeared to Powell to be less incapacitated than she actually was. Instead, such evidence created weight and credibility issues for the jury to determine.” *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

The State argues next that there was sufficient evidence to support count two. Brief of Respondent at 18-22. Again, the State misrepresents appellant’s argument and fails to provide citations to the record. Contrary to the State’s claim, appellant did not argue that it was “impossible” that Whittaker penetrated Turner. After referring to the record which reflects conflicting testimony, appellant pointed to the forensic scientist’s testimony and argued that based on her testimony, the forensic evidence and lack of forensic evidence raises reasonable doubt that penetration occurred. *See* Brief of Appellant at 23-28.

The State claims that it “showed that there was a mixture of Whittaker’s and victim’s DNA found on the blanket,” which is misleading. Accurately stated, the forensic scientist testified that she generated a DNA profile from the amylase stain on the comforter which matched the combined DNA profiles of Turner and Whittaker. RP 446-47. Body fluids that contain the protein amylase includes saliva. RP 447-48, 452. More important, she testified that she detected amylase but no semen on the vaginal endocervical swabs. RP 453-54. 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 corroborates Whittaker's testimony. Contrary to the State's assertion, even when admitting the evidence as true, including Turner's testimony, and drawing all reasonable inferences therefrom, while viewing the evidence in favor of the State, no rational juror could have found beyond a reasonable doubt that Whittaker had sexual intercourse with Turner in the bedroom. Count two must therefore be reversed and dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Whittaker's convictions.

DATED this 2<sup>nd</sup> day of October, 2017.

Respectfully submitted,

/s/ Valerie Marushige  
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**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](mailto:CntyPA.GeneralDelivery@clark.wa.gov).

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

DATED this 2<sup>nd</sup> day of October, 2017.

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

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**Transmittal Information**

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