

FILED
Court of Appeals
Division II
State of Washington
10/31/2018 11:22 AM
NO. 50934-2-II

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

STATE OF WASHINGTON, Respondent/Cross-Appellant

v.

RONALD WITTHAUER, Appellant/Cross-Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02355-1

CORRECTED BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I. The trial court properly limited Witthauer’s cross-examination of C.Z. to that which was relevant to her veracity and admissible pursuant to the evidence rules.	1
II. The prosecutor did not commit misconduct.	1
III. Cumulative error did not deny Witthauer his right to a fair trial.	1
IV. The State agrees the trial court erred in failing to make a specific finding that Witthauer suffered from a chemical dependency.	1
STATEMENT OF THE CASE.....	1
ARGUMENT	21
I. The trial court properly limited cross-examination to relevant evidence allowed under ER 608.	21
II. The Prosecutor did not Commit Misconduct and Any Potential Misconduct did not Prejudice Witthauer	28
III. Cumulative Error did not Deny Witthauer a Fair Trial	39
IV. The State Agrees the Trial Court Erred in Failing to Make Specific Finding Witthauer Suffers From Chemical Dependency Prior to Imposing Chemical Dependency Evaluation and Treatment as a Community Custody Condition.	40
CONCLUSION.....	41
STATE’S CROSS-APPEAL	41
ASSIGNMENTS OF ERROR	41
I. The trial court erred in ruling that Witthauer’s indecent liberties conviction merged with his rape in the second degree conviction.	41
II. The trial court applied the incorrect legal analysis by employing the merger doctrine.....	41

III.	The trial court erred in failing to sentence Witthauer on his indecent liberties conviction as it does not “merge” with rape in the second degree and is not the same offense as rape in the second degree.	41
	ISSUES PRESENTED.....	41
I.	Whether the merger doctrine applies to concurrent convictions for indecent liberties and rape in the second degree.	41
II.	Whether the trial court erred in applying the merger doctrine and finding the two offenses merged and therefore erred in failing to sentence Witthauer on the indecent liberties conviction.	41
	STATEMENT OF THE CASE.....	42
	ARGUMENT	42
I.	The trial court erred in finding that Rape in the Second Degree and Indecent Liberties with Force merged and the trial court erred in failing to sentence Witthauer on the Indecent Liberties count.	42
	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)...	22, 24
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	24
<i>Olden v. Kentucky</i> , 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).....	24
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	22
<i>State v. Anderson</i> , 153 Wn.App. 417, 220 P.3d 1273 (2009), <i>rev. denied</i> , 170 Wn.2d 1002, 245 P.3d 226 (2010).....	30, 32, 33, 34
<i>State v. Arredondo</i> , 188 Wn.2d 244, 394 P.3d 348 (2017).....	22
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1998).....	39
<i>State v. Blair</i> , 3 Wn.App.2d 343, 415 P.3d 1232 (2018).....	23
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997), <i>cert. denied</i> , 523 U.S. 1007 (1998).....	29
<i>State v. Burton</i> , 165 Wn. App. 866, 269 P.3d 337 (2012).....	29
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	48
<i>State v. Carlson</i> , 80 Wn.App. 116, 906 P.2d 999 (1995).....	26
<i>State v. Chenoweth</i> , 185 Wn.2d 218, 370 P.3d 6 (2016).....	47
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	22, 24
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	30, 39
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	29
<i>State v. Dickensen</i> , 48 Wn.App. 457, 740 P.2d 312 (1987).....	22
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	23
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	31
<i>State v. Estill</i> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	29
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983).....	26
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	29, 32
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996).....	30
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	46
<i>State v. Fuentes</i> , 179 Wn.2d 808, 318 P.3d 257 (2014).....	43
<i>State v. Gregory</i> , 158 Wn.2d, 759, 147 P.3d 1201 (2006).....	29, 32
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	39
<i>State v. Hughes</i> , 118 Wn. App. 713, 77 P.3d 681 (2003).....	28
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979), <i>cert. dismissed</i> , 446 U.S. 948 (1980).....	46
<i>State v. Jones</i> , 118 Wn.App. 199, 76 P.3d 258 (2003).....	40

<i>State v. Jones</i> , 71 Wn.App. 798, 863 P.2d 85 (1993), <i>review denied</i> , 124 Wn.2d 1018 (1994).....	45
<i>State v. Kunze</i> , 97 Wn.App. 832, 988 P.2d 977 (1999).....	23
<i>State v. Land</i> , 172 Wn.App. 593, 295 P.3d 782, <i>rev. denied</i> , 177 Wn.2d 1016 (2013).....	45
<i>State v. Lee</i> , 188 Wn.2d 473, 396 P.3d 316 (2017).....	23, 24
<i>State v. Lile</i> , 188 Wn.2d 766, 398 P.3d 1052 (2017).....	23
<i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	28
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	33
<i>State v. Montgomery</i> , 163 Wash.2d 577, 183 P.3d 267 (2008).....	26
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 801 (2011).....	43
<i>State v. Negrete</i> , 72 Wn.App. 62, 863 P.2d 137 (1993).....	34
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991).....	43
<i>State v. Nysta</i> , 168 Wn.App. 30, 275 P.3d 1162 (2012), <i>rev. denied</i> , 177 Wn.2d 1008 (2013).....	45, 48
<i>State v. O'Connor</i> , 155 Wn.2d 335, 119 P.3d 806 (2005).....	22, 24
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	21
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	28
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	23
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	29
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	28
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	28, 34
<i>State v. Venegas</i> , 155 Wn.App. 507, 228 P.3d 813, <i>rev. denied</i> , 170 Wn.2d 1003, 245 P.3d 226 (2010).....	32, 33
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	43, 46
<i>State v. Wade</i> , 186 Wn.App. 749, 346 P.3d 838 (2015).....	22
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	30, 34
<i>State v. Wilkins</i> , 200 Wn.App. 794, 403 P.3d 890 (2017), <i>rev. denied</i> , 190 Wn.2d 1004, 413 P.3d 10 (2018).....	43
<i>Taylor v. Illinois</i> , 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).....	22

Statutes

RCW 9.94A.589(1)(a).....	47
RCW 9.94A.607(1).....	40
RCW 9A.44.010(1)(a), (b).....	44
RCW 9A.44.010(2).....	44
RCW 9A.44.010(6).....	44
RCW 9A.44.050(1)(a).....	44
RCW 9A.44.100(1)(b).....	44

Other Authorities

WPIC 4.01..... 32

Rules

ER 401, 403 22

ER 607 24

ER 608 21, 26

ER 608(b)..... 23, 24, 25, 26

GR 14.1 45

Unpublished Opinions

State v. Pearson, 3 Wn.App.2d 1013, slip op. 1-2 (Div. I, 2018)..... 45

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly limited Witthauer's cross-examination of C.Z. to that which was relevant to her veracity and admissible pursuant to the evidence rules.**
- II. The prosecutor did not commit misconduct.**
- III. Cumulative error did not deny Witthauer his right to a fair trial.**
- IV. The State agrees the trial court erred in failing to make a specific finding that Witthauer suffered from a chemical dependency.**

STATEMENT OF THE CASE

Ronald Witthauer (hereafter 'Witthauer') was charged by information with Rape in the Second Degree by forcible compulsion and/or when the victim was incapable of consent by reason of being physically helpless or mentally incapacitated, and indecent liberties with forcible compulsion for an incident that occurred in the early morning hours of July 19, 2015. CP 8-9, 2-3. At trial, the jury convicted Witthauer of Rape in the Second Degree and Indecent Liberties as charged in the Amended Information. CP 43, 45. The jury also found Witthauer abused a position of trust to facilitate the commission of the crime. RP 44, 46.

The testimony and evidence was as follows: C.Z., a 31-year-old married woman and mother of one, was raped by her uncle, Witthauer, on July 18-19, 2015, in Clark County, State of Washington. RP 196, 226-32.

C.Z. testified that Witthauer was her father's brother. RP 197-99. C.Z. knew her uncle well as her family spent a lot of time with him when she was young, such as holidays and on camping trips and other family outings. RP 198. Witthauer was her favorite uncle. RP 199. In July 2015, C.Z. lived in La Center, Washington with her husband and her son. RP 199. On July 18, 2015, C.Z., her son, her friend Tricia Smith, and Ms. Smith's two sons, went to a beach area on the Columbia River called the Bottoms. RP 148, 200. They had a happy, fun day swimming and floating on the river. RP 201. Ms. Smith testified that C.Z. appeared to be fine all day, was having a good time and did not appear upset. RP 150. During that day, C.Z. was communicating with Witthauer over Facebook. RP 202. He eventually asked C.Z. to call him on the phone. RP 202. Witthauer and C.Z. ended up talking on the phone; Witthauer sounded really sad and said he was depressed because his girlfriend had left him. RP 152-53, 202-04. Witthauer asked if he could pick C.Z. up and take her home so that they could talk. RP 204. At that point, C.Z., Ms. Smith, and their sons had left the Bottoms and were at Walmart. RP 204. Witthauer came to Walmart and picked C.Z. up. RP 205-08. Ms. Smith took her sons and C.Z.'s son to her house, with the plan that C.Z. would pick her son up later that evening. RP 155-56. Ms. Smith was surprised that C.Z. did not come that evening

to pick up her son and did not respond to Ms. Smith's text messages. RP 156.

When Witthauer arrived at Walmart to pick C.Z. up, he had his friend, Daniel Hainley, with him. RP 207. C.Z. saw that Witthauer had a beer in his hand and his speech was slurred and his eyes were bloodshot; C.Z. believed he had been drinking. RP 208. Witthauer also told C.Z. that he was "fucked up." RP 208. At that point in the evening, C.Z. had not consumed any alcohol or drugs. RP 210. C.Z. got into the truck; Mr. Hainley was driving. RP 210. On the drive, C.Z. consumed some vodka from a bottle she had in her purse. RP 210. She took a few drinks from that bottle during the ride. RP 211. C.Z. expected the men to take her home to La Center, but instead, they drove to her grandmother's house, where Witthauer has a motor home parked on the property. RP 212-14. Witthauer convinced C.Z. to stay for one drink. RP 213. C.Z. sat down on a lawn chair outside the motor home along with Witthauer and Mr. Hainley. RP 214-15. Witthauer started telling C.Z. about his break-up with his girlfriend. RP 216-17.

While they were talking, Witthauer offered C.Z. a beer. RP 218. When he gave C.Z. the beer, it was already open. RP 218. C.Z. had some of the beer, but she soon began to feel really dizzy and felt unwell. RP 219. C.Z. tried to stand up but she fell down; she testified that her legs felt

like jello when she stood and she felt as if she couldn't move them. RP 219-20. C.Z. didn't know what was going on and she was scared; she tried to call her husband. RP 220. Witthauer told C.Z. she was just drunk and needed to sleep it off, and he picked her up and carried her over his shoulder into the motor home. RP 220-21. At the time, C.Z. was 5'1" tall and weighed 92 pounds. RP 221. Witthauer put her down on the bed inside the motor home. RP 222. C.Z. was yelling at Witthauer to call her husband and that she needed him to pick her up and take her home. RP 222. Witthauer told her that he had called her husband and that her husband said she was just drunk and needed to sleep it off. RP 222. Witthauer then left the motor home and was outside with Gumby. RP 222.

For a while, C.Z. lay on her stomach, unable to move much, on the bed in the motor home. RP 222-23. She felt very dizzy and groggy; she tried to get up and she could not. RP 223. C.Z. felt as if her body had shut down. RP 223. C.Z. fell asleep. RP 223. She woke up to the sound of Mr. Hainley's truck starting up; she saw the truck lights come on and heard Mr. Hainley and Witthauer saying goodbye. RP 223-24. Witthauer then came into the motor home. RP 224. C.Z. was still very dizzy and extremely weak and was not able to move much and could not walk. RP 224. When Witthauer came inside, he got onto the bed and kneeled next to C.Z. RP 224. C.Z. said she thought Gumby was going to take her home

and then asked Witthauer to please call her husband to come get her. RP 224-25. Witthauer went to get his phone, but then put his phone down and asked C.Z. if she wanted “to fuck.” RP 225. C.Z. told Witthauer that he wasn’t funny and commented that this is why people don’t like him when he’s drunk. RP 225. Witthauer told her he wasn’t joking; C.Z. got scared. RP 225. Witthauer again asked, “so do you want to fuck?” RP 226. C.Z. again said no, that he was her uncle. RP 226. Witthauer told C.Z. that no one would find out. RP 226. C.Z. kept telling him no. RP 226.

At that time, C.Z. was still lying face down on the bed. RP 226. Witthauer straddled the back of her legs and was on top of her. RP 226. C.Z. tried to push him away with her arm, but he grabbed her arm and pinned it to the bed. RP 227. Witthauer took off C.Z.’s pants and swimsuit bottoms; Witthauer had one hand on C.Z.’s arm and the other around her neck. RP 228. C.Z. used her free hand to put over her vagina to try to stop Witthauer. RP 228. Witthauer grabbed that arm and pinned it down, and then put his penis inside C.Z.’s vagina. RP 228-29. During the rape, C.Z. felt extreme pain and she was terrified that Witthauer was going to kill her. RP 230. C.Z. felt a bad burning sensation when Witthauer ejaculated into her vagina. RP 231. During the rape Witthauer also put a finger inside C.Z.’s anus. RP 231-32. C.Z. was not conscious during the entire rape, but she was conscious when Witthauer finished; he threw a blanket over her

and told her he loved her and he went to bed. RP 232. C.Z. stayed lying on the bed, face down, just as he had put her. RP 232. C.Z. was terrified. RP 232. Yet she tried to leave the trailer, but Witthauer had some kind of lock on the door so she could not get out. RP 233. C.Z. ended up spending the entire night in Witthauer's trailer, physically in pain, and scared Witthauer would kill her. RP 233.

In the morning, Witthauer woke up and acted as if nothing had happened. RP 234. Witthauer told C.Z. that C.Z.'s husband had been calling his phone; he then dialed C.Z.'s husband's phone and put it on speaker phone. RP 234. C.Z. did not tell her husband what had happened as Witthauer was standing next to her with the call on speaker phone. RP 234. Witthauer then drove C.Z. home, continuing to act as if nothing had happened. RP 235. C.Z. interacted with him to keep herself safe; she wanted to make sure she got out of that car alive. RP 235. Witthauer stopped at a friend's house on his way home; C.Z. did not disclose to Witthauer's friend what had happened because she was humiliated and embarrassed and she did not know what Witthauer and the friend would do if she said something. RP 235-36.

C.Z. made it home, but she did not know what to do. RP 236. She was worried about the impact of what had happened would have on her family and herself. RP 236. C.Z. called her friend Ramona because she did

not know what to do. RP 237. Ramona testified that C.Z. sounded hysterical on the phone; she was crying and very upset. RP 467. C.Z. was crying so much she could barely talk. RP 468. C.Z. told Ramona that her uncle picked her up to give her a ride, but he took her to his house and raped her and wouldn't let her leave. RP 476. Ramona told C.Z. to go to the hospital and call the police. RP 476. C.Z. was reluctant to do those things as she didn't want to get anyone in trouble and that it was family. RP 476. Ramona told her it didn't matter who it was, that she needed to make the report. RP 476. C.Z. went to a hospital in Portland, Oregon with her husband. RP 237. At the hospital, C.Z. underwent an examination that took a few hours, and they made a report to police. RP 238.

Jane Valencia, a sexual assault nurse examiner working at a hospital in Portland, saw C.Z. on July 19, 2015 at about 2:20pm. RP 359-61. Ms. Valencia took a patient history from C.Z., learned what had happened to her and examined her. RP 362. During the examination, C.Z. was crying; she told Ms. Valencia that she had been held down by her neck and her neck hurt and was a 10 on a pain scale from 1 to 10. RP 371-72. Ms. Valencia took urine and blood samples from C.Z. RP 373-75. Ms. Valencia then did a genital examination; she noted redness and swelling to the vaginal opening, the labia minora, the posterior fourchette, the urethral meatus, and the inside of the vagina. RP 381-83. These findings were

abnormal. RP 381-83. Ms. Valencia also noted scratches on both of C.Z.'s arms, a scratch on the back of her neck. RP 385-86. Ms. Valencia also observed whitish fluid in the vagina, and used swabs to collect potential evidence from C.Z.'s body. RP 384-87. She collected oral swabs, vaginal swabs, and cervical swabs, which she then dried and sealed in an envelope, and placed with the blood, urine, and clothes she collected from C.Z. and placed in a lockbox at the hospital. RP 387-88, 396-97.

When C.Z. went to Ms. Smith's house to pick up her son, much later than planned, C.Z. appeared very upset, her face was puffy from crying, and she was not her normal self. RP 157. Soon after C.Z. started talking to Ms. Smith she started crying. RP 158. C.Z. was shaky and uneasy. RP 159. Even weeks after this day, Ms. Smith noticed C.Z. was not acting like her normal self; she did not want to be with people, she did not want to talk, and stayed inside alone a lot. RP 165.

Prior to trial, the court addressed the State's motions in limine involving cross-examination of C.Z. regarding her pharmacy technician license revocation. RP 30-40. The State moved to exclude extrinsic evidence of C.Z.'s license revocation pursuant to ER 608, and Witthauer argued that the document revoking C.Z.'s license was admissible. RP 34-35. The document was a copy of a final order that was entered by default against C.Z. in July 2015. RP 37. The basis for her revocation was an

allegation of illegally obtaining oxycodone for personal use from December 2014. RP 37-38. The trial court identified the prior conduct of C.Z. that was pertinent to her veracity as the December 2014 allegation that she illegally obtained oxycodone. RP 38. In applying ER 608, the trial court denied Witthauer's request to admit a copy of the order from the Oregon Pharmacy Board revoking C.Z.'s license. RP 38. The trial court stated,

Now, although the rule doesn't contemplate it, the Constitution clearly contemplates that under certain circumstances the Court may require that to occur if it's essential to the defense that the defendant wants to put on, that he be allowed to attack the credibility of a particular witness in a particular way; but the rule normally applies and I find it applies here.

I do find the incident, the December 2014 incident in which there's an allegation of dishonesty, not just misconduct, but dishonesty by [C.Z.] is probative of truthfulness or untruthfulness. And so although reputation evidence is normally the way that people prove the conduct of whether or not a witness is supposedly truthful or untruthful, I find that under 608(b) that the incident in question – whether or not she was, in fact, employed by Kaiser Permanente and engaged in these activities in December 2014 – may be inquired upon in cross-examination of the witness so that she can be asked whether, in fact, she did these things, and the defense is bound by her answer. If she answers that she did those things, that's the end of the inquiry under the rule; if she says I didn't do these things, that's also the end of the inquiry because the Court's not going to bring in whoever it was from December of 2014 and have them testify about what it is they thought she did back in 2014 that resulted ultimately in her license being revoked.

RP 28-40. In reaffirming its ruling during C.Z.'s testimony at trial, the court stated,

I ruled at the time that the license suspension itself was irrelevant and didn't have anything to do with the case and couldn't be inquired upon; however, the license suspension was based upon allegations that [C.Z.], in December 2014 while employed by Kaiser Permanente, had fraudulently manipulated prescriptions for other people in order to obtain oxycodone for her own use.

I ruled that because that relates to dishonesty, even though it wasn't a criminal conviction and therefore it wasn't admissible under 609, that I would allow the defense to inquire of her on cross-examination whether she, in December 2014, had done those things. If she said, "Yes, I've done them," that's the end of the inquiry; if she said, "No, I didn't do them," that's the end of the inquiry because under the rule, extrinsic evidence cannot be used to do those things so you're stuck with whatever answer she gives.

RP 242. During cross-examination, C.Z. denied ever diverting oxycodone for her own use. RP 295. The inquiry went no further. RP 295.

Officer Carlos Ibarra of the Portland Police Department in the State of Oregon received a call from the hospital where C.Z. was treated asking him to come pick up potential evidence that had been collected. RP 436, 440-41. Officer Ibarra took the items Nurse Valencia had obtained and took them to PPD's property room and inventoried each item. RP 441. He inventoried clothing, blood, urine, and a sexual assault kit and placed them into evidence in their secure evidence room. RP 441-47.

At the time of the incident, Elizabeth Luvera was a detective with the Clark County Sheriff's Office working with the major crimes unit. RP 329. In August 2015, Det. Luvera replaced Det. Glen Smyth as the Domestic Violence detective with the sheriff's office, and in that capacity she began working on this case. RP 329-30. On August 6, 2015, Witthauer came to meet with Det. Luvera for an interview. RP 331-32. Witthauer told Det. Luvera that he and his friend Daniel picked C.Z. up from the Walmart in Woodland one night; Witthauer indicated C.Z. was "wasted" at that time. RP 334. Witthauer explained they took C.Z. back to where he lived and he convinced her to go into his trailer. RP 335. Witthauer then claimed that he and his friend, Daniel, stayed outside the trailer for a while before Daniel went home, and then Witthauer slept in his truck and not in his trailer where C.Z. was. RP 336. Witthauer denied having intercourse with C.Z. more than one time during his conversation with Det. Luvera. RP 337. Witthauer gave a sample of his DNA to Det. Luvera. RP 339-40. Witthauer also told Det. Luvera that his DNA would not be found on C.Z., and that he could not ejaculate when he was extremely intoxicated and that he had been drinking on the night C.Z. was there. RP 342.

Detective Fred Nieman is a detective in the Major Crimes Unit of the Clark County Sheriff's Office. RP 505. Det. Nieman was assigned to conduct follow-up on Witthauer's case after both original detective, Det.

Glen Smyth and Det. Luvera had left the sheriff's office. RP 506-07.

During his handling of the case, Det. Nieman obtained the evidence from the Portland Police Department and transported them back to his office where he inventoried the items and photographed them. RP 509. Det. Nieman then took the items to the sheriff's office's evidence unit, a secure facility where he had the items logged in. RP 515-16. He also requested that the sexual assault kit and C.Z.'s bikini bottoms be sent to the State Crime Lab for analysis. RP 517. Det. Nieman also ensured the blood and urine samples were properly stored in a refrigerator in the evidence facility. RP 531-33. Det. Nieman also spoke with C.Z., Kendra Witthauer, Ramona Lowe, and Tricia Smith during his investigation. RP 517-19, 571. After he received the results of the DNA testing from the crime lab, Det. Nieman attempted to contact Witthauer. RP 519. He went to Witthauer's residence, and made contact with Witthauer's mother. RP 521. Det. Nieman took photographs of the property, including the trailer C.Z. had described. RP 521-25. Det. Nieman was unable to contact Witthauer that first day he went to his residence, nor was he able to contact him the second time he went there. RP 525-26. On his third visit to Witthauer's residence, Det. Nieman found him there, inside the main residence of his mother. RP 526. Witthauer gave Det. Nieman permission to go inside his trailer; Det. Nieman took photographs inside the trailer which were

admitted at trial. RP 527-28. Det. Nieman took Witthauer into custody at that time. RP 531.

Det. Nieman obtained a search warrant for C.Z.'s phone records, which he received and analyzed. RP 537. Det. Nieman was able to identify locations from the GPS information from C.Z.'s phone records to show when her cell phone was at particular locations of interest to the case, including the Wal-Mart in Woodland, the defendant's residence, and C.Z.'s residence. RP 562. The records showed C.Z. made a phone call to Witthauer's phone at 8:02pm on July 18, 2015, and that Witthauer's phone made two calls to C.Z.'s phone at 8:39pm and 9:04pm on the same date. RP 564. C.Z.'s phone made another call to Witthauer's phone at 9:12pm that day. RP 565. Det. Nieman also found that the first call C.Z.'s phone made the day after, on July 19, 2015, was to Ramona Lowe. RP 570. The next call C.Z. made was to her husband at 11:20am on July 19, 2015. RP 570. Det. Nieman also obtained Facebook messenger conversations between C.Z. and Witthauer that were given to him by C.Z. RP 572-73. This conversation showed that Witthauer messaged C.Z. at 7:52pm on July 18, 2015 asking C.Z. to call him. RP 575.

Justin Knoy, a forensic scientist with the Washington State Patrol toxicology lab analyzed samples of C.Z.'s blood and urine, that had been taken at the hospital the day after the incident, and which had been

provided to him by the Clark County Sheriff's Office. RP 618-20. The analysis of C.Z.'s blood showed no alcohol and no drugs present. RP 623. The analysis of C.Z.'s urine showed the presence of ethanol, the type of alcohol consumed in wine, beer, and hard alcohol, and 7-amino clonazepam, which is the primary metabolite of clonazepam, a benzodiazepine. RP 623-25. Both alcohol and clonazepam are central nervous system depressants, which slow down brain activity, impair a person's motor control skills, and can cause drowsiness and confusion. RP 625-26. Walking and standing are motor control skills. RP 626.

Mr. Knoy testified that a combination of alcohol and clonazepam would typically have an additive effect in that the effects of both will combine to have a greater depressant effect on the brain. RP 626. Mr. Knoy testified that because alcohol and clonazepam did not show up in the testing of C.Z.'s blood, but did show up in her urine, he would estimate that both were consumed not recently prior to the samples being taken. RP 627. The test results could be consistent with a person consuming alcohol and clonazepam about twelve hours prior to having urine and blood collected. RP 627.

David Stritzke works as a forensic scientist in the DNA unit of the Washington State Patrol Crime lab. RP 650. Mr. Stritzke analyzed evidence obtained from C.Z. at the hospital the day after the incident. RP

660-62. Mr. Stritzke also had a known sample of DNA from Witthauer, which he used to create a DNA profile. RP 664. Mr. Stritzke also created a DNA profile from the oral swabs taken of C.Z. RP 667. Mr. Stritzke then analyzed the vaginal and cervical swabs taken from C.Z. by the sexual assault nurse; the swabs contained many sperm cells. RP 668-70. Mr. Stritzke then tested the vaginal swabs for DNA and found that it contained a mixture consistent with originating from two people; the male component of the vaginal swab sample matched the DNA profile of Witthauer, and the estimated probability of selecting an unrelated individual, at random, from the U.S. population with the same profile is one in twelve quadrillion. RP 672-74. This means that there is a very small probability of randomly selecting someone in the U.S. and having their DNA also match this profile. RP 674.

Michael Witthauer is Witthauer's 15-year old nephew, the son of Witthauer's brother, Tom, and Tom's wife, Kendra. RP 640. Michael testified that on July 18 or 19, 2015 he was hanging out with his cousins, Sean and Jacob, while his uncle, Witthauer, was outside watching them. RP 640-41. It was the night of the "burnout," a car show in their town. RP 640-42. Witthauer's friend, Dan, was also with him. RP 641. Michael saw Witthauer leave for about 45 minutes to an hour sometime around 9 or 10pm. RP 641. Michael was still outside playing basketball when

Witthauer returned. RP 641. Michael did not see anyone except Dan come back with Witthauer when he returned. RP 642. The following day, Michael and his family went swimming at Heisson Bridge. RP 642. Witthauer was also there, swimming, and he was shirtless. RP 642. Michael observed no injuries to Witthauer on that date. RP 643.

Daniel Hainley has known Witthauer for 30 years. RP 704. He was with Witthauer on July 18, 2015. Mr. Hainley testified that he was present when Witthauer received a phone call from C.Z., and that he heard her on the phone. RP 708-09. Mr. Hainley indicated C.Z. sounded slurry and upset. RP 709. C.Z. asked them to pick her up at Walmart. RP 710. Mr. Hainley and Witthauer went to Walmart to pick C.Z. up; she got into the truck and sat next to Witthauer. RP 711-12. C.Z. told them she wanted to go back with them and not to her house, so Mr. Hainley drove them back to Witthauer's residence. RP 713. He saw C.Z. with a bottle of vodka in the truck. RP 714. Once they arrived at Witthauer's residence, Witthauer and C.Z. got out of the truck and went inside Witthauer's trailer. RP 714. Mr. Hainley stayed awhile outside; Witthauer came back out a couple of times and they drank beer together. RP 715. At one point, Mr. Hainley saw C.Z. stumble. RP 717. When Mr. Hainley left, C.Z. gave him a hug. RP 716. Mr. Hainley saw Witthauer then get into his own truck as Mr. Hainley left. RP 716. Mr. Hainley spoke to police about a month later; he

knew about the rape allegation from Witthauer prior to speaking with police. RP 725-26.

Kendra Gist-Witthauer is the wife of Witthauer's brother, Todd. RP 735. Ms. Gist-Witthauer testified that she talked with C.Z. about the incident about 6 weeks to two months afterwards, and that C.Z. told her that she scratched, bit, punched, and hit Witthauer's chest during the incident. RP 732, 741. Ms. Gist-Witthauer saw Witthauer swimming the day after the "burnout," a car show event in their town, and saw no injuries to his chest, face, or legs. RP 733-34. She indicated that the incident involving C.Z. occurred on the night of the "burnout." RP 732-35. However, on cross-examination, Ms. Gist-Witthauer's memory was refreshed that the "burnout" was on July 17, 2015, so the day they went swimming and she observed Witthauer not to have any injuries was the day of July 18, 2015, prior to the rape occurring. RP 739-40.

The defendant testified that he engaged in consensual intercourse with his niece, C.Z. RP 757-58. Witthauer testified that what happened with his niece was wrong, but they had both been drinking and both were upset about relationship issues. RP 758. Witthauer testified he was embarrassed about what happened. RP 759. He agreed he told Det. Luvera that he did not have sexual intercourse with C.Z., and that he told everyone he did not have sexual intercourse with her. RP 766-67.

Witthauer testified he first told someone when he told his attorney the night before his testimony that he had had consensual sexual intercourse with C.Z. RP 767. Witthauer agreed he had lied to police, his friend, his mother, his brothers, and his other family members about what happened with C.Z. RP 779. Witthauer admitted he also told people that there was some kind of conspiracy against him where his DNA was planted inside C.Z. RP 785. Witthauer told that story to a lot of people, including family members. RP 785-86. Witthauer admitted this was a lie. RP 786. He indicated he told this lie to help protect himself and because he wanted them to believe it. RP 786.

During the prosecutor's cross-examination of Witthauer, the prosecutor engaged in the following exchange:

- Q: Oh, okay. So we should take your word for that?
A: Yes.
Q: Well, a man's word is only as good as it is, isn't it?
A: I imagine so.
Q: And when a man doesn't tell us the truth, should we take him at his word? Would you? I'll withdraw that.
A: If you –
Q: You don't have to answer that. Now, is it normal for you to have sex with your niece?
A: No.
Q: How many nieces do you have?
A: Four.
Q: I'm sorry?
A: Four, I believe.
Q: How many have you had sex with?
A: One.

Q: Okay. Would that answer change if there was DNA evidence about other people?

A: What do you mean?

DEFENSE: I'm going to object to this line of questions.

THE COURT: Sustain the objection. Disregard any questions or answering concerning allegations of misconduct with anyone else. They don't have anything to do with this case.

RP 780-81.

Witthauer then called Kim Witthauer, C.Z.'s mother to testify. RP 798. She did not know until the morning she testified that she would be a witness in the case for Witthauer. RP 803. Witthauer asked her if she recalled July 18, 2015, and she indicated she did not. RP 799. Witthauer showed Kim Witthauer purported phone records including her phone number and her husband's number, but she indicated she did not have knowledge of the phone calls which took place on July 18, 2015. RP 800. Kim Witthauer initially indicated she did not tell the detective that C.Z. told her she was going to her uncle's, then Kim Witthauer indicated she didn't remember, then she said she may have said that, and finally on the fourth time being asked the same question by defense, said she guessed C.Z. told her that. RP 800-03. Kim Witthauer also indicated she has significant health problems which affect her memory. RP 803-04. Her

health problems cause memory loss and she has to be reminded of things she's done, like day-to-day things. RP 804.

During closing arguments, the prosecutor stated the following regarding the burden of proof:

...Finally, we come to the burden of proof where the facts meet the law. What must the State prove to you? To what level? Is it beyond all doubt? Is it a hundred percent? Is it to a scientific certainty? Well, we got a lot of scientific certainty in this case. But, no, the answer is the State must prove the case to you beyond a reasonable doubt, and you don't have to take my word for it. We don't have to guess what that is because Judge Lewis defined it for us. And he tells us that a reasonable doubt is a doubt for which a reason can be given. And if, as you discuss the case, as you consider the evidence, fairly and fully, you have an abiding belief, a belief that lasts, a belief that endures, that the defendant did these things to [C.Z.], that you are convinced as the law requires.

RP 855-56. Witthauer did not object to this argument. In rebuttal, after Witthauer had argued the victim's mother's testimony itself established reasonable doubt as to his guilt, the prosecutor stated the following:

And—and we get the claim that, you know, well, gee. [C.Z.] is lying because of the testimony of her mother, Kim Witthauer. And you know, that – that's just really kind of a shame. I mean, Ms. Witthauer, she's called to the stand as a surprise witness. I really don't know why. She's got some serious medical problems. Some serious memory problems. She's got trouble even making it back off the stand. She didn't say that [C.Z.] told her one way or the other. She basically – she can't remember. She said she can't remember what she did the day before. I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even

present that evidence if not as a distraction? It's just – it's a shame. And we get this bit about, well, he, you know, why would he have taken her to Tom? ...

RP 876-77. Witthauer also did not object to this argument.

The jury convicted Witthauer of both Rape in the Second Degree and Indecent Liberties, and found the abuse of trust aggravator for each count. CP 43-46. This appeal timely follows.

ARGUMENT

I. The trial court properly limited cross-examination to relevant evidence allowed under ER 608.

Witthauer alleges the trial court erred in failing to allow him to cross-examine the victim further about an alleged prior act of dishonesty, and that the trial court erred in failing to allow Witthauer to admit extrinsic evidence regarding this prior act of the victim's. The trial court properly applied ER 608 to the facts of this case and appropriately ruled that ER 608 does not allow impeachment by extrinsic evidence and thus Witthauer was limited to impeaching the victim's credibility without the use of extrinsic evidence. Witthauer was not denied his right to confront the victim and the trial court's ruling was proper. Witthauer's claim fails.

Generally, appellate courts review a trial court's evidentiary rulings for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). A court abuses its discretion if it makes its decision for

untenable reasons or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). When reviewing an issue under an abuse of discretion standard, this Court will reverse “only if no reasonable person would have decided the matter as the trial court did.” *State v. O’Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005). A defendant’s right to impeach a State’s witness is guaranteed by the constitutional right to confront witnesses. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *State v. Dickensen*, 48 Wn.App. 457, 469, 740 P.2d 312 (1987). But the right to cross-examination is not absolute, and “[t]he confrontation right and associated cross-examination are limited by general considerations of relevance.” *State v. Darden*, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002) (citing Evidence Rules (ER) 401, 403); *State v. Arredondo*, 188 Wn.2d 244, 266, 394 P.3d 348 (2017). A defendant’s constitutional right to confront witnesses does not extend to irrelevant or inadmissible evidence. *State v. Wade*, 186 Wn.App. 749, 763-64, 346 P.3d 838 (2015). Additionally, the defendant’s right to offer evidence does not extend to testimony that is otherwise inadmissible under our rules of evidence. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).

This Court reviews the right of confrontation based on a claim of improper limitation of cross-examination of a state's witness for an abuse of discretion. *State v. Blair*, 3 Wn.App.2d 343, 350, 415 P.3d 1232 (2018) (citing *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017)). A trial court abuses its discretion if its exercise of discretion is manifestly unreasonable or is based on untenable grounds or done for untenable reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An appellate court must not replace the trial court's discretion with its own; it is not reversible error unless the trial court abused its discretion. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013); *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017).

ER 608(b) provides that a party may attack a witness's credibility by inquiring, on cross-examination of the witness, into that witness's past specific instances of conduct if the past instances are probative of truthfulness or untruthfulness. ER 608(b). Credibility evidence of state's witnesses is generally relevant, but admission of specific instances is "highly discretionary under ER 608(b)." *State v. Kunze*, 97 Wn.App. 832, 859, 988 P.2d 977 (1999). A witness's prior bad act may not be relevant, especially when the prior act is "unrelated to the issues in the case." *State v. Lee*, 188 Wn.2d 473, 489, 396 P.3d 316 (2017). Furthermore, not all evidence of a witness's misconduct is "probative of a witness's

truthfulness or untruthfulness under ER 608(b).” *O’Connor*, 155 Wn.2d at 350. “The confrontation clause primarily protects ‘cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness *as they may relate directly to issues or personalities in the case at hand.*’” *Lee*, 188 Wn.2d at 489 (quoting *Davis*, 415 U.S. at 316 and citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). Particularly, impeachment evidence that is “intended to paint the witness as a liar is less probative than evidence demonstrating a witness’ bias or motive to lie in a specific case.” *Id.* (citing *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988)). A trial court appropriately considers whether the “instance of misconduct is relevant to the witness’s veracity on the stand and whether it is germane or relevant to the issues presented at trial.” *O’Connor*, 155 Wn.2d at 349.

To determine whether the trial court violated Witthauer’s constitutional rights, this Court should apply basic rules of evidence. *See Darden*, 145 Wn.2d at 624. Under ER 607, “[t]he credibility of a witness may be attacked by any party....” Under ER 608(b), a party may introduce “[s]pecific instances of the conduct of a witness,” other than conviction of a crime, and only “for the purpose of attacking or supporting the witness’ credibility....” ER 608(b). The limitation on evidence of specific instances of a witness’s conduct is that they may not be proved by extrinsic

evidence. ER 608(b). Instead, the party cross-examining the witness may ask the witness about the conduct if the conduct is probative of the witness's character for truthfulness or untruthfulness. ER 608(b). If the witness denies the prior instance of conduct, the inquiry on cross-examination is at an end as no extrinsic evidence of a witness's prior conduct may be admitted pursuant to ER 608(b).

Witthauer sought to cross-examine the victim regarding her losing her pharmacist tech certification in Oregon a few years prior to trial; Witthauer also sought to admit a copy of the ruling revoking her certification. The trial court properly allowed Witthauer to ask C.Z. whether she had done the act which was probative to her truthfulness – whether she had diverted prescription medication for her own use while working in a pharmacy. Whether a licensing/certification board made a finding on the merits or by default was not probative to whether C.Z. was truthful, and it would have amounted to nothing more than admitting another person's (or in this case entity's) opinion about a witness's veracity. The trial court properly allowed Witthauer to cross-examine C.Z. within the bounds of ER 608(b), by allowing him to ask her about the alleged deceptive act, and properly prohibited the admission of extrinsic evidence on this subject pursuant to ER 608(b) and also properly prohibited the board's act of revoking C.Z.'s certification as irrelevant, not

probative of C.Z.'s truthfulness, and also because it was nothing more than one's opinion of another's veracity. *State v. Carlson*, 80 Wn.App. 116, 123, 906 P.2d 999 (1995). A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony. *State v. Montgomery*, 163 Wash.2d 577, 591, 183 P.3d 267 (2008).

The trial court very clearly based its decision on ER 608 and other applicable evidence rules, including general principles of relevance. The trial court's decision was not based on untenable grounds, nor was it made for untenable reasons. The decision is in line with case law and the restriction of use of extrinsic evidence to impeach a witness pursuant to ER 608(b). The trial court properly limited Witthauer's cross-examination of C.Z. to follow the confines of ER 608(b). The trial court did not err and it should be affirmed.

Any potential error in the limitation of Witthauer's cross-examination was harmless. An error under ER 608 is harmless unless "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *State v. Ferguson*, 100 Wn.2d 131, 137, 667 P.2d 68 (1983). Given the full evidence presented at trial, summarized above, it is clear that the jury's verdict would not have been affected by knowing the victim had had her certification revoked by default a few years prior to trial. The victim reported as soon as she was

safe; she was extremely upset during her report to her friend, to a nurse at the hospital, and on the stand at trial; she had injuries and her vagina was red, and irritated, and swabs taken during the sexual assault exam showed the presence of the defendant's semen. Additionally, the defendant initially denied any intercourse with the victim. When the DNA results showed the presence of his semen on the victim he concocted a wild conspiracy theory alleging that the victim and his ex were involved in a scheme to steal his semen and plant it on the victim. Finally at trial, the defendant admitted to sexual intercourse, but claimed it was consensual. Given the significant evidence against the defendant, including DNA evidence, and the defendant's total lack of credibility based on the numerous lies he told for months and years prior to the case going to trial, there is no chance that the jury's verdict would have been affected had evidence that the victim's certification to work as a pharmacy technician had been revoked by default a couple years prior to trial. Therefore, even if this court finds the trial court should have allowed additional cross-examination of the victim and/or admission of extrinsic evidence on the subject of her veracity, such error was harmless beyond a reasonable doubt. Witthauer's claim fails.

II. The Prosecutor did not Commit Misconduct and Any Potential Misconduct did not Prejudice Witthauer

Witthauer alleges the prosecutor committed prosecutorial misconduct during closing argument and his cross-examination. The prosecutor did not commit misconduct during closing or cross-examination, and if any misconduct did occur, it was cured by the court's instructions, or was not so flagrant and ill-intentioned as to have denied Witthauer a fair trial. Witthauer's claim of prosecutorial misconduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A

defendant who fails to object waives the error unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court’s instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a

prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Id.*

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

In Witthauer's case, any potential misstatement by the prosecutor did not affect the jury's verdict. Witthauer was not denied a fair trial. The closing argument must be taken in the entire context of which it was

given. Witthauer did not object at trial to any of the statements in the closing argument to which he now assigns error. A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Witthauer claims the prosecutor committed misconduct by misstating the burden of proof. During closing argument, the prosecutor stated that the State had to prove the case beyond a reasonable doubt and that the judge had defined for them what that was. He stated, "And he tells us that a reasonable doubt is a doubt for which a reason can be given. And if, as you discuss the case, as you consider the evidence, fairly and fully, you have an abiding belief, a belief that lasts, a belief that endures that the defendant did these things to [C.Z.], that you are convinced as the law requires." RP 856. Witthauer did not object to this argument. Failure to object to claimed prosecutorial misconduct constitutes a waiver of the objection on appeal unless the misconduct is "so flagrant and ill-

intentioned that it evinces an enduring and resulting prejudice” that cannot be cured by an instruction from the court. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

Generally an argument that the jury must be able to articulate a reason why the defendant is not guilty in order to acquit is improper. *See State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009), *rev. denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010); *State v. Venegas*, 155 Wn.App. 507, 523, 228 P.3d 813, *rev. denied*, 170 Wn.2d 1003, 245 P.3d 226 (2010). However, such arguments are not necessarily flagrant and ill-intentioned misconduct requiring a new trial. *See Anderson*, 153 Wn.App. at 431. In Witthauer’s case, the prosecutor did not make a fill-in-the blank type argument; instead, what Witthauer takes issue with is clearly a one word misstatement on the prosecutor’s part. The trial court’s instruction to the jury, following WPIC 4.01 stated that “a reasonable doubt is one for which a reason exists...” CP 23. In closing, the prosecutor, telling the jury about the instructions the judge gave them on reasonable doubt said, “a reasonable doubt is one for which a reason can be given.” RP 856. Just before and after this statement, the prosecutor correctly discusses the State’s burden and the requirement that the jury have an abiding belief in the truth of the charge. RP 856. The prosecutor did not make improper

arguments like ones previously seen, such as telling the jury “in order to find the defendant not guilty you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is – ‘ blank,” *Venegas*, 155 Wn.App. 507, or “in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” *Anderson*, 153 Wn.App. at 431. In addition, the prosecutor did not spend any time during closing discussing this issue, telling the jury that they had to be able to articulate why they would not convict, nor did the prosecutor make any arguments along those lines. The potential misstatement was fleeting, a mere mistake in phrasing that did not prejudice the defendant.

Even if this court finds the prosecutor’s statement was misconduct, Witthauer still must demonstrate prejudice, which requires he show there is a substantial likelihood that the prosecutor’s statement affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). When reviewing the prosecutor’s closing argument as a whole, the evidence presented at trial, this Court should not conclude that there is a substantial likelihood that the prosecutor’s fleeting misquote of the trial court’s instructions to the jury affected the verdict. Additionally, the prosecutor was referring the jury to the instructions given to it by the judge, and juries are presumed to follow instructions, and the trial court’s

proper instructions and presumption of innocence instruction “minimized any negative impact” the misstatement may have had. *See Anderson*, 153 Wn.App. at 432. As the trial court correctly instructed the jury, the prosecutor’s only potential improper statement was fleeting and a clear misquote of the trial court’s instructions, and there was no objection from Withhauer, there is no reasonable argument that the prosecutor’s statement was so flagrant and ill-intentioned as to cause an enduring prejudice incurable by a jury instruction. Accordingly, Withhauer has failed to establish reversible prejudice and his claim of prosecutorial misconduct for the prosecutor’s statement regarding the burden of proof fails.

Withhauer also argues the prosecutor improperly argued about the defense witnesses during closing argument and disparaged defense counsel. It is improper for a prosecutor to disparage defense counsel’s role or impugn his or her integrity. *State v. Thorgerson*, 172 Wn.2d 438, 451, 258 P.3d 43 (2011) (citing *State v. Warren*, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wn.App. 62, 67, 863 P.2d 137 (1993)). Our Supreme Court has found it is improper for a prosecutor to call defense counsel’s presentation “bogus” or involving “sleight of hand.” *Thorgerson*, 172 Wn.2d at 452. However, even with those improper remarks, the Court found no prejudice as these statements were not likely to have altered the outcome of this case. There, the prosecutor’s remarks

told the jury to disregard irrelevant evidence, and focused on the evidence before the jury. *Id.* Though the remarks were improper, they were not prejudicial. *Id.* The prosecutor's statements in Witthauer's case were significantly less improper than those the prosecutor made in *Thorgerson*, if they were improper at all.

In this argument, Witthauer claims the prosecutor committed misconduct by arguing that it was a shame that the defense called the victim's mother as a witness when the victim's mother's testimony was essentially irrelevant. The prosecutor stated in his rebuttal argument,

And—and we get the claim that, you know, well, gee. [C.Z.] is lying because of the testimony of her mother, Kim Witthauer. And you know, that – that's just really kind of a shame. I mean, Ms. Witthauer, she's called to the stand as a surprise witness. I really don't know why. She's got some serious medical problems. Some serious memory problems. She's got trouble even making it back off the stand. She didn't say that [C.Z.] told her one way or the other. She basically – she can't remember. She said she can't remember what she did the day before. I don't say that to be, you know, rude to her. But, I mean, what is that? Who hangs their hat on that in a case? Why would you even present that evidence if not as a distraction? It's just – it's a shame. And we get this bit about, well, he, you know, why would he have taken her to Tom? ...

RP 876-77. This part of the prosecutor's rebuttal was in response to Witthauer's closing argument wherein he stated, “[h]er own mother tells you that she told her they were on their way to her uncle's house.

Consistent or a fact that the defense extracted from them in the warfare of

this trial. Reasonable doubt.” RP 866. Defense argued there that C.Z.’s mother’s testimony alone established reasonable doubt that Witthauer had committed the crimes. The prosecutor, in response to this, shows the jury the lack of relevance of C.Z.’s mother’s testimony. Ms. Witthauer, C.Z.’s mother, testified only as to her sparse memory of phone calls her daughter might have made to her family on the day of the rape. RP 798-805. Ms. Witthauer’s testimony is all of seven pages of transcript, several of those lines taken up by multiple objections, and the substance of her testimony can be reduced to this: Ms. Witthauer has a bad memory due to significant medical problems and she does not recall really if her daughter called her and told her she was going to the defendant’s residence, couldn’t remember if she told police that, and then finally upon the third or fourth time being asked the same question by Witthauer responded that she “guess[ed]” she told police that. RP 798-805. Ms. Witthauer spoke to her medical issues, and also testified that she did not know until that same morning when Witthauer served her with a subpoena that she was going to testify in the case, and she was visibly debilitated and showed issues with physically getting down from the witness stand at the end of her testimony. *Id.*

Defense’s argument that Ms. Witthauer’s testimony, in and of itself, created reasonable doubt as to Witthauer’s guilt was an incredulous

statement. The portion of the prosecutor's rebuttal argument that Witthauer takes issue with responds to this incredulous statement, noting the irrelevance of her testimony, that it did not change any of the pertinent facts of the case, and it could have only been a distraction tactic. This argument is strong advocacy and it is far from misconduct. The reasonableness and appropriateness of the prosecutor's argument in response to the defendant's closing is supported by the fact that Witthauer did not object to this argument from the prosecutor. Witthauer did not give the trial court the opportunity to instruct the jury to disregard or otherwise cure any potential misconduct. And this argument was so fleeting and insignificant to the prosecutor's overall arguments on rebuttal, that it cannot be reasonably said that these statements were substantially likely to have affected the outcome of the trial. The prosecutor did not impermissibly impugn defense counsel's integrity, and even if that did occur, it was so fleeting so as to cause no prejudice. Witthauer's claims of prosecutorial misconduct fail.

Witthauer's final claim of prosecutorial misconduct likewise fails. Witthauer claims the prosecutor committed misconduct during his cross-examination of him. The prosecutor quickly got to the salient points of his cross-examination of Witthauer, eliciting the number of lies Witthauer told police and his family and friends, first denying any sexual intercourse with

C.Z., then claiming some far-fetched conspiracy wherein his semen was stolen and planted inside C.Z.'s vagina in order to frame him, to finally his claim at trial that sexual intercourse did occur and was consensual. The prosecutor's questioning was quick and confidently exposed Witthauer's preposterous claims and multiple prior lies. The prosecutor may have over-stepped, but then he withdrew the question; the second time the prosecutor possibly over-stepped the judge instructed the jury to disregard any questions or answers related to the subject of any other allegations of misconduct as they were irrelevant. These potential problematic questions are not misconduct, nor do they constitute such misconduct that was material to the outcome of the trial and that denied the defendant his right to a fair trial.

Any potential misconduct by the prosecutor during cross-examination was not likely to have affected the jury's verdict. The seriousness of the irregularity was not overwhelming because defense objected and the objection was sustained, or the prosecutor withdrew the complained-of question. RP 780-81. At the time of the complained-of question, the trial court sustained Witthauer's objection and instructed the jury to disregard the questions and answers concerning allegations of misconduct with anyone else as they did not have anything to do with the case. RP 781. Additionally, Witthauer sought no additional curative

instruction. RP 781. In light of all the evidence, the defendant's preposterous direct examination, the trial court's admonition to the jury, and the lack of a request for a jury instruction, show the prosecutor's cross-examination did not deny Witthauer his right to a fair trial. When a defendant does not request a curative instruction or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the prejudice that resulted. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1998); *Davenport*, 100 Wn.2d at 762-63. The prosecutor did not belabor an improper line of questioning of the defendant; when he came close to an improper question he immediately backed off and nothing about the prosecutor's questions led to any prejudice for Witthauer.

Witthauer has failed to show any prosecutorial misconduct that prejudiced his right to a fair trial. Witthauer's claim of prosecutorial misconduct should be denied.

III. Cumulative Error did not Deny Witthauer a Fair Trial

Witthauer argues that cumulative error resulted in an unfair trial. There may be situations when each error individually does not warrant reversal of a conviction, but all the small errors, accumulated, resulted in an unfair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Cumulative error does not apply where there were only a few errors which

had little or no effect on the outcome of the trial. *Id.* As discussed in the preceding sections, Witthauer has failed to prove how each alleged error or instance of misconduct affected the outcome of his trial. He has likewise failed to show how the combined potential errors or instances of misconduct affected the outcome of the trial. Witthauer has failed to show he was denied his due process right to a fair trial due to cumulative error. This claim fails.

IV. The State Agrees the Trial Court Erred in Failing to Make Specific Finding Witthauer Suffers From Chemical Dependency Prior to Imposing Chemical Dependency Evaluation and Treatment as a Community Custody Condition.

The State agrees with Witthauer's claim that the trial court failed to make an express finding that he has a chemical dependency prior to imposing a chemical dependency evaluation and treatment as a condition of his community custody. This express finding is required by the legislature pursuant to RCW 9.94A.607(1) and case law. *State v. Jones*, 118 Wn.App. 199, 209-10, 76 P.3d 258 (2003); *State v. Warnock*, 174 Wn.App. 608, 299 P.3d 1173 (2013). Therefore, the chemical dependency evaluation and treatment condition should be stricken on remand unless the superior court is able to make a statutory determination that Witthauer suffers from a chemical dependency.

CONCLUSION

The trial court should be affirmed in all respects as Witthauer has failed to show any error denied him a fair trial. Witthauer's claims should be denied.

STATE'S CROSS-APPEAL

ASSIGNMENTS OF ERROR

- I. The trial court erred in ruling that Witthauer's indecent liberties conviction merged with his rape in the second degree conviction.**
- II. The trial court applied the incorrect legal analysis by employing the merger doctrine.**
- III. The trial court erred in failing to sentence Witthauer on his indecent liberties conviction as it does not "merge" with rape in the second degree and is not the same offense as rape in the second degree.**

ISSUES PRESENTED

- I. Whether the merger doctrine applies to concurrent convictions for indecent liberties and rape in the second degree.**
- II. Whether the trial court erred in applying the merger doctrine and finding the two offenses merged and therefore erred in failing to sentence Witthauer on the indecent liberties conviction.**

STATEMENT OF THE CASE

Witthauer was convicted at trial of indecent liberties and rape in the second degree, with an abuse of trust aggravator found for each count. CP 43-46. At sentencing, the judge indicated that the indecent liberties conviction merged with the rape in the second degree conviction and did not impose a sentence on the indecent liberties conviction. RP 909; CP 64. The State objected to the trial court's merger finding. RP 911. Thereafter the State filed its notice of appeal regarding sentencing. CP 90. The State hereby submits this cross-appeal alleging the trial court erred in finding that indecent liberties merged with rape in the second degree.

ARGUMENT

I. The trial court erred in finding that Rape in the Second Degree and Indecent Liberties with Force merged and the trial court erred in failing to sentence Witthauer on the Indecent Liberties count.

The trial court erred in finding that the conviction for indecent liberties merged with the conviction for rape in the second degree. Indecent liberties and rape in the second degree are not the same offense and therefore convictions for both crimes in this case does not violate the defendant's right to be free from double jeopardy. The trial court's merger of indecent liberties and failure to enter a sentence on the indecent liberties

count should be reversed and the cause remanded for the trial court to enter a sentence on the indecent liberties conviction.

This Court reviews double jeopardy claims de novo. *State v. Wilkins*, 200 Wn.App. 794, 805, 403 P.3d 890 (2017), *rev. denied*, 190 Wn.2d 1004, 413 P.3d 10 (2018). While the constitutional guaranty against double jeopardy is designed to protect a defendant from receiving multiple punishments for the same offense, it does not bar multiple punishments and multiple sentences arising from multiple offenses. *See State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 801 (2011), *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991), and *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014). The trial court inherently found, based on its merger ruling, that indecent liberties with force and rape in the second degree by forcible compulsion constitute the same offense. This finding is erroneous.

This Court applies the “same evidence” test to analyze double jeopardy claims, determining whether the crimes are both the same in law and the same in fact. *State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). If there is an element of each which is not included in the other, and proof of one would not necessarily also prove the other, the offenses are not the same and convictions for both offenses are not prohibited by double jeopardy guaranties. *Id.* The elements of indecent liberties by force

under RCW 9A.44.100(1)(b) include knowingly causing another person to have sexual contact with the defendant by forcible compulsion. RCW 9A.44.100(1)(b). “Sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). The elements of rape in the second degree are engaging in “sexual intercourse” with another person by forcible compulsion. RCW 9A.44.050(1)(a). “Sexual intercourse,” as relevant in this case, is defined as having “its ordinary meaning and occurs upon any penetration, however slight,” and also includes “any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.” RCW 9A.44.010(1)(a), (b). As applies to both indecent liberties and rape in the second degree, “forcible compulsion” is defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6).

The offenses of indecent liberties and rape in the second degree have elements not included in the other offense. Rape requires proof of

intercourse, which is not an element of indecent liberties, and indecent liberties requires proof that the perpetrator acted for sexual gratification, which is not an element of rape. *State v. Jones*, 71 Wn.App. 798, 825, 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018 (1994); *see also*, *State v. Pearson*, 3 Wn.App.2d 1013, slip op. 1-2 (Div. I, 2018) (an unpublished opinion from the Court of Appeals finding that child molestation and rape of a child were not the same offense as a matter of law).¹ These offenses are therefore not the same in law.

Even though two offenses are not the same in law, there may still be a double jeopardy violation if the two offenses are the same in fact. *State v. Nysta*, 168 Wn.App. 30, 47-48, 275 P.3d 1162 (2012), *rev. denied*, 177 Wn.2d 1008 (2013). Under a same in fact determination, the appellate court looks to whether “evidence of the same single act was *required* to support each conviction..” *Id.* at 48. In *State v. Land*, 172 Wn.App. 593, 295 P.3d 782, *rev. denied*, 177 Wn.2d 1016 (2013), Division I of this Court found that when the offense of child rape is committed by penetration, child rape is not the same offense as child molestation. *Land*, 172 Wn.App. at 600. They concluded that,

...this is so even if the penetration and molestation allegedly occur during a single incident of sexual contact

¹ GR 14.1 allows for citation to unpublished decisions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding on this Court and may be given as much or little persuasive value as this Court chooses.

between the child and the older person. The touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point, the act of penetration alone, regardless of motivation, supports a separately punishable conviction for child rape.

Id.

The concepts of “merger” and “same criminal conduct” and “double jeopardy” are often confused and “merger” is frequently used by attorneys and judges alike to describe concepts of “same criminal conduct” and “double jeopardy.” However, “merger” is a separate doctrine, a subset of double jeopardy essentially. It is a rule of statutory construction that applies only when a crime is elevated to a higher degree by proof of another crime. *State v. Johnson*, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980); *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005); *Vladovic*, 99 Wn.2d at 420-21. In essence, if one crime, when completed is itself an element of a greater crime, then the merger doctrine would apply. *See Johnson, supra, Freeman, supra, and Vladovic, supra.* Common examples of “merger” are when a completed kidnapping elevates what would otherwise be a second degree rape to a first degree rape, or when a completed assault elevates a robbery in the second degree to a robbery in the first degree. In such situations, the lower offense, i.e., the kidnapping and the assault, would merge into the first degree rape and first degree robbery convictions.

Indecent liberties by forcible compulsion, when completed, is not itself an element of rape of any degree which elevates the crime to higher degree of rape. The merger doctrine is inapplicable in the case of convictions for indecent liberties and rape in the second degree.

Additionally, “same criminal conduct” is a separate and distinct concept from double jeopardy. *State v. Chenoweth*, 185 Wn.2d 218, 222, 370 P.3d 6 (2016). Instead of determining whether two offenses are the same, like in a double jeopardy analysis, in determining whether two offenses constitute the “same criminal conduct,” the court determines whether two convictions warrant separate punishments. *Id.* Two offenses constitute “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). Thus while the offenses of indecent liberties and rape in the second degree may constitute “same criminal conduct,”² this has no bearing on whether they violate double jeopardy.

Our Supreme Court has found that two convictions, one for incest and one for rape in the second degree, do not violate double jeopardy even when both acts required “sexual intercourse,” proven by penetration, and there was one act of “sexual intercourse” that was the basis for both

² At sentencing the State agreed the two offenses constituted “same criminal conduct.” RP 901, 911. Though under *Chenoweth*, the two offenses could be argued to not encompass “same criminal conduct,” the State does not argue this on appeal as it agreed to a same criminal conduct finding at the time of sentencing.

convictions. *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). This holding was based on the “same evidence” test, finding that the offenses were not the same in law because one required proof of a certain kind of relationship, and the other required proof of force. *Id.* at 778. The Court discussed that despite the fact that both the incest and forcible rape convictions were based on the same act, one act of sexual intercourse, the offenses were not the same as they had different legal elements, and proof of one of those crimes would not necessarily prove the other. *Id.* at 778-80. In Witthauer’s case, proof of indecent liberties did not require proof of penetration, and proof of rape did not require proof of sexual gratification. The key question in determining whether two crimes are the same in fact is whether the evidence *required* to support the conviction for indecent liberties would have been sufficient to warrant a conviction for rape, or whether the evidence *required* to support the conviction for rape would have been sufficient to warrant a conviction for indecent liberties. *See Nysta*, 168 Wn.App. at 48.

In looking at the facts used to prove each of the crimes at Witthauer’s trial, each offense required proof of a fact that the other did not. *See Nysta*, 168 Wn.App. at 48. In this analysis, it is important to focus on the evidence that is *required* to prove each offense, and not confuse it with considering all the evidence available to prove each offense. *See id.*

at 50. While proof of a defendant's sexual desire for the victim, or of his sexual gratification, may be evidence available to support or help prove a rape, it is not evidence that is *required* to prove rape. Additionally, penetration is not *required* to prove indecent liberties. Thus the offenses here, indecent liberties and rape in the second degree are not the same in law or in fact, and they therefore do not violate double jeopardy. Additionally, during closing argument, the prosecutor specified what conduct supported which count and he argued that the defendant committed indecent liberties by sexually touching C.Z.'s buttocks and anus, moving his hands "across her body and touch[ing] her to gratify his own pleasures." RP 855. The prosecutor also specified that the rape charge was committed when the defendant had sexual intercourse with her, while she was both physically incapacitated, and while he used forcible compulsion to accomplish the sexual intercourse. RP 855. Thus it is quite clear from the facts at trial and as argued by the prosecutor that the State relied on two different kinds of touching to satisfy each crime and that proof of one was not necessary to prove the other.

As discussed above, the trial court improperly found that indecent liberties "merged" into rape in the second degree. As indecent liberties, itself, is not an element of rape that elevates it from a lower degree to a higher degree of rape, the merger doctrine is inapplicable. Instead, the

proper analysis is whether these two offenses constitute double jeopardy. They are clearly not the same in law, and not the same in fact. Accordingly, the trial court erred in finding the two offenses merged and in failing to sentence Witthauer for the crime of indecent liberties. This matter should be remanded for imposition of a sentence on the indecent liberties conviction.

CONCLUSION

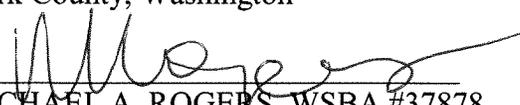
The merger doctrine is inapplicable to this case as the crime of indecent liberties is not itself an element of the crime of rape which elevates rape to a higher degree. Additionally, Witthauer's convictions do not violate double jeopardy and the trial court should have entered a sentence on the indecent liberties count. This matter should be remanded for the trial court to enter a sentence on indecent liberties.

DATED this 31st day of October, 2018.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

October 31, 2018 - 11:22 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50934-2
Appellate Court Case Title: State of Washington, Respondent/Cross Appellant v. Ronald Witthauer, Appellant/Cross Respondent
Superior Court Case Number: 15-1-02355-1

The following documents have been uploaded:

- 509342_Briefs_20181031112034D2727271_1892.pdf
This File Contains:
Briefs - Respondents/Cross Appellants - Modifier: Amended
The Original File Name was Brief - Corrected from Respondent.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- winklerj@nwattorney.net

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

Filing on Behalf of: Rachael Rogers - Email: rachael.rogers@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 5686

Note: The Filing Id is 20181031112034D2727271