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Court of Appeals
Division II
State of Washington
10/12/2018 4:09 PM

COURT OF APPEALS NO. 51389-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION TWO

TANNER BIRDSALL,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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

The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion for a mistrial.
2. The trial court erred in denying the motion for a new trial under CrR 7.5.
3. The prosecutor committed misconduct when she violated the motion in limine by suggesting that the defendant had drugged the complaining witness.
4. The prosecutor committed misconduct in closing when she misrepresented the toxicology evidence presented at trial.
5. The prosecutor committed misconduct in closing when she invoked recent social issues from the “Me Too” movement, referring to the double standards between the sexes, and victim blaming.
6. Defense counsel provided ineffective assistance of counsel when he failed to object to the rampant prosecutorial misconduct in closing argument.
7. Defense counsel provided ineffective assistance of counsel when he failed to object to irrelevant and unfairly prejudicial evidence relating to how S.C. felt about the indignities she suffered at the hospital and elsewhere as a result of this incident.
8. Defense counsel provided ineffective assistance of counsel when he failed to raise a “reasonable belief” affirmative defense.

9. Defense counsel provide ineffective assistance of counsel when he failed to advise the sentencing court that youth was a mitigating factor the court needed to consider in determining the appropriate sentence.

Issues Pertaining to the Assignments of Error

1. Because of Tanner Birdsall's arm fracture, he had Vicodin at his house. The court granted a motion to exclude any evidence that the complaining witness may have ingested Tanner's prescription drugs. As she had done before in the two earlier mistrials, the prosecutor again violated this ruling. This time the prosecutor did so by questioning the state toxicologist on the inability to test the bottles of alcohol for other substances. The court expressed concern at the violation but stated that it would reserve ruling until after the verdict. Did the court err in so ruling?

2. The trial court denied the post-trial motion to set aside the verdict based on the above-described violation of the motion in limine. The court took the defense to task for not interviewing the jury to determine whether this testimony impacted their verdict. The court stated that without evidence that the jury relied upon this information, defense counsel was asking the judge to speculate about the evidence's impact. Where the jury's thought process is not admissible to attack a verdict, did the court err in denying the defense motion?

3. In closing argument, the prosecutor invoked social issues to bolster her case. She spoke about double standards that exist with men and women, about the ways boys are trained, and argued that questioning whether the complaining witness had consented to sex was tantamount to “blaming the victim.” The State also misrepresented the toxicology evidence in closing. Did this flagrant and ill intended misconduct deprive the appellant of a fair trial?

4. The defense presented evidence that Tanner believed S.C. consented to sex through her actions, and that he would not have known S.C. was incapable of consenting. Where the affirmative defense of “reasonable belief” was consistent with the defense theory, did the defense attorney provide ineffective assistance of counsel in failing to request and argue that instruction?

5. Defense counsel failed to object to prosecutorial misconduct in closing. Did this failure, combined with other omissions, deprive Tanner of a fair trial?

6. Tanner was 19 years old at the time of this offense. Despite Tanner’s “tender years,” the defense failed to raise Tanner’s young age as a mitigating factor to the court. Did defense counsel provide ineffective assistance of counsel at the sentencing stage?

II. STATEMENT OF FACTS

1. Procedural Facts

The Grays Harbor Prosecutor charged appellant Tanner Birdsall with one count of rape in the second degree under the incapacity prong, alleged to have occurred on or about February 9, 2016. CP 1-2. Tanner was 19 at the time of the incident. S.C., the complaining witness, knew Tanner from high school. She was 19 years old as well. She alleged that Tanner had sex with her when she was too intoxicated to consent. CP 1-2. She made the same allegation against her ex-boyfriend Joel Krebs. He was tried separately and is not part of this appeal.

A trial commenced on April 11, 2017 before the Honorable F. Mark McCauley. CP 65. The jury was unable to reach a verdict and the court declared a mistrial. The State decided to retry Tanner's case. This trial began on August 29, 2017 before Judge McCauley. CP 48. The jury was again unable to reach a verdict and the court declared a second mistrial. CP 51.

Determined to obtain a conviction, the prosecutor brought Tanner to trial again on November 29, 2017. CP 58. This time, after making an emotional appeal to the jury in closing argument about "double standards" and "victim blaming" (RP 973, 1005), the prosecutor got her conviction. CP 62.

The defense had earlier brought a motion for a mistrial, which the court stated could be raised after the jury verdict. RP 907-08. Following the verdict, defense brought a CrR 7.5 motion for a new trial. The court heard and denied the motion on December 21, 2017. CP 75-90; The sentencing hearing occurred the next day. Tanner had an offender score of 0. The court imposed an indeterminate sentence, with a minimum sentence of 90 months. CP 102-107. Tanner filed this timely appeal. CP 118.

2. Trial Testimony

S.C. and Joel dated for close to two years while in high school. She was older than him, she was junior when they started dating. When she was 18, but still in high school, she invited Joel to move into a trailer with her on her parents' property. RP 705. Two days after she graduated, however, she broke up with Joel and moved to Tacoma. RP 629, 705.

The breakup was difficult. RP 630. They had friends in common and when S.C. came home to visit, more often than not she and Joel found themselves at the same parties. It was awkward. RP 633. According to S.C., they eventually agreed to be cordial with each other, but she did not really consider him a friend or someone she could trust. RP 633, 638. Nonetheless, she kept him as part of her Snapchat community. RP 636-37.

On February 9, 2016, S.C. sent a message via Snapchat that she would be home soon and asked if anyone wanted to get together. RP 635-

37. Joel responded that he would be with Tanner Birdsall that evening, and asked if S.C. wanted to join them at Tanner's house. S.C. accepted the invitation. RP 638-39.

S.C. had been friends with Tanner since first arriving at high school. She had moved from Tacoma in her freshman year and felt out of place. Tanner was among several students who welcomed her to the new school. RP 625-27. They were "really good friends in high school. RP 626-27.. He was popular, involved in sports, and her family liked him. RP 627; 762. S.C. knew that both Tanner and Joel had girlfriends. RP 700.

On February 9, 2016, S.C. agreed to meet Joel and Tanner at a nearby 7Eleven and then follow them back to Tanner's home. RP 642-44. They got to the house somewhere around 8:30 pm. RP 702-03. A ping-pong table was set up to play beer pong, and it appeared that both guys had been drinking before she arrived.¹ RP 645. S.C. typically likes to drink Mike's Hard Lemonade, because it doesn't taste like alcohol. RP 646. Mike's has an alcohol content of 5%, similar to a bottle of beer. RP 934. Tanner and Joel offered S.C. a Mike's from the fridge while they continued to play beer

¹ Beer pong is a game where there are cups of beer set up on each side of the ping pong table, and the person on the opposite side tries to throw the ping pong ball into one of the cups on the other side. If successful, the person on that side has to drink the beer in that cup. If the person throwing doesn't make it into a cup, then he or she has to take a drink. A variation is to fill the cups with water, and just take a sip of whatever drink you have in your hand if you miss your shot. RP 649.

pong. She sipped her drink and talked to them while they played. RP 646-67

After about 45 minutes to an hour, S.C. finished her drink and went to the fridge for a second. RP 701. She began playing beer pong with Tanner and Joel, switching from side to side. RP 726. The cups on the table were filled with water and each player continued to drink whatever beverage they had in their hands at the time.

At some point early in the evening S.C.'s mom called to find out where she was. S.C. explained that she was with Joel and Tanner and that she had drunk a Mike's. She told her mom that she was going to spend the night at Tanner's house. RP 648.

At some point, S.C. asked the boys if they had ever played strip beer pong. They said no but asked if she would like to play. S.C. said, "not now", but maybe later. Ex 8. They eventually did play, leaving Tanner in his underwear and socks, and S.C. down to her underwear. *Id.* (S.C. testified that while everything was a little foggy, she thinks she had her panties and bra on RP 652.). Everyone seemed to be enjoying themselves, with S.C. raising her arms in the air and telling everyone that she was having fun.

S.C. went back to the refrigerator for more Mike's. The testimony is unclear as to how many she had. She believes she had three drinks over two hours and was starting her fourth. RP 652. Not long after, she went to

bathroom and fell. RP 655. Joel picked her up and carried her to the bedroom. She vomited into a bowl. Joel wiped off her face. Ex 8. at 2. A short while later she sat up and said she was feeling fine. *Id.*

Joel and S.C. started kissing. After a moment Tanner started kissing her stomach and moving his mouth down towards her legs. S.C. was smiling. She turned on her side and Tanner began having vaginal intercourse with her from behind. At the same time, S.C. was engaged in oral sex on Joel. When Tanner stopped, Joel began having vaginal sex with her. S.C. began moaning. She made no attempt to move away or ask them to stop. After a while Tanner began having sex with her again. While he was doing so, however, Joel put music on the iPhone. When a particular song came on, S.C. began to cry. She said the song was hers and Joel's song. This made Tanner uncomfortable and he left the room. Joel stayed inside the room with S.C.²

The next morning, Joel and Tanner worried whether their girlfriends would find out about them having sex with S.C.. Ex. 8. So when S.C. woke up feeling sore and asked Joel what happened the night before, he told her only that she had drunk too much and fallen down. Tanner, wishing to support Joel, agreed with what he told S.C.. Ex. 8.

² The above facts are taken from Tanners statement, admitted as Ex. 8.

According to S.C., she drove home that morning unsure about what had happened. She made the 20 to 25-minute trip without incident. RP 736. Once home, she felt sick to her stomach and holed up in the bathroom. It was unusual for her to be that sick while dinking. RP 633. Her mom just thought she was hung over. RP 784. S.C. told her mom that she hurt in the vaginal area but denied having sex when her mom asked. RP 770. S.C. has a medical condition that causes pain with intercourse or eating certain foods. RP 730. She had previously scheduled surgery for the following week, to address this condition. RP 730.

Later in the day, S.C. said she began having flashbacks of events from the night before. Her mom took her to the local hospital, but they sent her to another hospital where a rape test could be administered. A blood test found no alcohol or drugs in her system. Ex 9.. Upon examination, a pubic hair was found near her genitals (she shaves, so she knew it was not hers). RP 673.

The prosecutor later asked S.C. to describe the hospital experience: “How did it make you feel?” S.C. responded, “It was very invasive, very – felt very—almost violating.” RP 672. Under questioning from the prosecutor, S.C. described medication she was prescribed due to possible HIV concerns, and a painful injection to the right buttock. RP 673. At the

hospital, she still professed to not have a clear idea of what had happened to her.

S.C. testified that over time her memories returned to her. By the third trial she testified that she now remembered how Joel and Tanner carried her to the bedroom and laid down next to her. She doesn't remember what they said, but she remembers they took her bra and panties off. RP 674. S.C. She testified she was "under the effects of alcohol, and was having a hard time speaking or really moving or doing anything." RP 675. She claimed she was slipping in and out of consciousness and that she wanted them to stop but she was unable to speak. RP 678.

Tanner left the room and Joel had sex with her. S.C. testified that she screamed at Joel to "stop, it hurts." RP 679. But Joel did not stop, and must just kept getting louder *Id.* S.C. described how she woke up later in the night and crawled out towards the living room where she heard voices. She was naked. RP 683. Tanner asked her what she needed and she said that she wanted her clothes. Tanner helped her get dressed and helped her back to bed. *Id.*

S.C. woke up again at 2:00 am, feeling that the alcohol had left her system. *Id.* She went to the kitchen, checked the time, and then woke up Tanner who was sleeping in the living room. She said she was cold, so

Tanner got her extra blankets. RP 684. She fell back asleep and was woken up by the boys around 8:00 am. *Id.*

S.C. testified that she had only drunk once before, and that was at her graduation party where she had two Mikes. RP 725.³ Her mom had supplied drinks for the kids in her graduating class

After the hospital visit, the police contacted S.C. about her complaints. They obtained a wiretap order to record a prearranged “confrontation call” between S.C. and Tanner. They provided her with some questions to ask and told her that it was okay to lie in certain situations during the conversation. During the call, Tanner told her they had sex together that night but stated that it was just the two of them. Ex. 4. He later explained that he was trying to protect Joel from getting in trouble with his girlfriend. Ex. 8.

During the conversation, S.C. told Tanner that she did not believe him, that she thought he had drugged her and she going to talk to the police if he did not tell the truth. He assured her he had not drugged her and asked her not to call the police. Ex. 8. She hung up on him, and he called her back. During their conversation Tanner said it sounded like she had blacked out,

³ The amount she had drunk in the past appears to have decreased with the passage of time. In her first time, she had been drinking alcohol “a couple of times.” RP 18. When asked how much she drank in high school and shortly after high school she stated “just one or two, maybe three at the most.” RP 18.

and he explained that he had done so himself on other occasions. Ex. 4. Following the disturbing phone call with S.C., Tanner sent a text to her mother asking her to give him a call, explaining that he was not the one who blacked out. RP 775; Ex. 1.

Following his arrest, Tanner gave a statement to the police in which he acknowledged that both he and Joel had sex with S.C. that night. He noted everyone was somewhat intoxicated that night, but that S.C. was clearly a willing participant. *See* Ex. 8.

3. Toxicology Evidence

Both the State and the defense presented expert toxicology evidence. The State called Lyndsey Knoy from the Washington State Patrol Toxicology Laboratory. Knoy has a Bachelor of Science in Chemistry and has been with the toxicology lab since 2013. RP 875. In this case, she was called upon to estimate S.C.'s BAC and level of intoxication based on the number of drinks she consumed that evening. This question was hypothetical and based on a 130-pound female consuming Mike's Hard Lemonade. RP 887. Despite the name "Hard Lemonade," both experts agreed that the drink is only five percent alcohol. RP 888; RP 934. This is similar to the alcohol content in beer. RP 934.

Knoy explained the basics of Widmark's Equation, and its limitations. She noted that it uses the same Rho factor for all women (.55)

and for all men (.68). Further, it assumes that all drinks are consumed at one time. The prosecutor asked Knoy to estimate the maximum BAC if a hypothetical woman who drank three, five or six drinks during an evening.

Knoy stated that if three Mike's were ingested into the system at one time "the highest theoretical BAC" would be a .13. RP 891. If spaced out with one in the first hour, with the second within a half hour, and a third in "pretty quick succession," the highest potential BAC would be .12. RP 892-893.

As to five drinks, if they were consumed all at one time, the highest BAC would be .21. RP 894. If it took an hour to consume the first drink, and then the remaining four were consumed in quick succession with no burn off, the BAC would be .20. RP 895. If six drinks were ingested all at one time, the highest BAC would be .26. As in the above scenarios, if the first Mike's was drunk slowly, and the remaining five were consumed in quick succession, the highest hypothetical BAC would be .25. RP 895.

Knoy stated that a blackout refers to the loss of memory, rather than a state of consciousness. A person in a blackout can still carry on conversations, they just do not remember them. RP 922. The blackout would not be apparent to others. RP 921. Knoy acknowledged that "a person can talk and walk and look just fine, but their brain is just not recording the

memories.” RP 921-22. A fragmentary blackout is one in which some of the memories may return over time. RP 904.

The defense called David Predmore, a toxicologist with the University of Washington from 1971 until 1999. While working there, Predmore obtained a Master of Chemistry, and completed course requirements for a doctorate in analytical chemistry. RP 930. Although retired from the university, he continues to do consulting work.

Predmore described the flaws in Knoy’s reasoning. One of the main difficulties with Knoy’s estimations was that she did not take metabolism into account after the first drink. RP 942. As Predmore explained, “You have to take the metabolism for the whole time, not just a .0075 for the first hour. It has to include all of the hours, because that’s what’s going on. You don’t have to get to your peak to start burning off. All you have to do is start absorbing alcohol and your liver starts taking care of it.” RP 942. In fact, studies have demonstrated that women have a higher metabolism rate than men. RP 938.

Predmore also disagreed with Knoy’s use of a .55 Rho factor. That figure is more appropriate for heavier women and is not commonly used these days. RP 934-35. Predmore explained that S.C. does not “sound like an overly heavy person.” RP 935-36.

Applying the correct figures, Predmore estimated that three Mike's over a two-hour period would produce a BAC near .09. RP 944. If S.C. had consumed five Mike's over a four-hour period, her BAC would be .14. RP 941. Predmore further explained that if a person did not feel the effects of alcohol at 2:00 am, then the alcohol would be out of her system by 8:00 am. RP 945-46. The fact that someone still feels sick at that point does not mean there is still alcohol in her system. RP 946.

In cross-examination, the prosecutor focused on the fact that a person's reasoning and ability to drive can be affected by just two alcoholic drinks. RP 951.⁴

4. Closing Argument

The prosecutor began her closing argument with an emotional appeal to the jury:

The facts of this case are what every girl fears. What every woman fears. What every parent's worst nightmare is. We talk to our girls about be careful how you dress, right. Be careful how you act, what you say. We tell our girls don't give boys the wrong impression. And why do we do that? The potential juror we heard from the other day said it right, because there's a double standard.

RP 973. The defense objected to this argument about non-empaneled jurors and noted that the State's argument was not based on the evidence in the

⁴ She also questioned Predmore on his use of .04 instead of .043 in his calculations. Predmore explained that the difference could be significant with enough drinks, but with only four or five drinks, the difference would only be .001. RP 952.

case. The Court sustained the objection, telling the State to limit her argument to the evidence in the case. *Id.* The prosecutor did not do so:

Women should be allowed to dress how they want and act how they want. But that's not how society is, right, unfortunately. And we do tell our boys, no means no. That's something we taught them in the last couple of years. But we don't tell our boys that no response is yes. Nobody ever says that. We don't tell our boys that if she doesn't tell you to stop that that's yes. We don't tell boys that if she is so drunk that she can't walk, that she's falling down, that she's passing out, that she's in and out of consciousness, she's vomiting, and she's lying on the bed partially clothed, that that means yes. We don't tell boys not to rape. That's what happened here. And while there's a double standard, we don't blame the victim. That's not what we do.

RP 973-74.

The prosecutor told the jury “there’s not a woman on the planet who has sex with someone after they vomited.” RP 982. She argued Tanner admitted lack of consent when he never claimed S.C. said yes. *Id.* The prosecutor told the jury that S.C.’s BAC was as high as .26 or .25 depending upon how quickly she drank the alcohol. RP 983. She falsely told the jury that the defense expert had not used the “right category for women, made her a heavyset women so that the numbers are off.” RP 993. In reality, Predmore had explained the opposite, that he had not used a Rho factor of .55 because that was for heavier women, which S.C. clearly was not.

The prosecutor asserted conclusions not supported by the evidence. She argued that because BACs of .10 or .14 are illegal for driving, they also

incapacitate one's ability to consent. She also incorrectly argued that sickness the next morning meant S,C, still had alcohol in her system. This was not what the experts testified to in the case.

Defense counsel argued that the sex was consensual that night, as supported by Tanner's statement to the police as well as the recorded "confrontation calls." RP 997. The defense pointed out that someone who is in a blackout state does not have a sign on their head identifying the fact that they are in a blacked out condition. RP 995.

In rebuttal, the prosecutor twisted many of the defense arguments. Defense counsel had pointed out the incongruency of S.C.'s claim to not like Joel but nonetheless hanging out with him. In rebuttal, the prosecutor argued this was a case of "victim blaming. It's her fault what happened. She went there. It's on her." RP 1005.

After defense counsel pointed out that S.C. had the advantage of knowing the "confrontation call" was being recorded, the prosecutor argued "there's no advantage. [S.C.] lost her self-respect, her trust, her friends, her ability to go on as a normal person, that's gone. There's no advantage there." RP 1006.

5. Motion for a Mistrial and Motion for a New Trial

Prior to the first trial, the defense brought a motion to prevent S.C. from testifying that she believed Tanner had slipped Vicodin into her drink.

At an evidentiary hearing, she testified that when she previously took Vicodin for pain, she began vomiting and had a migraine that lasted for three days. RP 5. Upon questioning she acknowledged she had taken Vicodin on several previous occasions, but only had a bad reaction once. The court found there was too much speculation for S.C. to testify about her belief she had been drugged. RP 9-10.

Despite the court's ruling, during the first trial the prosecutor asked Knoy about testing for drugs. RP 182. Defense counsel objected. The court held that while the technician could talk about why there were no signs of alcohol, she could not talk about why there was no evidence of drugs. The court explained the drug issue was pure speculation. RP 185.

In the second trial, the prosecutor tried to introduce the issue of drugs again. First, the prosecutor asked Officer Beck about medication he recovered in his search of the house. RP 467-68. The judge sustained the objection and ordered the prosecutor and witness to refrain from talking about collection of medication. RP 468. That same day, the prosecutor asked Toxicologist Knoy about drugs in S.C.'s system. Again, the judge sustained the objection. RP 538-39.

At the start of the third trial, the defense brought a written motion to exclude evidence that the complaining witness may have ingested prescription drugs. CP 53. The motion noted that the court had ruled on this

issue on many occasions. However, “no formal written order prohibiting this evidence has been entered.” The defense requested that the court issue an order excluding “any evidence” of alleged prescription ingested by the complaining witness. *Id.* The court granted the motion, but noted that mention of Tanner’s prescription medication in the confrontation tape was permissible. Supp CP __ (Order, 11/6/2017).

During the current trial, the State asked Knoy, “What alcohol level would you expect to see in the blood” more than 24 hours after the last drink? RP 896. Knoy responded that she would expect to see zero alcohol in the blood. *Id.* She was then shown Exhibit Number 9, which was the lab report. RP 897. The State asked whether she had tested for both alcohol and drugs in this case and Knoy responded that she had and that none were detected. RP 897. Despite the court’s order and the lack of evidence that Tanner had drugged S.C., the Prosecutor proceeded to ask questions about drugs:

MS RILEY: With the information you just provided, if the blood was taken 24 hours after, would this be the results that you would expect to see regardless of what a BAC level would be *or drugs in the system?*

MR. CAMPBELL: Your Honor, first all, it’s a compound question and . . .

THE COURT: Sustained. Rephrase.

MS. RILEY: Okay

MR. CAMPBELL: And I think—as to BAC, it has been asked and answered. If there's other parts, I would like to be heard outside the jury.

THE COURT: All right. Just . . .

MS. RILEY: So were the results what you would have expected based on that time frame that was after 24 hours?

MR. CAMPBELL: Again, I object. Asked and answered. She already testified to this.

THE COURT: Sustained.

MS. RILEY: Okay

MS. RILEY: *And if bottles of alcohol were collected in this case, but they were empty, they were dry . .*

WITNESS: Okay

MS. RILEY: *Would there have been any ability for the lab to have tested those for any substance that might have been there or anything like that?*

ANSWER: *No. We cannot test empty anything.*

RP 897-98 (emphasis added).

The direct examination continued for a short while longer. Before cross-examination, the jurors were excused, and defense counsel brought a motion for mistrial. RP 906-07. He argued the State had violated the motion in limine again by asking questions which were intended to raise the possibility that S.C. was drugged. RP 906-07. The court agreed there was an order in limine which prohibited this. RP 907.

The prosecutor attempted to argue that she was allowed to go into it because it was in the toxicology report that no alcohol or drugs were found. RP 907. But defense counsel reminded the court that the report was introduced for purposes of a test of alcohol in the blood, which was a totally different issue. The trial court agreed:

Yeah. I mean I don't like the fact that it was - I was kind of shaking my internal head. When I test for substances, I - I mean I don't know what you were referring to because it doesn't seem like empty Mike's Hard Lemonade that have dried out after four days or whatever, you're not going to - why would you test for a little bit of alcohol? You expect there to be alcohol. So it did kind of send a message that you were asking her whether there was a test for other substances, so. . . Well, I'm not going declare a mistrial at this point. I'm going to let this trial proceed, but I guess I would allow you to post-verdict motion if you want to research the law and make a motion. I'm not prohibiting you, obviously, from that.

RP 907. The judge stated he did not want to order a mistrial at this time “because - we’ll see what the verdict is.” RP 907-08. The judge indicated he was not saying what he would do at a later time and that he needed to think about it more. RP 908. “But I – I wish it wasn’t put that way, because I did order no reference to other drugs or substances.” *Id.*

Following the guilty verdict, the defense brought the motion to set aside the verdict based on the above described incident. At the hearing, defense counsel reminded the judge that this exact same issue had come up in prior trials, requiring the court to admonish the prosecutor that the

State was not to bring in any speculative evidence about drug use. RP 1017.

The defense pointed out that it was a carefully worded question by the prosecutor, asking if the bottles could be tested for any “substance” that might be there. RP 1020. The jury instruction defining mental incapacity specifically refers to “the influence of a substance.” *Id.*, *See* CP 0068.

The prosecutor claimed that she was entitled to ask the question because the defense asked the officer whether they had submitted the bottles for DNA testing. The defense pointed out this was not the reason she gave at the time, and that it was clear from the context that she was not asking about DNA when she referred to “any substance.”

The court asked defense counsel whether he had spoken to any jurors about this issue. RP 1022. Defense counsel stated he had not. *Id.* The judge told him that he was free to talk to jurors. “I mean you would have been welcome to go and talk to any juror and your motion would have been much stronger.” RP 1023. When defense counsel stated that he talked to jurors from the previous trials, the judge interrupted him: “No. I’m talking about this jury. To get one of those jurors to say this issue came up in our short deliberations and it affected us in some way.” RP 1023-24. The judge continued, “it would have been potentially much [more] pervasive [sic]

bolstering of that motion if there were, in fact, was some discussion of it. You're just asking me to speculate that they even talked about it." RP 1024.

The judge noted that in the recorded conversation, Tanner said, "Are you accusing me of drugging you?" RP 1025. From this the judge reasoned that "if anyone planted the actual real seeds of planting drugs in somebody's drink, it was Tanner in his taped conversation." *Id.* Ms. Riley continued to assert that her question was simply a response to the DNA comment. RP 1029.

In denying the defense motion, the court stated that defense counsel was "hypersensitive" (RP 1033), and he could have spoken to the jurors if he wanted to find out whether they had considered the statement. RP 1034. The court stated, "It's all very tenuous, as far as any kind of violation," and that the fairness of the trial was not affected. RP 1034.

III. ARGUMENT

1. The trial court erred when it initially denied the motion for a mistrial to first "see what the verdict is" and later denied the motion for a new trial based on a misunderstanding of the facts and the law.

The court erred in denying the motion for a mistrial. When examining a trial irregularity, the question is whether the irregularity so prejudiced the jury that the accused was denied his right to a fair trial. If it did, the trial court should have granted a mistrial. *State v. Escalona*, 49 Wn.

App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity may have had this impact, the appellate court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. *Escalona*, 49 Wn. App. at 254.

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The appellate court's inquiry is focused on whether the act or omission by the lower court was “manifestly unfair, untenable or unreasonable.” *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990).

Here the prosecutor violated the same court order in all three of the trials. The defense brought a timely motion for a mistrial in the last. The judge denied the motion at the time, stating he wanted the trial to proceed, but suggested defense counsel could research the issue and renew the motion post-trial. The judge stated he wanted to see first how the jury ruled. RP 907-08.

The court's denial of the motion was based on untenable grounds. The court acknowledged the violation of the motion in limine and that the implication of what the prosecutor was suggesting through her question was clear. It left the judge shaking his head. Nonetheless, the court declined to grant

the motion based in large part on the court's desire to see how the jury would rule. But a jury plays no role in determining whether a mistrial should be granted. This is a question of law for the trial court. A court abuses its discretion when it applies the wrong standard of law. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). The court's ruling was procedural error requiring remand on the issue.

A similar mistake of law occurred when counsel brought the CrR 7.5 motion for a new trial. Again, the court misperceived the jury's role in determining whether a new trial should be granted. The judge believed that defense counsel was obligated to talk with the jury and determine whether they relied upon evidence. The judge believed that in the absence of declarations from the jurors, the judge was required to speculate on whether the evidence had an impact on the jury's verdict. The court was mistaken. Declarations from jurors as to the evidence they considered in reaching their verdict cannot be used to attack the verdict. *See State v. Elmore*, 139 Wash. 2d 250, 985 P.2d 289 (1999); *See also, State v. Linton*, 156 Wn.2d 777, 132 P.3d 127 (2006) ("The effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence" cannot be used to attack the jury's verdict.) (Per Fairhurst, J., with three Justices concurring and five Justices concurring in the result.). Because the court's decision was

based on untenable grounds, the trial court abused its discretion. *In re Morris*, 176 Wn.2d 157, 170, 288 P.3d 1140 (2012).

In addition to the misapplication of the law, the court's ruling was manifestly unreasonable. Although it was clear to the court at the time of the testimony that the prosecutor's question related directly to whether there might have been drugs in the bottle, at the post trial motion the court accepted the State's post-hoc claim that its question was responsive to defense counsel's earlier questions about whether the bottles had been tested for DNA evidence.

This holding fails for many reasons, the most important of which is context. These questions were asked regarding the toxicology report, which specifically referred to drug analysis. The prosecutor first asked about whether she would expect to see alcohol drugs in S.C.'s system more than 24 hours later. When defense counsel objected, the prosecutor tried a different approach. She mentioned the alcohol bottles that were collected that were empty and dry, and then asked whether there would "have been any ability for the lab to have tested those for *any substance* that might have been there or anything like that. RP 897-98. It is simply not credible that the prosecutor was referring to DNA when she asked about other substances, nor would the question have been interpreted that way by the jury.

The judge also suggested that the evidence was cumulative of Tanner's earlier recorded statement, "Are you accusing me of drugging you?" RP 1025. This misses the point. Tanner's question to S.C., combined with the absence of any drugs in her system, was exculpatory evidence. By contrast, eliciting testimony that there could have been undetected drugs in the bottles was inculpatory evidence. The court's reasoning was manifestly unreasonable.

S.C.'s description of how she seemed to have passed out and couldn't move or speak after starting her fourth drink was questionable. Hearing there could have been something in the bottles which was no longer traceable could have easily influenced some jurors who might otherwise have questioned the reliability of S.C.'s story. Moreover, the State's similar misconduct relating to drugging allegations in the previous trials demonstrates the importance of this evidence to the State. Because the trial court erred in denying the motion for a mistrial and the motion for a new trial, reversal is required.

2. Rampant prosecutorial misconduct during the trial and closing argument deprived appellant of a fair trial.

a. Standard of review

A prosecutor has a special duty in trial to act impartially in the interest of justice and not as a "heated partisan." *State v. Reed*, 102 Wn.2d

140, 147, 684 P.2d 699 (1984). Her “devotion to duty is not measured, like the prowess of the savage, by the number of their victims.” *State v. Montgomery*, 56 Wash. 443, 447–48, 105 P. 1035 (1909). Rather, as a quasi-judicial officer, a prosecutor must seek verdicts free of prejudice and based on sound reason and admissible evidence. *In re Glassmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In falling short of this standard, the prosecutor not only deprives the defendant of a fair trial, but also denigrates the integrity of the prosecutor’s role. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

The appellant carries the burden of establishing that the prosecutor’s actions were both improper and prejudicial when viewed “in the context of the record and all of the circumstances at trial.” *Glassmann*, 175 Wn.2d at 704. In establishing prejudice, the appellant must establish a “substantial likelihood” that the misconduct affected the jury’s verdict. *Id.* There is an additional requirement when, as is the case here, defense counsel did not object to the misconduct. Appellant must also establish that the conduct was flagrant and ill-intended, and that an instruction from the court would not have cured the defect.

b. The prosecutor’s arguments were designed to arouse the jury’s passion by focusing on social policy and the need to end the double standard between the sexes.

“A prosecutor may not properly invite the jury to decide any case based on emotional appeals.” *In re Detention of Gaff*, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Nor may prosecutors “use arguments calculated to inflame the passions or prejudices of the jury.” *Glassmann*, 175 Wn.2d at 704 (quoting American Bar Ass’n, Standards for Criminal Justice, std. 3-5.8(c) (2nd ed. 1980)). This is because improper appeals to passion or prejudice prevent calm and dispassionate appraisal of the evidence. *State v. Elledge*, 144 Wn.2d 62, 85, 26 P.3d 271 (2001).

A prosecutor must not suggest that a conviction is needed in order to protect the community. *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). The reason for this is obvious: “The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem.” *Id.* The corollary is also true, a jury may be led to believe that by failing to convict, the jury is making society a more dangerous place. *See e.g., State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991) (finding reversible error where prosecutor suggested

that by telling children that we do not believe them when they make these complaints, it was akin to declaring “open season” on children).

In this case, the misconduct was multifold. As described above, the prosecutor committed misconduct when she suggested through her questioning that Tanner may have drugged S.C. This misconduct alone was sufficient to require the court to have granted a mistrial and the motion for a new trial. But even if this Court were to conclude that this misconduct alone did not rise to the level of requiring the judgment to be vacated, the prosecutor’s outrageous misconduct in closing compels a new trial.

“We talk to our girls about be careful how you act, what you say. We tell our girls don't give boys the wrong impression. And why do we do that? The potential juror we heard from the other day said it right, because there's a double standard.” RP 973. The prosecutor continued, “Women should be allowed to dress how they want and act how they want. But that's not how society is, right, unfortunately.” She further told the jury they must say no to “blaming the victim.”

In making this argument, the prosecutor attempted to capitalize on recent events in the media. On November 29, 2017, three days before closing argument, the national headlines were of Matt Lauer’s firing for

sexual misconduct.⁵ Just hours later, Garrison Keillor, the radio host of *A Prairie Home Companion*, was fired for similar reasons. *Id.* The prosecutor was tapping into the national outrage to obtain a conviction she was unable to attain in the first two trials.

This is similar to the prosecutorial misconduct in *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993), where the prosecutor made repeated references to “the war on drugs” and described neighborhoods and schools as battlefields. Echevarria initially objected, but on appeal the State argued the error was not preserved because he did not continue to object. *Id.* But the court held the comments were so flagrant and ill-intentioned that no instruction could have erased the prejudicial effect. *Id.*

The court of appeals held that these comments were “a blatant invitation to the jury to convict the defendant, not on basis of the evidence, but, rather, on the basis of fear and repudiation of drug dealers in general.” *Id.* at 599. The court agreed the prosecutor’s comments “so colored the proceedings,” that Echevarria was denied a fair trial. *Id.*

Appeals to passion in rebuttal argument that misrepresent the defense argument are particularly prejudicial. Here, defense counsel had pointed out the incongruency of S.C.’s claim to not like Joel but nonetheless

⁵ New York Times, 11/30/2017, “*The #MeToo Moment: When the Blinders Come Off.*” <https://www.nytimes.com/2017/11/30/us/the-metoo-moment.html>.

hanging out with him. In rebuttal, the prosecutor argued this was a case of “victim blaming. It’s her fault what happened. She went there. It’s on her.” RP 1005.

The “Me Too” movement and issues of double standards and victim blaming. have invoked strong emotions across the country. Few people remain neutral. They are issues that had no place in this trial.

c. The prosecutor committed misconduct when she misrepresented the evidence in closing argument.

The prosecutor also committed misconduct by misstating crucial evidence. It is misconduct for a prosecutor to mislead the jury in summarizing evidence during closing argument. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Washington courts have recognized that prosecutors have a duty not to make statements unsupported by the record and which may mislead the jury. *See State v. Ray*, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991); *State v. Grover*, 55 Wn. App. 923, 936, 780 P.2d 901 (1989), *review denied*, 114 Wn.2d 1008 (1990).

Here the prosecutor misrepresented the toxicology testimony. The prosecutor told the jury that the figures Mr. Predmore used produced an inaccurate result because he was treating S.C. as an overweight woman. The opposite was true. He rejected the higher “average” number relied upon by the State’s toxicologist because that number was more appropriate for a

heavier woman. RP 934-936. This misstatement of crucial evidence central to the case denied Tanner a fair trial.

d. The error is preserved for appeal and reversal is required because cumulative misconduct affected the jury's verdict.

Some of the misconduct was objected to, while other misstatements were not. The defense objected to the prosecutor's questions regarding testing of the bottles for drugs. He also initially objected during the prosecutor's closing argument about double standards, but did not renew his objection when the State continued down that same track. Nor did he object when the prosecutor misstated the toxicology evidence.

As a general rule, defense counsel is required to object in order to preserve an issue on appeal. "However, the failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015) (reversing a conviction based on prosecutorial misconduct which had not been objected to below). The initial question to be resolved is whether the misconduct was so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In our case, the prosecutor's argument during closing was that jurors are responsible for addressing the culture of double standards for men and

women, where girls have to be careful what they wear or say for fear of giving the wrong impression. This same type of improper argument was addressed in *State v. Powell, supra*, where the prosecutor discussed the consequences of failing to accept a child's word. Defense counsel failed to request a curative instruction. In deciding whether the issue could be raised on appeal, the appellate court reasoned that it was mere speculation that a carefully worded instruction would have remedied the prejudice caused by the remarks. *Powell*, 62 Wn. App. at 919. "This is one of those cases of prosecutorial misconduct in which 'the bell once rung cannot be unring.'" *Id.*, quoting *State v. Trickel*, 16 Wn. App. 18, 30, 533 P.2d 139 (1976). This was also the reasoning of the court of appeals in *State v. Echevarria, supra*, where the prosecutor's invocation of the war on drugs required reversal despite the lack of a continuing objection. 71 Wn. App. at 598

As this Court previously recognized, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011) (citing *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500, 504 (1956)). Because a curative instruction would not have remedied the various acts of misconduct, the lack of an objection does not preclude appellate review.

After determining that the error can be addressed on appeal, the next question is whether there is a reasonable likelihood the misconduct affected the jury verdict. “The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, ‘do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.’” *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). In assessing the prejudicial impact of the prosecutor’s misconduct, the reviewing court does not consider each statement in isolation. Rather, the court focuses upon the “cumulative effect of the prosecutor’s improper conduct.” *State v. Jungers*, 125 Wn. App. 895, 906, 106 P.3d 827 (2005).

Here, the prosecutor invoked social issues the jury would not be justified in considering the resolution of Tanner’s case. Nor is this a case in which the evidence was overwhelming. The State’s two prior attempts to obtain a conviction had been unsuccessful. The misconduct was prejudicial and requires a new trial.

3. **In the alternative, defense counsel was ineffective in failing to object to obvious misconduct.**

The Federal and State Constitutions guarantee all criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). If this Court finds that the prejudice resulting from the prosecutor's repeated acts of misconduct could have been cured by an objection and instruction from the trial court, then defense counsel was ineffective in failing to make those objections.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness and may be satisfied by showing that defense counsel failed to object to improper remarks by the prosecutor in closing. *State v. Horton*, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003). *Burns v. Gammon*, 260 F.3d 892, 895-96 (8th Cir. 2001). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." *In re Cross*, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

In some limited circumstances, the failure to object may be strategic. For instance, in *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995), defense counsel did not object to an improper line of questioning where the prosecutor was trying to provoke the defendant in cross-examination to call the officers liars. In finding this was a strategic decision, the court noted that the defendant “stood up well to the improper questioning” and “refused to agree that the State’s witnesses were lying or incorrect.” *Id.* Such is not the case here. There was no strategic value in remaining silent and allowing the prosecutor to mislead the jury. Misconduct is particularly damaging when the jury hears it immediately prior to beginning its deliberations. *State v. Powell*, 62 Wn. App. at 919.

In order to show prejudice, Tanner need not show that his attorney’s deficient performance more likely than not altered the outcome of the proceeding. *State v. Thomas*, 109 Wn.2d at 226. Rather, he need only show “a probability sufficient to undermine confidence in the reliability of the outcome.” *Fleming*, 142 Wn.2d at 866 (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). As discussed above, the State’s case was far from overwhelming. Defense counsel’s failure to object lent credence to the prosecutor’s arguments and unfairly tipped the jury in favor of the prosecution.

4. Tanner Birdsall was denied his Constitutional right to effective assistance of counsel when defense counsel failed to request a reasonable belief affirmative defense instruction.

In addition to failing to object to much of the prosecutor's misconduct, defense counsel also failed to raise an important affirmative defense. A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting that instruction. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786 (1984). The evidence supporting the instruction is viewed in the light most favorable to the proponent. *State v. Bergeson*, 64 Wn. App. 366, 367, 824 P.2d 515 (1992).

An attorney's failure to raise a valid affirmative defense constitutes deficient performance. *State v. Thomas*, 109 Wn.2d 222, 223, 226-29, 743 P.2d 816 (1987). Rape in the second degree under the incapacity prong is a strict liability offense. But in order to ameliorate the harshness of the law, the legislature created an affirmative defense which allows the defendant to establish his reasonable belief that the defendant was capable of consent. *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009); see RCW 9A.44.030(1). The failure to raise a reasonable belief affirmative defense in cases where the facts warrant an instruction constitutes ineffective assistance of counsel. *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007); *Powell*, 150 Wn. App. at 155.

The court in the current case instructed the jury:

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

CP 68. The court further provided the jury with a definition of mental incapacity and physical helplessness:

Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.

A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

CP 069. Instruction 7 defined consent to mean “that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.” CP 068.

Under these instructions, a defendant who believes that he has received valid consent to engage in sexual intercourse is nonetheless guilty if the jury concludes that the woman was not capable of meaningfully understanding the nature of sexual intercourse. The harshness of this rule is softened by a statutory affirmative defense to this charge:

In any prosecution under this chapter in which lack of consent is based solely upon the victim’s mental incapacity

or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that *at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.*

RCW 9A.44.030 (1) (emphasis added). Under this defense, a defendant may explain that while he knew someone was intoxicated, he did not know that she was incapable of giving consent. This is evaluated from the standpoint of a reasonable person standing in the defendant's shoes that night.

While Tanner's statement establishes that he knew they were all intoxicated, he believed S.C. was consenting to sex. She was not passed out, she was smiling while he kissed her down her legs, and she recognized a particular song that was playing through the stereo. Ex. 8. Tanner described how they started by just lying in bed talking about "high school and stuff," and then one thing led to another. He described their cuddling and kissing and how S.C. was engaged and enjoying it. The evidence was sufficient to obtain a reasonable belief instruction.

In closing argument, defense counsel argued that Tanner had no way of knowing that S.C. was in a blackout condition, and that there are no visible signs for when someone has a blackout. The problem is what Tanner knew or did not know was irrelevant to the charges without this reasonable belief instruction. Including the affirmative defense would have been consistent with the defense theory and would have provided a means by

which the jury could find Tanner not guilty, even if they concluded that S.C. was too intoxicated to meaningfully consent.

The State may argue that it was a trial strategy decision to not seek the affirmative defense. But the question is whether this was a *reasonable* strategy. *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997). “A decision is not permissibly tactical or strategic if it is not reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470-471 (2000). This Court’s reasoning in *State v. Powell*, *supra*, is helpful.

The defendant in Powell was charged with the same crime under similar conditions. The woman he had sex with later stated she was too intoxicated to have consented. *Powell*, 150 Wn. App. 149. She had a BAC of .13,⁶ which is higher than the BAC estimated by Predmore in Tanner’s case. There was some evidence that the complaining witness was highly intoxicated, but Mr. Powell testified that he did not think she was as intoxicated as she claimed. He testified that the sex was consensual. *Id.* at 149-50. The complaining witness stated that soon after they began having sex, she acted like she was a willing participant because she was fearful of Powell. This Court noted that the witness’s behavior as a willing participant entitled Powell to the reasonable belief instruction. *Id.* at 154.

⁶ *Powell*, at 151.

The court found that failure to request a reasonable belief instruction constituted a deficient performance by defense counsel:

But we are aware of no objectively reasonable tactical basis for failing to request a “reasonable belief” instruction when (1) the evidence supported such an instruction; (2) defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with the defendant’s theory of the case. Thus, as in *Hubert*, we hold that failure to request such an instruction under these circumstances was deficient performance.

Id. at 155. This Court further found that Mr. Powell was prejudiced by this deficient performance. *Id.* The same result is required here. Tanner is entitled to a new trial based on his attorney’s failure to request this necessary instruction.

5. Tanner Birdsall was denied effective assistance of counsel when defense counsel failed to argue Tanner’s youth as a mitigating factor.

The right to effective assistance of counsel described above applies with equal force to sentencing hearings. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 95 (2002). In particular, defense counsel’s failure to cite to cases that could justify a departure below the standard range often gives rise to an ineffective assistance of counsel claim. *Id.*

Tanner Birdsall’s birthdate is October 13, 1996. He was 19 years old at the time of this incident. In *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), the Court recognized that youthfulness could be a mitigating factor. The Court examined research focused on brain development and how

impulse and behavior control continues to develop into a person's 20s. *Id.* at 692. Quoting from the Washington Defender Association's amicus brief, the Court observed that "[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond." *Id.*

The Supreme Court found that the defendant's young age, even though legally an adult, is a substantial and compelling factor for imposing a sentence below the standard range. *Id.* at 696. Unfortunately, defense counsel failed to raise this mitigating factor with the court. This was a significant error, as the type of impulsive behavior in this case is precisely the type of behavior which the trial court should consider in determining the appropriate sentence. In fact, defense counsel did not even raise youthfulness to argue for a sentence at the bottom of the range. The remedy when this information is not brought to the court's attention is to remand for a new sentencing hearing. Thus, even if the conviction was to stand, remand for sentencing would be required. *State v. McGill*, 112 Wn. App. 95, 101-02.

IV. CONCLUSION

This was an unfair trial resulting in an unjust conviction. For the reasons stated above, appellant respectfully requests this Court reverse his conviction.

Dated this 12th day October 2018

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October 12, 2018 - 4:09 PM

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