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Court of Appeals
Division II
State of Washington
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NO. 51389-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

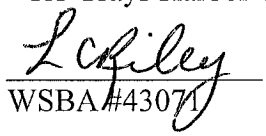
TANNER BIRDSALL,
Appellant.

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

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

ERIN C. RILEY
Deputy Prosecuting Attorney
for Grays Harbor County



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I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The Appellant was originally charged by Information filed on March 9, 2016. CP 1-2. There were two prior jury trials, which resulted in hung juries before the third and final trial that began on November 29, 2017 and was completed on December 1, 2017. See Volumes I and V of RP. On October 30, 2017, defense filed a motion for orders in limine, which were granted by the trial court. CP 52-54. The jury instructions included instructions for the original charge of Rape in the Second Degree as well as the lesser-included crime of Rape in the Third Degree. CP at 68-69. The Appellant was found guilty of Rape in the Second Degree and was sentenced on December 22, 2017 to 90 months/7 and ½ years. RP December 22, 2017 at 10.

b. Statement of Facts

On February 11, 2016, Deputy Wecker of the Grays Harbor Sheriff's Office was advised of a pending sex offense. RP November 30, 2017 at 845. St. Peter's Hospital had called regarding a 19-year old female having a rape kit performed. *Id.* The reported sex offense had occurred on February 9, 2016. *Id.* at 846. At the time Deputy Wecker

was informed of the report, S. C. was at her mother's residence on Middle Satsop. *Id.* Both S.C. and S.C.'s mother testified at trial.

Deputy Wecker responded to S.C.'s mother's location near Montesano. RP November 30, 2017 at 846. S.C. provided a statement to Deputy Wecker and an investigation ensued. *Id.* At trial, S.C. testified at trial that she had moved to Montesano with her family as a freshman from Tacoma when she was 15. RP November 29, 2017 624-625. S.C. testified about the difficulties coming to high school at that age, but that people eventually warmed up to her after the first couple of days. *Id.* at 625. S.C. testified that the Appellant was part of the group that had initially welcomed her and that she had met him on her first day of class when she first came to Montesano. *Id.* at 626. S.C. described that she and the Appellant were really good friends while they were in high school and that there had not been any romantic interest between them. *Id.* at 627. S.C. described the Appellant has being really nice and that he hung out with the more sporty, popular kids. *Id.* S.C. testified that she didn't really hang out with him much outside of school, primarily because of all the sports she was involved in herself and living 15 miles outside of town without a vehicle or a license when she was younger. *Id.* S.C. testified that they

weren't best friends, but the Appellant was someone that she could definitely trust. *Id.*

S.C. testified that she didn't have much experience with drinking in high school, not until at her graduation party. RP November 29, 2017 at 628. S.C. testified that it had been her experience that alcohol affected her very heavily and that it didn't take much to make her intoxicated. *Id.* at 629. S.C. testified that when she drank, she had Mike's Hard Lemonade because it just tasted like juice. *Id.* S.C. testified that in high school her boyfriend was Joel Krebs. *Id.* S.C. testified that they started dating in February of her junior year and that they broke up two days after her high school graduation. *Id.* S.C. testified that the Appellant and Joel Krebs had become very good friends in high school. *Id.* at 629-630. S.C. described that her breakup with Joel Krebs was pretty bad and that they had a very bad relationship. *Id.* at 630. S.C. testified that Joel Krebs had lived with her for a few months near the end because he had a lot of problems at home with his own family. *Id.* S.C. testified that Joel Krebs was an Aberdeen student and if she, Joel Krebs, and the Appellant hung out, it was always with a group of others. *Id.*

S.C. described that Joel Krebs and the Appellant typically drank a lot in high school and around graduation. RP November 29, 2017 at 630.

S.C. testified that she was the designated driver, just to make sure no one would get hurt or anything bad would happen. *Id.* at 630-631. S.C. testified that after she graduated in June of 2105, she traveled to Hawaii and California, then moved back to Tacoma after returning home. *Id.* at 631. S.C. testified that she was working a full-time job at first to get some adult life experience, then decided to go to beauty school. *Id.* S.C. testified that when she had days off, she would sometimes come back to Montesano and visit whatever friends were left who were not at college or to visit her family. *Id.* at 631-632. S.C. testified that that she occasionally had contact with Joel Krebs and the Appellant after moving to Tacoma. *Id.* at 632. S.C. testified that it gotten to a point between her and Joel Krebs where they could be in the same social situations and that they had made amends to the point where they could be cordial to each other. *Id.* at 633. S.C. testified that she did not fully trust Joel Krebs, but that they could be nice. *Id.*

S.C. testified that most of their contact was through texting or social media messaging. RP November 29, 2017 at 633. S.C. testified that she would see the Appellant around in social situations where other people would be hanging out or she would see him out and about in town, but that they never really talked over the phone or anything. *Id.* S.C.

testified that after her breakup with Joel Krebs, they had both moved on to other relationships afterward. *Id.* at 634. S.C. testified that there had been no interest or attempts in getting back together between her and Joel Krebs after their breakup. *Id.* S.C. testified that she really didn't keep up with the Appellant after graduation and that they had become more on the acquaintance side of friendship post-graduation. *Id.*

S.C. testified that in February of 2016, she was coming down to stay at her mom's and visit for a few days. RP November 29, 2017 at 635. S.C. testified that she was hoping to make some last minute plans with friends, if anyone was still around or not busy. *Id.* S.C. testified that she had posted on Snapchat on February 9, 2016 that she was coming home for a few days and to message her if anyone wanted to make plans. *Id.* at 635-636. S.C. testified that she sent the message out to all her friends and that she received a message back from Joel Krebs, asking if she wanted to come hang out with him and the Appellant. *Id.* at 637. S.C. testified that she was a little hesitant because they had never really ask her to hang out with them before, just the three of them. *Id.* S.C. testified that both Joel Krebs and the Appellant were in relationships at that time. *Id.* at 639. S.C. testified that she had no issues with either Joel Krebs or the Appellant

at that time and that she had not been involved in a sexual relationship with Joel Krebs since their breakup before graduation. *Id.* at 639-640.

S.C. testified that she didn't have any concerns about hanging out with either of them at that time. RP November 29, 2017 at 641. S.C. testified that while she didn't fully trust Joel Krebs because of things that had happened in their relationship, but she trusted that if anything were to happen that the Appellant would stop it and protect her. *Id.* S.C. testified about making a plan to meet up with Joel Krebs and the Appellant, including having a discussion about drinking. *Id.* 642-643. S.C. testified that they asked if she was going to drink and she had told them no. *Id.* at 643. S.C. testified that she believed she would just go over to the Appellant's house, hang out, catch-up for a few hours, then go back to her mom's house that same night. *Id.* S.C. testified that she followed them from the 7-11 because she had never been to the Appellant's house before. *Id.* at 644. S.C. described the house as a small-sized single, detached home and that it was pretty dark out by the time she got there. *Id.* at 644-645. S.C. testified that when she got there, no one else was there and there was a table set up for beer pong. *Id.* at 645. S.C. testified that there was Mike's Hard Lemonade at the house for her and that the Appellant and Joel Krebs were drinking beer. *Id.* at 646.

S.C. testified that show got a quick tour of the house, took one of the Mike's Hard Lemonade from the Appellant, and began catching up with them. RP November 29, 2017 at 646-647. S.C. testified that after she had that first drink, she decided that she would just stay and that the Appellant told her it would be okay for her to stay on the couch. *Id.* at 647. S.C. testified that she talked to her mom to let her know where she was and that she would be staying. *Id.* at 648. S.C. testified that she didn't have any concerns about drinking with Joel Krebs and the Appellant and staying the night at the Appellant's house since they were friends and the Appellant said it was okay. *Id.* at 649. S.C. testified that they were playing beer pong and that, at first she was just watching them play. *Id.* at 650. S.C. testified that there was just water in the cups and that they were drinking just their own alcohol. *Id.* S.C. testified that she joined in the game, switching off, being on each of their teams. *Id.* S.C. testified that at that time she had maybe two or had started on her third of the Mike's Hard Lemonade. *Id.* at 651. S.C. testified that she had drank her first one pretty slow because she hadn't drank since her high school graduation so she knew her tolerance was pretty low. *Id.* S.C. testified that after that first one, she started to feel really good so she kept drinking them. *Id.*

S.C. testified that she recalled starting on a fourth drink and that the game changed from regular beer pong to strip beer pong. RP November 29, 2017 at 652. S.C. testified that she didn't remember much past that point in the night, but did recall agreeing to going down to underwear because she figured it was no different than a bathing suit, which they had seen before. *Id.* at 652-653. S.C. testified that things got really fuzzy and that the alcohol was affecting her very heavily. *Id.* at 653. S.C. testified that she was falling down a lot and having a hard time standing by herself for any period of time. *Id.* S.C. testified that she would sit down in between plays and that she was having a hard time standing up and walking in general. *Id.* at 653, 654. S.C. testified that she continued not to have any concerns about being with Joel Krebs or the Appellant or playing strip pong with them. *Id.* at 654. S.C. testified at one point she went to the bathroom and she made it there, but when she finished and stood up to walk out of the bathroom, she fell. *Id.*

S.C. testified that she didn't fully hit the ground when she fell and that she believed it was Joel Krebs who caught her and began carrying her. RP November 29, 2017 at 655-656. S.C. testified that she was not able to walk on her own at that point and that she was very intoxicated. *Id.* at 656. S.C. testified that it would not have been in her character to have

flirted with either Joel Krebs or the Appellant, whether drinking or not. *Id.* S.C. testified that she had little to no memory at that point and described feeling very heavy, pretty dizzy, and very hard to stand by herself or have any basic motor functioning. *Id.* at 656, 657. S.C. testified that the next morning, the last memory she had was at that point when she was carried into the bedroom. *Id.* at 657. S.C. testified that the only other memory she had from that night the next day was waking up naked and by herself in the bed because she was cold. *Id.* S.C. testified that she went out into the kitchen to find the time because she couldn't find her phone and saw that it was about 2 a.m. *Id.* S.C. testified that she woke the Appellant up and asked him to close the windows because it was cold. *Id.* S.C. testified that the Appellant asked her if she was okay and that she had told him she didn't know, that she was confused, and that she didn't really remember anything. *Id.* S.C. testified that he told her that she was fine and just to go back to bed. *Id.*

S.C. testified that she went back to the bedroom and fell asleep until 8:00 a.m. the next morning. RP November 29, 2017 at 657-658. S.C. testified that the next thing she remembered was Joel Krebs and the Appellant waking her up at 8:00 a.m. and telling her that she needed to hurry up and leave. *Id.* at 658. S.C. testified that when she was woken up,

she was in the bed by herself and was wearing her pajama shorts and sports bra. *Id.* S.C. testified that she felt pretty sick and really confused. *Id.* at 659. S.C. testified that she didn't really remember anything and her whole body was sore. *Id.* S.C. testified that she was sore in her private area and inside as well. *Id.* S.C. testified that she was concerned about the way she was feeling and that she had asked Joel Krebs and the Appellant about it, but they told her that nothing had happened. *Id.* S.C. testified that they said she had fallen and hit her crotch against the corner of the couch. *Id.* S.C. testified that at the time she wasn't really thinking that what they said didn't make any sense and that they were rushing her, telling her that they had to leave and she had to hurry up. *Id.* S.C. testified that Joel Krebs had said he had to go to school and the Appellant had said he had to go to work. *Id.* at 660. S.C. testified that they were acting kind of weird, rushing her, and making sure that she didn't leave anything and that she had everything with her. *Id.*

S.C. testified that when she told them she was hurting down there, their response was that they looked at each other and were laughing and playing if off by saying, "Oh, you don't remember? You fell." RP November 29, 2017 at 660-661. S.C. testified that they told her that she was really drunk and falling over and kept asking if she remembered

anything. *Id.* at 661. S.C. testified that she had specifically asked them about any kind of sexual contact given where she was hurting and that they had both denied it. *Id.* S.C. testified that she felt suspicious about what they were telling her, but at that time she was just really sick and hung over and she didn't have a reason to believe that they would like to her. *Id.* at 661-662. S.C. testified that she went home and that she was very sick, vomiting until about noon. *Id.* at 662. S.C. testified that both Joel Krebs and the Appellant called and texted her to ask how she was feeling, if she remembered anything, and what she remembered. *Id.* at 663. S.C. testified that after she finished being sick, she went to sleep until about 4:15 p.m. *Id.* at 664. S.C. testified that she still didn't feel good, was still hurting really bad down there, and she knew something was wrong. *Id.*

S.C. testified that after she woke up, she had a memory come back of someone saying, "Am I better than Jacob?" in the middle of the night. RP November 29, 2017 at 665. S.C. testified that it didn't make sense to her and she was slowly getting small snippets of remembering things as time went on. *Id.* S.C. testified that she just knew something was wrong and called her mom, who was not home yet, and told her that she needed to come home, that she needed to talk to her, and that something is wrong.

Id. at 665-666. S.C. testified that she was feeling really scared and that she was not sure why she was remembering the things she was remembering because Joel Krebs and the Appellant had told her that nothing had happened. *Id.* at 667-668. S.C. testified that she talked to her mom and they decided she should go to the hospital. *Id.* 668-669. S.C. described waiting for hours in the ER and that she was remembering more and more things during that time. *Id.* at 671. S.C. testified about going through the rape kit exam, describing how process and how she felt at the time. *Id.* at 671-672. S.C. testified that she had not been sure about reporting anything and described the nurse finding a pubic hair during the exam when she did not have any, which made her believe that something had happened. *Id.* at 672-673.

S.C. testified that at this point she had memories of them carrying her to the bedroom and putting her on the bed. RP November 29, 2017 at 674. S.C. testified that she remembered they had both laid down next to her and were talking to her, but she didn't know what they were saying. *Id.* S.C. testified that she remembered they started touching her and taking off whatever clothes she had left. *Id.* S.C. testified that she was unable to move and that she could not talk or say anything. *Id.* S.C. testified that she remembered the Appellant being on top of her and that he had put his

penis inside of her while Joel Krebs was kissing, touching, and doing other things to her. *Id.* at 675. S.C. testified that she remembered the Appellant asking her, "Am I better than Jacob?" and that she was crying. *Id.* at 676. S.C. testified that she remembered the Appellant saying to Joel Krebs, "I can't stay hard because she won't stop crying" and she heard Joel Krebs say, "We're bros now." *Id.* 676, 677. S.C. testified that at some point Joel Krebs left the room and she heard the door shut. *Id.* S.C. testified that she was going in and out of consciousness and that she wanted it to stop, but she couldn't move, couldn't really talk, or do anything. *Id.* at 677, 678.

S.C. testified that she remembered hearing the door shut and that she was just laying there crying, still having a hard time keeping her eyes open. RP November 29, 2017 at 678-679. S.C. testified that she was pretty sure she was alone in the room and passed out again. *Id.* S.C. testified that when she woke up again, Joel Krebs was on top of her and he had his penis inside of her. *Id.* at 679. S.C. testified that she was still having a really hard time keeping her eyes open and that he was being very aggressive and forceful. *Id.* S.C. testified that at some point, she started screaming stop and that it hurt and that she was crying. *Id.* S.C. testified that every time she screamed louder, the music that had been playing in the living room kept getting turned up louder and louder. *Id.*

S.C. testified that after Joel Krebs had finished and she remembered her face being wiped off with a shirt or a towel. *Id.* S.C. testified that she heard the bedroom door slam and she was alone again. *Id.* at 679-680.

S.C. testified that as memories came back, she later remembered that while the Appellant was inside of her before Joel Krebs had left the room, he had kept trying to put his penis in her mouth. RP November 29, 2017 at 680-681. S.C. testified that was when she had remembered Joel Krebs saying they were bros now. *Id.* at 681. S.C. testified about being alone at some point and attempting to get up to try to find somebody. *Id.* at 683. S.C. testified that she had used the door handle to pull herself up and that she was still unable to really walk or to stand up very well by herself. *Id.* S.C. testified that she fell through the doorway and skinned her knees. *Id.* S.C. testified that she heard voices toward the living room/kitchen area and starting crawling that way. *Id.* S.C. testified that she was crying and that she was naked. *Id.* S.C. testified that she remembered the Appellant picking her up and asking her if she was okay and what she wanted. *Id.* S.C. testified that she said she wanted her clothes and she remembered him start to help her put her clothes back on before she passed out again. *Id.* S.C. testified with more detail about waking up at 2:00 a.m. and remembering the Appellant following her back

into the bedroom and laying down in the bed, but not near her. *Id.* at 683-684.

S.C. testified that she was entirely sure out the sequence of events or the order of how things happened, but that what she described was the order she mostly remembered. RP November 29, 2017 at 685. S.C. testified that she had no member of giving either the Appellant or Joel Krebs consent to have sex with her or encouraging them to have sex with her. *Id.* S.C. testified that she does not believe she could have given consent because she was unable to walk or stand by herself, she wasn't speaking coherently, and did not have a lot of control over what she could do with her body. *Id.* S.C. testified about the span of time from when she left the Appellant's house to when she got home from the hospital and that the police contacted her once she was home later that morning. *Id.* at 688-689. S.C. testified about working with Sergeant Wallace on conducting recorded confrontations during the investigation. *Id.* at 690-696. On re-direct, S.C. verified that she had no memory of throwing up or of seeing any evidence of that like a puke bowl. *Id.* at 740. S.C. also verified that she had no memory being sexually assaulted when she had woken up at 2 a.m. or in the morning at 8 a.m. *Id.* S.C. further verified on re-cross with defense that she still does not have a complete memory of that night, that

her memory didn't come back like a full motion picture, just little snippets of little pieces that she tried to put back together. *Id.* at 742.

S.C.'s mother, Sarah Leithold, testified next at the trial and described her relationship with S.C. as being very close and that they had open communication about anything, including drinking, boys, and relationships. RP November 30, 2017 at 758. Mrs. Leithold testified about her knowledge of Joel Krebs and the Appellant and her interactions with them, including her understanding of their relationships with S.C. *Id.* at 760-767. Mrs. Leithold testified about S.C. come down for the visit and her plan to visit with the Appellant, who she understood was having a party. *Id.* at 768. Mrs. Leithold testified about not having any concerns about S.C. drinking or staying over at the Appellant's house, stating that she trusted that the Appellant would never let anything happen to her. *Id.* at 769. Mrs. Leithold testified about seeing S.C. the next morning and that S.C. was on the floor, vomiting profusely, and shaking violently. *Id.* at 769-770. Mrs. Leithold testified that she thought at first that S.C. had just gotten trashed and was massively hung over. *Id.* at 770. Mrs. Leithold testified that she talked to S.C. about her hurting down there and that she had asked S.C. if she had sex. *Id.* at 771. Mrs. Lethold testified that it was normal for them to talk about those things as part of the relationship.

Id. Mrs. Leithold testified about S.C. calling her later in the day about 5 p.m. telling her that she needed her to come home and that something was wrong. *Id.* at 772.

Mrs. Leithold testified that she and her husband went right home and found S.C. very distraught and crying. RP November 30, 2017 at 772. Mrs. Leithold testified about taking S.C. to the hospital, first in Elma and then in Olympia, for a rape kit exam. *Id.* at 773-775. Mrs. Leithold testified about Facebook messages that she had received from the Appellant the next day, which were admitted into evidence. *Id.* at 775-776. Mrs. Leithold testified about the common occurrence of having group campouts with boys and girls at their home, including the night of the graduation party. *Id.* at 782, 786. Mrs. Leithold testified about those group campouts including S.C. and the Appellant and that it would not have been unusual for S.C. to spend the night somewhere with a mix of boys and girls or just boys. *Id.* Mrs. Leithold testified that while she wasn't exactly thrilled about S.C. staying the night at the Appellant's house with Joel Krebs there because of the history, she felt that the Appellant would never let anything happen to her and that he was a friend to all of them. *Id.* at 787.

Detective Sergeant Darrin Wallace testified about his involvement with the case, including the recorded confrontations that were done in this case. RP November 30, 2017 at 789-801, 808-814. Copies of the recorded confrontations were admitted and played at trial. *Id.* at 801, 807-808, 815. Detective Sergeant Wallace testified about the Appellant's arrest and the search of his home, including what evidence was collected. *Id.* at 816- 822. During Detective Sergeant Wallace's testimony, photographs of the Mike's Hard Lemonade that were located during the search were admitted as well as photographs of the Appellant's house. *Id.* at 821, 826. Detective Jason Wecker testified about his involvement with the case, including his initial contact with S.C. and her mother after they returned from the hospital, his part in the recorded confrontations, and the Facebook messages Mrs. Leithold had received from the Appellant. *Id.* at 842-848. Lieutenant Brad Johansson testified about his involvement with the case, including the interview with the Appellant following his arrest *Id.* at 851-856. Lieutenant Johansson testified about the Appellant asking him where the case was going and what Joel Krebs had told them already. *Id.* at 857. Lieutenant Johansson testified that he had not told the Appellant what Joel Krebs had said and he did not show him Joel Kreb's statement because he wanted to the hearing the Appellant's version. *Id.*

Lieutenant Johansson testified about the Appellant's statement, including that he had said S.C. was really intoxicated, stumbling around, falling, and that they had felt she had too much to drink. RP November 30, 2017 at 858-559. Lieutenant Johansson further testified that the Appellant had told him that S.C. had drank 5 of the Mike's Hard Lemonades and they hid the last one from her. *Id.* at 859. Lieutenant Johansson testified that the Appellant had told him that after they cut her off, she went to the bathroom at one point and he wasn't sure if she fell down or passed out, but S.C. was laying down on the floor in the bathroom. *Id.* Lieutenant Johansson testified that the Appellant told him that Joel Krebs went in there and picked her up, then carried her back to his bedroom. *Id.* at 860. Lieutenant Johansson testified that the Appellant told him that they got her bowl in case she got sick and she started vomiting on the bed. *Id.* Lieutenant Johansson testified that the Appellant told him that a short time later, S.C. sat up and said that she was fine. *Id.* Lieutenant Johansson testified that the Appellant told him that they were all sitting on the bed together and that Joel Krebs started kissing S.C. and that he [the Appellant] started kissing her stomach, eventually taking her underwear off. *Id.* at 860-861. Lieutenant Johansson testified that the

Appellant told him that S.C. didn't say anything or try to stop him and that he eventually started having sex with S.C. *Id.* at 861.

Lieutenant Johansson testified that he told the Appellant that S.C. had remembered someone had wiped her mouth off at some point and that the Appellant told him right before he started having sex with S.C., Joel Krebs had wiped S.C.'s mouth off because she had puke on her face. RP November 30, 2017 at 861. Lieutenant Johansson testified that the Appellant told him that after the puke was wiped off, S.C. was rolled over on her side and he started having sex with her from behind. *Id.* Lieutenant Johansson testified that the Appellant told him stated that while he was having sex with her from behind, S.C. was sucking on Joel Kreb's penis. *Id.* Lieutenant Johansson testified that the Appellant told him stated that when he stopped having sex with S.C., Joel Krebs then had sex with her, and that they switched again after that. *Id.* Lieutenant Johansson testified that the Appellant told him stated that Joel Krebs had some music turned on and when the music came on, S.C. started crying because it had been their song when she and Joel Krebs had been in a relationship. *Id.* at 861-862. Lieutenant Johansson testified that the Appellant told him stated that S.C. became upset and was crying while he was having sex with her and it got really weird so he stopped. *Id.* at 862.

Lieutenant Johansson testified that the Appellant told him stated that the Defendant had not told him that S.C. had consented or agreed to have sex, only that she didn't tell him to stop or try to make him stop. RP November 30, 2017 at 862. Lieutenant Johansson testified that when he asked the Appellant if he thought she was sober enough to make a reasonable decision on whether or not to have sex or not, the Appellant told him no, that none of them could because they were all too drunk. *Id.* at 863. Lieutenant Johansson testified that he asked the Appellant about why he had initially denied having sex with S.C. when she first told them that her vagina was hurting and that the Appellant told him that Joel Krebs had told her that nothing happened and she had fallen down on a chair so he just kind of went along with it. *Id.* at 864. Lieutenant Johansson testified that the Appellant told him that he and Joel Krebs had been concerned the night before that their girlfriends were going to find out and that was probably why Joel Krebs had initially said nothing happened. *Id.* Lieutenant Johansson testified that DNA was obtained, but not tested since the Appellant and Joel Krebs had eventually admitted to having sex with S.C. so DNA testing would not have assisted in the case at that point. *Id.* at 868. On re-cross, defense asked Lieutenant Johansson about the bottles not being tested for DNA evidence, sweat, saliva, or skin particles and

there was a discussion about what that testing might have revealed. *Id.* at 873.

State toxicologist Lyndsey Knoy testified related to her work, training, and education as a forensic scientist, the effects of alcohol on the human body, and Widmark's equation for estimating BAC levels. RP November 30, 2017 at 875-886. On direct, the State had Ms. Knoy explain what Widmark's equation was. *Id.* at 886. Ms. Knoy explained the equation, including the assumptions used, one of which being a rho factor that is assigned to both men and women for the equation. *Id.* Ms. Knoy explained that estimated rho for men is .68 and .55 for women in the equation, which is used to accommodate for the general size differences between men and women. *Id.* Ms. Knoy used the rho of .55 when doing her estimation for the victim's BAC level because the victim was a 130 pound female. *Id.* at 889. Ms. Knoy estimated that a person the same size of S.C. who consumed 3 Mike's Hard Lemonade would have a BAC of .13. *Id.* at 889. With burn-off factored in, Ms. Knoy testified that the BAC would be .12 over a period of approximately three hours. *Id.* at 890, 892-893.

Ms. Knoy then made the estimate for 5 Mike's drinks, which she testified would be a BAC of .21 and .20 with burn-off factored in. RP

November 30, 2017 at 895. Ms. Knoy also made the estimate for 6 Mike's drinks and testified that the estimated BAC would be .26 and .25 with burn-off factored in. *Id.* at 895. The State asked Ms. Knoy if the bottles had been collected, but were empty or dry, would there be any ability to test for any substance that might have been there or anything like that. *Id.* at 898. Ms. Knoy testified that they cannot test empty anything. *Id.* Ms. Knoy then testified to the effects on the body at the levels of alcohol she had calculated. *Id.* at 899. Ms. Knoy testified that she would expect the degree of affected by to be very great in a novice drinker at a .21/.22 BAC, if not passed our or unconscious. *Id.* at 900. Ms. Knoy testified about the phenomenon of blackout, including both enbloc, which is a total memory loss blackout, and fragmentary, which is when a person can remember bits and pieces. *Id.* at 902. Specifically, Ms. Knoy testified about how memories can start to come back in fragmentary blackouts sometime later after the event. *Id.* at 904. When asked about a person having been drinking who then was falling down, had vomited, and experienced fragmented blackout, Ms. Knoy testified that she would assume that the person drank a large amount of alcohol for that particular person. *Id.* at 905.

Defense made an objection following Ms. Knoy's testimony, outside the presence of the jury, regarding the State's question about the possibility of bottles being tested if they were dry and empty. RP November 30, 2017 at 906. The State explained that it was attempting to thwart any attempts by defense to argue down the line that the police had not thoroughly processed the evidence, including testing, since defense had already made his intentions to do so in the questioning of Lieutenant Johansson. *Id.* at 908. The Court ruled that it was not going to declare a mistrial and allowed the trial to move forward. *Id.* at 909. The Court advised that he would not prohibit defense from making a post-verdict motion if he wanted to research the law and make a motion. *Id.* On cross, Ms. Knoy testified that with a .14 BAC, it would take a little less than 10 hours for the alcohol to be completely gone from the system. *Id.* at 921. The State rested after Ms. Knoy's testimony. *Id.* at 928.

Defense presented testimony from David Predmore, a former state toxicologist who retired 1999. RP November 30, 2017 at 928. Mr. Predmore testified about his experience and education and about Widmark's equation. *Id.* at 928-935. In his testimony, Mr. Predmore used .68 in his calculation, which is the number for the average man, claiming that this would also include some women who "work out and do that sort

of thing." *Id.* at at 935. On cross, the State questioned the defense's expert about his use of a different rho than the State's expert used, specifically that his calculation was not adjusted to accommodate a woman. See *Id.* at 934-935. Instead, the defense's witness used a rho of .68, which is used for the average male or larger females. See *Id.* at 886, 935, 952. By using the rho of .68 in the formula, this changed the calculation, giving the victim a lower estimated BAC. The rho of .68 that the defense's witness used was not reflective of the victim in this case who was a female, reported to be 5'4' and 130 pounds. *Id.* at 934. On cross, the defense's witness admitted that he used a number [rho] that Widmark came up with that was not the number [rho] for average women, which is what was argued in closing. *Id.* at 952. Jury instructions were given to the jury on December 1, 2017, which included the lesser-included crime of Rape in the Third Degree. RP December 1, 2017 at 959-972. Closing arguments were made by the State, including rebuttal and defense. *Id.* at 972-993, 993-1004, 1004-1013. The jury returned a verdict of guilty on the original charge of Rape in the Second Degree.

On December 21, 2017, defense later filed a post-conviction motion for a mistrial and a hearing was held. RP December 21, 2017 at 1016. Defense argued that the State had purposely violated the motion in

limine order regarding evidence about drugs or drug use. *Id.* at 1017-1027. The State argued that it had not and had merely been responding to/preparing for defense's argument that the police had not fully investigated the case, purposely making no mention of drugs or drug use in the entirety of the case. *Id.* at 1028-1030. The Court agreed with the State's assessment that it was defense who put in the issue about testing the bottles for DNA. *Id.* at 1019. The Court further pointed out that it was mere speculation that the jury who convicted the Defendant had seen the evidence the way defense was asking the Court to and talked about the issue of substances or drugs being introduced to the victim from that single question. *Id.* at 1024. The Court also pointed out that the main complaints defense had from prior trials were the fact that the Appellant was taking pain pills fairly close in time to the rape and the victim's testimony about having never felt that bad before drinking, which the Court had previously allowed. *Id.* at 1024-1025. The Court pointed out that neither of those facts were discussed in the current trial. *Id.* at 1025. The Court went so far as to say that the only evidence that was presented about drugs or drugging was from the Appellant himself in the confrontation calls that defense had agreed could come into the trial unaltered. *Id.*

The Court pointed out that the answer given by the witness to the State's question was that no testing was done so the Court could not see the impact that defense was arguing the question and answer had on the jury. RP December 21, 2017 at 1026. The State argued then, as now, that the State purposely avoided any discussion even remotely related to drugs or drugging. *Id.* at 1028-1029. The State pointed out that, to defense, who had knowledge of the facts related to drugs or possible drugging even though they weren't brought into the trial, hearing the question with that knowledge made him leap to thinking about drugs, but to the jury, who didn't have that knowledge, they would not have. *Id.* at 1030. The Court agreed with this assessment, stating that defense was hypersensitive, but that the State made absolutely no mention of Vicodin, no mention of the victim's allergic reaction to Vicodin, and not even any mention of her feeling different than when she drank before, which had been testified to and allowed in the two previous trials. *Id.* at 1033.

The Court further acknowledged at the time the question was asked, it had surprised him, but the State had not mentioned Vicodin, not mentioned any drug. RP December 21, 2017 at 1033. Further, while the Court stated that if he seen the question coming, he might have recommended that the State not go there, the Court found that the question

had no effect on the jury's verdict. *Id.* at 1033-1034. The Court found that there was no direct violation of the order from the motion in limine and that defense's argument that there had been a violation was very tenuous. *Id.* at 1034. The Court did not find that the fairness of the trial was affect and did not find prejudice to the Appellant. *Id.* The impression the Court made in its findings was that it too had reacted to the question at the time during the trial based on the knowledge that the Court had from the first two trials, just as defense had, but that this jury simply did not have the information that the parties did and would not have made the leap from that the single question, which was answered in the negative in any case, to have caused the jury to speculate that drugs or drugging was involved. *Id.* at 1031-1034. The defense motion for a mistrial was denied.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Denial of Mistrial Allegation

This court applies an abuse of discretion standard in reviewing the trial court's deal of a mistrial. *State v. Hopson,* 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court will find abuse of discretion only when " 'no reasonable judge would have reached the same conclusion.' " *Id.* (quoting *Sofie v. Fibreboard Corp.,* 112 Wash.2d 636,

667, 771 P.2d 711 (1989)). A trial court's denial for a motion for mistrial will be overturned only when there is a " 'substantial likelihood' " that the error prompting the request for a mistrial affected the jury's verdict. *State v. Russell,* 125 Wash.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane,* 116 Wash.2d 315, 332–33, 804 P.2d 10 (1991)). Further, this court has held that trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Mak,* 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *quoted in Hopson,* 113 Wash.2d at 284, 778 P.2d 1014. The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown,* 132 Wash.2d 529, 561, 940 P.2d 546 (1997)).

This issue was addressed by the Court both at the time of the trial and following the verdict of the jury when defense made a motion for a new trial based on the same argument. RP November 30, 2017 906-911; CP 91-96 and RP December 21, 2017 1016-1035.

As such, the State will stand by its argument as addressed in its Response to Motion for a New Trial. CP 91-96. As was argued previously by defense, the Appellant argues again that a substantial right of the defendant was violated by misconduct by the prosecution by an isolated question about testing of the bottles. In support of this argument, that Appellant again argues that the prosecution introduced evidence in violation of an order in limine, which stated in relevant part that "the State shall not introduce any evidence or make any argument related to the assertion that Tanner Birdsall introduced or provided prescription drugs to the complaining witness S.C." The Appellant again supports this claim by arguing that in previous trials the State sought to introduce evidence to suggest that S.C. may have been under the influence of drugs and that the defendant was responsible or played a part in causing her to ingest drugs. While this is again not at all a true rendition of the State's actions in the prior two trials, whatever happened in any prior trial is irrelevant to the issue at hand.

In this trial where the Appellant was convicted, the State made zero reference to drugs in its presentation of the case. In prior trials, the State, in compliance with the Court's original ruling on this issue, had elicited testimony from S.C. about how she felt after ingesting alcohol

provided by the defendant and his co-defendant because S.C. was concerned about the possibility of being drugged since she felt more affected by the alcohol in this instance than she had when she drank the same type of alcohol in the past. In this case, however, the State did not present even that testimony at trial, purposely steering clear of <u>any</u> reference to the possibility of the victim being drugged.

The State's theory throughout the trial in which the Appellant was convicted, from opening to closing, was clearly that the victim was intoxicated by alcohol to the point of being blacked out and unable to consent to sexual intercourse with the focus being on the Appellant's actions in lying about what he had done to the victim. Before the State presented the question to the witness from the WSP lab, defense had asked Lieutenant Johansson about the bottles being tested for the transfer of DNA, sweat, saliva, or even skin particles, which are all substances. *See* Attachment A in CP 97-100. The State did know from previous trials that one of defense's main arguments previously was that evidence was not tested, intimating that the investigation was improperly or poorly done, rather than the reality of the testing either being unnecessary or impossible, which was the case here.

In prior trials, defense had never before asked any witness about the bottles being tested for anything so the State had never had the need to ask any of its witnesses about the testing of the bottles in the prior trials. In the briefing done by defense in its motion for a new trial, defense misquoted the State in its briefing by saying that the State asked about testing for "substances *in* the bottles," which is not what the State asked. There was no reference to testing what was *in* the bottles, but rather for testing for any substance that might have been there, which was in direct response to defense's prior questioning of Lieutenant Johansson that elicited testimony that testing on the bottles for substances that may have been there had not been done during the investigation. Because the jury had no testimony or other evidence about drugs or any intimation that S.C. was drugged at the time the State asked its question, at most the jury would have inferred that question about testing for substances was related to those substances previously listed by defense in its questioning. Additionally, because defense did not make an objection to the question during the witness's testimony, no attention was drawn to the issue that may have even inferred to the jury that there might have been something more to focus on with regard to the bottles and/or the bottles' contents.

Furthermore, there was documentation at the trial about no drugs being found in S.C.'s system, which was admitted into evidence without objection by defense and referred to by defense in its questioning of that same witness on cross. Defense twice pointed out that no drugs had been found during its cross of that witness, while referring to that document, and defense also stated in closing that there was no evidence that S.C. was drugged. The State did not object to these questions or defense's closing remarks. Therefore, even if the issue were to be stretched to think that there *could* have been some member(s) of the jury who inferred the question about testing for substances was drug related, despite having no testimony or evidence about drugs from the State, the issue was certainly cured by defense's repeated questions and comments that drugs were not present and/or not at issue. The State's case was always about the victim's level of intoxication by alcohol and the State's questioning and evidence throughout the case and closing arguments were entirely focused on that issue as the sole explanation for her being physically helpless or mentally incapacitated.

Further, throughout the trial, the State provided ample evidence of the victim's high level of intoxication by alcohol to support her being physically helpless or mentally incapacitated at the time she was raped by

the Appellant. The Appellant was convicted on that evidence combined with his own damning statements in the confrontation calls and nothing more. He certainly was not convicted on a single question that would have required a series of assumptions and knowledge of facts not presented to the jury in order to stretch the meaning of the words to make a finding that there might have been drugs in the victim's alcohol. All of which would have been counter to all of the evidence actually presented at trial. This was exactly how the Court ruled at the hearing for defense's Motion for a New Trial. RP December 21, 2017 1016-1035.

The Court agreed with the State's assessment that it was defense that put in the issue about testing the bottles for DNA. RP December 21, 2017 at 1019. The Court further pointed out that it was mere speculation that the jury who convicted the Defendant had seen the evidence the way defense was asking the Court to and talked about the issue of substances or drugs being introduced to the victim from that single question. *Id.* at 1024. The Court also pointed out that the main complaints defense had from prior trials were the fact that the Appellant was taking pain pills fairly close in time to the rape and the victim's testimony about having never felt that bad before drinking, which the Court had previously allowed. *Id.* at 1024-1025. Arguably those two facts could have given

some impression that drugs were involved, however, neither of those facts were discussed in this trial at all, as the Court clearly pointed out. *Id.* at 1025. The Court went so far as to say that the only evidence that was presented about drugs or drugging was from the Appellant himself in the confrontation calls that defense had agreed could come into the trial unaltered. *Id.*

The Court further pointed out that the answer given by the witness to the State's question was that no testing was done so the Court could not see the impact that defense was arguing the question and answer had on the jury. RP December 21, 2017 at 1026. The State argued then, as now, that the State purposely avoided any discussion even remotely related to drugs or drugging. *Id.* at 1028-1029. The State pointed out that, to defense, who had knowledge of the facts related to drugs or possible drugging even though they weren't brought into the trial, hearing the question with that knowledge made him leap to thinking about drugs, but to the jury, who didn't have that knowledge, they would not have. *Id.* at 1030. The Court agreed with this assessment, stating that defense was hypersensitive, but that the State made absolutely no mention of Vicodin, no mention of the victim's allergic reaction to Vicodin, and not even any

mention of her feeling different than when she drank before, which had been testified to and allowed in the two previous trials. *Id.* at 1033.

The Court further acknowledged at the time the question was asked, it had surprised him, but the State had not mentioned Vicodin, not mentioned any drug. RP December 21, 2017 at 1033. Further, while the Court stated that if he seen the question coming, he might have recommended that the State not go there, the Court found that the question had no effect on the jury's verdict. *Id.* at 1033-1034. The Court found that there was no direct violation of the order from the motion in limine and that defense's argument that there had been a violation was very tenuous. *Id.* at 1034. The Court did not find that the fairness of the trial was affect and did not find prejudice to the Appellant. *Id.* The impression the Court made in its findings was that it too had reacted to the question at the time during the trial based on the knowledge that the Court had from the first two trials, just as defense had, but that this jury simply did not have the information that the parties did and would not have made the leap from that the single question, which was answered in the negative in any case, to have caused the jury to speculate that drugs or drugging was involved. *Id.* at 1031-1034.

In short, it was not manifestly unreasonable for the Court in this case to reserve decision at the time the initial objection and motion for a mistrial was made. The Court wanted to see what the totality of the evidence presented at this trial was going to be and what impact, if any, that single question would have. The Court clearly indicated in its finding on the Motion for a New Trial that it had been initially surprised by the question, but after thinking about the issue, reflecting on all three trial, and separating the information presented in those trial from the information presented in the trial where the Appellant was convicted, there simply wasn't a violation of the motions in limine and the jury was not effected. Further, there was no abuse of discretion because there can be no finding that any other reasonable judge would not have reached the same conclusion under the same facts and circumstances.

The Court in this case went through its reasoning is great detail and, under the facts and circumstances on this trial, any reasonable judge would have come to the same conclusion that the allegation of misconduct was tenuous at best and that the question, in context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury, had no prejudicial effect. The Court was also very clear in its findings that there was little to no effect on the jury's

verdict given the quick decision of the jury, which negates any argument that there was a "substantial likelihood" that the alleged misconduct affected the jury's verdict.

The Appellant, therefore, has failed to meet its burden that there was an abuse of discretion and that there was prosecutorial misconduct, which created a "substantial likelihood" that the jury's verdict was effected. As such, the verdict of the jury must stand.

2) Prosecutorial Misconduct Allegations

An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson,* 172 Wash.2d 438, 442, 258 P.3d 43 (2011). An appellant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Thorgerson,* 172 Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the prosecutor's statement is " 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.' " *State v. Dhaliwal,* 150 Wash.2d 559, 578, 79 P.3d 432 (2003)

(quoting *State v. Brown,* 132 Wash.2d 529, 561, 940 P.2d 546 (1997)). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Thorgerson,* 172 Wash.2d at 454.

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. *State v. Boehning,* 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal,* 150 Wash.2d at 578.

a) Misconduct related to the alleged suggestion that the Appellant drugged the victim

First, the Appellant argues that the prosecutor committed misconduct by suggesting that he may have drugged the victim. This was addressed above and will not be re-argued here.

b) Misconduct related to the alleged focus on recent media headlines in an effort to inflame the jury's passion

The Appellant next argues that if the Court of Appeals does not find that the prosecutor committed misconduct based on that issue, then the prosecutor committed "outrageous misconduct" in closing argument. The Appellant argues that the State's comments in closing arguments about the common-knowledge fact that there is a double standard in society that girls need to be careful how they to act, what they say, what they wear somehow equated to a recent media event. The Appellant argues that the prosecutor made those statements to "capitalize" on national headlines about Matt Lauer's firing for sexual misconduct and the firing of Garrison Keillor for similar reasons.

It is unclear to the State how the Appellant makes this connection. In reviewing the prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, there simply is no misconduct. Even if there could be argument that the prosecutor's closing arguments were somehow misconduct, there was certainly nothing said that resulted in prejudice that had a substantial likelihood of affecting the jury verdict and that no curative instruction would have obviated the prejudicial effect on the jury. What was stated is a common-knowledge,

historical double standard with no reference to recent media cases, the #MeToo movement, or anything of the sort.

Furthermore, defense made no objection except for a single objection right at the beginning of the prosecutor's closing with regard to a comment that was made by a potential juror in jury selection. RP December 1, 2017 at 973. As such, the Appellant's failure to object constituted a waiver unless the prosecutor's statement is " 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.' There is nothing in the record to indicate that those limited statements that related to a common-knowledge double standard that has existed for decades were so flagrant and ill-intentioned to have cause an enduring and resulting prejudice that could not have been cured by an instruction to the jury.

The Appellant, therefore, has failed to meet its burden that there was prosecutorial misconduct, that was both improper and prejudicial. Based on the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions, the statements made by the prosecutor in closing arguments were not misconduct. Even if the Court somehow found that there was misconduct, the Appellant failed to show that there was a substantial likelihood that

any alleged misconduct affected the jury verdict. Furthermore, because the Appellant had waived his ability to argue this issue by failing to object to the prosecutor's statements during trial, the Appellant must show that the statements were so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. The Appellant cannot do so. As such, the verdict of the jury must stand.

c) Misconduct related to alleged misrepresented evidence in closing

The Appellant next argues that there was misconduct in closing argument because the prosecutor misrepresented the evidence given by their expert witness. RP December 1, 2017 at 983. The Appellant cites to the record were the defense expert is being questioned by defense in support of this argument and neglects to acknowledge the prosecutor's questioning of its own expert on this topic and the questioning of the defense's witness, which is where the information the State argued in closing came from. On direct with its own expert, the State had Ms. Knoy explain what Widmark's equation was. RP November 30, 2018 at 886. Ms. Knoy explained the equation, including the assumptions used, one of which being a rho factor that is assigned to both men and women for the equation. *Id.* Ms. Knoy explained that estimated rho for men is .68 and

.55 for women in the equation, which is used to accommodate for the general size differences between men and women. *Id.* Ms. Knoy used the rho of .55 when doing her estimation for the victim's BAC level because the victim was a 130 pound female. *Id.* at 889.

In his testimony, the defense's expert used .68 in his calculation, which is the number for the average man, claiming that this would also include some women who "work out and do that sort of thing." RP November 30, 2017 at 935. On cross, the State questioned the defense's expert about his use of a different rho than the State's expert used, specifically that his calculation was not adjusted to accommodate a woman. See *Id.* at 934-935. Instead, the defense's witness used an rho of .68, which is used for the average male or larger females. See *Id.* at 886, 935, 952. By using the rho of .68 in the formula, this changed the calculation, giving the victim a lower estimated BAC. The rho of .68 that the defense's witness used was not reflective of the victim in this case who was a female, reported to be 5'4' and 130 pounds. *Id.* at 934. On cross, the defense's witness admitted that he used a number [rho] that Widmark came up with that was not the number [rho] for average women, which is what was argued in closing. *Id.* at 952.

Although the Appellant argues that the State misrepresented the evidence in closing argument, it is painfully clear in reviewing the entirety of the record, including the State's expert witness's testimony, the defense's expert witness's testimony, both on direct and cross, and the statements made in closing, that the State did not misrepresent the evidence presented at trial. While it may be difficult to decipher from the Verbatim Report of Proceedings, which does not include the equation that was written out on the board by the defense's expert, the jury heard the equations calculated by Ms. Knoy in her testimony and saw the equation written out by Mr. Predmore on a board at the time of the trial. See RP November 30, 2017 at 886-896 and 934. From those citations, it is clear, even without the benefit of seeing Mr. Predmore's written calculation, that the State was referring to the .55 rho used by Ms. Knoy in her verbal calculations and the .68 rho used by Mr. Predmore in his written calculation.

The State, therefore, did not misrepresent the evidence in closing argument. Rather, the State rightly pointed out that the defense's expert had incorrectly calculated the equation for the victim in this case by using the .68 rho, which is for men or heavy women. RP December 1, 2017 at 983-984. The State further pointed out that the defense's own expert

agreed that a person who can't walk, who is passing out, who is vomiting, who is blacking out, would have a very high BAC. *Id.* at 984. This was also supported in the testimony on cross-examination of Mr. Predmore. *Id.* at 951. The Appellant cannot claim misconduct here because there was no misrepresentation of the evidence at all. Everything related to the statements made by the State in closing as it related to toxicology evidence is supported in the record. As such, the verdict of the jury must stand.

d) Cumulative misconduct

The Appellant argues that the accumulative misconduct alleged resulted effected the jury's verdict. Despite making no objection, other than the one objection early on in the State's closing related to the comment about the potential juror's statement in jury selection, the Appellant now wants this Court to find that he preserved this issue on appeal. Even if the Court were to find that he had not waived this issue on appeal, which it should, the Appellant's argument is based on alleged prosecutorial misconduct that did not occur.

The Appellant's argument really appears to be based solely on the fact that he was convicted in this trial as opposed to the results from the other two jury trials that ended in hung juries. This same argument was made by defense in his motion for a new trial. See RP December 21, 2017

1016-1027. The State pointed out then, which it will re-state again now, that the third trial was very different. The evidence presented was different, the testimony was different, the jury pool was different, more like the make-up of the jury who had convicted the co-defendant in a similarly quick fashion, and there was no evidence of jury tampering as there had been in the other two trials. *Id.* at 1029, 1030-1031.

As all trial attorneys know, trial presentation generally improves after a hung jury with the benefit of speaking with the jury members who were unable to reach a conclusion, making adjustment based on that information or other factors, the fact that witnesses are more relaxed and better prepared, that the attorneys are better prepared and more familiar with the witnesses and the case, that new strategies are developed, that new evidence may be presented or located, and so on. A different outcome is possible in any case, and it was most certainly possible in this case under the circumstances. What is also certain is that the different outcome in this trial was not based on cumulative misconduct as there was no misconduct committed as argued above. As such, the verdict of the jury must stand.

3) Ineffective Assistance Allegations

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland,* 466 U.S.at 687. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland,* 466 U.S. at 700. An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland,* 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995).

Deficient performance prejudices a defendant if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier,* 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier,* 171 Wn.2d at 33. If defense counsel's trial conduct is a legitimate trial strategy

or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Lord,* 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied,* 506 U.S. 856 (1992).

a) Ineffective for failure to object to alleged obvious misconduct

Here, the Appellant argues again about the "obvious misconduct" by the prosecutor at trial, which did not occur. According to his own case law, with regard to the trial, the Appellant must show that his defense counsel's representation was deficient and that counsel's deficient representation prejudiced the defendant. See *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). With regard to closing remarks, again from the Appellant's own case law, he must show that the prosecutor's remarks were improper and prejudicial in order to argue that his defense's failure to object to those remarks may have been deficient performance. See *In re Cross*, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

Nowhere in case law, whether cited by the State or by the Appellant or otherwise, does it say, however, that defense counsel's representation is deficient for not objecting to statements that are not misconduct. If the statements by the prosecutor in this case are not misconduct, then how can the Appellant's attorney possibly have been deficient for failing to object? It cannot. Defense in the trial made objections when he felt they were

appropriate, but that does not mean that if he did not object at all times when the Appellant now wants him to have objected that his attorney was deficient. The Court strongly presumes that defense's performance was reasonable. Defense counsel in this case was hired by the Appellant and he is a highly experienced, qualified, and respected attorney in the area.

There was nothing deficient in his performance throughout the trial and he cannot be expected to have objected to statements that were not misconduct by the State. The Appellant simply argues that the State's case was not strong, which negates the overwhelming testimony and evidence that was presented to the jury, and, therefore, defense's alleged failure to object to every statement or argument made by the prosecutor must have unfairly tipped the jury in favor of the prosecution. This argument has no basis and must be denied.

b) Ineffective for failure to raise the affirmative defense of reasonable belief

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.* "The right

to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." *State v. Darden,* 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

These rights are not absolute, of course. Evidence that a defendant seeks to introduce "must be of at least minimal relevance." *Darden,* 145 Wash.2d at 622. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory,* 158 Wash.2d 759, 786 n. 6, 147 P.3d 1201 (2006). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Darden,* 145 Wash.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow,* 99 Wash.2d 1, 14, 659 P.2d 514 (1983).

A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his

theory. *State v. Washington,* 36 Wash.App. 792, 793, 677 P.2d 786, *review denied,* 101 Wash.2d 1015 (1984). For defense counsel's failure to request a reasonable believe instruction to amount to deficient performance, the Appellant must show that had counsel requested this instruction, the trial court would have given it. *State v. Powell,* 150 Wash.App. 139, 154, 206 P.3d 703 (2009). To warrant a reasonable believe instruction, the Appellant would have to present evidence supporting his theory that at the time of the offense, he reasonably believed that the victim was not mentally incapacitated and/or physically helpless. See RCW 9A.44.030(1); *Powell,* 150 Wash.App. at 154.

In *State v. Powell,* the Defendant testified that, based on PLM's conduct, including her nonverbal and verbal reactions to him, he believed she was consenting to the sexual contact with him. None of the other witnesses, who were all State's witnesses, testified that PLM appeared too drunk or otherwise incapacitated to make decisions, even though she did appear somewhat intoxicated to some. Furthermore, PLM herself testified that, apparently soon after the sexual activity began, she had purposefully acted as if she were a willing participant because she was afraid, although she apparently did not display her fear to Powell. Based on the evidence

that PLM pretended to be a willing sexual participant, the Court of Appeals ruled that Powell was entitled to a "reasonable belief" instruction.

In re Hubert, the Court of Appeals found that defense counsel was ineffective for failing to raise or argue a "reasonable belief" defense based on the fact that his counsel was admittedly not familiar with the defense and there existed evidence that would support such a defense. *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). The evidence in Hubert that supported the defense related to the parties sharing a beer with the Defendant and another party and the victim possibly smoking marijuana with them as well. *Id.* at 926. The Defendant testified that the victim was friendly and flirtatious with him throughout the evening and seemed receptive to a sexual relationship. *Id.* at 926-927. He testified that he knocked on the bedroom door where the victim had gone to sleep, entered, and laid down beside her in the bed. *Id.* at 927.

The Defendant testified that the victim rolled over and said hi to him, using his nickname. *Hubert*, 138 Wash.App. at 927. He testified that they began kissing and fondled one another. *Id.* The Defendant testified that he removed his own pants and he asked the victim to take off her pants. *Id.* The Defendant testified that the victim began to remove her pants, allowing the Defendant to assist her. *Id.* The Defendant testified

that he anticipated that they would have sex, but before he penetrated her, the victim jumped out of the bed and told him, "I'm too drunk to do this, Neeco. And I have a boyfriend and what we did was really wrong." *Id.* The Defendant testified that he attempted to comfort the victim, who appeared upset, but she left the house. *Id.* The Defendant testified that he remained in the bed in the victim's room. *Id.* He testified that when she returned, he tried to talk to her, but she rebuffed him and went to the other party's room, who ordered him to leave the house 30 minutes later. *Id.*

The victim testified that she and the Defendant did not interact privately during the evening and that she had not flirted with him. *Hubert*, 138 Wash.App. at 927. The victim testified that after going to sleep, she awoke to find the Defendant penetrating her and her clothing removed. *Id.* The victim testified that she had been dreaming that another female friend had been kissing her and that she was telling that female friend that she did not want to kiss her. *Id.* The victim testified that she told the Defendant she had a boyfriend, pushed him off of her, got out of bed, and went to her boyfriend's house. *Id.* The victim testified that she returned about an hour and a ½ later and discovered that the Defendant was still in her room. *Id.* The victim testified that she woke up the other party in the house and described to her what had happened. *Id.* The victim testified

that the other party asked the Defendant to leave then house, which he did. *Id.*

In addition to this evidence, the Defendant also testified that he believed the victim was awake during the entire encounter. *Hubert*, 138 Wash.App. at 929. Both the Defendant and the victim testified that the Defendant stopped physical advances as soon as the victim cut off the encounter and that he remained in the victim's bedroom for hours following the incident. *Id.* The Court of Appeals found that despite this evidence the Defendant's attorney failed to raise or argue a "reasonable belief" defense and did not request an instruction. *Id.* The Court found that the Defendant's attorney only had to review the section headings of chapter 9A.44 RCW, which is prominently labeled "Defenses to prosecution under this chapter," or the pattern jury instructions for the charged offense of Rape in the Second Degree to find the defense. *Id.* The Court found that the attorney's failure to discover and advance the defense was plainly deficient performance. *Id.*

The circumstances presented in this case, however, are nothing like those in Powel or Hubert. In both of those cases there was evidence presented, even by the victims, that they were functional enough wake up, react, and to leave when they found themselves in sexual situations with

the defendants. In both Powel and Hubert, there was also evidence presented that neither defendant believed the victims to be impaired and testified that they appeared to be willing participants. Additionally, in Powel, while some witnesses testified that the victim did appear somewhat intoxicated, none of the other witnesses, who were all State's witnesses, testified that she appeared too drunk or otherwise too incapacitated to make decisions.

In Hubert, the victim had been drinking and dancing with her girlfriends earlier in the night and once at the other party's house, she shared a beer with her and the Defendant, possibly smoking marijuana with them as well. The victim told both the other party and the Defendant that she was tired and going to sleep. It appears from the information provided in the case that the victim was able to take herself to bed before the incident and there was no mention of her appearing intoxicated or otherwise being too incapacitated to make decisions. Certainly, the victim was able to speak to the Defendant, get up, and go to her boyfriend's house after allegedly being attacked by the Defendant. The evidence and testimony in those cases is easily distinguishable from the evidence and testimony presented in the case at hand.

Here, the victim initially had no memory of the events the next morning and the Appellant and the other defendant in this case lied to her about what had happened the night before. The Appellant and the other defendant made up excuses as to why her body was sore and why her vagina was hurting, claiming that she was essentially fall-down drunk and that she had hit her vagina on the edge of the couch. The Appellant and the other defendant hurried her out of the house, even though she described still feeling under the influence to the point where she didn't feel that she should have driven and becoming violently ill once she got home. The victim and her mother both testified about how the victim was still sick later the next day, vomiting all the next morning, and then sleeping most of the day away. The victim testified to having flashbacks later the next day and getting pieces of her memory back where she had flashbacks of both the Appellant and the other defendant having sex with her. The victim testified about not being able to move or talk at first and then that she was crying, telling them to stop, that it hurt, etc…as the rapes went on.

The Appellant and the other defendant continued to lie to her for days following the event and continued to tell her about how intoxicated she had been. The Appellant and the other defendant told her about how

she was so drunk that she had fallen down, that she had to be carried, and that she had thrown up. The Appellant and the other defendant continued to deny having sex with the victim, even after they were arrested and the police got involved. It was not until after giving an initial statement to law enforcement that the story changed to a claim that the sex was consensual. Even then, the Appellant told police that the victim had drank at least 5 Mike's Hard Lemonades and that she had fallen down, had to be carried, and had thrown up before they had the alleged consensual sex.

Furthermore, there was expert testimony estimating the victim's BAC level at the time of the incident. The testimony was that her BAC was estimated to be .12/.13, if the victim only had 3 Mike's Hard Lemonades, which was all the victim remembered drinking, .20/.21, if the victim had 5 Mike's Hard Lemonades, which is what the Appellant told the police she had, and .25/.26, if she had all 6, which is what the Appellant had told the victim she had during the recorded confrontation. There was further expert testimony about the phenomenon of blackouts, which coincided with the testimony of the victim and her memory lost. The Appellant had also told the officers in this case that she had not said anything or tried to stop him when he and the other defendant began having sex with her. The Appellant gave no statement about the victim

consenting and, in fact, he told the officers in this case that she was in no condition to give consent that night.

Additionally, the Appellant did not testify in this case, which certainly was a tactically decision by his defense counsel. In order to have had evidence to support a "reasonable belief" defense, the Appellant's attorney would have had to put the Appellant on the stand, which he elected not to do. There was simply no evidence presented that would support a defense that the Appellant reasonably believed that the victim was not physically helpless or otherwise incapacitated. There is further no information that his counsel, who again was hired, highly experienced in criminal law, and who has been practicing since his admission in 1990, was unaware of the defense. Under the circumstances, it was simply a trial tactic not to attempt such a defense, which would have subjected the Appellant to cross-examination by the State. Furthermore, based on the evidence and testimony that was presented at trial, there is no way the trial court would have ever given that instruction.

As such, the Appellant's counsel was not deficient in his performance for not requesting the defense and there is nothing in the record that would support a showing that, if he had requested the instruction, that the trial court would have given it. The argument is not

supported under the case law or by the facts in this case. Therefore, the request for a new trial must be denied.

c) Ineffective for failure to argue the Appellant's youth as a mitigating factor

Here, the Appellant argues that defense's representation was deficient because he did not make an argument for an exceptional sentence below the standard range based on the mitigating factors of youth under *O'Dell*. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). The appellant was over the age of 18, had graduated from high school, and was living on this own in his own house. Even if he weren't over the age of 18, there is nothing about the appellant that would have suggested that he was "particularly vulnerable" to "impulsivity, poor judgement, and susceptibility to outside influences" as was suggested in *O'Dell*. *Id.* at 690-91. The appellant is no more vulnerable to such things than is any other adult criminal currently incarcerated with him. To say otherwise is to make the argument that no one who makes a poor decision and commits a crime should ever be fully held accountable for their crimes and punished accordingly. The appellant was properly sentenced within the standard range for his crime and defense was not deficient for not arguing otherwise.

The Appellant further argues that, if defense counsel does not raise the issue of youthfulness, the remedy is to automatically remand the case for a new sentencing. The State does not believe that to be the case at all, as evidenced by the Court's ruling in the other defendant's case. In that case, the Court cited to *State v. Hernandez-Hernandez*, 104 Wn.App. 263, 15 P.3d 719 (2001) as being more applicable than *O'Dell*. See Unpublished Opinion at page 26 for Joel Krebs, 49396-9-II. In *Hernandez-Hernandez,* the court focused on the fact that the sentencing court, even without argument, had the discretion to impose an exceptional downward sentence and thus held that counsel was not deficient. *Hernandez-Hernandez*, 104 Wn.App. at 266. Just as in Krebs case, defense presented argument to encourage the sentencing court to be lenient in its sentencing and impose the low end due to his youth. RP December 22, 2017 at 5-10.

Multiple family members spoke to the trial court about him being a young man, including his mother, who stated her son had completed two years of his electrical apprenticeship while also working 40-hours plus a week. RP December 22, 2017 at 5-6. She further talked about what a great loss it would be to his family to be without the Appellant, particularly his two younger sisters who allegedly couldn't understand

why someone who want to take away their big brother that had always been there to protect and love them. *Id.* at 6. The Appellant's mother further stated that the Appellant's absence would also be a great loss to his family, his co-workers, and society and asked for the sentencing court to give him the minimum amount possible. *Id.* The Appellant's aunt also spoke to the court at sentencing about how the Appellant had been a "family man" even from the time that he was little and that he was a good man, not just with their family, but with the entire community. *Id.* at 7. The Appellant's aunt also asked for leniency. *Id.*

The Appellant's attorney also addressed the sentencing court, requesting the low end of the range. RP December 22, 2017 at 8. The sentencing court, after hearing from all parties, including the Appellant, who apologized for the hurt he had caused, sentenced the Appellant to the middle of the range. *Id.* at 10. The court stated that the sentence was fair under the circumstances, acknowledging that this was the same sentence that Mr. Krebs had received as the State had argued. *Id.* Even though the Appellant's attorney had not cited to *O'Dell* or otherwise requested an exceptional downward sentence, his counsel's arguments did encompass mitigating factors. Furthermore, even without argument, the sentencing court had the discretion to impose an exceptional downward sentence as

established in *Hernandez-Hernandez* and simply chose not to. The Appellant's attorney in this case was not deficient, just as Mr. Krebs' attorney was found not to be deficient under similar circumstances in his appeal. See Unpublished Opinion at page 26 for Joel Krebs, 49396-9-II. Therefore, the Appellant's claim here must similarly fail.

III. CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the convictions and the sentence in this case.

DATED this 22nd day of January, 2019.

Respectfully Submitted,

BY:

ERIN C. RILEY
Deputy Prosecuting Attorney
WSBA # 43071

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

STATE OF WASHINGTON, Respondent, v. TANNER BIRDSALL, Appellant.	No.: 51389-7-II **MOTION AND DECLARATION FOR ORDER OF ACCEPTANCE OF OVERLENGTH BRIEF AND LATE BRIEF**

COMES NOW the respondent, State of Washington, by and through Erin C. Riley, Deputy Prosecuting Attorney, and moves the court for an order to allow for an over-length brief, to waive sanctions and accept the Respondent's Brief for filing in the above-entitled matter.

THIS MOTION is based upon the attached declaration.

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

By _____
ERIN C. RILEY
Deputy Prosecuting Attorney
WSBA #43071

DECLARATION

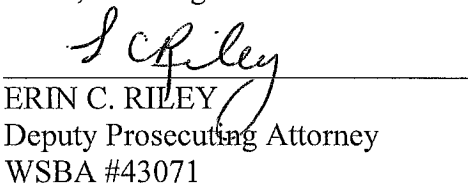
I, Erin C. Riley, hereby declare and say as follows:

PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WA 98563
(360) 249-3951 FAX 249-6064

That I am a duly appointed Deputy Prosecuting Attorney for Grays Harbor County, Washington, and am familiar with the records and files herein;

On December 21, 2018, the State received a ruling from the Court of the Appeals, which granted an extension of time to January 23, 2019 for the State to file its Respondent's Brief. Due an extended trial that ended on January 24, 2019, the State missed the deadline by one day and is filing this request in tandem with its Respondent's Brief. The State respectfully requests that any sanctions be waived and the brief of respondent be accepted for filing. The State is also requesting that the Court allow the State to file an over-length brief of respondent. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24th day of January, 2019, at Montesano, Washington.



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