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Division II
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NO. 51928-3-II

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

STATE OF WASHINGTON, Respondent

v.

BRANDON EUGENE DOCKTER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00524-0

CORRECTED BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State did not misstate the law nor improperly shift the burden of proof during closing argument when it discussed the evidence and the defendant's affirmative defense.**
- II. **The Court did not err when it instructed the jury, at defendant's request, on the definition of consent as provided in WPIC 45.04.**
- III. **The defendant did not receive the ineffective assistance of counsel when his trial counsel proposed WPIC 45.04 and utilized the instruction to support his defense.**
- IV. **As Dockter conceded in closing argument, the State presented sufficient evidence to establish the victim's mental incapacity or physical helplessness at the time of the penetration and sexual contact by the defendant.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Brandon Eugene Dockter was charged by amended information with one count of Rape in the Second Degree and one count of Indecent Liberties for engaging in sexual intercourse and knowingly having sexual contact with AC¹ on or about March 8, 2017, while AC was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 46-47; RCW 9A.44.050(1)(b); RCW 9A.44.100(1)(b). CP 4-6. The

¹ For the purposes of protecting the victim's privacy the State will refer to her by her initials at the time of trial. The State has observed that this Court has done the same even where the victim of a sex crime was not less than 18 years old. *See State v. Staten*, --- Wn.App.2d ----; 51349-8-II (2019).

case proceeded to a jury trial that began on February 5, 2018 in front of The Honorable Scott Collier and concluded with the jury's verdict on February 7, 2018. The jury convicted Dockter as charged. CP 143-44.

The trial court sentenced Dockter to an indeterminate sentence pursuant to RCW 9.94A.507 and a minimum sentence of 78 months of total confinement. CP 187, 191, 203. Dockter filed a timely notice of appeal. CP 205.

B. STATEMENT OF FACTS

On March 7, 2017, AC lived at her friend Emily Cavagna's small trailer in La Center, Washington. RP 67-68, 86-87, 167. Early that day Cavagna ran into her former high school friend, Brandon Dockter. RP 170-71. Cavagna told him that she was going to be at the Main Street Bar that night and "if he wanted to come [she] would be there." RP 170-71.

Cavagna was not going to the bar alone, however, as she was planning on going with AC. RP 69-70, 168-69. Another of Cavagna's friends, Sam Harper, was going to meet Cavagna and AC at the bar. RP 69-70, 137-38, 168-69. While at that time they were just friends, AC had romantic feelings for Harper. RP 153-54, 192.

Eventually, AC, Cavagna, Dockter, and Harper were all at the Main Street Bar. RP 170-71. At the bar, Cavagna introduced AC to

Dockter as the two had never met. RP 69-70. While they were there, Cavagna played pool and hung out with Dockter and AC spent time with Harper to include drinking beer and eating pizza. RP 71, 153, 172, 249. AC, did not, however, have much, if any, further contact with Dockter; neither engaged in bantering, flirty behavior, or physical touching with the other. RP 71, 138-39, 142-43, 171-72, 267.

In fact, when the group left the bar and relocated to an after party, the same dynamic remained. RP 71, 139, 173. AC spent her time with Harper and showed no interest in Dockter. RP 72, 142, 173-74. Because Harper had to work early the next day, he and AC left the party after a short time and headed back to Cavagna's trailer where the two smoked some marijuana to help them sleep and then went to bed. RP 72-73, 140-41, 143-45, 174. The two went to sleep in the trailer's king bed, which AC and Cavagna shared since the trailer was so small and there was not really another viable option. RP 67-69, 153-54, 164-65, 168.

Cavagna had told AC and Harper that she would catch a ride back to her place, and at eventually 3:00 AM she enlisted Dockter as her driver. RP 174-77. Because of the time and the need for a ride later that morning, Cavagna allows Dockter to stay at the trailer and go to sleep, but she told him beforehand that "you're just crashing here" and nothing was going to

happen between them but sleep. RP 177-78, 269-270, 280-81. When Cavagna and Dockter arrived at the trailer, AC and Harper were asleep and did not wake up. RP 86, 178-79, 189-190.

At that point, all four were in the king size bed and sleeping from left (next to a wall) to right was AC, Harper, Cavagna, and Dockter. RP 147, 178-79. Thus, AC and Dockter were at opposite sides of the bed and because she had been asleep the whole time AC did not know that Dockter was at the trailer. RP 86.

At around 6:30 AM, Harper woke up to go to work. RP 141-42. Harper's departure did not waken AC or Cavagna, and before he left Harper observed Dockter still sleeping on the near side of the bed by the door. RP 86, 141-42, 146-48, 178-180. But once Harper left, his spot in the bed was available and at some point Dockter moved past Cavagna and put himself right in between her and AC. RP 178-180. During this reorganization AC and Cavagna remained asleep. RP 86, 178-180, 271.

Cavagna eventually woke up though, as she got cold and that is when she noticed that Dockter was in between her and AC. She then noticed Dockter pull his pants down and begin thrusting into AC, but she heard nothing other than a single sigh followed by silence. RP 179-181. During this time period, Cavagna pretended to be asleep and rolled back

the other way. RP 180-81. The next thing she heard was AC saying “Emily?” in a scared voice, followed by “Who the fuck are you?” or “Who the fuck is this?” directed at Dockter and then ordering him to leave. RP 79-81, 181-84.

At that point, both Dockter and Cavagna got out of the bed. RP 81, 183, 185. Cavagna then asked Dockter to take the leg of a nearby table, which he did and handed to Cavagna, who, in turn, began hitting him with it until he left. RP 81, 183, 185, 276. About 10 minutes later, at about 7:30 AM, Dockter sent Cavagna a text that read “Long story short, just to let you know, I don’t think either one of us knew what was going on until that moment. So thanks for hitting me with the pole. I really appreciate it whether you believe it or not.” RP 185-86.

AC testified that she went to bed next to Harper, and that the next thing that she remembered was that she was having a sexual dream. RP 80. She had no idea that Dockter was beside her in bed. RP 88. She then awoke to her shirt up to her neck, her pants and underwear down by her knees, a person’s hands on her breasts, her vagina being penetrated, and an attempted anal penetration. RP 75-80, 88, 90-91. Though “not entirely sure” of the sequence AC explained that “he pulled out [(of my vagina)] and then attempted anal. And then I woke up.” RP 91. After she awoke,

AC reached back “to see who it was,” assuming it would be Harper, but she felt short hair instead of Harper’s long hair and heard a voice different than Harper’s say something like “where do you want me to finish.” RP 78-79. It was at that point that AC “jumped away” and said who “the fuck” is this and told Dockter to get out. RP 79-81.

On March 9, 2017, AC, after spending the previous day sitting in Cavagna’s trailer confused and depressed, spoke with Harper and Cavagna, and decided the police should be called. RP 81-82, 89, 93-94, 151-52, 154-55, 187-88. Cavagna then called 911. RP 90, 188. The responding deputy spoke to AC and Cavagna, and then Harper took AC to the hospital for a sexual assault examination. RP 83, 241, 245. AC told the Sexual Assault Nurse Examiner that “I am here for a rape” and that on the night in question she was having a “sexual dream” before waking up as “he tried to do anal” and then “he went back vaginal. I was still confused. He was touching me in the genital area and playing with my nipple rings. His hands were all over me.” RP 247-48. She also repeated to the nurse the same sequence of events where she reached back and felt Dockter’s short hair before she jumped up and said “Who the fuck are you?” and “shouted at him to get out.” RP 248.

Dockter also testified. His testimony mostly mirrored the testimony of AC, Cavagna, and Harper. *See* RP 269-283. He admitted to sexual contact and sexual intercourse with AC. RP 272-74, 289. He acknowledged that AC showed no interest in him throughout the night, that it was reasonable to assume that AC did not know that he was in the trailer, that AC did not wake up when he moved to middle of the bed, that she never looked at him, and that she said nothing to him prior to asking “Who the fuck are you?” RP 280, 283-89, 291. Instead, Dockter claimed that after he woke up with his arm around AC, that she grabbed his hand and placed it between her legs and, though he agreed that this was the only sign that AC was awake, he thought that she did this intentionally and so he began rubbing her vagina. RP 275, 286-88. When she then moved her body back into his he continued the sexual contact and eventually engaged in sexual intercourse. RP 275, 288-89. The two never made eye contact and Dockter did not say anything until he “ask[ed] her where she wanted me to finish” RP 274, 290-91.

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ARGUMENT

I. The State did not misstate the law nor improperly shift the burden of proof during closing argument when it discussed the evidence and the defendant's affirmative defense.

At trial, “[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

A prosecutor commits misconduct by misstating the law or improperly shifting the burden of proof. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015); *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). If a misstatement of the law is “repeated multiple times” the “[r]eptive misconduct can have a cumulative effect.” *Allen*, 182 Wn.2d at 376 (citation and internal quotation omitted).

In order to obtain relief based upon prosecutorial misconduct, the defendant must establish that misconduct occurred and, if he or she objected at trial, “show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted). Importantly, “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

In this prosecution for rape and indecent liberties the State had to prove that Dockter “engage[d] in sexual intercourse with [AC] . . . [w]hen [AC] [wa]s incapable of consent by reason of being physically helpless or mentally incapacitated.”² CP 130, 134; RCW 9A.44.050(1)(b). In order to make this determination the jury was given instructions defining “consent,” “physically helpless,” and “mentally incapacitated.” CP 132-33. The jury was told that “[c]onsent means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual

² Indecent liberties, similarly, requires the State to prove that a person “knowingly causes another person to have sexual contact with him or her or another . . . [w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless.” RCW 9A.44.100(1)(b); CP 136, 139.

contact.” CP 132; RCW 9A.44.010(7). The jury was also instructed that “[m]ental 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 from some other cause” and that 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 133; RCW 9A.44.010(4)-(5).

Additionally, Dockter raised the “reasonable belief” affirmative, statutory defense to both the rape and indecent liberties. CP 135, 140. The jury was instructed that “it is a defense” to the charges “that at the time of the acts the defendant *reasonably believed* that [AC] was not mentally incapacitated or physically helpless” and that the “defendant has the burden of proving this defense by a preponderance of the evidence.” CP 135, 140 (emphasis added).

Here, Dockter claims that the State misstated the law and “shifted the burden from the State to prove that [AC] was incapacitated, to Mr. Dockter to prove that he . . . checked to see that [AC] was awake or to prove that she was . . . awake.” Brief of Appellant at 11. In particular, Dockter takes issue with the following portion of the State’s closing argument:

Even the defendant's own version is him lying next to -- him moving next to a sleeping woman, putting his arm around her, and then touching her vagina when she has not looked at him, spoken to him, made any noises to indicate she's awake. His version is he does not check at all to see if this woman is awake, conscious, and consenting. But the law in this state does impose that obligation on people when they have sex. When someone has sex with another person, they have to make sure that that person is awake and conscious and able to consent.

MR. [BAILES]: Objection, Your Honor. The instruction says that he has to have a reasonable belief. It doesn't say that he has to go through --

THE COURT: You may continue. I'll let you take the instructions as provided to you and apply them to the facts as you decide them. Go ahead.

[THE STATE]: That is an obligation on people when they have sex, which is why there is a law that someone -- it is crime to have sex with someone who is incapable of consent.

RP 340-41.

Dockter's claim that the above argument "shifted the burden from the State to prove that [AC] was incapacitated, to Mr. Dockter to prove that he ... checked to see that [AC] was awake or to prove that she was ... awake" ignores the entire context in which the argument was made and how the particular facts of the case related to his own defense for which he bore the burden of proof. Br. of App. at 11. First, the State properly and repeatedly discussed its burden of proof, to include the burden to prove AC's mental incapacity or physical helplessness and the relevant jury

instructions, before making the argument about which Dockter complains. RP 320, 322-24, 334-35; CP 134, 139. For example, the State correctly commented that “[i]f you [(the jury)] believe beyond a reasonable doubt that [AC] was asleep when this – was not capable of giving consent I should say when this activity started, then I have met my burden.” RP 332.

And later the State reiterated the same correct statement of the law:

if you [(the jury)] are convinced that [AC] was asleep or in a dream-like state, either of those qualify. *If you are convinced that she did not have the ability to consent to sexual intercourse or sexual contact with the defendant at that time, I have met my burden.* I have met my burden if you have an abiding belief in the truth of those charges.

RP 335 (emphasis added).

Next, the State began addressing Dockter’s affirmative defense noting that after the State meets its burden that Dockter “then has to prove to you, the defense, that he reasonably thought she was capable [of consenting].” RP 332, 335. In this portion of the State’s closing argument the State attacked Dockter’s claim that he could prove that his belief that AC was capable of consenting to sexual activity was reasonable. RP 332-341. And the State’s rebuttal closing focused almost entirely on the defendant’s failure to establish his “reasonable belief” defense. RP 348-352.

Thus, in the context of the State's entire argument and the jury instructions, which properly allocated the burden of proof, the State's argument about which Dockter complains did not amount to misconduct. Rather the argument, properly understood, is that Dockter's failure to do anything to ascertain AC's capacity to consent defeated his defense that he reasonably believed that she had the capacity to consent. And this is true; a defendant is guilty of rape if he has sexual intercourse with a person who is asleep unless the defendant can prove by a preponderance of the evidence that he had a reasonable belief that the sleeping person was capable of consent because a person who is asleep is, as a matter of law, physically helpless and/or mentally incapacitated,. RCW 9A.44.030(1); *State v. Puapuaga*, 54 Wn.App. 857, 859-861, 776 P.2d 170 (1989); *State v. Mohamed*, 175 Wn.App. 45, 58-60, 301 P.3d 504 (2013); *see State v. Ortega-Martinez*, 124 Wn.2d 702, 709-717, 881 P.2d 231 (1994) (noting that "[i]t is important to distinguish between a person's general ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation"). In fact, the State explicitly made this argument later:

[Y]ou're not just being asked what was in the defendant's mind. You're being asked if it was reasonable. Did he reasonably believe *she was able to consent* at that moment?

He didn't check. And Ladies and Gentlemen, I submit to you that *in that -- this specific situation based on the totality of the circumstances*, that that is really the only reasonable thing to do.

That's the only way somebody could reasonably believe that [AC] was awake is if they checked because she was asleep when he got there, she was asleep when he moved, and she wasn't indicating she was awake. Even if she did grab his hand, how does that indicate to him -- to a reasonable person that *this woman is truly able and consenting to sex with him*[?]

RP 352 (emphasis added).

If the complained about argument is stripped from the context in which it was made and taken too literally it may appear inartful or incorrect. But in the context of the entire argument the State properly stated the law and did not *improperly* shift the burden of proof. Thus, the State did not commit prosecutorial misconduct in its closing argument.

Nonetheless, even assuming the argument amounted to misconduct, the error was harmless as there is not "a substantial likelihood" the argument "affect[ed] the jury's verdict." *Emery*, 174 Wn.2d at 760. The evidence of Dockter's guilt was overwhelming and the evidence of AC being mentally incapacitated or physically helpless at the time of the sexual activity was so strong that even Dockter admitted in his closing that "honestly all of the testimony is that she probably was asleep at the time." RP 345, 347 ("they probably have proved that [AC] wasn't awake . . .).

Thus, even if the argument improperly shifted the burden of proof on incapacitation it cannot be said that Dockter was prejudiced by the argument since he was essentially in agreement that the State proved AC's mental incapacitation and/or physical helplessness.

And Dockter's closing argument acknowledging AC was asleep—obviating the potential prejudice from the alleged misconduct—but that he had a reasonable belief³ she was capable of consent was better than the alternative defense of arguing that the State failed to prove incapacity and that, in fact, AC was awake and actually consenting since such a claim was belied by the evidence. No jury was ever going to believe that AC knowingly consented to sexual activity with Dockter given that it was agreed by all that (1) up until that night AC and Dockter were strangers; (2) AC did not flirt with, pay attention to, have physical contact with, or talk at any length to Dockter at the bar or house party; (3) AC was asleep when Dockter arrived at the residence; (4) AC was asleep when Dockter moved into the spot in bed next to her that was recently vacated by Harper, an individual for whom AC had a romantic interest; and (5) AC testified that she awoke to sexual contact and penetration. Plus, Dockter

³ As Dockter correctly noted in his own closing in response to the argument he claims is misconduct: “[w]hen you read the instructions, it doesn't say there's a laundry list of things you have to do to make sure someone is consenting, that someone is capable of giving you consent. She is showing him with actions that he can reasonably interpret to be someone who is interested in having sex with him. She told you she was having a sexual dream.” RP 345.

sent a text to Cavagna that very morning shedding light on AC's capacity to consent in which he stated "long story short just letting you know I don't think *either of us knew what was going on* until that moment." RP 185-86.

Furthermore, that Dockter did not move for a mistrial at the time of the State's argument "strongly suggests . . . that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *Swan*, 114 Wn.2d at 661. Nor did the State repeat the complained about argument, a fact that lessens the potential for prejudice.

Because of the arguments made by both parties, the jury instructions given, which the jury is presumed to have followed, the court's oral instruction to the jury to "take the instructions provided to you and apply them to the facts," and the overwhelming evidence of guilt, any prosecutorial misconduct was harmless as there is not a substantial likelihood the argument affected the verdict.

II. The Court did not err when it instructed the jury, at defendant's request, on the definition of consent as provided in WPIC 45.04.

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009) (quoting *State v. Barnes*, 153 Wn.2d. 378, 382, 103

P.3d 1219 (2005)). On the other hand, it is well-settled that pursuant to the invited error doctrine a “party may not request an instruction and later complain on appeal that the requested instruction was given.” *State v. Stud*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (quoting *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)) (citation omitted). “Generally speaking, no rule of law is better established than the rule that a party will not be heard to complain of an error which he induced the trial court to commit.” *State v. Ortiz-Triana*, 193 Wn.App. 769, 373 P.3d 335 (2016) (quoting *State v. McNeil*, 161 Wn. 221, 223, 296 P. 555 (1931)).

Here, Dockter proposed and the trial court gave a jury instruction modeled on WPIC 45.04, which defines consent. RP 231, 296, 312; CP 132. Consent means that “at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” CP 132; WPIC 45.04; RCW 9A.44.010(7). The State initially expressed concern about the instruction being given, but Dockter, aware of the issue with giving the instruction in cases that involve rape and “forcible compulsion,” responded to State’s comment and continued to request that the instruction be given. RP 231, 296.

The State ultimately did not object to the instruction. And for good reason; the consent instruction “permit[ted] the parties to argue their

theories of the case, d[id] not mislead the jury, and properly inform[ed] the jury of the applicable law.” *Hayward*, 152 Wn.App. at 641. The instruction did not *need* to be given since the State was tasked with proving “mental incapacity” or “physical helplessness” rather than lack of consent, and Dockter, for the purpose of establishing his defense, needed to establish that he “reasonably believed that the victim was not mentally incapacitated and/or physically helpless” rather than that he believed that the victim consented to sex. RCW 9A.44.050; RCW 9A.44.030(1). In short, this case was more about the “[c]apacity to consent, not whether there was consent.” *State v. VanVlack*, 53 Wn.App. 86, 88, 765 P.2d 349 (1988).

But that does not mean that the given instruction misled the jury or was an inaccurate statement of the law, and Dockter fails to provide authority or a convincing argument for why giving the instruction in his case was error. Br. of App. at 15-17. On the contrary, Dockter properly utilized the instruction to argue his defense. RP 342-45, 347. The State also commented on the instruction in its closing stating that:

you have a definition of consent in here, but it’s important to note that you’re not being asked whether or not she consented. That’s not the question before you. You’re being asked if she was even able to consent. And she was not, because she was asleep.

RP 322-23.

Nevertheless, Dockter puzzlingly argues that correct legal definition of consent would be especially confusing to jurors “where, as here, Mr. Dockter was attempting to convince the jury that [AC] appeared to be giving consent. . . .” Br. of App. at 17. At the same time, he argues that the instruction did not need to be given because “[consent] can still be argued without the WPIC definition.” Br. of App. at 17. Basically, Dockter wanted to argue that it appeared AC was capable of consenting to sexual intercourse, but now thinks the jury should not have been instructed on the correct legal definition of consent.

This argument is untenable. Dockter had it right at trial where he utilized the consent instruction to argue that because AC engaged in, to him, “conduct indicating freely given agreement to sexual intercourse or sexual conduct” that it was reasonable for him to believe that AC had the *capacity* to consent. RP 342-45, 347. Because AC was asleep and there was no verbal communication between her and Dockter before the sexual contact, instructions stating that “conduct” by itself could constitute consent was particularly helpful for his argument. In other words, if Dockter could establish some evidence of actual consent by conduct he could much more easily clear the reasonable belief bar as to AC’s capacity to consent.

But if the trial court gave WPIC 45.04 in error, the error was invited by Dockter. Dockter proposed WPIC 45.04 and argued for its inclusion as part of the jury instructions. RP 231, 296. Dockter cannot now be heard to “complain on appeal that the requested instruction was given.” *State v. Stud*, 137 Wn.2d at 546. Thus, the invited error doctrine prevents appellate review of the propriety of giving WPIC 45.04.

On the other hand, if this Court determines that invited error doctrine does not apply, any error in providing proper legal definition of consent as a jury instruction was harmless. The evidence of Dockter’s guilt was overwhelming and in the context of the arguments made and the other jury instructions there is no chance the instruction affected the verdict.

III. The defendant did not receive the ineffective assistance of counsel when his trial counsel proposed WPIC 45.04 and utilized the instruction to support his defense.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective

assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35.

The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective representation, and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. A trial counsel's trial strategy or tactics cannot form the basis for finding deficient performance unless a defendant can "establish that no conceivable legitimate tactic explains counsel's performance." *State v. Carson*, 184 Wn.2d 207, 218, 357 P.3d 1064 (2015) (citations omitted). In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Strickland*, 466 U.S. at 694.

Here, Dockter's trial counsel's decision to propose WPIC 45.04, the consent instruction, was a legitimate tactic. As argued above, counsel utilized the consent instruction to argue that because AC engaged in, to Dockter, "conduct indicating freely given agreement to sexual intercourse

or sexual conduct” that it was reasonable for Dockter to believe that AC had the capacity to consent. RP 342-45, 347. Rather than “place the additional burden upon Mr. Dockter to prove that Ms. Cornell in fact consented,” as now Dockter claims⁴ contrary to the arguments made by each party in closing argument, the instruction provided additional authority for Dockter’s argument that he had met his burden to prove his defense. Br. of App. at 18. As a result, Dockter cannot “establish that no conceivable legitimate tactic explains” his trial counsel’s decision to propose WPIC 45.04. *State v. Carson*, 184 Wn.2d at 218.

Nor can Dockter establish prejudice. In fact, Dockter does not even argue that he has shown by a reasonable probability that, “but for” his counsel’s error, the outcome of the case would have been different. *Strickland*, 466 U.S at 694. Instead, he argues deficient performance and claims that the performance “resulted in prejudice to Mr. Dockter.” Br. of App. at 18-19. This is insufficient. As articulated previously, the evidence against Dockter was overwhelming. There is not a reasonable probability that he would have been acquitted had his trial counsel not proposed WPIC 45.04. As a result, his ineffective assistance of counsel claim fails.

⁴ Dockter also links the giving of the consent instruction to his trial counsel’s decision to “concede[] the issue of capacity” in his closing argument, but how he arrives at that conclusion is unexplained other than his say so. Br. of App. at 18. Had there been insufficient evidence that AC was sleeping at the time of the incident no language in WPIC 45.04 would have prevented Dockter from arguing that the State did not satisfy its burden of proof on the issue of capacity to consent.

IV. As Dockter conceded in closing argument, the State presented sufficient evidence to establish the victim’s mental incapacity or physical helplessness at the time of the penetration and sexual contact by the defendant.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996).

As a preliminary matter, “physically helpless” and “mentally incapacitated” are not alternative means of committing Rape in the Second Degree. *State v. Al-Hamdani*, 109 Wn.App. 599, 603-07, 36 P.3d

1103 (2001).⁵ Consequently, the State need only present sufficient evidence of “physical helplessness” *or* “mental incapacitation” in order to sustain a conviction for Rape in the Second Degree. *Id.*; *see State v. Krebs*, 5 Wn.App.2d 1039, 2018 WL 5014244, 4-6.⁶ Dockter only alleges insufficient evidence of “mental incapacity” and does not address “physical helplessness.” Br. of App at 19-20. Accordingly, he has not properly challenged the evidence that AC was “physically helpless” at the time of the sexual contact and sexual intercourse and his claim fails. *Puapuaga*, 54 Wn.App. at 860-61 (equating “the state of sleep” with being “physically helpless”).

Even if, however, Dockter has properly challenged the sufficiency of the evidence of his convictions, he has applied the wrong standard of review. Dockter now reviews all of the evidence in light most favorable to him such that he claims that AC “not only was able to consent, but did” and that his text message to Cavagna was not an admission but “merely an apology to his friend.” Br. of App. at 19.

The inferences from the evidence in favor of the State are quite different. AC testified that she awoke to her shirt up to her neck, her pants and underwear down by her knees, a person’s hands on her breasts,

⁵ For the same reasons the terms do not create alternative means of committing Indecent Liberties.

⁶ *Krebs* is an unpublished opinion from this Court. Pursuant to GR 14.1(a) the opinion “may be accorded such persuasive value as the court deems appropriate.”

her vagina being penetrated, and an attempted anal penetration. RP 75-80, 88, 90-91. Though “not entirely sure” of the sequence AC explained that “he pulled out [(of AC’s vagina)] and then attempted anal. And then I woke up.” RP 91. She also testified that before she awoke she was having a sexual dream. RP 80. When combined with AC’s statements to the Sexual Assault Nurse Examiner that she was there “for a rape” and that on the night in question she was having “sexual dream” before waking up as “he tried to do anal” and Dockter’s text message in which he stated “long story short just letting you know I don’t think either of us knew what was going on until that moment” the evidence of AC’s physical helplessness or mental incapacitation at the time of the sexual contact is overwhelming. RP 185-86, 247-48.

In fact, the trial testimony so convincingly established AC’s incapacity to consent that Dockter conceded the issue, stating “honestly all of the testimony is that [AC] probably was asleep at the time” of the sexual contact. RP 345. And in summing up the case, Dockter reiterated the concession stating “I submit to you they probably have proved that [AC] wasn’t awake and that Brandon had sex with her. That’s not a dispute.” RP 347. It’s not believable that Dockter would have conceded the issue had the State not presented sufficient evidence of AC’s inability to consent. Instead, sufficient evidence supported Dockter’s convictions.

CONCLUSION

For the reasons argued above, this Court should affirm Dockter's convictions.

DATED this 19th day of June, 2019.

Respectfully submitted:

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