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Division II  
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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JOHNNY ROACH,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES ..... ii

I. ISSUES..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT .....5

    A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
    WHEN IT DISMISSED JUROR 2 FOR CAUSE .....5

        1. Standard Of Review .....5

        2. The Discussion With Juror 2 Sufficiently Shows There  
        Was A Probability Of Actual Bias, Therefore, The Trial  
        Court Did Not Abuse Its Discretion When It Dismissed  
        Juror For Cause .....6

    B. ROACH CONSENTED TO SEIRAH TO TESTIFY AT HIS  
    TRIAL THEREBY WAIVING HIS MARITAL PRIVILEGE  
    RIGHT GRANTED BY RCW 5.60.060(1) .....20

        1. Standard Of Review .....20

        2. Roach, After Conferring With His Trial Counsel, Waived  
        The Spousal Privilege Granted In RCW 5.60.006(1) And  
        Affirmatively Consented To Seirah Testifying .....21

    C. ROACH RECEIVED EFFECTIVE ASSISTANCE FROM  
    HIS ATTORNEY DURING HIS SENTENCING  
    PROCEEDINGS .....33

        1. Standard Of Review .....33

        2. Roach Attorney Was Not Ineffective During His  
        Representation Of Roach During The Sentencing  
        Proceedings ..... 33

D. THE TRIAL COURT PROPERLY IMPOSED A DNA FEE UPON ROACH .....	40
IV. CONCLUSION.....	41

## TABLE OF AUTHORITIES

### **Washington Cases**

<i>State v. Bogart</i> , 57 Wn. App. 353, 788 P.2d 14 (1990) .....	27
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997) .....	30, 32
<i>State v. Burden</i> , 120 Wn.2d 371, 841 P.2d 758 (1992) .....	22
<i>State v. Calhoun</i> , 163 Wn. App. 153, 257 P.3d 693 (2011) .....	34, 35, 38
<i>State v. Clark</i> , 26 Wn.2d 160, 173 P.2d 189 (1946) .....	22, 23
<i>State v. Coley</i> , 180 Wn.2d 543, 326 P.3d 702 (2014) .....	6
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009) ..	8, 10, 11, 17
<i>Sate v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005) 8, 9, 10, 17, 18	
<i>State v. Finch</i> , 137 Wn.2d 792, 810, 975 P.2d 967 (1999) .....	20
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003) .....	35
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017) .....	35, 37
<i>State v. Irby</i> , 170 Wn.2d, 874, 246 P.3d 796 (2011) .....	18
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	33, 34
<i>State v. McFarland</i> , 189 Wn.2d 47, 399 P.3d 1106 (2017) .....	36, 38
<i>State v. O'Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015) .	34, 35, 36, 37
<i>State v. Phillips</i> , 6 Wn. App. 2d 651, 431 P.3d 1056 (2018) .....	8, 16
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	33, 34
<i>State v. Rodriguez</i> , 146 Wn.2d 260, 269, 45 P.3d 541 (2002) .....	21

*State v. Sassen Van Elsloo*, 191 Wn.2d 798, 425 P.3d 807  
(2018) .....5, 6, 8,11, 12, 17, 18

*State v. Tatum*, 74 Wn. App. 81, 871 P.2d 1123 (1994) .....21

*State v. Wheeler*, 95 Wn.2d 799, 631 P.2d 376 (1981) .....27

**Federal Cases**

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.  
674 (1984) .....34

**Washington Statutes**

RCW 2.36.110 .....11

RCW 4.44.120 .....7

RCW 4.44.150 .....7

RCW 4.44.170(2) .....7

RCW 4.44.180 .....7

RCW 4.44.190 .....7, 8, 12

RCW 5.60.060(1) .....20, 21, 22, 29, 30

RCW 9.94A.010(1) .....36

RCW 9.94A.535 .....36, 40

RCW 43.43.7541 .....40

**Constitutional Provisions**

U.S. Const. amend. VI; Const. art. I, sect. 22 .....6

**Other Rules or Authorities**

CrR 6.4 .....7  
WPIC 1.01 .....15  
WPIC 1.02 .....16

## I. ISSUES

- A. Did the trial court abuse its discretion when it dismissed Juror 2 for cause without further questioning?
- B. Did the trial court abuse its discretion when it refused to allow Roach to retract his prior waiver of spousal privilege and allowed Roach's wife to testify at trial?
- C. Did Roach receive effective assistance from his trial counsel during the sentencing phase?
- D. Did the trial court improperly impose the DNA fee?

## II. STATEMENT OF THE CASE

When K.M.U. was 12 years old, her "cousin" Seirah and Seirah's husband, Johnny Roach, raped K.M.U.<sup>1</sup> RP 158-61, 164-65. K.M.U. was watching television with Seirah in Seirah's bedroom. RP 162. Roach came into the bedroom and began touching K.M.U. in a manner she did not like. RP 162-63. K.M.U. told Roach to stop. *Id.* Seirah told K.M.U. it was okay. RP 163.

Roach got on top of K.M.U. RP 163. K.M.U. told Roach she did not want to do this. RP 163. K.M.U. told Roach multiple times to stop and stop touching her. RP 163. Seirah told K.M.U. it was okay, K.M.U. would like it, and it would be fine. RP 163-64. Seirah was

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<sup>1</sup> The State will refer to the majority of the witnesses and people mentioned by their first names, as that is how they are continually named throughout the verbatim report of proceedings by the different witnesses while testifying. This is for clarity purposes and to help protect the identity of the minor victim, there is no disrespect intended.

holding down K.M.U.'s arms. RP 164. Roach pulled down K.M.U.'s pants, took off his pants, and put his penis in K.M.U.'s vagina. RP 164-65. Seirah would kiss Roach while he was raping K.M.U. RP 164-65.

Prior to the rape K.M.U. was a virgin. RP 173. The rape was painful and K.M.U. bled as a result of the injuries incurred from the rape. RP 167-68. K.M.U. did not tell anyone about the rape because she was scared. RP 168.

In late January, 2019, K.M.U.'s older sister, K.K.U., asked K.M.U. if she was still a virgin. RP 169, 199. Seirah was present when K.K.U. inquired if her sister was still a virgin. *Id.* K.M.U.'s response was to look down and not say anything. RP 200. Seirah responded by giggling. RP 169, 200. K.K.U. followed Seirah to the kitchen, then went outside and spoke to her sister. RP 169, 200. K.M.U. told K.K.U. what had happened. *Id.* K.K.U. was angry, went back inside the residence and told Seirah to get out. RP 170, 200.

K.K.U. decided their mother, Heather, needed to know what happened to K.M.U. RP 171, 201. K.K.U. told Heather K.M.U. had been raped. *Id.* Heather called and reported the rape to the police. *Id.* Deputy Woods responded to their residence and spoke to K.K.U. and Heather. RP 230. Deputy Woods did not speak to K.M.U.

because she did not feel comfortable talking to him about the incident. RP 230. When Deputy Woods asked K.M.U. if she would speak to him about the incident K.M.U. immediately began to cry. RP 231.

K.M.U. was referred to speak to Samantha Mitchell, a forensic interviewer. RP 171, 232-33. K.M.U. was also referred to the Providence St. Peter Hospital Sexual Assault Clinic and Children Maltreatment Center for a clinical examination. RP 262, 268, 271. Nurse Lisa Wahl conducted the examination. RP 271. K.M.U.'s description of the events was consistent with a blunt trauma injury to her vagina, due to the bleeding and difficulty urinating after the rape. RP 277-78. K.M.U. also had physical findings, a groove indicative of scarring inside K.M.U.'s vagina that was possibly caused by trauma. RP 290-95.

The State charged Roach and Seirah, as codefendants, with Rape of a Child in the Second Degree. CP 1-3. Roach and Seirah's cases were severed for trial. CP 72. An amended information was filed with only Roach's name. CP 8-9. Roach elected to avail himself of his right to a jury trial. See RP.

The State filed a memorandum of authorities supporting its arguments for why Seirah's testimony was admissible in Roach's

trial. CP 73-79. While the State filed the motion three days prior to trial, Seirah was on the State's witness list filed two month prior. CP 73-79; Supp. CP Witness List. On the first day of trial, the trial court determined what it considered hearsay statements by Seirah, in violation of the confrontation clause, are not admissible. RP 33-37. The second day of trial, the State informed the trial court it intended on calling Seirah and wanted to know if Roach was intending to invoke his marital privilege to prevent Seirah from testifying. RP 136-37. Roach consented to his wife, Seirah, testifying at the trial. RP 143.

The third day of trial, after the State had entered into a plea agreement with Seirah in regard to her testimony, Roach attempted to revoke his consent. RP 312-13, 316-17. The State argued Roach had waived his consent and the State had relied upon that waiver to its detriment. RP 313-15, 318. The trial court ultimately ruled in favor of the State, finding detrimental reliance. RP 321-23. Seirah testified, inconsistently, contradicting what she saw at different points during her testimony, and in the end stated her husband did not have sex with K.M.U. even though that is contrary to her earlier statements and testimony. RP 352-416.

Roach was convicted as charged. RP 473; CP 24. Roach was sentenced to a minimum term of 114 months and a maximum term of life in prison. CP 38-51. Roach timely appeals his conviction and sentence. CP 52-66.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED JUROR 2 FOR CAUSE.**

Roach claims the trial court abused its discretion when it dismissed Juror 2<sup>2</sup> for cause. Brief of Appellant 9-20. Roach claims the trial courts improper removal deprived him of a fair trial and warrants reversal of his conviction and a new trial. *Id.* The trial court acted within its discretion when it dismissed Juror 2 for cause and this Court should affirm Roach's conviction.

##### **1. Standard Of Review.**

A trial court's dismissal of a juror for cause is reviewed for an abuse of discretion. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 814, 425 P.3d 807 (2018). A trial court abuses its discretion if its decision is manifestly unreasonable, applies an incorrect legal

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<sup>2</sup> Juror 2 was a prospective or potential juror, not an impaneled juror. For simplicity the State will refer to the potential jurors as Juror and their #.

standard, or relies on unsupported facts. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014). (internal quotations and citations omitted).

**2. The Discussion With Juror 2 Sufficiently Shows There Was A Probability Of Actual Bias, Therefore, The Trial Court Did Not Abuse Its Discretion When It Dismissed Juror For Cause.**

The State requested potential Juror 2 be dismissed for cause during the State's second round of voir dire. RP 113. Roach argues the trial court's granting of the State's request was improper because there was insufficient proof to show potential Juror 2 exhibited actual bias. Brief of Appellant 9-20. Roach cites to a number of cases in an attempt to exemplify actual bias and how the trial court did not meet its obligation. *Id.* The cases Roach cite are distinguishable. Juror 2's statements to the deputy prosecutor, when taken in context, show her actual bias, a refusal to view the evidence with an open mind and consider all the evidence prior to making a determination regarding Roach's guilt.

A criminal defendant has a guaranteed right, pursuant to both the state and federal constitutions, to a trial by an impartial jury. U.S. Const. amend. VI; Const. art. I, sect. 22; *Sassen Van Elsloo*, 191 Wn.2d at 807. This right is safeguarded by court rules and statutes that require trial judges to dismiss jurors who are not qualified to

serve, including those who are bias. *Id.* Jurors fall into three possible categories, potential, impaneled, or deliberating. *Id.* A potential juror is the juror that has been summoned in for jury service, appeared as required, and has not yet been excused. *Id.*, citing RCW 4.44.120.

Voir Dire is governed by the criminal rules. CrR 6.4. The purpose of voir dire is for the parties to discover bias so they may effectuate for cause challenges. CrR 6.4(b). Voir dire also enables the intelligent exercise of a party's preemptory challenges through the knowledge gained during the process. *Id.* Either party has the ability to challenge a juror for cause. CrR 6.4(c). A juror may be challenged generally or in the particular action. RCW 4.44.150.

The State did not raise a general for cause challenge in this matter, rather, the State challenged Juror 2 for her ability to serve on Roach's case. RP 111-14. In this action, there was no implied bias alleged on the part of the State. *Id.* The State challenged Juror 2 for actual bias. RCW 4.44.170(2); RCW 4.44.180; RCW 4.44.190; RP 111-13.

For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

RCW 4.44.170(2). It is not enough for a potential juror to have stated they have formed an opinion or expressed some belief based upon what they may have heard or read to sustain a challenge for actual bias. RCW 4.44.190. The trial “court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.” *Id.* Actual bias is established by proof. *Sassen Van Elsloo*, 191 Wn.2d at 808. To prove actual bias, a mere possibility of bias is insufficient, the record must demonstrate “there was a probability of actual bias.” *Id.* at 809.

The determination of bias is not done within a vacuum. The trial court may consider all of the circumstances when it determines if a juror should be dismissed for cause. *State v. Phillips*, 6 Wn. App. 2d 651, 662, 431 P.3d 1056 (2018). “The trial judge is in the best position to evaluate whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like.” *Phillips*, 6 Wn. App. 2d at 662-63 (internal quotations and citations omitted).

Roach discusses *Sassen Van Elsloo*,<sup>3</sup> *State v. Depaz*,<sup>4</sup> *State v. Elmore*,<sup>5</sup> and as exemplars of trial courts improper dismissing of

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<sup>3</sup> *Sassen Van Elsloo*, 191 Wn.2d 798.

<sup>4</sup> *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009).

<sup>5</sup> *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005).

jurors for cause. Brief of Appellant 16-17. The cases are distinguishable. *Elmore* is a case primarily regarding juror nullification. *Sate v. Elmore*, 155 Wn.2d 758, 767-81, 123 P.3d 72 (2005). The question presented was whether the trial court properly dismissed a deliberating juror who was accused of attempting to nullify the jury. *Id.* at 763-67. The trial court was given notice from the presiding juror and another juror that Juror 8 was refusing to participate in deliberations and stated they did not care what the judge said, they did not agree with the law and would not convict based upon the law. *Id.* at 763. The trial court reviewed the notes written by the two jurors, inquired of one of the jurors, heard arguments from the attorneys, and decided this information was sufficient to show Juror 8 was refusing to follow the law and deliberate. *Id.* at 764. The trial court determined it was necessary to excuse Juror 8 for being unfit for jury service. *Id.* After an objection from defense counsel, the trial court heard directly from Juror 8, who denied the allegations. *Id.* at 764-65. The trial court entered an order finding Juror 8 not credible, disqualifying Juror 8 for refusing to follow the law and not participating in deliberations. *Id.* at 765-66. The trial court found the other jurors were credible. *Id.*

Roach discusses the “heightened evidentiary standard” that trial court failed to apply in *Elmore* when it weighed conflicting evidence regarding Juror 8’s conduct. Brief of Appellant 16, *citing Elmore*, 155 Wn.2d at 779. In *Elmore*, the Court discussed the evidentiary standard necessary to remove a deliberating juror. *Elmore*, 155 Wn.2d at 768-73. *Elmore* concluded the correct standard to remove a deliberating juror required a court “to retain a juror if there is any reasonable possibility that the dispute among the jury members stems from disagreements on the merits of the case.” *Id.* at 777-78. The Court affirmed the reversal of *Elmore*’s conviction and remand for a new trial. *Id.* at 780.

*Depaz* was similarly an issue with the dismissal of a juror who was potentially a holdout juror. Juror 3 was accused of misconduct for using her phone and talking about the case with her husband. *Depaz*, 165 Wn.2d at 846-48. The trial court inquired of the other jurors and Juror 3, who told the trial court she was a holdout juror. *Id.* The trial court denied the state’s motion to dismiss Juror 3, finding she did not engage in any type of misconduct to warrant disqualification. *Id.* at 848. The jury ended up in deadlock, and the trial court, while acknowledging nothing had changed from earlier in regard to Juror 3, discharged Juror 3 and sat an alternate in her

place. *Id.* at 848-51. The Supreme Court ruled prejudice is determined by the trial court “by concluding whether any misconduct committed by the juror has affected the juror’s ability to deliberate before deciding to excuse the juror under RCW 2.36.110.” *Id.* at 857. If the juror cannot fairly deliberate due to the misconduct then the trial court may excuse the juror. *Id.* The Supreme Court vacated Depaz’s conviction. *Id.* at 862.

The trial court in *Sassen Van Elsloo* dismissed an impaneled juror, midtrial, due to a tangential connection to an important defense witness. *Sassen Van Elsloo*, 191 Wn.2d at 801-06. The record showed Juror 12 realized after she was impaneled, but prior to opening statements, that she was familiar with a defense witness, Burton, because she had worked with Burton to secure inpatient treatment for her nephew. *Id.* at 803-05. Burton was the defendant’s alibi witness. *Id.* at 803. Juror 12 made it clear she had no real feelings either way about Burton, except to say she was happy her nephew got the treatment he needed. *Id.* at 803-05. The deputy prosecutor requested Juror 12 be removed for cause due to Burton being an important witness for the defense. *Id.* at 805. The defense objected to Juror 12’s removal. *Id.* The trial court removed Juror 12. *Id.* at 805-06.

The Supreme Court discussed the requirement for proof of actual bias for dismissal of a potential juror and the standards of bias applying to potential jurors also apply to impaneled jurors. *Id.* at 809-10. The Court found a “party must prove (1) that the impaneled juror has formed or expressed a biased opinion and (2) that ‘from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.’” *Id.* at 810, *citing* RCW 4.44.190. The Court found the trial court abused its discretion when it dismissed Juror 12 because there was no showing of actual bias. *Id.* at 810-14. The Court then discussed the remedy for dismissal of an impaneled but not a deliberating juror. *Id.* at 814-23. The erroneous dismissal of an impaneled juror is subject to a harmless error analysis. *Id.* at 822-23. In Sassen Van Elslloo’s matter, the Court found the error was not harmless and remanded the matter for a new trial. *Id.* at 825.

Roach argues Juror 2’s statements did not warrant dismissal because there was insufficient proof of actual bias. Brief of Appellant 12-15. Roach asserts Juror 2 was no differently situated than prospective Jurors 30, 37, and 41 who all indicated they would need to consider all of the evidence before making a decision. *Id.* at 14. Roach’s interpretation of Juror 2’s statements to the deputy

prosecutor is not accurate. Juror 2, unlike Jurors 30, 37, and 41, had made up her mind before she ever heard one piece of evidence.

During the second round of voir dire, the deputy prosecutor asked the venire how they were going to be able to figure out who to believe if they only heard from the alleged victim, and maybe the defendant. RP 108. Juror 23 stated, "I would be just willing to listen to all of the evidence that is presented." *Id.* Juror 30 agreed to evaluate the evidence. RP 109. Juror 37 stated "evidence is evidence" and agreed they would have to evaluate the evidence in the context of everything that had been presented. RP 109-10. Juror 41 expressed reservation about sending someone to prison on a "he said, she said" situation but also stated that they would want to look at as much evidence as was available, hear what the witnesses had to say, and then base their decision on that. RP 110.

The deputy prosecutor asked the trial court how much time remained and was about to segue into a different topic when Juror 2 inquired:

PROSPECTIVE JUROR NO. 2: I have a question.

MR. HALSTEAD: Yeah. Number 2, go ahead.

PROSPECTIVE JUROR NO. 2: Back to that.

MR. HALSTEAD: Yeah.

PROSPECTIVE JUROR NO. 2: Let's just say the person that is charging the gentleman is 14 years old, and the only thing that you can look at is her testimony?

MR. HALSTEAD: No, I'm not -- well, the question I posed is what if -- and that's why I kind of predicated it with these sexual assaults normally only happen with two people, right?

PROSPECTIVE JUROR NO. 2: Yeah.

MR. HALSTEAD: There is always other individuals around, right, that eventually hear it and then it gets reported. But that's the only real evidence, though, because they are the only two in the room, right?

PROSPECTIVE JUROR NO. 2: Right.

MR. HALSTEAD: So what do you do?

PROSPECTIVE JUROR NO. 2: I couldn't convict.

MR. HALSTEAD: You could not?

PROSPECTIVE JUROR NO. 2: No, not with just one person's word.

PROSPECTIVE JUROR NO. 2: If it was a young child, a young girl.

RP 111-12. The deputy prosecutor then asked if anyone else agreed.

RP 112. Then the deputy prosecutor asked a hypothetical about arriving back at your residence to find your home being burglarized.

RP 112. The deputy prosecutor explained you saw the person burglarizing your home, walking out with your belongings, you call the police, and ultimately you are the only person who identifies the

man at trial as the person who stole all your stuff. *Id.* The deputy prosecutor stated you told the jury the man, who knew from prior contacts, stole your stuff, and the jury said it does not matter because you were the only person who saw him, “we are not going to convict him.” RP 112-13 Juror 2 replied, “That’s our law.” RP 113. Juror 2 then stated,

If I’m talking - - if I’m listening to a 14-year-old girl, the only witness, and there is no other corroborating evidence of a doctor visit, hospital visit, DNA, something that is more evidence, I cannot in all conscience send that gentleman to prison for that one thing.

*Id.* The deputy prosecutor then asked to strike Juror 2 for cause. *Id.* Roach objected, arguing Juror 2 did not state she could not be fair. *Id.* Roach’s counsel went on to state, “[s]he’s saying, if that’s all the evidence there is, I don’t believe I could convict. I don’t know if that’s enough for cause.” *Id.* The State’s response was Juror’s 2 answers were “pretty clear.” *Id.* The trial court then struck Juror 2 for cause. *Id.*

Juror 2’s questions and answers indicate, unequivocally, that she would walk into the trial and have already made up her mind, regardless of the testimony in any case, where the State (or the plaintiff) only has a complaining witness to testify. The oral instruction to the jury, given in advance of the evidence be presented, instructs

the panel, “[i]t is your duty as a jury to decide the facts in this case based upon the evidence presented to you during the trial.” WPIC 1.01. Similarly, every jury is instructed they “**must** consider all of the evidence that [the court] has admitted that related to the proposition.” WPIC 1.02. Juror 2’s statement, that a singular witness to an event would never be sufficient to convict a person, requires Juror 2 to have already decided the weight of evidence and credibility of a witness without ever hearing one word of testimony.

The trial court did not improperly apply the law and therefore abuse its discretion when it removed Juror 2 for cause. Roach appears to be arguing absent Juror 2 actually stating she could not be fair and impartial it was improper to remove her for cause. Nothing in the cases above, the court rules, or the statutes require a juror to use magic words before trial judge can remove him or her. The trial court makes determinations for cause considering all the facts and circumstances before the court, which can include observations of the juror’s mannerisms, demeanor, and other extraneous factors that may be best observed and evaluated by the judge. *Phillips*, 6 Wn. App. at 662. The actual weight of the specific evidence in a case does not come into play until the juror is actually deliberating. The question before the trial court in the removal of a potential juror is

whether the juror will actually consider all of the evidence without a preconceived determination of the case. Juror 2 clearly had already weighed a case based upon what evidence could potentially be admitted. While Roach argues the State presented more than just the victim's testimony, this is immaterial. The State may have not been able to bring in more than just the victim's testimony if evidentiary ruling had not been made. Further, Juror 2's answer made it clear she was unwilling to listen to the evidence with an open mind if there were only two sides to the story. This is sufficient to show there was a probability of actual bias. *Sassen Van Elsloo*, 191 Wn.2d at 808. The trial court did not abuse its discretion and the dismissal when it dismissed Juror 2.

As discussed, the above three cases discussed by Roach dealt with impaneled jurors. *Sassen Van Elsloo*, 191 Wn.2d 798; *Depaz*, 165 Wn.2d 842; *Elmore*, 155 Wn.2d 758. Two of the cases, *Elmore* and *Depaz*, are regarding deliberating jurors. While the factors governing actual bias are the same regardless of a juror's status, the test regarding removal and the remedy for the defendant is not the same. *Sassen Van Elsloo*, 191 Wn.2d at 914-23. While the State does not concede the trial court erred in its dismissal of Juror 2, *arguendo*, if Juror 2 was improperly dismissed Roach is not

entitled to a new trial because there is no prejudice argued or proven due to Juror 2's dismissal.

Roach argues he is entitled to remand and a new trial because the removal of a qualified juror, without applying the correct legal standard requires dismissal. Brief of Appellant at 20. Roach cites to *Elmore* and *State v. Irby*, 170 Wn.2d, 874, 886-87, 246 P.3d 796 (2011) to support his argument. *Irby* does not apply as it was a right to presence case in regards to a violation of the defendant's right to present during voir dire and the dismissal of jurors in his absence. *Irby*, 170 Wn.2d 885-87. Roach conveniently ignores the Supreme Court's thorough discussion regarding "the remedy for the erroneous dismissal of a potential juror" found in *Sassen Van Elsloo*, a case Roach cites extensively. *Sassen Van Elsloo*, 191 Wn.2d at 815-17; Brief of Appellant at 10, 16-17, 19-20.

The dismissal of a potential juror does not automatically violate a defendant's right to unanimous verdict or impartial jury. *Sassen Van Elsloo*, 191 Wn.2d at 818-19. No party has a vested right to a particular person to sit on their panel until the jury is accepted and sworn. *Id.* at 819. It is simply enough that it appears a defendant's case "has been tried by an impartial jury." *Id.* (internal quotations and citations omitted). The Court further explained the

erroneous dismissal of a potential juror does not cause the impaneling of a biased juror. *Id.* Jury selection continues after dismissal of the potential juror. *Id.* “[I]t is presumed that the juror chosen in the place of the one rejected, is an impartial juror, such as the law requires.” *Id.* (internal quotations and citations omitted). Therefore, a defendant is not entitled to a new trial because the error in dismissing the potential juror was cured through the selection of an impartial juror. *Id.* at 816-17. The rejection of a qualified person can only prejudice a party through the necessity of accepting other jurors who are not qualified. *Id.* Therefore, “a defendant must prove that the improper dismissal of a potential juror was prejudicial to be entitled to a new trial.” *Id.*

Roach argues the State cannot show the wrongful dismissal of Juror 2 had no effect on his verdict. Brief of Appellant at 20. As argued above, that is not the test. Roach has not proven he was prejudiced by the alleged improper dismissal of Juror 2. Brief of Appellant 19-20. Roach’s failure to meet this burden requires this Court to affirm his conviction. Further, the State did not exercise all of its preemptory challenges. CP 80-84. The State only used two of its six preemptory challenges for the initial 12 jurors, and exercised a preemptory challenge during the choosing an alternate juror. *Id.*

The State exercised preemptory challenges during its second and fourth round, while Roach exercised all six of his preemptory challenges. *Id.* Therefore, one can presume even if the challenge for cause had been overruled, the State would have used one of its preemptory challenges to remove Juror 2.

Juror 2 showed through her statements that she was unwilling to wait until the evidence was presented to make a determination about the case. This Court should find the trial court did not abuse its discretion when it dismissed Juror 2. Even if this Court finds the trial court abused its discretion when it removed Juror 2, this Court should find Roach has not proven prejudice and affirm Roach's conviction

**B. ROACH CONSENTED TO SEIRAH TO TESTIFY AT HIS TRIAL THEREBY WAIVING HIS MARITAL PRIVILEGE RIGHT GRANTED BY RCW 5.60.060(1).**

Roach validly consented to his wife, Seirah, testifying at trial. Roach argues the trial court erred when it refused to allow Roach to revoke his consent the following day. Brief of Appellant 21-25. The trial court's determination that Roach waived his right to revoke his consent was not in error. This Court should affirm the trial court's ruling and Roach's conviction.

## **1. Standard Of Review.**

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). This Court will find a trial court abused its discretion “only when no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). (internal quotations and citation omitted). “When the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo on appeal.” *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

## **2. Roach, After Conferring With His Trial Counsel, Waived The Spousal Privilege Granted In RCW 5.60.060(1) And Affirmatively Consented To Seirah Testifying.**

Roach affirmatively waived his right to assert the spousal privilege and prevent Seirah from testifying at his trial. Roach complains the trial court should have allowed him to retract his waiver after the State relied upon it in the course of the trial. Brief of Appellant 21-25. The trial court’s determination that Roach could not withdraw his waiver, the State had relied upon the waiver to its

detriment, and to allow Seirah to testify was not an abuse of discretion.

A spouse has the right, by statutory authority, to prevent their spouse from being called as a witness to testify at trial against them or testify regarding communication between the couple during their marriage:

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership...

RCW 5.60.060(1). There are exceptions to this privilege, such as a criminal prosecution where one spouse is the victim. *Id.*

The reasoning behind “the testimonial privilege is to foster domestic harmony and prevent discord.” *State v. Burden*, 120 Wn.2d 371, 375, 841 P.2d 758 (1992) (internal quotations and citations omitted). The privilege also “prevents the testifying spouse from having to choose between perjury, contempt of court, or jeopardizing the marriage.” *Burden*, 120 Wn.2d at 375 (internal quotations and citations omitted). A spouse may waive the testimonial privilege. *State v. Clark*, 26 Wn.2d 160, 168, 173 P.2d 189 (1946). A spouse

may expressly waive his or her right to exclude the evidence banned pursuant to RCW 5.60.060. *Clark*, 26 Wn.2d at 168.

The State, after it did not prevail on its pretrial motions regarding the admission of Seirah's statements absent her testimony, informed Roach's trial counsel it was the State's plan to call Seirah as a witness.<sup>6</sup> RP 11-37, 136. The second day of trial, before testimony began, Roach's counsel informed the trial court of the State's intention of calling Seirah. RP 136. Roach's counsel complained the State did not want to tell him if they had worked out a deal with Seirah. *Id.* The deputy prosecutor responded, "We have not worked out a plea deal, but we are bringing it up now to address the issue." *Id.* The deputy prosecutor continued, explaining he informed defense counsel of the State's intention to call Seirah and the need to go through the colloquy with Roach to determine if Roach was going to waive his privilege. RP 137. Without Roach waiving his privilege there was no reason the State would enter into a plea deal with Seirah that would include her testimony at Roach's trial, to do so would be futile. Roach, after consultation with his attorney, consented to Seirah testifying. RP 137, 143.

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<sup>6</sup> Seirah had been on the State's witness list since March 15, 2019. Supp. CP Witness List.

On the third day of trial, prior to testimony being taken, Roach's counsel reported to the trial court the previous evening the deputy prosecutor had told trial counsel, after the parties interviewed Seirah, he could not ethically call Seirah as a witness. RP 310-12. The deputy prosecutor changed his position the morning of trial, informing Roach's counsel he was going to call Seirah to testify. RP 312. After receiving the information, trial counsel spoke to Roach, who decided to "invoke[e] his right under the rule of incompetency to not allow his wife to testify." RP 312.

The State took the position that Roach had waived his right to spousal privilege. RP 312. The trial court asked the State if it was aware of any rule, case law, or any authority that supported the premise that once a party waived the privilege it was irrevocably waived. RP 313. The State acknowledged it did not have anything directly, but waiver was generally determined by the person possessing the privilege, and due to the defense not stating prior to trial whether it would invoke the privilege the State addressed the issue yesterday, therefore the privilege was now waived because Roach had made his election. RP 314. The State further explained based upon Roach's waiver of spousal privilege it made a plea agreement with Seirah to secure her testimony. *Id.* The plea

agreement would have never been brokered and entered into without Roach's waiver. RP 314-15. The State's position was allowing Roach to retract his waiver prejudiced the State due to its detrimental reliance on the waiver. RP 315.

Roach's counsel responded that the State was not prejudiced in his case and it could not "ethically stand here and say '[l]ook we've been prejudiced on this other case based on what you did in this case.' Ethically, I don't think you can do that." RP 316. Roach's counsel then asserted he did not state anything the prior day regarding the rule of incompetency. *Id.* The trial court recollection was the issue came up the prior day in the context of Seirah testifying. RP 317. The trial court understood the State's request was to enforce Roach's election from the prior day regarding Roach's decision whether Seirah could testify. *Id.* Roach's counsel stated, "the record is the record, and I'm not going to dispute what's on the record...again, my client is invoking his right to preclude his wife to testify under the rule of incompetency. I don't believe he is prohibited from doing that. Nothing has happened in the trial." *Id.* Roach's counsel asserted the State would be in a different position if it had mentioned Seirah was going to testify during the State's opening statement. *Id.*

There was further discussion regarding the statements of Seirah, how those statements had changed, and the nature of the changes. RP 319-20. The State asserted Seirah had always been consistent regarding Roach having sex with K.M.U., it was other details that were inconsistent. *Id.* The deputy prosecutor acknowledged Seirah has given a number of different versions of the events and it was not clear what other details were the actual truth. RP 320. The deputy prosecutor confirmed he told Roach's attorney the previous evening, he was 99 percent sure the State was not going to call Seirah, but after further research and discussions the deputy prosecutor had decided to call Seirah as a witness. RP 321.

The trial court reviewed the record from the prior day's proceedings. RP 321. The trial court informed the parties the question addressed was whether Roach would object to Seirah being called to testify. RP 321. The issue addressed was testimonial privilege, or spousal incompetence. RP 322. The trial court found there was a failure to object, there was consent, and that consent was relied upon by the State to its detriment when it made a plea deal with Seirah, a severed co-defendant. *Id.* The trial court ruled the waiver was prejudicial to the State and it did affect the decisions the State made in Roach's case, therefore it did prejudice the State

regarding its handling of Roach's matter. RP 322. The trial court allowed Seirah to testify. RP 323.

The trial court correctly ruled Roach had waived his right to exercising his spousal privilege to prohibit Seirah from testifying. Prior to testimony being taken, Roach affirmatively consented to Seirah testifying at trial. The trial court did not err when it applied the concept of detrimental reliance and held it barred Roach from now asserting spousal privilege. While the trial court noted there was no case law known directly on point, there is case law applying detrimental reliance to plea agreements. *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981); *State v. Bogart*, 57 Wn. App. 353, 356, 788 P.2d 14 (1990); RP 322.

In *Bogart*, Ward Bogart and his cousin, Scott, were arrested for robbing a store. *Bogart*, 57 Wn. App. at 354. Bogart's attorney negotiated a plea deal to allow Bogart to plead guilty to robbery in the second degree and serve a six month sentence. *Id.* Bogart's attorney left town for a vacation, and while his attorney was gone, the deputy prosecutor charged Bogart with robbery in the second degree and sent Bogart's attorney a plea offer of a mid-range sentence. *Id.* at 354-55. The plea offer also indicated if the plea was not accepted by a certain date the charge would be amended to

robbery in the first degree. *Id.* at 355. Due to changing circumstances, including additional evidence, the State amended Bogart's charges to robbery in the first degree after his arraignment. *Id.* at 355-56. That same day, Bogart, after receiving advice from his attorney, attempted to enter a plea of guilty to the original charge of robbery in the second degree. *Id.* at 356. The trial court rejected the plea, a bench trial was later held, and Bogart was found guilty of robbery in the first degree. *Id.*

The issue in *Bogart* was whether Bogart had a right to the plea deal originally worked out between his attorney and the deputy prosecutor. *Id.* at 356.<sup>7</sup> A criminal defendant has no right to a plea deal. *Id.* "The State can revoke a plea proposal offered to a criminal defendant until such time as the defendant enters a plea or has made some act in detrimental reliance upon the offer." *Id.* The reliance has to have a real, tangible detriment. *Id.* The trial court, in a plea offer context, resolves two issues when evaluating detrimental reliance, "(1) how far the State's offer extended and (2) what the parties' reasonable expectations were." *Id.* The State must uphold its end of the bargain if the defendant has entered a plea of guilty. *Id.* The

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<sup>7</sup> The following citations for *Bogart* will omit the internal citations.

remedy for a breach may include a party electing specific performance. *Id.* at 356-57.

There can be no misunderstanding why the State requested the trial court determine if Roach was going to assert his right to spousal privilege under RCW 5.60.060 to prevent Seirah from testifying. The State was clear its intention was to call Seirah to testify, dependent on whether Roach was invoking his right to prevent his spouse from testifying. RP 136-37. The unique nature of spousal privilege does make Roach's decision regarding privilege a direct consequence to Seirah's case and the State's handling of that case. The State had not reached any type of plea deal with Seirah, her attorney was waiting, literally, outside the courtroom to speak with prosecutors regarding some type of agreement. RP 138. Roach expressly waived his right to spousal privilege. The State relied upon Roach's consent to allow his wife to testify when it decided to broker a plea deal with Seirah, a severed co-defendant. The reliance was to the State's detriment in the course of Roach's trial, and in Seirah's case, and the State was entitled to demand the waiver of privilege be adhered to and Seirah permitted to testify. The trial court's decision to require Roach to adhere to his previously expressed

waiver of spousal privilege and allow Seirah to testify was not an abuse of discretion.

Arguendo, if the trial court abused its discretion by refusing to allow Roach to retract his earlier waiver and invoke his right to under RCW 5.60.060 to prevent Seirah to testify, Roach was not prejudiced by the error. The marital privilege is a statutory right, not a constitutional right. A reviewing court employs a prejudicial standard for an evidentiary ruling that does not implicate a constitutional mandate rather than constitutional harmless error analysis. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Bourgeois*, 133 Wn.2d at 403 (citations omitted).

K.M.U. testified Roach raped her with Seirah present. RP 165. K.M.U. stated she went to the bathroom after the rape, it was difficult for her to urinate and she was bleeding from her vagina, and the blood was different than her period. RP 167-68, 173. K.M.U. had never had sex prior to being raped by Roach. RP 173. Heather testified K.M.U. became quieter, she did not want to go anywhere, began wearing sweats and hoodies all the time. RP 213. K.K.U. testified when she asked K.M.U. if she was still a virgin, Seirah

giggled in response. RP 199-200. Seirah was the one who informed K.K.U. who K.M.U. had sex with. RP 200. It was following speaking with Seirah and then her sister that K.K.U. told their mother K.M.U. had been raped. RP 200-01.

Deputy Woods testified regarding K.M.U.'s demeanor when he responded to the report of the rape and saw her later when K.M.U. went in for the forensic interview. RP 230-31, 233. Deputy Woods described K.M.U. as crying and upset. *Id.* K.M.U. was not comfortable discussing the incident with Deputy Woods. RP 230-31. Nurse Wahl's examination was consistent with K.M.U.'s description of the incident. RP 277-76, 278. Nurse Wahl also located trauma to K.M.U.'s vagina. RP 288-93. Nurse Wahl could not definitely state what caused the trauma but did state it was possible the trauma was caused by penile-vaginal penetration. RP 293.

Seirah's testimony was inconsistent and contradictory. RP 350-419. Seirah initially testified Roach had sex with K.M.U. while Seirah forcefully held down K.M.U.'s arms. RP 362-64. Seirah acknowledged K.M.U. was struggling, saying stop, and she did not like it. RP 366. On cross-examination Seirah testified she had lied during multiple interviews. RP 396-400. Seirah stated K.M.U. was on top of Roach having sex after Roach had been on top of K.M.U. RP

399-400. Seirah admitted she had just lied during her testimony when she told the jury K.M.U. had been crying while in the bedroom with Roach, that K.M.U. had actually only been crying in the bathroom after the incident. RP 403-04. Seirah acknowledged she had told so many versions of the events that she could not keep them straight. RP 407. On redirect, Seirah testified the sex between Roach and K.M.U. never happened. RP 416, 419.

Contrary to Roach's assertion to this Court, Seirah's testimony was not prejudicial. While Seirah was the other "eye witness" to the rape, her testimony was not helpful. The State's gamble at cutting a deal with Seirah did not pay off in the way it had hoped. Seirah recanted on the stand, became adamant that her husband did not have sex with K.M.U., and admitted she had lied multiple times, which had already been acknowledged by her many inconsistent statements. The testimony of K.M.U., K.K.U., Heather, and Lisa Wahl were all consistent with K.M.U.'s version of being raped by Roach. Seirah's testimony did not, within reasonable probabilities materially affect the outcome of Roach's trial. *Bourgeois*, 133 Wn.2d at 403 (citations omitted). Therefore, Roach was not prejudiced and the error was harmless.

This Court should affirm Roach's conviction because the trial court did not abuse its discretion when it determined Roach had waived his spousal privilege and allowed Seirah to testify. The trial court's determination that there was detrimental reliance on the part of the State was a reasonable conclusion to reach. If this Court were to find the trial court abused its discretion, Roach was not prejudiced by Seirah's testimony, and therefore the error was harmless. This Court should affirm Roach's conviction.

**C. ROACH RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY DURING HIS SENTENCING PROCEEDINGS.**

Roach argues he received ineffective assistance from his trial counsel during his sentencing hearing because his attorney failed to educate himself regarding the recent developments in the law prior to the sentencing hearing. Brief of Appellant 25-30. The record does not support Roach's assertion and he received effective assistance from his trial counsel during his sentencing hearing.

**1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

## **2. Roach's Attorney Was Not Ineffective During His Representation Of Roach During The Sentencing Proceedings.**

To prevail on an ineffective assistance of counsel claim Roach must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The right to effective assistance of counsel extends throughout all proceedings including sentencing. *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011) (internal citations omitted). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice occurs if, but for "counsel's deficient performance, there is a reasonable probability" the defendant's "sentence would have been different." *Calhoun*, 163 Wn. App. at 168.

Roach argues his counsel failed to request a mitigated sentence based upon Roach's youth and therefore he received ineffective assistance of counsel during his sentencing hearing. Brief of Appellant at 28-30. Roach opines his attorney failed to research relevant law, in particular Roach's entitlement to have the trial court consider a mitigated exceptional sentence. *Id.* at 29-30. Roach further claims he was prejudiced by his attorney's deficient performance because the trial court is required to consider the mitigated sentence, therefore there was a reasonable probability the trial court would have "exercised its discretion to consider a mitigated sentence had defense counsel made the request." *Id.* at 30. Roach argues facts not supported by the record and his argument thus fails.

Youthful age of an offender is not a per se mitigating factor, entitling a person to an exceptional sentence below the standard range. *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409

(2017); *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015). A trial court is required to consider a juvenile offender's youth as a possible mitigating factor, even if that juvenile has been adjudicated in adult court. *Houston-Sconiers*, 188 Wn.2d at 8-9, 20-21. Roach is not a juvenile offender, therefore the trial court was not required to consider his youth as a mitigating factor.

One of the objectives of the Sentencing Reform Act (SRA) is to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and offender's criminal history." RCW 9.94A.010(1). The structure provided by the SRA does not eliminate the discretion afforded to the trial courts when determining appropriate sentences. *State v. McFarland*, 189 Wn.2d 47, 52, 399 P.3d 1106 (2017), *citing* RCW 9.94A.010. A trial court is permitted to "impose a sentence outside the standard range sentence for an offense if it finds, considering the purpose the SRA, that there are substantial and compelling reasons justifying an exceptional sentence." *McFarland*, 189 Wn.2d at 52, *citing* RCW 9.94A.535 (internal brackets omitted).

Due to the advancements in the understanding of brain development, it is now widely accepted that adolescent's emotional and cognitive development may impact and relate to the defendant's

crime. *O'Dell*, 183 Wn.2d 695-96. Therefore, a trial court is permitted to consider youth as a mitigating factor when imposing a sentence on a youthful offender. *Id.* at 686. A youthful offender includes offenders who are close in age to 18 years old when they committed their crime. *Id.* The State acknowledges Roach is a youthful offender. Roach was 18 years old when he raped 12 year old K.M.U. with the assistance of his wife. RP 158, 160-61, 353. Simply being a youthful offender does not require a defendant's trial attorney to argue youth as a mitigating factor for a sentence below the standard range.

A seasoned attorney understands how to employ a strategy calculated to optimize their client's likelihood of receiving the best possible outcome. There is nothing in the record to support Roach's assertion his attorney was not apprised of *Houston-Sconiers*, *O'Dell*, or any other relevant law in preparation for Roach's sentencing hearing. RP 479-85. Roach argues his attorney was not aware of cases that came out two and four years prior because in retrospect he is displeased with the result of his sentencing hearing. While Roach's counsel could have argued youth as a mitigating factor, he chose not to do so, and the record is silent as to why. RP 479-85. The likely answer is after hearing all of the evidence presented, trial counsel concluded his best argument was to request to trial court not

give his client, Roach, top end of the range. This is precisely what Roach's trial counsel did. RP 483-84. This is not deficient performance, and therefore not ineffective assistance of counsel.

If this court were to find Roach's counsel's performance deficient, Roach was not prejudiced. Contrary to Roach's argument, prejudice is not shown in this context by there being a reasonable probability the trial court would have exercised its discretion to consider a mitigated sentence if Roach's attorney had made the request. Brief of Appellant 30. A trial court is required to consider an exceptional sentence below the standard range when a party requests. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). The prejudice Roach must show is that there is a reasonable probability the request for a mitigated sentence would be granted if his attorney had argued for a sentence below the standard range. *Calhoun*, 163 Wn. App. at 168. Roach fails, the trial court would not have granted a mitigated sentence below the standard range.

K.M.U. and Heather gave victim impact statements during the sentencing hearing. RP 479-82. Heather told Roach, "I knew the day that I looked into your eyes you were a piece of shit." RP 480. "No matter how much time you get, Johnny Roach, my daughter gets a life sentence and forever is changed by what you did to her." RP 480-

81. Heather stated a number of other things before concluding, “You’re a vile, pathetic human being, and you deserve exactly what you get every second of every day, and I feel no remorse and never feel sorry for you.” RP 481. K.M.U. discussed how difficult it was to trust people and with men that she considers family,” RP 481-82.

The State requested a high end sentence of 114 months, noting that Rape of a Child in the Second Degree does not require force, but force was employed in this case. RP 483. Roach’s counsel requested a mid-range sentence of 100 months. RP 483-84. The trial court sentenced Roach to high end of the standard range, 114 months. RP 484.

I’m going to impose the top of the range. This is a case that calls out, screams out, for the top of the range. It’s senseless. There’s no reason for it. There’s no excuse for it.

I’m considering the impacts on the victim, and they are serious impacts. They are lifelong impacts. She’s been sentenced - - as many people have reflected over the years with these types of cases, the perpetrator gets a determinate sentence, but the victim is sentenced to a lifetime of memories, of difficulties, and I recognize that.

And I recognize the courage that it took for [K.M.U.] to come up here today and for her to come and tell her story on the stand.

I think that [Heather’s], although her words the terms, might have crossed the line in some people’s minds, her sentiment really nails it, really hits the nail on the

head, with characterizing this crime and characterizing Mr. Roach.

RP 485.

It is clear from the trial court's statements even if Roach had argued his youth, which was known to the court, as a mitigating factor, the trial court would not have found substantial and compelling reasons justifying an exceptional sentence to give Roach a mitigated sentence below the standard range. RCW 9.94A.535. Roach was not prejudiced by his attorney's alleged deficient performance. This Court should find Roach's trial attorney provided effective assistance of counsel during Roach's sentencing hearing and affirm Roach's sentence.

**D. THE TRIAL COURT PROPERLY IMPOSED A DNA FEE UPON ROACH.**

Roach asserts the trial court improperly imposed a DNA fee because he was indigent at the time of sentencing and this court should strike the fee. Brief of Appellant 30-32. Pursuant to RCW 43.43.7541, effective June 7, 2018, the imposition of the DNA-collection fee is required "unless the state has previously collected the offender's DNA as a result of a prior conviction." Roach argues his DNA fee must be stricken because he has a prior felony and his

DNA has previously been collected. Brief of Appellant 31-32. Roach ignores the record made during his sentencing hearing. RP 483.

At the sentencing hearing, the deputy prosecutor informed the trial court, “There’s been no DNA previously taken according to the triple I. Would ask the court require that DNA be taken.” *Id.* The deputy prosecutor also asked the trial court to impose the DNA fee. *Id.* The State checked the record prior to sentencing, and the database showed Roach’s DNA had not been previously submitted. Therefore, the trial court appropriately ordered Roach’s DNA collected and the fee imposed. RP 485; CP 42. This Court should affirm the imposition of the DNA fee.

#### **IV. CONCLUSION**

The trial court did not abuse its discretion when it dismissed Juror 2 for cause. The discussion with Juror 2 sufficiently showed there was a probability of actual bias on the part of Juror 2. Roach waived his spousal privilege and affirmatively consented to his wife testifying at his trial. The trial court’s determination that the State had relied on Roach’s waiver to its determinant and allowing Seirah to testify was not an abuse of discretion. Roach received effective assistant of counsel during his sentencing hearing. Finally, Roach’s DNA had not previously been collected, therefore the DNA fee was

appropriately imposed. This Court should affirm Roach's conviction and sentence.

RESPECTFULLY submitted this 25<sup>th</sup> day of March, 2020.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

**LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE**

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