

FILED

JAN 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31382-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEVEN P. HARRINGTON,

Defendant/Appellant.

BRIEF OF APPELLANT STEVEN P. HARRINGTON

Bevan J. Maxey, WSBA #13827
Attorney for Appellant,
STEVEN P. HARRINGTON

Maxey Law Office, PLLC
1835 West Broadway Avenue
Spokane, WA 99201
(509) 326-0338

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 3

C. STATEMENT OF THE CASE 3

D. STANDARD OF REVIEW..... 20

E. ARGUMENT..... 20

F. CONCLUSION 29

TABLE OF AUTHORITIES

Table of Cases

<u>In re Yates</u> , 117 Wn.2d 1, 296 P.3d 872 (2013)	27
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).....	2, 3, 16, 25, 26, 27, 28
<u>State v. Beskurt</u> , 176 Wn.2d 441, 293 P.3d 1159 (2013)	27
<u>State v. Dvkstra</u> , 127 Wn.App. 1, 110 P.3d 758 (2005)	21
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006)	27, 28
<u>State v. Frawley</u> , 140 Wn.App. 713, 167 P.3d 593, 595-97 (2007).....	20, 27, 28
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1968).....	20, 21
<u>State v. Isom</u> , 18 Wn.App. 62, 567 P.2d 246 (1977).....	22
<u>State v. Kinchen</u> , 92 Wn.App. 442, 963 P.2d 928 (1998)	25
<u>State v. Jackson</u> , 82 Wn.App. 594, 918 P.2d 945 (1996).....	20, 21
<u>State v. Leyerle</u> , 158 Wn.App. 474, 242 P.3d 921 (2010).....	26, 27, 28
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.3d 245 (1995)	21
<u>State v. Soderquist</u> , 63 Wn.App. 144, 816 P.2d 1264 (1991)	20, 21
<u>State v. Spotted Elk</u> , 109 Wn.App. 253, 34 P.3d 906 (2001).....	20
<u>State v. Warnick</u> , 121 Wn.App. 737, 90 P.3d 1105 (2004).....	21

Other Case Law

Gibson v. Ortiz, 387 F.3d 812 (9th Cir. 2004)..... 21

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560,
608 S.Ct. 2781 (1979)..... 20, 21

Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005) 21

Statutes

RCW 9A.40.040 15, 21, 24

RCW 9A.40.010(1) 15

RCW 9A44.050(1)(a)..... 1, 15, 21

Court Rules

RAP 12.2..... 24, 25, 29

Constitutional Provisions

Article I, section 10, Wash.St. Const 25, 28

Article I, section 22, Wash.St. Const 25, 28

Sixth amendment, U.S.Const 25, 28

Fourteenth amendment, U.S.Const 25, 28

A. ASSIGNMENTS OF ERROR

1. The superior court of Okanogan County, State of Washington, erred on August 9, 2012, in accepting and adopting the verdicts of the jury [August 9 Trial RP 379-82; CP 76] that the defendant, STEVEN P. HARRINGTON, was guilty of counts 1 and 2 of the March 2, 2012, information [CP 156-58] involving the crime of rape in the second degree by forcible compulsion [RCW 9A.44.050(1)(a)], and unlawful imprisonment and [RCW9A.40.010(1)], which offenses allegedly occurred on February 5, 2012; and for which there was insufficient evidence presented at trial to establish, beyond a reasonable doubt, that the defendant had in fact committed each of the elements of these alleged crimes against the complaining witness, Chynna Jane Padillo. [August 9 Trial RP 382].

2. The superior court of Okanogan County, State of Washington, further erred on December 25, 2012, in formally entering judgment and sentence, and warrant of commitment, against the defendant, Mr. HARRINGTON, based upon the erroneous acceptance by the court of the foregoing verdicts of the jury [August 9 Trial RP 379-82; CP 76] that said defendant was guilty of said criminal charged as alleged in the information filed by the prosecution on March 2, 2012. [Sentencing RP 29-33; CP 1, 3-16].

3. The superior court of Okanogan County, State of Washington,

likewise erred when, after the jury was empanelled, the court allowed juror no. 8 [Carrie Cockle] to be interviewed in closed session, out of the hearing of the other seated jurors, about her acquaintance and familiarity with the defendant's sister in violation of the accused's public trial right and the procedural requirements mandated by State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). [August 8 Trial RP 67-68].

4. The superior court of Okanogan County, State of Washington, similarly erred, on August 8, 2012, in failing to consider and apply the same Bone-Club requirements before allowing prospective juror no. 23 [Mirrick Nordhaugen] to be examined by the prosecution about the contents of her jury questionnaire, with only a undisclosed, rather than making any specific reference whatsoever in open court and on the record as to what crime in which this prospective juror had been named as a "defendant in a criminal case" in the past, and then granting the state's request to strike this juror for cause without first identifying for the record the exact crime for which the juror was charged. [August 7, 2012 RP 92-93].

5. The superior court of Okanogan County, State of Washington, likewise erred, on August 8, 2012, in terms of failing to first consider and apply the Bone-Club requirements before removing the names of the prospect jurors from their individual jury questionnaires prior to having them scanned and made a formal part of the trial record. [August 8 Trial

RP 229].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, contrary to the jury's verdict, as well as the court's subsequent entry of judgment and sentence, the evidence presented by the plaintiff, STATE OF WASHINGTON, against the accused, STEVEN P. HARRINGTON, failed to establish the defendant's guilt, beyond a reasonable doubt, on counts 1 and 2 of the information, insofar as there was insufficient evidence of forcible compulsion to sustain the charge of rape in the second degree and there was also insufficient evidence that the complaining witness, Chynna Jane Padillo, was at any time restrained by the accused? [Assignments of Error Nos. 1 and 2].

2. Whether the superior court violated the public trial right in this case by failing to first abide by the procedural requirements and mandate of State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)? [Assignments of Error Nos. 3 through 5].

C. STATEMENT OF THE CASE

1. Introduction. The facts in this case are for the most part without dispute in terms of both the complaining witness' and defendant's renditions of the operative facts governing the events occurring on February 5, 2012. The principal issues of fact in this case focuses upon

whether the sexual contacts between the two parties was either consensual in nature or the result of forcible compulsion and, in terms of the latter, whether the complaining witness, Chynna Jane Padillo, was unlawfully imprisoned at any time during the events on February 5. The defendant readily acknowledged that the parties had gotten into a physical altercation, and that he and Ms. Padillo had engaged in any assault upon the other. Ultimately, this case presents itself as a classic "he said, she said" scenario in terms of whether the crimes as charged in the March 2, 2012, did in fact occurred.

2. Factual background. The conflicting factual accounts as presented by each of the parties at trial can be described and outlined as follows:

a. Complaining witness' version of events. Sometime in 2011, the complaining witness, Chynna Jane Padillo, became acquainted with the defendant, STEVEN P. HARRINGTON, through neighbors, and had a dating relationship from November 2011 through February 5, 2012, while the two resided in separate residence in Spokane, Washington. [August 8, 2012 RP 92; August 9, 2012 RP 175]. After a heated discussion as to whether Mr. HARRINGTON would go by himself due to the fact he has an ex-girlfriend in Grand Coulee, the two decided to go drive together to Oroville on February 5, 2012, in order to visit Mr. HARRINGTON's mother. [August 8, 2012 RP 93, 127].

They left from Spokane in Ms. Padillo's Toyota truck around 10:00 p.m. [August 8, 2012 RP 93]. However, before leaving, they engaged in oral sex and Ms. Padillo smoked some oxycodone around 8:00 p.m. [August 8, 2012 RP 94-95]. Because Mr. HARRINGTON was unable to ejaculate during oral sex, this raised the issue in Ms. Padillo's mind whether the defendant might have recently been involved with another woman. [August 8, 2012 RP 126]. There was some tension over this before they left. [August 8, 2012 RP 126].

During the start of their trip, the couple stopped at a gas station, and Mr. HARRINGTON bought a 40 ounce malt liquor and a sparks which is a tea and alcohol beverage. [August 8, 2012 RP 95-96]. Initially, the defendant drove and continued to do so towards their destination, while Ms. Padillo fell asleep. [August 8, 2012 RP 96]. Prior to going to sleep, Ms. Padillo took off her pants so as to "flirt" with Mr. HARRINGTON, and so he would think she was "cute." [August 8, 2012 RP 96, 129]. She awoke sometime later and discovered Mr. HARRINGTON had drank most of the malt liquor. [August 8, 2012 RP 96, 129]. She found Mr. HARRINGTON to be in a good mood. [August 8, 2012 RP 96-97].

At some point, they shared the remaining "Spark" drink, and she became "tipsy." [August 8, 2012 RP 97, 132]. They both began "singing and dancing" while Mr. HARRINGTON continued to drive. [August 8,

2012 RP 97]. However, when she noticed that Mr. HARRINGTON seemed a little tipsy and was driving erratically, Ms. Padillo took over the driving. [August 8, 2012 RP 97, 132-33]. She then felt okay to drive. [August 8, 2012 RP 97-98, 132]. She got out of the truck and went around to the driver's side of the truck; she was still in her underwear at the time. [August 8, 2012 RP 133-34]

Later on, before reaching Grand Coulee, the couple pulled off the highway in order to have consensual sex but a semi-truck pulled up nearby and interrupted their plans, so they decided against having sex and drove on. [August 8, 2012 RP 98-99, 119, 130-32]. The couple then began listening to music. [August 8, 2012 RP 98]. When a song "Irreplaceable" came on the CD player, they got into a playful argument. [August 8, 2012 RP 99]. Ms. Padillo does not like the song because Mr. HARRINGTON used to taunt her with it in terms of the possibility of cheating on her. [August 8, 2012 RP 99].

Eventually, the couple got into a full blown argument over the song during she was trying to take the CD out of the player and Mr. HARRINGTON kept returning the CD to the player. [August 8, 2012 RP 99; August 9, 2012 RP 176]. When the CD eventually got broken, the defendant got mad and back-handed her in the face. [August 8, 2012 RP 99].

As a result, Ms. Padillo pulled the truck over and parked. [August

8, 2012 RP 99]. At this point, she was also extremely angry and started pulling Mr. HARRINGTON's braids and told him never to hit her again. [August 8, 2012 RP 99, 134; August 9, 2012 RP 176]. Ms. Padillo eventually let go of his hair and he started punching her in the face several times and bloodied her nose. [August 8, 2012 RP 99-100; August 9, 2012 RP 176]. At this point, she thought her nose was broken. [August 8, 2012 RP 99-100]. The defendant responded that she had hit him first, and it was her fault. [August 8, 2012 RP 100]. Her face was covered with blood. [August 8, 2012 RP 100]. She began screaming at the defendant, and told him to get out of the truck and to call his mother or sister to come pick him up. [August 8, 2012 RP 100].

At some point, she then found her cell phone and tried unsuccessfully to call 911. [August 8, 2012 RP 100]. Mr. HARRINGTON saw who she was trying to call and became angry again, so she exited the truck. [August 8, 2012 RP 100]. Once again, she was still not in her jeans and only wearing her underwear. [August 8, 2012 RP 100-01].

Ms. Padillo started running down the road in order to find help. [August 8, 2012 RP 101]. The defendant followed her in the truck and asked her to get back in. [August 8, 2012 RP 101; August 9, 2012 RP 176]. Because there were no houses in the area, she eventually got back in the truck in the passenger seat. [August 8, 2012 RP 101; August 9, 2012

RP 176-7].

Mr. HARRINGTON then started driving again. [August 8, 2012 RP 101; August 9, 2012 RP 177]. During this time, she told him she wanted nothing further to do with him. [August 8, 2012 RP 101]. This got him really upset. [August 8, 2012 RP 101]. As a result, Mr. HARRINGTON told Ms. Padillo that he had been cheating on her with his ex-girlfriend, Amanda, the day before. [August 8, 2012 RP 103, 105, 110, 118, 135; August 9, 2012 RP 177]. This, in turn, made her extremely angry. [August 8, 2012 RP 135]. The couple often fought over the possibility of other women. [August 8, 2012 RP 125, 126].

Ms. Padillo tried once again to get out of the truck. [August 8, 2012 RP 103; August 9, 2012 RP 177]. Mr. HARRINGTON grabbed her by the hair, then pulled her back inside the vehicle and told her to close the door which she did. [August 8, 2012 RP 103; August 9, 2012 RP 177]. Mr. HARRINGTON then slammed her head into the passenger window several times. [August 8, 2012 RP 103, 135-36; August 9, 2012 RP 177].

The defendant then continued to drive this time to his sister's home in Omak, rather than to his mother's residence. [August 8, 2012 RP 103]. At first, Padillo felt relieved. [August 8, 2012 RP 103]. However, further down the highway, Mr. HARRINGTON pulled off on a side road, parked the truck and turned lights off. [August 8, 2012 RP 105].

He then pulled down his pants and indicated to Ms. Padillo that he

wanted her to perform oral sex on him. [August 8, 2012 RP 105; August 9, 2012 RP 178]. She did not want to do this. [August 8, 2012 RP 105; August 9, 2012 RP 178]. Nevertheless, he grabbed her by the hair, pulled her head down and forced her mouth onto his penis. [August 8, 2012 RP 105; August 9, 2012 RP 178]. All along, she was crying and her jaw was shaking. [August 8, 2012 RP 105]. Eventually, he let her up. [August 8, 2012 RP 105; August 9, 2012 RP 178].

The defendant then moved her over into the passenger seat of the vehicle. [August 8, 2012 RP 106, 136]. Mr. HARRINGTON told her to remove her underwear, and she complied. [August 8, 2012 RP 106]. Mr. HARRINGTON then picked Ms. Padillo and placed her on his lap so that she was facing the windshield. [August 8, 2012 RP 106]. He first penetrated her anal cavity from behind with his penis. [August 8, 2012 RP 106; August 9, 2012 RP 178].

Later on, Mr. HARRINGTON penetrated Ms. Padillo's vagina and he ejaculated. [August 8, 2012 RP 106-07; August 9, 2012 RP 178]. Finally, Mr. HARRINGTON entered her anally once more, and continued to "pump" even though she was screaming and said it hurt. [August 8, 2012 RP 106-07; August 9, 2012 RP 178]. In response, he told her to shut up. [August 8, 2012 RP 106-07]. Eventually, he did stop and moved her back into the driver's seat. [August 8, 2012 RP 107, 136].

Ms. Padillo asked Mr. HARRINGTON for her pants because she

felt she might be "leaking" blood. [August 8, 2012 RP 107, 108, 137-38]. He gave her pants to her, and she put them on. [August 8, 2012 RP 107, 114]. Ms. Padillo then drove to Mr. HARRINGTON's sister Sophia's home in Omak. [August 8, 2012 RP 107].

After they arrived, Ms. Padillo went inside to use the bathroom. [August 8, 2012 RP 108-09]. Sometime later, she allegedly saw her keys on the floor and, as she attempted to retrieve them, Mr. HARRINGTON grabbed her, pushed her to the floor, and began kicking her in the back and spitting on her. [August 8, 2012 RP 109-10, 138-39; August 9, 2012 RP 179]. The defendant's sister convinced her to stay until the morning which she did. [August 8, 2012 RP 109-10].

Earlier the next morning, Ms. Padillo found her keys in cushions of the sofa, "sneaked" out of the house and drove back to Spokane. [August 8, 2012 RP 109-10, 139]. Upon arriving in town, she first went to her work place, Manor Place. [August 8, 2012 RP 112-13, 141-42].

Eventually, a co-worker, Stephanie Ramirez, had her taken to Holy Family Hospital, where Ms. Padillo was treated and examined by Dr. Charles Roberts and the nursing staff for injuries and possible evidence of the alleged rape. [August 8, 2012 RP 26-27, 74, 112-13; August 9, 2012 RP 170-74, 186-95]. During this same time, she was interviewed by Spokane City police officer, Marie Rosenthal, who also collected physical evidence from the alleged victim, Ms. Padillo. [August 8, 2012 RP 36-50,

127-28].

Law enforcement in Okanogan County, State of Washington, later contacted Ms. Padillo by telephone in Arizona. [August 8, 2012 RP 25-26, 32-33].

b. Defendant's rendition of the facts. In late September or early October, 2011, the parties became acquainted and, roughly a month later, became boyfriend and girlfriend. [August 9, 2012 RP 280-81]. They lived together for a time and had sex once or more a day. [August 9, 2012 RP 280-81].

During the course of their relationship, the complaining witness, Chynna Jane Padillo, often became extremely jealous of other women, including an ex-girlfriend of the defendant's named Amanda. [August 9, 2012 RP 282-84]. On occasion, she would even go as far as to smell "down there" when he had been gone for a time by himself. [August 9, 2012 RP 283]. Moreover, it was Ms. Padillo habit to act out when she became jealous over other women. [August 9, 2012 RP 286]. In this regard, there had been a few suicide attempts on her part. [August 9, 2012 RP 286]. On at last one other occasion when she was angry, Mr. Padillo had chased Mr. HARRINGTON down in her truck when he had attempted to extricate himself from the furor. [August 9, 2012 RP 286].

Leading to the events in question, on February 4, 2012, the parties left Spokane around 7:00 p.m., and headed toward Mr. HARRINGTON's

mother's home in Oroville, Okanogan, State of Washington. [August 9, 2012 RP 286-78]. Originally, Mr. HARRINGTON had planned on traveling alone but then they decided that Ms. Padillo would accompany him on the sojourn. [August 9, 2012 RP 286-87].

Prior to leaving, Ms. Padillo smoked some oxycodone. [August 9, 2012 RP 287-88]. She also smoked some more before they went passed the Northern Quest Casino in Airway Heights, Spokane County, State of Washington. [August 9, 2012 RP 288].

At Airway Heights, Ms. Padillo took over the driving since he did not have a valid driver's license. [August 9, 2012 RP 288-89]. Thereafter, he drank a 40 ounce Old English malt liquor which they had purchased prior to leaving Spokane. [August 9, 2012 RP 289].

After traveling passed Grand Coulee, Okanogan County, State of Washington, Mr. HARRINGTON took over the driving. [August 9, 2012 RP 289]. They stopped at gasoline station in Grand Coulee and purchase three 30 ounces Sparks and a raspberry Twisted Tea. [August 9, 2012 RP 290]. He drank the latter beverage. [August 9, 2012 RP 290]. The Sparks drinks were for Ms. Padillo, and she consumed all three during the course of their trip. [August 9, 2012 RP 291].

When they were just past Nespelem, Ms. Padillo "went down" on him and performed oral sex. [August 9, 2012 RP 291]. Mr. HARRINGTON shortly thereafter pulled off of highway 155, onto the

shoulder, and then they had sexual intercourse. [August 9, 2012 RP 292-93]. Ms. Padillo had her pants and panties off at the time. [August 9, 2012 RP 292-93]. They engaged in sex in a "doggie style position." [August 9, 2012 RP 294]. He first entered her vaginally, then anally and, finally, vaginally again. [August 9, 2012 RP 294].

They also had anal sex a few days before. [August 9, 2012 RP 294]. Also, the anal sex during their trip was not forced. [August 9, 2012 RP 294]. Ms. Padillo was "moaning and moving around" the entire time. [August 9, 2012 RP 294].

After engaging in sexual intercourse, Mr. HARRINGTON continued driving. [August 9, 2012 RP 295]. Later, they got into a fight over the song "Irreplaceable" by Beyonce. [August 9, 2012 RP 295-96]. Ms. Padillo did not like not the song because he had commented sometime prior that, in relation to the words of the song, he could have another "chick" in a minute. [August 9, 2012 RP 296]. Ever since then she has hated the song. [August 9, 2012 RP 296].

At first, she kept ejecting the CD while he, in turn, kept placing it back in the player. [August 9, 2012 RP 296]. Eventually she became enraged and began pulling his hair braids. [August 9, 2012 RP 297]. After an onslaught of physical assaults upon one another including him slapping her, Ms. Padillo finally got out of the truck and began walking down the highway. [August 9, 2012 RP 297].

Mr. HARRINGTON followed her and asked that she get back in the vehicle. [August 9, 2012 RP 298]. Eventually she did, and there were no more incidents before they arrived at his sisters' residence in Omak. [August 9, 2012 RP 298]. Although there were no further physical altercation while route, the issue of infidelity continued. [August 9, 2012 RP 298]. Ms. Padillo said a couple of times that perhaps she would have sexual relations with someone else and then he could see how it feels. [August 9, 2012 RP 298]. She also asked Mr. HARRINGTON whether he had ever cheated on her. [August 9, 2012 RP 298]. He would not answer her. [August 9, 2012 RP 298-99].

Sometime later, Mr. HARRINGTON got out of the driver's side of the truck, went around to the passenger side and then Ms. Padillo continued driving. [August 9, 2012 RP 299]. Eventually, they arrived at his sister's home. [August 9, 2012 RP 299]. After they got there, Ms. Padillo only accused Mr. HARRINGTON of assaulting her nothing else. [August 9, 2012 RP 300-01]. The next morning, Mr. HARRINGTON went to Oroville to his mother's home. [August 9, 2012 RP 305]. Later on, he discovered that Ms. Padillo would not respond to his cell phone messages. [August 9, 2012 RP 305-06]. Eventually, he got a text from Stephanie Ramirez indicated that Ms. Padillo had said that he had forced her to have sex. [August 9, 2012 RP 305-06]. Later on, detective Kreg Sloan contacted him and said he was being accused of rape and assault.

[August 9, 2012 RP 307]. In March, he learned that a warrant had been issued for his arrest. [August 9, 2012 RP 308]. He never forced Ms. Padillo to have sex and denied having done so. [August 9, 2012 RP 313-14].

2. Procedural history. The defendant, STEVEN P. HARRINGTON, was arrested and charged by information on March 2, 2012, with the crime of rape in the second degree by forcible compulsion [RCW 9A.44.050(1)(a)], and unlawful imprisonment [RCW 9A.40.040 and RCW 9A.40.010(1)], which offenses allegedly occurred on February 5, 2012. [CP 156-58]. Mr. HARRINGTON was later arraigned on April 30, 2012, in the superior court of Okanogan County, State of Washington, under cause no. 12-1-00068-7, and pled not guilty to the charges. Following the superior court's June 25, 25, 2012, grant of a continuance of the original trial date pursuant to the provisions of Rule 3.3(f)(2) of the Washington Superior Court Criminal Rules [CrR] [June 25, 2012 RP 8], trial commenced in this matter on August 7, 2012. [August 7, 2012 RP 1, et seq.].

During the course of jury selection, the superior court on August 8, 2012, allowed the plaintiff, STATE OF WASHINGTON, to voir dire prospective juror no. 23 [Mirrick Nordhaugen] about the contents of her jury questionnaire with respect to her having been previously named as a "defendant in a criminal case." [August 7, 2012 RP 92-94]. This was

done without the prosecution having first disclosed in open court the nature or substance of the crime for which the juror had been charged, nor its final disposition after trial. [August 7, 2012 RP 92-94]. Likewise, no analysis was undertaken by the court beforehand with respect to the requirements mandated by State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). [August 7, 2012 RP 92-94]. This was so even though Bone-Club had earlier been referenced as a consideration when selecting this particular juror questionnaire. [August 7, 2012 RP 27-28]. Ms. Nordhaugen was eventually dismissed for cause by the prosecution based upon her answers to the juror questionnaire and her inaudible comments during oral examination by the STATE. [August 7, 2012 RP 92-94].

After the jury was empanelled, and during the presentation of the prosecution's case-in-chief, the court also allowed juror no. 8 [Carrie Cockle] to be interviewed in closed session, out of the hearing of the other seated jurors and the public, about her acquaintance and familiarity with the defendant's sister without again conducting any analysis under Bone-Club. [August 8 Trial RP 64, 65, 67-68]. Such contacts with Sophia Harrington included working with her at Wal-Mart and also being friends on Facebook. [August 8, 2012 RP 67]. It was only after the closed examination of Ms. Cockle that the court advised the other jury members that the one juror was acquainted with a potential witness and a relative of

the defendant, and that the panel would continue. [August 8 Trial RP 69]. Ms. Harrington was never identified to the jury panel as being this person. [August 8 Trial RP 69].

During the STATE's case-in-chief, the prosecution presented the testimony of the complaining witness, Chynna Jane Padillo, along with several other witnesses who stated Ms. Padillo seemed distraught, traumatized and upset when they had contact with her shortly after the alleged February 5 incident [August 8, 2012 RP 38, 54, 59-61], as well as her friend, Stephanie Ramirez, who testified the complaining witness had told her she and the defendant, STEVEN P. HARRINGTON, had gotten into a fight and he raped her. [August 8, 2012 RP 72-74, 80-81].

In addition to the testimony of these lay witnesses, and also the investigating officers, Okanogan County sheriff's detective Kreg Sloan [August 8, 2012 RP 25-35], and Spokane City police officer Marie Rosenthal [August 8, 2012 RP 36-50], the prosecution presented the expert testimony of Dr. Charles Roberts who had examined Ms. Padillo on February 5 after she was taken to Holy Family Hospital in Spokane. [August 9, 2012 RP 170-199]. Initially, she gave him a history of the alleged incident from the evening before, and seemed to be "emotionally traumatized." [August 9, 2012 RP 176-81]. Dr. Roberts then undertook a physical examination of Ms. Padillo during which he observed swelling, bruising and tenderness over various locations on her body which were

consistent with her having been physically assaulted. [August 9, 2012 RP 181-86, 191-92].

Later on, he conducted a full pelvic and internal examination of Ms. Padillo, and did not find any tears, bleeding, soft tissue injury or other trauma to the vaginal area, although he opined that this lack of any vaginal trauma was not necessarily inconsistent with a rape having occurred. [August 9, 2012 RP 187-89, 194-96]. In addition, he attempted to examine her anal cavity but she demonstrated tenderness in this area, and so he did not conduct any internal visual inspection of the anus, except for swabs and samples taken from the exterior perineum area. [August 9, 2012 RP 189-90].

Overall, Dr. Roberts found no tears, lacerations or bleeding in the anal area. [August 9, 2012 RP 213-14]. Again, tenderness and sensitivity were the only symptoms which the Ms. Padillo demonstrated during the course of Dr. Robert's examination. [August 9, 2012 RP 189-90].

Finally, the prosecution presented the testimony of Beau Baggenstoss who is employed with the Washington State Patrol crime laboratory. [August 9, 2012 RP 262-63]. Mr. Baggenstoss tested the jeans which Ms. Padillo had worn the evening of February 5, and had discovered a mix of secretions which proved to be the semen of the defendant combined with a component of vaginal secretions from Ms. Padillo. [August 9, 2012 RP 273]. This expert witness found no evidence

of blood stains during his examination and testing of the jeans. [August 9, 2012 RP 274-75].

In response to the STATE's case, the defendant testified on his own behalf to the effect that he had, in fact, physically assaulted Ms. Padillo during the altercation while in transit, but that all sexual contacts had been consensual. [August 9, 2012 RP 292-95, 296-98]. In turn, his attorney during closing argument pointed out that short of Ms. Padillo's claim that she had been raped, the physical evidence of Dr. Roberts and Mr. Baggenstoss was just as consistent with consensual sex since there was no injury suggesting otherwise, and Ms. Padillo had a history of engaging in behavior going over the top such as false accusations against others. [August 9, 2012 RP 360-63].

On August 9, 2012, the jury entered a verdict of guilty on both counts. [August 9, 2012 RP 379-82; CP 3, 76]. The court accepted the verdict, and Mr. HARRINGTON was sentenced on December 31, 2012, to a minimum term of 147 months imprisonment. [December 31, 2012 RP 23-30; CP 7].

This appeal follows. [CP 2]. Additional, facts and circumstances are set forth below as they relate to a particular issue and argument raised by the appellant.

D. STANDARD OF REVIEW

The standard for review of the sufficiency of evidence to convict is whether, after viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements and facts of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Soderquist, 63 Wn.App. 144, 148, 816 P.2d 1264 (1991). Also, an error associated with a violation of the public trial right is constitutional in nature and reviewed de novo. State v. Frawley, 140 Wn.App. 713, 167 P.3d 593, 595-97 (2007), and its progeny. Finally, an error of constitutional magnitude including a violation of the public trial right is presumed prejudicial and requires reversal unless the prosecution establishes that such error is harmless beyond a reasonable doubt. Frawley, at 714; see also, State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001).

E. ARGUMENT

1. There was insufficient evidence to convict the defendant, STEVEN P. HARRINGTON, beyond a reasonable doubt, of any of the charges filed under counts 1 and 2 of the information as alleged by the plaintiff, STATE OF WASHINGTON. [Issues Nos. 1 and 2].

As indicated above, the gravamen of the defense of the appellant,

STEVEN P. HARRINGTON, was that the sexual liaisons at issue were consensual in nature, and not the result of any "forcible compulsion" claimed by the STATE OF WASHINGTON. Accordingly, given the controverted evidence, the charges against Mr. HARRINGTON for the crimes of rape in the second degree by forcible compulsion [RCW 9A.44.050(1)(a)], and unlawful imprisonment [RCW 9A.40.040 and RCW9A.40.010(1)], were not subject to proof beyond a reasonable doubt.

In reviewing the sufficiency of evidence to convict, the appellate court must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements and facts necessary to establish the crime for which the defendant is charged beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); Juan H. v. Allen, 408 F.3d 1262, 1274 (9th cir. 2005); Gibson v. Ortiz, 387 F.3d 812, 820 (9th cir. 2004); State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Dvkstra, 127 Wn.App. 1, 10, 110 P.3d 758 (2005); State v. Warnick, 121 Wn.App. 737, 741, 110 P.3d 758 (2004); State v. Soderquist, 63 Wn.App. 144, 148, 816 P.2d 1264 (1991). Stated differently, the reviewing court must be convinced beyond a reasonable doubt that the prosecution's evidence against the accused is substantial and compelling, tending to establish the circumstances from which the jury could have

reasonably inferred the act or acts required to be proved. See, State v. Isom, 18 Wn.App. 62, 66-67, 567 P.2d 246 (1977). In this vein, the evidence when considered as a whole must be consistent with the hypothesis the defendant is guilty. Id.

a. Rape in the second degree.

Here, the record reflects that the defense requested inclusion in the court's instructions to the jury the so-called consent instruction [WPIC 18.25] and, after considering the request, the court granted the request of the defendant. [August 9, 2012 RP 323-25]. Under the court's instruction no. 8, the jury was instructed:

A person is not guilty of rape if the sexual intercourse is consensual. Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

The defendant has the burden of proving that the sexual intercourse was consensual by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

[CP 91].

In turn, the prosecution theory of the case as set forth in jury instruction no. 4 was that "[a] person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another

person by forcible compulsion." [CP 87]. Under instruction no. 6, "[f]orcible compulsion means physical force that overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another person or in fear of being kidnapped or that another person will be kidnapped." [CP 89].

Given the indisputable fact the evidence presented in this case entails a classic "he said, she said" situation, it is just as likely that the parties engaged in consensual sex rather than a rape having occurred on February 5, 2012. The later situation is even more plausible when the fact Ms. Padillo harbored ongoing jealousy and anger over Mr. HARRINGTON's involvement with other women, had a habit of over-reacting when upset, and was accustomed to acting out and engaging in dramatics. Clearly, these factors and characteristics draw her accusations of rape squarely into doubt. Furthermore, even Ms. Padillo acknowledged during her testimony that she and the defendant had at least twice attempted to have consensual sex that evening, and she took her jeans off so that Mr. HARRINGTON might think she was "cute."

Furthermore, the simple fact that Ms. Padillo appeared distraught, traumatized and upset could just as easily be explained as her response to having been assaulted by Mr. HARRINGTON during the physical altercation which both parties described during each of their testimonies. Finally, the physical evidence taken by both the STATE's experts, Dr.

Roberts and Mr. Baggenstoss, is likewise equivocal at best. There was nothing reflecting or confirming a rape, as opposed to any sexual relations having been consensual.

Under these circumstance, there was more than sufficient evidence to establish the defense's claim of consent by a preponderance of the evidence [CP 91] and the jury should have found otherwise, whereas there was clearly no evidence of "forcible compulsion" beyond a reasonable doubt except for Ms. Padillo bald claims which could have been easily fueled due to jealousy and anger over Mr. HARRINGTON alleged "cheating." Thus, Mr. HARRINGTON conviction for rape in the second degree should be reversed on this appeal. RAP 12.2.

b. Unlawful imprisonment. For the same reasons, the charge of unlawful imprisonment [RCW 9A.40.040] cannot stand in the face of consensual sexual relations, nor can it attributed to any physical altercation which occurred that evening since both parties' acknowledge that Ms. Padillo was at some point free to get out of the truck and run away.

Instruction no. 9 provided that:

A person commits the crime of unlawful imprisonment when he or she knowingly restrains the movements of another person in a manner that substantially interferes with the other person's liberty if the restraint was without legal authority and was without the other person's consent or accomplished by physical force, intimidation, or deception.

The offense is committed only if the person acts knowingly in all these regards.

[CP 92]. In this regard, unlawful imprisonment can only occur when the "means of escape . . . present a danger or more than a mere inconvenience." State v. Kinchen, 92 Wn.App. 442, 452 n.16, 963 P.2d 928 (1998). In other words, if there is a known, safe means of escape involving only a slight inconvenience, there is no imprisonment. Id.

Consequently, the allegation that Mr. HARRINGTON at one point took Ms. Padillo's keys while they were at his sister's house does serve to make out the crime of unlawful imprisonment. After all, by her own testimony, she later found the keys in the sofa. In sum, Mr. HARRINGTON conviction for unlawful imprisonment should likewise be reversed on this appeal. RAP 12.2.

2. The failure of the superior court to abide by the mandates of Bone-Club, as identified in Part C, above, violated Mr. HARRINGTON's constitutional "public trial right" as guaranteed under the sixth and fourteen amendments to the United States constitution and Article I, sections 10 and 22, of the Washington state constitution. [Issues nos. 3 through 5].

As outlined in the "Statement of Case," above in Part C, the superior court violated on at least two [2] occasions the public trial right of the appellant, STEVEN P. HARRINGTON, with respect to its failure to adhere to the mandate of State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Again, during the course of jury selection, the superior court allowed the plaintiff, STATE OF WASHINGTON, to voir dire prospective juror no. 23 [Mirrick Nordhaugen] about the contents of her

jury questionnaire with respect to her having been previously named as a "defendant in a criminal case." [August 7, 2012 RP 92-94]. This was done without the prosecution having first disclosed in open court the nature or substance of the crime for which the juror had been charged, nor its final disposition after trial. [August 7, 2012 RP 92-94]. Likewise, no analysis was undertaken by the court beforehand with respect to the requirements mandated by State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). [August 7, 2012 RP 92-94]. This was so even though Bone-Club had earlier been referenced as a consideration when selecting this particular juror questionnaire. [August 7, 2012 RP 27-28]. Ms. Nordhaugen was eventually dismissed for cause by the prosecution based upon her answers to the juror questionnaire and her inaudible comments during oral examination by the STATE. [August 7, 2012 RP 92-94].

Suffice it to say, the guaranty of open criminal proceedings extends to voir dire. State v. Leyerle, 158 Wn.App. 474, 479, 242 P.3d 921 (2010). As the court further noted in Leyerle, at 484, "[s]eparate questioning of potential jurors is routinely recorded . . . , and the mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures. [Citations omitted]. Here, the inquiries address to Ms.

Nordhaugen were in open court and were recorded. However, her specific answer to the questionnaire which drew attention to her by the prosecution in terms of having previously been named as a criminal defendant was not.

While the appellant is fully mindful of the decisions in In re Yates, 117 Wn.2d 1, 29-30, 296 P.3d 872 (2013), and State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013), where the questionnaire itself has no independent effect on the trial, and only served as a "framework" for oral voir dire, so as not to implicate the openness of the proceeding, this is not the case here.

First, it is clear from the record that the undisclosed nature of the criminal charge against prospective jury no. 23 obviously drew attention to her from the prosecution. Second, even the court became concerned after the fact, so as to think it wise in terms of Bone-Club to require the jury questionnaires be "scanned" and made a part of the record, this was "too little, too late" as suggestion by the court in Leyerle, at 484. Hence, the appellant submits that this constituted prejudice and a violation of the public trial right with the remedy being reversal of his convictions in this case. See, State v. Frawley, 140 Wn.App. 713, 721, 167 P.3d 593 (2007); State v. Easterling, 157 Wn.2d 167, 174, 181, 137 P.3d 825 (2006).

This same error involving a violation of the public trial right, and failure to apply and make Bone-Club findings, was further compounded by the court's allowing a seated jury to later be examined outside public view.

It is axiomatic that the trial court may not close a courtroom without first applying and weighing the requirements set forth in Bone-Club, and entering findings justifying such closure. Frawley, at 720-21, Easterling, at 175.

Again, during the presentation of the prosecution's case-in-chief, the court allowed juror no. 8 [Carrie Cockle] to be interviewed in closed session, out of the hearing of the other seated jurors and the public, about her acquaintance and familiarity with the defendant's sister without again conducting any analysis under Bone-Club. [August 8 Trial RP 64, 65, 67-68]. Such contacts with Sophia Harrington included working with her at Wal-Mart and also being friends on Facebook. [August 8, 2012 RP 67]. It was only after the closed examination of Ms. Cockle that the court advised the other jury members that the one juror was acquainted with a potential witness and a relative of the defendant, and that the panel would continue. [August 8 Trial RP 69]. Ms. Harrington was never identified to the jury panel as being this person. [August 8 Trial RP 69].

Once again, the ruling and opinion expressed in Leyerle, at 484, causes this to be reversible error. The simple fact this examination of juror no. 8 was recorded is not enough. The matter should have been conducted in public view as mandated by the sixth and fourteenth amendments to the United States constitution, and Article I, sections 10 and 22 of the Washington state constitution. Id. Consequently, the

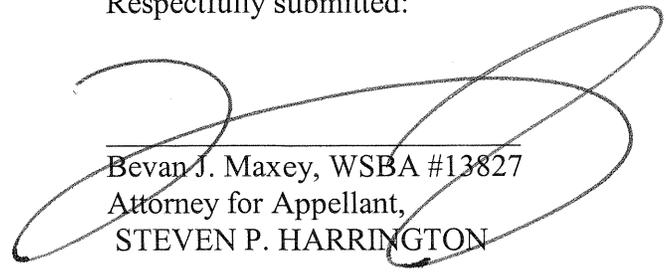
convictions, judgment and sentence entered against the appellant should be reversed. RAP 12.2.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, STEVEN P. HARRINGTON, respectfully requests that the criminal convictions, judgment and sentence entered against him in this matter be reversed, and the underlying charges be dismissed with prejudice.

DATED this 30th day of January, 2014.

Respectfully submitted:



Bevan J. Maxey, WSBA #13827
Attorney for Appellant,
STEVEN P. HARRINGTON