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Court of Appeals
Division III
State of Washington

NO. 313824

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

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

STEVEN P.HARRINGTON

DEFENDANT/APPELLANT

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

I. Summary of Facts.

The victim in this case, Ms. Padilla, and the defendant, Mr. Harrington, began a dating relationship in November of 2011. [August 8, 2012 RP 92:15-18]. The relationship lasted until the date of the incident in this case, February 5, 2012. [August 8, 2012 RP 92:19-23]. After a brief argument, Mr. Harrington and Ms. Padilla agreed to drive to Oroville, Washington to visit Mr. Harrington's parents. [August 8, 2012 RP 93:5-15]. Prior to leaving, Ms. Padilla and Mr. Harrington smoked a pill of Oxycodone. [August 8, 2012 RP 93:23-94:6]. Ms. Padilla also gave Mr. Harrington consensual oral sex. [August 8, 2012 RP 94:17].

While driving, Mr. Harrington consumed alcohol. [August 8, 2012 RP 96:5-7]. Because the couple had gotten into an argument before leaving the house, Ms. Padilla took off her pants and was only wearing her underwear in the vehicle in an attempt to try to be cute and flirty. [August 8, 2012 RP 96:13-19]. After waking up from a short nap, Ms. Padilla began sharing another alcoholic beverage with Mr. Harrington, who was still driving. [August 8, 2012 RP 97:8]. By that time, Ms. Padilla felt she was in a better condition to drive so she took over driving for Mr. Harrington. [August 8, 2012 RP 97:21-98:15]. After a little more driving, the couple pulled to the side of the road to try to have consensual sex but

their attempt was cut short when a semi-truck pulled up and shone its lights on their vehicle. [August 8, 2012 RP 98:15-19].

Later on during the drive, the couple got into an argument over a song that came on the CD they were listening to; a song that Mr. Harrington would use to taunt Ms. Padilla with whenever they would argue. [August 8, 2012 RP 99:16-20]. Mr. Harrington got angry and slapped and then back handed Ms. Padilla. [August 8, 2012 RP 99:20-21]. Ms. Padilla pulled the vehicle over, grabbed him by the hair and told him never to do that again. [August 8, 2012 RP 99:21-23]. Mr. Harrington then punched Ms. Padilla in the face several times until her nose was bleeding. [August 8, 2012 RP 100:1-2].

Ms. Padilla attempted to call 9-1-1 from her phone, but she did not have service so she grabbed Mr. Harrington's phone and when he saw who she was calling, he became very angry. [August 8, 2012 RP 100:21-24]. Ms. Padilla got out of the vehicle because she was afraid he was going to hit her again. [August 8, 2012 RP 100:24-25]. Still in her underwear, Ms. Padilla started running down the road looking for anyone to help, but nobody was around so she ended up getting back into the vehicle when Mr. Harrington drove over to where she was. [August 8, 2012 RP 101:1-21]. When Ms. Padilla told him she didn't want to have anything to do with him anymore, Mr. Harrington told her that he had

cheated on her that day with his ex-girlfriend. [August 8, 2012 RP 102:3-4].

At that point, Ms. Padilla tried to get out of the vehicle again. [August 8, 2012 RP 103:4]. Mr. Harrington grabbed her by the hair and pulled her back into the vehicle, telling her to “shut the fucking door.” [August 8, 2012 RP 103:5-6]. Mr. Harrington then slammed her head into the window several times. [August 8, 2012 RP 103:11-13]. Ms. Padilla asked if they could just go to Mr. Harrington’s sister’s house in Omak, Washington, to which he agreed. [August 8, 2012 RP 103:18-22]. However, Mr. Harrington drove a short distance, pulled off onto a dirt road, turned the car around, and turned the lights off. [August 8, 2012 RP 105:5-7]. He then pulled his pants down and looked at Ms. Padilla in a way that said “I know what I want you to do.” [August 8, 2012 RP 105:8-10].

Ms. Padilla asked him please not to do this. [August 8, 2012 RP 105:11]. He told her to “shut the fuck up,” grabbed her by the hair and forced her head onto his penis. [August 8, 2012 RP 105:12-13]. Ms. Padilla attempted to perform oral sex because he had her by the hair, but she was crying and her jaw was shaking. [August 8, 2012 RP 105:14-15]. Mr. Harrington then pulled her head up, picked her up by the hips and put her on his lap. [August 8, 2012 RP 105:19-23]. He told her to take off her

underwear and Ms. Padilla kept telling him he didn't have to do this. [August 8, 2012 RP 106:20-21]. Mr. Harrington put his penis into Ms. Padilla's anus, then switched to her vagina where he ejaculated, and then put his penis back into her anus. [August 8, 2012 RP 106:24-107:1]. Ms. Padilla kept screaming and telling him to stop, but Mr. Harrington kept telling her to shut up. [August 8, 2012 RP 107:1-2].

Mr. Harrington then told Ms. Padilla to get off of him because he was done, so she got into the driver's seat and began driving to Mr. Harrington's sister's house. [August 8, 2012 RP 107:4-5, 18-20]. When they got to his sister's house, Mr. Harrington began crying and said "I really fucked up didn't I?" [August 8, 2012 RP 108:7]. Ms. Padilla wiped the blood from her face and ran into Mr. Harrington's sister's house and into the bathroom. [August 8, 2012 RP 108:14-18]. When she got into the house, a friend of Mr. Harrington's sister, Megan Archer, noticed blood on her nose. [August 8, 2012 RP 54:22-24]. Mr. Harrington barged into the bathroom and began screaming at Ms. Padilla. [August 8, 2012 RP 108:19-20]. Mr. Harrington eventually left the bathroom and his sister began trying to calm Ms. Padilla down. [August 8, 2012 RP 109:1-10].

Mr. Harrington then needed to use the bathroom so Ms. Padilla and his sister left the bathroom. [August 8, 2012 RP 110:9-11]. As Ms. Padilla was closing the door, she saw her keys on the floor behind Mr.

Harrington so she reached for her keys. [August 8, 2012 RP 110:13-15]. Mr. Harrington threw Ms. Padilla on the ground and started kicking her in the back and telling her she wasn't going anywhere. [August 8, 2012 RP 110:15-16]. He kept calling her a bitch, kicking her and spitting on her. [August 8, 2012 RP 110:16-18]. Ms. Padilla stayed the night at Mr. Harrington's sister's house because she thought it was the safest thing to do rather than go ask Mr. Harrington for her keys and put herself in more danger. [August 8, 2012 RP 111:1-4]. Ms. Padilla was able to find her keys in the sofa the next morning as well as Mr. Harrington's cell phone which contained texts to his ex-girlfriend saying he thinks he's going to go to jail. [August 8, 2012 RP 111:14,22].

Ms. Padilla left the house, stopped at a gas station and got directions to Spokane. [August 8, 2012 RP 112:13-14]. Ms. Padilla pulled over to a smoke shop where she got more directions to Spokane. [August 8, 2012 RP 112:25]. The employees noticed that she looked as though she had been crying and her hair was disheveled. [August 8, 2012 RP 60:17-21].

After getting back to Spokane, Ms. Padilla was taken to the hospital by a friend, Stephanie Ramirez. [August 8, 2012 RP 26:25]. The friend noticed that Ms. Padilla was shaken up and crying. [August 8, 2012 RP 73:12-15]. Ms. Padilla told Ms. Ramirez that on their way to Mr.

Harrington's sister's house, the two had gotten into a fight and Mr. Harrington had hit and raped her. [August 8, 2012 RP 74:2-3]. Ms. Padilla was examined by Dr. Charles Roberts. [August 9, 2012 RP 173:1-4]. Ms. Padilla told Dr. Roberts that she had been sexually assaulted by her boyfriend. [August 9, 2012 RP 175:4-5]. Ms. Padilla had scratches, soreness and swelling on her head and body consistent with an assault. [August 9, 2012 RP 183:3].

Officer Marie Rosenthal of the Spokane Police Department responded to the hospital where she contacted Ms. Padilla. [August 8, 2012 RP 37:18]. She noticed that Ms. Padilla was very upset, seemed distraught, and was crying while trying to tell the officer what happened. [August 8, 2012 RP 38:1-9]. The officer noticed multiple brushings all over her body, face and mouth, as well as bruising on her arms, legs, chest, back and forehead. [August 8, 2012 RP 39:1-13]. She had a scratch on her nose and a large scratch on her outer thigh. [August 8, 2012 RP 39:15,25]. The bruises were all fresh. [August 8, 2012 RP 43:18-19]. The officer inspected the vehicle and noticed blood on the front seat, on the center console, on the radio, in a cup, and in other areas of the vehicle. [August 8, 2012 RP 45:2-4,21-22;46:1-8,16-19].

On February 15, 2012, Mr. Harrington sent Ms. Padilla multiple messages on Facebook apologizing, stating he made a huge mistake, and

asking for Ms. Padilla to come back to him. [August 8, 2012 RP 120:18-121:14]. Detective Kreg Sloan of the Okanogan County Sheriff's Office had contact with Mr. Harrington on March 13, 2012. [August 9, 2012 RP 236:19-22]. When Det. Sloan informed Mr. Harrington that he had a warrant, Mr. Harrington replied, with no mention of rape by Det. Sloan, "how can you rape someone when you've been living with her?" [August 9, 2012 RP 237:11-13]. Mr. Harrington was arrested on April 17, 2012. [August 9, 2012 RP 238:8-11]. Ms. Padilla's clothing was tested and sperm was found in the inside of the jeans. [August 9, 2012 RP 273:7-8]. This area of the jeans was DNA tested and the male DNA matched a sample taken from Mr. Harrington. [August 9, 2012 RP 273:9-14].

Mr. Harrington's version of the events is primarily consistent with that of Ms. Padilla; however, under Mr. Harrington's version of the events, all sexual acts were consensual. According to Mr. Harrington, Ms. Padilla initiated oral sex with him during the drive. [August 9, 2012 RP 291:23-292:2]. Ms. Padilla initiated the oral sex by reaching over and rubbing Mr. Harrington and then performed oral sex while Mr. Harrington continued to drive. [August 9, 2012 RP 292:4-12]. Mr. Harrington then pulled over and they had consensual sex on the side of the road. [August 9, 2012 RP 292:17-18]. They had sex in the "doggie style" position, first vaginally, then anally, then vaginally again. [August 9, 2012 RP 294:1-9].

Ms. Padilla was moaning and moving around during the sexual encounter. [August 9, 2012 RP 295:2]. After they concluded having sex, they continued driving and shortly thereafter is when the argument began regarding the song that came on the CD. [August 9, 2012 RP 295:9-296:2]. Mr. Harrington's recantation of the physical altercation between the two at this point is also consistent with the recantation by Ms. Padilla. [August 9, 2012 RP 297:1-22].

II. Relevant Procedural History.

Mr. Harrington was charged with Count I, Rape in the Second Degree [RCW 9A.44.050(1)(a)] and Count II, Unlawful Imprisonment [RCW 9A.40.040]. [CP 156-158]. Mr. Harrington's jury trial was held on August 7, 2012, August 8, 2012, and August 9, 2012. Mr. Harrington was found guilty of both counts. [August 9, 2012 RP 379:17-23]. Mr. Harrington was sentenced on December 31, 2012. [December 21, 2012 RP 27-30].

Prior to beginning voir dire, the trial court and counsel engaged in a discussion regarding which juror questionnaire would be administered to the jury. [August 7, 2012 RP 27:13]. The version decided upon by the parties contained phrasing that it was a "confidential" questionnaire. [August 7, 2012 RP 27:15]. After a brief mention of *Bone-Club*, the court

and counsel agreed to strike the word “confidential” from the questionnaire. [August 7, 2012 RP 28:9-18].

During the State’s voir dire, the State asked the panel if any jurors had been accused of a crime. [August 7, 2012 RP 90:1-2]. Juror number 23, Mirrick Nordhaugen, raised her number and was subsequently questioned further by the State. [August 7, 2012 RP 90:8,92:13]. Ms. Nordhaugen was asked if she was comfortable sharing what happened. [August 7, 2012 RP 92:16]. Her response was inaudible to the record. [August 7, 2012 RP 92:18]. The State then asked if she had any hard feelings about having been accused of a crime. [August 7, 2012 RP 92:19-20]. Her response was again inaudible to the record; however, the State replied, “You do, okay.” [August 7, 2012 RP 92:21-22]. Ms. Nordhaugen was then asked whether she would be able to listen to all of the evidence with an open mind in this case or whether she might start out favoring one side before having heard the evidence. [August 7, 2012 RP 92:22-25]. Her response was again inaudible to the record. [August 7, 2012 RP 93:1]. The State replied, “You don’t think you’d be (inaudible)?” [August 7, 2012 RP 93:2]. The State then moved to strike Ms. Nordhaugen for cause. [August 7, 2012 RP 93:2-3].

The court followed this with its own questioning where Ms. Nordhaugen again indicated that she would not be able to decide the case

on the evidence; rather it would be affected or impacted by her past experiences. [August 7, 2012 RP 93:13-19]. The court granted the State's challenge for cause. [August 7, 2012 RP 93:23].

During the course of the trial, the court took a recess and during this recess, juror number 8, Carrie Cockle, informed the bailiff that she believed she knew Mr. Harrington's sister, a witness in this case. [August 8, 2012 RP 64:8-9]. The court discussed two options: first, the court could not do anything, or second, the court and counsel could talk to the juror, out of the presence of the other jurors, and conduct a brief voir dire of her. [August 8, 2012 RP 64:15-19]. The court decided to inquire of Ms. Cockle. [August 8, 2012 RP 64:25]. After the recess, the court reconvened on the record. [August 8, 2012 RP 66:19-23].

The court brought Ms. Cockle into the courtroom and had her sit in the jury box. [August 8, 2012 RP 65:1]. The court questioned Ms. Cockle about her relationship with Mr. Harrington's sister. [August 8, 2012 RP 67:13]. She was asked whether her casual relationship caused her concern about being fair and impartial. [August 8, 2012 RP 67:17-19]. Ms. Cockle indicated she had no such concern. [August 8, 2012 RP 67:20]. She was asked whether Mr. Harrington's sister conveyed anything about this case to her or whether she had any other information based on her acquaintance; again she said she did not. [August 8, 2012 RP 67:22-68:1].

Ms. Cockle was then permitted to remain on the jury. [August 8, 2012 RP 68:19]. There is nothing in the record to indicate that this voir dire was in a closed session or closed to the public in any way.

During a break in the trial, the court quickly brought up the question of scanning the juror questionnaires into the record. [August 9, 2012 RP 229:1]. The court stated it felt that, in light of *Bone-Club*, that the juror questionnaires should be scanned into the record. [August 9, 2012 RP 229:1-5]. The court reasoned that it is better to just scan them into the record rather than engage in the *Bone-Club* analysis. [August 9, 2012 RP 229:16-21]. The court decided to redact the jurors' names to maintain some sense of juror privacy. [August 9, 2012 RP 230:18]. Both the State and defense agreed to this decision. [August 9, 2012 RP 230:19-22].

ARGUMENT

I. There was sufficient evidence to support findings of guilt for both Counts I and II.

The standard of review on a challenge to the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); *State v.*

McPherson, 111 Wn.App. 747, 756, 46 P.3d 284 (Wn.App.Div.3, 2002). When the sufficiency of evidence is challenged on appeal, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201; *McPherson*, 111 Wn.App. at 756. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201; *Mines*, 163 Wn.2d at 391; *McPherson*, 111 Wn.App. at 756. The reviewing court considers circumstantial evidence equally reliable as direct evidence. *McPherson*, 111 Wn.App. at 756. Finally, credibility determinations are for the trier of fact and are not subject to review. *Mines*, 163 Wn.2d at 391. Thus, an argument that a witness was not credible is without merit. *Id.*

A. Rape in the Second Degree

The jury was instructed on the applicable law for the crime of Rape in the Second Degree as follows:

Instruction Number 4: "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."

Instruction Number 5: "Sexual intercourse mean that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or any act of sexual contact between persons involving the sex organ of one person in the mouth or anus of another whether such persons are of the same or opposite sex."

Instruction Number 6: “Forcible compulsion means physical force that overcomes resistance or a threat expressed 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.”

Instruction Number 7: “To convict the defendant of the crime of rape in the second degree each of the following three elements of the crime must be proved beyond a reasonable doubt. One, that on or about February 5, 2012 the defendant engaged in sexual intercourse with China Padilla. Two, that the sexual intercourse occurred by forcible compulsion. And three, that this act occurred in the State of Washington. ...”

Instruction Number 8: “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.”

[August 9, 2012 RP 336:1-337:19].

In this case there was sufficient evidence to find that the defendant had sexual intercourse with Ms. Padilla by forcible compulsion.

Appellant’s argument is essentially that because this is a “he said, she said” situation, that alone creates reasonable doubt. Appellant further argues that it was more likely than not that the intercourse was consensual

given that “Ms. Padilla 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.” [Appellant’s Brief at 23]. However, by Appellant making these arguments, Appellant is asking this Court to invade the province of the jury and make determinations of credibility of the witnesses, as this argument bears on Ms. Padilla’s motive to lie, rather than what factually occurred. By classifying this case as a “classic ‘he said, she said’” situation, Appellant essentially admits that there is sufficient evidence to find guilt as a classic he said, she said situation comes down to the credibility of the witnesses and who the jury believes is telling the truth.

Ms. Padilla testified that while they were driving, an argument ensued between the two. [August 8, 2012 RP 99:14-20]. She testified that the defendant slapped her and back handed her, so she pulled the vehicle over, grabbed his hair and told him never to do that again. [August 8, 2012 RP 99:21-22]. Mr. Harrington then punched her in the face several times causing her nose to bleed. [August 8, 2012 RP 100:1]. When she tried to get out of the car, Mr. Harrington grabbed her by the hair and pulled her back into the vehicle. [August 8, 2012 RP 103:5-6]. He then slammed her head into the window several times. [August 8, 2012 RP 103:12]. This violent assault is fairly compelling circumstantial evidence

that any sexual activity that took place thereafter would not be consensual as it is highly unlikely that Ms. Padilla would have consented to sex after receiving such a brutal beating.

Mr. Harrington drove the vehicle to another dirt road where he stopped the vehicle, pulled his pants down and looked at Ms. Padilla in a way that she recognized as a request for oral sex. [August 8, 2012 RP 105:6-10]. She testified that when she asked him not to do this, he told her to “shut the fuck up” and he grabbed her by the hair and forced her head onto his penis. [August 8, 2012 RP 105:12]. Her jaw was shaking and she was crying so Mr. Harrington picked her up by the hips and put her on his lap. [August 8, 2012 RP 106:21]. Ms. Padilla testified that the defendant put his penis in her anus. [August 8, 2012 RP 106:24]. He then put his penis in her vagina where he ejaculated, and then put his penis back into her anus. [August 8, 2012 RP 106:24-107:1]. She further testified that she did not consent to any of this sexual intercourse and that she kept telling him to stop and he kept telling her to shut up. [August 8, 2012 RP 107:2,119:1-3]. This direct testimony by Ms. Padilla provides more than enough evidence for a jury to find beyond a reasonable doubt that Ms. Padilla did not consent to the sexual intercourse.

Ms. Padilla’s testimony is corroborated by evidence that Mr. Harrington sent multiple apologies to her, first when they arrived at his

sister's house [August 8, 2012 RP 108:7] and then through multiple texts and Facebook messages [August 8, 2012 RP 120:18-121:8]. Officer Rosenthal testified that when she responded to Ms. Padilla's report, she had bruising on her arms, legs, chest, and forehead. [August 8, 2012 RP 39:4-13]. She had a scratch on her nose and a long scratch on her right outer thigh. [August 8, 2012 RP 39:15,25]. All the bruises were fresh and were just starting to form. [August 8, 2012 RP 43:18-19]. There was also blood found all over inside the vehicle. [August 8, 2012 RP 45:2-46:19]. A DNA test showed that Mr. Harrington's sperm was found on the inside of Ms. Padilla's pants. [August 9, 2012 RP 273:7-14]. All of this is further evidence that this incident was violent, and therefore not consensual. Any prior occurrences of oral sex or attempted consensual sex are irrelevant to whether the intercourse that took place was consensual or not as it is clear that a person can consent to sex in one instance, but refuse consent in another.

The burden was on the defendant to prove by a preponderance of the evidence that the intercourse was consensual. The jury heard the testimony of all the witnesses, including Ms. Padilla and Mr. Harrington. The jury determined, based on the evidence presented and their determinations of credibility of the witnesses, that Ms. Padilla's version of the events was true. Mr. Harrington did not prove the intercourse was

consensual by a preponderance of the evidence and it is improper for Appellant to essentially ask this Court to make that finding now. This court may not question the credibility of the witnesses, but may only review whether, assuming the truthfulness of the State's evidence and viewing that evidence in the light most strongly against the defendant, the jury could have found guilt beyond a reasonable doubt. There was sufficient evidence presented for the trier of fact to find Mr. Harrington guilty of Rape in the Second Degree.

B. Unlawful Imprisonment.

The jury was also instructed on the applicable law for the charge of unlawful imprisonment:

Instruction Number 9: "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."

Instruction Number 11: "To convict the defendant of the crime of unlawful imprisonment each of the following five elements of the crime must be proved beyond a reasonable doubt. One, that on or about February 5, 2012 the defendant restrained the movements of China Padilla in a manner that substantially interfered with her liberty. Two, that such restraint was A) without China's consent or B) accompanied by physical force, intimidation or deception and three, that such restraint was without legal authority, and [four] that with regards to elements 1, 2, and 3 the

defendant acted knowingly and Five, that any of these acts occurred in the State of Washington. ...”

[August 9, 2012 RP 337:20-339:2].

There was sufficient evidence for the jury to find Mr. Harrington guilty beyond a reasonable doubt for the crime of unlawful imprisonment. Appellant asserts that because Ms. Padilla was able to get out of the vehicle at one point, there was no unlawful imprisonment. Appellant further asserts that because Ms. Padilla later found her keys in the sofa, there was no unlawful imprisonment at Mr. Harrington’s sister’s house. Both of these assertions are erroneous and are based upon an incomplete collection of the testimony.

Though Ms. Padilla was able to get out of the vehicle at one point early on in the argument, she testified that when she tried to get out of the car after Mr. Harrington punched her in the face, he grabbed her by the hair and pulled her back into the vehicle. [August 8, 2012 RP 103:5-6]. He then slammed her head against the door several times. [August 8, 2012 RP 103:12]. This testimony is sufficient to make a finding of guilt beyond a reasonable doubt. Ms. Padilla attempted to get out of the vehicle and Mr. Harrington forcibly pulled her back inside, slammed her head against the wall and then raped her. This includes both physical force and

restraint of her movement and provides a sufficient basis for the jury's verdict.

The jury could also find the elements of unlawful imprisonment satisfied by the events which took place at Mr. Harrington's sister's house. When Ms. Padilla and Mr. Harrington were at his sister's house, Mr. Harrington wanted to use the bathroom so Ms. Padilla and the other individuals with her left the bathroom. [August 8, 2012 RP 110:12]. As Ms. Padilla was pulling the door shut, she saw her car keys on the bathroom floor behind Mr. Harrington. [August 8, 2012 RP 110:14]. Ms. Padilla testified that she reached to grab them and when she did, Mr. Harrington threw her to the ground, started kicking her in the back and said "you aren't going anywhere." [August 8, 2012 RP 110:15-16]. She further testified that she spent the night at his sister's house because she was afraid to go ask him for her keys because she didn't want to endanger herself anymore. [August 8, 2012 RP 111:3-4]. This is also sufficient evidence for the jury to find guilt beyond a reasonable doubt for the crime of unlawful imprisonment. Mr. Harrington used physical force to prevent her from retrieving her keys and, because of his prior actions, Ms. Padilla was too afraid to go ask him for the keys.

II. The trial court was not required to engage in *Bone-Club* analysis for any of the three assigned errors asserted by Appellant as none of the three constituted a closure of proceedings for public trial purposes.

Whether the right to a public trial has been violated is a question of law subject to de novo review. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009); *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). The public trial right is protected under the Sixth Amendment to the United States Constitution and article 1, sections 22 and 10 of the Washington State Constitution. *State v. Beskurt*, 176 Wn.2d 441, 445, 293 P.3d 1159 (2013). A closure occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). In order for a court to close a proceeding to the public, the court must first weight five criteria laid out by the Washington State Supreme Court in *Bone-Club*. *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). This requirement applies to all proceedings, including jury selection. *Beskurt*, 176 Wn.2d at 445; *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009).

If the trial court closes proceedings to the public without first conducting the *Bone-Club* analysis, the appellate court will devise an appropriate remedy. *Momah*, 167 Wn.2d at 149. If the error is structural

in nature, it warrants automatic reversal of conviction and remand for a new trial. *Id.*; *Wise*, 176 Wn.2d at 14. An error is structural when it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Momah*, 167 Wn.2d at 149; See also *Wise*, 176 Wn.2d at 14. Appellant asserts that the trial court erred on three separate occasions by effectively closing the proceedings without first engaging in the *Bone-Club* analysis. However, the trial court did not err as no closure of proceedings occurred, thus no *Bone-Club* analysis was required for any of the three assigned errors asserted by Appellant.

A. Juror number 8, Ms. Cockle, was not questioned in closed session, but rather in open court; as such, there is no assignable error.

Appellant asserts in his brief that juror number 8, Carrie Cockle, was questioned in closed session, out of the presence of the other jurors and the public. This is not correct. Ms. Cockle was questioned out of the presence of the other jurors, but this questioning was done in open court with full access by the public. Appellant has pointed to no portion of the Verbatim Report of Proceedings to indicate that this voir dire was done in closed session; rather there is significant evidence to the contrary.

During the trial, the court took a recess after the conclusion of testimony from one of the State’s witnesses. [August 8, 2012 RP 63:13].

During the recess, Ms. Cockle advised the bailiff that she knew the defendant's sister. [August 8, 2012 RP 64:8]. The court advised that there were two options of how to address the issue: 1) the court could do nothing or 2) the court could talk to the juror "obviously out of the presence of the others" and conduct a brief voir dire of her as to whether her familiarity with the defendant's sister would affect her ability to be fair and impartial. [August 8, 2012 RP 64:15]. The court and parties agreed to the latter.

The court decided that the best way to handle the situation would be "instead of having the other jury members wonder is just to simply say a question came up regarding an acquaintance and if there is a problem then [the court] will deal with it. If there is no problem [the court] will instruct them accordingly and they are to draw no conclusions from it and [the trial] will continue." [August 8, 2012 RP 65:15]. After another short recess, the court reconvened and Ms. Cockle was brought into the courtroom. [August 8, 2012 RP 67:1]. She was questioned in open court regarding her familiarity with the defendant's sister and whether it would affect her ability to be fair and impartial. [August 8, 2012 RP 67:1-68:7].

While Ms. Cockle was questioned outside the presence of the other jurors, she was questioned in open court with full access by the public.

Appellant has not pointed to any portion of the Verbatim Report of

Proceedings that would indicate the questioning was done in closed session or outside the public view. Therefore, there is no Constitutional public trial right issue as there was no closure of any proceedings. No *Bone-Club* analysis was required and there is no assignable error to the trial court.

B. The State individually questioned juror 23 based on her answers to the State's oral voir dire and there is no requirement to engage in *Bone-Club* analysis when not inquiring as to specific details of a potential juror's criminal history.

Appellant asserts that the trial court erred in allowing the prosecution to question juror number 23, Mirrick Nordhaugen, regarding her answers to the jury questionnaire without referencing or questioning in open court as to what crime the juror had been charged with when she was a "defendant in a criminal case." However, appellant mischaracterizes this issue as the record clearly indicates that Ms. Nordhaugen was individually questioned based on her answer to an oral question regarding which jurors had been accused of a crime, not some answer she gave on the juror questionnaire. [August 7, 2012 RP 90:1-2,8]. Because Ms. Nordhaugen was challenged for cause based on her responses to the oral voir dire questions, the trial court did not err.

However, even if Ms. Nordhaugen was questioned individually based on her answer to a question on the questionnaire, there is still no

error. Appellant further asserts the trial court erred by then granting the State's challenge for-cause without first identifying for the record the exact crime for which the juror was charged.

The Washington State Supreme Court has addressed jury questionnaires under *Bone-Club* in at least two recent cases- *Beskurt* and *Yates*. See *State v. Beskurt*, 176 Wn.2d 441, 293 P.3d 1159 (2013); *In re Personal Restraint Petition of Yates*, 177 Wn.2d 1, 296 P.3d 872 (2013). In *Beskurt*, prior to voir dire, the jurors were asked to complete a questionnaire to assist in questioning of prospective jurors. *Beskurt*, 176 Wn.2d at 443. During voir dire, the attorneys used the questionnaires to identify which prospective jurors would be questioned individually. *Id.* at 444. At the conclusion of the trial, the court sealed the questionnaires. *Id.* The defendant appealed, arguing that the sealing of juror questionnaires without conducting a *Bone-Club* analysis violated the defendant's public trial right. *Id.*

The Supreme Court held that no *Bone-Club* analysis was necessary to seal the jury questionnaires as no closure had taken place. *Beskurt*, 176 Wn.2d at 447. The Court explained in detail,

The questionnaires were completed prior to voir dire and utilized by the attorneys as a 'screening tool.' This facilitated the process by helping the attorneys identify which venire members would be questioned individually in open court and what questions to ask, if any. During

general and individual voir dire, the judge, prosecutor, and defense attorneys, including [the defendant's] counsel, questioned venire members in order to determine their ability to sit as an impartial juror. At most, the questionnaires provided the attorneys and court with a framework for that questioning. In some instances, the court began by reiterating a prospective juror's questionnaire response and then asked that person to elaborate in open court...Nothing suggests the questionnaires substituted actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court.

Beskurt, 176 Wn.2d at 447.

Shortly after *Beskurt*, the Supreme Court decided *Yates*. Of the many assigned errors in *Yates*, the defendant asserted that the sealing of juror questionnaires violated his public trial rights. In that case, the questionnaires were sealed by stipulation of the parties and no *Bone-Club* analysis was conducted. *Yates*, 177 Wn.2d at 29. The Court followed their holding in *Beskurt*, stating "the questionnaires served as a 'framework' for oral voir dire, the oral portion of voir dire provided the basis for any for-cause challenges, and that portion of voir dire was open to the public." *Id.*

As the record indicates, in this case, the jury panel was orally asked who had been accused of a crime and Ms. Nordhaugen indicated that she had. [August 7, 2012 RP 90:1-2]. She was then individually questioned as to whether she had any hard feelings about being accused of

a crime. [August 7, 2012 RP 92:19]. While her answer was inaudible to the transcriber, the State's next comment was "You do, okay," suggesting Ms. Nordhaugen had replied in the affirmative. [August 7, 2012 RP 92:22]. The State then asked Ms. Nordhaugen whether she thought she would be able to listen to all of the evidence with an open mind in this case or whether she thought she might start out favoring one side before having heard the evidence. [August 7, 2012 RP 92:22]. Her response was again inaudible to the transcriber; however, the State's next comment was "You don't think you'd be (inaudible)?" [August 7, 2012 RP 93:2]. Again, this suggests Ms. Nordhaugen responded in the affirmative. It was at that point that the State moved to challenge Ms. Nordhaugen for cause. [August 7, 2012 RP 93:2].

The court questioned Ms. Nordhaugen on its own, asking her "Okay, so individually or accumulatively your concern is that those experiences would affect your serving as a juror?" [August 7, 2012 RP 93:9]. Ms. Nordhaugen replied, "Yes." [August 7, 2012 RP 93:12]. The court then asked "And consequently you would not be able to try the case or decide the case based on the evidence, the evidence alone, rather than [sic] it would be affected or impacted by those past experiences, is that correct?" [August 7, 2012 RP 93:13]. Again, Ms. Nordhaugen replied,

“Yes.” [August 7, 2012 RP 93:19]. The court granted the State’s challenge for cause. [August 7, 2012 RP 93:23].

This case is consistent with, and almost factually identical to, both *Beskurt* and *Yates*. While *Beskurt* and *Yates* involved the sealing of questionnaires, the Court’s analysis is persuasive on the issue presented in this case. The juror questionnaires in this case were used only as a framework for the oral questioning during voir dire. The State questioned Ms. Nordhaugen individually based on her response to one of the oral voir dire questions and possibly an answer on the questionnaire. The State did not question her about the specific crime for which she was charged, as that is not the purpose of voir dire. The purpose of voir dire is to ensure a fair and impartial jury under article I, section 22 whose prejudices do not taint the entire venire and render the defendant’s trial unfair. *Momah*, 167 Wn.2d at 152. The State’s oral questioning revolved around that goal. When it became clear, based on Ms. Nordhaugen’s answers, that she could not be impartial, the State challenged her for cause.

There is no basis to require the State or trial court to disclose what the specific crime Ms. Nordhaugen was accused of or require the Court to inquire in open court. *Bone-Club* does not require courts to engage in the five part analysis unless there is a closure that affects the defendant’s public trial rights. See *Bone-Club*, 128 Wn.2d 254. Non-inquiry in open

court of specific details surrounding a jury questionnaire answer is not a closure, especially in light of the holdings in *Beskurt* and *Yates*, and Appellant has pointed to no authority suggesting that it is. The specific crime with which Ms. Nordhaugen was charged and the outcome of that case are not relevant; what is relevant is the affect that experience had on Ms. Nordhaugen and whether that affects her ability to be a fair and impartial juror. That was the focus of the State's oral voir dire.

Appellant has made no prima facie showing that his public trial right was violated. In *Yates*, the Court pointed out that Yates had failed to make a prima facie showing that his right to a public trial was violated because he had failed to show that a closure occurred, as he had not shown, or even attempted to show, that any for-cause challenge was based on the jury questionnaires, as opposed to oral voir dire. *Yates*, 177 Wn.2d at 30. The same applies in this case. The trial record indicates that the for-cause challenge of Ms. Nordhaugen was based on her oral answers to the oral questions in open court. The trial court did not err when it excused Ms. Nordhaugen for cause without inquiring or stating in open court the crime for which she was charged or the outcome of that case.

C. The trial court did not err when it removed the names of the jurors from the jury questionnaire forms before scanning the questionnaires into the court record.

There is a strong interest in protecting juror privacy. Individual juror information, other than name, is presumed to be private. GR 31(j); *Beskurt*, 176 Wn.2d at 448. Anyone seeking access to this information must petition the trial court for access and must make a showing of good cause. GR 31(j); *Beskurt*, 176 Wn.2d at 448. In this case, juror's names were used in open court and are part of the public record, but the jurors' names were redacted from the questionnaires before the questionnaires were scanned into the record. The redaction of juror names from the questionnaires is not meant to attempt to redact juror names from the public view, but to prevent the information provided on the individual questionnaires from being associated with any particular juror. This allows public access to the questionnaires, but maintains juror privacy which is presumed under GR 31.

Appellant's assertion that the court erred when removing the names of the jurors prior to scanning them into the court record is essentially subsumed under the holdings in *Beskurt* and *Yates*. In both *Beskurt* and *Yates*, the court had fully sealed the jury questionnaires. See *Beskurt*, 176 Wn.2d 441; *Yates*, 177 Wn.2d 1. The Court held this not to be a closure. The appellant now argues that, despite the Supreme Court's

ruling that no *Bone-Club* analysis is required when sealing jury questionnaires, *Bone-Club* analysis is required when merely redacting the questionnaires. However, redactions are a lesser form of sealing. Sealing means protecting from examination by the public, while redaction means to protect from examination a portion of the record as opposed to the entire record. See General Rule 15(b). Thus, if sealing is not a closure, redaction certainly cannot be.

Redactions of jury questionnaires must logically be subsumed under the more restrictive sealing. *Beskurt* and *Yates* are dispositive on this issue and the trial court did not err when it redacted the juror's names from the questionnaires prior to scanning them into the court record.

Furthermore, the doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Boyd*, 109 Wn.App. 244, 249, 34 P.3d 912 (Wn.App.Div.3, 2001); *State v. Phelps*, 113 Wn.App. 347, 353, 57 P.3d 624 (Wn.App.Div.2, 2002) citing *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990);. Where it applies, the doctrine precludes judicial review even where the alleged error raises constitutional issues. *Boyd*, 109 Wn.App. at 249; *Phelps*, 113 Wn.App. at 353 citing *Henderson*, 114 Wn.2d at 871.

When the court engaged in the discussion regarding redacting the names from the juror questionnaires before scanning them into the record,

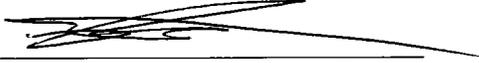
defense counsel actively participated in that discussion and acquiesce with the court's decision. [August 9, 2012 RP 230:19-22]. Appellant should be barred from now arguing on appeal that this was error.

CONCLUSION

Based on the exhibits and testimony admitted in this case, there was sufficient evidence for a rational trier of fact to find guilty beyond a reasonable doubt for both Count I, Rape in the Second Degree and Count II, Unlawful Imprisonment. Furthermore, there was no closure of the courtroom or record in this case, thus the public trial right was not implicated and no *Bone-Club* analysis was required. Appellant's assignments of error are premised on an inaccurate account of the record or an assertion of a *Bone-Club* analysis requirement where none is actually required under that case or its progeny.

Dated this 1 day of July, 2014

Respectfully Submitted:


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Okanogan County, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent)
vs.)
Steven P Harrington)
Defendant/Appellant)
_____)

COA No. 313824

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 2nd day of July, 2014, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Respondent's brief to:

Steven P Harrington
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1313 N. 13th Ave
Walla Walla, WA 99362

Having obtained prior permission, I also served Bevan Maxey at <hollye@maxeylaw.com> by email using Division III's e-service feature.

Dated this 2nd day of July, 2014.


Shauna Field
Office Administrator