FILED
May 21, 2014
Court of Appeals
Division III
State of Washington

NO. 31719-6-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

TERRY MICHAEL HOEFLER

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: Brian V. Hultgrenn, #34277
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

TABLE OF CONTENTS

A. COUNTERSTATEMENT OF THE ISSUES 1

1. **DID THE STATE OFFER SUFFICIENT EVIDENCE TO ESTABLISH L.S. WAS NOT MARRIED TO THE APPELLANT AND THAT THE APPELLANT TOOK A SUBSTANTIAL STEP TOWARDS COMMITING RAPE OF A CHILD IN THE FIRST DEGREE?** 1

2. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING AN OFFICER TO TESTIFY AS TO HIS OBSERVATIONS DURING A SHOW UP WITH THE APPELLANT?** 1

3. **DID THE STATE ENGAGE IN IMPROPER AND PREJUDICTIAL CONDUCT WHEN IT MENTIONED A BURGLARY COMMITTED CONTEMPORANEOUSLY WITH THE ATTEMPTED RAPE THAT THE APPELLANT HAD CONFESSED AND PLED GUILTY TO?** 1

4. **DID THE STATE UNLAWFULLY APPEAL TO THE JURY'S EMOTIONS WHEN IT COMMENTED ON THE CHILDREN'S REACTION TO THE ATTEMPTED RAPE AFTER A WITNESS HAD TESTIFED TO THAT REACTION?** 1

5. **DID THE APPELLANT'S TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY CHOOSING TO CONCEDE THE BURGLARY CONVICTION IN ORDER TO CONCENTRATE ON DENYING THE CHARGE OF ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE?** 1

TABLE OF CONTENTS CONTINUED

B. RESPONSE TO STATEMENT OF THE CASE 2

C. RESPONSE TO ARGUMENT 6

1(a). THE STATE OFFERED DIRECT EVIDENCE AND AMPLE CIRCUMSTANTIAL EVIDENCE PROVING THE APPELLANT WAS NOT MARRIED TO L.S. AT THE TIME OF THE INCIDENT. 6

1(b). THE STATE'S INFORMATION ADEQUETELY APPRISED THE DEFENDANT THAT HE WAS BEING CHARGED WITH ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE AND THE STATE'S EVIDENCE PROVED THE APPELLANT TOOK MULTIPLE SUBSTANTIAL STEPS TOWARDS COMMITTING THAT CRIME. 12

2. CORPORAL GORDON THOMASSON OBSERVED AND WAS CORRECTLY ALLOWED TO TESTIFY THAT HE SAW THE APPELLANT EXHIBIT AN ERECTION WHEN BROUGHT INTO THE PRESENCE OF THE VICTIM FOR A SHOW UP. 16

3. THE STATE CORRECTLY REFERRED TO FACTS RELEVANT AND ALREADY IN EVIDENCE, IN ARGUING THAT THE APPELLANT COMMITTED THE ATTEMPTED RAPE IN THE COURSE OF COMMITTING A BURGLARY. 22

TABLE OF CONTENTS CONTINUED

4. THE STATE PROPERLY ARGUED THE FACTS SUBMITTED INTO EVIDENCE DURING CLOSING ARGUMENT BY POINTING OUT EVIDENCE THAT CONFIRMED AN ACTUAL CRIME HAD OCCURRED AND THE STATE'S WITNESSES WERE CREDIBLE BECAUSE THEY SHOWED REAL EMOTION. 28

5. DEFENSE COUNSEL DID NOT OBJECT TO ARGUMENT CONSISTENT WITH THE DEFENSE THEORY OF THE CASE AND MADE A STRATEGIC DECISION TO FOCUS ON DEFENSE OF THE CHARGE WHICH WOULD RESULT IN A LIFE SENTENCE. 30

D. CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Cf. Engle v. Isaac, 456 U.S. 107, 133-134,
102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982) 31

In re Martinez, 171 Wash.2d 354, 364, 256 P.3d 277 (2011) 15

Kimmelman v. Morrison, 477 U.S. 365,
1036 S.Ct. 2574, 2583, 91 L.Ed.2nd 305 (1986) 34

Michel v. Louisiana, supra, 350 U.S. at 101, 76 S.Ct., at 164 31

State v. Bailey 52 Wash.App. 42, 5, 757 P.2d 541 (1988) 8, 9

State v. Belgarde 110 Wash.2d 504, 755 P.2d 174 (1988) 27, 28

State v. Benitez, 175 Wash. App. 116, 124-25,
302 P.3d 877, 882 14

State v. Borrero, 97 Wash.App. 101, 107,
982 P.2d 1187 (1999) 13

State v. Brett, 126 Wash.2d 136, 214, 892 P.2d 29 (1995) 29

State v. Cronin, 142 Wash. 2d 568, 585,
14 P.3d 752, 760-61 (2000) 17

State v. Dhaliwal, 150 Wash.2d 559, 577,
79 P.3d 432 (2003) 25, 26

State v. Eaton, 164 Wash.2d 461, 468,
191 P.3d 1270, (2008) 14

State v. Goodman, 150 Wash.2d 774,
779, 83 P.3d 410 (2004) 14

State v. Gosby, 85 Wash.2d 758, 766-67,
539 P.2d 680 (1975) 8

TABLE OF AUTHORITIES CONTINUED

State v. Jackson, 62 Wash.App. 53, 55-56,
813 P.2d 156 (1991) 16

State v. Leach, 113 Wash.2d 679, 689,
782 P.2d 552 (1989) 12

State v. McFarland, 127 Wash.2d 322, 334-35,
899 P.2d 1251 (1995) 31

State v. Miller, 71 Wash.2d 143, 426 P.2d 986 (1967) 14

State v. Myers, 133 Wash.2d 26, 34,
941 P.2d 1102 (1997) 17

State v. Rainy, 107 Wash.App 129, 135-36,
28 P.3d 10 (2001) 32

State v. Rivas, 168 Wash.App. 882, 891–92,
278 P.3d 686 (2012) 13

State v. Shuck, 34 Wash.App. 456, 458,
661 P.2d 1020 (1983) 9

State v. Standifer, 48 Wash.App. 121, 125-126,
737 P.2d 1308 (1987) 34

State v. Tandecki, 153 Wash.2d 842, 847,
109 P.3d 398 (2005) 13

State v. Thorgerson, 172 Wash.2d 438, 442,
258 P.3d 43 (2011) 23

State v. White, 80 Wash.App. 406, 410,
907 P.2d 310 (1995) 30

Strickland v. Washington, 466 U.S. 668, 689,
104 S.Ct. 2052 ..... 31, 34

TABLE OF AUTHORITIES CONTINUED

STATUTES

RCW 26.50.010 10

OTHER AUTHORITIES

5A Karl B. Tegland, WASHINGTON PRACTICE:
EVIDENCE LAW AND PRACTICE § 602.1 (5th ed.). 18

5A Karl B. Tegland, WASHINGTON PRACTICE:
EVIDENCE LAW AND PRACTICE § 602.2 (5th ed.). 19

5B Karl B. Tegland, WASHINGTON PRACTICE:
EVIDECNE LAW AND PRACTICE § 701.8 (5th ed.). 19

5B Karl B. Tegland, WASHINGTON PRACTICE:
EVIDECNE LAW AND PRACTICE § 701.11 (5th ed.). 19

WPIC 5.01 21

RULES

CrR 2.1(a)(1) 13

CrR 401 23

ER 602 ..... 17, 18, 20

ER 701 ..... 17, 19, 20

CONSTITUTIONS

U.S. CONST. amend. VI 12, 13

A. COUNTERSTATEMENT OF THE ISSUES

1. **DID THE STATE OFFER SUFFICIENT EVIDENCE TO ESTABLISH L.S. WAS NOT MARRIED TO THE APPELLANT AND THAT THE APPELLANT TOOK A SUBSTANTIAL STEP TOWARDS COMMITING RAPE OF A CHILD IN THE FIRST DEGREE?**

2. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY ALLOWING AN OFFICER TO TESTIFY AS TO HIS OBSERVATIONS DURING A SHOW UP WITH THE APPELLANT?**

3. **DID THE STATE ENGAGE IN IMPROPER AND PREJUDICTIAL CONDUCT WHEN IT MENTIONED A BURGLARY COMMITTED CONTEMPORANEOUSLY WITH THE ATTEMPTED RAPE THAT THE APPELLANT HAD CONFESSED AND PLED GUILTY TO?**

4. **DID THE STATE UNLAWFULLY APPEAL TO THE JURY'S EMOTIONS WHEN IT COMMENTED ON THE CHILDREN'S REACTION TO THE ATTEMPTED RAPE AFTER A WITNESS HAD TESTIFED TO THAT REACTION?**

5. **DID THE APPELLANT'S TRIAL COUNSEL PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY CHOOSING TO CONCEDE THE BURGLARY CONVICTION IN ORDER TO CONCENTRATE ON DENYING THE CHARGE OF ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE?**

B. RESPONSE TO STATEMENT OF THE CASE

In the early morning hours of July 22, 2012, Tahti Dilkey, Kable Gunter, and the Appellant, Terry Hoefler, traveled north of Pasco, Washington, heading towards Mesa. The truck they were in began to smoke so they stopped to look for oil. RP 98-99. Both the Appellant and Gunter wore similar clothing. The Appellant and Gunter left to look for oil and were gone for a long period of time. RP 100-01.

During this time period the Appellant went and entered the residence adjacent to Oakdale egg farm. RP 150. L.S. lived inside this home with her Aunt Vieny Sanchez, her Uncle Raphael Esparza, and her cousins, F.S. and I.S, and Raphael's mother. RP 378. L.S. was eleven years old. RP 52. Vieny was primarily responsible for raising L.S. because her father was often gone fishing in Alaska and her mother was not around. RP 53.

The Appellant entered the home. Initially, he believed no one was home, and saw the opportunity to burglarize the residence. RP 150-51. He stole clothing, perfume, makeup, and electronic equipment. RP 152. He then went to a bedroom and noticed the children sleeping there. RP 153. He took L.S. out of her bed and brought her out to the living room. RP 383-84. He put

her on the couch, pulled off her shorts, and put a plastic bag in her mouth. L.S. took the bag out of her mouth and yelled. RP 385-86. The Appellant then fled the house. RP 388. L.S. could not see his face and described him as a white guy with a tattoo. RP 387.

Vieny awakened to the sound of multiple children screaming. Her boyfriend Raphael opened the door to their bedroom. RP 60. L.S. came running to the room wearing only her underwear and t-shirt, telling Vieny a man was in the house. While she did this she was continuously pulling her shirt down to cover herself. RP 61. L.S. looked scared and kept saying someone was in the house and had tried to touch her. L.S. said that the man had told her to be quiet, he was just gonna see something, and it wasn't gonna hurt. RP 61-62. It took Vieny and Raphael between five to ten minutes to confirm the man had left the house and to call the police. RP 63.

After leaving the house, the Appellant returned to the car. He looked appeared upset and told Dilkey that "the little girl... woke up." RP 104. At that time began to wipe the truck down for prints. RP 105.

Police responded to the scene. Deputy George Rapp received the call out at 2:19am and proceeded on Glade Road towards the location. He received a description of the suspect,

observed a man matching that description, and made a stop of that man, identified as Kable Gunter, at 2:27am. RP 132. Gunter had been on foot and looked as if he had been running. Rapp did not see any vehicles in the area that Gunter could have come from. RP 123. Deputy Rapp located Gunter approximately 4.7 miles from the residence of L.S. RP 100-01. Cpl. Thomasson brought L.S. and F.S. to the location to see if they could identify Gunter. F.S. stated he believed it to be the man in the house but L.S. did not positively identify him. RP 241.

Several hours later, after police had already come to the scene, Vieny and Raphael drove to Oakdale farm to warn the employees there about a possible fugitive in the area. RP 69. On the way to the farm Vieny noticed the Appellant hiding in the canal. RP 69. She armed herself with a stick and called 911 to report him. RP 70-71. As the Appellant got out of the canal he wore a girl's skirt and had several women's garments, including underwear, draped over his upper body. As he begin run, he took these off. RP 71. The skirt he wore had belonged to L.S. and she had left the skirt draped in her and her cousins' room that night. RP 391. Cpl. Gordon Thomasson responded to the scene and placed the Appellant under arrest. RP 246.

At that time the Appellant was brought back to the house for a show up with L.S. and her cousin F.S. RP 247. L.S. did not recognize the Appellant but she did recognize the skirt he was wearing as her own. RP 249. Following the show up, Cpl. Thomasson pulled the Appellant back out of the patrol vehicle. Based on the small tight skirt the Appellant wore, and the manner in which he moved around, Cpl. Thomasson could see the Appellant had an erection. 277-78.

During the Appellant's arrest, he told Detective Jason Nunez of the Franklin County Sheriff's office that nobody else was involved in the offense. RP 148. Later, under Miranda, the Appellant admitted he entered the home and decided to "burglarize" the place. He admitted L.S. woke up at some point and that he had interactions with her. RP 153. The Appellant denied attempting to rape L.S., but he did say "[i]f I wanted to have I could have done it." RP 155. He later told another member of law enforcement that he had carried L.S. to the living room, but he did not rape her and they would not find his "DNA or anything." RP 293.

On July 25, 2012, the Franklin County Prosecutor's Office filed an Information alleging one count of Residential Burglary and one count of Attempted Rape of a Child in the First Degree. CP

128-129. On March 26, 2013, the Appellant's trial counsel filed a Third Party Perpetrator Brief indicating he would be arguing that Kable Gunter had been identified by witnesses as the perpetrator and Gunter had actually committed the attempted rape. CP 107-108.

The first day of trial the Appellant announced his intention to plead guilty to the Residential Burglary charge. RP 9. The following day, his counsel stated: "[m]y client's never from the inception of this case said that he wasn't guilty of residential burglary. It's the sex charge that he's contested all along." RP 11. The Appellant then went forward to plead guilty to the Residential Burglary charge. RP 14. The trial proceeded and the Appellant was found guilty of Attempted Rape of a Child in the First Degree. CP 50.

C. RESPONSE TO ARGUMENT.

1(a). THE STATE OFFERED DIRECT EVIDENCE AND AMPLE CIRCUMSTANTIAL EVIDENCE PROVING THE APPELLANT WAS NOT MARRIED TO L.S. AT THE TIME OF THE INCIDENT.

During direct examination of L.S.'s guardian, her Aunt Vieny Sanchez, was asked a series of questions about the victim's, L.S.'s, living situation. This included thirteen questions detailing

everything from L.S.'s age to her housemates. RP 52-54. In the final question, the record indicates the State asked, "[n}ow, this is gonna sound like a silly question, but is Vieny married at this time?" RP 54. When viewing this question in the context of the entire section of testimony, and in the context of whom the question is being asked to, it is clear that the State simply misspoke by mentioning the name of the witness instead of the name of the victim, L.S. Given that the jury observed this context and heard the question through twelve different sets of ears, it understood the question to be an inquiry about whether L.R. was married.

The manner the State phrased the question also indicates the question refers to L.S. and not Vieny. The State indicates **"[n}ow, this is gonna sound like a silly question**, but is Vieny married at this time?" The reason the question sound silly to the layperson is that no layperson would understand why someone would think an eleven-year-old would be married. A layperson assumes young children are not married. Only prosecutors concerned with specific elements (like L.S. not being married to the Appellant) would inquire about an eleven-year-olds marriage status. Asking Vieny about her marriage status would not be a silly question. Vieny had already testified she lived with Raphael. RP

50-51. Asking about her marriage situation would be logical, the State would not need to preface such a question with, "now this is gonna sound like a silly question." The only logical reading of the record is a reading which takes into consideration the totality of the circumstances surrounding the question asked, and understands what the jury understood at the time, that Vieny indicated L.S. was not married.

In any event, ample circumstantial evidence was offered by the State which proved the Appellant was not married to L.S. when he attempted the rape. The State may carry its burden with the introduction of circumstantial evidence alone and such evidence is not considered less reliable then direct evidence. State v. Gosby, 85 Wash.2d 758, 766-67, 539 P.2d 680 (1975). This rule has been applied in cases of rape of a child where the victim does not specifically testify that she is not married. Division Two, in State v. Bailey, found that no direct evidence had been presented which related to the marital status of the victim. 52 Wash.App. 42, 5, 757 P.2d 541 (1988). Despite this, the court upheld the conviction because the jury could have reasonably inferred, from the circumstantial evidence, that the three year victim was not married to the defendant. Id. Specifically, the defendant in Bailey had lived

with the victim's family for a short time and acted as a babysitter on several occasions. Id. The defendant in that case would obviously not be married to a three-year-old which he had previously babysat. Id.

In another case, State v. Shuck, Division One ruled that circumstantial evidence met the State's burden to prove the defendant was not married to the victims. 34 Wash.App. 456, 458, 661 P.2d 1020 (1983). In that case, the two victims did not testify that they were not married to the defendant. Id. They did testify that they were in Ninth grade and that that had only known the defendant for a short amount of time. Id. Viewed in a light most favorable to the State, the evidence was deemed "more than sufficient to enable the rational trier of fact to infer beyond a reasonable doubt that Shuck was not married to either of the girls." Id.

In the current case, such circumstantial evidence shows that the victim was not married to the Appellant. First of all, Vieny, the aunt and guardian of L.S., testified that L.S. was eleven. This fact alone can be dispositive circumstantial evidence that L.S. was not married. In the State of Washington, one must be seventeen to be married, unless a Superior Court Judge waives such a rule upon a

showing of necessity. RCW 26.50.010. One might argue it is technically possible for an eleven year old to be married under this statute. The burden of the State does not require them to prove the elements beyond all possible doubt. Almost nothing can be proven beyond all doubt. The burden of the State is to prove the truth of the charges beyond a reasonable doubt. It is reasonable to infer, under such statutory constraints, that an eleven-year- old would not be married in the State of Washington.

The living arrangements are also consistent with such a situation. L.S. testified that household consisted of her aunt and uncle, Vieny and Raphael, her cousins, F.S. and I.S. (and a baby which was born later), and Raphael's mother. At no point is a husband mentioned or any other member of a household. L.S. also testified that she normally slept in her cousins' room because she preferred to sleep there instead of her own room. Sharing a bed with her two cousins is consistent with L.S. being an unmarried child.

Lastly, L.S. was taken to a show up to see if she could identify the Appellant. She indicated she could not identify as the individual in her home which had taken her out of her room. If the Appellant had in fact been married to her, she would have been

able to identify him in some manner. She could not. Likewise, if the Appellant had been married to L.S. he certainly would have had cause to enter her place of residence at some point. L.S. did not indicate she had ever seen him inside the home. The Appellant's own statement is consistent with him having no prior knowledge of the residence or of L.S. He told Detective Nunez that his car had broken down adjacent to L.S.'s home and that he had initially wandered in looking for oil. Once inside, he realized there were items of value and decided to burglarize the residence. If the defendant had been married to L.S., he would have known the contents and disposition of the residence. Instead, he was surprised to find "a girl" there and told Detective Nunez she approached him and later became hysterical. This would not be the normal reaction of a girl upon seeing her husband.

Together these pieces of circumstantial evidence paint a clear picture that the Appellant was not married to L.S. In fact, the Appellant only saw L.S. for the first time that night when his vehicle happened to break down near her house. L.S. did not recognize him the night in question or when she came to trial months later. These pieces of evidence prove, beyond a reasonable doubt, that L.S. was not married to the Appellant.

1(b). THE STATE'S INFORMATION ADEQUETELY APPRISED THE DEFENDANT THAT HE WAS BEING CHARGED WITH ATTEMPTED RAPE OF A CHILD IN THE FIRST DEGREE AND THE STATE'S EVIDENCE PROVED THE APPELLANT TOOK MULTIPLE SUBSTANTIAL STEPS TOWARDS COMMITTING THAT CRIME.

The Information filed by the State in this clearly informed the Appellant of the charges he faced. The State then offered evidence which clearly supported and proved those allegations during the course of the trial. The distinction between the proof offered at trial and the language of the Information does not change the elements of the crime or validity of the conviction.

In the State's Information, the State is required to allege facts supporting every element of an offense, in addition to adequately identify the crime charged. State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). The goal of this process is to define the charge sufficiently for a defendant so that he or she may adequately prepare a defense and also be protected from a subsequent prosecution for the same offense. Id. at 688. The Appellant suggests that instead of providing notice, the purpose of the charging document is to anticipate the exact details of the trial. This is contrary to the spirit of U.S. CONST. amend. VI which states

that in "all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation." The State's Information was drafted with this purpose in mind.

The Appellant suggests that insufficient evidence supports the conviction because the State did not prove the precise language of the Information in terms of the push on the couch and the removal of the victim's underwear. The principle underlying this argument is the assumption that the charging document determines the law of the case. He does not offer any authority to support this presumption. Current case law suggests the contrary:

> Applying the law of the case doctrine to an information is contrary to the information's purpose. In the information, the prosecutor may allege "that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." CrR 2.1(a)(1). The purpose of the information is to give the defendant sufficient notice to adequately prepare a defense. *State v. Tandecki,* 153 Wash.2d 842, 847, 109 P.3d 398 (2005). But jury instructions serve a different purpose. "[B]ecause the purpose of jury instructions is to instruct the jury on the applicable law, they 'must necessarily contain more complete and precise statements of the law than are required in an information' or charging document." *State v. Rivas,* 168 Wash.App. 882, 891–92, 278 P.3d 686 (2012) (quoting *State v. Borrero,* 97 Wash.App. 101, 107, 982 P.2d 1187 (1999), *remanded,* 141 Wash.2d 1010, 10 P.3d 407 (2000)), *review denied,* 176 Wash.2d 1007, 297 P.3d 68 (2013). Because an information does not need to contain the same level of specificity

> as jury instructions and it is not intended to provide a precise statement of the law, it would defeat the purpose of the information if we applied the same rules to an information as we apply to jury instructions

State v. Benitez, 175 Wash. App. 116, 124-25, 302 P.3d 877, 882 (2013).

A crime's essential elements are determined by the statute. When the State provides additional details in the information beyond the statutory elements, those details are regarded as mere surplusage. State v. Eaton, 164 Wash.2d 461, 468, 191 P.3d 1270, (2008) (*concurring opinion* citing State v. Miller, 71 Wash.2d 143, 426 P.2d 986 (1967) and State v. Goodman, 150 Wash.2d 774, 779, 83 P.3d 410 (2004)). The specificity of the details provide in the State's information are mere surplusage. Those detail simply provided the Appellant notice of the crime he faced.

It should also be noted that the distinction drawn between the testimony and such details is one of degree, not of direct opposition. Trial testimony did not discount the allegations, it merely clarified them. Whether the victim as placed on the couch or pushed on the couch does not stop that act from being consistent with the Appellant preparing to rape her. Likewise, pulling down her shorts is also consistent with preparation to

commit rape. Whether the underwear was also pulled down does not change the nature of the allegation.

When considering claims of insufficiency of the evidence, the Court acknowledges that a reviewing court is not ideally placed to second guess the trier of fact:

> The standard for determining whether a conviction rests on insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury.

In re Martinez, 171 Wash.2d 354, 364, 256 P.3d 277 (2011) (citations omitted).

In this case the Appellant not only committed the two acts specified in the Information, but did a number of other acts and steps showing intent to commit the crime. He L.S. out of her room in the first place. He placed a bag in her mouth, presumable to prevent her from crying out for help. He later donned her clothing and then became obviously aroused when brought back into her presence for identification purposes.

> To prove an attempted rape, the State must establish that the defendant took a substantial step toward commission of the crime with the intent to have sexual intercourse. Conduct is not a substantial step "unless it is strongly corroborative of the actor's criminal purpose." Mere preparation to commit a crime will not support an attempt conviction.

State v. Jackson, 62 Wash.App. 53, 55-56, 813 P.2d 156 (1991). These facts reach beyond preparation, and go to intent and then actual action towards the defendants' goal. In Jackson, the court found the evidence sufficient even though the defendant simply approached the victim and told her to lift up her skirt or he would kill her. Id. at 55. This case goes well beyond those facts. Taking the truth of the State's evidence and all inferences therein, the record is sufficient uphold the jury's decision finding the Appellant took a substantial step toward committing Rape of a Child in the First Degree.

2. CORPORAL GORDON THOMASSON OBSERVED AND WAS CORRECTLY ALLOWED TO TESTIFY THAT HE SAW THE APPELLANT EXHIBIT AN ERECTION WHEN BROUGHT INTO THE PRESENCE OF THE VICTIM FOR A SHOW UP.

Corporal Gordon Thomasson testified as to what he saw the day of the incident. Although the trial judge required him to couch those observations, after laying a foundation, in the form of a formal opinion, such observations do not constitute an opinion, nor do they extend beyond his personal knowledge.

A reviewing court defers to the trial court's decisions regarding evidentiary ruling by utilizing the abuse of discretion standard. State v. Myers, 133 Wash.2d 26, 34, 941 P.2d 1102 (1997). "An evidentiary ruling will remain undisturbed by this court unless we find that the trial court's ruling is based on untenable grounds or was made for untenable reasons." State v. Cronin, 142 Wash. 2d 568, 585, 14 P.3d 752, 760-61 (2000). In this case, the court heard the witness's explanation of why he inferred the Appellant had an erection and found that is sufficiently satisfied ER 602 and ER 701. The reviewing court has no reason to disturb this ruling.

Attempting to limit a witnesses description of what they saw at the time of an incident is not the purpose of ER 602. ER 602 states "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter..." During the course of Cpl. Thomasson's testimony, the State established that he was present at the time of the show up. He testified that the Appellant wore the victim's skirt, which was short and tight on him. He observed the manner in which the Appellant moved with the skirt and how his

anatomy reacted with it. RP 276-278. This establishes personal knowledge.

The goal of ER 602 is not to limit the observations that the witness can make based on what he or she saw:

> Rule 602 restates the time-honored view that a witness who testifies to a fact which can be perceived by the senses must have had the opportunity to observe the fact and must have actually observed it. Stated negatively, the rule bars statements which purport to relate facts but which are based only on the reports of others.

5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 602.1, at 338-39 (5th ed.). Cpl. Thomasson statement that the Appellant appeared to have an erection is not based on the statements of others; it is based on his observations. The Appellant argued at trial that Cpl. Thomasson's observations were not extensive enough to make such an observation. However, that argument does not foreclose his right to testimony about such facts.

> In many situations it may be questionable whether the witness's opportunity to observe the events in questions was sufficient to satisfy the requirement... In situations like this, where reasonable persons could differ on whether the witness on whether the witness has sufficient opportunity to observe, the testimony should normally be admitted, allowing the jurors themselves to judge the weight of the evidence.

5A Tegland § 602.2, at 340 (5th ed.). Even if the Court thought Cpl. Thomason's observation was questionable, without actually lifting the skirt, The Court's duty would to be to allow the testimony into evidence and let the Appellant (as his counsel did) cross examine regarding the reliability of his evidence. The trial court correctly adhered to his rule.

The distinction made between the Appellant's reading of the rule and that of Tegland's, is one of robotic inflexibility versus one of common sense. Courts have previously noted ER 701 allows for witnesses to make inferences based on their senses. Examples of this include estimating the speed a vehicle: [a]ny person who has observed a moving vehicle may estimate its speed. Previous experience and background merely go to the weight given to the estimate. 5B Karl B. Tegland, WASHINGTON PRACTICE: EVIDECNE LAW AND PRACTICE § 701.8, at 13 (5th ed.). A witness may not have witnessed the odometer of the vehicle or have been using a radar to track a vehicle's speed, but that witness still is able to make an estimation based on a lifetime of seeing moving vehicles. For the same reason, courts often allow evidence of the demeanor of another person. 5B Tegland § 701.11, at 17 (5th ed.). While a witness may not know exactly what is going

through another person's head at a given moment, they can still infer whether someone is angry, upset, etc.

Cpl. Thomasson inferred the Appellant had an erection based on his observations. Such an inference is not based on "scientific, technical, or other specialized knowledge within the scope of rule 702." The trial judge did not need to require foundation as to this opinion. However, to the extent he did require that foundation would merely go to determining the weight of Cpl. Thomasson's testimony. The trial court correctly ruled in this instance by utilizing a common sense reading of ER 602 and 701. Following such logic is not an abuse of discretion.

In any event, the State had multiple pieces of evidence regarding the Appellant's intent to commit rape. These pieces of evidence occurred in much closer proximity in time to the physical acts and provided probative evidence as to the Appellant intent. The first piece of evidence is explained by L.S. statement that she was asleep when the Appellant picked her up and took her to the living room. If the Appellant had innocent intentions he could have left her sleeping, he did not. The Appellant than set her down and took off some of her clothing. Again this is consistent with an intention to sexually assault her; otherwise such clothing could be

left on. The Appellant put a bag in her mouth, presumably to muffle her screams. This is consistent with the idea that he would take some action which would make her cry out in alarm.

Although the Appellant did not admit his intentions (not surprising), all of this circumstantial evidence indicates he intended to commit a crime of sexual violence. "The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts of the case. WPIC 5.01. The logical inference of the actions goes strongly to intent. These actions occurred contemporaneously with the burglary. That he later exhibited an erection in the victim's presence only added to an already overwhelming amount of evidence of intent. It should also be noted that testimony about the erection would have had no effect on the testimony or photographic evidence that the Appellant had chosen to don the victim's skirt, and nothing else, following the incident. Even if the court had abused its discretion by allowing the testimony about the Appellant's erection in evidence, the ruling had no change on the final outcome of the trial.

3. THE STATE CORRECTLY REFERRED TO FACTS RELEVANT AND ALREADY IN EVIDENCE, IN ARGUING THAT THE APPELLANT COMMITTED THE ATTEMPTED RAPE IN THE COURSE OF COMMITTING A BURGLARY.

The Appellant's argument that the State committed prosecutorial misconduct, by mentioning the burglary fails to understand and recognize the context of the overall trial. The Appellant's trial counsel recognized he had no defense against the burglary case. He had confessed to law enforcement and he had also been arrested in close proximity to a large number of items taken in the burglary and while wearing a skirt taken in the burglary. Because of this reality, his trial counsel sought to gain credibility by admitting to the burglary and focusing his defense on denying the attempted rape, the charge which could send him to prison for life. The Appellant's argument of prosecutorial misconduct ignores this strategic choice which defense counsel made at trial. It also ignores the reality of the difference in stigma between burglary and attempted rape of a young girl.

In order for the Appellant's prosecutorial misconduct argument to succeed, he must establish "that the prosecutor's conduct was both improper and prejudicial in the context of the

entire record and the circumstances at trial." State v. Thorgerson, 172 Wash.2d 438, 442, 258 P.3d 43 (2011). The Appellant has a burden to establish prejudice by proving there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 442-43. When determining if misconduct requires reversal the count must consider the context of the entire case. Id. at 443.

The conduct highlighted by the Appellant as prosecutorial misconduct is the State's arguments regarding the burglary and its role in the attempted rape charge. The Appellant cites various arguments summarizing the facts of the burglary which he argues are the improper comments. These statements were relevant to the crime charged and properly referred to evidence admitted in the case in multiple different ways.

Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." CrR 401. In order to prove the Appellant committed the crime of Attempted Rape of a Child in the Second Degree, the State needed to prove that on the night in question, the Appellant entered the house and took a substantial step toward raping L.S. In order to prove the Appellant entered the

house the State offered a variety of pieces of evidence. These included the Appellant's own statements, possession of items from the home, possession/wearing of a skirt from L.S.'s room, witnesses statement's about him going towards the house, being gone for awhile, and then returning and wiping the car down for prints, the Appellant hiding from the police in a canal, discarded items from the home making a trail toward where the Appellant was arrested, etc. These are all pieces of evidence showing a burglary. They are also pieces of evidence proving the elements of the attempted rape charge. They prove the Appellant's identity as the individual who interacted with L.S. within that house on the night in question. Just because such evidence is admissible to prove the burglary does not make it improper in the rape case.

When the State refers to the burglary, it is correctly asserting that such evidence is relevant to the charge of attempted rape. The central issue in the trial is whether the Appellant is the person who actually took L.S. from her room. The fact that the Appellant was in process of committing a burglary explains his presence in the home and in the bedroom of the victim. The burglary is not being used as a prior bad act or a crime of dishonesty against the Appellant, it is merely evidence he was in the home and in the victim's room. The

term burglary encompasses the common vernacular of what the Appellant was doing when he attempted the rape. It is not meant as proof of a legal conviction; it is a description of what the Appellant was doing the night in question. The mention of the burglary, in this context, was never about talking about unadmitted evidence.

The Appellant's defense is based on the principle that he should be held accountable for the burglary, but not for the attempted rape. His argument that another individual, Kable Gunter, had committed the crime. The State mentions the burglary as a rebuttal to this defense. The State pointed out the connection between the crimes to reinforce the idea that all that evidence that put the Appellant was in the home was relevant to prove his identity as the perpetrator, not just that there was a burglary. The State did not suggest the jury should "draw an inference of guilt from the unadmitted evidence." The State suggested the jury should draw an inference of identity from *admitted* evidence of the burglary. During a trial, attorneys "are permitted latitude to argue facts in evidence and reasonable inferences in their closing arguments." State v. Dhaliwal, 150 Wash.2d 559, 577, 79 P.3d 432 (2003). It is

very reasonable and logical to for the State to argue that the burglar was also the attempted rapist.

In any event, the Appellant cannot show any prejudice was caused by the State's augment. This is due to fact that a burglary conduct had already been admitted to by the Appellant to multiple members of law enforcement. At no point during the trial did the Appellant dispute the burglary or deny responsibility. The jury heard multiple times, prior to closing argument, that the Appellant admitted the burglary. The defense focused on a third party perpetrator defense. The issue in the case was identity of the culprit. Because the burglary was not disputed, the Appellant's trial counsel saw no reason to object to discussion of the burglary. "Where there is a failure to object to improper statements, it constitutes a waiver unless the statement is so flagrant and ill-intentioned that is causes an enduring and resulting prejudice and could not have been neutralized by a curative instruction to the jury." Dhaliwal. at 578. The fact of the actual burglary conviction itself is not relevant when the underlying conduct is admissible and has already been put before the jury.

Common sense also dictates a distinction be made between the two crimes and the stigma they carry. A simple home burglary pales in comparison to an attempted rape of a young girl. It is unrealistic to operate under the assumption that one would assume guilt on an incredibly serious sex offense simply because commission of burglary was discussed in other testimony.

The case rested on whether or not the State could successfully prove, beyond a reasonable doubt, that the Appellant, not Kable Gunter, was the man who entered the home and attempted the rape. The State proved, almost beyond all doubt, that the Appellant was the one who had entered the home on the night in question while the alleged third party perpetrator was miles away. The State properly pointed this out to the jury during closing argument. The burglary conduct itself was important only so far as it proved the identity of the perpetrator. It was not important as an underlying conviction because a burglary does not automatically associate a person with a sexual assault offense.

The Appellant cites the case of State v. Belgarde for the assertion that a prosecutor cannot call attention to items not in evidence during closing argument. 110 Wash.2d 504, 755 P.2d 174 (1988). In that case the prosecutor said the defendant was

"strong in" a group (the American Indian Movement) which was comprised of madman and butchers who killed indiscriminately. Id. at 508. During the same closing the prosecutor also commented on the defendant's choice to remain silent. Id. at 512. The current case does not rise to this level. Commenting on a burglary which is not in dispute, the facts of which were properly admitted into evidence, does not constitute flagrant and ill intentioned behavior and does nothing to prejudice the jury.

4. THE STATE PROPERLY ARGUED THE FACTS SUBMITTED INTO EVIDENCE DURING CLOSING ARGUMENT BY POINTING OUT EVIDENCE THAT CONFIRMED AN ACTUAL CRIME HAD OCCURRED AND THE STATE'S WITNESSES WERE CREDIBLE BECAUSE THEY SHOWED REAL EMOTION.

The State bears the burden of proving all elements of a crime beyond a reasonable doubt. In doing this, the State must show that crime, or an attempted crime, actually occurred. In this case, the State properly argued that one can look at the reaction of the children involved in the case and see the authenticity of their testimony and the reality that a crime occurred. The Appellant would undoubtedly have preferred the jury not hear about how his actions terrorized children, but such evidence came in during

testimony and the State mentioned such testimony for legitimate reasons.

"Arguments which may evoke an emotional response are appropriate if the prosecutor restricts his argument to the circumstances of the crime." State v. Brett, 126 Wash.2d 136, 214, 892 P.2d 29 (1995). In this case the evidence clearly indicated that at least two children were crying and upset. Vieny testified in some detail about the demeanor of both children when they woke her up, yelling at her door. That testimony was accurately summarized by the State during closing argument.

The purpose of the summary was not to inflame the jury's prejudices, but to point out that such emotions can play a role in their weighing the credibility and authenticity of the witnesses. The Appellant told police that L.S. approached him and would not go back to her room. However, L.S. said she was taken from her room and put on a couch. L.S.'s fear and dismay at the time of the incident, and her tears during trial, were consistent with her version of the events, not the Appellant's. Likewise, her attempt to pull her shirt down was consistent with a feeling a being violated. These pieces of evidence go to the authenticity of L.S. and her cousin.

They are relevant and the jury has the ability to consider them during deliberations.

5. DEFENSE COUNSEL DID NOT OBJECT TO ARGUMENT CONSISTENT WITH THE DEFENSE THEORY OF THE CASE AND MADE A STRATEGIC DECISION TO FOCUS ON DEFENSE OF THE CHARGE WHICH WOULD RESULT IN A LIFE SENTENCE.

The Appellant faced an overwhelming amount of evidence in the burglary case. His statements admitting guilt coupled with the physical evidence left him with no valid defense. The Appellant did have a possible defense to the attempted rape charge because L.S. and F.S. had incorrectly identified someone else as being present within the house. The Appellant's trial attorney chose to concede the burglary in order to bolster the Appellant's defense against the two strikes charge which would result in a life imprisonment. Such a strategic decision is within the purview of the trial attorney and is not ineffective assistance of counsel.

The standard of review for ineffective assistance of counsel is de novo. State v. White, 80 Wash.App. 406, 410, 907 P.2d 310 (1995) However, the Supreme Court has underlined the importance of taking a measured and deferential approach to examining a defense counsel's trial strategy:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, supra, 350 U.S. at 101, 76 S.Ct., at 164.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two-pronged test. State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The first step for the appellant is to show that "defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances..." Id. In considering this factor the courts "engage

in a strong presumption counsel's representation was effective. Id. at 335. Indeed, the burden is on the appellant in this case to demonstrate, based on the available record, that his trial defense counsel was ineffective. Id. The second prong the appellant must satisfy is to make a showing that "defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

For the appellant to satisfy the first prong and show there is that deficient representation he must show that there is "no legitimate strategic or tactical reasons" for the trial defense counsel to have made his decision. State v. Rainy, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001). The Appellant argues that there is not a legitimate trial strategy for allowing the State to mention the burglary plea. This ignores the Appellant's entire strategy at trial.

The Appellant and his trial counsel took two actions that made his trial strategy clear. One, he filed a third party perpetrator brief, and two; he entered a guilty to Residential Burglary. CP 108-109, 95-104. By taking these actions, the Appellant focused his defense solely on the attempted rape charge. This made sense given the circumstances. The Appellant did not have a good

defense versus the burglary, but he did have a possible defense for the attempted rape as the children had identified another individual, Kable Gunter, as the man within the home.

This decision, sought to turn the admissions to the burglary into a positive instead of a negative. The Appellant's trial counsel argued the Appellant admitted to the burglary because he has "[t]aken responsibility." RP at 504. The suggestion is that he Appellant is accepting responsibility for his part in the crime, but Kable Gunter is the one responsible for the rape. Since the Appellant had no defense to the burglary, it is logical for him to try and turn it around. He wants to appear genuine in comparison to various State witnesses who may have credibility problems (Gunter and Dilkey). RP at 105. The jury has no idea that the plea occurred the morning of trial, for all they know the Appellant pled guilty to the charge months earlier. In that sense, the State actually plays into the hands of the defense by mentioning there was a plea as it follows the theme of the Appellant taking responsibility to his part in the crime.

The idea that the Appellant's trial counsel should have stood up and made an objection to the mention of a burglary plea also disregards human nature. The Appellant is attempting to get the

jury to believe he was in the house but did not do anything to the child. That instead, someone else was also in the home. If the Appellant spent the entire trial trying to deny a burglary which he obviously committed he would not have any credibility with the jury by the time of closing arguments. If he blatantly lied about the burglary he could not be trusted when he told law enforcement he did not attempt the rape. The Appellant pled guilty the morning of trial to secure this argument. Accepting responsibility for the burglary was a tactical decision, not an act of negligence as suggested by the Appellant.

In any event, the Appellant in this case cannot meet the requirements of showing prejudice:

> "[w]here as in this case, counsel's failure to litigate a motion to sever is the basis of the defendant's claim, showing prejudice entails demonstrating that the motion should have been granted. Kimmelman v. Morrison, 477 U.S. 365, 1036 S.Ct. 2574, 2583, 91 L.Ed.2nd 305 (1986). In addition, the defendant must show that there is a 'reasonable probability' that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Kimmelman, 106 S.Ct. at 2583 Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

State v. Standifer, 48 Wash.App. 121, 125-126, 737 P.2d 1308 (1987).

The fact of the actual burglary plea did not change the evidence. As discussed above, the evidence of the burglary was cross admissible as evidence of the attempted rape. The Appellant could only hope to mitigate the damage of the burglary by admitting to it. He could not change the fact that compelling circumstantial evidence tied him directly the attempted rape. Such evidence had already been admitted. An example of this was L.S.'s skirt. She testified that he was taken from the room she slept in on the night of the incident and she next saw it being worn by the Appellant. The theft of the skirt surely qualifies as burglary, but that it is a burglary is inconsequential compared to the fact that it places the Appellant in the room with the victim and also could be deemed to indicate he has some particular interest in the victim, given that he chose to don the skirt once he escaped the premises. There are multiple other examples of such evidence in the State's case. Not referring to the burglary as a conviction has no impression upon this evidence whatsoever.

D. CONCLUSION

Understanding of the issues in dispute within the trial as a whole shows the Appellant was represented effectively and received a fair trial. On the basis of the arguments set forth herein,

it is respectfully requested that the jury verdict of the Superior Court for Franklin County be upheld.

Dated this 21st day of May 2014.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By:
Brian V. Hultgrenn,
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 21st of May 2014 a copy of the foregoing was delivered to Terry Michael Hoefler #758076, Appellant, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla WA 99362 by depositing in the mail of the United States

of America a properly stamped and addressed envelope and to Susan M. Gasch, opposing counsel, gaschlaw@msn.com by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 21st of May, 2014

Notary Public in and for
the State of Washington,
residing at Kennewick.
My appointment expires:
May 19, 2018.

adi