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

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

v.

JULIO GAVIER RAMIREZ JR.

Appellant.

BRIEF OF APPELLANT, JULIO RAMIREZ JR.

Submitted by:

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I. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied defendant's request for an exceptional sentence downward.
2. The trial court erred when it denied the defendant the opportunity to cross-examine the victim's current relationship status.
3. There was insufficient evidence to support a conviction for Rape in the Second Degree.

B. ISSUES PRESENTED

1. Did the trial court abuse its discretion by not sentencing the defendant to an exceptional sentence downward?
2. Did the trial court abuse its discretion when it denied defense counsel the opportunity to cross-examine the victim regarding her current relationship status?
3. Whether there was sufficient evidence to support the jury's finding that Mr. Ramirez engaged in sexual intercourse while the victim was incapable of consent by reason of being physically helpless or mentally incapacitated?

II. STATEMENT OF THE CASE

A. Factual History.

On April 28th, 2015, Julio G. Ramirez Jr. ("Mr. Ramirez") was charged by information with one count of Third Degree Rape¹ against Heather Solomon ("Ms. Solomon"). CP at 1. An amended information was filed on July 30th, 2015, adding one additional count of Second Degree Rape² against Ms. Solomon. CP at 2. Consequently, the amended information alleged that Mr. Ramirez committed Rape in the Second Degree and Rape in the Third Degree against Ms. Solomon on or about February 1, 2015. CP at 2

The Court heard motions in limine on December 14th, 2015. RP at 2. The defense argued as one of its motions in limine that the State be precluded from admitting testimony regarding two past incidents where Mr. Ramirez made a forward advance towards Ms. Solomon because it was too remote in time. CP at 3-6; RP at 12-18. The court ultimately ruled, however, that such evidence was admissible because its probative value outweighed its prejudicial value. CP at 18.

¹ RCW 9A.44.060(1)(a).

² RCW 9A.44.050(1)(b).

The State's case in chief was initiated on December 15th, 2016. CP at 44. Consequently, the first witness to be called was Ms. Solomon. TM-RP at 15³. Furthermore, the order of testimony was modified, so that instead of the defense moving right into cross-examination of Ms. Solomon, the court permitted the prosecutor to interrupt direct-examination of Ms. Solomon and proceed with direct-examination of Dr. Nolan McMullin. TM-RP at 61; RP at 44-57. Once both direct and cross-examination of Dr. McMullin was completed, the State resumed direct-examination of Ms. Solomon. RP at 75-9.

During direct-examination of Ms. Solomon, the State elicited testimony from Ms. Solomon that Mr. Ramirez had attempted to force himself on her. TM-RP at 22-5⁴. Furthermore, the State also questioned Ms. Solomon about a New Years Resolution where she vowed not to be intimate with any other individuals. RP at 75. Additionally, the State also inquired as to whether Ms. Solomon was in a relationship with

³ Verbatim Report of Proceedings as transcribed by Court Reporter, Ms. Tammey McMaster, CCR No. 2751 ("TM-RP").

⁴ The Defense did not object to this line of questioning at the time because the court ruled it admissible per motions in limine. CP at 3-6; RP at 12-18.

anyone else that might prompt her to describe the incident on February 1, 2015, as nonconsensual, to which she responded in the negative. RP at 79. Upon completion of direct-examination, the defense began its cross-examination. RP at 79-100.

Immediately upon cross-examination, the defense attempted to elicit testimony regarding the nature of Ms. Solomon's relationship with her roommate, Kendra Warren ("Ms. Warren"). The State immediately objected and the court sustained the objection. RP at 80. After the defense was finished with cross-examining Ms. Solomon, the State began redirect with the defense submitting re-cross-examination of Ms. Solomon. RP at 100.

The next witness to be called by the State was Christopher Benesch. RP at 102-111. Followed by Kelsey Scott. RP at 115-21. And finally, the State's final witness was Stormi Koerner. RP at 122-58. The State then rested, where the defense then called Mr. Ramirez to the stand followed by Stormi Koerner. RP at 164-98. The defense rested on December 15th, 2016. RP at 199.

Proposed Jury instructions were addressed on December 16th, 2016 and neither the State nor the defense took exception

to the Court's proposed instructions to the Jury. RP at 209; CP 76-95. At the completion of reciting the jury instructions to the jury and the closing arguments, the jury retired to begin deliberations. RP at 211-63.

The jury returned a verdict on December 17th, 2016. Consequently, the jury found Mr. Ramirez not guilty of Rape in the Third Degree and guilty of Rape in the Second Degree. RP at 267; CP at 25-6. Sentencing was then scheduled for January 22nd, 2016. RP at 275.

Prior to the January 22nd, 2016 sentencing hearing, the defense filed a motion for Arrest of Judgment arguing that an individual sleeping is not "mentally incapacitated" or "physically helpless" as a matter of law. CP 27-30. The State, in turn, filed a response. CP 31-5. Argument was heard on January 22nd, 2016 where the Court found and entered an order stating that there was in fact sufficient evidence of incapacitation or physical helplessness to support the conviction of Rape in the Second Degree. CP at 36; RP at 276-88. Sentencing, however, was continued out until February 26th, 2016.

Before sentencing, the defense filed a Sentencing Memorandum on February 24th, 2016. CP at 37-59. The basis of the sentencing memorandum requested that the court consider an exceptional sentence downward. CP at 37-42.

The sentencing hearing was conducted February 26th, 2016 where the court heard arguments regarding sentencing. RP at 290-311. During sentencing, the State sought eighty months of incarceration. RP at 290. Whereas, based on its sentencing memorandum, the defense requested an exceptional sentence downward. RP at 291-97; CP 37-42. Ultimately, the court sentenced Mr. Ramirez to seventy-eight months to life. RP at 305; CP 60-75. This appeal followed.

B. Procedural History.

An information was filed on April 28th, 2015, alleging one count of Rape in the Third Degree. CP at 1. Subsequently, the State filed an amended information alleging an additional count of Rape in the Second Degree on July 30th, 2015. Trial began on December 14th, 2015. RP at 2.

Prior to the first day of trial, the defense filed its Motions in Limine on December 11th, 2015. CP 3-7. The State followed by filing its Trial Memorandum on December 18th, 2015. Arguments regarding pretrial motions were heard on December 14th, 2015. RP at 12-35.

The State's case-in-chief began on December 15th, 2016. TM-RP at 15. Trial concluded and the jury began deliberations on December 16th, 2015. RP at 266. The court's instructions were read to the jury December 16th, 2016 and filed with the court on December 18th, 2016. RP at 211-21; CP at 76-95. The jury returned its verdicts on December 17th, 2016. RP at 267. The jury found Mr. Ramirez not guilty of count one and guilty of count two. RP at 267; CP at 25-6.

A sentencing hearing was scheduled for January 22nd, 2016. RP at 275. The Defense, prior to the sentencing hearing, filed a Motion for Arrest of Judgment on December 28th, 2015. CP at 27-30. The State, in turn, filed its Response to Defendant's Motion for Arrest of Judgment on January 20th, 2016. CP at 31-35. A hearing was held on January 22nd, 2016 to address the defendant's Motion for Arrest of Judgment. RP 276-88. The Court denied defendant's Motion for Arrest of Judgment and filed its order denying such motion on January 22nd, 2016. RP at 287; CP at 36. Additionally, the Sentencing hearing scheduled for January 22nd, 2016 was continued until February 26th, 2016. RP at 288-9.

The defense then filed its sentencing memorandum on February 24th, 2016. Consequently, the court sentenced Mr. Ramirez on February 26th, 2016 and the Judgment and Sentence was filed on February 29th, 2016. RP at 290-311; CP at 60-75. This appeal followed.

III. DISCUSSION

A. THE TRIAL COURT ERRED BY DENYING DEFENDANT'S MOTION FOR AN EXCEPTIONAL SENTENCE DOWNWARD.

The court abused its discretion by not granting Defendant's motion for an exceptional sentence downward because the Court categorically denied the defendant's motion and did not consider the mitigating factors presented supporting a downward departure. Therefore, the sentence should be reversed and remanded for resentencing.

Generally, pursuant to RCW 9.94A.585(1), "[a] sentence within the standard range . . . for an offense shall not be appealed[]"; although, such a prohibition is not absolute when an exceptional sentence is requested and denied. *See State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727, 728 (2000) (footnote omitted) ("[Where] a defendant has requested an exceptional sentence below the standard range, we may review the decision if the court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence."). Given this, "[a] trial court abuses discretion when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'" *State v. Grayson*, 154 Wn.2d 333, 342, 111

P.3d 1183, 1188 (2005) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)). Consequently, "[t]he failure to consider an exceptional sentence is reversible error." *Grayson*, 154 Wn.2d at 342.

In addition, pursuant to RCW 9.9A.535:

The court may impose a sentence outside the standard range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(1) Mitigating Circumstances - Court to Consider
The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are **illustrative only and are not intended to be exclusive reasons for exceptional sentences.**

(a) To a significant degree, the victim was the initiator, will participant, aggressor, or provoker of the incident.

. . . .

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct . . . was significantly impaired

(Emphasis added).

All things considered, the court in this case abused its discretion where it categorically declined to impose an exceptional sentence downward based on an impermissible basis and, as the record suggests, this refusal was based on a

categorical bar to imposing exceptional sentences downwards for defendant's convicted of rape.

Specifically, on February 24th, 2016, the defense submitted its Sentencing Memorandum requesting an exceptional sentence downward based on the defendant's age – namely capacity -- at the time of the offense as well as the social mores that provided the context in which the offense was committed. CP at 37-42. Contrarily, the State requested a sentence within the standard range. RP at 299. Ultimately, the court denied Mr. Ramirez' request for a downward departure and sentenced him within the standard range.

This denial, however, was in error because the court used an impermissible basis in denying defendant's request for an exceptional sentence downward. Specifically, the court did not consider the defendant's age as a mitigating factor under RCW 9.94A.535. Namely, when faced with this mitigating factor, the court stated "[a]nd we do know in the law that it is true that age or lack of criminal record, either one of those, are mitigating factors because they **presumed (sic) to be inherent in the sentence** the State has directed we give." CP at 302-3 (emphasis added). However, this assertion of the law is

incorrect. While it is true that lack of criminal history is not a mitigating factor prescribed by RCW 9.94A.535, age is. For instance, the sentencing guidelines vary depending on the defendant's criminal history. The more criminal history there is, the higher the range. The court was correct in asserting this consideration is inherent within the guidelines. *See id.*

However, age is not. And while age is not specifically listed in the unexhausted reasons provided in RCW 9.94A.535 for downward departure, it still needs to be considered when requested since RCW 9.94A.535 is "not intended to be exclusive." Generally speaking, though the court articulated how age can be a factor in determining an individual's capacity, the court assumed that such a consideration was inherent in the sentencing guidelines from the outset so it would seem the court never really considered it as grounds for a downward departure. CP at 302-4.

Equally as important, Mr. Ramirez requested a downward departure based on the social mores that young adults are faced with today regarding sexual culture. CP at 39. Similar to age, this is not specifically a mitigating factor listed in RCW 9.94A.535(1) but one that needs to be considered. While the

court did note it was not familiar with today's social mores, the record does not suggest it was used to consider whether a downward departure from the guidelines was warranted. RP at 304.

Given these points, if this court does find that the sentencing court did consider the mitigating factors proposed by the defense, it should however, acknowledge that the sentencing court did not exercise its discretion based on the fact that a request for a downward departure would never be appropriate in cases of rape convictions. During the sentencing hearing, the court stated:

And the line ultimately, from my perspective, regardless of social mores and regardless of youth, regardless of impulsivity or lack of brain development, there is consent. That is the **ultimate line**. It is the assessment of society, if things are consensual and we're adults, then so be it. But if they are not, they are not. And that is in fact the line, at least from my perspective. And so the jury found in this case.

RP at 304 (emphasis added).

Consequently, based on the court's perspective, it would appear that mitigating circumstances for any individual convicted of rape, i.e. sexual intercourse without consent, are never appropriate. This is also reversible error. *See State v. Grayson*, 154 Wn.2d 333, 342 111 P.3d 1183, 1188 (2005) ("[a]

trial court abuses discretion when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.'") (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

In summary, Mr. Ramirez requested an exceptional sentence downward. CP at 37-42. Subsequently, the court denied this request, arguably, because the court viewed the defendant's age to be an inherent consideration in the sentencing guidelines. RP at 300-5. Additionally, it does not appear that the court considered the sexual mores affecting today's young adults. *Id.* Furthermore, the record also suggests that this court has adopted a bright line rule where all individuals convicted of rape are lumped into a specific category that never warrants a downward departure of the defendant's sentence. *Id.* at 304. Consequently, even if this court was to find that the sentencing court considered the mitigating factors properly, this categorical denial of a downward departure is an improper basis to deny a defendant's request for sentence below the standard range and is reversible error. The sentence should be reversed and remanded back to the sentencing court so that Mr. Ramirez can be resentenced.

B. THE COURT ABUSED ITS DISCRETION BY DENYING THE DEFENSE AN OPPORTUNITY TO INQUIRE INTO MS. SOLOMON'S PAST AND CURRENT RELATIONSHIP STATUS.

Mr. Ramirez was denied his federal and state constitutional rights to confront and cross-examine adverse witnesses because the defense was not entitled to question Ms. Solomon of her current and past sexual relationships after the State opened the door on direct examination.

1. RIGHT TO CROSS EXAMINATION

Namely, "[t]he sixth amendment to the United States Constitution and [Washington] Const. art. 1, § 22 grant criminal defendant's two separate rights: . . . (2) the right to confront and cross-examine adverse witnesses." *State v. Hudlow*, 99 Wn.2d 1, 14-5, 659 P.2d 514, 522 (1983) (citations omitted). However, "[u]nder ER 611(b), the trial court has discretion to determine the scope of cross examination" and this determination will not be disturbed absent an abuse of discretion. *State v. McDaniel*, 83 Wn. App 179, 184, 920 P.2d 1218, 1221 (1996) (citations omitted).

"Although [the right to confront and cross-examine adverse witnesses] is of constitutional magnitude, it is subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against

the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.

Id. at 185. The aforementioned prejudicial evidence that would limit cross-examination in a sexual assault trial is that of the victim's alleged sexual history. However, such evidence is not automatically precluded and is still left to the discretion of the court, which is governed by RCW 9A.44.020. Specifically, RCW 9A.44.020 provides in relevant part:

(2) Evidence of the victim's past sexual behavior . . . is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section

(3) In any prosecution for the crime of rape . . . pursuant to the following procedures:

(a) A written pretrial motion shall be made by the defendant

. . . .

. . . .

(d) If the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant

Furthermore, in instances where the defendant does not file a pretrial motion requesting the use of such evidence⁵, the defendant is still not automatically barred from introducing such evidence. Pursuant to RCW 9A.44.020(4):

Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

Consequently, "confrontation violations . . . are subject to a harmless error analysis." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640, 644 (2007). Given this, due to the constitutional nature of infringing on a defendant's right to confrontation, "error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *Id.* Moreover, "[a] constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *Id.*

In light of the above rules, the inquiry that this court must make is whether, under RCW 9A.44.020(4), the State elicited

⁵ See RCW 9A.44.020(3)(a).

testimony regarding Ms. Solomon's past sexual behavior. *See Hudlow*, 99 Wn.2d 1, 21, 659 P.2d 514, 525 (1983). Here, during the State's direct examination of the complainant, Ms. Solomon, the State inquired:

Question: Did you have any person to hide a consensual sexual relationship with Mr. Ramirez, from, maybe a man who was interested in you or some other reason for hiding a consensual relationship?

Answer: No.

RP at 79. At this point the State turned over questioning to the defense. The following questions and answers took place between the defense and Ms. Solomon.

Defense Question: What was the nature of your relationship with Kandra Warren?

Answer: We were friends and roommates.

Defense Question: It wasn't romantic at all?

Answer: No.

Defense Question: You had never kissed her?

State's Objection: Your Honor, I'm going to object.

Court: I'm going to sustain it.

Defense Question: More limited: Did you -- From the time that the prosecutor asked whether or not you were in any sort of relationship with anybody, **at the time of this incident** did you have a relationship at all that was romantic at all or sexual at all, or involved kissing at all, during this -- on the date of February 1st?

Answer: No.

RP at 79-80 (emphasis added).

Based on the line of questioning above, it seems apparent that the State in its case-in-chief on direct examination put in issue Ms. Solomon's past and current sexual status and whether or not that status might make her inclined to be dishonest about the nature of her sexual encounter with Mr. Ramirez. However, when Mr. Ramirez specifically questioned Ms. Solomon regarding the sexual relationship with her roommate Ms. Warren, the State objected and the court sustained the objection, consequently prohibiting the defense from impeaching her. RP at 79. It was at this point that the court erred in prohibiting the defense from pursuing this line of questioning. Rather than an outright prohibition, the court should have excused the jury and proceeded with a hearing so the defense would have been given an opportunity to make an offer of proof. *See* RCW 9A.44.020(3), (4).

The reason being is that the evidence sought on cross-examination was highly relevant. *See McDaniel*, 83 Wn. App. 179, 184, 920 P.2d 1218, 1221 (1996) (citations omitted). Specifically, the State inquired as to whether due to Ms.

Solomon's past sexual relationship status, there was an individual in Ms. Solomon's life that might cause her to be dishonest about a consensual relationship with Mr. Ramirez. RP at 79. Whether or not Ms. Solomon would be dishonest about her sexual encounter with Mr. Ramirez is highly relevant as it tends to make an accusation of rape more or less probable. *See* ER 401.

However, Mr. Ramirez was not able to pursue questioning on this matter. Instead, Mr. Ramirez was limited to narrowing his line of questioning to "the time of the incident"⁶ rather than being able to broaden his question to include past sexual behavior like the State was able to. *See* RP. At 79-80. This denial and subsequent limitation is in direct contradiction with RCW 9A.44.020(4) since this statute allows Mr. Ramirez to inquire as to the victim's past sexual behavior "when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior" In this case, the State **did not limit its question to current** sexual behavior and instead introduced both past and current sexual behavior when asking a broad question of "[d]id you have any

⁶ RP at 80

person to hide a consensual sexual relationship with Mr. Ramirez” RP at 79. Interestingly, although the State opened the door to questioning about the victim’s past sexual behavior, the defense was limited to asking a narrow question regarding “the time of the incident.” RP at 80. Consequently, due to the Court’s abuse of discretion, Mr. Ramirez was not able to impeach Ms. Solomon and introduce highly relevant evidence that would make the accusation of rape less probable for the fact-finders.

Given these points, the right to cross-examination may still be limited pursuant to the Rape Shield Law⁷ if the State can "demonstrate a compelling interest to exclude a defendant's relevant evidence"; although, this did not happen because the court did not give the defense an opportunity to make an offer of proof. *Hudlow*, 99 Wn.2d 1, 16, 659 P 2d 514, 522 (1983).

In conclusion, due to the court limiting the defense's ability to cross-examine Ms. Solomon regarding her past and current sexual/relationship status, the defendant was not afforded his right to cross-examination nor the ability to effectively impeach Ms. Solomon. This was an abuse of the

⁷ RCW 9A.44.020

court's discretion as it should have either let the defense pursue its questioning or in the alternative if it was inclined to prohibit such questioning, allow the defense to make an offer of proof regarding the relevance of such questions. *See* RCW 9.44.020(4). Additionally, the court also abused its discretion by not allowing the defense to make an offer of proof regarding this testimony so that the court could consider its relevance. Therefore, Mr. Ramirez' conviction should be reversed and remanded for a new trial so that Mr. Ramirez is given the opportunity to effectively exercise his right to confrontation.

C. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT OF RAPE IN THE SECOND DEGREE.

Mr. Ramirez' conviction should be reversed and dismissed because no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez committed the act of Rape in the Second Degree by means of sexual intercourse with an individual who was either mentally incapacitated or physically helpless.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of

the crime beyond a reasonable doubt. In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture.

State v. Colquitt, 133 Wn. App. 789, 796, 137 P. 3d 892, 895 (2006) (internal citations omitted).

Furthermore, beyond a reasonable doubt is defined as:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence.

CP at 82.

1. RAPE IN THE SECOND DEGREE

"A person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated." CP at 91; *see also* RCW 9A.44.050(1)(b). Specifically:

Mental incapacity is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.

A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to act.

CP at 92.

In this case, the State sought to prove that Ms. Solomon was either mentally incapacitated or physically helpless at the time of the digital penetration because Ms. Solomon stated she was asleep at the time of the incident. RP at 238-9.

2. PHYSICALLY HELPLESS OR INCAPACITATED

No reasonable juror could have found that Mr. Ramirez was guilty of Rape in the Second Degree because Ms. Solomon's testimony did not establish beyond a reasonable doubt that she was asleep when the sexual intercourse was initiated. Specifically, she was neither physically helpless nor incapacitated.

In this case, Mr. Ramirez was found guilty of Rape in the Second Degree by means of sexual intercourse with Ms. Solomon while she was physically helpless or incapacitated. CP at 93; *see also* CP at 26. However, considering Ms. Solomon's testimony and admitting the truth of such testimony "and all inferences that reasonably can be drawn from that evidence", no juror could find **beyond a reasonable doubt** that Ms. Solomon was asleep at the time of the sexual intercourse. *See State v.*

Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892, 895 (2006)
(citation omitted).

"A challenge to the sufficiency of the evidence, by its terms, is fact sensitive." *Id.* at 799. In this case, Ms. Solomon testified that she and Mr. Ramirez have been friends since high school, roughly three to four years. TM-RP at 22. Ms. Solomon stated while they were in high school, roughly three to four years prior to this incident, Mr. Ramirez forced himself on her at a party by throwing her on his bed and trying to remove her shirt. TM-RP at 23. Ms. Solomon resisted Mr. Ramirez' forceful advance and the two moved on from this incident. *Id.* at 23-7. Ultimately, Mr. Ramirez, again, made a romantic pass at Ms. Solomon in the years to follow. TM-RP at 29. However, Mr. Ramirez' gesture the second time was more a confession of his feelings for Ms. Solomon rather than overt, physical demonstration of those affections. *Id.* at 29-30. Taking this evidence at face value, specifically, accepting the truth of State's evidence, Ms. Solomon's testimony, it is reasonable to infer that Ms. Solomon was aware that Mr. Ramirez harbored romantic feelings for her.

On the night of the incident, Ms. Solomon testified that Mr. Ramirez stayed the night with her at her apartment. TM-RP at 39. Upon arriving at Ms. Solomon's apartment, Ms. Solomon and Mr. Ramirez undressed while in Ms. Solomon's bedroom before they climbed into Ms. Solomon's bed to watch a movie and go to sleep. *Id.* at 39-40. At this point, Ms. Solomon stated she fell asleep with Mr. Ramirez in her bed and was later awakened by Mr. Ramirez trying to remove Ms. Solomon's boxers and underwear. TM-RP at 42. Ms. Solomon stated with **certainty** that Mr. Ramirez' actions woke her up. *Id.* At this point, Ms. Solomon said "good morning" and asked what he was doing. *Id.* at 43. Mr. Ramirez then gave Ms. Solomon her boxers and underwear back and they proceeded to go back to bed. *Id.* at 42-45. Upon lying back down, Mr. Ramirez pulled Ms. Solomon closer to him in an effort to cuddle and Ms. Solomon did not "shy away." *Id.* at 45. Ms. Solomon then testified that the next time she woke up was when Mr. Ramirez had his fingers inside her vagina. *Id.* at 46. The prosecutor then inquired:

Prosecutor: Did you feel his finger initially go into you?

Ms. Solomon: **I don't think so.**

Id. at 47 (emphasis added).

Taking Ms. Solomon's testimony as the truth, no reasonable juror could find beyond a reasonable doubt that she was asleep, i.e. physically helpless nor incapacitated, so as to support a finding of guilt for Rape in the Second Degree. Here, we have a woman who has maintained a relationship with a man that she knew had romantic feelings for her. We have a woman who, assuming it as the truth, was subjected to an attempted rape years ago. *Id.* at 23. Finally, we have a woman, who on the night of incident, awoke to find Mr. Ramirez attempting to take off her boxers and underwear. *Id.* at 42. Consequently, due to the fact sensitive nature of a sufficiency of the evidence claim, the above facts clearly create a reasonable doubt as to whether Ms. Solomon did not understand "the nature or consequences of the act of sexual intercourse." *See Id.* at 92. Based on her testimony alone, the "reasonable inference" to be drawn is that she knew Mr. Ramirez had strong feelings for her and apparently was confused about Ms. Solomon's own feelings.

However, even if the facts above do not establish that no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez was guilty of Rape in the Second Degree, Ms.

Solomon's testimony regarding her recollection of the moment of penetration does. When Ms. Solomon was asked whether she felt Mr. Ramirez enter her body with his fingers, she responded that she did not know. *Id.* at 47. The prosecutor's inquiry was a yes or no question. If she were either mentally incapacitated or physically helpless she would not have felt the penetration. However, if she was not, she would have felt it. Her response was she does not know if she felt the initial penetration, a reasonable inference being that **she did** feel the digital penetration. Again, taking her testimony at face value, there are two reasonable inferences that can be drawn, she was awake and felt it or she was not.

Consequently, the fact that the **complainant had doubt** as to whether she felt the digital penetration creates doubt that she was asleep. Ultimately, no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez penetrated Ms. Solomon while she was supposedly asleep. Therefore, Mr. Ramirez' conviction should be reversed and the charge of Rape in the Second Degree should be dismissed.

IV. CONCLUSION

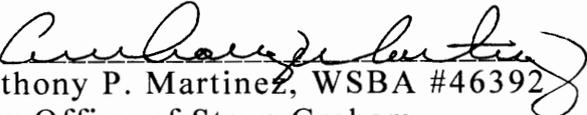
The appellant assigns three errors to the trial court. The court abused its discretion when it denied Mr. Ramirez' request for a downward departure below the standard sentencing range. The discretion was abused because the sentencing court did not consider the mitigating factors offered and also the sentencing court denied Mr. Ramirez' request based on the category of the crime he was convicted of. Ultimately, Mr. Ramirez' sentence should be reversed and remanded back to the sentencing court for resentencing.

Second, the trial court abused its discretion in limiting the defense's ability to cross-examine Ms. Solomon on the nature of her current and past sexual relationships. This error is of constitutional magnitude where prejudice is presumed. Given the nature of this error, Mr. Ramirez' conviction should be reversed and remanded for re-trial.

Finally, there was insufficient evidence to support a finding of guilt on the charge of Rape in the Second Degree. Specifically, no reasonable juror could have found that Ms. Solomon was asleep at the time of sexual intercourse because

even Ms. Solomon had doubt as to whether she was asleep. As such, the conviction should be reversed and dismissed.

DATED this 21st day of October, 2016.

By 
Anthony P. Martinez, WSBA #46392
Law Office of Steve Graham
Attorney for Appellant Julio Ramirez Jr.

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**NO. 342239-III
COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

SPOKANE COUNTY No.: 15-1-01651-3

JULIO RAMIREZ,

Defendant.

AFFIDAVIT OF SERVICE

I, Anthony Martinez, do hereby certify under penalty of perjury that on October 21st, 2016, I hand delivered a true and correct copy of the foregoing Appellant's Brief to:

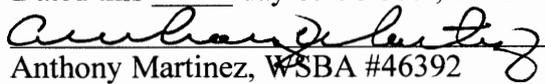
Mr. Brian O'Brien
Spokane County Prosecutor's Office
1100 West Mallon
Spokane, WA 99260

Washington Court of Appeals, Division III
500 N. Cedar
Spokane, WA 99201

Mr. Julio Ramirez, DOC 387964
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of October, 2016.


Anthony Martinez, WSBA #46392