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DEC 20, 2016

Court of Appeals
Division III
State of Washington

34223-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JULIO RAMIREZ JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 3

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT SENTENCING THE DEFENDANT TO AN EXCEPTIONAL SENTENCE DOWNWARD..... 3

 Standard of review. 3

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUSTAINING THE STATE’S OBJECTION TO THE DEFENDANT’S QUESTION REGARDING WHETHER H.S. EVER HAD KISSED HER FEMALE ROOMMATE. 7

 1. Standard of review. 8

 2. Argument. 9

 C. 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. 15

 Standard of review 15

V. CONCLUSION 19

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	9
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	8, 9
<i>State v. Davis</i> , 182 Wn.2d 222, 340 P.3d 820 (2014).....	16
<i>State v. Friederich–Tibbets</i> , 123 Wn.2d 250, 866 P.2d 1257 (1994).....	3
<i>State v. Garcia–Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997), <i>review denied</i> , 136 Wn.2d 1002 (1998).....	4
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005)	4
<i>State v. Hudlow</i> , 99 Wn.2d. 1, 659 P.2d 842 (1983)	11, 12, 13
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	8
<i>State v. Leavitt</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8, 14
<i>State v. O’Dell</i> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	4, 5
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	8
<i>State v. Peppin</i> , 186 Wn. App. 901, 347 P.3d 906, <i>review denied</i> , 184 Wn.2d 1016 (2015).....	7
<i>State v. Price</i> , 158 Wn.2d 630, 146 P.3d 1183 (2006)	9
<i>State v. Quigg</i> , 72 Wn. App. 828, 866 P.2d 655 (1994)	14
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	16
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	16

<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).....	17
<i>State v. Williams</i> , 96 Wn.2d 215, 634 P.2d 868 (1981).....	17

FEDERAL CASES

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	15
<i>United States v. Owens</i> , 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988).....	14

STATUTES

RCW 9.94A.585.....	3
RCW 9A.44.020.....	9, 10, 11, 13
RCW 9A.44.050.....	18

RULES

RAP 2.5.....	8, 13
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I. APPELLANT'S 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.

II. 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?

III. STATEMENT OF THE CASE

The defendant and H.S.¹ had become friends at Rogers High School, but had never "hung out" outside of school until after they both graduated.

¹ The defendant, Julio Ramirez, was three months short of his nineteenth birthday on February 1, 2015, the date of the rape. CP 1. H.S. was 18 years of age at the time of the rape. RPA 16 (RPA is the report of the proceeding transcribed by Ms. McMaster, totaling 62 pages, RPB is the report of proceedings transcribed by Ms. Wittstock, and totals 312 pages).

RPA 22. While the defendant and H.S. were good friends, they never were romantically involved. RP 30.

On the night of the rape, the defendant, H.S., and her female roommate attended a house party in the Gonzaga University area. RPA 35-37. They took two cars in case someone wanted to leave early. *Id.* They attended the party for a few hours, leaving together around 2:00 a.m. RPA 38.

The defendant and H.S. returned to the apartment while the roommate went downtown to pick up her boyfriend. *Id.* The defendant, who lived with his parents, informed H.S. that he did not want to go home that night to face his parents because he had been drinking. RPA 38. H.S. agreed to allow him to stay at her place. *Id.* She allowed him to sleep on her bed.

After falling asleep, H.S. awoke because she was being jostled around by the defendant as he attempted to remove her shorts and underwear. RPA 42. H.S. asked him what he was doing and informed him that she was not going to do anything sexual with anyone until she was involved in a relationship. RPA 43. The defendant seemed to respect her decision. RPA 45. Thereafter, H.S. fell back to sleep. *Id.*

A short time later, H.S. awoke, feeling pain, realizing the defendant's fingers were inside her vagina. RPA 46-47. She had been sleeping on her stomach. RPA 47. Barely awake, she tried to move forward,

but the defendant kept grabbing her hips, pulling her back, in a successful attempt to insert his penis into her vagina. RPA 48. The defendant had wrestled in high school and was very strong. RPA 25, 49. After H.S. began to cry, the defendant stopped his attack. RPA 49-50. H.S. told the defendant to leave, to which he replied, "I can understand if you never talk to me again." RPA 51.

The defendant denied that there was any non-consensual touching occurring that night. RPB 180-182. He stated that both the digital and penile penetration was consensual, and that after approximately twenty minutes of copulation, H.S. decided to stop - she left the bed and ran to the bathroom. RPB 180-182. He testified that she was awake during the whole encounter, although he admitted he had told the police she was not awake. RPB 192.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT SENTENCING THE DEFENDANT TO AN EXCEPTIONAL SENTENCE DOWNWARD

Standard of review.

A standard range sentence is generally not appealable. RCW 9.94A.585(1); *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). Appellate review of the sentencing court's denial of a request for an exceptional sentence below the standard range is limited to circumstances where the sentencing court refuses to exercise its discretion

at all, or relies on an impermissible basis for refusing to impose an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). “While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). The sentencing court’s failure to consider an exceptional sentence authorized by statute is reversible error. *Id.* at 342.

1. Argument.

The defendant claims that the trial court abused its discretion by categorically failing to consider the mitigating circumstances proffered by the defendant at the time of his sentencing. Appellant Br. at 8. At the time of sentencing, the defendant claimed his relative youth and his lack of “instruction or education on the nuances of modern sexual mores as they existed in 2015, or instruction on how to comport his behavior with state law” supported his request for an exceptional sentence downward. CP 39, 38-41 (Defendant’s Sentencing Memorandum).

The defendant also requested an exceptional sentence downward based upon his youth, relying in most part on the recent decision of *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). In *O’Dell*, the defendant

asked the court to impose an exceptional sentence downward because his capacity to appreciate the wrongfulness of his conduct was impaired by his youth. *Id.* at 685. Witnesses testified that the defendant acted much younger than his chronological age and that his bedroom contained childish memorabilia such as toys and stuffed animals. *Id.* at 697-98. The trial court denied the request based on its belief that it could not consider the defendant's age as a possible mitigating factor. *Id.* at 685-86. Because this belief was erroneous, resentencing was warranted. *Id.* at 696-97.

The sentencing record in this case establishes the trial court fully understood that the defendant was requesting an exceptional sentence and was making the argument in good faith.

Here the state has made a request for a standard range sentence and the defense has made a request for a downward deviation, or a sentence below the standard range. Both of those are made in good faith. And both of those have good arguments on either side of it.

RPB 302.

Further, the trial court understood that youth and brain science as it relates to "capacity" or "some sort of particular vulnerability" of the youthful offender was a proper inquiry in this case:

Mr. Graham has argued that we are moving toward -- or have moved, depending how you look at it -- to the question whether the court can consider, if you will, capacity, if you want to say it that way, or some sort of particular vulnerability, if you will. First of all, we all know that

Mr. Graham acknowledges it, Mr. Martin acknowledges it, I believe, and I certainly understand it to be true, that people in -- that are in their teens, early 20s, don't display the same level of maturity of someone who is, say, 30 years old would display. And we know that for a lot of reasons, not the least of which we know all about brain science - we are learning about brain science. We know that this is a period of development, and people have to learn over a period of time appropriate judgment, and so on and so forth.

RPB 303.

However, continuing, the trial court found the defendant had not demonstrated any reason justifying an exceptional sentence in this particular case:

But here it's pretty clear Mr. Ramirez grew up in a household where there were appropriate social mores, there was appropriate parenting, there were certainly boundaries. He attended school. Interacted on a social level. He interacted with [H.S.] on a social level and understood her requests [regarding consent] in the past, and had honored those.

RPB 303.

In conclusion, the trial court found that a standard range sentence at the low-end of the range was appropriate:

Having said all of those things, and I say them all simply so you know that I have really thought about it, this has weighed -- it has weighed on me -- but under the current status of the law, I don't find that there is a reason for this Court to deviate from the standard range. I don't find that the court's language in terms of allowing, if you will, a youthful defendant in terms of their emotional and mental ability has been demonstrated in this case to be something less than normal capacity, something less than reasoned judgment that

Mr. Ramirez has demonstrated in the past and knew what that was in this case, and ultimately failed to demonstrate that appropriate judgment. Accordingly, I'm going to enter a sentence within the standard range.

RPB 304-305.

The trial court considered the defendant's youth, and found he had at least the normal emotional and mental ability to make reasoned judgments. It also considered and addressed the defendant's understanding of the then-existing social mores involved in intimate relationships, including the defendant's recognition of the role consent plays in this type of incident. The trial court did not abuse its discretion in this regard. A trial court that has considered the facts and thereafter concluded that there is no basis for an exceptional sentence downward has exercised its discretion, and the defendant may not appeal that ruling. *State v. Peppin*, 186 Wn. App. 901, 912, 347 P.3d 906, *review denied*, 184 Wn.2d 1016 (2015).

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY SUSTAINING THE STATE'S OBJECTION TO THE DEFENDANT'S QUESTION REGARDING WHETHER H.S. HAD EVER KISSED HER FEMALE ROOMMATE.

On appeal, Mr. Ramirez contends that the trial court violated his right to confrontation by sustaining the State's objection to his question asking the victim, H.S., whether she had ever kissed her female roommate.

This argument is not preserved for appeal and is not supported by the record below.

1. Standard of review.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. *Kirkman*, 159 Wn.2d at 926. To raise an error for the first time on appeal, an appellant must demonstrate (1) the error is truly of constitutional dimension, and (2) the error is manifest. Manifest error in RAP 2.5(a)(3) requires a showing of actual prejudice. *Id.* at 927. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009).

The right to cross-examine adverse witnesses is not absolute. “The confrontation right and associated cross-examination are limited by general considerations of relevance.” *State v. Darden*, 145 Wn.2d 612, 620-21,

41 P.3d 1189 (2002) (citing ER 401, ER 403). The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *State v. Price*, 158 Wn.2d 630, 648-49, 146 P.3d 1183 (2006).

The right of cross-examination is also limited by the Rape Shield Statute, RCW 9A.44.020, that excludes evidence of a victims' prior sexual behavior if offered to attack the credibility of the victim. Appellate courts review the trial court's limitation of the scope of cross-examination for an abuse of discretion. *Darden*, 145 Wn.2d at 619. Discretion is abused if it is exercised without tenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

2. Argument.

After describing the circumstances surrounding the rape, H.S. was asked the following question:

Prosecutor: 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?

H.S.: No.

Prosecutor: Your Honor, I don't have any further questions.

The Court: All right. Your witness, Mr. Graham.

Mr. Graham [defendant's attorney]: What was the nature of your relationship with Kandra Warren [H.S.'s roommate]?

H.S.: We were friends and roommates.

Mr. Graham: It wasn't romantic at all?

H.S.: No.

***Mr. Graham:* You had never kissed her?**

Prosecutor: Your honor, I'm going to object.

The Court: I'm going to sustain it.

Mr. Graham: 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?

H.S. : No.

Mr. Graham: Now, you indicated to - Let me back up. You had this - - You were wearing - When you say Mr. Ramirez put his fingers inside of you, this was when he had - when you had boxer shorts and underwear on, is that correct?

RPB 79-80 (emphasis added).

The trial court's limitation on defendant's question as to whether H.S. had *ever* kissed her female roommate was proper. The question was not relevant to the issue of consent and was of the type prohibited by the "Rape Shield Statute," RCW 9A.44.020. The "Rape Shield Statute" governs testimony concerning a victim's past sexual behavior. This statute provides that a victim's "marital history, divorce history, or general reputation for

promiscuity, nonchastity, or sexual mores contrary to community standards,” is inadmissible if offered to attack the victim’s credibility. RCW 9A.44.020(2). Our Supreme Court has interpreted RCW 9A.44.020 to mean that “credibility is ruled out altogether as the basis for introducing past sexual conduct, and consent is made a suspect justification for the introduction of such evidence.” *State v. Hudlow*, 99 Wn.2d. 1, 8, 659 P.2d 842 (1983). The court noted that the purpose of the statute was to overturn the former common law rule that evidence of promiscuity or nonchastity was evidence of a woman’s lack of credibility, but not so for a man. *Id.* at 8. Another fallacy of the common law rule was the belief that a woman who had consented to sexual activity with another in the past was more likely to currently consent to sexual activity with the defendant. *Id.* at 10. The court rejected the notion that past consent to sexual activity meant one was likely to have consented in the current case; such evidence did “not even meet the bare relevancy test of ER 401.” *Id.* Instead, the court suggested that past patterns of behavior might be relevant if similar to the behavior at issue in the present case. *Id.* at 10-12. Even in cases where past sexual behavior had some relevance to the case at bar, the trial judge has discretion to exclude the evidence if it presented a danger of prejudicing the truthfinding process. *Id.* at 12-14. However, the defendant’s constitutional right to present evidence could only be overcome by the showing of a

“compelling state interest” in excluding relevant evidence. *Id.* at 14-16. The court concluded that the compelling interest test was satisfied with respect to evidence that had minimal relevance, but would not be met for evidence that was highly probative. *Id.* at 16. The court concluded that the trial court had not abused its discretion in excluding evidence that the victims had a reputation for promiscuity. *Id.* at 17-19.

Here, for the first time, the defendant claims he “*was denied his federal and state constitutional rights to confront and cross-examine adverse witnesses because the defense was not entitled to question [H.S.] of her current and past sexual relationships after the State opened the door on direct examination.*” Appellant Br. at 14. This broad claim bears little relationship to the actual narrow question asked and disallowed - whether H.S. had *ever* kissed her roommate - and the follow-up questions. Importantly, after the question was objected to, the defendant was able to ask whether H.S. was “in any sort of relationship with anybody, at the time of this incident,” whether she had “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.” RPB 80. The defendant was allowed to ask whether H.S. was involved romantically with anyone, including kissing, during the relevant time period. Immediately after the objection to the question was sustained, the defendant did not even attempt to make some sort of offer of proof that

would apprise the court of his belatedly raised concern regarding its ruling; instead he proceeded to rephrase and *expand* his inquiry into the kissing and sexual relationship area.

The defendant's failure to apprise the trial court or make an offer of proof is fatal to his confrontation claim. The claim that the state opened the door to the precise question disallowed is left unexplained by the defendant. In an instance such as this where the the prosecutor's question² can be given several meanings, RCW 9A.44.020(4), part of the Rape Shield statute, first requires that the defendant attempt to clarify its meaning, through an offer of proof. Only if, after clarification, the testimony still tends to prove the relevance of *past sexual conduct* is further cross examination in that area permissible. *Hudlow*, 99 Wn.2d at 26.

Here, there was no offer of proof made as to what the witness would have said, or what the basis was for admission of the girl-on-girl-kissing evidence. Indeed, there was no indication that the defendant wished to do something other than rephrase his question. With nothing further, there is no *manifest* or *obvious* error cognizable under RAP 2.5(a)(3). A trial court would not know it was *sua sponte* denying a defendant his constitutional

² "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?" RPB 79

right to confrontation under these circumstances. Moreover, it is not immediately apparent that a constitutional issue is involved. The sustaining of an evidentiary objection to a narrow question does not obviously implicate the confrontation clause where H.S. was subject to cross-examination at trial. *United States v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988); *State v. Leavitt*, 111 Wn.2d 66, 71, 758 P.2d 982 (1988); *State v. Quigg*, 72 Wn. App. 828, 834, 866 P.2d 655 (1994). The defendant's claim that he was denied the ability to impeach the victim, H.S., fails to explain *how* he was denied this ability. Nothing in the record establishes whether H.S. had or had not *ever* kissed her roommate. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333.

Interestingly, rather than acknowledge a failure on the part of counsel to make a record, defendant seeks to assign blame to the trial court for failure to call for a hearing. The defendant claims that by denying his ability to ask whether H.S. had *ever* kissed her roommate, the trial court prevented the defendant from being "afforded his right to cross-examination" and his "ability to effectively impeach [H.S.]" and in doing so, abused its "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 relevancy of such questions.” Appellant Br. at 20-21. Nothing in the record supports the claim that the court “prohibited such questioning”; the defendant was allowed to ask H.S. if she had “a relationship at all that was romantic at all or sexual at all, or involved kissing at all, during this” February 1, 2015, time period. RPB 80. Perhaps, in the absence of being called on to make a record, the trial court should not be faulted.

There was no confrontation error. If there were error, it was harmless. The defendant was able to ask H.S regarding any relationships she was involved in at the time of the incident.

C. 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.

Standard of review

Mr. Ramirez challenges the sufficiency of the evidence supporting his conviction of second degree rape. The purpose for sufficiency of the evidence review is “to guarantee the fundamental protection of due process of law.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for determining the sufficiency of the 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). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the state’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury,

upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

The defendant claims there was insufficient evidence to establish the fact that H.S. was asleep at the time of the defendant's digital penetration.

The defendant admitted to the police that he digitally penetrated the victim while he was asleep. RPB 192, 278³ (Defendant's Motion to Arrest Judgment)(defendant's counsel admitting that this fact had to be considered in the motion for arrest of judgment). H.S. testified as follows:

Prosecutor: What woke you the next time?

H.S.: The next time I woke up to him fingering me.

Prosecutor: Was it still dark out?

H.S.: Yes.

RPA 46.

³ An audio tape of the defendant's confession was admitted at trial but the defendant did not designate it on appeal. Exhibit P4, admitted at RPB 143. The State has designated the transcript in its designation of clerk papers filed with the trial court on December 20, 2016.

Prosecutor : And I'm not trying to embarrass you but when you say the term "fingering," what do you mean by that?

H.S. His fingers were in my vagina.

Prosecutor: Did you feel any pain or anything from that motion he was doing?

H.S.: Yes.

Prosecutor : How was your body when this happened to you?

H.S.: I was on my tummy.

RPA 46-47

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

H.S.: I don't think so

Prosecutor: When you first realized you were awake, was his finger inside or outside of your body?

H.S.: Inside.

Prosecutor: What did you do after you woke up and realized what was happening?

H.S. I tried to move so his fingers wouldn't be inside of me.

RPA 47-48.

A defendant is guilty of Rape in the Second Degree if he "engages in sexual intercourse with another person [when] the victim is incapable of consent by reason of being physically helpless or mentally incapacitated."

RCW 9A.44.050(1)(b). The State argued in this case, and the jury found, that Mr. Ramirez had sexual intercourse by digital penetration with H.S.

when she was incapable of consent by reason of being mentally incapacitated by sleep. The above direct statements provide a sufficient basis to support a jury's finding that H.S. was asleep at the time of the non-consensual digital penetration. The jury was free to believe H.S.'s testimony and disbelieve the defendant's to the contrary. That judgment should not be disturbed on appeal.

V. CONCLUSION

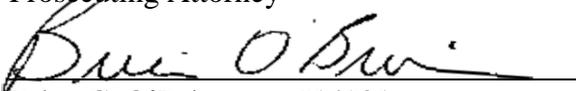
The trial court considered the facts of this specific case and this specific defendant. It thereafter concluded that there is no basis for an exceptional sentence downward. There was no abuse of discretion in this regard.

The trial court did not abuse its discretion when it sustained one objection to whether H.S. had ever kissed her roommate.

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.

Dated this 20 day of December, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

JULIO RAMIREZ JR.,

Appellant,

NO. 34223-9-III

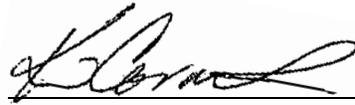
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 20, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Anthony Martinez
anthony@grahamdefense.com

12/20/2016
(Date)

Spokane, WA
(Place)



(Signature)