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No. 37159-0-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

T. P., APPELLANT

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**BRIEF OF RESPONDENT**

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**FEDERAL AUTHORITY**

Sixth Amendment to the United States Constitution... 30

*Strickland v. Washington*, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)...23, 25, 26, 31

*United States v. Arroyo-Angulo*, 580 F.2d 1137,  
1146-47 (2d Cir.), (1978) ..... 12

*United States v. LeFevour*, 798 F.2d 977, 983 (7th Cir.  
1986)..... 16

*Harris v. Rivera*, 454 U.S. 339, 346, 102 S. Ct. 460, 70  
L. Ed. 2d 530 (1981) ..... 16

*Builders Steel Co. v. Comm'r of Internal Revenue*, 79  
F.2d 377, 379 (8th Cir. 1950) .....17

*Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981).. 27

*Brookhart v. Janis*, 384 U.S. 1, 8, 86 S. Ct. 1245,  
16 L. Ed. 2d 314 (1966)..... 27

*Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)  
..... 27

*Miranda v. Arizona*, 384 U.S. 436, (1966)..... 28

**WASHINGTON STATE AUTHORITY**

*State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512,  
(1999)..... 23

*State v. Bell*, 59 Wn.2d 338, 352, 368 P.2d 177  
(1962) ..... 19

<i>State v. Bourgeois</i> , 133 Wn.2d 389, 399, 945 P.2d 1120, 1125, (1997) .....	12, 15, 16, 18, 21
<i>State v. Carson</i> , 184 Wn.2d 207, 220-21, 357 P.3d 1064 (2015) .....	23
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 226, 25 P.3d 10.11 (2001) .....	22
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 806, 659 P.2d 488 (1983) .....	12
<i>State v. Dow</i> , 162 Wn. App. 324, 335, 253 P.3d 476 (2011) .....	23
<i>State v. Foster</i> , 135 Wn.2d 441, 471, 957 P.2d 712 (1998).....	20
<i>State v. Fortun-Cebada</i> , 158 Wn. App.158, 167, (2010) .....	30
<i>State v. Froehlich</i> , 96 Wn.2d 301, 635 P.2d 127, (1981) .....	12
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994) .....	25
<i>State v. Gower</i> , 179 Wn.2d 851, 856, 321 P.3d 1178, 1180, (2014) .....	31
<i>State v. Grier</i> , 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).....	22
<i>Matter of Hopper</i> , 4 Wn. App. 2d 838, 844, 424 P.3d 228 (2018).....	22
<i>State v. Kirkman</i> , 159 Wn.2d 918, 927, 155 P.3d 125 (2007) .....	19
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) .....	23

State v. Mercy, 55 Wn.2d 530, 348 P.2d 978 (1960)	20
State v. Miles, 77 Wn.2d 593, 599, 464 P.2d 723, 726-727, (1970)	20
State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)	19
Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993)	21
State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173, 179, (1984)	13, 15
State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26, 30, (2002)	16, 19, 31-32
State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001)	27
State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)	21
State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970, 995, (2004)	21-22
State v. Vargas, 9 Wn. App. 2d 1034, (2019)	19
State v. Wafford, 199 Wn. App. 32, 41, 397 P.3d 926 (2017)	22
State v. White, 132 Wn. App. 1056 (2006)	27
<u>Washington Pattern Jury Instructions</u>	
WPIC 1.02	17-18
WPIC 1.01	31
<u>Washington Rules of Evidence</u>	
ER 401	19

Statutes

RCW 13.40.020(18)(b). ..... 6, 12  
RCW 9A.44.020 ..... 14  
RCW 13.04.021(2).....31

**INTRODUCTION**

The Court entered a Guilty verdict following a bench trial in Superior Court, Juvenile Division, to 1

count of Rape in the Third Degree, after which, Appellant filed this timely appeal alleging four assignments of error. Respondent, State of Washington assigns and concedes error as to issues A and D raised by Appellant; but Respondent does not concede to either assignment of error as to issues B and C. Therefore, this response is limited only to issues B and C presented by Appellant.

#### **STATEMENT OF THE CASE AND ISSUES RAISED ON APPEAL**

##### A. Length of Community Supervision.

Appellant alleges that the juvenile court exceeded its authority when it imposed 24 months of Community Supervision rather than 12 months, with which the State agrees. The proper, standard range length of Community Supervision for this offense, given Appellant's criminal history, was 12 months, not 24 months. RCW 13.40.020(18)(b). The State concedes this was error and must be corrected.

B. Whether the Court erred by allowing some testimony about victim's reputation in the community for truthfulness from victim's parents.

The Court did not err when it allowed the victim's mother to testify about her understanding of her daughter's reputation for truthfulness in the community, as the State is entitled to anticipate impeachment efforts by the defense, and there is no evidence that the Court relied upon that testimony in making its decision. For the same reasons, the State was properly allowed to inquire of the victim's father about his understanding of his daughter's reputation for truthfulness in the community.

C. Whether defense counsel was ineffective when, in argument, he conceded an element of the charged offense but never argued that Appellant was guilty of the crime.

Defense counsel was not ineffective when, during argument, he admitted Appellant committed an element of the crime charged, but never admitted guilt of the crime.

D. Whether a clerical error in the Disposition Order should be corrected.

The State believes that a clerical error was made in the Disposition Order and that it should be corrected.

### **I. Facts.**

In March, 2018, T.P. and A.S. became acquainted with each other, initially and primarily on the social media platform, Snapchat. They were both 14 years old at the time and attended the same Jr. High school. Immediately after meeting on social media, they met face-to-face and continued to communicate via Snapchat and in person after school. T.P. expressed his interest in having sex with A.S. during their first face-to-face meeting, which was the same day they met on social media. *RP 73*. T.P. also expressed his intent to have sex with A.S. via Snapchat during their first social media interactions. *RP 73*. A.S. advised that she was not interested in that. *RP 66-67*. T.P. pressed and when rebuffed again, agreed to continue to get to know each other and just 'kick it' together.

Over the next couple of weeks, T.P. and A.S. spent time together getting to know each other and eventually spent time at her parents' home. *RP 67*. T.P. came to A.S.'s home more than once, and while there they played video games together in her bedroom, with her parents home (*RP 43, 52*) and her bedroom door open. *RP 75*.

During the time they spent getting to know each other, T.P and A.S. exchanged Snapchat messages or “texts”. *RP 68-69*. T.P. continued to express his intent to have sex with A.S. and A.S. continued to refuse. T.P. advised A.S. that he “still wanna finger you” (*State’s exhibit 3*). And later T.P. told A.S. “...I’m tryna finger you...” (*State’s exhibit 5*).

Despite this sexual activity standoff between them, and A.S.’s discomfort about the subject, A.S. and T.P. continued to hang out some, but less. T.P. “started using it against me” (*RP 74*) telling A.S. that if she did not let him finger her or have sex with him he would not hang out with her anymore. After a short while of no contact between the two teenagers, A.S. missed T.P. and wanted to hang out with him again, so she messaged him to come hang out and if he did, she would buy him a coffee drink. *RP 74-75*.

T.P. accepted the invitation and he came to A.S.’ house and the two played video games together in A.S.’s bedroom. At some point A.S. got off of her bed to go into the bathroom where she put on her eyeliner before they went to get coffee. T.P. followed A.S. into the bathroom, put his hands on her and tried to put his hand in her pants. *RP 75-76*. A.S. stopped T.P. physically and verbally, which made T.P.

angry and he left the bathroom and went back into the bedroom to resume playing the video game. *RP 76.*

When A.S. went back into her bedroom and sat to watch T.P. play the video game, T.P. put down the game controller and started kissing A.S., which A.S. initially consensually engaged in. *RP 77.* But then T.P. pushed A.S. back onto the bed, feet off the floor, got his body on top of hers and tried to put his hands in her pants. *RP 78-79.* A.S. told him "No" and "Stop" repeatedly and fought his hands off, but he overpowered her and put his fingers inside of her pants and into her vagina. *RP 79-81.* At some point in this struggle, A.S. gave up resisting because she felt helpless. *RP 79.*

When T.P. was done, both he and A.S. got up off the bed and T.P. opened his pants, displayed his genitals and twice demanded that A.S. give him a blow job. *RP 81.* A.S. steadfastly declined to obey the demand. *RP 81.*

Two months passed before A.S. told anyone about the incident. Then approximately six more months passed before she told anyone else. *RP 83.* She and T.P. had stopped "hanging out". A.S. battled depression over the incident, which was noticed but not fully understood by both of her parents. *RP 82-83. RP 44. RP 53.* Some of

the symptoms that A.S.'s parents noticed were nightmares, loss of appetite, and A.S. was "not as happy". *RP 44.*

In January, 2019, A.S. disclosed the events of the rape to her parents and the police investigation ensued in due course. The State charged T.P. with Rape in the Third Degree and on September 11, 2019, the matter went to an adjudicatory hearing. At that hearing, the audio taped statement that T.P. had given to the Detective was admitted as an Exhibit and played for the trier of fact. *RP 26-41.*

At the adjudicatory hearing, the State called four witnesses: Detective Ramon Bravo; Angela Sheldon, A.S.'s mother; Kenneth Sheldon, A.S.'s father, and A.S. herself. The defense declined to cross examine either Detective Bravo or A.S. The defense waived opening statement and did not call any witnesses for its case in chief.

Throughout the adjudicatory hearing defense trial counsel made timely objections and arguments.

The Court found T.P. guilty of Rape in the Third Degree, ordered a Pre-Sentence Investigation and proceeded to a disposition hearing on October 2, 2019. The Court sentenced T.P. to 30 days custody, 24 months of Community Supervision, no monetary fine, \$100 Crime Victim's Compensation fee, \$100 DNA collection fee, and no community restitution. The Court also imposed a number of

Community Supervision terms and restrictions, including an order to register as a sex offender and have no contact with A.S. This timely appeal followed.

## **II. AUTHORITY AND DISCUSSION.**

### A. Length of Community Supervision.

The State concedes that the appropriate length of Community Supervision for this juvenile, under a standard range sentence for the crime of conviction, was 12, not 24 months. RCW 13.40.020(18).

### B(1). Admission of Reputation Evidence.

“The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a manifest abuse of discretion.”, *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983); *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120, 1125, (1997). The State agrees that generally:

...corroborating testimony intended to rehabilitate a witness is not admissible unless the witness's credibility has been attacked by the opposing party.” *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d [\*575] 127 (1981). However, “In particular cases, the credibility of a witness may be an inevitable, central issue. See, e.g., *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146-47 (2d Cir.), cert. denied, 439 U.S. 913 (1978). Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged

and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence.”

*State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173, 179, (1984).

Here, the Appellant and the victim provided identical factual recitations of the events, except for whether or not there was sexual contact, and whether or not there was consent to said contact. Arguably a “he said/she said” kind of case. The defense clearly attempted to pre-emptively attack the credibility of A.S., even though A.S. had not yet testified (and was not later cross examined), by and through her parents’ cross examination. Defense counsel asked A.S.’s mother about A.S.’s prior home-schooling and the reasons for their choice to home-school her. *RP 46*. As one of the reasons that A.S. had been home-schooled, the mother allowed that A.S. had been bullied at school. *RP 46*. Defense counsel pressed the mother as to the type of bullying that A.S. had experienced, choosing to call A.S. a “slut” as a means of reminding the mother of her (mother’s) prior defense interview words. *RP 47*. The defense was thus asserting to the court that, as regarded the matter before it, A.S. was not to be believed because she was reputed to be a morally loose, sexually active, lonely, depressed, pathetic young teenager, so eager to have

friends that she would bribe them to get them to agree to hang out with her. *RP 46-48.*

This credibility attack on the victim's character was a violation of RCW 9A.44.020, the so-called "Rape Shield" statute which, in pertinent part says:

...(3) In any prosecution for the crime of rape, trafficking pursuant to RCW 9A.40.100, or any of the offenses in chapter 9.68A RCW, or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent, except where prohibited in the underlying criminal offense, only pursuant to the following procedure:... (*emphasis added*)

The statute goes on to outline the procedure one must use to seek admission of such evidence, a process requiring a factual basis, an initial judicial decision, testimony in a closed courtroom and a positive ruling in favor of admissibility, before it can be used at trial on the issue of consent of the victim. RCW 9A.44.020(3)(a-d). No such pre-trial procedure was used in this matter and no such judicial permission to elicit or provide evidence of the victim's past sexual behavior or general reputation for promiscuity was requested or given. The defense reference to A.S. having been bullied at school and called a

“slut” by unnamed people was an attempt to show two things: First, to impugn the victim’s credibility, and second, to raise doubt on the issue of consent, the ultimate defense theory of the case. *RP 98*.

This attack was also a violation of ER 404(a) because it was used by the defense to attempt to show a character trait of the victim (sexual promiscuity) and “proving [her] action in conformity therewith on a particular occasion.” Such use was improper, but over the prosecution’s objection, the question was allowed. *RP 47*.

The prosecution anticipated that type of impeachment effort and sought to “...pull the sting of cross examination...” (*Bourgeois, Id.* at 402) by inquiring about the victim’s character for truthfulness during direct examination, before the anticipated defense attack on it. A.S.’s credibility was “an inevitable, central issue.” *Petrich, Id.* at 575. Under these circumstances, the prosecution was entitled to elicit corroborating evidence before the defense’s credibility attack. *Id.*

Defense counsel also attacked the credibility of A.S. through her father’s testimony. During cross examination, the defense asked the father about whether in fact there were observable behavioral changes in his daughter after the alleged incident, something to which the father had just testified on direct exam; whether or not A.S. was depressed and for how long; and the father’s reasons for keeping A.S.

home for home-schooling. *RP 57-58*. Defense counsel is entitled to those queries.

A trial is not just combat; it is also truth-seeking; and each party is entitled to place its case before the jury at one time in an orderly, measured, and balanced fashion, and thus spare the jury from having to deal with bombshells later on. It is on this theory that defense counsel, in beginning their examination of a defendant, will often ask him about his criminal record, knowing that if they do not ask, the prosecutor will do so on cross-examination. What is sauce for the goose is sauce for the gander.

*United States v. LeFevour*, 798 F.2d 977, 983 (7th Cir. 1986), as cited in *Bourgeois, Id.* at 402.

Here, the prosecution anticipated that defense counsel would seek to undermine the victim's credibility and sought to 'pull the sting' ahead of time as allowed by controlling law.

B(2). Admission of reputation evidence for victim's truthfulness in the community.

"In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." *Harris v. Rivera*, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981). *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26, 30, (2002).

In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent

evidence, unless all of the competent evidence is sufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

*Builders Steel Co. v. Comm'r of Internal Revenue*, 79 F.2d 377, 379 (8th Cir. 1950). As cited in *Read, Id.* at 245.

Here, the trial Judge heard very limited reputation testimony from the victim's two parents, about their own beliefs in their own daughter's reputation in the "community" for truthfulness. The mother acknowledged on cross examination that she had never asked anyone what her daughter's reputation was (*RP 46*) and the father, while asserting that his understanding of his daughter's reputation for truthfulness was that she was truthful, gave no basis or foundation for his belief.

The State acknowledges that as to either parent witness, the specifics of what that "community" encompassed were never defined, but asserts that the trier of fact is in a position, and has the duty to assess, witness credibility and the weight to assign to their testimony. In all bench trials such as this case, the judge necessarily becomes the trier of fact in the absence of a jury. Thus, jury instructions are informative as to the duties incumbent upon the trier of fact. Washington Pattern Jury Instruction, 1.02 provides, in pertinent part:

...You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

*WPIC 1.02, excerpted.*

Here, the trial Judge allowed some limited reputation evidence but there is no affirmative evidence that he failed to balance it as to bias, foundation and weight. But even if the Judge should not have admitted the reputation evidence, "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403.

A trial Judge hearing a bench trial is the trier of fact as well as the Judge. "Bench trials place unique demands on judges, requiring

them to sit as both arbiters of law and as finders of fact.” *Read*, 147 Wn.2d at 245.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.” *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). We presume the jury followed the court's instructions absent evidence to the contrary. *Id.* at 596. In [*State v.*] *Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) for example, the court concluded there was no prejudice in large part because the jury was properly instructed that jurors “are the sole judges of the credibility of the witnesses.” 159 Wn.2d at 937 (quoting Clerk’s Papers). *State v. Vargas*, 9 Wn. App. 2d 1034, (2019)

Judges hearing bench trials are entitled to the same presumption as juries, namely, that they will follow the law and disregard evidence that is inadmissible, irrelevant, of no value or little value to the trier of fact. “Evidence is relevant only if it tends to make the existence of any fact of consequence more or less probable. ER 401.” *Read*, *Id.* at 244. Here, the parents’ testimony was brief, admittedly lacked foundation, and carried little if any weight as to whether or not their daughter was lying about the sexual assault she suffered at the hands of T.P..

In *State v. Bell*, 59 Wn.2d 338, 352, 368 P.2d 177 (1962), our Supreme Court stated:

The trial court, in a criminal case (where a jury has been waived), has the duty of evaluating the testimony of the

various witnesses where there is a conflict and of making findings of fact. *Cf. State v. Mercy*, 55 Wn.2d 530, 348 P.2d 978 (1960). As in a civil case, our function is to determine whether there was substantial evidence to support the findings which are challenged in appellant's assignments of error. If so, we must accept the findings as verities. *State v. Miles*, 77 Wn.2d 593, 599, 464 P.2d 723, 726-727, (1970).

"Substantial evidence exists when the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." *State v. Foster*, 135 Wn.2d 441, 471, 957 P.2d 712 (1998). Here, the trial Judge had substantial evidence of the fact of T.P.'s guilt whether or not the character evidence provided by the victim's parents was admitted or considered. For example, all admitted Exhibits (with the possible exception of Exhibit 1) were supportive of T.P.'s guilt, showing his intent to "finger" A.S. as well as her refusal to allow it. *State's Exhibits 2-6*. Also, there was no dispute about whether or not T.P. had the opportunity to commit the crime, as all fact witnesses, including T.P.'s own admitted statement, agree that he was present at the relevant time in the relevant place. Further, the trier of fact was in a position to assess the demeanor and credibility of all of the witnesses, including the victim's, and also including through

the voice of the accused on the admitted audio recording of his voluntary statement to the police Detective. State's Exhibit 1.

On appeal, the court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence." *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939-40, 845 P.2d 1331 (1993). Here, the Court's conclusion that Appellant is guilty of the crime was based on substantial evidence independent of the character evidence the victim's parents provided.

But even an error in admitting evidence does not require reversal if there was no prejudice to the defendant. *Bourgeois*, 133 Wn.2d at 403. This is particularly so if the error is from an evidentiary ruling as opposed to a constitutional mandate. *Id.* Courts apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403,

*State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970, 995, (2004).

Here, the evidence of T.P.'s guilt was overwhelming as a whole.

C. Defense Counsel was Not Ineffective

All criminal defendants/respondents have a Sixth Amendment right to effective counsel. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). In order to establish that his attorney was ineffective, an Appellant must demonstrate both: (1) that counsel performed deficiently; and (2) that the deficient performance resulted in prejudice. *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 10.11 (2001). Both prongs of the test must be satisfied or the ineffectiveness claim fails. *Matter of Hopper*, 4 Wn. App. 2d 838, 844, 424 P.3d 228 (2018). The reviewing court reviews ineffective assistance of counsel claims *de novo*. *State v. Wafford*, 199 Wn. App. 32, 41, 397 P.3d 926 (2017).

In order to establish deficient performance, the Appellant has the burden of showing that their attorney's conduct fell "below an objective standard of reasonableness." *Grier*, 171 Wn.2d at 33. An attorney's performance is presumed effective, and this presumption is overcome only if counsel's actions cannot be explained by any

conceivable legitimate strategy. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512, (1999). Conduct that "can be characterized as legitimate trial strategy or tactics" is generally not considered deficient performance. *State v. Dow*, 162 Wn. App. 324, 335, 253 P.3d 476 (2011); *State v. Carson*, 184 Wn.2d 207, 220-21, 357 P.3d 1064 (2015). An attorney's performance is not deficient simply because the reviewing court does not believe the strategy employed was ideal. *Carson*, 184 Wn.2d at 220.

Any alleged deficiency is not considered in isolation, but rather within its surrounding context. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("Competency of counsel is determined based upon the entire record below."). The court must accordingly consider counsel's contemporaneous perspective, and should not find an attorney deficient based on the benefit of hindsight. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L Ed. 2d 674 (1984).

Here, when one considers the entire record below, one sees that defense counsel was well prepared and actively, appropriately acting on behalf of his client throughout. Defense counsel anticipated and correctly argued a pre-trial witness exclusion issue which

prevented the State's three corroboration of disclosure witnesses from testifying. *RP 11-13*. He argued for the exclusion of witnesses. *RP 13*. He knowingly, advisedly waived making an opening statement, *RP 16*, appropriately objected to hearsay, *RP 19*, argued for better foundation to be laid before an Exhibit was admitted, *RP 24 – 26*, successfully objected to the admission of State's Exhibits 2- 6 through the Detective's testimony, *RP 37-38*, and successfully objected to further leading questions of the Detective and prevented the Detective from providing improper opinion testimony, as well as arguable expert testimony about reasons that sexual assault victims might not immediately report the assault. *RP 38-41*.

On the State's second witness, the mother of the victim, defense counsel timely objected to proposed character evidence from the witness about the victim, properly citing the procedure to follow under the Evidence Rules. *RP 45*.

On cross examination, defense counsel undermined the weight of the mother's testimony about her daughter's reputation for truthfulness, showed the witnesses' bias, and skillfully attacked the credibility of the victim through this State's witness. *RP 46-50*.

Similarly, and perhaps even more so, defense counsel's timely objection and careful cross examination diminished the strength of the State's third witness' testimony, the victim's father. *RP 53-58*.

After carefully monitoring the State's direct exam of the victim, inserting appropriate objections, requests for clarity for the record and generally guarding Appellant's rights under the rules of evidence, defense counsel strategically chose not to cross examine the victim. *RP 59-88*.

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. *Strickland, Id.* at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. *Id.* at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Here, defense counsel demonstrated his preparedness for the case, familiarity with the rules of evidence and ability to apply the rules to the testimony throughout the case. His decisions not to cross examine the Detective or the victim were legitimate trial strategy. As to the Detective, there was no persuasive value to cross examining him as he was not a fact witness and during

his testimony, defense counsel had limited any potential damage the Detective's opinion testimony might have caused through the use of timely, well founded objections which were sustained.

As to the victim, defense counsel had observed her demeanor and testimony throughout her time on the witness stand and presumably made a decision, based on his overall observations of the totality of the circumstances that had presented themselves during the trial, that there was no defense value in cross examining the victim. He had effectively undermined the victim's credibility through cross examination of the victim's parents. This was also a strategic decision planned for and made carefully at the time. There is no suggestion that defense counsel was not prepared to cross examine the victim or the Detective, no suggestion that defense counsel was ineffective in the cross examinations that he did implement, or the pre-trial issues he argued and objections he made throughout.

Defense counsel has the right and the duty to make strategic trial decisions and those decisions must be reviewed from defense counsel's "contemporaneous perspective". *Strickland*, 466 U.S. at 689.

An attorney may not admit his client's guilt contrary to his client's earlier entered plea of "not guilty" unless the defendant unequivocally understands the consequences of the admission. *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir. 1981) (citing *Brookhart v. Janis*, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966)). Plus an attorney may not stipulate to facts that amount to the "functional equivalent" of a guilty plea. *Wiley*, 647 F.2d at 649. [\*9]

For tactical reasons, counsel may stipulate to a particular element of a charge or to issues of proof. *Wiley*, 647 F.2d at 649. Furthermore, counsel's performance is not deficient when he or she admits guilt on one particular count where the evidence is overwhelming. *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) (citing *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991)). *State v. White*, 132 Wn. App. 1056 (2006).

Appellant asserts that defense counsel's closing argument -- which is not evidence -- was unreasonable trial strategy, and that defense counsel conceded Appellant's guilt. Such assertion is incorrect. Defense counsel did concede an element of the charge, but never that Appellant was guilty of the crime. That is a reasonable trial strategy, employed by many more than competent defense lawyers in cases where the evidence admitted at trial allows for use of that strategy.

Here, the admitted evidence was that the two youth in question had been explicitly discussing having sexual activity from the very

beginning of their relationship, that the victim had suffered from depression on and off, that she didn't have any friends, that she'd been called a "slut" at school, that she had waited for approximately eight months to make a disclosure of the alleged assault, and that even knowing the terms of the "deal" T.P. had made with her about hanging out with her again requiring her to let him finger her, she still invited him to hang out and provided added incentive for it. Under those admitted evidentiary facts, defense counsel's assertion in closing argument that there was no lack of consent, a required element of the crime charged, was manifestly reasonable.

But defense counsel also provided more rationale than a bald assertion that there was consent: As to Appellant's *Mirandized* (*Miranda v. Arizona*, 384 U.S. 436, (1966)) statement that he and A.S. "made out", defense counsel pointed out that the definition of "made out" was never specified. Defense counsel raised the idea that that phrase may encompass sexual activity, and that in any event, there was consensual "making out" testified to by both A.S. and T.P. *RP 94-95*.

The thrust of defense counsel's argument was that the victim was making up the assertion that T.P. had sexually touched her

without her consent, and that she made it up to get attention. While that kind of defense is offensive to victims of sexual assault generally and to this victim specifically, it is nonetheless a “tried and true” defense trial strategy that sometimes produces the desired result.

Further, defense counsel’s closing argument clearly demonstrates that he understood the law on consent by his discussion of “intention”:

What this case is about is her intention. It’s not about his intention – it’s clear what his intention is. And I hate to say this – it’s clear what all teenage boys’ intention is because I raised three daughters. But this is not about that; this is about her intention at the moment. And her intention at the moment is based on what she tells him. And she tells him, well I’m not going to hang out with you if you don’t let me do that and then she contacts him. And she not only contacts him, but she puts a carrot in front of him that says look, I’ll take you out for coffee; I’m attracting you to me. That is her intention. And her intention knows what his intention is. At that moment in time, even if we believe everything A.S. says, it’s her intention at that moment in time to do that and she has told him that by her actions.

So there’s not a lack of consent here. There is consent at the very beginning of this. Now, does that change; does it not change? I don’t know; I wasn’t there and the Court wasn’t there. *RP 95-96*.

Defense counsel’s closing argument was not inconsistent with T.P.’s statement to police. Appellant paints that interaction with too broad a brush. In fact, defense trial counsel explained and reconciled

how T.P.'s statement to police was consistent when he points out that the phrase "make out" was never defined in terms of the extent and specifics of sexual activity that "making out" involves. *RP 95*.

As to defense counsel's alleged lack of diligence to obtain a current understanding of the law of consent, Appellant again misapprehends the thrust of defense counsel's closing argument. It was not intended to say that once consent was given it cannot ever be withdrawn, rather, it was stated to cast doubt on the credibility of A.S.'s statement that she had actually withdrawn consent at the relevant time, citing the fact that neither of A.S.'s parents, who were both home at the relevant time, heard any crying out for help or any other such sound of alarm from A.S. *RP 97*. Similarly, defense counsel pointed out during closing argument, that there was no other corroborating evidence to support A.S.'s claim. *RP 97*. Defense counsel's argument was not contrary to his client's recorded statement, nor was it an improper, misstatement of the law of consent.

The defendant must show that the errors made were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *State v. Fortun-Cebada*, 158 Wn. App.

158, 167, 241 P.3d 800 (2010) (quoting *Strickland*, 466 U.S. at 687).

Here, defense counsel's performance at trial was reasonable, considering all of the circumstances.

Lastly, the Judge entered Findings of Fact and Conclusions of Law in this matter on December 11, 2019. In each of the seven findings of fact, the Court made its finding based on the evidence, not argument by counsel. "Evidence includes testimony of witnesses, documents, and physical objects." WPIC 1.01, excerpt. It is not, and was not, counsel's closing argument.

Findings of Fact 2.1, 2.2, 2.5 and 2.6 were unrebutted and are therefore verities on appeal. The disputed Findings of Fact are decided by the neutral fact finder, which in all juvenile matters is the Judicial Officer. RCW 13.04.021(2). In this case, the fact finder heard and admitted or excluded the evidence, weighed it for relevance, bias and value, and in the absence of affirmative evidence to the contrary, is presumed to have applied it appropriately. *State v. Gower*, 179 Wn.2d 851, 856, 321 P.3d 1178, 1180, (2014).

"[a] defendant can rebut the presumption by showing the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential

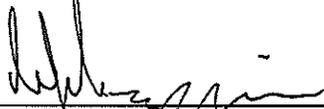
findings that it otherwise would not have made." *Read*, 147 Wn.2d at 245-46. No such showing has been made herein.

D. The State agrees that a Clerical error was made in the Order of Disposition and should be corrected.

### III. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to dismiss this appeal.

Respectfully submitted this 6<sup>th</sup> day of May, 2020



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