

80587-3

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
NO: 21989-5-III

STATE OF WASHINGTON

v.

JOHN EDWARD MINES, JR.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE ROBERT D. AUSTIN

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to find the Defendant guilty of First Degree Rape.
2. There was insufficient evidence presented to find the Defendant guilty of Kidnaping in the First Degree.
3. There was insufficient evidence presented to find the Defendant guilty of Second Degree Assault.
4. The trial court erred in imposing an exceptional sentence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was there sufficient evidence of First Degree Rape presented at trial in order to sustain a conviction?
2. Was there sufficient evidence presented at trial to sustain a conviction for Kidnaping in the First Degree?
3. Was there sufficient evidence presented at trial to sustain a conviction for Second Degree Assault?
4. Was there sufficient justification in the record for the trial court to impose an exceptional sentence?

III. STATEMENT OF THE CASE

Jennifer Robinson testified that She had been working a Frankie Doodles restaurant prior to November 8, 2002. Vp 45. She had gotten into an argument with the manager a few weeks prior to November 8, 2002 and lost her job there. Vp 45. She was a recovering addict and when She lost her job She relapsed into drug use on the night of November 8, 2002 using both cocaine and heroin. Vp 45. She state She first used heroin at age 20 and

continues to struggle with her addiction every day. Vp 46. Because of her addiction She has had convictions for theft and possession of stolen property and ongoing involvement with the police. Vp 46.

Ms. Robinson stated that on November 7, 2002 She went to K-Mart and purchased some clothes and that at about 3 or 4:00 p.m. She decided too get high. Vp 47-48. She bought blue jeans, a white sweater, brown shoes and a black or brown jacket. Vp 48. She stated She was staying in a house on Alice off of Ash by Safeway and Alberto's. Vp 48. She went to a house by the K-Mart on Sprague and Havana to get high. Vp 48. She was riding with friends and they dropped her off at the house. Vp 49. It was a drug house. Vp 49.

Once at the drug house She smoked some cocaine and did some heroin. Vp 49. She did too much heroin and fell asleep for a while, a long while "because I did not wake up until like it was after midnight". Vp 49. After awakening She took a shower, got dressed and started walking. Vp 50. She started walking down Sprague to look for a ride. Vp 50. She was picked up on Sprague by a blue van which had stopped at a stoplight. Vp 50. The side passenger door was opened and She was asked by the occupants if She wanted a ride and She accepted. Vp 50. The van had a passenger seat which swivelled, a driver's seat, a big empty space and a large back seat. Vp 50-51. It was very early in the morning, after midnight. Vp 51. Ms. Robinson saw two individuals, the driver and front passenger, before She got into the van and afterwards noticed a third in the back. Vp 51. She did not know the individuals and was unable to get a good look at the front passenger or the

driver. Vp 51. She described the third individual as “he had – umm – kinky hair. Brown kinky hair, dark colored hair. And he was like, I thought he was maybe Mexican. Light skinned. But I – that’s – I couldn’t tell you much more.” Vp 52. Her stated purpose was to get a ride home. Vp 52.

After entering the van She stated She was asked by the individual in the back “something to do with oral sex”. Vp 52. She refused and asked to be dropped off at the corner. Vp 52. She testified that the individual in the back hit her in the face multiple times and She was knocked unconscious. Vp 52. She testified that She was hit repeatedly in the face and that they made threatening statements to the effect that She was going to die. Vp 53. She tried to open the door and escape but was grabbed by the front passenger and the back passenger. Vp 53. She testified that they both hit her and even the driver hit her at least once. Vp 53.

Ms. Robinson faded in and out of consciousness until She woke up and realized that objects were being inserted into her body, a bottle and another object.. Vp 53. The objects were inserted in her vagina and anal areas. Vp 54. Ms. Robinson testified that the front passenger was the one who was doing the insertions of the objects and the back passenger was the one who was talking and telling her She was going to die. Vp 54. She was repeatedly hit and kicked. Vp 54. She identified the objects being used as a screwdriver and a light green plastic pop bottle. Vp 55. She stated She asked the men to stop several times but they didn’t and continued to hit her. Vp 55. She did not attempt to fight back. Vp 55. She stated She was hit in head and hit and kicked in the stomach. Vp 56. She had lost her clothing sometime

during the alleged attack, but could not remember when or how. Vp 56-57.

After She regained consciousness the van stopped and the driver was called back to “check this out”. Vp 58. She had the impression that the driver was African American. Vp 58. The driver came to the back of the van and then returned to his seat. Vp 58. After the driver returned to his seat they threw her stuff out and told her to get out as well. Vp 59. After exiting the van She laid on the ground and cried for a few minutes. Vp 60. She looked around and found She was in the middle of nowhere and tried to put her clothes back on. Vp 60. It was hard to walk but She walked and crawled to a house. Vp 60. She banged on the door and screamed for help. Vp 60. She stated She was in a lot of pain. Vp 61.

The door was answered and an ambulance was called immediately. Vp 61. She does not remember talking to anyone that night until She was in the hospital. Vp 61-62. She initially told the officers She was abducted and forcibly thrown into the van near Safeway at Northwest Boulevard. Vp 62. This was a lie and She told the detective that it was a lie on the Friday before trial. Vp 62. She initially lied because She was on probation and She was afraid She would be violated if her probation officer found out about her relapse. Vp 62. She identified the defendant in the courtroom as the individual in the back of the van. Vp 66-67.

On cross examination She admitted that She had told the same lie to the officers about being abducted by the Safeway store between Maple and Ash. Vp 74. She also admitted that She had not initially admitted to using

drugs but that She did tell the detectives later that She may have used that day . Vp 74. She admitted to lying to the defendant's attorney prior to the trial about this same issue. Vp74-75. The story at that time was very specific about meeting a friend and getting hooked up to buy some drugs including the amount She was interested in buying or obtaining from her friend. Vp 75-76. The story was that while waiting for her friend She saw the van it slowed down, someone inside said something to her and then She was grabbed and pulled into the van. Vp 76-77. The interview took place in January of 2003 which was a couple of months after the incident occurred . Vp 77. Later She notified the state that She hadn't been truthful. Vp 78. Her stated reason for not being honest at the beginning was because She didn't think the police would be serious about investigating the incident. Vp 78-79. Even though She was in pain She still chose to lie about the facts of this case to the officers. Vp. 80. She also initially lied about her drug use to the officers and to the medical staff at the hospital. Vp 81. She also admitted She may have used some pills of some kind at the drug house. Vp 82. Drug use can affect your memory but it did not affect her ability to lie about the incident even at the time of the incident. Vp 82-83. She did not recall getting in the van and asking for drugs. Vp 83.

She described the driver as being African American with corn rows in his hair. Vp 84. She described the front passenger as being white with a goatee and blond hair. Vp. 84-85. She couldn't remember if there were any interior lights in the van. Vp 86. She couldn't recall if she was carrying a soda pop bottle when She had been picked up. Vp 86. She did not recall

smelling any alcohol or seeing any drugs in the van. Vp 88-89. She did not know how long She was in the van. Vp 90. She was struck basically all over her body. Vp 90. Ms. Robinson left the hospital against medical advice. Vp 91. She did not have any broken bones or any other fractures for injuries. Vp 91. She admitted that the home She lived in on Alice was a drug house as well. Vp 92. She could not remember whether or not She was struck with anything except hands. Vp 94. She admitted to injecting heroin into her left arm. Vp 101.

Dr. Michael May testified that he is an emergency room physician and he treated Jennifer Robinson on November 8, 2002 when She was brought into the emergency room. Vp 105. He identified Ms. Robinson from photographs taken that night. Vp 105-106. Ms. Robinson appeared to be upset and confused when he treated her. Vp 106. Dr. May examined her for physical injury. Vp 106. She had contusions on her forehead and cheekbone as well as some bruising in the periorbital area. Vp 107. Contusions are scrapes and bruises. Vp 107. Dr. May stated that there was also some swelling and bruising on her forehead, small abrasions on the side of her face and abrasions on her back. Vp 107-108, There were abrasions and contusions on her neck and the angle of her jaw. Vp 108. These were consistent with someone having their throat squeezed. Vp 108. Dr. May identified track marks on her left arm. Vp 108. Ms. Robinson was vague as to when She had last used drugs when asked by the Dr. Vp 109. In reviewing a picture of Ms. Robinson's left arm he identified track marks and contusions which could have been the result of the heroin use. Vp 109.

There were also abrasions on the area of her armpit which would have been consistent with a bra being forcibly removed. Vp 110. The Dr identified more bruising and abrasions on her upper right arm, her neck, her right ear and behind her right ear. Vp 110-111. Her injuries were consistent with being hit several times. Vp 111. Her level of consciousness was “waxing and waning” during the examination. Vp 112. Dr. May suspected that She may have had a closed head injury that caused a concussion. Vp 113.

Dr. May conducted examinations of her pelvic regions. Vp 113. He performed a visual inspection and noted redness in the perineal area. Vp 113. He attempted to conduct a pelvic exam including the insertion of a speculum. Vp 113. Ms. Robinson requested he not continue because it caused her pain. Vp 113. Dr. May also performed a rectal examination. Vp 113-114. He found grass and dirt in the area, a laceration approximately one inch long, and the area was extremely tender and sore. Vp 114. Again Ms. Robinson requested he not continue the examination and he complied with that request. Vp 114. He could not determine how old the bruising and contusions on her body were but could say that the laceration and abrasions were consistent with having occurred within approximately 12 hours. Vp 114-115. Dr. May had her admitted to the hospital so that She could be monitored and checked. Vp 115.

On cross examination Dr. May testified that the 12 hour time period would be from the time the Dr. saw her. Vp 117. Dr. May saw Ms. Robinson at 8:00 a.m. on November 8, 2002. Vp 117. This would indicate the injuries would have occurred at 8:00 p.m. although this is not a precise

measurement of time. Vp 117. Ms Robinson initially said She had been clean between 2 days to two weeks. Vp 118. Dr. May found out that She had both heroin and cocaine in her system as well as benzodiazepine. Vp 119. Benzodiazepine is a muscle relaxant. Vp 119. Her level of consciousness during her exam could be related to the drugs in her system. Vp 120. Ms. Robinson has self reported to the Dr. that She had never lost consciousness during the alleged assault. Vp 120. She also lied about her drug use. Vp 120. Some of the injuries were consistent with someone trying to restrain Ms. Robinson. Vp 121. She did not have any broken bones or life threatening injuries. Vp122.-123. Dr. May saw the rectal laceration and some redness in the perineal area but did not see any other tears. Vp 123-124. Ms. Robinson did not wish for any FURTHER examination due to self reported pain. Vp 124. There was no bleeding in the vaginal area but a small amount was detected in the rectal area. Vp 124-125. The redness in the vaginal area could have been due to a number of things. Vp 124-125.

On re-direct the Dr. was asked if he thought She was faking her pain and the Dr. said no. Vp 126. Dr. May also stated that a screwdriver could have cause a great deal of injury. Vp 126. The laceration in the rectal area could have been caused by either a sharp object or by stretching. Vp 127.

On re-cross Dr. May stated that if a person were hit repeatedly She could have had several other potential. Vp 129. She was checked for all of these types of fractures but did not have any of them although She did have an old fracture of the zygoma. Vp 129. It would take a significant amount of force to break a bone in the face. Vp 129. Ms. Robinson never asserted

that She had been strangled. Vp 130.

Kevin Jenkins is employed by the Washington State Patrol Crime Lab as a micro analyst Vp 131. A micro analyst examines small particles related to crimes such as hair and fibers. Vp 132. He had received the alleged victims clothing and a partially burned dark blue floor mat. Vp 134. He also received several hairs from a mountain dew bottle and from Jennifer Robinson as well as hairs recovered from Jennifer Robinson. Vp 135. The hairs removed from Ms. Robinson were used as a control sample. Vp 135. He examined all of the clothing items submitted for trace evidence and found a fiber which when compared to the floor mat and carpet from the van was similar. Vp 143. He also analyzed a clump of hair and fibers. Vp 143. The fibers were similar to the van carpet. Vp 144. He found hair samples taken from the floor of the van and they were similar to Ms Robinson. Vp 145-146. He examined hair samples taken from the Mountain Dew bottle and compared them to Ms. Robinson's hair and were found to be similar. Vp 146. The hairs found in the van were pulled not cut. Vp 148. It is impossible to match hairs. Vp 148.

Sharon Smeltzer is an RN at the Deaconess Medical Center emergency room. Vp 151. She was the receiving nurse for Ms. Robinson when She was brought in to the ER. Vp 151. She assisted in undressing Ms. Robinson. Vp 152. Ms. Robinson had lots of debris on her when they undressed her. Vp 153. The debris was collected into the sheet She was lying on. Vp 154.

Patricia Wiseman is also a registered emergency room nurse at

Deaconess Hospital. Vp 160. Her job on this particular case was to collect evidence. Vp 161. The rape kit has a step by step procedure which includes an interview with the victim and collections of evidence based on that interview. Vp 161. Ms. Robinson's clothing had already been collected. Vp 161. Then the alleged victim's orifices are swabbed. Vo 161-162. Once the evidence is collected it is given to the officers, which they did in this case. Vp 161-162.

Carol McElfish testified that She was the one who made the 911 call. Vp 177. At the time of the call Ms Robinson lied to the 911 operator about how and where She got into the van. Vp182.

Ronald Nye is a Spokane County deputy sheriff. Vp 185. At approximately 4:48 a.m. he received a call regarding a rape and possible abduction. Vp 186. He spoke briefly with Ms. Robinson after arriving at the McElfish home then he backtracked along Marshall Road to where he thought She had been released.. Vp 187. He traveled approximately a quarter of a mile and found What looked like her belongings including a purse. Vp 189. He had his spot and headlights on. Vp 189. After finding the items he called Deputy Hines to come to the location and guard the scene. Vp 190. He then went to the hospital to interview Ms Robinson. Vp 191. He described Ms Robinson as crying off and on and complaining of pain. Vp 192. He collected her clothing. Vp 192. The button on the jeans was missing and the zipper on the jeans was broken. Rp 194. The deputy also collected the sheet that had been under Ms Robinson at the hospital on which they had collected the debris from her anal area. Vp 196. After collecting the

evidence he placed it in the property room where evidence is stored pending trial. Vp 198. The deputy testified that the information given to him at that time by Ms Robinson was the fictitious location and events She had told up until trial. Vp 200-201. During the time he spoke with Ms. Robinson She remained conscious. Vp 202.

Detective David Skogen was contacted at 5:43 a.m. on November 8, 2002 regarding an alleged sexual assault. Vp 207. He went to the scene on Marshall Road to process the scene. Vp 208. He collected items from the crime scene, packaged them up and took them to the property room. Vp 211. The bra he found there had a strap torn off . Vp 214. He also identified a receipt from K-Mart found at the scene which was date stamped November 7, 2002 at 9:53 a.m. Vp 217.

Detective Minde Connelly was the assistant investigator working on this case. Vp 221. The assault took place in the city of Spokane. Vp 221. They located the van at Pull & Save in a salvage area. Vp 221-222.. The van was taken to the processing center and a warrant was obtained to search it and the warrant was executed on November 12, 2002. Vp 222. Arson investigators and a forensic specialist assisted in the search. Vp 222. The vehicle was registered to Clinton Cramer. Vp 223. The van was a 1986 Chevy, blue in color with bucket seats in front, a bench seat in the far back and a side sliding door on the passenger side. Vp 224. The van had extensive fire damage. Vp 224. Evidence was collected including carpet samples and moisture samples. Vp 226. The moisture samples were taken to test for possible accelerants. Vp 226. The carpet samples were taken to

compare with fibers and hair found on the alleged victim. Vp 227. In addition She took items of evidence collected by Detective Hammond in to have them swabbed for DNA. Vp 231. Specifically She took in a Mountain Dew bottle and a champagne bottle, both of which were found at the scene, for testing. Vp 231. They were also checked for fingerprints. Vp 231. When She examined the Mountain Dew bottle She found a couple of hairs near the top of the cap and collected those, they were put into a separate envelope. Vp 233. The swabs were taken to the property room with instructions to be turned over to the Washington State Patrol crime lab for DNA testing and fingerprinting. Vp 236. No fingerprints were found on the items. Vp 237. During cross examination Detective Connelly again admitted that the story Ms Robinson told was that She had been picked up at Maple and Ash by the individuals in the van. Vp 239. That Ms. Robinson had purchased a Mountain Dew at that location. Vp 239. The hair collected on the Mountain Dew bottle appeared to be head hair and there did not appear to be any other substances to collect from the bottle. Vp 242.

Detective Brian Hammond was called at his home on November 9, 2002 regarding the incident involving Ms Robinson. Vp 246. He was assigned as the lead investigator on this case. Vp 246. He reviewed the reports written by the other officers involved in the investigation. Vp 246. He was struck by the combination of alleged perpetrators in this case, one black man with a white one and a light skinned black one. Vp 247. He started to search for any calls involving such a group. Vp 247. The information received was that Mr. Mines hung out with Clinton Cramer who

had a van registered to him which matched the description given by Ms Robinson. Vp 247. He generated a photo montage which included Mr. Mines picture. Vp 248. The montage was shown to Ms Robinson at the hospital. Vp 249. Ms Robinson identified Mr. Mines from the montage. Vp 250. Based on the identification by Ms Robinson he decided to interview Mr. Mines. Vp 252. He also decide To go back to the location where ms. Robinson was released to look for more evidence. Vp 253. He eventually located the Mountain Dew bottle. Vp 259. He collected hair samples from Ms. Robinson. Vp 262. He interviewed Mr. Mines with his mother and Clinton Cramer present on November 11, 2002. Vp 264. He applied for a search warrant on the van, obtained one and when the van was found he had it towed to the vehicle processing center covered with a tarp to preserve the evidence. Vp 265. He interviewed Mr. Mines at the police station. Vp 266. He described Mr. Mines as angry and told him why he was being looked at as a suspect. Vp 268-269. Mr. Mines told him that he was with C.J. (Clinton Cramer) on Friday night in the van and that they had picked up a prostitute on Sprague and Freya. Vp 269. Mr. Mines did not identify who else was with them. Vp 270. However when he was arrested during a traffic stop he was with David McKibben who fit one of the descriptions given by Ms Robinson. Vp 271. He asked Mr. Mines What happened after Ms Robinson got into the van and Mr. Mines stated she was looking for dope. Vp 272-273. Mr. Mines stated "she did not want to blow the three of us and she was looking for dope." Vp 273. Mr. Mines told the detective that she started trying to get out of the van at that point and even grabbed the steering wheel until he

grabbed her by the hair and told her to quit. Vp 273. Mr. Mines denied hitting Ms Robinson and denied that anyone else hit her either. Vp 274. Mr. Mines eventually identified David McKibben as being with them in the van as well as Cameron Wilder that night. Vp 274. Detective Hamond then left the room. Vp 277.

When he reentered the room he asked Mr. Mines again if anyone in the van had hit her and Mr. Mines said no that he had just grabbed her by the hair to keep her from grabbing the wheel of the van and causing it to wreck. Vp 278. Mr. Mines told him they stopped and let her out of the van he but he didn't remember where. Vp 278. Mr. Mines said they then went home and he was the first to be dropped off. Vp 279. He didn't say who else was in the van at that time. Vp 279. The detective left the room again and when he looked in on Mr. Mines that time Mr. Mines admitted to hitting her but denied any sexual assault on her. Vp 279. Detective Hamond then interviewed and arrested Mr. Cramer. Vp 280. Mr Mines finally identified Mr. McKibben as the third individual in the van. Vp 281. Mr. McKibben's photograph matched the description given by Ms Robinson of the third individual. Vp 282.

Detective Hamond requested the DNA swabs be processed from the pop bottle in order to compare them with any DNA found in the rape kit. Vp 282. The DNA they were looking for a match with was Ms. Robinson's. 282-283. Detective Hamond inspected the evidence collected and noticed it's condition. Vp 286-288. He noticed blood on her shirt. Vp 288.

Prior to his interview with Ms. Robinson Detective Hamond did a

background check on her. Vp 290. Ms. Robinson had four alias names she had used in the past. Vp 290. Each alias means she has been in contact with law enforcement using that alias. Vp 291. Ms. Robinson had convictions for possession of stolen property, second degree theft and city theft. Vp 295. Ms. Robinson lied to the detective about where the incident took place again saying it happened at Maple and Ash. Vp 297-98. He questioned her again and again she lied at least two more times. Vp 298. The detective went to Safeway and obtained video surveillance tapes and reviewed those. Vp 299. He also went to other businesses in that area as well. Vp 299. He stated he believed her version but on November 14, 2002 he prepared a charging request which named the location as Freya and Sprague. Vp 300. On his first contact with Mr. Mines he was complaining of an assault. Vp 301. Mr. Mines did have abrasions on his face. Vp 301. Mr. Mines was calm and agreed to talk to the detective. Vp 301-302. At the public safety building Mr. Mines was in one room and Mr. Cramer was in another. Vp 302. Breaks were taken during the interrogations. Vp 303. The interviews were not video or audio taped. Vp 303. Mr. Mines made reference to Ms Robinson being a prostitute during the interview. Vp 306.

Denise Olson works for the Washington State Patrol Crime Lab as a forensic scientist. Vp 316. she provided the DNA testing on the exhibits in this case. Vp 321. Another individual who works at the lab, Matthew Gamette, dried the samples from the exhibits to preserve them for testing. Vp 322. She received the swabs from the Mountain Dew bottle, the Champagne bottle and the water bottle found at the scene. Vp 322-323. She also

received control swabs from each of the items. Vp 323. She was able to develop a DNA profile from the swab from the Mountain Dew bottle. Vp 324. The profile matched Ms. Robinson. Vp 324. The DNA profile is the same no matter What fluid it is for each person. Vp 325. The swab on the Mountain Dew bottle was from the neck and lid of the bottle. Vp 326. If a person drinks from the bottle they will leave their DNA on the bottle. Vp 326. Perspiration can also leave DNA behind. Vp 326. She could only say that Ms. Robinson had had contact with the bottle at some point not What kind of contact she had had. Vp 327.

Clinton Cramer is a friend of Mr. Mines and has known him since 1998. Vp 330. Mr. Cramer was also charged with rape 1st degree, kidnaping 1st degree, and assault 2nd degree in this case but was given a plea in exchange for his testimony. Vp 331. His charges will be lowered to kidnaping 2nd degree with a sexual motivation and assault 3rd degree. Vp 331. The recommended sentence is 13 to 18 months. Vp 331. In addition there was an agreement with the Kootenai County prosecutor's office not to charge him with any crimes related to the burning of his van. Vp 331-332. Mr. Cramer and Mr. Mines became good friend and started seeing each other daily in 2001 and eventually became house mates. Vp 332. He also knows David McKibben. Vp 333. On November 8, 2002 he was in his van with Mr. Mines and Mr. McKibben. Vp 334. They did not use any drugs or alcohol though Mr. McKibben had used some drugs earlier in the day. Vp 335. They just were driving around. Vp 336. Mr. Mines drinks Mountain Dew and there were a few empty bottles in the car. Vp 337. Mr. McKibben

was in the front passenger seat and Mr. Mines was in the back seat. Vp 337. Mr. Cramer testified that they developed a plan to pick up a hooker and beat her up and take her money. Vp 338. They saw a woman walking alone on Sprague near Freya and slowed down. Vp 339-340. Mr. Mines and Mr. McKibben opened the door and asked if she wanted a ride. Vp 340. She got into the van. Vp 341. Ms. Robinson then asked if they had a substance call "yea" which he believed to be "coke". Vp 342. Mr. Mines asked if she would give them all oral sex. Vp 342. She declined the request and asked to be let out. Vp 342. He kept driving. Vp 342. Ms. Robinson then tried to exit the van. Vp 343. She was pulled back into the van by Mr. Mines. Vp 343-344. He heard sounds of a struggle coming from the back of his van. Vp 344. He also kept a set of tools in the van including screwdrivers. Vp 345. He continued to drive because he was told to keep driving by both Mr. Mines and Mr. McKibben he stated he did so because he was scared of Mr. Mines. Vp 346. Mr. McKibben eventually left his seat and went to the back of the van. Vp 348. Ms. Robinson came to the front of the van and she was pulled back by Mr. Mines and Mr. McKibben. Vp 349. No both Mr. Mines and Mr. McKibben were telling him to keep driving. Vp 350 The only thing he heard was a lot of wrestling in the back of the van. Vp 351-352. Ms. Robinson continued to ask to be let out of the van. Vp 352. She then flew up to the front of the van and grabbed the steering wheel and almost wrecked the van. Vp 353. Mr. Mines and Mr. McKibben pulled her to the back again. Vp 353. At one point he was told to "check this out" and he looked back to see them inserting a Mountain Dew bottle in her body, either her anal or vaginal cavity.

Vp 355-356. He testified that Mr. Mines was the one putting the bottle in Ms Robinson. Vp 358. He testified at this time he told them to let her go. Vp 358. They rummaged through her belongings and told her to get out. Vp 360. They threw her stuff out after her as well as the bottle. Vp 361. They went to Mr. Mines home. Vp 363. They discussed cleaning the van but did not other planning. Vp 365. Mr. Cramer and Mr. McKibben cleaned out the van that morning and returned to the house. Vp 368-369. The van caught fire a week or two after this incident happened. Vp 370. The fire started in the dash. Vp 371. The fire was not intentional. Vp 371. The night of the incident Mr. Cramer was wearing a black coat with the hood up. Vp 375-376. He testified that he did not see Mr. McKibben use any instruments on Ms. Robinson. Vp 376. He testified that he did see Mr. Mines with his hand on the bottle while it was inside her. Vp 377.

The van had tinted windows which limit the amount of light available on the inside. Vp 379. The van had several speakers for the stereo system. Vp 380. The stereo was usually playing and could have been on that day. Vp 380-381. The rear view mirror was missing. Vp 381. The exhaust was loud. Vp 381. In addition to the lack of light and the noise in the van he was also wearing his coat with the hood up. Vp 382. The hood blocks his vision when he turns around. Vp 383. Mr. Cramer admitted to initially lying to Detective Hamond about his whereabouts in the early morning hours of November 8, 2002. Vp 386. Ms. Robinson got into the van of her own free will. Vp 389. At the time of his initial interview Mr. Cramer said he didn't tell the detective much that "He knew the description of it. He told me." Vp 394. "So he was

telling you?” Vp 394. “Yes he already knew about it, off of somebody else already telling him.” Vp 394. Mr. Cramer admitted that he benefitted from providing the testimony for the State. Vp 400. The sentencing range for his initial charges were 138-184 months for the rape, 78-102 for the kidnaping, and 15-20 months for the assault. Vp 401. Now on the new charges in the plea offer his range on the kidnaping is 12-14 months and on the reduced assault charge the standard range is 3-8 months. Vp 401-402. Mr. Cramer was facing a possibility of 286 months and will now receive a recommendation for 13-18 months which is a substantial reduction. Vp 402. The deal was reached prior to his talking to the police again. Vp 403. The next interview with the police was in January when he also talked to defense counsel. Vp 404. At that interview he gave the detective additional information. Vp 404. There was interior lighting in the van but it was not on at the time of the incident. Vp 407-408. When they stopped on Marshall road the only light was coming from outside the van’s tinted windows and there were no streetlights. Vp 408.

Jamie Taitch testified that she is an investigator for the counsel for the defense. Vp 431. She was present when Mr. Cramer was interviewed by defense counsel. Vp. 432. She disputed several points of Mr. Cramer’s testimony about What was said and not said by him at the interview. Vp 432. She testified that the route taken by Mr. Cramer on the night of the incident took approximately 14 minutes. Vp 433.

Michael Zambryski is an arson investigator for the Spokane Fire department. Vp 438. He investigated the fire in the van. Vp 439. Mr.

Cramer claimed the fire started in the dashboard. Vp 440. He inspected the wiring of the stereo to determine if it could have been the cause of the fire. Vp 440-441. There was no indication that the fire was caused the way Mr. Cramer claimed. Vp 441-442. The cause of the fire was undetermined but in his opinion it was started between the front seats and the back seat and was caused by a human. Vp 442-443. He inspected the van on November 12, 2002. Vp 444. The fire occurred on November 8, 2002. Vp 444. In his opinion the likely scenario was that the van was parked on the side of the road and the fire was intentionally set. Vp 446.

Mr. Mines was found guilty by the jury on February 19, 2003. Vp 499.

IV. ARGUMENT

The State failed to present sufficient evidence in this matter to support the verdict of guilty beyond a reasonable doubt of 1^o Rape and Kidnaping and for Second Degree Assault. The witnesses who appeared for the state simply were not credible there was no other evidence connecting Mr. Mines to these offenses.

A. There was insufficient evidence presented to find the Defendant guilty of First Degree Rape beyond a reasonable doubt

The United States Supreme Court set the reasonable doubt standard of proof for criminal cases in *In Re Winship*, 397 U.S. 358, 90 S. Ct. 1086, 25 L. Ed. 2d 368 (1970). Under this standard of proof, the

prosecutor must prove each and every element of the statute beyond a reasonable doubt. A claim of insufficient evidence is one of constitutional magnitude. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). If there is insufficient evidence of an element of the crime charged it is violation of the defendant's Fifth and Fourteenth Amendment due process rights. *Winship*, 397 U.S. at 361, (U.S. Const. amts. V & XIV). Such a constitutional claim may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Regan*, 97 Wn.2d 47, 50, 640 P.2d 725 (1982); *State v. Theroff*, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980), *Baeza*, 100 Wn.2d at 488.

“To satisfy due process requirements the State must prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged. *Jackson v. Virginia, supra*.

In evaluating petitioner's claim, the reviewing court must not attempt to determine whether it believes the State has met the burden of proof. *State v. Green, supra* at 221, 616 P.2d 628. Rather, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of [. . .] beyond a reasonable doubt". *Jackson v. Virginia, supra*, 443 U.S. at 319, 99 S.Ct. at 2789; *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

Baeza, 100 Wn.2d at 490, *see also State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

1. **On the Face of the Evidence There Was Not Enough Evidence to Prove Beyond a Reasonable Doubt Mr. Mines committed first degree rape.**

The evidence presented by the State in this matter does not support a finding beyond a reasonable doubt of Rape in first Degree. RCW 9A.44.040 sets out the elements for Rape in the first degree:

(1) A person is guilty of Rape in the first degree when such person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon or What appears to be a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury, including but not limited to physical injury which renders the victim unconscious; or

(c) Feloniously enters into the building or vehicle where the victim is situated.

In this case the victim herself hindered any gathering of the evidence by being untruthful to the investigating authorities. As stated previously the alleged victim in this case was consistently lying to investigators and medical staff from the beginning of this case. She lied about where she was picked up. She lied about how she got into the van in the first place. She lied about What happened in the van. She lied to the Doctor treating her about her drug use that day. She only admitted to lying to everyone on the Friday before the trial. She consistently maintained her lies until the eve of trial. In addition she would not allow the medical staff to do a thorough examination on her in order to preserve evidence and left the hospital against medical advice.

These are not the actions of a normal victim.

In looking at the statute there is no evidence that Mr. Mines engaged in intercourse by forcible compulsion. The victim was not able to say with certainty that he was the one who put anything into her body cavities. She identified Mr. McKibben as the person who was engaging in that conduct, not Mr. Mines. In addition, while Mr. Cramer said he saw Mr. Mines doing these acts on cross he admitted that he had a hood on his head which obstructed his view. He also admitted that there was no light on in the van that the windows were tinted, there were no streetlights and that the only light in the van at the time came from what little light there was outside the van. All of these facts bring into question the credibility of his testimony. Mr. Cramer was given a substantial reduction in his charges with the corresponding substantial reduction in the amount of time he would serve if he would testify. In addition, as pointed out in the fact section of this brief, at trial he testified that Detective Hamond already knew things and told him how it was and that eventually became his statement. In other words Mr. Cramer had a lot riding on his deal with the State and he did not want to blow it. Because of these factors his testimony simply is not credible.

There was no mention of a deadly weapon being involved in this incident. The only mention made was of the possible use of a screwdriver which was never recovered and a Mountain Dew bottle. It would be a far stretch of the imagination to consider a plastic soda bottle a deadly weapon and there was no direct testimony about a screwdriver being used on that it was mentioned as a possibility.

Regarding the kidnaping element, Ms. Robinson testified that she had gotten into the van voluntarily. Regarding serious physical injury, again Ms. Robinson did not allow a thorough examination to determine What her injuries were. However she certainly did not testify to any lasting injuries during the trial and appeared to be doing fine physically.

In looking at the evidence there is simply not enough to prove beyond a reasonable doubt that Mr. Mines committed First Degree Rape. The testimony does not match up with the elements of the statute.

B. There was insufficient evidence presented to find the Defendant guilty of Kidnaping in the First Degree.

There is not sufficient evidence in the record to prove that Mr. Mines was guilty of Kidnaping in the First Degree beyond a reasonable doubt. The elements for Kidnaping in the First Degree are set out in RCW 9A.40.020:

(1) A person is guilty of kidnaping in the first degree if he intentionally abducts another person with intent:

(a) To hold him for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him; or

(d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

Again looking at the evidence presented at trial it is clear that the evidence presented was insufficient to meet these elements.

First there is nothing in the record to support the idea that Ms Robinson was intentionally abducted. The record is clear she got into the van of her own free will, even though she initially lied and said otherwise. Second there was nothing presented to show that she was held for ransom or reward or as a shield or hostage. The prosecutor did attempt to show that she was held to facilitate the commission of a felony when he presented testimony by Mr. Cramer that they planned on robbing a prostitute, however as previously discussed Mr. Cramer's version of events seems to change to whatever benefits him the most at the time, so he is hardly credible on this issue. There was nothing to indicate that they planned on doing any bodily injury on Ms Robinson when she entered the vehicle. In fact the testimony indicates they thought she was a prostitute and were requesting oral sex from her. There was no mention of any intention of inflicting extreme mental distress on Ms Robinson or any third person and there certainly wasn't any evidence of interfering with a governmental function. At best the evidence would support a finding of unlawful imprisonment if the jury found that they had indeed not allowed her to leave when she requested to be let go.

It is clear from the evidence presented that there was insufficient evidence presented to prove First Degree Kidnaping beyond a reasonable doubt

C. Was there sufficient evidence presented at trial to sustain a conviction for Second Degree Assault?

RCW 9A.36.021 sets out the elements for Second Degree Assault:

(1) A person is guilty of assault in the second degree if he or she under circumstance not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally or unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

There is nothing in the record to support that Mr. Mines slapping and pulling Ms Robinson away from the wheel inflicted substantial bodily harm. The medical evidence showed some abrasions, contusions and one laceration. As stated earlier the testimony does not show substantial harm to Ms Robinson, she was able to leave the hospital after a short stay. She impeded any further

examination of her injuries when she complained of pain and refused to allow the examination to continue. Certainly there was no testimony given to show that she continued to suffer any injuries by time of trial. There was no proof of any use of a deadly weapon as stated earlier. There was testimony that a screwdriver may have been used but it is unclear if one actually was used and none was recovered. As discussed above a plastic soda bottle hardly qualifies as a deadly weapon. The issue of the intent to commit a felony was discussed previously as well and again that rests entirely on the tainted testimony of Mr. Cramer. Certainly there is no evidence that shows any actions by Mr. Mines rose to the level of torture.

Mr. Mines admits to hitting Ms Robinson once. The reason for that striking was that he felt she was putting them all at risk when she grabbed the steering wheel of the car and almost caused them to crash. This does not rise to the level of a second degree assault. If anything he would be guilty of a simple assault, but he would probably have a self defense/defense of others claim even to that charge under the circumstances.

D. The trial court erred in imposing an exceptional sentence.

Under the Sentencing Reform Act a sentencing court generally sentences a defendant within the standard range. However, “[a] court may impose a sentence outside the standard range for an offense if it finds, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. If a sentencing court goes outside the standard range, the court “shall set forth the reasons for its decision in written findings of fact and conclusions of law.” Id. Furthermore, RCW 9.94.A.535 (1) and

(2) provide a list of illustrative circumstances that justify an exceptional sentence.

An appellate court reviews a sentencing court's imposition of an exceptional sentence under a three part analysis; (1) are the sentencing court's reasons supported by the record under the clearly erroneous standard; (2) Do the stated reasons justify an exceptional sentence under as a matter of law; and (3) did the sentencing court abuse its discretions by imposing a sentence that is 'clearly excessive' or 'clearly to lenient'?" *State v. Garcia*, 105 Wn App 762, 771, 20 P. 3d 1069 (2001); se also *State v. Grewe*, 117 Wn. 2d 211, 813 P.2d 1238 (1991).

The sentencing Reform Act of 1981 (9SRA) allows the trial court to impose a sentence outside the standard range when it finds substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.120 (recodified as RCW 9.94A.505); RCW 9.94A.390 (recodified as RCW 9.94A.535); *State v Cardenas*, 129 Wn. 2d 1, 914 P 2d 57 (1996). The SRA provides an illustrative and nonexclusive list of aggravating and mitigating circumstances the trial court may consider in imposing an exceptional sentence. RCW 9.94A390 (recodified as RCW 9.94A.535). Id.

The reasons given by the trial court to justify a departure from the standard range sentence are appropriate if they are supported by substantial evidence in the record. *State v. Wilson*, 96 Wn. App. 382, 980 P. 2d 244 (1999). Substantial evidence exists if there is evidence of a "sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Id.

In the instant case the court found that the acts alleged were done with deliberate cruelty and thus justified an exceptional sentence. Vp 521-522. In making its decision the court relied heavily on the testimony given by Ms. Robinson and Mr. Cramer as to What took place that night. As stated earlier both of these individuals have a bad track record for lying. Ms. Robinson admitted she had been high all day that she faded in and out of consciousness and was not always aware of What was happening. Mr. Cramer admitted the lighting was bad to nonexistent and that his view was blocked by his coat hood. In addition Mr. Cramer's testimony was given in exchange for a tremendous reduction in his charges and sentence which brings into doubt his veracity. There was not enough evidence in the record to support an exceptional sentence.

V. CONCLUSION

For the above stated reasons this matter should be reversed and either remanded for a new trial.

Dated this 22th day of October, 2003.

Respectfully submitted:

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