

62768-6

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No. 62768-6-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**vs.**

**JAYDEANE FRANCIS ELL, Appellant.**

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**BRIEF OF RESPONDENT**

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STATE OF WASHINGTON  
J. H. ...

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**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the court abused its discretion in denying defendant's motion for new counsel where the court inquired into the complaint which was made the week prior to the scheduled trial date, determined that counsel had not revealed any confidences and addressed the defendant's concerns about lack of full discovery.
2. Whether, taking the evidence in the light most favorable to the State, testimony that the victim told emergency room staff that she had been raped, her testimony that the sexual intercourse occurred in the middle of her being beaten and that the defendant tried to strangle her during the beating, was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of rape by forcible compulsion, despite her testimony at trial that the sexual intercourse was consensual.
3. Whether, taking the evidence in the light most favorable to the State, testimony that the victim told emergency room staff that the defendant threatened to kill her by snapping her neck three different ways, along with the victim's testimony that he tried to strangle her and that she feared him during the beating was sufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of felony harassment.
4. Assuming that the record demonstrates that the judge answered the jury's question without notifying counsel, whether the judge's response, referring the jury to the instructions, was harmless error because it was neutral and didn't include affirmative information.
5. Whether defense counsel was ineffective for failing to request a voluntary intoxication instruction where defense made a tactical decision not to, presumably because it would have been inconsistent with the defense that a rape never occurred and that the defendant was not the one who committed the offenses and where there wasn't substantial

evidence in the record of the alcohol's effect on defendant's mind and body to support such an instruction.

6. Whether the defendant waived the issue of the court's failure to hold a hearing under CrR 3.5 to determine the admissibility of his statements, where the State did not offer the statements in its case in chief and only cross-examined the defendant and introduced rebuttal testimony regarding them after the defendant had testified on direct about his statements to the officer and where the record shows that his statements were voluntary.
7. Whether the prosecutor committed misconduct in closing because she referenced the consistency of statements the victim made to others that were admitted for impeachment purposes only, where she prefaced her comments with an explanation of the difference between impeachment evidence and substantive evidence and informed the jury that only the testimony from the nurse and doctor could be considered as substantive evidence and where she argued that the prior consistent statements made the victim's recantation testimony not credible.
8. Whether the trial court erred in not vacating the felony harassment conviction where it found that the harassment was the same criminal conduct as the assaults for purposes of the offender score, not double jeopardy.

## **B. FACTS**

### **1. Procedural facts**

Appellant Jaydeane Ell was charged by first amended information in January 2008 with Rape in the Second Degree, two counts of Assault in the Second Degree, Felony Harassment, Tampering with a Witness, two counts of Violation of a No Contact Order and one count of Attempted Violation of a No Contact Order for acts he committed on or about

January 16<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup>, 2008. CP 140-43, 146-47. The count of Tampering with a Witness was dismissed upon a half time motion. RP 796.<sup>1</sup> Ell was convicted by a jury of all other counts and was sentenced pursuant to RCW 9.94A.712 on the rape conviction and within the standard range otherwise. CP 20-25; 69-78.<sup>2</sup>

## **2. Substantive facts**

RHM<sup>3</sup>, a 25 year old woman, was taken to the emergency room at St. Joseph's Hospital on January 16, 2008 and reported that she had been beaten, threatened and sexually assaulted. RP 45, 297-98, 312, 366, Ex. 81. RHM worked at the Nooksack Casino and was separated from her husband with whom she had two children, who were in foster care. RP 46-47, 54-55. At the time she was living with Ell in a motel room in Bellingham and had been seeing him when she left her husband. RP 48, 53-54, 56. She had known Ell since she was 10 years old because she used to spend the summers with his parents when her brothers lived with

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<sup>1</sup> The verbatim report of proceedings for the trial are referred to by "RP", as the numbering is sequential, except for the morning of Oct. 22, 2008 which is referred to as 10/22/08 RP because it was transcribed by a different reporter. All other volumes are referred to by date.

<sup>2</sup> Other facts regarding Ell's sentencing issue are addressed within the context of that argument.

<sup>3</sup> The State references the victim by initials due to the nature of the offense, consistent with its charging information.

them.<sup>4</sup> RP 49-51. In fact she was so close to his parents that she called them “Mom” and “Dad.” RP 51.

At the hospital she was seen by a Sexual Assault Nurse Examiner (SANE). RP 325-26, 328. RHM consented to the sexual assault exam and to have her medical records disclosed to law enforcement. RP 382, 632-34; Ex. 76, 77. RHM told her that sometime between January 15 and 16, the previous night, that her boyfriend had tried to strangle her and beat her, and that she hadn't injured him because she didn't want to make it worse. RP 371-72, 386. She said that she had made a joke about pregnancy and that he had gotten really mad, swearing and yelling at her, pulling her hair out, punching her in the face and head and biting her. RP 388. She said that he had tried to break her hand and fingers and that she tried to twist away. RP 387. She said that he bit her because she was trying to protect her face. RP 396. She said that he had penetrated her vaginally one to two times when he had missed her anus and that he had penetrated her orally and anally. RP 387. He told her that if she made noise and the cops came, that he'd kill her even if the cops came, and that he'd snap her neck three different ways. RP 388. She told the nurse that

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<sup>4</sup> Ell's mother is RHM's brother's biological mother and RHM's half brother is also Ell's half brother. RP 172.

the incident lasted five hours and that at one point he let her use the bathroom. RP 388.

RHM also told the doctor who examined her that she had been punched, bitten and choked several times by her boyfriend and that she had been sexually assaulted vaginally, anally and orally. RP 503-04. The doctor testified regarding his observations as to her injuries and complaints, which were consistent with the nurse's and that the bruising of her neck was consistent with being choked. RP 503-06. RHM had bruising on her face and body, swelling on her face and hands, and multiple abrasions.<sup>5</sup> RP 372-76, 401-404; Ex. 81, Supp CP, Ex. 1-13, Ex. 15-41, Ex. 43-45.

At trial RHM testified that she had come back to the motel after finishing work at the casino around 7 or 8 p.m. RP 55, 59. She testified that Ell woke up and got mad when she said something in a playful manner about wishing he would be able to carry the baby.<sup>6</sup> RP 62-63. He snapped and starting yelling at her and pulling her hair, which scared her. RP 65-67. He yelled at her: "You're just like your mom, a devious bitch. Don't you fucking look at me. Only devious bitches look men in the eye."

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<sup>5</sup> Additional testimony and evidence regarding the rape and threat to kill is addressed within the arguments regarding the sufficiency of the evidence regarding the rape and felony harassment.

<sup>6</sup> RHM had talked with Ell about having a baby with him, although she wasn't pregnant. RP 63.

RP 70. He slapped her, grabbed her hair, and threw her on the bed and started hitting her with his fists. RP 72-74. She told him she had to visit her children, tried to cover her face and neck and kept moving her hands so he couldn't get a hold of them. RP 75, 78.

She testified that after Ell tried to break her hands that he tried to put his penis in her anus. RP 79. She said that she agreed to try anal sex at that time, that she chose to let him despite the fact that just prior he had been beating her, hurting her and causing her great pain. RP 83, 86. She also testified that she struggled throughout the entire ordeal and she was crying and pleading with him to stop when he was punching her. RP 80, 86. She also testified that he tried to choke her and that she struggled when he put his hands on her neck. RP 91-93.

She testified that at one point during the assault that he let her go to the bathroom and that she was still afraid of him at that point, and that at another point he had her call the casino so he could complain to her boss about her being sexually harassed at work.<sup>7</sup> RP 96-102. She said the phone call happened toward the end of the assault and that Ell fell asleep around 2 a.m. RP 99, 107. She did not call the police right after it was over, but slept until she had to take Ell to work early in the morning. She

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<sup>7</sup> The shift supervisor at the Nooksack Casino testified to receiving a phone call that night from an angry male who identified himself as Ell, complaining about sexual harassment of RHM and being very near threatening. RP 441-46.

testified she slept in the car until Ell's first break and then she had her supervised visit with her children.<sup>8</sup> RP 95, 108-110, 120.

She then went to work where she saw her friend Monica Abitia who noticed right away that something was wrong. RP 121-24, 573. RHM appeared very scared to Monica. RP 577. Monica went with RHM to the Human Resources person at the casino to make sure that Ell couldn't be at the casino while RHM was there. RP 280-81, 140, 579. While she was there, RHM agreed to call the police. RP 581. Monica said that RHM was very upset and crying when she talked with the Nooksack Police officer.<sup>9</sup> RP 585-86. The Nooksack officer followed RHM when she drove to the hospital. RP 136, 586.

RHM also testified that Ell contacted her by phone within a couple days after he was arrested where he told her, untruthfully, that he was facing 30 years to life.<sup>10</sup> RP 128, 178-85.

There was testimony from witnesses, *e.g.*, the Nooksack officer, Monica Abitia, the public defender's investigator, that RHM stated that she was raped contrary to her testimony at trial that she wasn't. An oral instruction was given by the judge upon such testimony instructing the

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<sup>8</sup> Ell denied telling RHM to stay in the car until his break. RP 848.

<sup>9</sup> It was then determined that the offense had occurred off the reservation, so Bellingham Police then took over at the hospital. RP 435.

<sup>10</sup> Recordings from the jail were played for the jury of his phone calls and attempted phone calls to RHM.

jurors to consider the evidence only for impeachment purposes. *See infra* p. 41-42. RHM also testified that she did remember telling the officer that Ell put his penis inside her anus and admitted that some of what she told the officer was the truth, that she gave him a full statement although she may have said something in anger. RP 79, 102-03.

### **C. ARGUMENT**

Ell makes a number of arguments challenging his convictions and sentencing. He asserts that there was insufficient evidence to support his convictions for rape in the second degree by forcible compulsion and felony harassment, thereby warranting dismissal of those charges. While the victim in this case did recant months after the incident as to the rape charge and did testify on the stand that the sexual intercourse was consensual, the medical hearsay testimony came in as substantive evidence and that testimony combined with the physical evidence of her injuries and her own testimony regarding the beating she suffered over a five hour period was sufficient evidence for a rational trier of fact to find Ell guilty of forcible rape and felony harassment.

As part of his sufficiency of the evidence challenge to the felony harassment, Ell asserts that his counsel was ineffective for failing to object to when the medical hearsay testimony was elicited from the nurse and doctor. However, the victim's statements about what happened and how

were clearly pertinent to treating her and determining whether a safety plan, part of her treatment, was necessary. Ell also asserts that his counsel was ineffective for failing to request a voluntary intoxication instruction. It's clear from the record that counsel did not want such an instruction and Ell has not born his burden to demonstrate that this choice was anything but a strategic one.

Ell also claims that the court itself erred in a number of ways during his case. He first asserts that the trial court violated his right to conflict-free counsel by denying his motion for new counsel. However, the record shows that the court adequately inquired into Ell's concerns, resolving his issue regarding not having been provided with all pages of the police reports. While Ell told the court that he personally had determined that his counsel was being ineffective, it's clear from the record that there was not a complete breakdown in communication, that Ell was a demanding client, desirous of greater communication with his attorney.

Ell also asserts that the trial court erred in answering a question from the jury regarding the definition of assault without consulting his attorney and him. However, the judge's response, referring the jury to the instructions, imparted no affirmative information and was harmless. Ell also asserts that the court erred by not vacating his felony harassment

conviction after it determined that it constituted the same criminal conduct under RCW 9.94A.589. RCW 9.94A.589 requires simply that offenses constituting the same criminal conduct only count as one point for offender score purposes and vacation of convictions is a remedy where double jeopardy concerns are at issue. The court's same criminal conduct finding didn't implicate double jeopardy and the judgment and sentence properly references the jury's verdict.

Ell also asserts that the prosecutor committed misconduct resulting in incurable prejudice in her argument regarding the rape, alleging that she argued impeachment evidence as substantive evidence to support a finding of guilt. Ell takes the prosecutor's comments out of context. Prior to her comments, she was careful to outline the difference between impeachment and substantive evidence and to inform the jury that the medical testimony was substantive evidence the jury could consider and that the discrepancies in statements could only be used as impeachment, to assess the credibility of the victim's recantation. If there were any objectionable argument, it did not result in prejudice that could not have been cured by an objection and instruction.

- 1. The court did not abuse its discretion in denying Ell's motion for new counsel because the court adequately inquired into Ell's complaint made the week prior to the scheduled trial date, determined that counsel had not revealed any confidences and addressed Ell's concerns about not being provided full discovery.**

Ell first asserts that the court erred in denying his motion for new counsel on July 17, 2008. In order to show a violation, Ell must show that his counsel had an irreconcilable conflict or that there was a complete breakdown in communication between them. Ell did not have an irreconcilable conflict with his attorney and the judge's inquiry sufficiently addressed Ell's complaints.

Defendants aren't entitled to appointment of counsel of their own choosing. The Sixth Amendment does not provide a defendant an absolute right to counsel of his choice. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). "To justify appointment of new counsel, a defendant 'must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" Varga, 151 Wn.2d at 200 (*quoting In re Stenson*, 132 Wn.2d 701, 734, 940 P.2d 1239 (1997)). A defendant's lack of trust or confidence in his attorney does not warrant substitution of counsel. *Id.* at 200.

Three factors are considered in reviewing a trial court's decision to deny a motion to substitute counsel: (1) the extent of the conflict; (2) the adequacy of the court's inquiry; and (3) the timeliness of the motion. In re Stenson (II), 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001). A trial court's decision denying a motion for substitute counsel is reviewed for abuse of discretion. Varga, 151 Wn.2d at 200. A trial court does not abuse its discretion in denying a motion to substitute counsel where it considers the defendant's reasons for dissatisfaction and questions the attorney regarding the merits of defendant's complaints. *Id.* at 200-201.

On July 17, 2008 defense counsel requested a continuance because although the State and defense had been very close to a resolution of the case, Ell now wanted a trial and counsel needed a couple weeks to complete witness interviews. 7/17/08 RP 3. At the hearing, defense counsel informed Judge Mura that Ell wanted new counsel. 7/17/08 RP 4. In response to the judge's inquiry as to why he wanted new counsel, Ell said that his attorney had only visited him a few times and requested continuances, that he had not been provided full disclosure by the prosecution, and that he had personally determined that he was receiving ineffective representation. 7/17/08 RP 4-5. Upon further inquiry, he stated that counsel had only spoken to him two times within two months and since then had been trying to "swing a plea bargain," and that he couldn't

make an informed decision without full disclosure. 7/1/08 RP 5-6. The judge asked defense counsel if he had requested discovery, to which counsel replied that he had, that Ell was referring to medical reports and photographs of the victim, and lab reports and that Ell had had a chance to see them, but that he had not provided a copy of them to Ell, anticipating an objection from the State. 7/17/08 RP 6.

Ell then claimed there had been a breakdown in communication. 7/17/08 RP 7. In response the judge stated that the worst way an attorney can spend time is with a client, explaining that what the attorney needs to focus on is the evidence and the witnesses and that frequently clients want their attorney to spend more time with them, but that it's not the best use of the attorney's time. *Id.* Then Ell claimed that counsel had revealed his confidences on multiple occasions and submitted a document for the judge to consider. *Id.* Ell asserted counsel had blown up at him and neglected his case in hopes of a plea bargain, that his attorney was telling him about the circumstantial evidence and things that could happen, but that he couldn't make an informed decision without full disclosure. 7/17/08 RP 8. Defense counsel informed the judge that Ell had a copy of all of the police reports. *Id.* Ell claimed 15 pages were missing, and upon inquiry from the judge, defense counsel explained that he did not give Ell duplicate pages or pages that had no useful information on them originally or upon

redaction. 7/17/08 RP 9. Ell asserted that he didn't think he could work with counsel because of the lack of full disclosure. Id.

The judge addressed the document that Ell had submitted indicating first that it wasn't a notarized statement, and second that it did not provide any factual basis for saying that confidences had been disclosed, only that counsel had been heard raising his voice at Ell.

7/17/08 RP 10. The judge then denied Ell's motion and instructed counsel to provide Ell with copies of the pages that Ell had not received because counsel felt they weren't beneficial. 7/17/08 RP 11. Upon request from defense counsel as to whether Ell should receive a copy of the victim's medical records, photos etc., the judge clarified that Ell was entitled to see all that information, although he didn't have to be provided a copy of it, and that he was entitled to the rape kit evidence. 7/17/08 RP 12. Ell then told the court he wanted a statement from every witness on the State's witness list, to which the judge replied that he would only get one if the witness had provided a written statement. 7/17/08 RP 12-13.

Later, on the first day of trial, Ell requested a continuance:

I've been incarcerated for nine months. Mr. Hendrix has come to see me once in the last nine months to prepare myself for trial, but we haven't had sufficient time to talk about this case or any adequate time to prepare a proper defense.

He's telling me that he's ready to go to trial, but I'm not obviously ready to go. I got all my discovery and stuff like

that, but he hasn't told me anything about the statements that is going to be made, what people are going to say at trial, how the prosecution is going to be presenting their case. It was last- the last conversation that we had on Wednesday, he told me barely anything in a scant less than two hours that we talked. He was supposed to come and see me last night. He made an appointment to me last night. ... So I honestly fear we're not ready for this. I have a lot of questions, a lot of things that I wish for him to present to the Court. Due to trial and jury selection, we haven't gone over everything of that sort. ...

RP 5-6. Defense counsel informed the court that he was ready to go forward with the case, that he had gone over with Ell what he expected the testimony of the State's witnesses to be and that he had solicited Ell's assistance in preparing cross-examination of them, that he had been preparing for trial since June when it became apparent that the case was not going to be resolved. RP 67.

The record here does not reflect a *complete* breakdown in communication between Ell and his counsel. At the time that he requested new counsel, part of his request was based on his belief that he had not been provided full discovery. As a result of the court's inquiry, the court instructed counsel to provide Ell with copies of the documents that Ell felt were being withheld from him. By the time of trial, Ell confirmed he had all the discovery and clearly had been communicating with his attorney, he just wanted additional time to go over the case with counsel. The court

also determined that Ell's confidences had not been revealed, just that counsel had raised his voice at Ell.

While the court did end up granting a continuance of the trial date, Ell made his request for new counsel when the case was set to go to trial the next week. 7/17/08 RP 11. The trial court did not abuse its discretion in denying the motion for new counsel. *See, In re Stenson* (II), 142 Wn.2d at 727-33 (strong words between defendant and attorney, differences of opinion regarding trial strategy, claims that the attorney had visited him less than 10 times in 10 months on death penalty case and claims that attorney refused to investigate things the defendant thought important did not result in irreconcilable conflict).

The case relied upon by Ell, United States v. Moore, 159 F.3d 1154 (9<sup>th</sup> Cir. 1998) is distinguishable. In that case, the defense attorney had failed to inform the defendant about plea negotiations, had failed to investigate, and informed the court that he felt physically threatened by the defendant and there was absolutely no communication between counsel and the defendant. *Id.* at 159. Here, there was communication, albeit not as much as Ell would have liked, and counsel was diligently working on the case. The judge inquired regarding Ell's concerns and addressed Ell's main concern about not getting certain documents. There was no

complete collapse of the attorney-client relationship warranting appointment of new counsel.

2. **Taking the evidence in the light most favorable to the State, the medical testimony that RHM complained of having been raped, her testimony that the sexual intercourse occurred in the middle of the beating, that she just wanted the beating to be over and that Ell threatened to kill RHM during the beating was sufficient evidence of rape by forcible compulsion.**

Ell next contends that there was insufficient evidence to support his rape in the second degree conviction. Specifically, he asserts that the State failed to prove the element of forcible compulsion.<sup>11</sup> Taking the evidence in the light most favorable to the State, RHM's testimony that she was beaten both before and after the sexual intercourse, that she tried to defend herself from the beatings, that she feared the defendant, that she told medical personnel that she had been raped or sexually assaulted, combined with the physical evidence of RHM's injuries and that Ell was a contributor to the DNA found in the semen in RHM's vagina, is sufficient evidence for a rational trier-of-fact to find beyond a reasonable doubt that Ell engaged in sexual intercourse by forcible compulsion, despite the fact

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<sup>11</sup> Ell includes argument that the State was required to prove that his intent in having sexual intercourse was for sexual gratification, under the law of the case doctrine, but only argues that there was insufficient evidence regarding the element of forcible compulsion. The State therefore does not address this aspect of Ell's argument.

that RHM testified that she was not “raped,” but that the sexual intercourse was consensual.

Under a sufficiency of the evidence analysis, the test is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

As charged, in order to prove rape in the second degree, the State had to prove beyond a reasonable doubt that Ell (1) engaged in sexual intercourse with RHM, (2) by forcible compulsion. CP 101, 140-41; RCW 9A.44.050(1)(a). Forcible compulsion is and was defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to oneself or another or in fear of being kidnapped or that another person will be kidnapped.” CP 99; RCW 9A.44.010(6). In order to prove forcible compulsion the

evidence must “must be sufficient to show that the force exerted was directed at overcoming the victim's resistance and was more than that which is normally required to achieve penetration.” State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). A victim need not resist physically in order for there to be force that overcomes resistance. *Id.* at 525-26. “[W]hether the evidence establishes the element of resistance is a fact sensitive determination based on the totality of the circumstances, including the victim's words and conduct.” *Id.* at 526.

RHM testified that when she came home to the motel from working at the casino, she didn't have any bruises, missing hair or injuries. RP 60. She testified that when Ell woke up, she said something that made him “snap,” that he yelled at her and pulled her hair, scaring her. RP 62-65. She testified that he slapped her and threw her on the bed and tried to grab her around the throat and was hitting her with his fist. RP 72-74. She said she covered her head and face, that she kept moving her hands so he couldn't get a hold of them, that he was trying to break them. RP 75-76, 78. She noticed that she had a bite mark on her hand and bruises on her fingers and hands afterwards. RP 77-78. She testified that she was in great pain during that beating, that she was crying and pleading with him to stop, that she wasn't sure if he was going to kill her, and that she didn't consider the beating to be rough sex and that she hadn't asked to be bitten.

RP 81, 84, 254, 260, 265. She testified that she struggled throughout the whole thing, that it lasted five hours, that at one point she asked him if she could go to the bathroom because she was trying not to upset him and was still afraid of him. RP 96, 99, 107. She remembered Ell threatening to hit and strangle her and remembered hoping it would stop. RP 87.

She also testified that Ell put his penis inside her anus, that it hurt and was uncomfortable, but that she had agreed to try anal sex, that she chose to let him. RP 81-86. Essentially she testified that she received a severe beating and was frightened of Ell and what he would do, but that in the middle of the hours long beating, she agreed to have anal intercourse with him, and after it was over, that he continued beating her again, against her will. RP 83.

At the hospital RHM consented to a sexual assault exam although she testified she felt coerced into signing it, and she signed the authorization to disclose her medical information to the police. RP 133-34, 145, 147, 382-84. She told the nurse that Ell had vaginally penetrated her once or twice when he missed her anus, she said that she had been penetrated orally as well, although it was mostly rectal penetration.<sup>12</sup> RP 371-72, 387. She told the nurse that Ell had gotten frustrated when he had

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<sup>12</sup> RHM remembered that she told the nurse that her vagina was penetrated once when he missed her anus. RP 163.

not been able to ejaculate and he got meaner with her. RP 388. She said that Ell bit her because she was protecting her face. RP 396. During the exam, the nurse observed swelling and bruising and abrasions on RHM's face and hands, a bite mark on her hand, and bruising and abrasions on her body. RP 401-04. RHM was the most severely beaten woman the nurse had seen in her 28 years of being a nurse. RP 409.

RHM told the doctor at the emergency room that she had been punched and choked by her boyfriend and that she had been sexually assaulted vaginally, orally & anally. RP 503-04. RHM complained of perineal pain in addition to neck pain and other pain. RP 504-05.

The vaginal and anal swabs from the sexual assault exam came back positive for semen. RP 529. Male DNA was present in the vaginal swab and Ell was included as a contributor. RP 533. Only 1 in 28,000 in the population would have the same alleles. RP 535. When the sample was submitted to the state DNA database, only one hit came back and that was for Ell. RP 535, 546-47. Additional clumps of hair were found in the motel room. RP 640.

Taking the evidence in the light most favorable to the State, a rational-trier-of-fact could find beyond a reasonable doubt on the above substantive evidence that Ell engaged in sexual intercourse with RHM through forcible compulsion. The medical hearsay came in as substantive

evidence not for impeachment purposes. The other testimony from Monica Abitia and the officers regarding what RHM told them the day or so after it happened did come in for impeachment only, to address the credibility of RHM's testimony that Ell and she had consensual sex. That testimony, in light of the impeachment testimony, and her own testimony about the hours long beating and the consensual sex occurring in the middle of it was clearly not credible.

RHM's testimony regarding the force that was used before and after the "consensual sex" is more than sufficient to demonstrate force used to overcome resistance. Resistance is not limited to use of physical force to defend oneself, RHM's relenting to the sexual intercourse in the middle of a severe beating, because she didn't want to make matters worse is sufficient evidence of force used to overcome resistance. In addition, she did testify that she struggled throughout the incident, and as is addressed in the next section, Ell threatened her as well.

3. **Taking the evidence in the light most favorable to the State, the medical testimony that Ell threatened to kill RHM by snapping her neck three different ways, combined with her testimony that he tried to strangle her and that she feared him during the beating was sufficient evidence of felony harassment.**

Ell next contends that there was insufficient evidence of the offense of felony harassment. Ell's argument is predicated in part on his

claim that his attorney was ineffective for failing to object to medical hearsay testimony of Ell's threats. But the medical hearsay testimony did come in as substantive evidence and that testimony along with the other evidence of the severe beating is sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Ell knowingly threatened to kill RHM. Moreover, counsel was not ineffective for failing to object because the hearsay was admissible under ER 803(a)(4).

To convict a person of felony harassment requires proof that the defendant knowingly threatened to kill and the victim reasonably feared that the threat would be carried out. State v. C.G., 150 Wn.2d 604, 608-09, 80 P.3d 594 (2003); RCW 9A.46.020. The threat to kill need not be literal: "the nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *Id.* at 611.

As acknowledged by Ell, the SANE nurse testified that RHM told her that if she made noise and the cops came, he'd kill her; "He'd snap her neck three different ways." RHM also testified that she remembered Ell threatening to strangle her and remember him telling her she'd better stay on the bed. RP 88, 94. She also testified that it would affect her if Ell had threatened to kill her daughters and that she didn't call police after it was over. RP 95. She also testified that when he allowed her to go to the

bathroom, that she was still afraid of him and that while she didn't remember asking the officer to because she was afraid, that the officer followed her when she drove from the casino to the hospital. RP 96, 136. She did testify that she remembered Ell saying something about not wanting to go to jail and that he might have said that he wasn't going easy and that there'd better be six cops. RP 153. RHM appeared very scared to hospital personnel. RP 315, 368, 621. During the beating, Ell called the supervisor at the casino to complain about RHM being sexually harassed. The supervisor testified that at the time of the call Ell was very angry and threatening. RP 445-46.

Taking this evidence in the light most favorable to the State, the medical testimony regarding Ell's threat to kill RHM and RHM's testimony that she remembered him saying something about not wanting to go to jail, given the surrounding circumstances, is sufficient proof of the element of knowing threat to kill.

*a. ineffective assistance of counsel*

Ell asserts that had his counsel objected to the medical hearsay regarding his threat to kill RHM, that there would have been insufficient evidence to convict him of the threat and therefore counsel was ineffective for failing to object. In order to prevail on an ineffective assistance of counsel claim based on failure to object, the appellant "must show (1) an

absence of legitimate strategic or tactical reasons supporting the challenged conduct ...; (2) that an objection to the evidence would likely have been sustained ...; and (3) that the result of the trial would have been different had the evidence not been admitted ...”. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The medical treatment hearsay exception under ER 803(a)(4) applies to statements that are “reasonably pertinent to diagnosis or treatment.” In re Grasso, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004). “Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment.” *Id.* at 20.

But a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic assault cases. ... A physician's treatment will necessarily differ when the abuser is a member of the victim's family or household; for example, the treating physician may recommend special therapy or counseling and instruct the victim to remove him or herself from the dangerous environment by leaving the home and seeking shelter elsewhere. ... Therefore, the physician frequently must know the identity of the perpetrator in order to render proper treatment.

State v. Price, 126 Wn.App. 617, 640, 109 P.3d 27, *rev. denied*, 155 Wn.2d 1018 (2005) (internal citations omitted); *see also*, Grasso, (because a medical professional treats not only the physical and emotional injuries from child abuse, a child's statements as to the identity of the perpetrator are statements relied upon in determining proper treatment).

Here, the nurse testified that the sexual assault exam includes a psychological part and that part of the exam always includes a safety plan for sexual assault and domestic violence cases. RP 358, 361-62. She explained that the plan of care includes crisis intervention and that RHM's crisis was being sexually and physically assaulted. RP 380-81. The doctor also testified that the safety plan is part of the patient's treatment, that once the injuries have been assessed the next priority is to ensure the patient's safety. RP 506-08. A safety plan was discussed with RHM and she was to stay with her aunt and uncle for a while. RP 168, 390. It was in response to the SANE nurse's asking RHM questions from the sexual assault report form about what happened that RHM told her about Ell's threat to kill her. RP 385-86, 388. Obviously a summary of the assault itself is going to be reasonably pertinent to diagnosis and treatment, because medical personnel need to know what happened in order to treat a patient. Who assaulted her and whether she would be safe returning to the same living situation is also clearly pertinent to the medical treatment

plan. Defense counsel was not ineffective for failing to object to the medical hearsay testimony because it was plainly admissible under ER 803(a)(4).

**4. Assuming the judge answered the jury's question without notifying counsel, the judge's response, referring the jury to the instructions, was harmless error because it was neutral and didn't include affirmative information.**

Ell asserts that the trial court erred when it answered a question from the jury during its deliberations without informing defense counsel and without the defendant being present. Even assuming that the record demonstrates that counsel was not consulted, the court's error was harmless because the court's instruction to the jury, to refer to the instructions, was neutral and contained no affirmative information.

Under the court rules, the court has an obligation to inform the parties when a jury asks a question and to permit them an opportunity to comment. CrR 6.15(f). Failure to comply with this rule is error. State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702, *rev. den.*, 110 Wn.2d 1024 (1988); State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1986). In order to assert this error on appeal, the record submitted by appellant must demonstrate that counsel and the defendant were not present at the time of the communication. State v. Rienks, 46 Wn. App. 537, 544-45, 731 P.2d

1116 (1987)<sup>13</sup>. Communications between the judge and jury in violation of CrR 6.15(f) are subject to harmless error in which the State bears the burden of proving the error harmless beyond a reasonable doubt. Allen, 50 Wn. App. at 419. Such an error is harmless if the judge’s communication was “negative in nature and conveyed no affirmative information.” Id. (quoting State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). A neutral instruction merely directing the jury to refer to the previous instructions is harmless error. Id. at 420.

In State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979), *rev. den.*, 93 Wn.2d 1026 (1980), after it had begun deliberating the jury sent out a note requesting a legal definition of assault. The judge responded “Read the instructions.” Id. at 794. The defendant argued on appeal that the judge’s response without his or counsel’s presence violated his right to be present at all trial proceedings. Id. On appeal the court found that the judge’s action was not prejudicial and did not constitute reversible error because his response was “negative in character and conveyed no affirmative information.” Id.

The judge here responded very similarly to the judge in Safford: “The definitions provided in the instructions are sufficient for the jury to

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<sup>13</sup> *But see*, Allen, 50 Wn. App. at 419 n.2 (assuming despite ambiguous record that counsel wasn’t present when judge responded to jury inquiry).

use. Refer to the instructions as a whole.” While the record does not reflect one way or the other whether the parties were informed of the jury’s question, even assuming that defense counsel was not informed and provided an opportunity to comment, it’s clear that the judge’s response was neutral and conveyed no additional information and therefore was harmless.

Ell contends that if defense had been given an opportunity to comment, that they may have come up with a more informative answer to address the jury’s question, one that would have directed them to a specific instruction, No. 20, already contained within the instructions previously given. However, the court was under no obligation to answer the jury’s question and counsel could not have required the judge to have given the response he advocates on appeal. Allen, 50 Wn. App. at 420. The judge’s response to the jury’s question, to refer to the instructions as a whole, necessarily included a reference to inst. 20 and was harmless error.

**5. Defense counsel was not ineffective for failing to request a voluntary intoxication instruction because it was a tactical decision not to do so as it would have been inconsistent with the defense that the a rape never occurred and that Ell was not the one who committed the offenses.**

Ell asserts that defense counsel was ineffective for failing to request an instruction on voluntary intoxication. Defense counsel’s

decision not to request one was unequivocal and tactical. In order to assert the defense, the defense would have been admitting that the rape and beatings occurred, which Ell was clearly not willing to admit. Such a strategic decision is not ineffective assistance of counsel. Moreover, the evidence did not support the giving of such an affirmative defense instruction. Even if the court had given one, Ell's own testimony refuted the defense and therefore Ell cannot prove prejudice.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003).

In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding ... not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." West, 139 Wn.2d at 46, (*citing Strickland*, 466 U.S. at 693). A reviewing court need not address both prongs of the test if a petitioner fails to make a sufficient showing under one prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

As noted previously, if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *review denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2w 112 (1992). "The defendant bears the burden of showing there were no 'legitimate strategic or tactical reasons' behind defense counsel's decision." State v. Rainey, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001).

When specifically questioned as to whether he would be requesting a voluntary intoxication instruction, defense counsel unequivocally stated no. RP 53-54. Presumably defense did not want the instruction because it would be somewhat inconsistent with their defense that Ell was not the one who committed the offenses against RHM or that a rape did not occur and that the only offense Ell was guilty of was one count of violation of a no contact order. RP 886-97. While it is permissible to argue inconsistent defenses in some circumstances, it is a legitimate strategy to choose not to. Moreover, it's clear from Ell's testimony he wasn't willing to testify that all of it may have happened or to admit that any of it happened except the one violation of the no contact order. RP 842-44, 846, 848. He wasn't even willing to admit that RHM had injuries, which clearly would have been visible, when they woke up and she drove him to work the next day. RP 844-45, 10/22/08 RP 13.

Moreover, particularly given his testimony, he would not have been entitled to such an instruction. A defendant is entitled to a voluntary intoxication instruction if he can show (1) the crime charged has as an element with a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002), State v. Gabryschak, 83 Wn.

App. 249, 252, 921 P.2d 549 (1996). Evidence of drinking by itself is not sufficient to warrant a voluntary intoxication instruction, there must be “substantial evidence of the effects of the alcohol on the defendant’s mind or body”. Gabryschak, 83 Wn. App. at 253. “Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state.” State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37, *rev. denied*, 119 Wn.2d 1024 (1992). In order to warrant the giving of the instruction, there must be “evidence in the record from which a rational trier of fact could determine the effect of [the defendant’s] intoxication on his ability to form the required mental state.” Gabryschak, 83 Wn. App. at 250.

Here while there was testimony from RHM and Ell that at some point during the five hour incident Ell was or may have been drunk, there was no testimony that he was so intoxicated that it affected his ability at that time to acquire the requisite mental states of knowledge and/or intent. RP 62, 243, 800, 821, 831-32, 835, 838-40. Ell initially testified that when he woke up when RHM came home he was still a little drunk, but also testified that he was pretty damn near “diminished capacity” when he

asked RHM to call the casino.<sup>14</sup> RP 800, 835, 838. In fact, Ell's testimony was all over the place, at one point he would state that none of it happened, at another that there was sexual intercourse but that it was consensual, at another point that he didn't remember whether any of it happened, and at another that he simply was not going to say whether it did or didn't happen. RP 821-22, 841-44, 846, 848-49 Moreover, Ell clearly had a recollection of some of the night's incidents, waking up when RHM came home, making a phone call to the casino about RHM being sexually harassed. RP 801, 828, 831-39. None of his testimony about what he did remember reflected an inability to form the mens rea of intent or knowledge. Ell's selective memory about what happened and his incredibly inconsistent testimony would not support the giving of a voluntary intoxication instruction.

This case is very similar to that in State v. Gabryschak, in which the defendant was also charged with felony harassment. The defendant's mother testified that he was too drunk to drive and the officers testified that the defendant appeared intoxicated. Gabryschak, 83 Wn. App at 251, 253. The court found that while there was ample evidence of intoxication, there was no evidence in the record from which the jury could "reasonably

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<sup>14</sup> There was no testimony that Ell drank anything during the time between RHM coming home and the phone call.

and logically infer that [the defendant] was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged.” Id. at 254. “At best, the evidence show[ed] that [the defendant] can become angry, physically violent, and threatening when he is intoxicated.” *See also, State v. Gallegos*, 65 Wn. App. 230, 828 P.2d 37 (1992) (trial court did not err in declining voluntary intoxication instruction where there was ample evidence that defendant had been drinking and that the drinking affected his balance and coordination, but nothing in the record demonstrating that he was unaware of his actions or acted without volition).

Defense counsel clearly did not want an instruction on voluntary intoxication. It would have been inconsistent with his defense that Ell was not the one who committed the offenses against RHM or that a rape never happened. Ell has not met his burden to show that counsel’s choice was not strategic. Moreover, the evidence did not establish that Ell’s ability to form the requisite mental states was affected by his intoxication. At most it demonstrated that when he had been drinking he could become angry, violent and abusive.

**6. Ell waived his ability to object to the admission of his statements to police without a prior hearing under CrR 3.5 and his statements were properly admitted only upon cross-examination.**

Ell next contends that it was error for the court to admit Ell's statements to the officer without having held a CrR 3.5 hearing. While Ell alleges that there was an issue regarding the voluntariness of his statements on appeal, his argument is predicated solely upon the timing of the advisement of his rights under Miranda. He did not object below to the court's failure to hold such a hearing and the record clearly reflects that the statements were voluntary. He waived this issue by failing to raise it below, and has failed to demonstrate that it is a manifest error of constitutional magnitude, particularly given that the State only brought the statements out after the defendant had testified about them in the defense case in chief. Ell cannot demonstrate prejudice from any alleged error & therefore cannot raise this issue for the first time on appeal.

A challenge to the admissibility of evidence is waived unless it is asserted below. RAP 2.5(a); ER 103. Unless the defendant can establish that a failure to comply with the procedural requirements of CrR 3.5 constitutes a manifest error of constitutional magnitude, failure to raise such an issue below waives the issue. State v. Williams, 137 Wn.2d 746, 748, 975 P.2d 963 (1999); *but see*, State v. S.W., 147 Wn. App. 832, 197

P.3d 1190 (2008) (juvenile could raise court's failure to hold CrR 3.5 hearing for first time on appeal where court failed to conduct independent assessment of credibility and voluntariness of statement, and thus admissibility of statement, before considering it as evidence to support adjudication where juvenile contested voluntariness of statement and where court failed to inform juvenile of ability to testify solely regarding statement). Moreover, failure to hold a CrR 3.5 hearing to determine the admissibility of a defendant's statements does not render the statement inadmissible where the record demonstrates that the statements were not involuntary. State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983).

CrR 3.5 provides in pertinent part: "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." CrR 3.5(a). The purpose of the rule is to prevent the admission of defendant's *involuntary, incriminating* statements. Williams, 137 Wn.2d at 751. In order to determine if a defendant's statement was voluntary the court determines whether the statement was coerced, i.e., whether his/her will was overborne, under the totality of the circumstances. State v. Adams, 138 Wn. App. 36, 46, 155 P.3d 989, *rev. den.*, 161 Wn.2d 1006 (2007).

A prosecutor may cross-examine a defendant in order to qualify or rebut the defendant's testimony on direct or to explore issues defendant raised in his testimony. State v. Graham, 59 Wn. App. 418, 427, 798 P.2d 314 (1990); *accord*, State v. Hayes, 73 Wn.2d 568, 571, 439 P.2d 978 (1968). Cross-examination is not confined to the questions asked, but may explore the subject areas discussed on direct. State v. Riconosciuto, 12 Wn. App. 350, 354, 529 P.2d 1134 (1974). If a defendant testifies, he or she is subject to vigorous cross-examination in the same manner as any other witness. Graham, 59 Wn. App. at 427.

At the motions in limine hearing, the prosecutor indicated that a CrR 3.5 hearing wasn't necessary because the State wouldn't be offering any of the defendant's statements "like that." RP 12. One of the prosecutor's motions in limine was to preclude defense from trying to introduce Ell's statements to police. RP 13. Defense counsel did not object to not having a CrR 3.5 hearing at that time and did not request one.<sup>15</sup> RP 12-13. As part of the defense case, Ell testified on direct about his conversation with the officers. While he testified that he was not read his Miranda rights until he was at the jail although he was handcuffed, he also testified that the officer treated him fairly, that he did know answers

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<sup>15</sup> In the agreed omnibus application, Ell did not affirmatively request a 3.5 hearing, but reserved with respect to that issue. Supp. CP \_\_\_, Sub Nom. 21.

to some of the questions but chose not to tell the officer and to be vague with the officer because the officer was being vague with him. RP 804, 806; 10/22/08 RP 5-7, 9. He testified that the officer was asking him questions about the night before and his sex life with RHM, and that he told the officer he had a “bad feeling about this.” 10/22/08 RP 805-06. On rebuttal, the officer testified that he read Ell his Miranda rights after arresting him, that Ell waived his rights, and spoke to him at the motel room. 10/22/08 RP 15-17.

There is nothing in the record that demonstrates that Ell’s statements to the officers were anything but voluntary, even assuming one believed his testimony that the officer didn’t read him his rights until he was taken to jail. The prosecutor clearly did not believe that the statements were particularly incriminating as she did not offer them in her case in chief and moved to preclude the defense from soliciting them from the State’s witnesses. As Ell cannot show any prejudice from the failure to hold a CrR 3.5 hearing, he waived the issue by failing to raise it below. Furthermore, Ell subjected himself to cross-examination regarding his statements to the officer by testifying about them on direct.

7. **The prosecutor did not commit misconduct in closing because she prefaced her comments about the consistency of the statements admitted for impeachment purposes with an explanation of the difference between impeachment evidence and substantive evidence and what could be considered as substantive evidence and argued that the prior consistent statements made RHM's recantation testimony not credible.**

Ell also asserts that the prosecutor committed misconduct during closing argument by arguing the impeachment evidence as substantive evidence. In particular Ell references the prosecutor's argument regarding the consistency of RHM's previous statements to others and that RHM's statements to the defense investigator and the police were the truth, and argues that the argument was exacerbated by a vague limiting instruction. Ell's selective references to the prosecutor's statements takes them out of context. The prosecutor did not commit misconduct: she specifically explained the difference between impeachment and substantive evidence, what the impeachment versus substantive evidence was and how the jury was supposed to use the impeachment evidence, to assess RHM's credibility.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Absent an objection, a claim of misconduct

is waived unless it is so flagrant or ill intentioned that it creates an incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86. A prosecutor enjoys wide latitude in expressing reasonable inferences from the evidence and is entitled to respond to arguments of defense counsel. State v. Gregory, 158 Wn.2d 759, 841-42, 147 P.3d 1201 (2006). Defense counsel's decision not to object or move for a mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Prior to or during the presentation of evidence limited to impeachment the court gave an oral instruction to the jury that the evidence was only being presented for the limited purpose of

impeachment, to address the issue of RHM's credibility regarding her recantation of the rape and other details of the incident. RP 432-33, 589, 594, 669, 683, 694. The written jury instruction in this case, which defense counsel did not object to, informed the jury that it could not consider evidence that had been admitted for impeachment purposes for any other purpose. CP 91 (Inst. 8); RP 861-62.

After outlining the offenses, the prosecutor stated that RHM had recanted just the rape, the offense that carried the most time. RP 871. She then explained the concept of rape by forcible compulsion under the law versus what RHM's personal understanding of what constitutes "rape." RP 871-72. She then explained:

Because of the recantation as the rape – as to the rape, there were a number of witnesses who were allowed to testify to impeach that part of her testimony that she testified to here in court.

*So those prior statements she made that were inconsistent with what she told you here in court could come in so you could evaluate her credibility as to that piece of evidence as she's sitting here.*

You can say, okay, she told all these other people a different statement. She – they were all consistent, but she told them all of them differently, and that's different from her testimony here in court. *You can then judge her credibility as to that based on those prior statements.*

Now, what's a little different is the law allows certain statements she may make to certain people to come in to prove rape just as though she said it up there. Those are the medical professionals you heard from.

*So Nurse Hardy and Dr. Naviaux testifying, that comes in what we call substantively. It comes in to prove rape. So*

*those statement that she made to the doctor and the nurse, those aren't coming in as we're just going to test her credibility. Those come in to prove the charge.*  
So you have proof beyond a reasonable doubt of the charge from Dr. Naviaux and Nurse Hardy, clearly.

RP 872. She reiterated that the testimony of the doctor and SANE nurse could be used as substantive proof of the rape. RP 874.

While the prosecutor did reference the consistency of the statements RHM made to a number of the witnesses, she did so in the context of the jury's duty to assess RHM's credibility. After referencing the consistency of the prior statements RHM made to others, she later queried: "Why is it after all of these consistent statements that she makes, and all of the evidence that's collected that corroborates that, why is it her testimony in here is a little different?" RP 877, 881. The prosecutor acknowledged the recantation and that RHM's testimony differed from the prior statements and offered an explanation to the jury as to why her testimony would be different: that RHM had a difficult choice to make between the family she loved and telling the truth. RP 881-82. She explained that the evidence showed that RHM's statements were consistent as to what happened up until an interview with Ell's attorney at which Ell's mother, RHM's "mom," was present. RP 883.

The statements the prosecutor made on rebuttal were in response to defense counsel's stating that it wasn't until 3:30 p.m. the next day that it

was being called a sexual assault, that it took hours before it came out that it was a sexual assault. RP 889-90. The prosecutor simply responded that it was in fact very little time, and came at the first time that RHM was safe. RP 902.

The prosecutor prefaced her argument with an explanation of what statements the jury could consider as substantive evidence, the ones to medical personnel, and what they could only consider, as impeachment, to assess RHM's credibility. That was the context in which all of her argument was made. The comments regarding the consistency of RHM's statements to others came in for the purpose of helping the jury to decide whether RHM's testimony that she wasn't raped, that the sexual intercourse was consensual, was credible or not. The prosecutor did not commit misconduct, and certainly any comment she made did not constitute flagrant misconduct warranting reversal.

**8. The trial court determined that the felony harassment offense was the same criminal conduct for purposes of the offender score, not double jeopardy, therefore vacation of the offense would have been improper.**

Lastly, Ell asserts that the trial court erred at sentencing when it did not vacate his felony harassment conviction after finding that it constituted the same criminal conduct as the offenses. In arguing that the court erred Ell relies solely on State v. Womac, 160 Wn.2d 643, 160 P.3d

40 (2007). However, Womac addressed the proper remedy when two convictions are the same for double jeopardy purposes, not for determinations under RCW 9.94A.589(1)(a). After the court determined that the felony harassment was the same criminal conduct as another offense *for offender score purposes*, it properly did not add a point in the offender score for that conviction, and that was all that is required by RCW 9.94A.589.

In determining the offender score, all other current offenses are to be counted as prior offenses, unless the court enters a finding that the other current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Unless otherwise provided,

the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the *same criminal conduct* then those current offenses shall be counted as one crime. ... "*Same criminal conduct*," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

RCW 9.94A.589(1)(a) (emphasis added). "[W]hen separate offenses encompass the 'same criminal conduct,' they count as one crime for offender-score calculation purposes." State v. Stockmyer, 136 Wn.App. 212, 218, 148 P.3d 1077 (2006). "Same criminal conduct" is conduct that

involves the same victim, the same objective intent, and occurs at the same time and place. State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

An appellate court reviews decisions regarding “same criminal conduct” for abuse of discretion or misapplication of the law. Id. at 122.

The Supreme Court in State v. Womac, 160 Wn.2d 643, 660, 160 P.3d 40 (2007) determined that if a jury’s verdict as to offenses subject to double jeopardy are reduced to judgment, then those convictions must be vacated. The Court summarized the issue and result:

Womac now claims the Court of Appeals violated double jeopardy principles by failing to vacate his convictions for felony murder and first degree assault. We agree. Because Womac's three separate convictions constitute the “same offense” for purposes of double jeopardy, his convictions for felony murder and assault in the first degree should be vacated.

Id. at 647. While the trial court in the case unfortunately used the language “same criminal conduct” when determining that the offenses violated double jeopardy, it is clear that the vacation of the convictions required by Womac is solely predicated on double jeopardy grounds. Id. at 650-56. The Court concluded that a double jeopardy violation against multiple punishment exists even if the conviction is not counted for sentencing purposes and even if no separate sentence is imposed for the merged offense. Womac, 160 Wn.2d at 656-58.

Here, defense never asserted and the court did not find that the felony harassment offense merged with the assault offenses, or that entry of convictions on all three offenses would violate double jeopardy. Defense counsel asserted that, *under RCW 9.94A.589(1)(a)*, the assault charges and the harassment charge occurred at the same time and place and involved the same victim, and therefore they should count as one offense, one point for offender score purposes. CP 49-50; 12/12/08 RP 11-12. Defense did not assert that under double jeopardy jurisprudence, the crimes were in fact and law the same. The court found that the two assaults were not the same criminal conduct, but that the felony harassment was, and therefore did not add a point for that offense in the offender score. 12/12/08 RP 29. The court's finding of "same criminal conduct" related to the offender score for each offense, not double jeopardy. The court's sentence was proper.

**D. CONCLUSION**

The State respectfully requests that this court affirm Ell's convictions and sentence.

Respectfully submitted this 17<sup>th</sup> day of November, 2009.

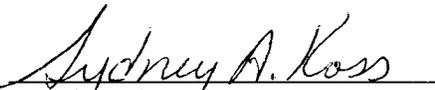
  
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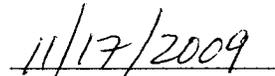
CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, addressed as follows:

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