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

STATE OF WASHINGTON,)	
Respondent,)	No. 65455-1-I
)	
Vs.)	STATEMENT OF ADDITIONAL
)	GROUND FOR REVIEW
BRYAN Z. ROSS,)	
Appellant.)	
_____)	

I, **BRYAN Z. ROSS**, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand that the court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

A. Assignment of Errors

- Trial Court erred in not proving all the essential elements of the crime charged.
- Trial Court erred when it overruled the objection continually made by defense counsel on jury instruction # 6, and it was error for the trial court to use this instruction for purposes other than impeachment.
- Mr. Ross is entitled to a New Trial based on the cumulative prejudice from multiple errors by defense counsel along with multiple errors made by the prosecution.

1. Issues Pertaining to Assignment of Errors

- When the trial Court charged the appellant, the Certification of Determination of Probable Cause did not prove the essential elements of that crime. In order to even charge Mr. Ross, the prosecutor had to use two (2) uncharged accusations that allegedly happened 9 years and 14 years earlier.
- When the trial court used this instruction, it was supposed to be used for impeachment purposes, but in the present case it was used to show common scheme or plan and the credibility of Ms. Shaffer.
- Due to the multiple errors made by the defense counsel and the multiple errors made by the prosecution, Mr. Ross was so prejudiced by the cumulative errors that he should be given a New Trial, based on that cumulative prejudice.

B. Argument

1. TRIAL COURT FAILED TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED.

The due process clause of the Fourteenth Amendment of the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime charged. **In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).**

In order for the State to charge the appellant with the crime charged, they must first prove beyond a reasonable doubt that the essential elements for the crime were met. Mr. Ross was charged and convicted of Rape in the Second Degree, and the elements are as follows:

9A.44.050 Rape in the Second Degree

(Elements)

(1) A person is guilty of Rape in the second degree when, under the circumstances not constituting rape in the first degree, **the person engages in sexual intercourse** with another person:

- (a) By forcible compulsion;
- (b) Incident happened in the State of Washington.

These elements of the crime were not met beyond a reasonable doubt by the State. The alleged victim in the case, stated to police and hospital officials, that, “he attempted vaginally with his penis,” When I asked about the different areas of her body, I asked what he used and fingers were not mentioned. **(See RP Vol. IV, Pg. 725-726 included as Exhibit 1);** “I say he does not get in,” “and you told the nurses at Providence that he didn’t get in me; isn’t that correct? Correct.” **(See RP Vol. III, Pg. 445-446, included as Exhibit 2);** “See I felt Ross did not enter my vagina,” **(See Cert. of Determination of Prob. Cause of Det. Laura Price, included as Exhibit 3);** “There is no physical evidence of penetration,” **(See RP Vol. V, Pg 864 included as Exhibit 4);** “There is a tear and it’s between the vaginal opening and the anus, not the vagina or the anus,” “This tear between the vagina can be—in between the vagina and anal area can be explained by the skin disorder, this lichen sclerosis, **(See RP Vol. V, 870-871 included as Exhibit 5).**

Mariah Low of the Washington State Patrol Crime Laboratory was the forensic person who processed the Rape Kit of the alleged victim. She processed oral swabs, anal swabs, perineal vulvar swabs, vaginal endocervical swabs, and skin swabs. **(See RP Vol. III, Pg 630 included as Exhibit 6).** Ms Low stated that the swabs were negative for semen on the oral; no sperm cells found, no male DNA detected, and no spermatozoon present on the swabs. There was also no blood found or detected on the stain or swabs. **(See RP Vol. III, Pg. 626-649, included as Exhibit 7).**

Even the prosecutor conceded to there being no evidence, and then stated, “I stand

Convicted of not giving you biohazards.” (See RP Vol. V, Pg. 873, included as Exhibit 8). Ms. Shaffer testified that during the alleged sexual encounter she poked at Mr. Ross’s eyes. (See RP Vol. III, Pg. 449, included as Exhibit 9). Det. Sgt. Michael Beech testified that he was at Mr. Ross’s house about two in the morning to discuss what allegedly happened and at that time he did not observe any swelling on Mr. Ross’s face, no scratches, nothing around the eyes, and nothing in the form of scabs or anything on his body that may have caused bleeding on the sheets. (See RP Vol. III, Pg 586, included as Exhibit 10).

The State never proved beyond a reasonable doubt that the appellant, Mr. Ross had sexual intercourse with Kathleen Shaffer, which is one of the essential elements needed to convict in this case.

B. Argument

2.

**DID THE TRIAL COURT ERR WHEN IT
OVERRULED THE OBJECTION OF JURY
INSTRUCTION # 6 THAT DEFENSE COUNSEL
CONTINUALLY MADE AND WAS IT ERROR
FOR THE TRIAL COURT TO USE THIS
INSTRUCTION FOR PURPOSES OTHER
THAN IMPEACHMENT?**

The instruction on the present case is generally used for impeachment purposes. (See WPIC, Exhibit 11). This instruction was brought in for the purpose to show a common scheme or plan and to the credibility of Ms. Shaffer.

This “New Ground” the trial court is talking about, should have never been used in this case or any case. Using prior bad acts was like ringing a bell in the ears of the jury and once a bell is rung, you cannot un-ring it, especially when the alleged prior bad acts

are allegations that were never investigated by the police, nor were any charges brought forth.

Defense Counsel objected to the use of this instruction and the entire fiasco of prior bad acts and its witnesses, because of the prejudicial effect it would have and obviously did have on the defendant, and also adding to the error, was the trial court changing the wording of the instruction from what the **WPIC** actually shows.

B. Argument

3. MR. ROSS IS ENTITLED TO A NEW TRIAL BASED ON THE CUMULATIVE PREJUDICE FROM MULTIPLE ERRORS, ESPECIALLY THE MULTIPLE ERRORS OF THE DEFENSE COUNSEL, AND ALSO THE MULTIPLE ERRORS OF THE PROSECUTOR.

Where the cumulative effect of multiple errors so infected the proceedings with unfairness, a resulting conviction or death sentence is invalid. See **Kyles v. Whitley**, 514 U.S. 419, 434-35, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995). As the Ninth Circuit pointed out in **Thomas v. Hubbard**, 273 F.3d 1164 (9th Cir. 2001), [i]n analyzing prejudice in a case which it is prejudicial to warrant reversal, this court has recognized the importance of considering the cumulative effect of multiple errors and not simply conducting a balkanized, issue-by-issue harmless error review.” **Id.** at 1178 (internal quotations omitted) (citing **United States v. Frederick**, 78 F.3d 1370, 1381 (9th Cir. 1996)); see also **Matlock v. Rose**, 731 F.2d 1236, 1244 (6th Cir. 1984)) (“Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.”).

Mr. Ross asserts that each of the errors described, merits relief. However, considered cumulatively, they certainly resulted in sufficient prejudice to merit a new trial.

B. Argument

4. WAS IT ERROR FOR THE TRIAL COURT TO USE THE CHALLENGED INFORMATION FROM THE PRESENTENCE INVESTIGATION REPORT, AFTER THE PROSECUTOR, DEFENSE COUNSEL, AND THE TRIAL COURT STATED THAT IT WOULD NOT BE USED TO DETERMINE MR. ROSS'S SENTENCE.

The trial court conceded when it stated: “Would you agree that it would be appropriate for the Court not to consider the challenged information as outlined by Ms. Doerner? Ms. Kenimond: Absolutely, your Honor. (See **RP Apr. 29, 2010, Pg. 10-11, included as Exhibit 12**).

Mr. Ross lacked conviction history, aside from the DUI conviction. There is no significant criminal history beyond that. Nothing beyond that DUI. (See **RP, Apr. 29, 2010, Pg. 50, included as Exhibit 13**)

In the sentencing phase of the trial, the prosecutor Ms. Kenimond stated: “Thank you, your Honor. Mr. Ross has been convicted of one count of rape in the second degree by the jury and the date of violation was the 12th of April, 2009. This matter requires that Mr. Ross be sentenced under **RCW 9.94A.507**. His standard range sentence is life in prison with a possibility of parole after a term of 78 to 102 months, **and the Court will set that low-end term.** (See **RP, Apr. 29, 2010, Pg. 12-13, included as Exhibit 14**).

Yet the sentencing judge stated: “You are a vicious **predator**, and under these circumstances, it is highly appropriate that you be sentenced to life in prison and that a

minimum term be set of the maximum allowed by law, which is 102 months, and so I impose the maximum permissible sentence under Washington law. (See **RP, Apr. 29, 2010, Pg. 59, included as Exhibit 15**).

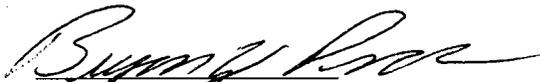
A **Predator** is defined as a **person who has committed many violent sexual acts** or who has a propensity for committing violent sexual acts. (See **Black's Law Dictionary, Eighth Edition**). Mr. Ross was convicted of a single count. He was only charged with a single count, yet the sentencing judge labeled him as a vicious predator, which could have only been done by using the information that was challenged in the P.S.I. Report, which contained inconsistent statements and uncorroborated information. This is a clear cut violation of Mr. Ross's Sixth and Fourteenth Amendment Rights to the United States Constitution.

C. Conclusion

Mr. Ross request this Honorable Court to give an Evidentiary Hearing to see if **this** merits a vacation of the charges or warrant a New Trial.

DATED this 27 day of April, 2011.

Respectfully submitted,


Bryan Z. Ross



SUBSCRIBED AND SWORN to before me



A Notary public for the State of Washington

Who resides at Connell

My Commission expires: 10-10-2012

EXHIBIT-1

EXHIBIT-1

1 Q. And what are the questions that you asked?

2 MS. KENIMOND: Objection; relevance.

3 THE COURT: Need to see you at side-bar.

4 (A SIDE-BAR DISCUSSION WAS HAD.)

5 THE COURT: Objection overruled.

6 A. I can't give them all to you verbatim because
7 there's multiple pages, but it starts out with a history
8 of the assault that's being reported, including any
9 penetration areas.

10 Q. Let me just stop you there.

11 When you interview a patient such as
12 Ms. Shaffer, do you talk about penetration?

13 A. Yes.

14 Q. Do you have a discussion about what penetration
15 is?

16 A. It kind of varies. The basic question is, were
17 you penetrated vaginally, and then we discuss with what.

18 Q. Okay. Did you do that in this case?

19 A. Yes.

20 Q. And what was said?

21 A. She said it was attempted vaginally with his
22 penis.

23 Q. Did she disclose anything further?

24 A. I asked about oral penetration, and she said no,
25 and I asked about rectal penetration, and she was

EXHIBIT-2

1 A. Correct.

2 Q. And he carefully placed it in his closet; isn't
3 that right?

4 A. It wasn't carefully. It was a race.

5 Q. And you've also indicated in the diary that you
6 provided that he couldn't get in; isn't that right?

7 A. I would not allow him to get full penetration.
8 By that I mean penile to scrotum.

9 Q. And in many of your statements you say he doesn't
10 get in whatsoever; isn't that right?

11 A. I say he does not get in.

12 Q. And, in fact, you also say that he can't get in
13 because he had to make his own hole; isn't that right?

14 A. Correct.

15 Q. So that wouldn't be at the anal area or the
16 vaginal area; that would be a separate area?

17 A. He tried any area.

18 Q. But when you say he made his own hole, it wasn't
19 at either of those locations; isn't that right?

20 A. He couldn't fully penetrate to the back. He
21 tried the front, and he -- what I'm going to call
22 sawing, trying to get in, and I kept pushing back, and
23 he hit that middle area.

24 Q. Did you recall indicating that -- to law
25 enforcement that you weren't sure that there was

EXHIBIT-3

EXHIBIT-3

wall or doorframe on the way into the bedroom, which she stated she told him it hurt. KFS stated he threw her onto the bed and started kissing her. KFS stated she told him no, and that he kept telling her to relax.

KFS stated ROSS took her clothing off her and took his clothing off very quickly and forced himself on top of her. KFS stated he bit her nipples and she yelled "No, no, no!" And "that hurts!" KFS stated ROSS just kept repeating, "relax" "close your eyes, I'm a nice guy."

KFS stated he forced her legs apart and began "jamming" her with his penis. KFS stated she felt ROSS did not enter her vagina with his penis, but she felt torn and thought she was bleeding. KFS stated she felt "this horrible ripping" in her vagina. KFS stated she slapped his face and tried to poke his eyes. KFS stated she said outloud, "I'm going to die."

KFS stated she started to fake a seizure and babble, which caused ROSS to stop. He refused to call 911 and eventually called her daughter to come get her. KFS stated he assisted her in getting dressed, of which she did not have her bra on when her daughter picked her up. A subsequent search warrant conducted on ROSS' residence did not produce the bra or any other articles of clothing belonging to KFS.

KFS stated that due to her disability, she knew she could not escape from him quickly, and where they were in the house was upstairs on the top floor (main living area is upstairs, along with the bedroom).

ROSS made multiple references to KFS that he felt she was the "love of his life", "I need to know how to help you (medically) for when you move in", "you're moving in here tomorrow".

KFS was seen by a SANE (Sexual Assault Nurse Examiner) at the hospital. KFS stated that during the exam, the nurse brought the doctor in to examine and confirm a tear in her vaginal area.

During the course of the investigation, a prior Island County case from 2002 was discovered with similar facts and circumstances. Additionally, I located a Protection Order with ROSS as the Respondent. I contacted the Petitioner, who gave similar information on how they met and the aggressiveness of his sexual behavior.

Based on the above information, I believe ROSS committed RAPE in the 2nd DEGREE (9A.44.050), by engaging in sexual intercourse with another, to wit; KFS, by FORCIBLE COMPULSION.

I hereby certify, under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Signed on 5/14/2009 at Coupeville, Washington



Laura Price, Detective

IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

BRYAN ZACHERY ROSS

Defendant.

NO.

CERTIFICATION OF DETECTIVE LAURA PRICE IN SUPPORT OF FINDING OF PROBABLE CAUSE

Comes Now, Island County Sheriff's Deputy, Detective Laura Price, and, hereby certifies or declares as follows:

On 4/12/09, in Island County, Washington, a felony to wit: Rape 2nd Degree was committed on the person of KFS DOB: 12/07/55 at 505 Michelle Dr, Camano Island, Island County, Washington, and FURTHERMORE, I believe that there is probable cause to believe that Bryan Zachery Ross, DOB 9/18/59, committed said crimes.

My belief is based upon the following facts and circumstances:

I have been a Deputy for the Island County Sheriff's Office for over five (5) years with a total of ten (10) years law enforcement experience. I am currently assigned as a Detective in Major Crimes investigating sexual assault and other felony level crimes. I have completed training conducted by the Washington State Criminal Justice Training Commission and other professional organizations comprising about 200 hrs dealing with rape investigation, child physical and sexual abuse interviewing and investigation, and sex offender dynamics as well as crime scene training, homicide investigation and other training integral to investigations of crimes. My total training in law enforcement issues beyond the Basic Academy is over 500 hours.

On 4/12/09 I received a call from Deputy Eastwood who stated KFS reported being raped at the listed location and was on her way to Providence Hospital in Everett, WA. I contacted KFS at the hospital and she stated the following:

About six weeks prior, in early March 2009, KFS was leaving a Fred Meyer store when she was approached by ROSS. After speaking for a few minutes they exchanged phone numbers and she left. By the time she got home a short while later, there were multiple phone messages for her from ROSS. KFS stated she did not return any of his phone calls. KFS stated she is disabled in that she has trouble walking and sometimes uses a cane.

On Easter Sunday, 4/12/09, KFS was on Camano Island visiting her family. She decided to call ROSS because he told her he lived on Camano Island. She spoke with him and he invited her to his home. She took her daughter and son in law with her to meet him. After an hour of visiting, ROSS invited them to stay and watch a movie. KFS agreed, her daughter and son in law left.

KFS stated after the movie started ROSS put his arm around her and they started kissing. KFS stated that ROSS then aggressively picked her up off the couch and carried her into the bedroom. KFS stated that ROSS slammed her into the

EXHIBIT-4

EXHIBIT-4

1 executed a search warrant hours after this happened.
2 They go to Mr. Ross' home. They search the closet.
3 They search the safe. Detective Price indicated she had
4 looked in the garbage. They didn't find a bra.

5 Now, Ms. Shaffer testified that she was
6 wearing layers that day. She was wearing a white shirt
7 and that there was a pink shirt underneath that matched
8 that bra, the alleged bra.

9 Where are the bruises if she hit her
10 backside on the wall or door? We have no pictures of
11 any bruises. We didn't get to see any bruises
12 whatsoever. The SANE nurse indicated there was no
13 bruising in her report. There was no disclosure of
14 bruises from Ms. Shaffer to the SANE nurses. Not even
15 redness.

16 Where are the bite marks? Ms. Shaffer
17 claims that he was biting her breasts and after she gets
18 to the hospital they view her breasts. Now, initially
19 the first nurse looks at her breasts and says there was
20 no indication of biting. And the second nurse said she
21 wasn't even allowed to look. Ms. Shaffer wouldn't even
22 let her look. There's no photograph. We didn't get to
23 see whether or not there was redness and that would have
24 been noted in a report.

25 Where are the indicators that Mr. Ross was

EXHIBIT-5

1 IGA, but Sandi and Ryan both say, no, Sandi called Ryan.
2 He was still there. They had left and then they decide,
3 okay, meet at the IGA. This is another inconsistency.

4 Now there's the calling to 911. Now
5 Ms. Shaffer said she called 911 and told them what was
6 going on and that they directed her, you need to go to
7 the police station. But Ryan says, oh, no. I said we
8 could go to the police station because it was close by,
9 and Sandi said, my mom was just kind of frantic and so
10 we thought we should just go there.

11 They arrive at the station and Ms. Shaffer
12 said, there's four officers, and in fact that's where I
13 met Detective Price. There's a med unit there. And the
14 deputies and Detective Price and Sandi and Ryan Johnson
15 all say, no, there were two officers that were there,
16 there was no med unit, and Detective Price said I didn't
17 meet her until I got to the hospital.

18 Now, these may seem like trivial
19 inconsistencies. The problem here is that there's so
20 many. And you might even think someone under stress
21 might make some mistakes but this is throughout, both
22 before and after the event. There's four statements and
23 two diaries and everything is inconsistent.

24 At the hospital you heard testimony that
25 Ms. Shaffer was seen by the SANE nurses and then she was

1 they examined it.

2 The tear in the vagina can be -- in between
3 the vagina and anal area can be explained by the skin
4 disorder, this lichen sclerosus. It causes itching.
5 The skin becomes more fragile. It's thinner. Anything
6 may have caused that tear because she's more prone to
7 it. And there were no marks on Mr. Ross' face. There
8 was no evidence of any poking, no redness, no swelling,
9 no cuts.

10 There's no evidence in clothing. We don't
11 know where the clothing went. There was testimony from
12 Ms. Shaffer there was a broken belt. We didn't get any
13 of that. There was -- her testimony said that there was
14 underwear. We didn't see any of that. That didn't even
15 get tested. Why didn't that get tested? Why didn't we
16 get to see if there was any blood? Things that could
17 have substantiated her story or been exculpatory
18 evidence. Evidence that would have indicated that this
19 never happened and Mr. Ross wouldn't be sitting here.

20 I told you that I'd be returning -- in
21 opening statement I told that you I would be returning
22 with a closing argument and here I am. The evidence in
23 this case or lack of it indicates that you should find
24 Mr. Ross not guilty.

25 THE COURT: I'd like to give the jury an

EXHIBIT-6

EXHIBIT-6

1 three items that I did examine, so the other ones were
2 not needed at that time.

3 Q. Thank you.

4 You said you received a reference sample.
5 What is that?

6 A. A reference sample is a known sample collected
7 from an individual that can be used to compare to
8 samples off the evidence.

9 Q. All right. And whose reference sample did you
10 receive and test in this case?

11 A. Bryan Ross.

12 Q. Now, what does a sexual assault kit typically
13 contain?

14 A. There are various exhibits. Usually, swabs
15 collected from the body of the individual it was
16 collected from. It's usually collected by a SANE nurse.

17 Q. Was that the case with this rape kit?

18 MS. DOERNER: Objection, Your Honor; calls
19 for speculation.

20 THE COURT: Sustained.

21 Q. What items were in this rape kit?

22 A. The ones I collected -- or the ones I processed
23 out of the rape kit were oral swabs, anal swabs,
24 perineal vulvar swabs, vaginal endocervical swabs, and
25 skin swabs which were collected from the right and left

EXHIBIT-7

EXHIBIT-7

1 MS. KENIMOND: Your Honor, the state next
2 calls Mariah Low.

3

4 MARIAH LOW,
5 having been called by the defendant and being first duly
6 sworn by the Court, testified as follows:

7

8 DIRECT EXAMINATION

9 BY MS. KENIMOND:

10 Q. Good afternoon, ma'am. Would you please state
11 your name and spell your last name.

12 A. My name is Mariah Low. Last name is spelled
13 L-O-W.

14 Q. And who do you work for?

15 A. I work for the Washington State Patrol Crime
16 Laboratory that's located in Marysville, Washington.

17 Q. And long have you worked for them?

18 A. Since November of 2005.

19 Q. In what capacity?

20 A. I'm a forensic specialist. I work in the DNA
21 section and then I also respond to crime scenes.

22 Q. All right. What's a forensic specialist?

23 A. I process evidence in criminal cases for the
24 presence of DNA, biological fluids, things like that.

25 Q. Okay. What kind of training do you need in order



1 to be able to do such things?

2 A. I have a bachelor of science degree in
3 biochemistry from the University of Washington in
4 Seattle, Washington. When I was hired on to the State
5 Patrol, I then underwent a one-year training program
6 that includes training both inhouse from the State
7 Patrol and then also from California Criminalistics
8 Institute, Pacific Coast Forensic Science Institute, and
9 other such training events.

10 Q. All right. Thank you.

11 About how many DNA tests have you run since
12 you started at the crime lab?

13 A. I'm not sure of the exact number, but it runs
14 roughly a hundred or more cases a year.

15 Q. All right. Thank you.

16 Are you familiar with state of Washington
17 against Bryan Ross?

18 A. Yes.

19 Q. How did you become involved in this case?

20 A. I tested some evidence that was submitted to the
21 laboratory that -- in association with this case.

22 Q. Would you please explain how evidence comes to
23 the laboratory and what happens to it while it is in the
24 custody of the laboratory.

25 A. When a case is submitted to the laboratory, it

1 comes in with a form, which is a Request for Laboratory
2 Examination form, and that's submitted by the police
3 agency, whichever agency has jurisdiction.

4 When it comes into the laboratory, it's
5 assigned a laboratory number to it. Each evidence item
6 is checked that it's securely packaged, all seals are
7 intact, and then a chain of custody is maintained while
8 it is in the laboratory. So it is always documented on
9 where the evidence is and it can be tracked throughout
10 the process.

11 Q. Where are, for example, rape kits stored inside
12 the laboratory?

13 A. We have an evidence vault that's inside the
14 laboratory that's secured limited access, and so when
15 the evidence comes in, it will be stored in that vault.
16 And then once I go to do my analysis, I will check that
17 out and store it in my possession until I am done.

18 Q. All right. Who has access to the vault before
19 you start your testing?

20 A. There are four or five people in our laboratory
21 that have access. Two of those people are property and
22 evidence custodians, which their primary duty is to
23 maintain the evidence and the evidence chain of custody.
24 Our laboratory manager has access to it and then
25 supervisors also have access to it.

1 Q. All right. When you say that after you take the
2 evidence out of the vault to test it you keep it in your
3 custody, what do you mean by that? How does that
4 happen?

5 A. I have a personal locked locker that I can keep
6 it in or freezers that are locked that I can keep that
7 evidence in. That way it's in my custody and I can do
8 what I need to do for the testing with it. I then
9 reseal it and return it to the vault.

10 Q. Thank you.

11 Does anyone else have custody to your
12 locker?

13 A. We have a personal key for our own lockers and
14 then as a DNA section we share freezers, as well.

15 Q. All right. So did you do some testing in this
16 case?

17 A. Yes, I did.

18 Q. Tell us, please, the items that you received for
19 testing.

20 A. I received a sexual assault evidence collection
21 kit. In this case, I also received a DNA reference
22 sample, and I received a sheet I examined. There was
23 some other evidence items that I did not examine.

24 Q. Why did you not examine those?

25 A. The point -- I was able to get results off the

1 three items that I did examine, so the other ones were
2 not needed at that time.

3 Q. Thank you.

4 You said you received a reference sample.
5 What is that?

6 A. A reference sample is a known sample collected
7 from an individual that can be used to compare to
8 samples off the evidence.

9 Q. All right. And whose reference sample did you
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19 for speculation.

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23 out of the rape kit were oral swabs, anal swabs,
24 perineal vulvar swabs, vaginal endocervical swabs, and
25 skin swabs which were collected from the right and left

1 breast.

2 Q. Okay. So when you get a kit and you test it,
3 what are you looking for? What is the purpose of the
4 test?

5 A. Well, there's a few steps in the DNA process.
6 The first one is screening. In that step we're looking
7 for a biological fluid, whether it's semen or saliva or
8 blood. We're looking for something that can give us a
9 DNA sample.

10 Q. Okay. Tell the jury, please, how this process
11 works. What is DNA testing? How do you do it?

12 A. DNA is found in the cells in your body, and each
13 individual has a unique profile except for identical
14 twins. And so when we find a body fluid or skin cells,
15 things like that, there is DNA in those cells, and then
16 we screen it for body fluid.

17 Q. This may help.

18 A. Okay. So once we have a sample that can be
19 tested, so that would be blood, semen, saliva, skin
20 cells, something like that, something that contains DNA,
21 we first take the step called extraction, and what
22 extraction does is it takes those cells and isolates the
23 DNA.

24 Once we have the DNA isolated in a useful
25 form for us, we can do the next step which is called

1 quantification. And in that step we're testing to see
2 how much DNA is in the sample. Once we know how much
3 DNA is in the sample, we can target specific areas of
4 the DNA and make copies of it, and that step is called
5 amplification.

6 After amplification, we can separate it by
7 size and then those size fragments of the areas we
8 targeted we can compare to known samples. This
9 collective targeted area that we look at is called a
10 profile. So we'll get a profile off of a question
11 sample, evidence sample, and then we can also get a
12 profile off of a reference sample or a known sample, and
13 then those two can be compared to see if they have the
14 same profile or not.

15 Q. All right. Thank you.

16 Was that the procedure that you used in this
17 case?

18 A. Yes.

19 Q. All right. Tell us, please, why you tested an
20 oral sample of -- from the Kathleen Shaffer rape kit.
21 Why the oral sample?

22 A. The oral sample was first screened for the
23 presence of semen, which there was negative. No semen
24 was found on the oral swabs. Then those oral swabs were
25 used as a reference sample for Kathleen Shaffer.

1 Q. And why is it important to have a reference
2 sample for Kathleen Shaffer?

3 A. So that the profile that we get from any female
4 can be compared to her. Since the samples were
5 reportedly collected from her, it's important to line
6 that back up and say, yes, it does match.

7 Q. All right. Why did you test the anal swab in
8 this case?

9 A. We tested vulvar, vaginal, and anal swabs, all
10 three orifices for the presence of semen.

11 Q. Did you detect any?

12 A. There was no sperm cells found. There was a
13 substance called P30, which is a protein found in semen
14 which was detected in the swabs. And then it was taken
15 forward to check for male DNA, but there was no male DNA
16 detected.

17 Q. All right. What swab did you detect the P30
18 from?

19 A. Those are from the perineal vulva, the vaginal,
20 endocervical, and from the anal swab.

21 Q. Okay. What does endocervical mean?

22 A. I am not exactly sure, but it's part of the
23 genital region. It's collected near the vaginal swab.
24 So the SANE nurse would be able to explain better than
25 myself.

1 Q. All right. Thank you.

2 All right. Let's talk about P30. What is
3 it?

4 A. P30 is a protein. It's part of seminal fluid and
5 we use it to identify semen.

6 Q. Okay. Is it a positive indicator for the
7 presence of semen?

8 A. It's considered a confirmatory test for the
9 presence of semen, so, yes.

10 Q. So what is a confirmatory test? Help us
11 understand that.

12 A. There's two different types of screening tests we
13 can do. One is a presumptive test. The other one is a
14 confirmatory test. A presumptive test means that it
15 indicates the presence of this biological fluid but it's
16 not indicative of it. So it could react with other
17 things.

18 And then a confirmatory test is more specific for
19 bodily fluid and it confirms the presence of that. So
20 there aren't the other things that would react with it.

21 Q. All right. Is it unusual to find P30 without
22 male DNA?

23 A. The P30 test is actually more sensitive in our
24 detection for the male DNA. The male DNA is part of the
25 quantification step that I talked about earlier and so

1 not finding male DNA we have still been able to find
2 male profile in some tests. There's reports out there
3 in forensic journals that that's possible.

4 Q. Okay. You said that there were also skin swabs.
5 Did you test those?

6 A. I did.

7 Q. And what were those skin swabs taken from?

8 A. They're reportedly collected from the right and
9 left breasts.

10 Q. All right. And what did you find there?

11 A. I tested those for the presence of amylase.
12 Amylase is a protein found in saliva. And so I tested
13 those for the presence of amylase, and human amylase was
14 found in those samples.

15 Q. Did you find anything else?

16 A. I then took those forward in the DNA process. I
17 found male DNA in those samples, and I was able to match
18 the male DNA profile back to the reference sample of
19 Bryan Ross.

20 Q. When you say you were able to match it back, what
21 does that mean?

22 A. It means that the sample from the skin swab, the
23 right and left breast skin swab, matched to the profile
24 of the reference sample from Bryan Ross.

25 Q. Thank you.

1 Did you test another item in this case?

2 A. I tested a fitted sheet.

3 Q. And what did you test it for?

4 A. The sheet I screened for the presence of blood.
5 I was looking for blood on the sheet.

6 Q. Did you find any?

7 A. I found two stains that were consistent with
8 blood.

9 Q. Did you test them?

10 A. Both stains I took forward to DNA, and one stain
11 had mostly male DNA so I stopped at that point and did
12 not take it forward to find the profile.

13 Q. Why not?

14 A. Because the sheet was reportedly collected from a
15 male bed, I did not feel that it was important to take
16 it through the entire process.

17 Q. Okay. What happened to the other stain?

18 A. The other stain was female DNA so I took it
19 forward in the DNA process and in that case I was able
20 to get a profile off of it and match it back to Kathleen
21 Shaffer.

22 Q. Okay. When you say match it back to Kathleen
23 Shaffer, what does that mean?

24 A. It means the sample from the sheet and the sample
25 from the oral swab from Kathleen Shaffer had the same

1 profile. They matched each other.

2 MS. KENIMOND: Thank you. I have no further
3 questions.

4 MS. DOERNER: Thank you, Your Honor.

5

6 CROSS-EXAMINATION

7 BY MS. DOERNER:

8 Q. You created a report of the summary of your
9 findings; is that right?

10 A. Yes, I did.

11 Q. And you feel as though your report is thorough
12 and accurate?

13 A. Yes.

14 Q. Okay. And it's a fair analysis of the evidence
15 that you were asked to analyze; is that correct?

16 A. Yes.

17 Q. What are the various forms that DNA can come
18 from? What body substances?

19 A. They can come from any cells that contain DNA.
20 So usually body fluids that we're looking for, blood,
21 semen, saliva, urine. Then there's also skin cells. So
22 things you touch can contain DNA.

23 Q. And when you test for DNA, can you then extract
24 the source of the DNA? Can you identify it as coming
25 from blood or semen or fluid or skin cells?

1 A. That's the screening process that we do. So in
2 the screening process we can detect what body fluid that
3 is and then take that sample forward with the DNA
4 process.

5 Q. Is it possible there can be more than one source?

6 A. Yes.

7 Q. Okay. So, for example, if you were to find a
8 fluid stain, it's possible that there could be some skin
9 cells in the skin?

10 A. Yes.

11 Q. Do you have the ability to then extract what
12 source it came from?

13 A. If it's the difference between sperm cells and
14 other cells, there is the ability to separate those.
15 Other than that, there's not.

16 Q. So it's possible that you could find a stain, for
17 example, on a sheet, as in this case, and there may be
18 skin cells that are mixed in with the appearance of what
19 might be blood and it would be impossible to extract
20 whether or not it came from a fluid source or skin cell
21 source?

22 A. That's true, although blood contains a lot more
23 DNA than skin cells.

24 Q. But it is possible?

25 A. It could be possible --

1 Q. Okay.

2 A. -- if there is a lot of skin cells there.

3 Q. Thank you.

4 And you were asked to analyze various items
5 you referred to, correct?

6 A. Yes.

7 Q. And there were five items that you collected and
8 submitted -- that were submitted to you you never
9 analyzed; is that correct?

10 A. I'd have to refer to the exact number. Can I
11 refer to my report?

12 Q. Sure, you can refer to that.

13 A. So, yes, there's five additional items that I did
14 not.

15 Q. So did you leave those sealed?

16 A. Yes.

17 Q. Okay. You didn't even open those?

18 A. Correct.

19 Q. Okay. What do you do with those items if you
20 choose not to analyze them?

21 A. They'll come into the laboratory, they'll remain
22 in the vault until the case is completed -- or my
23 testing is completed, and then when all the evidence is
24 released back to the agency, they go back to the agency.
25 So they come in, stay in the vault, and then leave.

1 Q. Are there items similar to blood that might
2 contain -- you had indicated that blood contains a lot
3 of DNA. Are there other fluids that contain a lot of
4 DNA?

5 A. Most body fluids contain a higher level of DNA
6 than does skin cells. So semen contains a lot of DNA.
7 So does blood and saliva.

8 Q. So saliva, as you said, can be one of those forms
9 of -- a higher level of DNA?

10 A. Yes.

11 Q. Okay. So you took swabs of the perineal and
12 vulvar area. I assume that's female genitalia.

13 A. Yes. And those are not taken by me. Those are
14 taken by the SANE nurse.

15 Q. I'm sorry. You took those swabs and tested those
16 swabs?

17 A. I tested those swabs, yes.

18 Q. You also tested the vaginal endocervical swabs?

19 A. Yes.

20 Q. And those are two separate swabs?

21 A. Yes, they are.

22 Q. You also tested the anal swabs, which are a
23 third?

24 A. Yes.

25 Q. And skin swabs that are a fourth?

1 A. Yes.

2 Q. Okay. So there were at least four different
3 swabs that you tested?

4 A. Yes. And then the oral swabs, as well, out of
5 that same.

6 Q. That would be a fifth?

7 A. Fifth.

8 Q. And you indicated in your report you view those
9 microscopically; is that correct?

10 A. We take the samples -- a swab, which is similar
11 to, you know, Q-tip cotton swab sort of thing. Take a
12 portion of that, extract it in some buffer, and then we
13 view that extracted buffer on a microscope slide and
14 stain it so that you can try to find sperm in there.

15 Q. And when you did that test on the swabs for
16 Ms. Shaffer, you failed to find any sperm presence --
17 spermatozoon present; isn't that right?

18 A. There were no spermatozoon present.

19 Q. And do you know where the vulvar perineal area
20 is?

21 A. Yes.

22 Q. Where is that located?

23 A. It's going to be in front of the vaginal area.

24 Q. When you say "in front," does -- if the vaginal
25 area is north to south, when you say "in front," is that

1 north or south?

2 A. North.

3 Q. So it would be the higher area?

4 A. Yes.

5 Q. Okay. And the lower area, would that be the
6 perineal vulvar area?

7 A. You're going to have to ask the SANE nurse
8 exactly where.

9 Q. You know where it is, but it's hard for you to
10 explain; it's not your forte?

11 A. That is not where my expertise is.

12 Q. You just take the swabs that are identified for
13 certain locations and then determine whether or not
14 there's a presence of certain things in them?

15 A. Correct.

16 Q. Okay. When you tested the vulvar perineal swabs,
17 you failed to discover any presence of blood; isn't that
18 correct?

19 A. There was some red brown staining on there, so I
20 screened it for the presence of blood, and that test was
21 negative. So there was no blood there.

22 Q. That would have come from the vaginal area; is
23 that correct?

24 A. Yes.

25 Q. And so, more importantly, you found DNA of

1 Shaffer but you didn't find blood in that area? When
2 you tested for DNA on a swab for that area, you found
3 DNA for Shaffer but you did not find blood?

4 A. I took it as far as to check for male DNA, but I
5 did not take it all the way to finding a profile. So I
6 do not know if it matches Shaffer.

7 Q. Okay. And you failed to find male DNA in that
8 area, as well, right?

9 A. Correct.

10 Q. And, in fact, you failed to find it in the anal
11 area; is that correct?

12 A. Yes.

13 Q. The skin swab area?

14 A. The skin swab from the breast, there was male DNA
15 in those.

16 Q. Okay. But not in the genital areas that were
17 tested?

18 A. Correct. The anal swab, perineal vulvar, and
19 endocervical vaginal all had no male DNA detected.

20 Q. Then you did the -- I'm sorry. Then you did the
21 oral swabs that detected positive DNA results in the
22 breast area, correct?

23 A. There's a skin swab in the breast area that, yes,
24 found in.

25 Q. And when you tested those you failed to test

1 those for DNA of Shaffer; is that correct?

2 A. That's not correct.

3 Q. So you did test those for DNA for Shaffer?

4 A. So the -- you're asking about the skin swabs,
5 correct?

6 Q. I'm asking about the skin swabs.

7 A. So the skin swabs, they are --

8 Q. In the breast area. I want to be clear.

9 A. In the breast area. Those went forward to DNA if
10 you assume the presence of Shaffer on those.

11 Q. And what do you mean by "assume"?

12 A. Okay. A DNA profile off of skin collected from
13 the human body, you would expect the donor of that
14 sample to be present.

15 Q. But you haven't determined particularly that it
16 was her, you're assuming that; is that correct?

17 A. The profile off of there matches her and that is
18 the profile that we deduced out so that's how you assume
19 that it's hers. And then whatever is remaining is what
20 matches.

21 Q. In your report do you recall that you put,
22 "assuming that the donor is that known sample"? So do
23 you -- did you do tests to confirm?

24 A. We do mathematical statistical tests in this, as
25 well, and so all of those assumptions must match with

1 the theory that this is her -- from her, and then we are
2 able to deduce that other profile.

3 Q. So that's based on a theory it would be her skin
4 cells that would be present or saliva that would be
5 present in that area?

6 A. If I was to swab my own hand, I would expect my
7 DNA profile on my hand. So the same way we take that
8 theory to the evidence swabs, and if they are collected
9 from the body we assume that the donor of that body is
10 present on that swab.

11 Q. But that's just -- that's not a confirmed result?

12 A. The result matches mathematically in that
13 profile.

14 Q. And by mathematically, how do you come to that
15 number?

16 A. There are two different mathematical tests we do
17 for each of the areas we looked at. The first one we're
18 testing for feet, height, balance, and then the second
19 mathematical test is we do a separation between the two
20 donors.

21 So in this profile, each area that we test,
22 which is called a low side for DNA, so in each low side
23 each individual will have up to two what are called
24 allele. So between each donor's allele there will be a
25 difference in the signal that we get, and that's one of

1 the mathematical tests we test for.

2 Q. When you tested the sheet, you indicated that you
3 found presence of DNA for Mr. Ross and Ms. Shaffer; is
4 that correct?

5 A. Can I refer to it again?

6 Q. Sure.

7 A. No. That's not correct.

8 Q. Okay. So you found a female profile DNA, but you
9 didn't find one that matched Ms. Shaffer; is that
10 correct?

11 A. There is the profile from one of the blood stains
12 on the sheet that matches Kathleen Shaffer.

13 Q. Okay. But that could have come from a different
14 source other than blood; that was your testimony
15 earlier?

16 A. The blood stain that I took forward matches the
17 Kathleen Shaffer. Now, what you had me say -- asked me
18 earlier was if skin cells from the DNA sample --

19 Q. Or saliva.

20 A. -- or saliva could also be present. And that's
21 true. It could be a mixture of blood and something
22 else, but the DNA from that area that was positive for
23 blood matches to Kathleen Shaffer.

24 Q. And it's possible that that could have come --
25 that could have been contaminated, so to speak, from

1 another source, not necessarily blood; you can't
2 determine 100 percent --

3 MS. KENIMOND: Objection, Your Honor.

4 THE COURT: Sustained as to the form of the
5 question.

6 Q. It's possible that some other substance could be
7 mixed into that stain that would then create a positive
8 DNA result for Ms. Shaffer; yes or no?

9 A. Yes. We can get --

10 Q. Thank you.

11 And in regards to the presence of male DNA,
12 would it be customary to find such DNA on the bed sheet
13 from someone that has slept on that bed?

14 A. Yes.

15 Q. And once again going to the swabs of the vaginal
16 area, you did not find any blood on those swabs.
17 Correct?

18 A. Correct.

19 MS. DOERNER: Thank you. No further
20 questions.

21 MS. KENIMOND: Very briefly, Your Honor.

22

23 REDIRECT EXAMINATION

24 BY MS. KENIMOND:

25 Q. There were several questions concerning the

1 perineal swab and whether or not you were able to find
2 the presence of blood on that swab.

3 Do you have any idea how long it was between
4 the swabbing and when Ms. Shaffer reported a rape?

5 A. I am not sure. The SANE nurse would be able to
6 tell you when they were actually collected.

7 Q. What can make blood go away?

8 A. There can be washing, wiping. They can degrade
9 over a long period of time.

10 Q. Would clothing interfere?

11 A. So that would go to wiping it away, clothing
12 transfer.

13 Q. Okay. Counsel asked you whether or not the blood
14 stain could have been contaminated by another substance
15 with Kathleen Shaffer's DNA in it. You answered yes.
16 What else did you want to say?

17 A. So the presence of blood in that stain, yes,
18 there is blood there, but maybe there could be saliva,
19 is what you were trying to suggest, which could be
20 possible, but the DNA profile that came from that stain
21 matched to Kathleen Shaffer.

22 MS. KENIMOND: I have no further questions.

23 MS. DOERNER: I have one -- a couple of
24 follow-up questions.

25 ////

RECROSS-EXAMINATION

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BY MS. DOERNER:

Q. In regards to the swabbing that's done on the vaginal area, if someone were bleeding in that area or had recently been bleeding in that area, would you be likely to find blood in a sample like that?

A. If a swab is taken from an area that is bleeding, actively bleeding, you would expect to find it on the swab.

Q. What if it had been recently bleeding?

A. If any of those blood, the scab or what have you, the dried blood in that area, was collected on the swab, you would expect to find it on the swab.

Q. And I just want to reiterate, it was your testimony that something such as saliva mixing with something such as blood on a sheet, it can indicate for the presence of a person's DNA; is that correct, yes or no?

A. Yes.

MS. DOERNER: Thank you. No further questions.

MS. KENIMOND: No further questions, Your Honor.

THE COURT: Thank you very much, Ms. Low. You're excused. You may step down.



EXHIBIT-8

EXHIBIT-8

1 evidence. I have asked you to do the remembering.
2 Remember. Remember all those things that may have been
3 misstated by lawyers.

4 You are the sole judges of credibility of
5 the witnesses. Remember not what we say but what the
6 witnesses said and how they acted when they said it.
7 Remember, ladies and gentlemen, that Caryn Young would
8 not expect to see a one-centimeter rip a month after the
9 injury because it would have healed by then. Remember,
10 ladies and gentlemen, that there was blood on the sheet,
11 and, yes, I stand convicted of not giving you
12 biohazards.

13 The blood on the sheet belonged to Kathleen
14 Shaffer. The only way it didn't belong to Kathleen
15 Shaffer is if somehow that with some brown stain not
16 blood is he spit on it and rubbed it in real hard.

17 Remember the stories, connect the
18 oh-so-very-big dots between the stories, judge
19 Kathleen's credibility. We don't just have Kathleen's
20 credibility, do we? We actually have in a rape case
21 some evidence besides he said/she said of the presence
22 of semen inside Kathleen Shaffer's vagina. And that's
23 the P30 that Mariah Low is talking about. It's not just
24 he said/she said. Yeah, I'd ask you the same question,
25 where's the bra? Where is it? Where is the trophy?

EXHIBIT-9

EXHIBIT-9

1 A. I don't recall those words, no.

2 Q. Did they ever talk to you or ask you about
3 whether or not his fingers had touched your vaginal
4 area?

5 A. No.

6 Q. They never asked you that question?

7 A. I don't remember that, no.

8 Q. And so during this event you also indicated that
9 you were poking at Mr. Ross' eyes; isn't that right?

10 A. I -- yes, I poked at his head -- I pushed his
11 head up, and I put my thumb in his eye and his eyes were
12 closed.

13 Q. Did you push hard?

14 A. Not hard enough for him to be agitated or to
15 further hurt me.

16 Q. On April 13, 2009, did you have finger nails?

17 A. I'm thinking they're the same way as they are
18 now.

19 Q. Are they beyond the tips of your fingers?

20 A. No.

21 Q. And you stated you poked him in the head and
22 eyes; isn't that right?

23 A. Yes. I pushed his head and his eyes.

24 Q. And at some point you begin to fake a seizure,
25 correct?

1 A. Yes.

2 Q. And you begin to talk like a child?

3 A. Correct.

4 Q. And you start talking in a way that won't make
5 sense, correct?

6 A. Correct.

7 Q. And Mr. Ross thinks you're having a seizure,
8 doesn't he?

9 MS. KENIMOND: Objection.

10 THE COURT: Sustained.

11 Q. Mr. Ross stops at that point; is that correct?

12 A. No. It was not until I started saying different
13 names.

14 Q. Okay. So you begin this behavior and at some
15 point Mr. Ross stops?

16 A. Correct.

17 Q. At that point you're also pretending to have your
18 seizure?

19 A. Correct.

20 Q. Did you ask him to go get your pills or did he
21 offer to go get the pills?

22 A. He asked me if there were any pills that I could
23 take.

24 Q. And so you tell him yes?

25 A. I stopped, I thought, and I said, yes.

EXHIBIT-10

EXHIBIT-10

1 me and saying that Mr. Ross had left her a message, that
2 he wanted to come, discuss the case with us -- or with
3 her, I'm sorry, because he was not -- he was a little
4 cloudy over what happened at his house that night.

5 Q. Okay. So this was a couple of days following you
6 being at his home in the morning?

7 A. Yes, ma'am.

8 Q. You said that was at about two in the morning?

9 A. I believe so, yes.

10 Q. At the time that you encountered Mr. Ross at his
11 home, did you observe any swelling on his face?

12 A. No.

13 Q. Scratches?

14 A. No.

15 Q. Anything around his eyes?

16 A. No.

17 Q. Nothing in the form of -- or did you check
18 anything in the form of scabs or anything on his body
19 that may have caused bleeding on the sheets?

20 A. No.

21 Q. At the point that the interview ended with
22 Mr. Ross when he came to your station, you said he was
23 red and flushed when he left; is that correct?

24 A. Yes.

25 Q. And at that point did you feel as though he was

EXHIBIT-11

EXHIBIT-11

NO. 6

Certain evidence has been admitted in this case only for a limited purpose. This evidence consists of the testimony of Desiree Johnson Husby and may be considered by you only on the issue of the credibility of Kathleen Shaffer or for the purpose of showing a common scheme or plan. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30

EVIDENCE LIMITED AS TO PURPOSE

Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of _____ and] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

NOTE ON USE

For a special instruction limiting consideration of a defendant's criminal conviction to impeachment, see WPIC 5.05, Prior Conviction—Impeachment—Defendant, and as to a witness's criminal conviction, see WPIC 5.06, Prior Conviction—Impeachment—Witness. Use bracketed material as applicable.

COMMENT

ER 105.

When the party against whom evidence is admitted for a limited purpose requests that the instruction be given, the limiting instruction must be given. *State v. Aaron*, 57 Wn.App. 277, 281, 787 P.2d 949 (1990) (“[ER 105] is mandatory.”). When evidence of the defendant's prior misconduct is admissible under ER 404(b) for a limited purpose, such as showing motive or intent, the court must, on request, instruct the jury on the limited purpose for which the evidence is admissible. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985). However, the party seeking a limiting instruction has the burden of requesting it and, in the absence of such a request, any objection to the lack of instruction is waived. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985), and authorities therein.

Special limiting instructions are appropriate when a criminal conviction is admitted to impeach a witness. See WPIC 4.64 (Evidence of Prior Conviction), WPIC 5.05 (Prior Conviction—Impeachment—Defendant), and WPIC 5.06 (Prior Conviction—Impeachment—Witness).

An instruction limiting the use of prior consistent statements of the prosecuting witnesses introduced to rehabilitate the witness was held proper and necessary in *State v. Pitts*, 62 Wn.2d 294, 382 P.2d 508 (1963). Similarly, an instruction that limits the jury's use of a prior inconsistent statement admitted for impeachment purposes to a determi-

nation of the credibility of a witness is proper. Impeaching and contradictory statements are “admitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony.” *State v. Johnson*, 40 Wn.App. 371, 699 P.2d 221 (1985).

WPIC 5.30 is cited with approval in *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), rehearing at 113 Wn.2d 520, 782 P.2d 1013 (1989), 787 P.2d 906 (1990), and *State v. Anderson*, 31 Wn.App. 352, 641 P.2d 728 (1982).

In some circumstances an instruction such as this may be inadequate to neutralize the prejudicial effect of the evidence. See the discussion in *State v. Ruzicka*, 89 Wn.2d 217, 570 P.2d 1208 (1977); see also Tegland, 5 Washington Practice, Evidence Law and Practice § 105.3 (5th ed.). Cf. *State v. Cotten*, 75 Wn.App. 669, 879 P.2d 971 (1994) (admission of co-defendant statements with limiting instruction upheld).

ER 105 is covered in more detail in Tegland, 5 Washington Practice, Evidence Law and Practice §§ 105.1 through 105.4 (5th ed.).

The instruction has been revised for the 2008 edition for better juror comprehension. No substantive change is intended.

Research References

West's Key Number Digest
Criminal Law ¶783

[Current as of July 2008.]



EXHIBIT-12

EXHIBIT-12

1 Armstrong as set forth in the presentence investigation,
2 information concerning Nathan Pettis set forth in the
3 presentence investigation, and other information
4 regarding other alleged victims of Mr. Ross set forth in
5 the conclusions section of the presentence
6 investigation; is that right?

7 MS. DOERNER: That is correct, Your Honor.
8 People -- as you may recall, I had to bring a motion to
9 compel in which to get contact information for
10 witnesses. It was at that November hearing where I was
11 not provided with that contact information. The
12 presentencing investigator in this matter has also not
13 contacted these people, but, yet, they're being used in
14 the recommendation in this case for the high end.

15 THE COURT: I just asked if that was what
16 you're challenging.

17 MS. DOERNER: That is what we're
18 challenging.

19 THE COURT: One remedy here, and having
20 reviewed the statutes and case authorities on this
21 issue, might be to have the Court disregard the
22 information related to Mr. Pettis and other alleged
23 victims. You conceded, I think correctly, Ms. Kenimond,
24 that the Court cannot consider the information related
25 to Ms. Armstrong.

1 Would you agree that it would be appropriate
2 for the Court not to consider the challenged information
3 as outlined by Ms. Doerner?

4 MS. KENIMOND: Absolutely, Your Honor.

5 THE COURT: Anything further, Ms. Doerner?

6 MS. DOERNER: Your Honor, there were
7 additional -- and while I recognize that this is the
8 discretion of the Court whether or not to allow
9 witnesses on -- to give information on behalf -- or
10 statements on behalf of Mr. Ross, there were people that
11 contacted my office that did wish to be here at this
12 hearing that were unavailable for today's date. They
13 did receive notice of the hearing date had changed, and
14 they did wish to appear on his behalf and to be present
15 for this sentencing and to provide a statement if the
16 Court was so willing to allow them to provide that, and
17 that was an additional issue, as well. I was contacted
18 late yesterday by the people, one involving a need to be
19 with an ill parent and one who was unable to be here due
20 to a conflict in scheduling. So there is that issue as
21 well to consider.

22 THE COURT: I'm prepared to rule on the
23 matter of the defendant's motion for continuance. As
24 Ms. Kenimond, I think, has correctly conceded under our
25 law, both statutory and case law, it would not be

1 appropriate for the Court to consider the information
2 supplied in the presentence investigation concerning the
3 alleged victim of Mr. Ross, Kimberly Speck Armstrong,
4 nor would it be appropriate to consider the information
5 relating to Nathan Pettis in the presentence
6 investigation, nor would it be appropriate for the Court
7 to consider the information regarding other alleged
8 victims of Mr. Ross set forth in the presentence
9 investigation. So I will disregard the information in
10 the presentence investigation related to those
11 particular matters.

12 As far as other issues raised relating to
13 this motion for continuance, it is true that there was
14 no order shortening time, and the motion may well be
15 procedurally improper. Assuming for the sake of
16 argument that the motion is procedurally properly before
17 the Court, I've ruled that I will not consider the
18 information I've outlined here.

19 As far as the issue of persons contacting
20 Ms. Doerner's office indicating that they wish to
21 present information at the sentencing hearing, no such
22 person has been identified. There's been no offer of
23 proof or other specific information set forth about
24 that. To the best of my recollection, there wasn't
25 anything in the motion or declaration for the

1 continuance that set forth that information.

2 The defendant could have subpoenaed these
3 persons had the defendant chosen to do that; did not do
4 that. Don't have any specific identification of these
5 persons. And I find that that would not be good cause
6 for a continuance.

7 So for all of these reasons, the fact that
8 the motion is procedurally improper, but also
9 considering for the sake of argument the merits of the
10 motion, I will disregard the information I've outlined
11 here in my decision as being information I cannot
12 consider under our law.

13 I find that the issue about the rescheduling
14 of the hearing, the fact that some unidentified persons
15 were unable to be present here to speak on behalf of
16 Mr. Ross is not a basis for a continuance. This date
17 has been set for some time. Subpoenas could have been
18 issued. This case was tried some time ago and efforts
19 could have been made with due diligence to have these
20 persons present for a sentencing hearing. So for all of
21 these reasons, I do deny the motion for a continuance.
22 We'll proceed with the sentencing hearing at this time.
23 Ms. Kenimond.

24 MS. KENIMOND: Thank you, Your Honor.
25 Mr. Ross has been convicted of one count of rape in the

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1 I greatly appreciate all of you being here today. Thank
2 you. Ms. Doerner.

3 MS. DOERNER: Thank you, Your Honor.

4 Mr. Ross would like to make a statement.

5 THE COURT: Do you have any argument to
6 present at this time, Ms. Doerner?

7 MS. DOERNER: Your Honor, I do. The real
8 facts doctrine allows only specific information to be
9 considered by the judge, the sentencing judge. The
10 information before the Court is what needs to be
11 considered at sentencing and what was presented at
12 trial, as well as the follow-up information in the
13 presentencing investigation.

14 We've raised the objections that we felt
15 were appropriate, that punishment must be based on the
16 conviction before the Court, not any allegations made
17 after. The comments of the victims that have been
18 provided today, as well as information from other people
19 can be taken into consideration to the extent that
20 information was before the judge at -- and considered by
21 the jury. However, there has been additional
22 information which has been presented, and Your Honor has
23 been very clear that he recognizes that that can't be
24 taken into consideration to the extent that if it wasn't
25 properly before the Court, as well as information that

1 was conceded to by the prosecutor as being improper in
2 the presentence investigation report.

3 Mr. Ross does lack conviction history, aside
4 from the DUI conviction. There is no significant
5 criminal history beyond that. Nothing beyond that DUI.
6 The inconsistent statements and uncorroborated
7 information that was contained in the presentencing
8 investigation, we've raised those objections already.
9 The information that was contained in the presentence
10 investigation report.

11 By the Department of Corrections'
12 recommendation, Gregg Freeman's own conclusion in the
13 statements were based upon the additional information
14 provided by some of those witnesses that were giving
15 information and providing statements today. Anything
16 that was improper should be disregarded by the Court,
17 and as Your Honor is well aware and already indicated he
18 would disregard. But at this point Mr. Ross would like
19 to provide a statement, would ask the Court to allow
20 that.

21 THE COURT: Does that complete the defense
22 presentation, then, other than Mr. Ross?

23 MS. DOERNER: Yes, Your Honor.

24 THE COURT: Mr. Ross, you have the right of
25 allocution. You have the right to address the Court

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1 continuance that set forth that information.

2 The defendant could have subpoenaed these
3 persons had the defendant chosen to do that; did not do
4 that. Don't have any specific identification of these
5 persons. And I find that that would not be good cause
6 for a continuance.

7 So for all of these reasons, the fact that
8 the motion is procedurally improper, but also
9 considering for the sake of argument the merits of the
10 motion, I will disregard the information I've outlined
11 here in my decision as being information I cannot
12 consider under our law.

13 I find that the issue about the rescheduling
14 of the hearing, the fact that some unidentified persons
15 were unable to be present here to speak on behalf of
16 Mr. Ross is not a basis for a continuance. This date
17 has been set for some time. Subpoenas could have been
18 issued. This case was tried some time ago and efforts
19 could have been made with due diligence to have these
20 persons present for a sentencing hearing. So for all of
21 these reasons, I do deny the motion for a continuance.
22 We'll proceed with the sentencing hearing at this time.
23 Ms. Kenimond.

24 MS. KENIMOND: Thank you, Your Honor.
25 Mr. Ross has been convicted of one count of rape in the

1 second degree by a jury and the date of violation was
2 the 12th of April, 2009.

3 This matter requires that Mr. Ross be
4 sentenced under RCW 9.94A.507. His standard range
5 sentence is life in prison with a possibility of parole
6 after a term of 78 to 102 months, and the Court will set
7 that low-end term.

8 Additionally, he will be on supervision for
9 any amount of time for the remainder of his life if he
10 is not in prison, and the Department of Corrections has
11 requested certain court-ordered conditions of that
12 community custody as they are proposed in Appendix A to
13 the proposed Judgment and Sentence.

14 Additionally, the Court is required to order
15 that he pay a \$500 victim assessment, \$217 court costs,
16 sheriff's fees for service of \$17.

17 THE COURT: Excuse me on that. Wasn't that
18 part of the -- isn't that part of court costs?

19 MS. KENIMOND: Oh. Yes. Sorry. Thank you,
20 Your Honor.

21 \$100 DNA collection fee, \$207.02 for witness
22 costs from the Island County Prosecutor's Office, \$188
23 for service of process for witnesses, and restitution to
24 Kathleen Shaffer, which at this point we're asking the
25 Court to reserve.

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1 available for contact with his assigned community
2 corrections officer as directed. He will pay
3 supervision fees.

4 I advise you, Mr. Ross, that you may not
5 own, use or possess any firearm or ammunition unless
6 your right to do so is restored by a court of record.
7 You must remain within the geographic boundary as set
8 forth in writing by your community corrections officer,
9 comply with all conditions, requirements, and
10 instructions, as set forth by the Department of
11 Corrections in judgment 03-1-00228-4, and we will
12 determine the issue of restitution at a later date.

13 You are a vicious predator, and under these
14 circumstances, it is highly appropriate that you be
15 sentenced to life in prison and that a minimum term be
16 set of the maximum allowed by law, which is 102 months,
17 and I so impose the maximum permissible sentence under
18 Washington law.

19 All persons are entitled to dignity and
20 respect in our society, but you have forfeited the right
21 to be at large in the community until at least 102
22 months have elapsed, and at that point you will be
23 evaluated to determine if you should serve the remainder
24 of your life in prison. And it is for that reason that
25 I do hope that Mr. Leggett, Ms. Shaffer, and others will