67655-5

67655-5

NO. 67655-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTY R. GRANDLUND,

Appellant.

BRIEF OF RESPONDENT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN 12 AM 11:29

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I. ISSUES

1. Was sufficient evidence presented to support Grandlund's conviction for 2nd Degree Rape for engaging in sexual intercourse with K.C. when she was incapable of consent by reason of being physically helpless when K.C. testified that she tried to stop Grandlund but could not move her limbs and was only able to mumble unintelligibly?

2. Has Grandlund made a sufficient showing to support a claim of ineffective assistance of counsel based on counsel's reasonable strategic and tactical decision to not argue that Grandlund reasonably believed K.C. consented to sexual intercourse when Grandlund denied having sexual contact with K.C. and did not testify that he believed she consented?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On January 8, 2011, fifteen year old K.C. (dob: 02/1995) made plans to spend the night with her friends, seventeen year old D. and fourteen year old S., the daughters of Dusty Ray Grandlund (dob: 07/1970). Grandlund and S. picked up K.C. at her residence in Arlington, WA, and drove K.C. to Grandlund's residence located at 20629 – 60th Avenue NE, Arlington, WA. Grandlund has never

been married to or in a state registered partnership with K.C. CP 42, 45; 1RP[1] 37-40, 47-51, 123-124, 133, 152, 157-162, 173-178; 2RP 21-27; 3RP 100-101.

Grandlund's residence consists of two bedrooms, a living room, a dining/kitchen area, and a shared bathroom. One bedroom is Grandlund's; his daughters share the other bedroom with a bunk bed. When K.C. arrived at Grandlund's residence on January 8, 2011, she spent most of the evening in the girls' bedroom chatting and playing on their computers. Grandlund spent most of the evening in the living room drinking mixed drinks of whiskey and Pepsi. Grandlund had been drinking the same beverage prior to picking up K.C. CP 42-43; 1RP 42-44, 51-52, 124, 179-181; 2RP 3-5, 23, 27-29; 3RP 96-97, 100-104, 115-116, 138, 146-148.

D. went to bed between 11:00 p.m. on January 8, 2011, and 1:00 a.m. on January 9, 2011. K.C. and S. stayed up chatting and playing until S. went to bed around 4:00 a.m. on January 9, 2011. After S. went to bed K.C. continued using the computer in the girls' bedroom. At some point after S. had gone to sleep, Grandlund came into the girl's bedroom and asked K.C. to help him transfer

[1] The Report of Proceedings seven volumes will be referenced as follows: 1RP July 11, 2011; 2RP July 12, 2011; 3RP July 13, 2011; 4RP July 14, 2011; 5RP August 24, 2011; 5/26/11 RP May 26, 2011; and 6/10/11 RP June 10, 2011.

music files from his computer to a thumb drive in his bedroom. K.C. accompanied Grandlund into his bedroom and began transferring the music files. K.C. spent about an hour to an hour and a half transferring files on the computer in Grandlund's bedroom. CP 43; 1RP 54-56, 60-64, 125-126, 134-135, 183-185; 2RP 29-31; 3RP 113-115, 149-154; 4RP 2-4.

While K.C. was transferring the music files, Grandlund left the bedroom and returned with a mixed drink of whiskey and Pepsi in a glass tumbler. Grandlund offered the drink to K.C. When she declined Grandlund began mocking her calling her a "pussy" to persuade K.C. to drink the alcoholic beverage. K.C. then began drinking the alcoholic beverage and consumed approximately three glass tumblers of whiskey and Pepsi. CP 43; 1RP 64-68, 126-127, 135-137; 4RP 16.

After K.C. completed transferring the music files, Grandlund took K.C. to the kitchen where he continued providing K.C. with alcoholic beverages. In the kitchen Grandlund gave K.C. approximately three more mixed drinks of whiskey and Pepsi from a shot glass he called a "chaser." K.C.'s vision began to get blurry. Grandlund also gave K.C. two or three shots of straight whiskey. K.C. became so intoxicated that she could not maintain her balance

and had to lean on the kitchen counter for support; the room felt like it was spinning. While K.C. was leaning against the counter, Grandlund approached her, took K.C.'s hand and placed it on his penis over his clothing. K.C. felt uncomfortable and pulled her hand away. CP 43; 1RP 68-80, 85, 127, 137, 150-151; 3RP 116.

At approximately 6:00 a.m. on January 9, 2011, D. woke up to let her dog out as part of her daily routine. D. observed K.C. and Grandlund in the kitchen. K.C. was drinking from a shot glass. Both Grandlund and K.C. looked like they had been drinking. D. became angry when K.C. put her arm around D. and leaned her weight against D. K.C. seemed off balance. D. told K.C. not to lean on her if she was drunk. CP 43; 1RP 76-77, 137, 150-151, 185-187, 192-195; 3RP 13-14, 116-117; 4RP 9-18.

After D. returned to bed, K.C. walked into the living room and sat on the couch. Grandlund followed K.C. into the living room and sat down beside her. Grandlund again took K.C.'s hand and placed it on his erect penis. Grandlund told K.C. that he wanted to have sex with her and not to tell anyone about what happens because he could get in trouble. K.C. moved away from Grandlund. K.C. reflexes were slow and sluggish and she was having difficulty interpreting what Grandlund was saying. K.C. got off the couch and

tried to make her way to the bedroom where D. and S. were sleeping. K.C.'s vision was blurred, her speech was slurred, she stumbled as she walked, and her body felt numb. Grandlund stopped K.C. in the hallway before she reached the girl's bedroom and put his hand down K.C.'s shorts, underneath her underwear, and penetrated her vagina with his fingers. CP 43; 1RP 80-85, 108-109, 127-128, 137-138.

Grandlund took K.C. by the hand and pulled her into his bedroom, placed his hand on her shoulder, and sat her on his bed. K.C. lay back on the bed because she felt like she was going to fall over. Grandlund removed K.C.'s shorts and underwear and took off his pants. Grandlund began kissing and licking K.C. on the neck and breasts. Grandlund performed oral sex on K.C. and penetrated her vagina with his tongue. K.C. tried to get Grandlund to stop but she was only able to mumble unintelligibly; she could not understand what she was saying. K.C. body felt numb, like she had been hit by a car. She could not move her limbs and felt like she was pinned to the bed. Grandlund stopped performing oral sex on K.C., put on a condom, and penetrated her vagina with his penis. K.C.'s last memory before she lost consciousness was of

Grandlund's penis inside her vagina. CP 44; 1RP 85-95, 128-129, 142, 149-150, 155-156.

Around 9:30 a.m. on January 9, 2011, D. found K.C. passed out on the bathroom floor. K.C. was wearing only her shorts and bra. D. retrieved K.C.'s shirt from Grandlund's bedroom. K.C. was unstable and had to be helped getting into bed in the girls' bedroom. She "seemed a little out of it" "like she was going to puke or something." K.C. threw up that morning. K.C. later found her eye glasses under the pillow on Grandlund's bed. CP 44; 1RP 96-104, 106-107, 129, 195-205; 2RP 4-7, 9-10, 31-39, 48-49; 3RP 28, 45-46.

Grandlund woke up around noon, walked into the living room where his daughters and K.C. were seated and asked if they had seen his missing condom. CP 44; 1RP 109, 206; 2RP 41-46; 3RP 112-113, 120-122; 4RP 19-24, 35-36.

Grandlund was scheduled to take D. and S. back to their mother's house in Lake Stevens on the afternoon of January 9, 2011. Rather than dropping K.C. off first at her house in Arlington, Grandlund drove to his father's house in Lake Stevens where he and his daughters went into the house. K.C. was feeling sick and remained out in the car. After spending some time visiting,

Grandlund left his father's house and drove D. and S. to their mother's house in Lake Stevens. Grandlund then drove back to Arlington, but did not take K.C. home. Instead, with K.C. in the car, Grandlund drove to a store in Arlington and purchased three condoms and a monster drink. K.C. asked Grandlund why he was not driving her home and he told her that he wanted to take her back to his house so they could have some more sex. K.C. insisted that she had to be home because her brother was waiting for her to babysit. Grandlund eventually dropped K.C. off at her house in Arlington. CP 44; 1RP 109-113, 130-131, 207-208; 3RP 82-87, 122-130, 138-146; 4RP 23-24, 36-37.

On January 9, 2011, K.C. disclosed to two friends, A.G. and N.R., that she had been sexually assaulted. K.C.'s friends told her sister-in-law, who reported the matter to the police. CP 44; 1RP 112-116, 131, 138-139, 147-149, 164-170; 2RP 58-76; 3RP 8-12.

Police obtained a search warrant for Grandlund's residence. During the search of the residence a ¼ full bottle of Kessler whiskey and two bottles of Pepsi were found on the kitchen floor. A chaser/shot glass containing some whiskey was found on the kitchen counter. Several glass tumblers matching the description given by K.C. used to consume the mixed alcohol beverage were

found in the kitchen. Three unopened condoms were found on the nightstand next to Grandlund's bed, an unopened condom was found in the left front pocket of a pair of jean located in a pile of laundry, and an open condom wrapper was found in the kitchen garbage can. CP 44; 2RP 85-89, 97-107; 3RP 13-19, 22-23, 26-28, 76-79.

A sexual assault examination of K.C. was performed at Valley General Hospital in the early morning hours of January 10, 2011. The Rape Kit from the examination was subsequently sent to the Washington State Crime Lab for forensic analysis. Grandlund's DNA matched DNA obtained from a swab collected from K.C.'s neck. CP 44-45; 1RP 115, 139-140, 151-152, 170-172; 2RP 79-84, 132-134, 139-177; 3RP 39-42, 60-63, 69-70.

Grandlund denied any sexual contact with K.C. when he was confronted by his ex-wife, when he was initially contacted by the police and during the police interview, and when he testified at trial. SDCP EX 50 pgs 13-18, 21, 30, 34; 2RP 17-18, 89-93; 3RP 34-40, 79-81, 110-113, 117, 131, 133-134.

B. PROCEDURAL HISTORY.

On May 10, 2011, Grandlund was charged with Rape of a Child in the 3rd Degree. CP 83-84. The State's offer of a 14 month

recommendation on the charge of rape of a child in the 3rd degree lapsed and Grandlund was arraigned on the amended information adding a charge of 2nd Degree Rape. CP 76-77; 5/26/11 RP 3-4. On June 10, 2011, Grandlund waived jury trial. CP 72; 6/10/11 RP 4-5. The case proceeded to trial July 11-14, 2011. On July 14, 2001, Grandlund was found guilty of 2nd Degree Rape and Rape of a Child in the 3rd Degree. The court vacated the conviction for rape of a child in the 3rd degree. CP 42-45; 4RP 84-104.

On August 24, 2011, Grandlund was sentenced to serve 90 months confinement on his conviction for 2nd degree rape. CP 25-41; 5RP 27-38. Grandlund timely appealed. CP 3-20.

III. ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

Grandlund argues the evidence was insufficient to support the trial court's finding that "at the time [Grandlund] engaged in sexual intercourse with K.C., she was incapable of consent by reason of being physically helpless."[2] Brief of Appellant 1, 6-9.

[2] CP 43, Finding of Fact (FF) 34. The only other FF Grandlund assigns error to is FF 15 regarding D.'s observation of K.C. and Grandlund in the kitchen. Grandlund also assigns error to the trial court's conclusion that Grandlund "was guilty of second degree rape as charged in count II." CP 45, Conclusion of Law 3. Grandlund does not assign error to any other Conclusion of Law.

1. Legal Standards.

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be

used to attack sufficiency of evidence to convict). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *citing* State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Delmarter, 94 Wn.2d at 638. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the

persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992).

2. Rape In The Second Degree.

> (1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:
>
> ***
>
> (b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;
>
> ***
>
> (2) Rape in the second degree is a class A felony.

RCW 9A.44.050. The information regarding count 2 read:

> COUNT II: SECOND DEGREE RAPE, committed as follows: That the defendant, on or about the 9th day of January, 2011, did engages in sexual intercourse with K.C. (DOB: 2/.../95), when K.C. was incapable of consent by reason of being physically helpless; proscribed by RCW 9A.44.050(1)(b), a felony.

CP 76-77.

3. Definition Of Physically Helpless.

"'Physically helpless' means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." RCW 9A.44.010(5).

4. Definition Of Consent.

"Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct

indicating freely given agreement to have sexual intercourse or sexual contact. RCW 9A.44.010(7).

In the present case, the State presented evidence that on January 9, 2011, K.C. consumed a significant amount of alcohol provided by Grandlund. When K.C. began feeling the affect of the alcohol Grandlund approached her, took her hand and placed it on his penis; K.C. pulled her hand away. Grandlund followed K.C. into the living room, sat next to her, placed her hand on his erect penis, began rubbing the inside of her thigh and told her that he wanted to have sex with her. K.C. got up from the couch and tried to go to the girls' bedroom; she had blurred vision, difficulty maintaining her balance, felt very intoxicated and confused. Grandlund led K.C. into his room, sat her on the bed, removed her clothing and began kissing her on the neck and breasts. K.C. tried to get Grandlund to stop but she could not move her limbs and could only mumble unintelligibly; she could not even understand her own words. K.C.'s last memory before she lost consciousness was of Grandlund's penis inside her vagina. K.C. was found passed out on the bathroom floor the next morning. CP 43, FF 11, 12, 13, 14, 16, 17, 18, 19; CP 44, FF 20, 21, 22, 24, 25. The evidence shows K.C.'s resistance to Grandlund's sexual advances and her increasingly

diminished ability to communicate as her system continued absorbing the alcohol she had consumed. When Grandlund led her to his bedroom K.C. was physically incapable of communicating her unwillingness to engage in sexual intercourse. The trial court found these facts had been proved beyond a reasonable doubt. CP 45, FF 36.

Viewed in the light most favorable to the State, the foregoing evidence was sufficient to permit any rational trier of fact to find beyond a reasonable doubt that K.C. was incapable of consent by reason of being physically helpless when Grandlund had sexual intercourse with her. There was sufficient evidence to support the court's conclusion that on January 9, 2011, Grandlund engaged in sexual intercourse with K.C. when K.C. was incapable of consent by reason of being physically helpless. Accordingly, Grandlund's conviction for 2nd degree rape should be affirmed.

B. INEFFECTIVE ASSISTANCE OF COUNSEL.

Grandlund argues that he was denied effective assistance by counsel not arguing that Grandlund reasonably believed that K.C. was not physically unable to communicate her unwillingness to engage in an act of sexual intercourse. Appellant's Brief 10-16.

1. Legal Standards.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); *see* U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

Competency of counsel is determined upon the entire record below. McFarland, 127 Wn.2d at 335; State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Courts engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. "The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226. Because of this presumption, the defendant must show that there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight and must

strongly presume that counsel's conduct constituted sound trial strategy." In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Generally, legitimate trial strategy based on reasoned decision-making cannot serve as the basis for a claim of ineffective assistance of counsel.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

In re Hubert, 138 Wn. App. 924, 928-29, 158 P.3d 1282, 1284 (2007) (citing Strickland, 466 U.S. at 690-691). Prejudice requires a showing that but for counsel's performance it is reasonably probable that the result would have been different. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); Thomas, 109 Wn.2d at 226.

As shown below defense counsel's representation in the present case did not fall below an objective standard of reasonableness. Grandlund has not met his burden of rebutting the strong presumption that counsel's representation was not deficient and that counsel's conduct consisted of sound trial strategy.

2. It Was Defendant's Burden To Prove That He Reasonably Believed The Victim Was Not Physically Helpless.

Chapter 9A.44 RCW provides a statutory defense to a charge of rape in the second degree:

> In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1). The defendant bears the burden of proof by a preponderance of the evidence. Hubert, 138 Wn. App. at 929.

Grandlund did not present evidence that he reasonably believed that K.C. consented to sexual intercourse, rather, he maintained that he did not have sexual contact with K.C. Grandlund's goal was outright acquittal on both the 2nd degree rape charge and the charge of rape of a child in the 3rd degree. The defense strategy would have been seriously undermined if counsel had argued that Grandlund believed K.C. consented to sexual intercourse. Counsel is not required to present a defense not warranted by the demonstrable facts. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982, 986 (1979).

Grandlund's argues that evidence supported the reasonable belief defense because D. "testified that K.C. appeared only 'a little' drunk right before the incident and 'a little' out of it after the incident." Brief of Appellant 15-16. This argument ignores the burden of the reasonable belief defense. Grandlund had to prove that he reasonably believed that K.C. was not physically unable to communicate her consent, not merely whether there was evidence regarding K.C.'s state of intoxication. State v. Coristine, 161 Wn. App. 945, 950, 252 P.3d 403 (2003). Grandlund presented no evidence regarding his belief about K.C.'s ability to communicate consent. Grandlund did not carry his burden to establish that at the time of the offense he reasonably believed that K.C. was not physically helpless.

Grandlund's reliance on State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009), and In re Hubert, 138 Wn. App. 924, 928-29, 158 P.3d 1282, 1284 (2007), is misplaced. In both Powell and Hubert the defendants admitted having sexual contact with the

victim and claimed that the victim consented to the sexual contact.[3] Grandlund did neither.

In Powell the defendant admitted having sex with a very incapacitated but willing victim. Powell, 150 Wn. App. at 146-149. Defense counsel argued that the evidence demonstrated that the victim was not physically helpless and that, from Powell's perspective, the victim appeared to be able to consent to the sexual activity. Powell, 150 Wn. App. at 151. Nonetheless, defense counsel did not propose a jury instruction based on the "reasonable belief" statutory defense to second degree rape, provided in RCW 9A.44.030(1). Powell, 150 Wn. App. at 152. The jury found Powell guilty of second degree rape. Powell, 150 Wn. App. at 152. The appellate court found that Powell had "demonstrated that he received ineffective assistance of counsel." Powell, 150 Wn. App. at 157-58.

In Hubert, the defendant admitted entering the intoxicated victim's bedroom and initiating a sexual encounter, that he and the victim kissed and fondled one another, he removed his own pants and assisted the victim remove her pants in anticipation that they

[3] See also State v. Coristine, 161 Wn. App. at 951-952 (in addition to offering substantial evidence showing the victim was capable of consent, Coristine presented evidence clearly addressing the issue that he reasonably believed the victim did consent).

would have sex. But before he penetrated her, the victim jumped out of bed and told him "I'm too drunk to do this ... I have a boyfriend and what we did was really wrong." Hubert, 138 Wn. App. at 927. Hubert testified that he believed the victim was awake during the entire encounter. Both Hubert and the victim testified that Hubert stopped physical advances as soon as the victim cut off the encounter, and that Hubert remained in the victim's bedroom for hours following the incident. Hubert, 138 Wn. App. at 929. Despite this evidence, Hubert's attorney did not raise or argue the "reasonable belief" defense. Nor did he request an instruction thereon. Hubert, 138 Wn. App. at 929. Hubert was convicted of attempted second degree rape. Hubert, 138 Wn. App. at 928. The appellate court found that Counsel's failure to discover and advance the defense was plainly deficient performance. Hubert, 138 Wn. App. at 930.

In the present case, Grandlund denied having had any sexual contact with K.C. He did not present evidence that K.C. consented to sexual intercourse; nor did he present evidence that he reasonably believed that K.C. was able to consent. Clearly such evidence would have contradicted his claim that he did not have sexual contact with K.C. Grandlund did not show by a

preponderance of the evidence that at the time of the offense he reasonably believed K.C. was not physically helpless.

3. Defendant Has Not Shown That Counsel's Assistance Was Ineffective.

To prevail on the claim of ineffective assistance of counsel, Grandlund must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. at 687; McFarland, 127 Wn.2d at 334-35. Because he bears the burden of rebutting the strong presumption that counsel's representation was not deficient, Grandlund must show there were no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336. Arguing that Grandlund reasonably believed K.C. consented to sexual intercourse would have essentially admitted that Grandlund committed the offense of rape of a child in the third degree.[4] See CP 76. Such a result would have been at odds with the defense strategy for outright acquittal. "Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided [his] attorney believes there is support for the decision. State v. Grier, 171 Wn. 2d 17, 39, 246 P.3d 1260, 1271

[4] Grandlund had declined an offer to plead guilty to rape of a child in the 3rd degree charged in the original information. 5/26/11 RP 3-4.

(2011). Grandlund was aware of the risks in pursuing an all or nothing strategy to obtain outright acquittal. On this record, the decision to pursue an all or nothing strategy was not objectively unreasonable. Grier, 171 Wn. 2d at 43; State v. Hassan, 151 Wn. App. 209, 221, 211 P.3d 441, 447 (2009). Grandlund has failed to meet his burden of "establishing the absence of any conceivable legitimate tactic explaining counsel's performance." Grier, 171 Wn.2d at 42 (citation omitted). Grandlund has not carried his burden to show counsel's performance fell below an objective standard of reasonableness.

IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted on June 11, 2012.

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Snohomish County Prosecuting Attorney

By: _____
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