NO. 100936-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

CRISTIAN MANUEL AMADOR,
Petitioner

FROM THE COURT OF APPEALS DIVISION II
CASE NO. 54594-2-II

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Cristian Manuel Amador, defendant in the trial court, and appellant in the Court of Appeals, is the petitioner herein.

II. DECISION

Petitioner seeks review of the Opinion of the Court of Appeals, Division II, filed on March 22, 2022, affirming his second degree rape conviction. A copy is attached as Appendix A.

III. ISSUES PRESENTED

A. Whether this Court should grant review because the Court of Appeals decision upholding use of the no corroboration instruction involves significant questions of constitutional magnitude per RAP 13.4 (b)(3), and/or involves an issue of substantial public

interest that should be determined by the Supreme Court per RAP 13.4 (b)(4).

B. Whether the no corroboration instruction, in the context of a second degree rape case featuring an affirmative defense, such as this case, constitutes a comment on the evidence.

C. Whether the no corroboration instruction, in the context of a second degree rape case featuring an affirmative defense, such as this case, constitutes a violation of due process.

D. Whether the giving of the no corroboration instruction in this case constituted harmless error.

E. Whether *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949), should be overruled.

IV. STATEMENT OF THE CASE

Cristian Amador and E.D. met in high school. They stayed in touch by messaging each other off and on, and then reconnected in person about a week before E.D.'s twenty-second birthday, which was February 7,

2018. That morning, Mr. Amador and E.D. worked out together at a gym. They made plans to go to the bar after Cristian got off work that evening. E.D. picked him up at his house that night, and drove him to a bar called Charlies. E.D. started drinking beer. Then, about 9:00 p.m., E.D.'s friend River Petramalo joined them. They started drinking green tea shots of alcohol. Emma recalled that she had about three of those before the bar closed at midnight. RP I 252 - 59. Petramalo testified that E.D. was not super drunk when they left Charlies. RP I 337.

Petramalo drove E.D. and Mr. Amador to Cascade Bar. They drank multiple shots of tequila. Emma and Cristian became flirtatious. They were touching each other a lot. Petramalo suggested that they go out to the car. She gave them the keys, and they went outside to be alone. RP I 346 - 47.

After a while Petramalo went out to the car and saw E.D. and Cristian kissing and fondling each other. E.D.'s breast was exposed in the backseat, where they were making out. RP I 346- 47. Petramalo got in the car and drove to E.D.'s house with both of her passengers in the back seat. E.D. threw up on the way. She was still talking. In fact she pleaded with Cristian to come in and spend the night with her, but he said no because her parents were inside. RP I 353; 397 - 98. E.D. was somewhat unsteady on her feet, so Petramalo used her keys to gain access to the house, and accompanied her up to her room. She thought E.D. was pretty drunk. RP I 356 - 57. But E.D. was still coherent and walking by herself. She was talking and laughing. Petramalo helped her take her clothes off. E.D. cooperated by lifting her arms up, etc. RP I 397 - 98.

Petramalo drove home with Mr. Amador. He came up to her apartment. They talked about where he was going to spend the night. She told him she did not want him spending the night at her place. RP II 804. So he said: "I think I'm just going to go back to Emma's." RP I 362 - 63. Petramalo called an Uber for him. She told him that the door to Emma's house was unlocked and where he could find her bedroom. RP II 806.

Mr. Amador went back to Emma's house and went in. He found her sleeping in her bra and underwear on her bed in the dark. He noticed some vomit here and there in her hair and on the floor. He cleaned it up somewhat and then got into bed with her. RP II 807.

This was approximately 3:45 in the morning. He fell asleep for a few minutes. He was awakened by Emma. She was rubbing her body against him in a spooning manner. They started to cuddle. He put his arm

around her. She was rubbing her hips against his groin. They started french kissing and making out. She was actively using her tongue to kiss him. She took off her underwear. He started to unbelt his pants, and she assisted him in removing his pants and his underwear. RP II 808 - 09. They had sexual intercourse. Although there was no conversation, she was moaning, which he took as an expression of pleasure while they were having intercourse. After sex they both fell asleep spooning each other with his arm wrapped around her. RP II 811 - 12.

Cristian believed, based on his entire experience with Emma throughout the evening, her insistence that he spend the night with her, the cuddling, the grinding, the moaning, the kissing, removing her own underwear and helping him remove his pants and underwear in bed, that she was not only physically and mentally able to consent,

but physically consenting to have sex with him that morning. RP II 848.

E.D. testified she did not remember how she got home. The next thing she remembered was being in bed with Cristian kissing and having sex with her. When she realized this was happening, she didn't say anything to him. She did not push him away. RP I 286. When she awoke the next morning she and Cristian were naked in bed together. She got him up and took him home.

The defense at trial was consent, augmented by the affirmative defense that Mr. Amador reasonably believed E.D. was not mentally incapacitated or physically helpless per RCW 9A.44.030 (1). As a result, the trial court instructed the jury that the defense had the burden of proving by a preponderance of the evidence that he reasonably believed E.D. was not mentally incapacitated or physically helpless.

CP 51; Appendix B.

The State requested that the trial court instruct the jury that it is not necessary that the testimony of the alleged victim be corroborated. The defense excepted, arguing that the WPIC recommends no instruction because it is a negative instruction, as expressed in the commentary to the former WPIC 45.02, and because "the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to the argument of counsel." RP II 772-73. Nevertheless, the court elected, again over exception, to give a no corroboration instruction modified by the language contained in *State v. Chenoweth,* 188 Wn.App. 521, 536 - 37, 354 P.3d 13 (2015). RP II 770 - 78. The modified instruction #11 read:

> In order to convict a person of the crime of rape in the second degree as defined in these instructions, it is not necessary that the testimony of the alleged victim

be corroborated. The jury is to decide all questions of witness credibility.

CP 50; Appendix C.

V. ARGUMENT

A. This Court should grant review because the Court of Appeals decision upholding the use of the no corroboration instruction involves significant questions of constitutional magnitude per RAP 13.4 (b)(3), and involves an issue of substantial public interest that should be determined by the Supreme Court per RAP 13.4 (b)(4).

1. The Court of Appeals invited review of the issues raised in this petition.

The Court of Appeals recognized that the constitutionality of the no corroboration instruction, in the context of a second-degree rape case featuring an affirmative defense, is an issue of first impression that has never been decided by this Court. The Court

emphasized that the no corroboration was not necessary and that its use in this context may have constituted an unconstitutional comment on the evidence. Appendix A, at 1-2.

The Court of Appeals also expressed that in this context the no corroboration instruction may violate the accused's due process right to a fair trial because it is fundamentally unfair to instruct the jury that no corroboration of the alleged victim's testimony is required to convict without also instructing that no corroboration of the accused's testimony is required to acquit. Appendix A, at 15.

The Court of Appeals also opined:

> *Amador's arguments appear to have merit. The no corroboration instruction seems to favor the alleged victim's testimony over the defendant's testimony*. And a number of cases in other jurisdictions have disapproved of giving no corroboration instructions. E.g., *State v. Stukes,* 416 S.C. 493, 499 -

> 500, 787 S.E.2d 480 (2016); *Gutierrez v. State,* 177 So. 3d 226, 230 - 34 (Fla. 2015); *Ludy v. State,* 784 N.E.2d 459, 461 - 63 (Ind. 2003) (emphasis supplied).

Appendix A, at 15.

Finally, the Court of Appeals concluded:

> There is no need for a no corroboration instruction, and the better course is for trial courts not to give one. The instruction is a correct statement of the law as expressed in RCW 9A.44.020(1). But as the concurring opinion noted in *Chenoweth*. "Many correct statements of the law are not appropriate to give as instructions." 188 Wn. App. at 538 (Becker, J., concurring). And as noted above, the holding in *Clayton* approving the no corroboration instruction has been rejected by much more recent cases from courts in other jurisdictions. E.g., *Gutierrez,*177 So. 3d at 230-34. *However, until the Supreme Court addresses this issue, we are constrained by Clayton to conclude that giving such an instruction is not reversible error* (emphasis supplied).

Appendix A, at 15 -16.

2. This petition raises two issues of constitutional magnitude relating to the no corroboration instruction which have never been decided by this Court.

The Court of Appeals felt constrained to uphold the use of the no corroboration instruction in this case based upon this Court's holding in *State v. Clayton,* 32 Wn.2d 571, 202 P.2d 922 (1949). As stated by the Court:

> There is no need for a no corroboration instruction, and the better course is for trial courts not to give one. The instruction is a correct statement of the law as expressed in RCW 9A.44.020(1). But as the concurring opinion noted in *Chenoweth,* 'Many correct statements of the law are not appropriate to give as instructions.'188 Wn.App. at 538 (Becker,J., concurring). And as noted above, the holding in *Clayton* approving the no corroboration instruction has been rejected by much more recent cases from courts in other jurisdictions. *E.g., Gutierrez,* 177 So. 3d at 230 - 34. However, until the Supreme Court addresses this issue, we are constrained by *Clayton* to conclude that giving such an instruction is not reversible error.

Appendix A, at 15 -16.

Clayton, however, was a child sexual assault. There was no affirmative defense. The context in this case is much different. Amador asserted the common law defense of consent, *State v. Weaville,* 162 Wn.App. 801, 819, 256 P.3d 426 (2011), augmented by the statutory affirmative defense that he reasonably believed that E.D. was not mentally incapacitated or physically helpless. RCW 9A.44.030(1); Appendix B. The two defenses go hand-in-hand. As a practical matter, therefore, the accused is compelled to testify in his/her own defense in second degree rape cases charging incapability of consent in order to carry his/her burden of proof. When he/she does, and the jury is instructed that the alleged victim's testimony need not be corroborated to find the accused guilty, an unfair and harmful inference results because the jury may believe that the accused's version of events must be corroborated to find the accused not guilty. As a

result, instructing the jury in an affirmative defense case that no corroboration of the alleged victims testimony is required to convict places the heavy hand of the judge on the scales of justice, constituting *in this context* a comment on the evidence, while at the same time unfairly tilting the playing field in violation of the accused's due process right to a fair trial.

The Court of Appeals recognized that these constitutional arguments were never addressed or decided by this Court in *Clayton,* that the Supreme Court Committee on Jury Instructions has long recommended against giving the no corroboration instruction, that our appellate courts have expressed reservations about its use for many years, and that other jurisdictions have more recently held that it constitutes a comment on the evidence. Appendix A, at 13-15. The Court of Appeals then went on to state: "Amador's arguments appear to

have merit. The no corroboration instruction seems to favor the alleged victim's testimony over the defendant's testimony." Appendix A, at 15.

3. The issues raised are of substantial public importance, and review should be granted by this Court.

The no corroboration instruction is commonly sought by prosecutors, and given by the courts, despite the fact that the instruction has been disfavored and condemned for years. 11 Washington Practise: Washington Pattern Jury Instructions Criminal §45.02 cmt. at 883 (3 erd ed. 2008); *State v Chenoweth*, supra, at 536-37. Second degree rape cases are tried state-wide on a regular basis. Many of these cases hinge on whether or not the alleged victim was unable to give consent because of mental incapacity or physical helplessness. In most of these cases the accused asserts, as an affirmative defense, that he/she reasonably believed that the alleged

victim had the capacity to consent, triggering the corresponding need to testify that the alleged victim had that capacity and did in fact consent. As a result, the issues raised in this petition are of substantial public importance, and review should be granted by this Court.

B. The no corroboration instruction, in the context of a second degree rape case featuring an affirmative defense, such as this case, constitutes a comment on the evidence.

Article IV, § 16 of Washington State Constitution prohibits the court from commenting on the evidence: "judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement by a court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the credibility of the testimony of any given witness may be inferable or otherwise communicated to the jury. *State v. Trickle,* 16 Wn.App. 18, 25, 553 P.2d

139 (1976), *review denied*, 88 Wn.2d 1004 (1977). The concern is that the constitution mandates that juries are supposed to determine the credibility of witnesses and the value of evidence, not the court. *State v. Davis,* 20 Wn.2d 443, 147 P.2d 940 (1944). Because of the deference juries accord the experience and wisdom of the court, comment by the court must be scrupulously avoided to ensure a fair trial, *State v. Crotts,* 22 Wash. 245, 250-51, 60 P. 403 (1900), and constitutionally prohibited judicial comments on the evidence are presumed to be prejudicial. *State v. Levy,* 156 Wn.2d 709, 132 P.3d 1076 (2006).

Although it is true that no corroboration is required for the jury to convict if the jury believes the testimony of the alleged victim beyond a reasonable doubt, and the trial court's instruction to the jury # 11 is a correct statement of the law, several Washington State Appellate

Court decisions have expressed reservations about the use of the no corroboration instruction. *State v Zimmerman*, 130 Wn.App. 170, 121 P.3d 1216 (2005), *remanded on other grounds,* 157 Wn.2nd 1012, 138 P.3d 13 (2006) (despite misgivings the court was bound by *Clayton*); *State v. Johnson*, 152 Wn.App. 924, 219 P.3rd 958 (2009) (upheld instruction because "similar to one we reluctantly approved in *State v Zimmerman*"); *State v Chenoweth* 188 Wn.App. 521, 354 P.3rd 13 (2015) (Becker, J., concurring only because bound by *Clayton*); Appendix A, at 15 ("The no corroboration instruction seems to favor the alleged victims testimony over the defendant's testimony").

Moreover, the Washington Supreme Court Committee on Jury Instructions has for many years recommended against giving the instruction:

> The matter of corroboration is really a matter of sufficiency of the evidence. An

> instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 *Washington Practice*: *Washington Pattern Jury Instructions: Criminal* § 45.02, cmt., at 917 (4th ed. 2016).

The no corroboration instruction has also been condemned by the Indiana Supreme Court because:

> Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness's testimony, and ignore evidence that conflicts with the witness's version of events.

Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003).

The no corroboration instruction has also been denounced for bolstering the testimony of the complainant by according it special status:

> It cannot be gainsaid that any statement by the judge that suggests one witness's testimony need not be subjected to the same tests for weight or credibility as the testimony of others has the unfortunate effect of bolstering that witness's testimony by according it special status. The instruction in this case did just that, and in the process effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony.

Gutierrez v. State, 177 So. 3d 226, 231-32 (Fla. 2015).

While all of this condemnation has merit, our courts have uniformly upheld use of the instruction. *State v. Clayton,* supra; *State v. Galbreath,* 69 Wn.2d 664, 419 P.2d 800 (1966); *State v. Malone,* 20 Wn.App. 712, 582

P.2d 883 (1978); *State v. Chenoweth,* supra*; State v. Zimmerman,* supra; *State v. Johnson,* supra. However, none of these cases involved a challenge to the instruction based upon its use in the context of a second degree rape case with a consent defense augmented by an affirmative defense.

The difference is that ordinarily the accused in a criminal case is not expected or required to produce evidence. The jury is specifically instructed that the accused has no burden of proof, has the right to remain silent, and the jury must return a verdict of not guilty if there is a reasonable doubt based even on a lack of evidence. When, however, an affirmative defense is asserted, the accused is required to produce evidence, including his own testimony, which the jury will be required to evaluate and weigh against the testimony of the alleged victim.

An instruction by the court constitutes a comment on the evidence if it reflects the courts attitude towards the merits of the case or the courts attitude toward the evidence is inferable from the statement. *State v Lane*, 125 Wn.2d 825, 838, 889 P. 2d 929 (1995); *State v Johnson,* supra at 935. While it may be true that in many applications, such as a child molestation case, instructing the jury that no corroboration of the alleged victim's testimony is required to convict is merely a correct statement of the law, that is not true when the accused testifies in support of an affirmative defense, because the judge in those cases is singling out and emphasizing the testimony of the alleged victim at the expense of the accused. Regardless of whether it is a correct statement of the law, the courts attitude toward the critical issue of whether or not the alleged victim had capacity to consent is easily and predictably inferable, and that is that corroboration is required to believe the accused.

This is one of those cases. The defense was capability to consent/consent. Only two people were in the room. Only two people testified about what happened in the room. The judge instructed the jury that no corroboration was required to believe the alleged victim. In so doing, he effectively endorsed the alleged victim by implying that corroboration would be required to believe the accused. This was recognized by the Court of Appeals: "Amador's argument appears to have merit. The no corroboration instruction seems to favor the alleged victim's testimony over the defendant's testimony." Appendix A, at 15.

C. The no corroboration instruction, in the context of a second degree rape case featuring an affirmative defense, such as this case, constitutes a violation of due process.

The due process clauses of both the United States and Washington State constitutions declare that no

person should be deprived of life, liberty, or property without due process of law. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Due process includes the guarantee of a fair trial. *State v. Scherner*, 153 Wn.App. 621, 651, 225 P.3d 248, *review granted,* 168 Wn.2d 1036, 233 P.3d 888, *affirmed,*173 Wn.2d. 405, 269 P.3d 207(2009).

The United States and Washington State constitutions also guarantee the accused "a meaningful opportunity to present a defense." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citations omitted); U.S. Const. amends. VI, XIV; Const. art. I, § 22. "The right of an accused in a criminal trial to due process is in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A basic

tenant of our jurisprudence is the right of the accused to offer testimony in support of his/her defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

In order to ensure that the accused's opportunity to present a defense is in fact meaningful, due process clearly contemplates that the trial court's instructions to the jury do not inferentially indicate a bias in favor of witnesses called by the State. Yet that is exactly what happens when the no corroboration instruction is given in a case where the accused is not simply required to show a reasonable doubt, but must affirmatively shoulder a burden of proof. Because both parties have a burden, the instruction effectively enhances the testimony of the alleged victim and devalues the testimony of the accused.

To illustrate the unfairness, imagine the accused asking for the same instruction. No judge would give it, but if the instruction is given at the State's request, the

only way to level the playing field would be to also instruct the jury that no corroboration of the testimony of the accused is required to acquit.

Seen in this light, the no corroboration instruction impaired Mr. Amador's constitutional right to a "meaningful opportunity to present a defense." *Holmes,* supra at 547 U.S. 319. At the same time, it undermined Mr. Amador's right to a "fair opportunity to defend against the State's accusations." *Chambers,* supra, at 410 U.S. 294.

D. The no corroboration instruction given in this case constituted prejudicial and reversible error.

Where constitutional error has been established as benefitting the prevailing party, namely the State in this case, there is a rebuttable presumption that the error was harmful. *State v Britton*, 27 Wn.2d 336, 341, 178 P.2d 341(1947); *State v Koch*, 157 Wn.App. 20, 40, P.2d

(2010). To overcome this presumption, the State must prove that the error was not prejudicial by showing, beyond a reasonable doubt, that the jury would have reached the same verdict even if the trial court had not given the disputed instruction. *State v Easter*, 130 Wn.2d 228, 242 922 P. 2d 1285 (1996); *Koch*, supra at 540.

The principal issue in this case was whether or not Mr. Amador reasonably believed that E.D. was conscious and capable of giving consent, and in fact did consent to sexual intercourse. Only two witnesses were present. The trial court's instruction informed the jury that no corroboration was necessary to believe the complaining witness, and without a corresponding instruction relating to the testimony of the accused, the clear implication was that the accused had to provide corroboration in order for the jury to accept his affirmative defense and return a verdict of not guilty. It cannot be said that the jury would

have reached the same verdict if the trial court had not given the no corroboration instruction. As a result, the error was harmful, prejudicial, and merits reversal. Id.

E. The rationale behind the no corroboration instruction is outdated and *Clayton* should be overruled.

The impetus for the no corroboration instruction was the abolishment of prior state law requiring witness corroboration in rape cases over a hundred years ago. *Chenoweth,* supra at 537, n.49 (citations omitted). The concern at that time was that despite the change in the law juries would still expect corroboration in order to convict. Since then, however, much has changed, and the justification for the instruction no longer exists. Especially with the popularity of the "MeToo" and "#TimesUp" movements, there is no longer any reason to believe jurors today can not fairly assess the credibility of women making sexual assault accusations.

It is no coincidence that the Washington State Supreme Court Committee on Jury Instructions now expressly recommends against the giving of the no corroboration instruction. Recognition of this reality is also reflected in more recent appellate court decisions questioning the current need for a no corroboration instruction. *State v. Zimmerman,* supra; *State v. Johnson,* supra; *State v. Chenoweth* (Becker, J., concurring),supra; Appendix A.

Finally, since *Clayton* was decided, the legislature has created a statutory affirmative defense to second degree rape. RCW 9A.44.030 (1). This affirmative defense was asserted by Mr. Amador in this case, and it is in this context that the no corroboration instruction clearly constitutes a comment on the evidence and violates due process.

The doctrine of stare decisis provides stability and clarity in the law and gives parties a clear standard with which to determine rights. *State v. Stalker,* 152 Wn.App. 805, 810-11, 219 P.3d 722 (2009). But the doctrine is "not an absolute impediment to change." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The courts can and will reject prior holdings "upon a clear showing that an established rule is incorrect and harmful." *Id.* (citation omitted); *Stalker* 152 Wn.App. at 810-812. The State Supreme Court recognizes there are occasions "when a court should eschew prior precedent in deference to intervening authority where the legal underpinnings of our precedent have changed or disappeared altogether." *Id.* at 678 (internal quotations & citations omitted).

The courts do not take an invitation for a change in precedent lightly. *Otton,* 185 Wn.2d at 678 (citation

omitted). The decision to change precedent is not based on whether the court would rule in the same way if the issue was a matter of first impression. *Id.* Rather, "the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent–promoting the evenhanded, predictable, and consistent development of legal principles, fostering reliance on judicial decisions, and contributing to the actual and perceived integrity of the judicial process." *Otton,* 185 Wn.2d at 678 (citing *Keen v. Edie,* 131 Wn.2d 822, 831, 935 P.2d 588 (1997) and *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)) (internal quotations & brackets omitted).

Since *Clayton* was decided, over 70 years ago, the legal underpinnings of its value as precedent have not only changed, but "disappeared altogether." *State v.*

Otton, supra at 678. Social expectations and realities have changed. Jurors no longer discount the testimony of the alleged victim in rape cases.

The law has also changed. RCW 9A.44.030 (1) was enacted in 1988, enabling the accused to assert an affirmative defense of reasonable belief in second degree rape cases where the State alleges physical helplessness or mental incapacity. Surprisingly, since then, the irreconcilable conflict between the no corroboration instruction and the right to a fair trial in second degree rape cases where the accused asserts this affirmative defense has never been addressed by our courts. This is therefore an issue of first impression, which the Court of Appeals recognized as meritorious. Appendix A, at 15.

In summary, since *Clayton* was decided social expectations have changed. Attitudes and beliefs have

changed. The law too has changed, creating an affirmative defense that did not exist in 1949.

The one thing that has not changed is the constitution. The accused still has a due process right to a fair trial, and can not expect to have a fair trial when the trial court approves a no corroboration instruction in the context of a second degree rape case featuring an affirmative defense. This unquestionably favors the alleged victim, Appendix A, at 15, while at the same time devaluing the testimony of the accused, and can not be constitutionally condoned. As a result, *Clayton* should be overruled.

VI. CONCLUSION

Based upon the foregoing argument and authorities, this Court should accept review, reverse and remand for a new trial, and overrule *State v. Clayton.*

This document contains 4,857 words.

DATED this 18 day of MAY, 2022

Respectfully submitted,

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Filing Petition for Review

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APPENDIX A

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March 22, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CRISTIAN MANUEL AMADOR, Appellant.	No. 54594-2-II UNPUBLISHED OPINION

MAXA, J. – Cristian Amador appeals his conviction of second degree rape based on the victim being incapable of consenting to sexual intercourse because she was physically helpless or mentally incapacitated. The conviction arose out of an incident in which Amador had sexual intercourse with ED in her house while she was intoxicated and partly asleep. ED stated that she had no memory after taking tequila shots at a bar until she woke up in her bed to Amador having sex with her. Amador claimed that ED consented to sexual intercourse by her actions.

We hold that (1) the trial court's exclusion on relevance grounds of evidence that Amador and ED had sex three years earlier and that ED had bragged to a friend about that sexual encounter on the night of the incident was not an abuse of discretion and did not violate Amador's constitutional right to present a defense; (2) the trial court did not err in excusing a juror for bias who had attended high school with Amador and knew him; and (3) although we believe that the trial court's jury instruction that it was not necessary that the testimony of the victim be corroborated in order to convict may have constituted an unconstitutional comment on

the evidence, we are constrained by a 1949 Supreme Court case to hold that the trial court did not err in giving this instruction. Accordingly, we affirm Amador's conviction.

FACTS

Background

ED met Amador in high school. They had been messaging each other off and on since then. They reconnected in person about a week before the incident. On the morning of February 7, 2018, ED's 22nd birthday, Amador and ED worked out together at a gym. They made plans to go out to a bar after Amador got off work that evening. That night, ED picked up Amador at his house and drove to a bar. Later, ED's friend River Petramalo joined them.

ED drank beer and liquor at the first bar. The three then went to a different bar, with Petramalo driving because ED was intoxicated. ED drank two or three tequila shots at the second bar.

After the tequila shots, ED and Amador were flirting and touching each other in the bar. Petramalo let Amador and ED use her car to continue being physical. When Petramalo later went out to the car, she saw Amador and ED making out with ED's shirt pulled down to expose one of her breasts. Petramalo got into the car and drove away with ED and Amador in the back seat. ED then threw up. Petramalo drove to ED's house, where she helped ED up to her room, helped get ED's clothes off, and put her in bed. Petramalo thought that ED was pretty drunk. ED asked Amador to come inside with her, but he declined.

Petramalo then drove to her house with Amador. Amador told Petramalo that he was going back to ED's house to check on her. Petramalo paid for an Uber so that Amador could go to ED's house, and she told him which room was ED's. Amador arrived at approximately 3:30 AM, went into ED's room, and got into bed with her.

ED did not remember what happened after she drank the tequila shots or how she got home. The next thing she remembered was being in her bed with Amador on top of her. He was having sex with her and kissing her. ED was conscious for about a minute before she passed out. When ED woke up the next morning both she and Amador were naked and in the bed together. She woke Amador up and took him home.

ED reported the incident to law enforcement, and officers interviewed both ED and Amador about the incident. The State charged Amador with second degree rape, alleging that he engaged in sexual intercourse with ED when she was incapable of consent by reason of being physically helpless or mentally incapacitated.

Motions Regarding Prior Sexual Encounter

Before trial, the State moved in limine to exclude any reference of prior sexual encounters between ED and Amador. Amador filed a motion seeking to admit evidence of a prior sexual encounter under RCW 9A.44.020(2), the rape shield statute. Amador's motion was supported by an affidavit from his attorney, who stated that (1) both ED and Amador had indicated that they had slept together a few years earlier at ED's parents' house when Amador was a virgin, and (2) on the night of the alleged rape ED was bragging about taking Amador's virginity. Amador's attorney admitted that Amador did not hear ED's statement about talking his virginity. The prosecutor represented that the parties' statements showed that the sexual encounter occurred at least three years earlier.

The trial court ruled that evidence regarding the prior sexual encounter would not be allowed at trial. The court stated that the prior encounter was too remote, and that "[t]he fact that they had sex three years ago really doesn't have anything to do with this case, that night." 1 Report of Proceedings (RP) at 23. The court characterized Amador's position as "arguing that I

should tell every man in the world that because I had sex with that woman . . . three years ago, then she's fair game today." 1 RP at 27. The trial court also excluded ED's statement about taking Amador's virginity.

Jury Selection

During jury selection, juror 13 stated that he knew Amador. Juror 13 and Amador went to high school together and had some classes together, although Amador was a year or two older. They were in a business marketing club together, and they were together once or twice for four or five days at the state business marketing competition in Bellevue. Juror 13 stated that he thought Amador was in the military, Amador was not a bad person, and this could happen to anyone. He believed that Amador probably was not the kind of person who would rape someone, but that did not mean that he could not have committed the crime. Juror 13 said that he could not honestly say yes or no whether his relationship with Amador would affect his outlook on the case.

The State moved to excuse juror 13 for cause because he knew information that the trial court had specifically excluded, specifically Amador's military service. The State also was concerned that juror 13 already had a preconceived idea that Amador was a good person and that juror 13 liked him. And the State emphasized that juror 13 had never indicated that he could set those thoughts aside.

The trial court granted the for cause challenge based on juror 13's bias. The court stated:

> You know, and it's been a lot of years since I've been in high school, but we kind of held out those people that were a couple years older with some reverence, some importance that wouldn't attach to other people. And the reality is we carry that through the rest of our lives with us those people we knew in high school that were two years older than [us]. We always probably will think of them in a more favorable way. I think that in and of itself creates an unsurmountable bias for this particular juror.

1 RP at 157.

Trial

At trial, ED, Petramalo, and Amador testified to the events of the evening as stated above. A law enforcement officer testified about a recorded interview she had with Amador in which Amador said that he went back to ED's house with the intent of something sexual happening.

Amador testified that he went back to ED's house, entered the house through an unlocked door, and went to her room. ED had vomited and Amador tried to wipe some of it off her. There was some vomit in ED's hair. Amador got into bed with ED with his clothes on and fell asleep. He testified that he woke up to ED rubbing against him in a spooning manner. They started cuddling, and ED started rubbing her hips against his groin. They started kissing. Amador took off ED's underwear and ED assisted him in taking off his pants and underwear. They then had sex. Amador acknowledged that ED was drunk and half asleep when they had sex.

Amador stated that while this was happening ED did not say anything to him. But she did not push him away or indicate that she did not want to have sex. Amador admitted that during the entire evening ED never said that she wanted to have sex with him.

The trial court instructed the jury that the State had to prove beyond a reasonable doubt that "the sexual intercourse occurred when [ED] was incapable of consent by reason of being physically helpless or mentally incapacitated." Clerk's Papers (CP) at 49. The trial court also gave the following jury instruction: "In order to convict a person of the crime of Rape in the Second Degree . . . it is not necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility." CP at 50. Amador objected to giving this instruction. The court also instructed the jury on the affirmative defense that Amador

reasonably believed ED was not mentally incapacitated or physically helpless, which Amador had the burden of proving by a preponderance of the evidence.

The jury found Amador guilty of second degree rape. Amador appeals his conviction.

ANALYSIS

A. EXCLUSION OF PRIOR SEXUAL ENCOUNTER

Amador argues that the trial court violated his constitutional right to present a defense by excluding evidence of his prior sexual encounter with ED and ED's statement on the night of the incident about taking Amador's virginity in that encounter. We disagree.

1. Legal Principles

Both the United States Constitution and the Washington Constitution protect a criminal defendant's right to present a complete defense. *State v. Orn*, 197 Wn.2d 343, 347, 482 P.3d 913 (2021). However, a defendant's right to present a defense is not absolute. *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019). A defendant has no constitutional right to present evidence that is inadmissible under standard evidence rules. *State v. Wade*, 186 Wn. App. 749, 764, 346 P.3d 838 (2015). For example, "[d]efendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Therefore, a defendant's evidence must at least have minimal relevance to implicate the right to present a defense. *Id.*

The Supreme Court has developed a two-step process when addressing evidentiary rulings and the right to present a defense. *Arndt*, 194 Wn.2d at 797-98. First, the challenged evidentiary rulings are reviewed under an abuse of discretion standard. *Id.* at 797. Second, the rulings are reviewed de novo to determine whether they violated a defendant's constitutional right to present a defense. *Id.* at 797-98. In evaluating whether the exclusion of evidence

violates the defendant's constitutional right to present a defense, "the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted." *Id.* at 812. In some cases involving evidence with high probative value, there may be no state interest compelling enough to exclude the evidence. *Id.*

2. Relevancy Determination

The trial court excluded evidence of Amador's prior sexual encounter with ED and ED's statement on the night of the incident about taking Amador's virginity in that encounter. As noted above, we review a trial court's decision to admit or exclude evidence for abuse of discretion. *Arndt*, 194 Wn.2d 797. We conclude that these rulings did not constitute an abuse of discretion.

a. Legal Background

Under ER 401, evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Irrelevant evidence is not admissible. ER 402. The threshold for admitting relevant evidence is low; there must only be minimal relevance. *State v. Horn*, 3 Wn. App. 2d 302, 313, 415 P.3d 1225 (2018).

RCW 9A.44.020(2), the rape shield statute, addresses the admissibility of an alleged rape victim's prior sexual behavior with the defendant:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, *but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.*

(Emphasis added). The term "material" means essentially the same thing as "relevant." *See State v. Weaville*, 162 Wn. App. 801, 820, 256 P.3d 426 (2011). The admissibility of past sexual behavior evidence is within the sound discretion of the trial court. *Id.* at 818.

"The inquiry into the relevance of past sexual activity requires an all-encompassing examination, both of the past sexual activity and of the circumstances comprising the defendant's defense, such as a claim of consent." *Id.* at 820. The relevance question regarding an alleged rape victim's prior sexual activity is whether " 'the woman's consent to sexual activity in the past, without more, makes it more probable or less probable that she consented to sexual activity on this occasion.' " *Id.* (quoting *State v. Hudlow*, 99 Wn.2d 1, 10, 659 P.2d 514 (1983)). A key factor in this determination is the factual similarities between the prior sexual encounter and the sexual encounter at issue in the rape trial. *Weaville*, 162 Wn. App. at 820.

A person is guilty of second degree rape if the person has sexual intercourse with a person who "is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b).[1] There 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).

b. Analysis

Three factors show that evidence of Amador's prior sexual encounter with ED was irrelevant. First, as the trial court emphasized, the prior sexual encounter occurred three years earlier. The fact that the two had consensual sex that long ago has little bearing on whether ED would consent to sex three years later.

[1] RCW 9A.44.050 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

Second, the only similarity between the two sexual encounters is that they both happened at ED's house. Amador made no showing of any other similarity. There is no indication that three years earlier (1) Amador entered ED's house through an unlocked door in the middle of the night, (2) ED was drunk and had vomited on herself, (3) ED was asleep when Amador got into bed with her, (4) ED was drunk and half asleep when they were having sex, and (5) no words were exchanged before or during Amador having sex with ED.

Third, the fact that Amador was charged under RCW 9A.44.050(1)(b) is significant. The only question for the jury was whether "the sexual intercourse occurred when [ED] was incapable of consent by reason of being physically helpless or mentally incapacitated." CP at 49. The question for the jury was whether ED was physically helpless or mentally incapacitated when Amador had sexual intercourse with her. Whether ED consented to sex with Amador three years earlier has nothing to do with whether she was physically helpless or mentally incapacitated when Amador had sex with her this time.

Regarding the exclusion of ED's statement about taking Amador's virginity, that statement was irrelevant to whether Amador believed that ED would consent to sex because he did not hear the statement. And the statement could not affect Amador's belief that ED had the capacity to consent at the time he had sex with her. Amador argues that this evidence was relevant to ED's state of mind that evening, and suggested that she remembered her previous sexual encounter with Amador favorably and that she was open to having another sexual encounter with him. But the mere fact that she remembered their prior sexual encounter is not relevant to whether she would consent to another sexual encounter three years later.

The standard of review is abuse of discretion. *Arndt*, 194 Wn.2d 797; *Weaville*, 162 Wn. App. at 818. We hold that the trial court did not abuse its discretion in excluding evidence of

ED's and Amador's prior sexual encounter and ED's statement on the night of the incident about taking Amador's virginity in that encounter.

3. Right to Present a Defense

Although we conclude that the trial court did not abuse its discretion in excluding evidence of Amador's prior sexual encounter with ED and ED's statement about taking Amador's virginity, we must evaluate de novo whether these rulings violated Amador's constitutional right to present a defense. *Arndt*, 194 Wn.2d at 797-98, 812.

Whether the defendant "was able to present relevant evidence supporting her central defense theory" is a significant factor in this analysis. *Id.* at 814. Conversely, evidence that has an extremely high probative value or that represents the defendant's entire defense generally cannot be excluded without violating the constitutional right to present a defense. *Id.* at 813.

Here, Amador was allowed to present significant evidence to support his defense of consent. The evidence from an independent witness allowed Amador to argue that ED was interested in having sex with him – flirting and touching him in the bar, making out with him in the car with an exposed breast, and asking him to come inside when she arrived at her house. In addition, Amador testified to all the facts that supported his argument that ED consented to sex. This included his testimony that ED engaged in conduct – cuddling, rubbing her hips against his groin, kissing, assisting in taking off his clothes – that indicated consent to have sex.

In other words, Amador "was able to present relevant evidence supporting [his] central defense theory." *Id.* at 814. His entire defense was not barred by the exclusion of the evidence of his prior sexual encounter with ED or her statement about taking his virginity.

We hold that the trial court's exclusion of evidence of Amador's prior sexual encounter with ED and ED's statement on the night of the incident about taking his virginity in that encounter did not violate Amador's constitutional right to present a defense.

B. DISMISSING A JUROR FOR CAUSE

Amador argues that the trial court erred in dismissing juror 13 for cause because there was no actual bias. We disagree.

Either party may move to dismiss a prospective juror for cause where the juror shows actual bias. RCW 4.44.130; RCW 4.44.190. A juror possesses actual bias where he or she evidences a "state of mind . . . which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights" of the party challenging the potential juror. RCW 4.44.170(2). Under RCW 2.36.110, the trial court has a duty to excuse any juror who, in the opinion of the judge, is unfit to serve as a juror because of bias.

We review for an abuse of discretion a trial court's ruling on a party's for cause challenge of a juror. *State v. Lawler*, 194 Wn. App. 275, 282, 374 P.3d 278 (2016). We give great deference to the trial court because of its ability " 'to observe the juror's demeanor [during voir dire] and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial.' " *Id.* (quoting *State v. Davis*, 175 Wn.2d 287, 312, 290 P.3d 43 (2012)).

Amador argues that the facts that juror 13 knew him and went to high school with him were innocuous and did not demonstrate bias. However, Amador is not someone juror 13 just met in passing. They had classes together and were in the same business marketing club. Amador and juror 13 spent four or five days together at the state business marketing competition once or twice. And juror 13 thought that Amador was good guy and probably was not the type

of person who would rape someone. Juror 13 also was aware of Amador's military service, which the trial court had excluded. Most significantly, when asked if his relationship with Amador would affect the case, juror 13 could not honestly answer yes or no.

Amador emphasizes that the trial court's basis for dismissing juror 13 was the court's own subjective belief that younger students hold some reverence for older students in high school. Amador argues that this is an irrational basis. However, the trial court was able to watch juror 13's demeanor and was in the best position to determine if juror 13 "looked up" to Amador to the extent that he was biased. And apart from the court's comments, juror 13's answers provided a valid basis for the court's finding of bias.

Given the great deference afforded to the trial court in making these decisions, we hold that the trial court did not abuse its discretion in dismissing juror 13 for cause.[2]

C. NO CORROBORATION JURY INSTRUCTION

Amador argues that the trial court erred in instructing the jury that no corroboration of the ED's testimony was needed to convict him of second degree rape. He claims that giving this instruction without also instructing that no corroboration of his testimony that ED consented was required to acquit constituted a comment on the evidence and violated due process. We are sympathetic to Amador's argument, but we are constrained to conclude that this instruction was not a comment on the evidence.

Article IV, section 16 of the Washington Constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A trial court makes an improper comment on the evidence if it gives a jury instruction that conveys to

[2] Because of our holding, we do not address the State's argument that even an erroneous dismissal of a juror for cause is not grounds for reversal because a defendant could never show prejudice.

the jury his or her personal attitude on the merits of the case. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). But because it is the trial court's duty to declare the law, a jury instruction that does no more than accurately state the law pertaining to an issue is proper. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). We review the instructions de novo to determine if the trial court has improperly commented on the evidence. *Levy*, 156 Wn.2d at 721.

The trial court's instruction was based on RCW 9A.44.020(1), which provides: "In order to convict a person of any crime defined in this chapter[,] it shall not be necessary that the testimony of the alleged victim be corroborated."

Significantly, the Washington Pattern Criminal Jury Instructions (WPIC) do not propose a no corroboration instruction. In addition, a WPIC comment recommends against giving such an instruction:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 45.02 cmt. at 1004 (5th ed. 2021).

Nevertheless, courts have upheld sex offense victim no corroboration instructions as correct statements of the law under RCW 9A.44.020(1). *E.g.*, *State v. Chenoweth*, 188 Wn. App. 521, 537, 354 P.3d 13 (2015); *State v. Johnson*, 152 Wn. App. 924, 936-37, 219 P.3d 958 (2009); *State v. Zimmerman*, 130 Wn. App. 170, 182–83, 121 P.3d 1216 (2005).

However, the concurring opinion in *Chenoweth* stated, "If the use of the noncorroboration instruction were a matter of first impression, I would hold that it is a comment on the evidence and reverse the conviction." 188 Wn. App. at 538 (Becker, J., concurring). And

this court in *Zimmerman* expressed misgivings about the no corroboration instruction, but believed that it was bound by the Supreme Court's holding decades earlier in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949) that the instruction was not an improper comment on the evidence. *Zimmerman*, 130 Wn. App. at 182-83.

In *Clayton*, the trial court gave the following instruction:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

32 Wn.2d at 572. The defendant argued that the instruction was a comment on the evidence because "the instruction singles out the prosecutrix from all the other witnesses and tells the jury that the weight of her testimony is such that a conviction can be based upon it alone." *Id.* at 573.

The court rejected this argument, holding that the trial court did not commit reversible error in giving the no corroboration instruction. *Id.* at 578. The court stated:

> It is true that, in the instruction of which complaint is here made, the trial court in a sense singled out the testimony of the prosecutrix. However, what the court thereby told the jury was not that the uncorroborated testimony of the prosecutrix in the instant case was sufficient to convict the appellant of the crime with which he was charged, but, rather, that in cases of this particular character, a defendant may be convicted upon such testimony alone, provided the jury should believe from the evidence, and should be satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged. That was a correct statement of law.

Id. at 574.

Amador acknowledges that the challenged instruction is a correct statement of the law and that Washington courts have upheld the use of the instruction. However, he emphasizes that none of these cases involved a situation where the defendant testifies that the alleged victim consented to sexual intercourse. He argues that the no corroboration instruction is an improper

comment on the evidence in this context because there is no corresponding instruction telling the jury that it also may believe the defendant's testimony without corroboration.

Regarding due process, Amador argues that giving the no corroboration instruction violates his due process right to a fair trial. He claims that it is fundamentally unfair to instruct the jury that no corroboration of the alleged victim's testimony is required to convict without also instructing that no corroboration of the defendant's testimony is required to acquit based on an affirmative defense.

Amador's arguments appear to have merit. The no corroboration instruction seems to favor the alleged victim's testimony over the defendant's testimony. And a number of cases in other jurisdictions have disapproved of giving no corroboration instructions. *E.g.*, *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480 (2016); *Gutierrez v. State*, 177 So. 3d 226, 230-34 (Fla. 2015); *Ludy v. State*, 784 N.E.2d 459, 461-63 (Ind. 2003).

In *Gutierrez*, the Florida Supreme Court reversed a sexual battery conviction because the trial court gave a no corroboration instruction based on a statute similar to RCW 9A.44.020(1). *Gutierrez*, 177 So. 3d at 230-34. The court stated:

> [A]ny statement by the judge that suggests one witness's testimony need not be subjected to the same tests for weight or credibility as the testimony of others has the unfortunate effect of bolstering that witness's testimony by according it special status. The instruction in this case did just that, and in the process effectively *placed the judge's thumb on the scale* to lend an extra element of weight to the victim's testimony.

Id. at 231-32 (emphasis added). The court concluded that the instruction "allowed the jury to weigh [the alleged victim's] testimony more heavily than other evidence that was not inconsistent with consensual sex." *Id.* at 234.

There is no need for a no corroboration instruction, and the better course is for trial courts not to give one. The instruction is a correct statement of the law as expressed in RCW

9A.44.020(1). But as the concurring opinion noted in *Chenoweth*, "Many correct statements of the law are not appropriate to give as instructions." 188 Wn. App. at 538 (Becker, J., concurring). And as noted above, the holding in *Clayton* approving the no corroboration instruction has been rejected by much more recent cases from courts in other jurisdictions. *E.g.*, *Gutierrez*, 177 So. 3d at 230-34. However, until the Supreme Court addresses this issue, we are constrained by *Clayton* to conclude that giving such an instruction is not reversible error.

We hold that the trial court did not err in instructing the jury that no corroboration of ED's testimony was needed to convict Amador of second degree rape.

CONCLUSION

We affirm Amador's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

LEE, C.J.

APPENDIX B

INSTRUCTION NO. 12

It is a defense to a charge of rape 2nd degree that at the time of the acts the defendant reasonably believed that Emma Davis was not mentally incapacitated or physically helpless.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

APPENDIX C

INSTRUCTION NO. 11

In order to convict a person of the crime of Rape in the Second Degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

STEVEN W. THAYER

May 19, 2022 - 10:53 AM

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