SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 94703-5

PETITION FROM THE WASHINGTON STATE COURT OF APPEALS, DIVISION THREE
NO. 34223-9-III

STATE OF WASHINGTON,

Respondent,

v.

JULIO GAVIER RAMIREZ JR.,

Petitioner

PETITION FOR DISCRETIONARY REVIEW

Submitted by:

Anthony P. Martinez, WSBA #46392
Stephen T. Graham, WSBA #25403
1312 North Monroe, #140
Spokane, WA 99201
Telephone: 509-252-9167
Attorney for Petitioner

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I. IDENTITY OF PETITIONER

Petitioner, Julio Gavier Ramirez Jr., was convicted of one count of Rape in the Second Degree in Spokane County Superior Court.

II. CITATION TO COURT OF APPEALS DECISION

Division III issued its published opinion in this case, No. 34223-9-III on June 15th, 2017. A copy of Division III's Opinion is attached as Appendix A.

III. STATEMENT OF THE CASE

On April 28th, 2015, Julio G. Ramirez Jr. ("Mr. Ramirez) was charged by information with one count of Third Degree Rape[1] against H.S. CP at 1. An amended information was filed on July 30th, 2015, adding one additional count of Second Degree Rape[2] against H.S. CP at 2. Consequently, the amended information alleged that Mr. Ramirez committed Rape in the Second Degree and Rape in the Third Degree against H.S. on or about February 1, 2015. CP at 2

[1] RCW 9A.44.060(1)(a).
[2] RCW 9A.44.050(1)(b).

The State's case in chief was initiated on December 15th, 2015. CP at 44. Consequently, the first witness to be called was H.S. TM-RP at 15[3]. Furthermore, the order of testimony was modified, so that instead of the defense moving right into cross-examination of H.S., the court permitted the prosecutor to interrupt direct-examination of H.S. and proceed with direct-examination of Dr. Nolan McMullin. TM-RP at 61; RP at 44-57. Once both direct and cross-examination of Dr. McMullin was completed, the State resumed direct-examination of H.S. RP at 75-9.

During direct-examination of H.S., the State elicited testimony from H.S. that Mr. Ramirez had attempted to force him-self on her. TM-RP at 22-5[4]. Furthermore, the State also questioned H.S. about a New Years Resolution where she vowed not to be intimate with any other individuals. RP at 75. Additionally, the State also inquired as to whether H.S. was in a relationship with anyone else that might prompt her to describe the incident on February 1, 2015, as nonconsensual, to which she responded in the negative. RP at 79. Upon completion of

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[3] Verbatim Report of Proceedings as transcribed by Court Reporter, Ms. Tammey McMaster, CCR No. 2751 ("TM-RP").
[4] The Defense did not object to this line of questioning at the time because the court ruled it admissible per motions in limine. CP at 3-6; RP at 12-18.

direct-examination, the Defense began its cross-examination. RP at 79-100.

After the Defense was finished with cross-examining H.S., the State began redirect with the Defense submitting re-cross-examination of H.S. RP at 100.

The next witness to be called by the State was Christopher Benesch. RP at 102-111. Followed by Kelsey Scott. RP at 115-21. And finally, the State's final witness was Stormi Koerner. RP at 122-58. The State then rested, where the Defense then called Mr. Ramirez to the stand followed by Stormi Koerner. RP at 164-98. The Defense rested on December 15th, 2016. RP at 199.

The jury returned a verdict on December 17th, 2015. Consequently, the jury found Mr. Ramirez not guilty of Rape in the Third Degree and guilty of Rape in the Second Degree. RP at 267; CP at 25-6. Sentencing was then scheduled for January 22nd, 2016. RP at 275.

Prior to the January 22nd, 2016 sentencing hearing, the Defense filed a motion for Arrest of Judgment arguing that an individual sleeping is not "mentally incapacitated" or

"physically helpless" as a matter of law. CP 27-30. The State, in turn, filed a response. CP 31-5. Argument was heard on January 22nd, 2016, where the Court found, and entered an order, stating that there was in fact sufficient evidence of incapacitation or physical helplessness to support the conviction of Rape in the Second Degree. CP at 36; RP at 276-88.

The sentencing hearing was conducted February 26th, 2016, where the court heard arguments regarding sentencing. RP at 290-311. During sentencing, the State sought 80 months of incarceration. RP at 290. Whereas, based on its sentencing memorandum, the Defense requested an exceptional sentence downward. RP at 291-97; CP 37-42. Ultimately, the court sentenced Mr. Ramirez to 78 months incarceration. RP at 305; CP 60-75. An appeal as a matter of right was filed with Division III of the Washington Court of Appeals where Mr. Ramirez' conviction was affirmed. Appendix A.

IV. ISSUE PRESENTED

A. Did Division III deny Mr. Ramirez due process when it held there was sufficient evidence to support his conviction?

V. DISCUSSION

A. BASIS FOR REVIEW UNDER RAP 13.4

As described below, this matter concerns a sufficiency of the evidence claim, thus qualifying for Supreme Court review under RAP 13.4(b)(3).

B. DIVISION III ERRED WHEN IT FOUND THERE WAS SUFFICIENT EVIDENCE OF RAPE IN THE SECOND DEGREE WHEN THE VICTIM GAVE CONFLICTING TESTIMONY.

Mr. Ramirez' conviction should be reversed and dismissed because no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez committed the act of Rape in the Second Degree by means of sexual intercourse with an individual who was either mentally incapacitated or physically helpless.

> Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture.

State v. Colquitt, 133 Wn. App. 789, 796, 137 P. 3d 892, 895 (2006) (internal citations omitted).

Furthermore, beyond a reasonable doubt is defined as:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence.

CP at 82.

1. RAPE IN THE SECOND DEGREE

"A person commits the crime of rape in the second degree when he or she engages in sexual intercourse with another person when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated." CP at 91; *see also* RCW 9A.44.050(1)(b). Specifically:

> Mental incapacity is that condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by illness, defect, the influence of a substance, or by some other cause.
>
> A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to act.

CP at 92.

In this case, the State sought to prove that H.S. was either mentally incapacitated or physically helpless at the time of the digital penetration because H.S. stated she was asleep at the time of the incident. RP at 238-9.

2. PHYSICALLY HELPLESS OR INCAPACITATED

No reasonable juror could have found that Mr. Ramirez was guilty of Rape in the Second Degree because H.S.'s testimony did not establish beyond a reasonable doubt that she was asleep when the sexual intercourse was initiated. Specifically, she was neither physically helpless nor incapacitated.

In this case, Mr. Ramirez was found guilty of Rape in the Second Degree by means of sexual intercourse with H.S. while she was physically helpless or incapacitated. CP at 93; *see also* CP at 26. However, considering H.S.'s testimony and admitting the truth of such testimony "and all inferences that reasonably can be drawn from that evidence", no juror could find **beyond a reasonable doubt** that H.S. was asleep at the time of the sexual intercourse. *See State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892, 895 (2006) (citation omitted).

"A challenge to the sufficiency of the evidence, by its terms, is fact sensitive." *Id.* at 799. In this case, H.S. testified that she and Mr. Ramirez have been friends since high school, roughly three to four years. TM-RP at 22. H.S. stated while they were in high school, roughly three to four years prior to this incident, Mr. Ramirez forced himself on her at a party by throwing her on his bed and trying to remove her shirt. TM-RP at 23. H.S. resisted Mr. Ramirez' forceful advance and the two moved on from this incident. *Id.* at 23-7. Ultimately, Mr. Ramirez, again, made a romantic pass at H.S. in the years to follow. TM-RP at 29. However, Mr. Ramirez' gesture the second time was more a confession of his feelings for H.S. rather than overt, physical demonstration of those affections. *Id.* at 29-30. Taking this evidence at face value, specifically, accepting the truth of State's evidence, H.S.'s testimony, it is reasonable to infer that H.S. was aware that Mr. Ramirez harbored romantic feelings for her.

On the night of the incident, H.S. testified that Mr. Ramirez stayed the night with her at her apartment. TM-RP at 39. Upon arriving at H.S.'s apartment, H.S. and Mr. Ramirez undressed while in H.S.'s bedroom before they climbed into

H.S.'s bed to watch a movie and go to sleep. *Id.* at 39-40. At this point, H.S. stated she fell asleep with Mr. Ramirez in her bed and was later awakened by Mr. Ramirez trying to remove H.S.'s boxers and underwear. TM-RP at 42. H.S. stated with **certainty** that Mr. Ramirez' actions woke her up. *Id.* At this point, H.S. said "good morning" and asked what he was doing. *Id.* at 43. Mr. Ramirez then gave H.S. her boxers and underwear back and they proceeded to go back to bed. *Id.* at 42-45. Upon lying back down, Mr. Ramirez pulled H.S. closer to him in an effort to cuddle and H.S. did not "shy away." *Id.* at 45. H.S. then testified that the next time she woke up was when Mr. Ramirez had his fingers inside her vagina. *Id.* at 46. The prosecutor then inquired:

> Prosecutor: Did you feel his finger initially go into you?
>
> H.S.: **I don't think so.**

Id. at 47 (emphasis added).

Taking H.S.'s testimony as the truth, no reasonable juror could find beyond a reasonable doubt that she was asleep, i.e. physically helpless nor incapacitated, so as to support a finding of guilt for Rape in the Second Degree.

Here, we have a woman who has maintained a relationship with a man that she knew had romantic feelings for her. We have a woman who, assuming it as the truth, was subjected to an attempted rape years ago. *Id.* at 23. Finally, we have a woman, who on the night of the incident, awoke to find Mr. Ramirez attempting to take off her boxers and underwear. *Id.* at 42. Consequently, due to the fact sensitive nature of a sufficiency of the evidence claim, the above facts clearly create a reasonable doubt as to whether H.S. did not understand "the nature or consequences of the act of sexual intercourse." *See Id.* at 92. Based on her testimony alone, the "reasonable inference" to be drawn is that she knew Mr. Ramirez had strong feelings for her and apparently was confused about H.S.'s own feelings.

However, even if the facts above do not establish that no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez was guilty of Rape in the Second Degree, H.S.'s testimony regarding her recollection of the moment of penetration does. When H.S. was asked whether she felt Mr. Ramirez enter her body with his fingers, she responded that she did not know. *Id.* at 47. The prosecutor's inquiry was a yes or no question. If she were either mentally incapacitated or

physically helpless she would not have felt the penetration. However, if she was not, she would have felt it. Her response was she does not know if she felt the initial penetration, a reasonable inference being that **she did** feel the digital penetration. Again, taking her testimony at face value, there are two reasonable inferences that can be drawn, she was awake and felt it or she was not.

Now, Division III, citing to *State v. Thomas*[5], correctly states that "[6]. . . because the jurors observed the witnesses testify firsthand, this court defers to the jury's resolution of **conflicting** testimony . . . "and therefore there was sufficient evidence that H.S. was asleep. This contention, however, is misapplied. In *Thomas*, the **conflicting** testimony at issue pertained to the testimony of multiple witnesses. *See* 150 Wn.2d 821, 83 P.3d 970 (2004). That is significantly distinguishable from the current issue. Namely, what we have here is not conflicting testimony, but rather, contradictory testimony. And essentially, no **reasonable** juror can find proof beyond a reasonable doubt that a crime has been committed

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[5] 150 Wn.2d 821, 83 P.3d 970 (2004)
[6] *See* Appendix A; *see also* 2017 WL 2602586 (Slip Op. filed June 15th, 2017) (emphasis added).

when the only evidence of that crime is testimony from a victim that contradicts herself regarding an element of that crime. In this case, that element is whether H.S. was asleep at the time of penetration.

Consequently, the fact that the **complainant had doubt** as to whether she felt the digital penetration creates doubt that she was asleep. Ultimately, no reasonable juror could have found beyond a reasonable doubt that Mr. Ramirez penetrated Ms. H.S. while she was supposedly asleep. Therefore, Mr. Ramirez' conviction should be reversed and the charge of Rape in the Second Degree should be dismissed.

VI. CONCLUSION

Mr. Ramirez' constitutional right to due process was violated when the Court of Appeals affirmed his conviction for Rape in the Second Degree. The Court of Appeals' decision rests entirely on the contention that it is the juror's role to weigh the credibility of witness testimony. This was in error because the issue does not pertain to conflicting testimony from more than one witness in which a credibility determination is required. Rather, the Court of Appeals erred by not considering that the issue in this case pertains to contradictory testimony

from the State's main witness, the victim in this matter, H.S that casts doubt on an element of the charge. As such, Mr. Ramirez respectfully requests that this court grant discretionary review.

DATED this 14 day of July, 2017.

Respectfully submitted,

Anthony P. Martinez, WSBA #46392
Stephen T. Graham, WSBA #25403
1312 North Monroe, #140
Spokane, WA 99201
Telephone: 509-252-9167

APPENDIX A

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34223-9-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JULIO G. RAMIREZ,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Julio Ramirez appeals his conviction for second degree rape. He argues the sentencing court abused its discretion by not considering the mitigating factors he presented and by categorically denying his request for an exceptional sentence downward. He also argues the trial court abused its discretion when it prohibited him from cross-examining the victim about whether she had ever kissed her roommate. Finally, he argues insufficient evidence supports the jury's finding that the victim was asleep when he had intercourse with her. We disagree with Mr. Ramirez's arguments and affirm his conviction and sentence.

FACTS

H.S.[1] and Mr. Ramirez became friends in high school. On one occasion, H.S. attended one of Mr. Ramirez's parties. Mr. Ramirez was intoxicated, pushed H.S. onto his bed, took off her shirt, and tried to kiss her. H.S. was not romantically interested in Mr. Ramirez and did not want to be intimate with him. She pushed him to the side, put her shirt back on, and left.

On another occasion, after they had graduated from high school, Mr. Ramirez stopped by H.S.'s apartment and the two sat and talked on the couch. Mr. Ramirez then grabbed H.S.'s hands and said he was romantically interested in her. H.S. did not feel the same, but told Mr. Ramirez she would let him know if that changed.

On January 31, 2015, H.S., H.S.'s female roommate, and Mr. Ramirez went to a house party together. They stayed at the party for a few hours and left around 2:00 a.m. H.S.'s roommate wanted to pick up her boyfriend, so H.S. and Mr. Ramirez drove back together to H.S.'s apartment.

Mr. Ramirez told H.S. he did not want to go home, because he lived with his parents and did not want them to know he had been drinking. Mr. Ramirez was 18 years

[1] We use the victim's initials to protect her privacy.

old at the time. H.S. told Mr. Ramirez that he could stay at her apartment. She told him he could sleep on her bed. Mr. Ramirez put on a movie, and H.S. fell asleep.

Sometime later, H.S. awoke to Mr. Ramirez trying to remove her clothing. When H.S. told Mr. Ramirez to stop, he complied. H.S. went back to sleep.

The next time H.S. woke up, she discovered she had been digitally penetrated by Mr. Ramirez. H.S. then started crying during what she described as additional acts of unwanted sexual contact. Mr. Ramirez eventually stopped and H.S. asked him to leave, which he did.

Several days later, H.S. went to the emergency room to get tested for sexually transmitted diseases. While there, she reported she had been sexually assaulted. Hospital staff called the police.

The State charged Mr. Ramirez with one count of second degree rape and one count of third degree rape. At trial, the State called H.S., who testified to the events described above. During direct examination, H.S. testified that when she woke up, Mr. Ramirez's fingers were in her vagina. The State then asked, "Did you feel his finger initially go into you?" Report of Proceedings (RP) (Dec. 15, 2015) at 47. H.S. responded, "I don't think so." RP (Dec. 15, 2015) at 47. The State then asked, "When

you first realized you were awake, was his finger inside or outside your body?" RP (Dec. 15, 2015) at 48. H.S. responded, "Inside." RP (Dec. 15, 2015) at 48.

Toward the end of H.S.'s testimony, the State asked H.S.:

> Did you have any [reason] to hide a consensual sexual relationship with Mr. Ramirez from, maybe a man who was interested in you or some other reason for hiding a consensual relationship?

1 RP at 79. H.S. said she did not.

Defense counsel began to cross-examine H.S. The following exchange then occurred:

> [Defense counsel]: What was the nature of your relationship with [K.W.]?
> [H.S.]: We were friends and roommates.
> [Defense counsel]: It wasn't romantic at all?
> [H.S.]: No.
> [Defense counsel]: You had never kissed her?
> [Prosecutor]: Your Honor, I'm going to object.
> THE COURT: I'm going to sustain it.
> [Defense counsel]: More limited: Did you—From the time that the prosecutor asked whether or not you were in any sort of relationship with anybody, at the time of this incident did you have a relationship at all that was romantic at all or sexual at all, or involved kissing at all, during this—on the date of February 1st?
> [H.S.]: No.

1 RP at 79-80. Defense counsel then moved to a different subject.

The jury found Mr. Ramirez guilty of second degree rape and not guilty of third degree rape. Following trial, Mr. Ramirez filed a motion requesting an exceptional

sentence downward. He argued two mitigating factors supported his request. First, relying chiefly on *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), he argued his young age and immature intellectual capacity rendered him less culpable. Second, he asserted that because of his traditional and religious upbringing, he received "no instruction or education on the nuances of modern sexual mores." Clerk's Papers (CP) at 39. He argued this lack of understanding led him to believe that H.S. gave him implicit consent when she shared a bed with him and changed in front of him.

At the sentencing hearing, Mr. Ramirez argued at length that these two factors supported an exceptional sentence downward. The State responded by arguing that Mr. Ramirez's age was not a mitigating factor because it only requires a low level of maturity for a person to understand he or she cannot have intercourse with someone who is asleep. The State also argued that although Mr. Ramirez was young, he was as capable as other 18-year-olds: he volunteered, worked, was a college student, had mature plans for his profession, and was not developmentally delayed.

The court began its ruling by explaining the difficult nature of the case. The court acknowledged Mr. Ramirez's young age, and stated this factor made its decision more difficult, given how the conviction and sentence would significantly affect Mr. Ramirez's life. The court stated Mr. Ramirez made a good argument for an exceptional sentence

downward, noting that modern brain science reflects that young people's brains are still developing and learning appropriate judgment.

However, the court also noted Mr. Ramirez was raised in a household with appropriate social mores, boundaries, and parenting. It noted Mr. Ramirez attended school and interacted socially. The court further noted Mr. Ramirez had interacted with H.S. socially before, and had understood and honored her refusals of consent in the past. The court agreed that modern sexual mores may put more strain on a young person's ability to be appropriate, exercise the right judgment, and not cross the line. However, the court then stated that "regardless of social mores and regardless of youth, regardless of impulsivity or lack of brain development, there is consent. That is the ultimate line." 2 RP at 304.

The court found Mr. Ramirez had normal emotional and mental abilities. The court further found that Mr. Ramirez had demonstrated reasoned judgment in the past, knew what the right decision was in this case, but ultimately failed to demonstrate appropriate judgment. The court concluded there was no reason to deviate from the standard range and denied Mr. Ramirez's request for an exceptional sentence downward. The court then imposed a low-end standard range sentence of 78 months' incarceration. Mr. Ramirez appeals.

ANALYSIS

A. REQUEST FOR EXCEPTIONAL SENTENCE DOWNWARD

Mr. Ramirez argues the sentencing court abused its discretion by not considering the mitigating factors he presented and by categorically denying his request for an exceptional sentence downward.

Generally, a defendant cannot appeal a standard range sentence. *See* RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481, 139 P.3d 334 (2006). However, a defendant may challenge the procedure by which a sentence within the standard range is imposed. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329, 944 P.2d 1104 (1997). When a defendant requested an exceptional sentence downward, review is limited to instances where the sentencing court either (1) categorically refuses to impose an exceptional sentence downward under any circumstances, i.e., states it will never impose a sentence below the standard range; (2) relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range, such as the defendant's race, sex, religion, or some other characteristic, e.g., stating that no drug dealer should get an exceptional sentence downward; or (3) fails to recognize it has discretion to impose an exceptional sentence downward. *Id.* at 330; *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007). In these situations, a

sentencing court abuses its discretion, and a reviewing court will reverse. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

As long as the sentencing court considered the facts and concluded that an exceptional sentence downward was factually or legally unsupportable, the defendant may not appeal its ruling. *Garcia-Martinez*, 88 Wn. App. at 330. For example, in *Cole*, the defendant unsuccessfully requested a below range sentence and then challenged the court's refusal to impose an exceptional sentence on appeal. *State v. Cole*, 117 Wn. App. 870, 880-81, 73 P.3d 411 (2003). The *Cole* court held the defendant could not appeal from a standard range sentence where the sentencing court considered the claimed mitigating factors, heard extensive argument on the subject, and then exercised its discretion by denying the request. *Id.* at 881. Similarly, in *Garcia-Martinez*, the court held a sentencing court that has considered the facts and concluded no basis exists for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. *Garcia-Martinez*, 88 Wn. App. at 330.

RCW 9.94A.535 governs exceptional sentences. It provides that "[t]he court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535(1).

The statute then lists 11 nonexhaustive examples of circumstances justifying exceptional sentences downward. RCW 9.94A.535(1)(a)-(k).

Here, Mr. Ramirez requested an exceptional sentence downward based on the mitigating circumstances of his young age and a lack of understanding of modern sexual mores. He argues the sentencing court did not consider either of these factors when it denied his request for an exceptional sentence. The record demonstrates otherwise.

The sentencing court considered Mr. Ramirez's age extensively. It repeatedly acknowledged Mr. Ramirez's young age, stated this factor made its decision more difficult, and noted that, based on brain science, young people are still developing and less able to make appropriate judgments.

The sentencing court also considered Mr. Ramirez's argument that he did not understand modern social mores relating to sexuality. The court noted these mores did not exist in prior generations, and stated they may put more strain on a young person's ability to be appropriate, exercise the right judgment, and not cross the line.

However, the sentencing court concluded these two factors were unpersuasive, given that Mr. Ramirez was raised in a household with appropriate social mores, boundaries, and parenting, had normal emotional and mental abilities, had attended school, had interacted socially, had interacted with H.S. socially before, and had

understood and honored H.S.'s refusals of consent in the past.[2] In light of this reasoning, it is clear the court considered the two mitigating factors Mr. Ramirez presented—the court simply did not find them persuasive.

Mr. Ramirez also contends the sentencing court categorically denied his request for an exceptional sentence downward. He relies on the court's remark stating that "regardless of social mores and regardless of youth, regardless of impulsivity or lack of brain development, there is consent. That is the ultimate line." 2 RP at 304. Mr. Ramirez contends this remark indicates that the court categorically refused to give an exceptional sentence downward to any defendant convicted of rape, "regardless" of what mitigating factors may be present.

However, in context, this remark simply indicated that the court did not believe these two particular factors—young adult age and claimed lack of appreciation for modern sexual mores—sufficiently diminish a person's culpability for having sexual intercourse without the other person's consent. This was not a categorical refusal to

[2] Mr. Ramirez argues the court erred when it reasoned his age was inherently considered as part of his standard sentencing range. Although Mr. Ramirez is correct the guidelines do not account for the defendant's age, *see* RCW 9.94A.510, the record makes clear the sentencing court did not deny Mr. Ramirez's request for an exceptional sentence based on a belief that his age was inherent in the standard range. Rather, the court denied his request for the above reasons.

consider an exceptional sentence for *any* individual convicted of rape, regardless of the circumstances.

The record demonstrates that the sentencing court considered Mr. Ramirez's request, heard extensive argument on the subject, and then provided a reasoned explanation for why an exceptional sentence downward was factually and legally unsupportable. The sentencing court acted within its discretion, and accordingly, Mr. Ramirez may not appeal his standard range sentence.

B. DEFENSE'S QUESTION ASKING VICTIM WHETHER SHE HAD KISSED HER ROOMMATE

Mr. Ramirez argues, for the first time on appeal, that the trial court abused its discretion when it prohibited him from cross-examining H.S. about whether she had ever kissed her roommate. Mr. Ramirez acknowledges Washington's rape shield statute generally bars evidence of the victim's past sexual behavior. However, he contends the questioning was proper because the State presented evidence about H.S.'s past sexual behavior in its case in chief.

Washington's rape shield statute provides that evidence of the victim's past sexual behavior is inadmissible on the issue of credibility and is generally inadmissible to prove the victim's consent. RCW 9A.44.020(2). Evidence of the victim's past sexual behavior

may be admissible to prove consent if specific procedural requirements are met. RCW 9A.44.020(3).

However, when the State opens the door in its case in chief by presenting evidence tending to prove the nature of the victim's past sexual behavior, the defense may cross-examine the victim on the subject. RCW 9A.44.020(4). The trial court nevertheless may require a hearing to determine if the cross-examination will elicit evidence that is relevant, not unduly prejudicial, and helpful in achieving substantial justice for the defendant. RCW 9A.44.020(3)(d), (4). Decisions on the admissibility of prior sexual behavior evidence under the statute are reviewed for an abuse of discretion. *State v. Hudlow*, 99 Wn.2d 1, 22, 659 P.2d 514 (1983).

Here, on direct examination, the State asked H.S. if she had any reason to hide a consensual sexual relationship with Mr. Ramirez from anyone else who was interested in her. H.S. testified she did not. On cross-examination, defense counsel asked H.S. if she had a romantic relationship with her roommate or if she had ever kissed her roommate. The State objected and the trial court sustained the State's objection. Defense counsel did not contest the court's ruling, and then asked H.S. whether she was in a romantic or sexual relationship with anyone around February 1. H.S. said she was not. Defense counsel then moved to another subject.

When a trial court excludes evidence, the proponent of that evidence must make an offer of proof to preserve the issue for appellate review. *See* ER 103(a)(2); *Seattle-First Nat'l Bank v. W. Coast Rubber, Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985). The purpose of this rule is to inform the court of the legal theory under which the offered evidence is admissible, inform the court of the specific nature of the offered evidence so the court can assess its admissibility, and create an adequate record for review. *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

Here, because Mr. Ramirez did not make an offer of proof as required by ER 103(a)(2), it is unclear whether the trial court excluded the evidence under the rape shield statute or on some other evidentiary basis, such as relevancy or undue prejudice. Mr. Ramirez argues the evidence was admissible under RCW 9A.44.020(4) because the State presented evidence in its case in chief about the nature of H.S.'s past sexual behavior. He further argues the evidence was relevant to prove whether another romantic interest prompted H.S. "to be dishonest about a consensual relationship with Mr. Ramirez." Br. of Appellant at 19. However, because he never made an offer of proof, the trial court was unable to consider whether the State opened the door in its case in chief or whether the question was relevant to the issue of consent. This also deprived the trial court of an opportunity to determine whether the issue required a hearing under RCW 9A.44.020(4).

Mr. Ramirez attempts to excuse his failure to make an offer of proof by claiming the trial court "did not give the defense an opportunity to make an offer of proof." Br. of Appellant at 20. However, the record indicates the defense never *attempted* to make an offer of proof. Had the defense attempted to make an offer of proof and had the trial court refused to consider it, Mr. Ramirez might have a valid excuse.

Mr. Ramirez also vaguely asserts the trial court's evidentiary ruling denied him his right under the Sixth Amendment to the United States Constitution to cross-examine adverse witnesses. Mr. Ramirez did not raise this issue at trial. Under RAP 2.5(a)(3), a defendant may raise an issue for the first time on appeal if it is a "manifest error affecting a constitutional right." However, because Mr. Ramirez never made an offer of proof, "the facts necessary to adjudicate the claimed error are not in the record on appeal" and, therefore, he cannot show the alleged error was manifest or obvious under RAP 2.5(a)(3). *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

C. SUFFICIENCY OF THE EVIDENCE

Mr. Ramirez argues that insufficient evidence supports his conviction for second degree rape. He contends the State failed to prove H.S. was mentally incapacitated or physically helpless because her testimony did not establish she was asleep beyond a reasonable doubt.

In a criminal case, evidence is sufficient to convict if it permits a rational trier of fact to find the essential elements of the crime proved beyond a reasonable doubt. *State v. Munoz-Rivera*, 190 Wn. App. 870, 882, 361 P.3d 182 (2015). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

It is not this court's role to reweigh the evidence and substitute its judgment for that of the jury. *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012). Instead, because the jurors observed the witnesses testify firsthand, this court defers to the jury's resolution of conflicting testimony, its evaluation of witness credibility, and its decision regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person commits the crime of second degree rape when he or she engages in sexual intercourse with another person when the other person is incapable of consent by

reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1), (b). "Sexual intercourse" includes digital penetration. *State v. Tili*, 139 Wn.2d 107, 111 n.3, 985 P.2d 365 (1999). "'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). "'[T]he state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness.'" *State v. Mohamed*, 175 Wn. App. 45, 58-59, 301 P.3d 504 (2013) (quoting *State v. Puapuaga*, 54 Wn. App. 857, 861, 776 P.2d 170 (1989)). Thus, a person who is asleep is "physically helpless" within the meaning of RCW 9A.44.010(5). *Id.* at 60.

Here, sufficient evidence supports the jury's finding that H.S. was asleep when Mr. Ramirez committed sexual assault. H.S. testified that when she woke up, she had been digitally penetrated. She testified that she did not think she felt the initial act of penetration. She then testified that when she first realized she was awake, penetration had already occurred.

Mr. Ramirez emphasizes the portion of H.S.'s testimony where she stated she did not "think" she felt Mr. Ramirez initiate digital penetration. RP (Dec. 15, 2015) at 47. Mr. Ramirez argues this statement contradicted her other testimony that she was asleep, thus creating reasonable doubt. But H.S.'s statements are not inconsistent with one

another. Even if they were, H.S. unequivocally testified she woke up to Mr. Ramirez's digital penetration. This court defers to the jury's resolution of conflicting testimony.[3] *See Thomas*, 150 Wn.2d at 874-75.

This evidence was sufficient to permit a rational jury to find, beyond a reasonable doubt, that H.S. was asleep when Mr. Ramirez digitally penetrated her and, therefore, find that she was physically helpless. We conclude sufficient evidence supports Mr. Ramirez's conviction for second degree rape.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Siddoway, J.

Pennell, J.

[3] Mr. Ramirez also argues that he had a prior relationship with H.S., that he had romantic feelings for her, that H.S. knew about his feelings, and that H.S. "apparently was confused about [her] own feelings." Br. of Appellant at 26. None of these arguments cast doubt on the evidence supporting any of the elements of second degree rape.

NO. 34223-9-III
COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, **Plaintiff,** **vs.** **JULIO RAMIREZ,** **Defendant.**	**SPOKANE COUNTY No.: 15-1-01651-3** **AFFIDAVIT OF SERVICE**

I, Anthony Martinez, do hereby certify under penalty of perjury that on July 14th, 2017, I hand delivered a true and correct copy of the foregoing Petition for Discretionary Review to:

Mr. Julio Ramirez, #387964
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

Washington Court of Appeals, Division III
500 N. Cedar St.
Spokane, WA 99201

Also, I, Anthony Martinez, do hereby certify under penalty of perjury that on July 14th, 2017, I emailed a true and correct copy of the foregoing Petition for Discretionary Review to

Mr. Brian O'Brien
Spokane County Prosecutor's Office
1100 West Mallon Ave.
Spokane, WA 99260
scpaapeals@spokanecounty.org

LAW OFFICE OF STEVE GRAHAM
1312 NORTH MONROE, #140
SPOKANE, WASHINGTON 99201
TELEPHONE (509)252-9167 FAX (509)356-1714

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14TH day of July, 2017.

Anthony Martinez, WSBA #46392

LAW OFFICE OF STEVE GRAHAM
1312 NORTH MONROE, #140
SPOKANE, WASHINGTON 99201
TELEPHONE (509)252-9167 FAX (509)356-1714