62305-2

62305-2

NO. 62305-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEWIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUE

To succeed on an ineffective assistance of counsel claim, the defendant must show deficient performance and prejudice. In this rape case, the defendant maintains that his counsel was ineffective for not objecting to the testimony from the victim and her mother about how the rape affected the victim. An objection, however, would likely have been fruitless, failure to object was likely tactical, and in any event, any deficient performance did not prejudice the defendant. Has the defendant failed to show ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant James J. Lewis was charged in King County Superior Court with one count of Rape in the Second Degree. CP 1. The jury found Lewis guilty as charged. CP 109. At sentencing, the trial court imposed standard range sentence of 170 months, based on an offender score of 6. CP 112-17. Lewis appeals. CP 123.

2. SUBSTANTIVE FACTS

a. Incident

In March of 2007, C.D. was 21 years old. 4RP 5.[1] She had a son, Carlito, who was one. 4RP 5-6. C.D. and Carlito lived with C.D.'s mother, Berthetta Robinson. 2RP 73-74; 4RP 5.

C.D. first met the defendant, James Lewis, when Lewis was a customer of an auto-parts store in Renton where C.D. worked. 4RP 6-8. After meeting, the two spoke several times on the phone over the course of a few days but never spent time together except when Lewis visited C.D. at her work. 4RP 9.

At around 3:00 a.m. on March 29, 2007, Lewis called C.D.'s home but C.D. did not answer.[2] 4RP 11. Lewis appeared at C.D.'s work that day and was upset that C.D. did not answer his phone call. Id. C.D., however, still agreed to get a "drink or pizza" with him after her work finished around noon. 4RP 13-14.

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[1] The verbatim report of proceedings is cited as follows:
1RP (July 21, 2008)
2RP (July 23, 2008)
3RP (July 24, 2008)
4RP (July 28, 2008)
5RP (July 29, 2008)
6RP (Aug. 15, 2008)

[2] C.D.'s mother believes that the 3:00 a.m. call was "probably two days" before March 29, 2007. 2RP 77-78.

C.D. told her mother about her plans to meet Lewis at a gas station and go with him to a restaurant called Vince's for lunch. Id. C.D. told her mother that she would be home within a few hours. Id.

After work, but prior to meeting with Lewis, C.D. dropped off Carlito at daycare, causing C.D. to arrive at the gas station late. 4RP 15. Lewis was clearly upset, presumably because C.D. was late. 4RP 16-17.

Lewis told C.D. that he wanted to change his clothes and that his apartment was just down the street. 4RP 17-19. The apartment, however, did not belong to Lewis. 3RP 23-25. Ronald Hoyt, who had known Lewis for about fifteen years, occupied the only bedroom in the apartment and allowed Lewis to sleep in the living room. Id. Lewis paid rent to live there, "off and on." Id. Hoyt established a clear house rule that no one could be in the apartment when he was not there. Id.

C.D. and Lewis drove separately to the apartment parking lot. Id. C.D. turned off her car's engine and rolled down her window, planning to stay in her car while Lewis changed. Id. C.D. refused Lewis's initial attempt to have her come up to his apartment but eventually relented after Lewis insisted and claimed that friends and kids were in "his" apartment. 4RP 20.

Lewis knocked on the apartment door, waited only a couple of seconds, and then used the key to get in. 4RP 23. After Lewis shouted a

greeting, closed the door behind C.D., and received no answer to his greeting, C.D. quickly realized that they were alone in the apartment. 4RP 24-25. Lewis then went into the bedroom and invited C.D. to join him. 4RP 26. C.D. refused. Id.

At this point, C.D. turned to leave the apartment, but Lewis came out of the bedroom and grabbed C.D. by the arm. 4RP 27. Lewis started to grope C.D., but she protested and said that they needed to leave. 2RP 30-32. C.D. tried to pull away, but Lewis maintained his grip and forcefully pulled her into the bedroom. 4RP 28. C.D.'s struggles could not overcome Lewis's force. 4RP 29.

In the bedroom, Lewis pushed C.D. on the bed, face down, while C.D. fought and shouted to be let go. 4RP 31. Lewis lay on top of C.D., pinning her hands behind her back. 4RP 32. When Lewis had C.D. restrained, Lewis kissed her back, fondled her body, lifted her shirt, and unhooked her bra. 4RP 32-34. In an aggressive and forceful tone, Lewis told C.D. to "be quiet," but C.D. continued to struggle despite being scared. 4RP 35. C.D. did not scream, but she did struggle loudly enough that Lewis, as well as anyone else in the apartment, would have easily heard her objections. 4RP 72.

C.D. started to cry as Lewis undressed her and she realized that she was about to be raped. 4RP 35-36. C.D. felt Lewis unbuckling his pants

on her lower back and pulling his penis out. 4RP 38. Lewis said, "shut up, you fat bitch," "be quiet," and "you know you want it." 4RP 39. Lewis then tried to put his penis in C.D.'s rectum. 4RP 40. C.D. clinched her anus so that Lewis could not penetrate. Id. Lewis told her to stop tightening up, but C.D. did not relent. 4RP 41. Lewis eventually penetrated C.D.'s vagina. 4RP 40-41. The vaginal penetration was very painful. 2RP 30-32; 4RP 42.

Lewis eventually got off of C.D. after she pleaded for him to stop and when she said that she had to pick up her son. 4RP 44-45. In an effort to escape, C.D. promised that she would return. 4RP 45-46. C.D. quickly dressed but Lewis kept her bra so that she would fulfill her "promise" to return. Id.

As C.D. continued to cry, Lewis walked her outside to her car and kissed her, which made her feel horrible, uncomfortable, and sick. 4RP 48-49. C.D. then drove to a nearby barbershop where her godfather, Dexter, worked. 4RP 50. Dexter's colleague, Abe Winston, was in the barbershop when C.D. entered. 2RP 152. When C.D. entered the barbershop, she was crying and saying she had been raped. 2RP 152. Per Winston's advice, C.D. used the phone. 2RP 15; 4RP 50.

C.D. first called her best friend, Jewleon Bruce, because he lived close to the barbershop. 4RP 52. During the call, C.D. was very

emotional and was crying. 3RP 147-50. She told Bruce that she had been raped. Id. C.D. then called her mother. 4RP 52. Bruce arrived at the barbershop first, followed by C.D.'s mother. Id.

C.D.'s mother called the police once she arrived at the barbershop. 2RP 89-91. The police arrived a few moments later. Id. C.D. told multiple police officers that she had been raped, even though describing the rape made her feel scared, embarrassed, emotional, horrible, and shattered. Id. When talking to Officer Denise Bouldin at the barbershop, C.D. "appeared to be very upset" and she had difficulty talking because she was "really crying over something that had just occurred with her." 2RP 108.

C.D. also described the sexual assault to Officer Shawn Benshoof while at the barbershop. 3RP 3-22. C.D. said that Lewis attempted anal sex, punched her several times, and then forced vaginal intercourse. 2RP 14.

Lewis was still at the apartment when the police arrived, and he gave the officers permission to search the apartment. 2RP 127. During the search, the officers obtained C.D.'s bra at the front of the open closet in Hoyt's bedroom. 2RP 54-67, 132-36. The officers put the bra into evidence. 2RP 132-36. The bed sheet used during the rape, which forensic scientists later concluded contained Lewis's sperm, was also put

into evidence. 2RP 143; 3RP 130. C.D.'s DNA was not found on the bed sheet. 3RP 130-34.

C.D. went to Harborview Medical Center ("HMC") later that evening and consented to a "very unpleasant, embarrassing, and painful" examination. 4RP 54. At HMC, C.D. was interviewed and examined by Melissa Kammenga, a Sexual Assault Nurse Examiner (SANE). 3RP 32-90. C.D. told Kammenga that she had been sexually assaulted. 3RP 40. C.D. said that she was worried about seeing Lewis again, being pregnant, or having contracted a sexually-transmitted disease. 3RP 48. C.D. also informed Kammenga that she was self-medicating for a yeast infection prior to the rape. 3RP 62-63.

During the physical examination, Kammenga noted that C.D.'s outer labia were tender to the touch, and there existed abrasions to other parts of her vagina. 3RP 52, 61. C.D. also suffered from light-headedness, a sore neck, difficulty breathing, abdominal pain, and a large abrasion on her right inner knee. 3RP 52, 69.

C.D. also met with Bethel Spagnolo, a social worker at HMC. 2RP 16-53. C.D. told Spagnolo that she was raped by Lewis and that he hit her in the face and briefly tried to choke her. 2RP 30-31. C.D. was tearful during the interview, frightened of seeing Lewis again, and asked, "why did this happen?" 2RP 25, 30-32. During this discussion, C.D.

wrapped a blanket around herself even though she was fully clothed. 2RP 32.

As advised by police, C.D. later acquired a sexual assault protection order against Lewis. 4RP 60.

b. Victim Impact Testimony

C.D.'s mother testified at trial and described C.D. on the day following the rape as "exhausted. She wasn't sleeping. She had nightmares. It was hard focusing for her." 2RP 96-97. C.D.'s mother further explained that C.D. "is still experiencing [these traumas]. She doesn't shake as much physically . . . but now she chain-smokes . . . she doesn't sleep." Id.

C.D. also testified. 4RP 2-87. She explained that she requested time off from work after the rape and struggled to stay composed when she did finally return to work a few days later because customers started to look like Lewis, causing "her heart [to] stop." 4RP 56-57. C.D. was asked about the impact of the rape on her generally, and she responded:

> I have never been the same. I have isolated myself and I can't keep a job. I have gained weight due to stress and I have gone through so many emotions up and down. I don't know what to do sometimes. Seems like I have 'raped' printed across my shirt.

> I can't do anything. I can't take care of my son and I don't go anywhere. I don't go to the movies or the mall or get my hair done. I don't drive the car. I just don't want anybody to talk to me. I have my brother, mom, and my friends do all the stuff for me. I try to do stuff and I just can't.
>
> I have problems sleeping. I have nightmares that I can't talk or that there is his friend and he said he would hurt me and tell the friends and try to leave it alone.

4RP 57-58. Lewis did not object to the impact testimony provided by C.D. or her mother.

During closing arguments, the State contended that there was no reason for C.D. to put herself through everything that occurred after the rape if what she was saying were not true. 4RP 102, 107-09. In response, and in an attempt to attack C.D.'s credibility, Lewis argued C.D.'s statements about the effects of the rape were not corroborated, and suggested the statements were fabricated by C.D.'s mother:

> Since then [C.D.] has had the psychological issues. The social worker and her own mother work in the rape relief field. She has a psychological background and she knows that someone who has been raped experiences during the months following that, and so we have got still just one source telling us, not only was it rape, but I tried to go to work and I quit my job and I can barely talk can't take care of my own son, my mom has to do it and I'm having nightmares.
> We don't have corroboration of that.

4RP 111-12.

Defense counsel also suggested that, to the extent there were post-rape trauma, these claims were exaggerated:

> Mom says she has nightmares and wakes up. I don't know how many of you are parents, but let me make an extreme example. If a child has a broken leg, if he as a pain in his leg I think all parents, even though they may not be that extreme, they are going to see some injury or harm to their child in a light different from some injury to someone in King County that they that don't even know.
>
> They will expand in their mind, they will see guilt that isn't actually there . . .

4RP 112.

In its rebuttal argument, the State again argued that the post-rape impact on C.D. is evidence that she suffered something traumatic on March 29, 2007. 4RP 125.

c. Trial

During trial, Lewis did not call any witnesses and did not testify. In his closing, Lewis's trial counsel argued that the State did not prove its case beyond a reasonable doubt, maintaining that there existed no corroboration to C.D.'s allegations of rape. The defense suggested that it was more likely that Lewis and C.D. had consensual sex in the apartment. 4RP 113 (suggesting how Lewis and C.D. met at the gas station with the express purpose of having consensual sex); 118 (same). The defense also raised the possibility that no sex occurred between Lewis and C.D.,

pointing out that no semen was found in C.D.'s vagina and that C.D.'s DNA was not found on Lewis's bed sheet. 4RP 116, 119.

C. ARGUMENT

1. LEWIS HAS FAILED TO SHOW THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Lewis contends that his attorney was constitutionally ineffective for failing to object to testimony about how the rape affected C.D. This argument fails. First, Lewis has not demonstrated that his attorney acted deficiently. Second, Lewis has not shown that any allegedly deficient performance prejudiced him.

In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Competency of counsel is determined based on the entire record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

a. Lewis Has Failed To Show That His Trial Counsel Acted Deficiently For Not Objecting To Testimony About The Impact Of The Rape On C.D.

There is a strong presumption that representation is reasonable and scrutiny of counsel's performance under the first prong is highly deferential. State v. Warren, 55 Wn. App. 645, 652-54, 779 P.2d 1159 (1989). "Deficient performance is not shown by matters that go to trial strategy or tactics." State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Further, "only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995).

i. Trial counsel was not deficient for not objecting because the trial court would not have sustained the objection.

The defense attorney did not act deficiently by not objecting because he probably realized that the impact testimony was relevant and

admissible. "'Relevant evidence' means evidence having 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." ER 401.

Testimony about the impact of rape on a victim is relevant evidence *to show that a rape occurred in the first place.* Several years of trauma for C.D. commenced on the afternoon of March 29, 2007, strongly suggests that *something* extremely difficult for C.D. to cope with took place in Lewis's apartment that day. In other words, in this case, where one of the defenses is consent, C.D.'s post-rape behavior corroborates the rape itself. C.D. would not likely have suffered an emotional collapse if she had consented to sex with Lewis. Denying C.D. and her mother the opportunity to describe changes in C.D.'s physical, mental, and emotional state caused by the rape would improperly deny the fact finder of relevant evidence demonstrating that Lewis raped C.D. that afternoon.

State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987), supports the conclusion that C.D.'s impact testimony was admissible. There, the court held that it was inadmissible for an *expert* to testify that the victim suffered from "rape-trauma syndrome" because that testimony constituted a medical diagnosis of defendant's guilt, "in essence, a statement that the defendant is guilty of the crime of rape." Id. at 348-49. The court, albeit

in dicta, went on to note, however, that lay testimony about how a rape affected a victim was clearly admissible:

> We do not imply, of course, that evidence of emotional or psychological trauma suffered by a complainant after an alleged rape is inadmissible in a rape prosecution. *The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.*

Id. at 349 (emphasis added). Under Black, this Court should conclude that the State was "free to offer lay testimony" about how the rape impacted C.D.

Similarly, this testimony was relevant to rebut Lewis's argument that C.D.'s version of the events was not credible. In State v. Gregory, 158 Wn.2d 758, 805-09, 147 P.3d 1201 (2006), for example, the State elicited testimony about the effects of rape and the ensuing trial had on the victim. The prosecutor, in closing argument, argued that the victim would not have subjected herself to a trial just to avenge a broken condom (the defense theory). On appeal, the court rejected Gregory's argument that the testimony improperly appealed to the jury's sympathy, noting that the evidence was appropriate to "rebut Gregory's argument that [the victim's] version of event was not credible." Id. at 809.

The same is true here. Defense counsel argued that C.D.'s version of the events was not credible, suggesting both that no sex occurred, or that it was consensual. The prosecutor argued that the impact testimony

showed that C.D. would not have gone through the entire ordeal if her allegations were not true. See 4RP 102 (prosecutor asking, "Do you doubt for a moment that this young woman, that she would put herself through this if it weren't true?"). Accordingly, as expressed in Gregory, the impact testimony was relevant to rebut any argument that she has fabricated the entire event (the defense theory).[3]

Lewis's counsel cites several cases from other jurisdictions where the courts excluded victim impact testimony during the guilt phase of trial. Br. of App. at 10-12 (citing Clark v. Commonwealth, 833 S.W.2d 793, 796-97 (Ken. 1991); Justice v. State, 775 P.2d 1002, 1010-11 (Wyo. 1989); United States v. Copple, 24 F.3d 535, 545-46, cert. denied, 513 U.S. 989 (3rd Cir. 1994)). However, each of these cases is inapposite. These decisions hinged on the determination that the victim impact testimony was "absolutely irrelevant with respect to the issues before the jury." See Justice, 775 P.2d at 1010.

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[3] Lewis asserts that Gregory is factually distinguishable because the court there was not asked to decide whether the impact testimony was relevant, but was asked to decide whether the testimony and closing argument constituted misconduct by appealing to the passions of the jury. That is a distinction without a difference. The court suggested that the testimony and closing did not constitute misconduct because the evidence was *relevant* to rebut the allegation that the victim's claims were not credible. Further, Lewis asserts that Gregory should not apply because, in Gregory, the defendant testified, but Lewis did not.

In Clark, the defendant, who was charged with murder, admitted on the witness stand that he shot and killed the victim. Clark, 833 S.W.2d at 794. Still, the State, in its closing argument, emphasized to the jury that their verdict will have an enormous impact on the victim's friends and family, and asked the jury to imagine the family "at the scene of the crime, begging 'please don't pull that trigger' and offering money to spare [the victim's] life." Id. at 796-97. None of this argument was relevant to the issue at trial.

In Justice, the defendant was on trial for armed robbery. Justice, 775 P.2d at 1003. The issue was not whether an armed robbery occurred, but whether the defendant was one of the individuals involved. Id. During the trial, the State elicited testimony about how the armed robbery affected the victims' lives after it occurred. Id. at 1010-11.

And in Copple, the defendant was on trial for mail fraud and tax evasion. Copple, 24 F.3d at 538. In that case, it was undisputed that the victims suffered enormous amounts of loss; what was disputed was whether the acts by the defendant constituted a crime. Id. The government elicited testimony explaining how the losses affected the victims, including testimony that the victims lost weight, lost all their savings, and needed the care of a doctor because of the incident. Id. at 545-46.

In all those cases, the courts correctly concluded that the victim-impact testimony was irrelevant because the testimony did not tend to prove a material fact at issue in the trial, but simply inflamed the jury's passions.

Unlike the situations in Clark, Justice, and Copple, the fact that C.D.'s appearance, outlook, demeanor, and emotional state changed radically after the incident was relevant to a material fact — namely, whether a sexual assault had occurred. Further, unlike what occurred in those cases, the prosecutor did not use this information to inflame the passions of the jury, but to show that something traumatic happened to C.D. that day at Lewis's house and to rebut the argument that her allegations were not credible. See 4RP 125 (prosecutor stating in closing arguments that the impact testimony was "evidence that [C.D.] suffered something traumatic"). In this case, an issue was whether she was raped in the first place (as opposed to an issue of identity), and her demeanor after the incident was relevant to show that she had suffered a sexual assault.

In summary, if Lewis had objected to the impact testimony at trial, the trial court would have been well within its discretion to overrule the objection and admit the victim impact testimony. Accordingly, defense

counsel did not provide deficient performance by failing to object to this admissible testimony.

ii. Trial counsel was not deficient for not objecting because legitimate tactical reasons existed not to object.

There were legitimate and strategic reasons not to object to the impact testimony. *First*, defense counsel may have reasonably decided not to object to admissible evidence so as not to call undo attention to the testimony. In Personal Restraint of Davis, 152 Wn.2d 647, 713-14, 101 P.3d 1 (2004), is directly on point. There, the defendant was charged with aggravated first degree murder, and the State, without objection, elicited testimony that the victim's husband was "distraught" about his wife's death and that his "existing poor medical condition worsened" after his wife was killed and that he died within a year. Id. at 713. Davis argued that his counsel was ineffective for not objecting to this testimony. Id. at 713. The Washington Supreme Court rejected the argument. The court held that defense counsel's decision not to object could be characterized as legitimate trial strategy because counsel "may not have wanted to risk emphasizing the testimony with an objection." Id. at 714; see also State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993) ("[T]rial counsel decided not to ask for a limiting instruction as a trial tactic so as not to

reemphasize this very damaging evidence."). This Court should reach the same conclusion. Like the attorney in Davis, Lewis's attorney may not have wanted to risk emphasizing the testimony of C.D. and her mother by objecting to the limited impact testimony during trial. This is especially true here, considering that, as explained above, the objection likely would have been overruled. See supra, pgs. 12-18.

Lewis argues that Davis is inapposite because Lewis's attorney addressed the impact testimony during his closing arguments. Lewis's attempt to distinguish Davis fails. Simply because Lewis's trial counsel felt it necessary to address the post-rape impact testimony in closing arguments does not preclude the possibility that his attorney may have sought to avoid bringing attention to the testimony at an earlier stage of the trial. And, although Lewis's attorney briefly mentioned the impact testimony during his closing, he probably felt this was necessary to rebut any assertion that the post-rape impact on C.D. was evidence that a rape occurred in the first place, an argument the prosecutor made in rebuttal. Put simply, for many reasons, Lewis's counsel may not have wanted to emphasize this testimony during trial, and, under In re Davis, this was an appropriate tactical choice.

Second, Lewis's trial attorney may have strategically decided to allow C.D. and her mother to provide impact testimony as a means to

impeach their credibility. This defense counsel attacked the credibility of C.D. and, to a lesser extent, that of C.D.'s mother. If the defense could show that either C.D. or her mother were not credible regarding *any* of the events or ensuing impact, this would increase the chance that the jury would find them not credible on the rest of their testimony, including whether a rape occurred. The impact testimony was a reasonable opportunity for impeachment considering that the State presented no evidence corroborating any of C.D.'s claims about how the incident affected her.

Indeed, this was the exact strategy employed by Lewis's counsel. During closing arguments, Lewis's counsel explained how the impact testimony could easily have been fabricated because C.D.'s mother, who has a psychology background, knows about "what someone who has been raped experiences during the months following." 4RP 111. To further suggest fabrication, Lewis's counsel emphasized how there was no iota of evidence that corroborated C.D.'s claims about the impact of the incident. 4RP 112. In short, allowing C.D. and her mother to testify about the alleged impact the incident had on C.D.'s life was necessary for Lewis to develop this opportunity to attack their credibility.

Under the facts of this case, Lewis has not demonstrated his decision not to object to the impact testimony was an "egregious

circumstance" that constitutes deficient performance. See Madison, 53 Wn. App. at 754.

b. Lewis Has Failed To Show That Any Alleged Deficiency Resulted in Prejudice.

Prejudice occurs if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. In re Davis, 152 Wn.2d at 672-73; McFarland, 127 Wn.2d at 335. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice based on the fact that a defendant's attorney did not object to certain testimony, a defendant must show that (1) had the objection been made it likely would have been granted, and (2) if the objection was sustained there was a reasonable probability the outcome would have been different. Warren, 55 Wn. App. at 653-54. Lewis does not meet either of these necessary requirements.

First, Lewis has failed to show that had the objection to the impact testimony been made, the objection likely would have been granted. For the reasons explained above, the impact testimony was entirely admissible, and the court would not have excluded this testimony.

Second, Lewis has failed to prove the jury likely would have acquitted without the impact testimony. The evidence against Lewis was overwhelming. C.D.'s account of March 29, 2007 is essentially consistent with the testimony from everyone she spoke to after the rape, including her mother, the nurse, the social worker, and her friend Jewleon Bruce. 2RP 16-53, 73-104, 150-66; 3RP 32-90; 4RP 2-87. Medical evidence corroborates her account. She suffered from light-headedness, a sore neck, difficulty breathing, abdominal pain, a large abrasion to her right inner knee, and abrasions and tenderness on her vagina. 3RP 52, 69. The officers discovered a bra in the apartment, showing that her clothes were off when the incident occurred and corroborates her claim that Lewis kept the bra to coerce her to return. 2RP 54-67, 132-36; 4RP 45-46. Further, the testimony showed that Lewis brought C.D. up to the apartment he shared with Hoyt at a time when Lewis knew he was not allowed to bring anyone there. 3RP 24-25; 4RP 106-07. Additionally, during trial, everyone who was asked about C.D.'s demeanor on March 29, 2007, testified that C.D. was crying, upset, emotional, angry, or scared shortly after the rape. 2RP 89, 96-97, 108-09, 152; 3RP 7, 48, 47-48.

Finally, C.D. had absolutely no motive to fabricate these allegations of sexual assault and repeat them to strangers, a process that only exacerbated her shame and humiliation. 4RP 107-08.

Under the facts of this case, Lewis fails to show any prejudice from any alleged deficient performance because Lewis would have been found guilty even if the impact testimony were excluded.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Lewis's conviction for Rape in the Second Degree.

DATED this 21st day of August, 2009.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 35815
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, attorney for the appellant, at Nielsen, Broman, & Koch, PLLC, 1908 East Madison, Seattle, WA 98122, containing a copy of the Brief of Respondent, in State v. James Lewis, Cause No. 62305-2-I, in the Court of Appeals, Division I. of the State of Washington.

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

UBrame
Name

8/21/09
Date

Done in Seattle, Washington

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