

NO. 67655-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

DUSTY GRANDLUND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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2012 MAR 13 PM 4:52

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

29

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT 5

 1. The State presented insufficient evidence to convict Mr. Grandlund of second-degree rape 5

 a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. 5

 b. The State failed to prove K.C. was incapable of consent by reason of being physically helpless..... 6

 c. The remedy is reversal and dismissal of the second-degree rape conviction..... 9

 2. Mr. Grandlund was deprived of this Sixth Amendment right to the effective assistance of counsel because his attorney elicited evidence supporting a ‘reasonable belief’ defense but failed to argue the defense applied..... 10

 a. Mr. Grandlund had a constitutional right to the effective assistance of counsel 10

 b. Defense counsel’s performance was deficient because he elicited testimony supporting the ‘reasonable belief’ defense but failed to argue the defense applied 12

 c. The deficient performance prejudiced Mr. Grandlund, because it is reasonably probable the factfinder would have concluded Mr. Grandlund proved the ‘reasonable belief’ defense had it been presented 16

E. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989)..... 5

State v. DeVries, 149 Wn.2d 842, 72 P.3d 748 (2003)..... 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 5

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 10

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 10, 12

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)..... 13

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1998) 11

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)..... 12

Washington Court of Appeals Decisions

In re the Personal Restraint of Hubert, 138 Wn. App. 924, 158 P.3d 1282
(2007)..... 12, 13, 16

State v. Bucknell, 144 Wn. App. 524, 193 P.3d 1078 (2008)..... 6, 8

State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009)..... 13, 14, 15, 16

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990) 9

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005)..... 6

United States Supreme Court Decisions

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87
L.Ed.2d 268 (1942)..... 11

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435
(2000)..... 5

<u>In re Winship</u> , 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	5
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970)..	5
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).....	10
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).....	11
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	10, 11, 12
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	10, 11
<u>Wiggins v. Smith</u> , 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)	11, 12

Decisions of Other Jurisdictions

<u>Bullington v. State</u> , 616 So.2d 1036 (Fla.Dist.Ct.App. 1993)	8
<u>People v. Huure</u> , 603 N.Y.S.2d 179, 193 A.D.2d 305 (1993), <u>aff'd</u> 84 N.Y.2d 930, 621 N.Y.S.2d 511, 645 N.E.2d 1210 (1994).....	8

Constitutional Provisions

Const. art. I, § 22.....	10
Const. art. I, § 3.....	5
U.S. Const. amend. VI	2, 10
U.S. Const. amend. XIV	5

Statutes

RCW 9A.44.010.....	6
--------------------	---

RCW 9A.44.030.....	12
RCW 9A.44.050.....	6, 8

A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove Mr. Grandlund committed second-degree rape.
2. In the absence of substantial evidence, the trial court erred in finding that D.L. observed that K.C. “appeared drunk.” CP 43 (Finding of Fact 15).
3. The trial court erred in finding, “At the time the defendant engaged in sexual intercourse with K.C., she was incapable of consent by reason of being physically helpless.” CP 45 (Finding of Fact 34).
4. The trial court erred in concluding Mr. Grandlund was guilty of second-degree rape as charged in count II. CP 45 (Conclusion of Law 3).
5. Mr. Grandlund was deprived of his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In order to prove second-degree rape as charged, the State was required to show beyond a reasonable doubt that the alleged victim was incapable of consent by reason of being physically helpless. This Court has recognized insufficient evidence supported convictions under this prong where an alleged victim was immobile from the chest down but could understand and speak, and where an alleged victim was profoundly mentally retarded but could grunt and mumble. Here, the State presented

evidence that the alleged victim was intoxicated, felt numb, and slurred her speech, but the alleged victim successfully rebuffed Mr. Grandlund's initial advances and she had conversations with him which she remembered and recounted at trial. Did the State fail to prove beyond a reasonable doubt that the alleged victim was incapable of consent by reason of being physically helpless, requiring dismissal of the conviction on count two?

2. A defendant is deprived of his Sixth Amendment right to the effective assistance of counsel where his attorney fails to advance a defense authorized by statute and supported by the evidence. It is a defense to second-degree rape as charged in this case that the defendant reasonably believed the alleged victim was not physically helpless. Mr. Grandlund's attorney did not argue the "reasonable belief" defense even though State's witnesses testified that the alleged victim seemed only "a little" drunk right before the incident in question and only "a little" out of it afterward. Was Mr. Grandlund deprived of his constitutional right to the effective assistance of counsel, requiring reversal and remand for a new trial on count two?

C. STATEMENT OF THE CASE

On January 8, 2011, 15-year-old K.C. asked her friends D.L. and S.G. if she could spend the night with them. The girls said she could after consulting with their father, Dusty Grandlund. 7/11/11 RP 48.

After the three girls worked and played on their computers, D.L. went to bed early while S.G. and K.C. stayed up late having a snowball fight. 7/11/11 RP 51, 55-56, 183. S.G. went to bed around 5:00 a.m., and K.C. resumed her computer use. 7/11/11 RP 56. Mr. Grandlund asked K.C. to help him copy computer files. 7/11/11 RP 61. While she was working on the computer, Mr. Grandlund gave her alcoholic beverages. 7/11/11 RP 65.

Around 6:00 a.m. D.L. got up to let her dog out. 7/11/11 RP 186. She encountered Mr. Grandlund and K.C. in the kitchen, and talked with them for a while. 7/11/11 RP 187-94. She thought her father appeared to have drunk a lot of alcohol while K.C. appeared only “a little bit” like she had been drinking. 7/11/11 RP 194-95.

According to K.C., after D.L. went back to bed Mr. Grandlund put K.C.’s hand on his penis. 7/11/11 RP 77. K.C. moved away and went to the living room and sat on the couch. 7/11/11 RP 78. They conversed for a while and Mr. Grandlund again put K.C.’s hand on his penis. 7/11/11 RP 80-81. K.C. stood up and walked toward the girls’ bedroom. Mr.

Grandlund stopped her in the hallway and digitally penetrated her.

7/11/11 RP 82. He then led her into his bedroom, and said, "let me show you how it's done." 7/11/11 RP 90.

According to K.C., Mr. Grandlund gave her oral sex and then put a condom on and had intercourse with her. 7/11/11 RP 90-94. She passed out, and later woke up on the bathroom floor. 7/11/11 RP 95-96. D.L. found her in the bathroom, and noticed that she was "a little out of it." 7/11/11 RP 197-99. After K.C. went home, she told her sister-in-law what had happened. 7/11/11 RP 114.

The State charged Mr. Grandlund with one count of third-degree rape of a child, and one count of second-degree rape. The latter count was based on an allegation that K.C. was incapable of consent by reason of being physically helpless. CP 76.

Mr. Grandlund waived his right to a jury trial and was convicted of both counts after a bench trial. CP 42-45. The court vacated the conviction on count one, third-degree rape of a child, to avoid a double-jeopardy violation. CP 25; 7/14/11 RP 101. Mr. Grandlund was sentenced to a minimum of 90 months and a maximum of life in prison. CP 28. He timely appeals. CP 3-20.

D. ARGUMENT

1. **The State presented insufficient evidence to convict Mr. Grandlund of second-degree rape.**

- a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748

(2003) (internal citations omitted). “[I]t is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned.” Id.

In reviewing a conviction following a bench trial, this Court evaluates whether substantial evidence supports each finding of fact. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Whether the properly entered findings support the conclusion of guilt is a question of law reviewed de novo. Id.

b. The State failed to prove K.C. was incapable of consent by reason of being physically helpless.

The State charged Mr. Grandlund with second-degree rape, alleging that he “did engage in sexual intercourse with K.C. (DOB: 2/18/95), when K.C. was incapable of consent by reason of being physically helpless; proscribed by RCW 9A.44.050(1)(b), a felony.” CP 76.

“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). “[A] victim with physical limitations but capable of communicating unwillingness is not deemed physically helpless under the Washington statute.” State v. Bucknell, 144 Wn. App. 524, 529, 193 P.3d 1078 (2008).

In this case the State failed to prove beyond a reasonable doubt that K.C. was incapable of consent by reason of being physically helpless. The trial court therefore erred in concluding Mr. Grandlund was guilty as charged in count two. Although K.C. testified that she imbibed a lot of alcohol and was “really drunk,” she successfully rebuffed Mr. Grandlund’s initial advances. 7/11/11 RP 77-82. When they were in the kitchen and he put her hand on his penis, she moved away from him and sat on the couch. 7/11/11 RP 77-80. When he joined her on the couch and again put her hand on his penis, she moved to the other side of the couch. 7/11/11 RP 81-82.

K.C. testified that when they were sitting on the couch talking, she was too drunk to understand what he was saying. 7/11/11 RP 80. Yet she proceeded to recount their conversation, stating that he told her he had liked her for a long time and that he had not had sex in six years. 7/11/11 RP 81.

She testified that Mr. Grandlund took her into his bedroom and she lay back on the bed because she felt unstable. 7/11/11 RP 89. She remembered he told her, “let me show you how it’s done.” 7/11/11 RP 90. She said she felt numb and could not push him off of her, 7/11/11 RP 91, but this is not the definition of “incapable of consent by reason of being physically helpless.” In Bucknell, for example, the victim had Lou

Gehrig's disease and was bedridden and unable to move from her chest down. Bucknell, 144 Wn. App. at 529. This Court held that because the victim was able to talk and understand and perceive information, she was not "physically helpless" for purposes of RCW 9A.44.050(1)(b). Id. at 529-30.

K.C. testified that her speech was slurred and that when she talked she mumbled and "could not even understand" herself. 7/11/11 RP 85, 156. But this condition did not render her incapable of consent by reason of being physically helpless. See id. at 529 (citing People v. Huure, 603 N.Y.S.2d 179, 182, 193 A.D.2d 305 (1993), aff'd 84 N.Y.2d 930, 621 N.Y.S.2d 511, 645 N.E.2d 1210 (1994) (stating that a profoundly mentally retarded woman who could grunt and mumble was not "physically helpless")).

Finally, K.C. testified that while she and Mr. Grandlund were having sex, she blacked out. 7/11/11 RP 95. But the State did not prove beyond a reasonable doubt that Mr. Grandlund continued to have sex with her after this point. See Bullington v. State, 616 So.2d 1036, 1038 (Fla. Dist. Ct. App. 1993) (cited in Bucknell, 144 Wn. App. at 529) (although alleged victim testified she passed out for a period of time during the sexual episode, reversal required because State did not present evidence that she was violated during this period of unconsciousness).

Although K.C. testified that she drank a lot, other evidence indicated that she was not so drunk as to be incapable of consent by reason of being physically helpless. First, as mentioned above, K.C. testified that she conversed with Mr. Grandlund, understood and remembered his statements, and moved away from him twice when he initiated sexual contact. 7/11/11 RP 77-82. Second, she testified that she successfully copied hundreds of computer files while she was drinking, shortly before the alleged rape. 7/11/11 RP 136. Third, D.L. testified that shortly before the alleged rape, K.C. appeared only “a little bit” like she had been drinking and that when K.C. was in the bathroom after the alleged rape she seemed only “a little” out of it. 7/11/11 RP 194, 199. Thus, although the State certainly presented evidence that K.C. drank a lot and was not feeling well, it did not present sufficient evidence to prove beyond a reasonable doubt that she was incapable of consent by virtue of being physically helpless.

c. The remedy is reversal and dismissal of the second-degree rape conviction.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Mr. Grandlund committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of

the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the conviction for second-degree rape based upon the State's failure to prove an element of the crime.

2. Mr. Grandlund was deprived of this Sixth Amendment right to the effective assistance of counsel because his attorney elicited evidence supporting a “reasonable belief” defense but failed to argue the defense applied.

a. Mr. Grandlund had a constitutional right to the effective assistance of counsel.

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)

(quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”) (quoting Strickland, 466 U.S. at 688). While an attorney's decisions are

treated with deference, his or her actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. Thomas, 109 Wn.2d at 226.

- b. Defense counsel's performance was deficient because he elicited testimony supporting the "reasonable belief" defense but failed to argue the defense applied.

"Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, counsel's performance is deficient." In re the Personal Restraint of Hubert, 138 Wn. App. 924, 926, 158 P.3d 1282 (2007). It is a defense to second-degree rape as charged in this case that "at the time of the offense the defendant reasonably believed that the victim was not ... physically helpless." RCW 9A.44.030(1). The defendant bears the burden of proving the defense by a preponderance of the evidence. Id.

Mr. Grandlund's attorney elicited evidence supporting this "reasonable belief" defense, yet failed to argue to the judge that the defense applied. Indeed, it appears Mr. Grandlund's attorney was unaware of the defense. But "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

This Court granted relief in similar circumstances in both Hubert and State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009). In Hubert, the alleged victim had spent the night drinking at several bars, then took the defendant home with her where the two smoked marijuana and drank beer. Hubert, 138 Wn. App. at 926. The woman went to bed and her roommate invited the defendant to sleep on their couch. Id. The defendant later entered the alleged victim's room and initiated a sexual encounter. Id.

The State charged Hubert with second-degree rape under the "physically helpless" prong, but he testified that he did not have sex with the woman because before he could penetrate her, she jumped up and said she was too drunk and had a boyfriend. Id. at 927. The defendant testified he believed the woman was awake during the entire incident. Id. at 929. She, in contrast, testified that she was asleep and awoke to find her clothing removed and Hubert penetrating her. Id. at 927.

Despite this evidence, defense counsel was unfamiliar with the law and therefore did not raise or argue the “reasonable belief” defense and did not request a jury instruction on the defense. Id. at 930. This Court held, “[c]ounsel’s failure to discover and advance the defense was plainly deficient performance.” Id.

Similarly, in Powell, defense counsel failed to propose an instruction on the “reasonable belief” defense in the face of a second-degree rape charge. Powell, 150 Wn. App. at 142. The alleged victim spent the day in Seattle drinking and smoking marijuana, then boarded a ferry for Bremerton. Id. She knew she was drunk, but was aware of her location and was able to carry on a conversation despite possibly slurring her words. Id. She then blacked out, and the next thing she knew she woke up in a motel room where a stranger, Powell, was having sex with her. Id. at 142-43. She pretended to enjoy it while she tried to figure out what had happened and how to escape. Id. at 143.

The motel manager testified that the alleged victim looked “like a zombie or something” when she and Powell checked in, but she did not appear to be drunk. Id. at 145. A half an hour later, right after the alleged incident, the manager said the alleged victim smelled like alcohol and did not appear to know where she was. Id.

The defendant told detectives that he met the woman on the ferry, where she appeared “so incapacitated” that ferry personnel were intervening. Id. at 146. He offered to “take her and help her,” and he took her to a motel where, according to him, she willingly had sex with him despite being “very, very incapacitated.” Id.

In closing arguments, defense counsel argued that the evidence demonstrated the alleged victim was not physically helpless. Counsel emphasized that the alleged victim was not so intoxicated that she was unable to board the ferry, and that the motel manager testified that she did not initially appear to be intoxicated. Id. at 152. However, counsel did not argue a “reasonable belief” defense or propose the relevant jury instruction. Id. As in Hubert, this Court held the failure constituted deficient performance. Id. at 154-55.

As in the above cases, counsel’s failure to argue the “reasonable belief” defense in Mr. Grandlund’s case constituted deficient performance. Counsel did argue that the State failed to prove K.C. was physically helpless, but reasonably competent counsel would also have argued that regardless of K.C.’s actual physical state, Mr. Grandlund reasonably believed she was not physically helpless. See Powell, 150 Wn. App. at 158 n.12. The evidence clearly supported the defense, as D.L. testified that K.C. appeared only “a little” drunk right before the incident and “a

little” out of it after the incident. The failure to argue the “reasonable belief” defense constituted deficient performance. Powell, 150 Wn. App. at 154-55; Hubert, 138 Wn. App. at 930.

- c. The deficient performance prejudiced Mr. Grandlund, because it is reasonably probable the factfinder would have concluded Mr. Grandlund proved the “reasonable belief” defense had it been presented.

Given the evidence presented, had defense counsel argued Mr. Grandlund reasonably believed K.C. was not physically helpless, the court may well have found Mr. Grandlund not guilty on count two. But because the attorney did not argue that the “reasonable belief” defense applied, the judge had no way of acquitting Mr. Grandlund even if he thought Mr. Grandlund reasonably believed K.C. was not physically helpless. Powell, 150 Wn. App. at 156. “Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” Hubert, 138 Wn. App. at 932. The remedy is reversal and remand for a new trial. Powell, 150 Wn. App. at 158.

E. CONCLUSION

Because the State presented insufficient evidence to prove Mr. Grandlund committed second-degree rape, this Court should reverse the conviction and dismiss the charge with prejudice. In the alternative, because Mr. Grandlund was deprived of the effective assistance of counsel, this Court should reverse the conviction and remand for a new trial.

DATED this 12th day of March, 2012.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67655-5-I
)	
DUSTY GRANDLUND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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