

70667-5

70667-5

NO. 70667-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RUBEN AYON-ROSALES,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court was correct in declining to give a unanimity instruction because Ayon-Rosales's oral and vaginal rape of the victim occurred in the same place at the same time, and thus, constituted a continuing course of conduct.

2. Whether the victim's boyfriend's testimony constituted an improper opinion on Ayon-Rosales's guilt when the testimony in question was merely a description of his first-hand observations, and when any possible error is harmless in light of the evidence and the record as a whole.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Ruben Ayon-Rosales, with one count of rape in the second degree for sexually assaulting M., his ex-girlfriend, on September 23, 2011. CP 1-7. A jury trial on this charge occurred in January 2013 before the Honorable William Downing.

When the parties and the trial court were discussing the jury instructions, defense counsel asked why the trial court was not

going to give the jury a unanimity instruction, given that there were “two potential acts of sexual intercourse” based on evidence of both oral penetration and vaginal penetration. RP (1/21/13) 357. In response, the trial court stated that the alternative statutory definitions of “sexual intercourse” constituted alternative means of committing the crime, and the jury did not need to be unanimous as to the means by which the crime was committed.¹ In addition, the trial court stated that the “continuous course of conduct exception” applied in this case based on the evidence. RP (1/31/13) 357.

The jury convicted Ayon-Rosales of second-degree rape as charged, and also found that the crime involved domestic violence. CP 124-25. Ayon-Rosales pleaded guilty to rape in the third degree in an unrelated case, and the trial court imposed a sentence of 110 months to life in prison. RP (7/17/13) 22-24, 24; CP 128-48. Ayon-Rosales now appeals. CP 150-69.

2. SUBSTANTIVE FACTS

M. began dating Ayon-Rosales in Mexico when she was 16 years old. RP (1/30/13) 274. Although they were in a relationship

¹ As will be discussed below, this analysis is incorrect.

for six years and had a daughter who died at birth, M.'s parents never knew they were dating. RP (1/30/13) 274-75. Ayon-Rosales left Mexico, came to the United States, settled in Seattle, and eventually paid M.'s way to come to Seattle as well. RP (1/30/13) 275-76; RP (1/31/13) 317. M. was pregnant with someone else's child when she arrived; Ayon-Rosales forced her to have an abortion. RP (1/31/13) 338. Ayon-Rosales helped M. fill out employment forms so that she could get a job at McDonald's. M. admitted that she submitted false documentation and used a false Social Security number in order to get the job at McDonald's because she "needed the work." RP (1/31/13) 331-32, 352.

M. lived with Ayon-Rosales in multiple locations in the Seattle area before they moved into a very small studio apartment at 107 Cherry Street. RP (1/30/13) 276-77. Both of them contributed to a down payment on a car. RP (1/31/13) 317-18. Shortly after they bought the car, Ayon-Rosales was picked up by immigration authorities, detained, and deported to Mexico. RP (1/30/13) 231; RP (1/31/13) 320.

M. met Brandon Gregory at around the time that Ayon-Rosales was detained by immigration authorities² and they began dating. RP (1/20/13) 217. M. and Gregory continued to make payments on the car, and they picked it up from Ayon-Rosales's mother's house so that Gregory could drive it. RP (1/30/13) 232, 240-41.

In the meantime, Ayon-Rosales returned to Seattle from Mexico. On September 23, 2011, he called M. and asked her if he could come to the studio apartment to pick up some of his belongings. M. agreed to meet him there, but told him that he needed to hurry because she needed to go to work at 4:00 p.m. RP (1/31/13) 292-93. Ayon-Rosales showed up at approximately 2:40 p.m. M. let him into the building. He asked M. if she was happy, but she did not answer. RP (1/31/13) 294.

M. opened the door to the apartment and stood in the doorway because she was afraid to be alone with Ayon-Rosales

² Gregory testified on cross-examination that Ayon-Rosales "was in the Seattle jail" when he started staying overnight with M. The trial court overruled defense counsel's objection and motion to strike this testimony because it was directly responsive to her question to Gregory. RP (1/30/13) 231; RP (1/31/13) 287-88. This was the only testimony for which defense counsel asked for any remedial measures; she asked the court to read a stipulation that Ayon-Rosales was in detention for immigration issues as opposed to a criminal offense. RP (1/31/13) 287-89. That turned out to be unnecessary, because M. testified that Ayon-Rosales was detained by immigration. RP (1/31/13) 320.

inside the apartment. He coaxed her to come inside, and then he told her that he wanted the car keys. RP (1/31/13) 295. M. was paying for the car and did not want to give him the keys, so she told him to come to McDonald's to get the keys from a friend. RP (1/31/13) 295-96. They started arguing, and Ayon-Rosales punched M. in the mouth with a closed fist when she told him that she would not give him the keys. RP (1/31/13) 297. He then went to the stereo and turned up the music so that no one would hear her. RP (1/31/13) 298.

Ayon-Rosales accused M. of being pregnant and punched her in the stomach several times. RP (1/31/13) 298-99. He told her that if she "wasn't with him, [she] wouldn't be with anyone else." RP (1/31/13) 299. M. told Ayon-Rosales that she would get back together with him so that he would stop hitting her. He told her clean herself up, so she took a shower. RP (1/31/13) 299-300.

When M. got out of the shower, Ayon-Rosales would not allow her to get dressed. RP (1/31/13) 301. He grabbed her by the hair, showed her a butter knife he had taken from the kitchen, and told her she "would die" if he cut her. RP (1/31/13) 302. He demanded oral sex, pulled down his pants, grabbed her head, and forced her to put his penis in her mouth. RP (1/31/13) 301-02.

M. told him that she could not perform oral sex because her mouth was too swollen and painful from him punching her. RP (1/31/13) 302. In response, he pushed her down on the couch and ordered her to spread her legs. M. told him she did not want to, but he had vaginal intercourse with her anyway. RP (1/31/13) 303-04. He also hit her in the face again. RP (1/31/13) 305.

When Ayon-Rosales was finished raping M., he gave her a hug and asked her to forgive him. He told her that he was going to take her away with him. RP (1/31/13) 306. M. begged him to let her see her family one last time. When Ayon-Rosales asked her if Gregory had a key to the apartment, M. lied and said that he did not. RP (1/31/13) 307.

Gregory had that day off from work, and he had planned to go to Alki Beach with some friends. He stopped by M.'s apartment to pick up a bag that he had left there. RP (1/30/13) 190-91. When Gregory unlocked the apartment door, the lights were off, music was playing, and Ayon-Rosales and M. were both naked. RP (1/30/13) 193, 95-96. Gregory initially thought that he had "caught them in the act," but then he saw that M. was crying, had a swollen lip, and "looked like she was hit in the eye." M. looked at Gregory and said, "Help me." RP (1/30/13) 193, 197, 199.

Gregory thought about fighting Ayon-Rosales, but then told him that he was calling the police. RP (1/30/13) 199. Gregory told M. to come to him to get her away from Ayon-Rosales. RP (1/30/13) 199-20. Ayon-Rosales put his clothes on, took M.'s phone and bank card, and tried to run away. Ayon-Rosales "started laughing like it was funny," "like it was a joke." RP (1/30/13) 200. Gregory ran after him, caught him in the elevator, and tried to "pin him down" and hold him for the police. RP (1/30/13) 200-01. Ayon-Rosales told Gregory that "if you touch me, you know, you will get arrested." Gregory responded that Ayon-Rosales had "just committed like rape."³ RP (1/30/13) 201-02. Gregory managed to get Ayon-Rosales's arms pinned behind him, but he tripped on the stairs when they got off the elevator and Ayon-Rosales got away. Gregory went back to the apartment to be with M. RP (1/30/13) 303. When asked how the incident was traumatic for him, Gregory said, "Well, because it was the first time ever someone got raped in front of me."⁴ RP (1/30/13) 238.

³ There was no objection to this testimony.

⁴ Defense counsel objected to this testimony, but did not move to strike it and no curative instruction or other remedial measures were requested. The prosecutor stated that he would "move on." RP (1/30/13) 238.

While Gregory was chasing Ayon-Rosales, M. went to her neighbor's apartment to use the telephone. Neighbor Anya Fortygin heard a soft knock on the door, looked through the peephole, and recognized M. Fortygin noted that M. had a bloody lip, a puffy face, and disheveled hair and clothing. She also looked like she had been crying. RP (1/29/13) 89-90. Fortygin also noted that M. was "very terrified and very scared[.]" RP (1/29/31) 90. M. told Fortygin that she needed to use the phone to cancel her bank card, which struck Fortygin as odd. RP (1/29/31) 91-92. Fortygin's friend Olesya Kryvoruchko noticed that M.'s hands were shaking and her voice was trembling as she attempted to call the bank. RP (1/29/31) 106-07. When M. was unsuccessful in completing the call, Fortygin gave her a glass of water and asked her what had happened. RP (1/29/13) 94. M. said that her ex-boyfriend had assaulted and raped her in her apartment, and that he had "locked her up" "for a couple of hours." At that point, Fortygin called 911. RP (1/29/13) 96.

Police officers and fire department personnel responded, and M. was transported to Harborview. RP (1/29/13) 70-74; RP (1/30/13) 174-77. Officers collected evidence at the scene, including the butter knife, and noted what appeared to be blood

stains on the futon couch. RP (1/30/13) 181-82. At Harborview, medical personnel treated M. for her injuries; her mouth was so swollen that when she tried to drink water through a straw, “the water dribbled down her face.” RP (1/29/13) 120.

Swabs collected during M.’s sexual assault examination were tested for DNA at the Washington State Patrol Crime Laboratory. The results revealed a mixed profile consistent with M.’s and Ayon-Rosales’s DNA. RP (1/30/13) 257, 262-65. The random match probability from the mixed profile was calculated to be one in 150 trillion. RP (1/30/13) 266.

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT AYON-ROSALES’S CRIME WAS A CONTINUING COURSE OF CONDUCT, AND THUS, NO UNANIMITY INSTRUCTION WAS REQUIRED.

Ayon-Rosales first claims that his right to a unanimous jury was violated because he committed multiple rapes, but the trial court did not give a unanimity instruction. Brief of Appellant, at 6-16. This claim should be rejected. The trial court correctly ruled that Ayon-Rosales engaged in a continuing course of conduct

rather than multiple discrete acts of rape. Accordingly, no unanimity instruction was required, and this Court should affirm.

As a preliminary matter, Ayon-Rosales is correct that the trial court erred in ruling that the alternative definitions of “sexual intercourse” constitute alternative means of committing the crime of rape, and thus, the jury need not be unanimous as to the means by which the crime was committed. Brief of Appellant, at 9-10. Definitional instructions do not create alternative means of committing a crime. See, e.g., State v. Smith, 159 Wn.2d 778, 784-88, 154 P.3d 873 (2007) (definitional instruction for “assault” is merely descriptive; the three definitions contained in that instruction do not constitute alternative means of committing assault); State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002) (alternative definitions of “theft” do not “create additional alternative means of committing an offense”). However, the trial court was correct that Ayon-Rosales engaged in a continuing course of conduct; therefore, the trial court’s error is of no significance on appeal. State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992) (“A trial court may be affirmed on any basis supported by the record and the law.”).

A criminal defendant may be convicted of a crime only when a unanimous jury concludes that the defendant committed the act charged in the information. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the evidence proves multiple discrete acts of similar misconduct, any one of which could support a conviction for the crime charged, either the trial court must instruct the jurors that they must agree on the same underlying act beyond a reasonable doubt or the State must elect which act it is relying upon as the basis for the charge. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); Kitchen, 110 Wn.2d at 409. When there has been neither a unanimity instruction nor an election by the State in a multiple acts case, the defendant's right to a unanimous jury is violated. Coleman, 159 Wn.2d at 512; Kitchen, 110 Wn.2d at 409.

But when the evidence proves a continuing course of conduct rather than multiple discrete acts, neither a unanimity instruction nor an election is required. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing State v. Petrich, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)). To determine whether a defendant engaged in a continuing course of conduct rather than multiple acts, the facts of the case must be evaluated in a

commonsense manner. Petrich, 101 Wn.2d at 571. When the conduct occurs in one location within the same time frame against the same victim, a commonsense approach strongly suggests that the defendant has engaged in a continuing course of conduct rather than a series of discrete acts. See, e.g., Handran, 113 Wn.2d at 17 (defendant's acts of kissing the victim and hitting the victim were a continuing course of conduct; acts occurred "in one place during a short period of time between the same aggressor and victim"); State v. Fiallo-Lopez, 78 Wn. App. 717, 724-25, 899 P.2d 1294 (1995) (two deliveries of cocaine to the same buyer within a short time frame constituted a single transaction rather than multiple crimes); State v. Craven, 69 Wn. App. 581, 587, 849 P.2d 681, rev. denied, 122 Wn.2d 1019 (1993) (no unanimity instruction required where child's injuries "strongly indicated that he had been subjected to continuing assaults" over the course of the charging period).

For example, in State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991), the Washington Supreme Court applied this principle in a case where the defendant was convicted of second-degree felony murder in the death of his 3-year-old nephew. The evidence presented at trial showed that the boy suffered multiple assaults at

the hands of the defendant in a 2-hour time frame, during which the fatal injuries were inflicted. Crane, 116 Wn.2d at 330. In rejecting the Court of Appeals' conclusion that Crane's right to jury unanimity was violated, the Crane court concluded that "a continuous course of conduct analysis is better suited to the evidence presented." Id.

This principle has also been applied in rape cases where the same victim is subjected to multiple acts of penetration within the same time frame. For example, in People v. Mota, 115 Cal. App. 3d 227, 171 Cal. Rptr. 212 (1981) (which is cited with approval in Petrich, 101 Wn.2d at 570-71), the victim was subjected to "continuous multiple acts of forced sexual intercourse" with the defendant and two other perpetrators over the course of an hour or more in the back of a van driven by an accomplice. Mota, 115 Cal. App. 3d at 230, 171 Cal. Rptr. at 214. Like Ayon-Rosales, defendant Mota argued that his right to a unanimous jury was violated because there were multiple acts of penetration by each perpetrator, but only one rape charge filed against each perpetrator. In rejecting this argument, the California appellate court agreed with the trial judge that the defendant "could be properly charged with one count of rape, even though it was alleged that he had assaulted the victim three or four times . . .

over a short period of time.” Mota, 115 Cal. App. 3d at 233, 171 Cal. Rptr. at 215 (alteration in original).

Appellate courts in other jurisdictions have reached similar conclusions in rejecting defendants' claims that multiple acts of rape had occurred. See, e.g., Commonwealth v. Thatch, 39 Mass. App. Ct. 904, 904-05, 653 N.E.2d 1121 (1995) (two acts of digital penetration and one act of anal intercourse constituted a continuing offense where the victim described these acts as an ongoing episode); Scott v. State, 668 P.2d 339, 342-43 (Okla. 1983) (two acts of intercourse in a two-hour period constituted a single, continuing offense); State v. Bailey, 144 Vt. 86, 98-99, 475 A.2d 1045 (1984) (rejecting a unanimity challenge where at least six acts of intercourse occurred within one-and-a-half hours at the defendant's apartment), *abrogation on other grounds recognized in State v. Benoit*, 158 Vt. 359, 609 A.2d 230 (1992); State v. Lomagro, 113 Wis.2d 582, 593, 335 N.W.2d 583 (1983) (multiple acts of intercourse occurring within two hours were conceptually similar and unanimity was not required); Steele v. State, 523 S.W.2d 685, 687 (Tex. Crim. App. 1975) (two acts of intercourse, one of which occurred in the victim's car and one of which occurred in her bedroom, were part of the same criminal transaction

occasioned by the defendant's use of force and threats); Bethune v. State, 363 S.W.2d 462, 464 (Tex. Crim. App. 1962) (no election required in a case involving several acts of intercourse occurring in the same bed on the same night). The same conclusion should be reached in this case.

In this case, M. testified that after she got out of the shower, Ayon-Rosales pulled down his pants, grabbed her head, and forced her to put his penis in her mouth. RP (1/31/13) 301. M. told Ayon-Rosales that she could not perform oral sex because her mouth was too swollen and painful from him punching her. RP (1/31/13) 302. After M. told Ayon-Rosales that it was too painful for her to perform oral sex, Ayon-Rosales pushed her down on the couch, ordered her to spread her legs, and put his penis in her vagina. RP (1/31/13) 303-04. Evaluating these facts in a commonsense manner, Ayon-Rosales engaged in a continuing course of conduct rather than multiple discrete acts. Accordingly, the trial court properly declined to give a unanimity instruction because none was required.

Nonetheless, Ayon-Rosales argues that his right to a unanimous jury was violated because the "unit of prosecution" for rape for double jeopardy purposes "is per act of penetration; it is

not an ongoing offense.” Brief of Appellant, at 11 (citing State v. Tili, 139 Wn.2d 107, 117, 985 P.2d 365 (1999)). Ayon-Rosales cites this Court’s decision in State v. Furseth, 156 Wn. App. 516, 233 P.3d 902, rev. denied, 170 Wn.2d 1007 (2010), for the proposition that “the unit of prosecution, the unit of conduct that constitutes the crime, should also determine what act the jury must agree on for conviction.” Brief of Appellant, at 14. Although this argument has merit when the “unit of prosecution” analysis dictates that the defendant’s conduct constitutes a *single count* of the crime at issue, this argument lacks merit when the defendant’s conduct could be charged as either *multiple counts* or a *single count* as a matter of prosecutorial discretion. Accordingly, contrary to Ayon-Rosales’s argument, this Court’s decision in State v. Brown, 159 Wn. App. 1, 248 P.3d 518 (2010), rev. denied, 171 Wn.2d 1015 (2011), is entirely correct.

In Furseth, the crime at issue was possession of child pornography – a crime that the Washington Supreme Court had recently determined could be charged as only a single count, regardless of the number of images possessed or the number of children depicted in those images. Furseth, 156 Wn. App. at 520-21 (citing State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916

(2009)). Therefore, this Court held that a child pornography case could not be a multiple acts case requiring a unanimity instruction as a matter of law:

Again, a multiple acts prosecution occurs where “several acts are alleged and any one of them could constitute the crime charged.” Kitchen, 110 Wn.2d at 411. Therefore, in order for a prosecution to constitute a multiple acts case, there must be evidence of multiple acts of proscribed conduct. As a matter of law, however, Sutherby precludes the possibility that a defendant such as Furseth could have committed multiple acts[.]

Furseth, 156 Wn. App. at 521. This analysis makes perfect sense when the “unit of prosecution” analysis dictates that only one “act” has occurred.

On the other hand, in cases where multiple counts could be charged based on the “unit of prosecution” analysis, but the defendant’s behavior constitutes a continuing course of conduct, the decision to charge multiple counts or a single count is a matter of prosecutorial discretion; jury unanimity is not implicated merely because multiple counts are theoretically possible. Accordingly, as this Court held in Brown, the “unit of prosecution” for violating a no-contact order is each individual violation of the order. Brown, 159 Wn. App. at 9-13. Nonetheless, it was proper for the State to charge the defendant with a single count of violating the no-contact

order based on multiple violations on a single day; such behavior constituted a continuing course of conduct, and no unanimity instruction was required. Id. at 13-15.

Contrary to what Ayon-Rosales contends, Furseth and Brown are not inconsistent. The “unit of prosecution” analysis defines the *maximum* number of charges that can be filed based on a defendant’s conduct; it does not define the minimum. Put another way, even if it is theoretically possible that the State could have charged Ayon-Rosales with two counts of rape based on oral penetration and vaginal penetration, the fact that the State did not do so does not mandate a unanimity instruction. Rather, the continuing course of conduct analysis still applies.⁵

In sum, the evidence establishes that Ayon-Rosales engaged in a continuing course of conduct when he raped M. both orally and vaginally. No unanimity instruction was required, and this Court should affirm.

⁵ Also, as a matter of policy, if Ayon-Rosales’s analysis were correct, some prosecutors might decide to charge every possible count as a matter of course in cases where the continuing course of conduct analysis would otherwise apply. This would be an undesirable outcome for most defendants.

2. THERE WAS NO IMPROPER OPINION TESTIMONY BECAUSE THE WITNESS TESTIFIED TO HIS FIRST-HAND OBSERVATIONS; HOWEVER, EVEN ASSUMING THAT ERROR OCCURRED, IT IS HARMLESS.

Ayon-Rosales also claims that his right to a fair trial was violated by improper opinion testimony regarding his guilt because Brandon Gregory testified that “it was the first time ever someone got raped in front of [him]” Brief of Appellant, at 17-22 (citing RP (1/30/13) 238). This claim should be rejected. Gregory’s testimony described his first-hand observations; he did not render an opinion on Ayon-Rosales’s guilt. Moreover, even if any error occurred, it is harmless in light of the evidence and the record as a whole.

As a general principle, “[i]mpermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). In determining whether testimony is, in fact, an impermissible opinion on the defendant’s guilt, courts consider factors relevant to “the circumstances of the case,” including: (1) “the type of witness involved”; (2) the nature of the testimony;

(3) the nature of the charges; (4) the defense presented; and (4) “the other evidence before the trier of fact.” State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). Also, “[t]he fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” Heatley, 70 Wn. App. at 579 (emphasis in original). Testimony based on first-hand physical observations is permissible. Id.

In this case, Brandon Gregory (a lay witness, not an expert or a police officer) testified that he walked into M.’s apartment, saw that M. and Ayon-Rosales were naked, and initially thought that he had “caught them in the act.” RP (1/30/13) 195-97. Gregory then saw that M. had a swollen lip and “looked like she was hit in the eye.” RP (1/30/13) 193. M. was crying; she said, “Help me.” RP (1/30/13) 199. Gregory chased Ayon-Rosales and tried to hold him for the police. RP (1/30/13) 200-01. Ayon-Rosales said “if you touch me, you know, you will get arrested,” and in response, Gregory told Ayon-Rosales that he had “just committed like rape.” RP (1/30/13) 201-02.

Based on Gregory's account of what he saw when he walked into M.'s apartment, his testimony that he had never seen someone being raped before is not an opinion on Ayon-Rosales's guilt. Rather, it is a factual description of what Gregory observed, and merely reiterates what Gregory said to Ayon-Rosales at the scene. Ayon-Rosales's claim should be rejected on the merits.

But even if Gregory's statement were construed as an opinion on guilt, any possible error is harmless.

The improper admission of opinion testimony is not an issue of constitutional magnitude. State v. Wilber, 55 Wn. App. 294, 299, 777 P.2d 36 (1989). Accordingly, such error "is not prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial." Id. In this case, as noted above, Gregory's statement that he had never seen someone be raped before was cumulative of his statement to Ayon-Rosales that Ayon-Rosales had just committed a rape. Moreover, evidence that was far more prejudicial than Gregory's statement was properly admitted at trial, including the fact that Ayon-Rosales had forced M. to have an abortion when she arrived in Seattle. RP (1/31/13) 338.

In addition, despite Ayon-Rosales's contention that this was a close case that hinged entirely on M.'s credibility and her dubious

motives to keep the car and obtain American citizenship, the evidence of Ayon-Rosales's guilt was overwhelming. Gregory walked in immediately after Ayon-Rosales raped M., and M. almost immediately told her neighbors that Ayon-Rosales had raped her. RP (1/29/13) 96. M.'s obvious injuries and terrified demeanor were noted by her neighbors and by her treatment providers. RP (1/29/13) 90, 106-08, 120, 127, 144. Given the DNA results, there was no dispute that Ayon-Rosales had intercourse with M. RP (1/30/13) 266-67. And, although Ayon-Rosales suggested in closing argument that M. consented to have sex with him,⁶ this suggestion is absurd in light of M.'s injuries and behavior.

In sum, there is no reasonable probability that Gregory's statement that he had never seen someone be raped before affected the jury's verdict in light of the evidence and the record as a whole. Accordingly, any possible error is harmless, and this Court may affirm on this basis as well.

⁶ RP (1/31/13) 380-82.

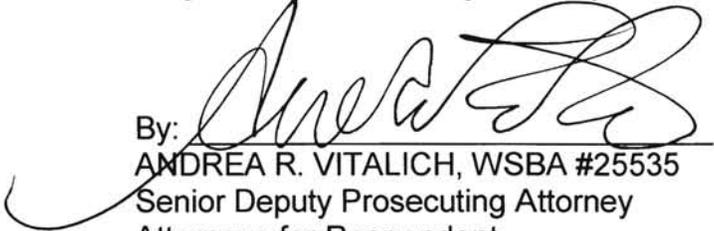
D. CONCLUSION

For the reasons stated above, this Court should affirm Ayon-Rosales's conviction for rape in the second degree.

DATED this 24th day of April, 2014.

Respectfully submitted,

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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 Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RUBEN AYON-ROSALES, Cause No. 70667-5-I, in the Court of Appeals, Division I, for 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.

U Brame
Name
Done in Seattle, Washington

4/24/14
Date