

NO. 35690-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

JERRY D. WIATT, JR.,
Petitioner.

THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 01-1-01136-1

HONORABLE GARY R. TABOR, Judge

RESPONSE TO PERSONAL RESTRAINT PETITION

FILED UNDER SEAL

EDWARD G. HOLM
Prosecuting Attorney
in and for Thurston County

JAMES C. POWERS
Deputy Prosecuting Attorney
WSBA #12791

Thurston County Courthouse
2000 Lakeridge Drive, SW
Olympia, WA 98502
Telephone: (206) 786-5540

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL) NO. 35690-2-II
RESTRAINT PETITION OF) RESPONSE TO PERSONAL
JERRY D. WIATT, JR.) RESTRAINT PETITION

Comes now Edward G. Holm, Prosecuting Attorney in and for Thurston County, State of Washington, by and through James C. Powers, Deputy Prosecuting Attorney, and files its response to this personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

The petitioner is currently in the custody of the Washington Department of Corrections. He presently has convictions for two counts of second-degree rape, two counts of third-degree rape, one count of voyeurism, one count of communication with a minor for immoral purposes, one count of attempted rape in the third degree, and six counts of furnishing liquor to a minor. On March 31, 2003, the defendant was sentenced to 328 months for rape in the second degree, with the other felony counts running concurrently with that sentence. A 12-month sentence was imposed for each of the gross misdemeanor counts, with those sentences running concurrently with each other, but consecutive to all of the felony sentences.

II. STATEMENT OF PROCEEDINGS

During the period from October 23 through November 13, 2002, defendant Jerry D. Wiatt, Jr. proceeded to a jury trial on charges in Thurston County Superior Court Cause No. 01-1-01136-1, which were set forth in Counts 1 through 18 of the Fourth Amended Information. See Appendix A. Counts 19 through 25 in that charging document had been severed by the trial court on October 9, 2002. 10-9-02 Hearing RP 4-5. The defendant was convicted on 16 of the 18 counts, either for the original charge or for a lesser included offense. The convictions consisted of three counts of second-degree rape, two counts of sexual exploitation of a minor, two counts of voyeurism, two counts of rape in the third degree, one count of attempted third-degree rape, and six counts of furnishing liquor to a minor.

The State then filed a Fifth Amended Information which contained the 7 severed charges. These were designated in the same manner as they had been in the Fourth Amended Information, and so the Fifth Amended Information contained Counts 19 through 25. See Appendix B. On January 3, 2003, the defendant pled guilty to Count 22, voyeurism, and to Count 24, communication with a minor for immoral purposes. The other five counts in the Fifth Amended Information were dismissed on motion of the State. 1-3-03 Hearing RP 15-16. This brought the total of the defendant's

convictions in this case to eighteen.

The convictions with the highest sentence range were those for rape in the second degree. The range was 210 to 280 months for each of those offenses. At sentencing, the court imposed concurrent exceptional sentences of 328 months for those counts. The court then ran all the other felony sentences concurrent with this 328-month term of confinement. Eight of the convictions were for gross misdemeanors. For each of those, the court imposed a sentence of 12 months, and ran those sentences concurrent with each other but consecutive to the felony convictions. See Appendix C.

Upon review, an unpublished opinion was entered in this case by the Court of Appeals in Cause No. 30168-7-II on April 26, 2005. The appellate court reversed and remanded Counts 2 through 6. All the other convictions were affirmed. Because some of the counts were remanded back for a new trial, the exceptional sentence in this case was not addressed. However, the State chose not to proceed further with the counts for which convictions were vacated. At this point, the State acknowledges that a new sentencing hearing must take place to impose standard-range sentences for each of the convictions for second-degree rape, replacing the trial court's exceptional sentence on those counts, pursuant to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

At the present time, the defendant's convictions in this case are as follows: Count 7, furnishing liquor to a minor, concerning victim A. Cruz; Count 8, rape in the third degree, concerning victim J. Bowles; Count 9, furnishing liquor to a minor, concerning victim J. Bowles; Count 10, attempted rape in the third degree, concerning victim H. Kalmikov; Count 12, rape in the second degree, concerning victim K. Hoskins; Count 13, furnishing liquor to a minor, concerning victim K. Hoskins; Count 14, rape in the second degree, concerning victim Z. Hawkins; Count 15, furnishing liquor to a minor, concerning victim Z. Hawkins; Count 16, rape in the third degree, concerning victim R. Rankis; Count 17, furnishing liquor to a minor, concerning victim R. Rankis; Count 18, furnishing liquor to a minor, concerning victim E. Gundlach; Count 22, voyeurism, concerning victim M. Blevins; Count 24, communication with a minor for immoral purposes, concerning victim S. Waltermeyer.

III. STATEMENT OF THE CASE

Count 7, furnishing liquor to a minor, concerning victim A. Cruz. The date of birth for A. Cruz is 8-18-83. In June, 2001, while Cruz was 17, she went to the residence of the defendant, which the defendant owned, on two occasions. Her first visit there was on June 28th. She only stayed a short time and had nothing alcoholic to drink. Trial RP 47-49, 76.

Cruz went back to the residence on the evening of June 29th. Initially, the defendant was not at home. His brother, Jeff, provided Cruz with mixed drinks, and then vodka shots while she played a drinking game. Trial RP 69-72. The defendant arrived home while this drinking game was taking place. Trial RP 73. The defendant then joined this game, which continued about another half hour, while Cruz continued to consume straight shots of vodka. By the end of the game, Cruz was heavily intoxicated. Trial RP 74-75, 80-81.

Counts 8 and 9, rape in the third degree and furnishing liquor to a minor, concerning victim J. Bowles. The date of birth for J. Bowles is 7-27-84. Trial RP 542. Bowles first met the defendant in 1999, when he lived at a different residence in Lacey. She had her first experience consuming alcohol at that residence. Trial RP 546-549.

In the summer of 2000, when Bowles was 16 years old, she went to a party at the residence in the Cedrona housing development in Olympia that the defendant had purchased and moved into around the beginning of that year. Trial RP 552-553, 1908. The defendant was present and furnished Bowles with a number of mixed alcoholic drinks and straight shots of hard liquor. Trial RP 554-556.

After Bowles had become intoxicated, the defendant

persuaded her to go with him up to his bedroom to look at his candles. Trial RP 557. When Bowles sat down on the bed in that room, the defendant sat down next to her and began kissing her. Bowles told him to stop and pushed him away. However, the defendant persisted in trying to kiss Bowles despite her resistance. Trial RP 558-559.

The defendant insisted that this was something Bowles really wanted despite the fact that she continued to say “no” to him. He removed her clothes while she repeatedly told him not to do that. Bowles was so intoxicated that she did not feel she could successfully physically resist the defendant’s actions. Trial RP 559-560.

The defendant put Bowles onto her back on the bed. He proceeded to get on top of her, placed his penis inside her vagina, and had sexual intercourse with her. Throughout what happened, Bowles continued to verbally try and get the defendant to stop, but without success. When the defendant was finished, he left the room. Trial RP 561-563.

Count 10, attempted rape in the third degree, concerning victim H. Kalmikov. The date of birth for H. Kalmikov is 9-3-79. Trial RP 1135. She first met the defendant at a party for her friend, Lara, on September 13, 2000. Trial RP 1138-1139. A few nights later, Kalmikov and her friend Lara met up with the defendant and one of his friends at a Red

Robin restaurant in Olympia. Trial RP 1147. They had alcoholic drinks at that location, and then went to a night club where they consumed additional alcoholic beverages. They stayed at the club until closing at 2 in the morning. Trial RP 1149-1151. They then returned to the Red Robin restaurant, where Kalmikov had left her vehicle. Lara decided to go home with the defendant's friend. Kalmikov felt unable to safely drive because of her intoxication, and so accepted the defendant's offer to go with him to his residence. Trial RP 1156-1159.

Once at the defendant's residence, the defendant persuaded Kalmikov to get into his hot tub with him. He gave her his sister's two-piece bathing suit to wear. Trial RP 1160-1161, 1166. While the two of them were in the hot tub, the defendant began taking off the lower half of Kalmikov's bathing suit. She said "no" and tried to physically push the defendant away, but was unsuccessful in preventing him from removing that portion of the bathing suit. Trial RP 1166.

At trial, Kalmikov testified the defendant then got on her and placed his penis in her vagina while she continued to resist verbally and physically. Trial RP 1167-1171. The defendant testified he removed the bottom part of Kalmikov's bathing suit while they were in the hot tub, and that Kalmikov then "freaked out". He denied placing his penis inside her.

Trial RP 2033-2034.

Kalmikov got out of the hot tub and got dressed. She tried to use a phone to call her friend Lara but the defendant grabbed the phone away from her. Trial RP 1171-1173. He then adopted a nicer tone, persuading Kalmikov to go up to his bedroom and just go to sleep. However, when she did that, he started kissing her and trying to take off her pants. She repeatedly told him to stop until he finally ceased his efforts. Trial RP 1174-1176.

The defendant became angry at that point, asserting that since he had bought drinks for Kalmikov that night he had the right to have sex with her. Trial RP 1177-1178. Kalmikov decided to leave despite not having a ride back to her car. She walked out of the defendant's residence between 4 and 5 in the morning and proceeded to the house of a neighbor and rang the doorbell. Trial RP 1178-1181, 1081.

Richard Phillips and his wife were awakened by the door bell. They went to the door and contacted Kalmikov, who was very upset and in tears. Trial RP 1081-1082. Kalmikov briefly referred to what had happened. At trial, Phillips recalled that Kalmikov told him a man had tried to rape her. Trial RP 1083.

Phillips and his son drove Kalmikov back to her vehicle at the

Red Robin restaurant. Trial RP 1087. Phillips wrote down the vehicle license number for the car Kalmikov was driving. He then gave that information to law enforcement. Trial RP 1095-1096.

Kalmikov drove home, made a telephone call to her friend, Eric Nelson, and told him a little about what had happened. Trial RP 1184, 1411-1413. At trial, Nelson recalled that Kalmikov told him she had been raped. Trial RP 1411. He then put his father on the line because his father was an ordained minister. Trial RP 1413. Eric's father also remembered that Kalmikov told him she had been raped. Trial RP 1426-1427.

Thurston County Sheriff's Deputy Casey Salisbury contacted Kalmikov by telephone after receiving the information from Phillips. Trial RP 1690. Kalmikov seemed hesitant to talk with him. Kalmikov later testified that she had not wanted the incident to result in legal proceedings, preferring to deal with it in her own way. Trial RP 1256. She told Salisbury that she might have been assaulted. She stated that the defendant had tried to have sex with her, that she had turned him down, he became angry, and then she left. Trial RP 1692.

Counts 12 and 13, rape in the second degree and furnishing liquor to a minor, concerning victim K. Hoskins. The date of birth for K. Hoskins is 12-13-83. Trial RP 939. She met the defendant in 2000, when

she was 16 years old. Trial RP 912, 945. On December 19, 2000, Hoskins went to a party at the defendant's residence. The defendant furnished her a mixed alcoholic drink called a "B-52". Trial RP 951.

Thereafter, she accidentally collided with another person and received a bloody nose. Later, she had little memory of what occurred next that evening other than throwing up in the bathroom. Trial RP 953-954. The defendant acknowledged at trial that he had sexual intercourse with Hoskins that night. Trial RP 2055-2056. However, Hoskins could only recall waking up in the defendant's bedroom without any clothes on, the defendant lying next to her. There was blood on the sheets in the area of her lower body. Trial RP 954-955, 1011. Hoskins asked the defendant if he had engaged in sexual intercourse with her, and he acknowledged that he had done that. Hoskins left at that point. Her clothes were in the bedroom, except for her shirt which was in the laundry room. Trial RP 955-956.

Hoskins thereafter entered into a consensual sexual relationship with the defendant that lasted until March of 2001. Trial RP 960, 978. As a result, she was again at the defendant's residence on a number of occasions. At the trial, she explained that she had felt ashamed with regard to the incident in December, and that her way of justifying what had happened was to develop a relationship with the defendant afterwards.

Trial RP 1023.

Counts 14 and 15, rape in the second degree and furnishing liquor to a minor, concerning victim Z. Hawkins, and Count 18, furnishing liquor to a minor, concerning victim E. Gundlach. The date of birth for Z. Hawkins is 2-2-83. Trial RP 1308. On the evening of February 12, 2000, Hawkins went to the defendant's residence in the late evening. She and her friend Erin Gundlach had been transported there by the defendant's brother, Jeff. Erin and Jeff were acquaintances. Trial RP 811, 1312. When Hawkins first arrived, she watched a movie while consuming several beers. Trial RP 1317-1318.

She and Erin then accompanied Jeff to the front of the residence where he called the defendant. Jeff asked Hawkins to get on the phone and tell his brother that she had "big boobs", but Hawkins refused. At this point, she was feeling sick as a result of the alcohol she had consumed. Trial RP 1319-1321.

Erin and Jeff then got into the hot tub. Hawkins declined to do so because of how she was feeling. Instead, she lied down on the floor near the front entryway to the residence, going in and out of consciousness. Trial RP 1322. The defendant, whom Hawkins had never met before, came home soon after. When he saw Hawkins on the floor, he got on top of her and

started kissing her. Hawkins felt numb and unable to resist. Trial RP 1323.

The defendant then dragged Hawkins up the stairs to his bedroom. He put her on his bed and took off all her clothes except for her underwear. He then took off his clothes and asked that she perform oral sex on him. Still feeling unable to move or resist, Hawkins did not respond except to turn her head away. Trial RP 1327-1329. The defendant then removed her underwear, put his penis inside her vagina, and proceeded to have sexual intercourse with her. Hawkins remained silent and unmoving. Trial RP 1330-1331.

While this was taking place, Erin began pounding on the bedroom door, which was locked. This caused Hawkins to struggle past the numbness she was feeling. She pushed the defendant off of her, and started putting her clothes back on. Trial RP 1332-1333. The defendant tried to coax Hawkins back to the bed. When that failed, he became angry, called Hawkins a "stupid bitch", and threatened to throw her out the window. However, Hawkins persisted in getting dressed. Trial RP 1333-1334.

Hawkins then went to leave the room. The defendant got in her way, but she went around him, unlocked the door, and went downstairs. Trial RP 1335-1337. Meanwhile, Erin had gone back into the hot tub. Erin observed Hawkins run outside. Hawkins was hysterical, crying and yelling

repeatedly that they had to get out of there. Trial RP 820-824.

The defendant then came out. He appeared to be angry. He stated that Hawkins should leave and never come back. Trial RP 824. Another male present, Kevin Barlow, eventually agreed to drive Hawkins home, and she then left. Trial RP 826.

Erin returned to the defendant's residence on May 7, 2000. Trial RP 844. She was under 18 years of age and was a junior in high school at the time. Trial RP 808, 812-813. The defendant was present and furnished her a mixed alcoholic drink on that occasion. Trial RP 847.

Counts 16 and 17, rape in the third degree and furnishing liquor to a minor, concerning victim R. Rankis.

R. Rankis went to a number of parties at the defendant's residence in the summer of 2000, when she was 17 years old. Trial RP 719-720. On one occasion in late July or early August, Rankis arrived at the defendant's residence in the late evening with her friend, Alicia Cochran. The defendant furnished Rankis several mixed drinks and about four shots of hard liquor. Trial RP 724-725, 728. Rankis also consumed several lines of cocaine, which she and Cochran had brought with them. Trial RP 729-730.

At one point, the defendant invited Rankis to his bedroom to show her something. Trial RP 731. Rankis was feeling highly intoxicated

and somewhat sick as well, and so she laid back on the bed in the defendant's room. Trial RP 734. The defendant kissed Rankis and began taking her clothes off. As a result of her intoxication, Rankis felt unable to move. Trial RP 734. The defendant then placed his penis inside her vagina. At that point, Rankis repeatedly said "no" to the defendant, but he did not cease the act of sexual intercourse in response. Trial RP 734-735, 784.

Rankis heard a banging on the bedroom door and Cochran's voice. Later, the next thing she could recall was Cochran in the bedroom helping Rankis to gather up her clothes. Rankis then recalled leaving in Cochran's car. Trial RP 735-737.

Count 22, voyeurism, concerning victim M. Blevins. This is a count the defendant pled guilty to after the trial. 1-3-03 Hearing RP 14-15. During the summer of 2000, the defendant engaged in a sexual relationship with M. Blevins, who was 16 at the time. On one occasion in the defendant's bedroom, Blevins was blindfolded at the defendant's request. The defendant then engaged in the act of sexual intercourse with Blevins. While that was taking place, the defendant video-taped the sexual act without Blevins having any knowledge of the videotaping. 1-3-03 Hearing RP 10.

Count 24, communication with a minor for immoral purposes, concerning victim S.W. This is the second count to which the defendant

entered a plea of guilty. 1-3-03 Hearing RP 14-15. In early 1999, S.W. went to the defendant's residence in Lacey at a time when S.W. was 14 years of age. The defendant furnished her with alcoholic beverages and as a result she became highly intoxicated. The defendant then invited S.W. to his bedroom. The next thing she later recalled happening was lying unclothed on the defendant's bed with the defendant on top of her. There was blood on the bed sheet and she felt pain in her vaginal area. 1-3-03 Hearing RP 12-13.

III. RESPONSE TO ISSUES RAISED

1. The Court of Appeals should exercise its discretionary authority under RAP 2.5(c)(2) regarding the law of the case and refuse to consider the defendant's claim that there was insufficient evidence to support the conviction for Count 12, rape in the second degree, regarding victim K. Hoskins.

In Count 12, the defendant was alleged to have engaged in sexual intercourse with K. Hoskins at a time when she was incapable of consent by reason of being physically helpless or mentally incapacitated. See Appendix A. The defendant did not dispute that he had sexual intercourse with Hoskins during the alleged incident, but claimed that it was consensual. Trial RP 2055-2056. Thus, the contested issue was whether Hoskins had been incapable of consent at the time. In this personal restraint petition, the defendant contends that there was insufficient evidence presented at trial to support a second-degree rape conviction on the basis of the victim's physical

helplessness or mental incapacity.

A person is incapable of consenting to sexual intercourse if that person is unconscious or for any other reason is physically unable to communicate unwillingness to the act. RCW 9A.44.010(5). A sleeping victim is physically helpless. State v. Puapuaga, 54 Wn. App. 857, 860-861, 776 P.2d 170 (1989).

A person is incapable of consenting to sexual intercourse due to mental incapacity if that person has a condition which prevents her from meaningfully understanding the nature and consequences of sexual intercourse. State v. Ortega-Martinez, 124 Wn.2d 702, 711, 881 P.2d 231 (1994). The issue is whether such a condition existed at the time of the alleged offense, as opposed to any other time. Ortega-Martinez, 124 Wn.2d at 716. The effects of intoxication can constitute such mental incapacity to consent. RCW 9A.44.010(4); State v. Al-Hamdani, 109 Wn. App. 599, 609, 36 P.3d 1103 (2001).

The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all

reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the direct appeal of the present case, the defendant made the same argument he has made here challenging the sufficiency of the evidence with regard to Count 12, rape in the second degree, concerning victim K. Hoskins.

As in this petition, the defendant emphasized in his appeal the evidence that Hoskins had only one drink and evidence from another witness that Hoskins did not seem seriously affected prior to the sexual intercourse taking place. However, the Court of Appeals rejected these arguments and found there was sufficient evidence.

Wiatt also contends that insufficient evidence supports his convictions of counts XII, second degree rape of K. Hoskins; count XIV, second degree rape of Z. Hawkins; count XVI, third degree rape of R. Rankis; and count VIII, third degree rape of J. Bowles. . . .

. . . Wiatt further contends that the evidence was insufficient

to support a finding that K. Hoskins and Z. Hawkins were mentally incapacitated because they testified that they had only consumed one to three alcoholic beverages prior to the alleged rapes and other witnesses testified that these two possessed mental capacity throughout the evening. Nevertheless, K. Hoskins and Z. Hawkins each testified that they were mentally incapacitated and physically helpless at the time of the rapes – K. Hoskins testified that she consumed one drink and then only remembers waking in Wiatt’s bed the following morning and Z. Hawkins testified that she was aware that Wiatt was raping her, but she was unable to physically resist him due to the effects of alcohol. As noted, we defer to the trier of fact on issues of witness credibility and conflicting testimony. See Camarillo, 115 Wn.2d at 71.

State v. Wiatt, 2005 Wash. App. Lexis 849 at 67-68 in Appendix I to this Response to Petition.

A prior appellate decision constitutes the law of the case. Sintra Inc. v. City of Seattle, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). Such an appellate holding will generally be followed in subsequent stages of litigation in the same case. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The Court of Appeals does have discretionary authority to review a prior appellate court decision under RAP 2.5(c)(2), which states as follows:

Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

This court rule embodies two separate exceptions to the law of the case

doctrine. The first is where there has been an intervening change in controlling precedent between the time of the appellate court's first decision and the later review. The second is where the prior decision is clearly erroneous and that erroneous decision would work a manifest injustice to one of the parties. Roberson, 156 Wn.2d at 42.; State v. Worl, 129 Wn.2d 416, 425-425, 918 P.2d 905 (1996).

The defendant has not cited in his petition any change of controlling precedent since the decision of the Court of Appeals affirming Count 12 in this case. Furthermore, the defendant has not even sought to show how the appellate court's prior decision in this case was clearly erroneous. Rather, the defendant has proceeded to argue the matter as if no such decision had been rendered.

The defendant argues that Hoskins did not claim to have been physically helpless. However, she testified that, after consuming a mixed drink and then vomiting in the bathroom, the next thing she remembered was waking up in the morning, unclothed, next to the defendant. Trial RP 953-954. In State v. Al-Hamdani,, supra, the victim testified that she was substantially affected by the alcohol she consumed, including vomiting. She later awoke in her residence with Al-Hamdani lying on top of her. While Al-Hamdani claimed that consensual sexual intercourse had occurred, the victim

testified that she had no recollection of it. Al-Hamdani, 109 Wn. App. at 602. The Court of Appeals noted that the jury could reasonably have found, based on that evidence, that the victim was unconscious and therefore physically helpless during the sexual intercourse. Al-Hamdani, 109 Wn. App. at 608. Considering the evidence in the light most favorable to the State, Hoskins' testimony provided a basis for the jury to find it proved that the victim was physically helpless at the time sexual intercourse occurred.

As regards mental incapacity, the defendant argues that Hoskins' lack of memory did not show she was mentally incapacitated when sexual intercourse took place, only that she had no memory of a consensual act. However, that same argument was rejected in State v. Al-Hamdani, supra, where the Court of Appeals found that the evidence was sufficient for the jury to find that the victim was mentally incapacitated due to her intoxication, not just forgetful. Al-Hamdani, 109 Wn. App. at 608-609.

The defendant seeks to distinguish the appellate court's decision in Al-Hamdani on the grounds that the victim in Al-Hamdani had consumed much more alcohol than did Hoskins. However, the claim that the evidence in this case was insufficient as to Count 12 because of the limited amount of alcohol consumed by Hoskins was specifically addressed and rejected by the Court of Appeals in the direct appeal of this case, noting that it was for the

jury to assess the credibility of Hoskins' testimony concerning the effects of the alcohol she consumed on that occasion. Wiatt, 2005 Wash. App. LEXIS 849 at 67-68 in Appendix I to Response to Petition.

In effect, by claiming insufficient evidence in this petition, the defendant has simply sought another opportunity for a second bite of the apple. Therefore, the Court of Appeals should exercise its discretion under RAP 2.5(c)(2) and refuse to consider this claim of insufficient evidence.

2. The defendant has provided no support for his claim that prosecutors misled the defense by agreeing not to suggest at trial that the defendant used a date rape drug.

In a motion in limine, the defense asked the trial court to preclude the State and the State's witnesses from speculating about whether the defendant had used a date rape drug. The State agreed to this motion, and so the motion was granted. 9-20-02 Hearing RP 80.

After the jury trial in this case, the defendant brought a motion for a new trial. On December 16, 2002, a hearing was held for the trial court to consider this motion. The basis for the motion was a claim that three or four jurors had committed misconduct by bringing extrinsic evidence concerning date rape drugs into the jury's deliberations. It was noted that some of this information came from television programs watched by one or more jurors. 12-16-02 Hearing RP 4-8. Jurors concluded they could consider whether

there was circumstantial evidence that the defendant had used a date rape drug in one or more of the incidents charged. 12-16-02 Hearing RP 10-11.

The trial court ruled that information regarding date rape drugs is a matter of common knowledge, and that the information about date rape drugs brought into the deliberations by several jurors did not amount to the sort of specialized extrinsic evidence that would constitute juror misconduct. 12-16-02 Hearing RP 49-51.

In the process of making this ruling, the trial court found that the State had scrupulously followed the court's order precluding any suggestion, or invitation to speculate, that the defendant may have used a date rape drug.

Let me expound upon that by saying that this was not as to any charge by the State. There's been no allegation that the State somehow winked or stomped their foot or did something to indicate to the jury, well, there's more to this story than meets the eye. There's no indication of misconduct in presenting the matter to the jury. It is clear that there was a motion to limit any discussion and that was followed scrupulously by the parties.

12-16-02 Hearing RP 51.

The defendant challenged the trial court's ruling on appeal, arguing that the jury had committed misconduct by impermissibly injecting extrinsic evidence into the jury deliberations.

Wiatt next asserts that he is entitled to a new trial due to juror misconduct. He argues that no evidence of date-rape drugs was presented at trial and, in discussing date-rape drugs, the jury

impermissibly injected extrinsic evidence into its deliberations.

Wiatt, 2005 Wash. App. LEXIS 849 at 42 in Appendix I to Response to Petition. However, the Court of Appeals rejected this argument. The court found that the jury in this case had simply utilized common knowledge about date rape drugs to reasonably consider whether such a drug may have been used. Wiatt, 2005 Wash. App. LEXIS 849 at 42-43 in Appendix I to Response to Petition.

Despite the trial court's finding that the State scrupulously avoided any suggestion to the jury that a date rape drug may have been involved, the defendant in this petition contends that the State misled the defense about the theory of the case it would pursue at trial when it agreed not to suggest that the defendant used a date rape drug. However, that is not correct. The defendant makes no showing that either the State's attorneys or the State's witnesses at any time during the trial raised the subject of date rape drugs or attempted to claim or suggest that the defendant used a date rape drug on any occasion.

The defense points to testimony by victims Hoskins, Hawkins, Rankis, and Gundlach concerning the effects they experienced from the alcohol they consumed. Such evidence did not constitute speculation about whether the defendant used a date rape drug.

The charges involving Hoskins and Hawkins alleged that they were physically helpless or mentally incapacitated due to their intoxication. Testimony by these victims concerning the effects they experienced from alcohol consumption directly related to those allegations. Testimony about Rankis's intoxication was relevant to help explain her reaction to the defendant's sexual advances, including her verbal resistance but lack of any physical resistance. Gundlach's testimony was offered in support of the common scheme or plan alleged by the State, whereby the defendant would encourage a girl under age to consume alcohol, and then if the girl became substantially affected by the alcohol consumed, the defendant would seek to take advantage of her condition in order to have non-consensual sex with her. Trial RP 849-855.

There is no support for the contention that the State misled the defense with regard to the evidence that would be presented in support of the charges. Any decision by jurors to view the testimony presented as circumstantial evidence of the use of a date rape drug was not based on any suggestion by the State but rather derived from the jurors' own reactions to that evidence.

3. The defendant has not proven that his trial counsel rendered ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was deficient, in that it fell below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) that defense counsel's performance prejudiced the defendant because there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). When considering a claim of ineffective assistance, the court must engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. To satisfy his burden to prove ineffective assistance, the defendant must show that there is an absence of any legitimate strategic or tactical reason for the challenged conduct of trial counsel. Id. at 336.

Date rape drugs. In this trial, the defense sought to prevent the jury from speculating about the possibility of the defendant's use of a date rape drug by precluding both the attorneys for the prosecution and the State's witnesses from suggesting that such a thing had occurred. 9-20-02 Hearing RP 80. This was clearly a strategic choice made by the defense, validly based on the absence of any direct evidence that the defendant had ever possessed or used such a drug. The court granted the defense motion in this

regard, and the State did not contend it had an evidentiary basis to object.

An alternative strategy would have been to allow both sides to explore this issue at trial, even though the defense had a legitimate legal basis to exclude any reference to the subject. Evaluating the trial after the fact, the defendant contends with the benefit of hindsight that it would have been better to have chosen this second alternative strategy. Whether that contention is accurate is itself a matter of speculation. However, there can be no dispute that foregoing an available objection to keep references to date rape drugs out of this trial would have been an unusual strategic choice, and one that would not have been intuitively a wise approach. Indeed, had defense counsel chosen that approach without success, it is very predictable that an ineffective assistance challenge would have resulted, focusing on the unusual nature of such a strategic choice.

Given that, pursuant to the defendant's motion in limine, the State never argued that a date rape drug could have been involved in this case, it was logical for defense counsel to expect that the jury would not seriously consider that theory. Day after day, experienced attorneys present motions in limine before the start of a trial on the basis of that very same logic. In acting in accordance with that assumption, the defendant's trial attorneys in this case certainly did not provide representation that fell below an objective

standard of reasonableness.

As noted above, a defense counsel's choice of trial strategy generally will not constitute ineffective assistance of counsel. State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). This is because of the deferential approach an appellate court is required to take in evaluating the performance of trial counsel.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular actor or omission of counsel was unreasonable. (Citations omitted.) A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Application in this instance of the principles set forth in the quote above can only result in the conclusion that defendant's trial counsel chose a legitimate strategy with regard to the subject of date rape drugs, and therefore that approach cannot be judged to have been ineffective assistance.

In its opinion in the direct appeal of this case, in determining that the jury's consideration of date rape drugs did not constitute misconduct, the appellate court found that defense counsel had invited the jurors to consider

alternative explanations for the incapacitation of the victims, citing three excerpts from the defense closing argument. Wiatt, 2005 Wash. App. LEXIS 849 at 43-44 in Appendix I to Response to Petition. In this petition, the defendant responds that therefore defense counsel's argument constituted ineffective representation. However, the one does not necessarily follow from the other.

Central to the defense in this case was a challenge to the credibility of the alleged victims. Necessarily, therefore, the defense argued to the jury that claims by victims concerning both the effects of the alcohol they consumed and their impaired memories concerning critical events did not fit the facts in evidence and therefore these alleged victims should not be believed. While this was a necessary defense argument in this case, at the same time it presented to the jury the question whether there was any explanation for the events relating to each charge that would support the credibility of the alleged victims.

Thus, the invitation to consider the possibility of a date rape drug was not the result of some misstep by defense counsel, but rather was intrinsic to the defense attempt to discredit the testimony of the alleged victims. This point was made by the appellate court in its ruling on this issue.

. . . In short, while Wiatt urged the jury to question the credibility of

these women, he also invited it to inquire into the possible effects of alcohol and to consider whether something else might have caused the victims' memory loss and incapacitation. Having invited the jury to so inquire, Wiatt is now barred from complaining of that inquiry on appeal.

Wiatt, 2005 Wash. App. LEXIS 849 at 44 in Appendix I to Response to Petition. Because this invitation to the jury derived from a necessary challenge by the defense to the credibility of the victims, it has not been shown to have been the result of deficient performance by defense counsel.

Furthermore, it has not been shown that, but for counsel's argument, the result of the proceedings would have been different. After the trial, a defense investigator thoroughly questioned jurors about their consideration of the subject of date rape drugs. The resulting information provided no suggestion that the jury was directed to their consideration of this subject by the remarks of defense counsel. Rather, that consideration arose from comparing the amount of alcohol consumed by some of the victims and the effects of that consumption that they reported. 12-16-02 Hearing RP 6-7. Since the appellate court found that the jurors could rationally infer the use of date-rape drugs from the testimony, apart from any argument by defense counsel, there is no basis to conclude that the result would have been any different absent the challenged remarks by defense counsel. Wiatt, 2005 Wash. App. LEXIS 849 at 42-43 in Appendix I to Response to Petition.

Witness Lindsey Howard. The State called Lindsey Howard to testify, and she was then cross-examined by defense counsel. The defendant now contends that defense counsel were ineffective in not returning Howard to the stand in the defense case to testify concerning victim R. Rankis. However, there is no showing that such further questioning would have probably caused a different result.

According to the defendant, Howard could have testified that she talked to Rankis after the charged incident, that Rankis admitted she had sex with the defendant and did not appear upset, and that Rankis would have told Howard if something bad had happened. This last proffered evidence, consisting of speculation about what Rankis would have revealed to Howard, would not have been admissible. With regard to the statements allegedly made by Rankis to Howard after the incident, Rankis admitted in her testimony that after the rape she did not accuse the defendant of having done such a thing to her. She explained that this was because she felt she should have done more to prevent it from happening. Trial RP 737-738.

The defendant argues that Howard could have testified that she believed Rankis was making up her allegation against the defendant. However, such opinion testimony on the credibility of Rankis would certainly not have been admissible. ER 608; State v. Jones, 117 Wn. App.

89, 91, 68 P.3d 1153 (2003).

The defendant argues Howard could have testified that Rankis wanted to have sex with the defendant. However, nothing is provided to show that this was anything other than a belief held by Howard. On the other hand, Justin Allison did testify for the defense that he heard Rankis state she was interested in having a sexual relationship with the defendant. Trial RP 1818. Crystal Phillips testified that she spoke to Rankis at the defendant's residence, and that Rankis stated the defendant was hot and she would like to sleep with him. Trial RP 1985-1986.

As regards Rankis being attracted to the defendant, Rankis admitted that she probably engaged in mutual kissing with the defendant at the time of the incident, but maintained she tried to stop the defendant when he went to the extent of having sexual intercourse with her. Trial RP 765-766, 769-770. Steve Aguilar also testified that Rankis showed an obvious interest in the defendant. Trial RP 1791.

Thus, there is no showing that admissible testimony by Howard would have added anything substantial to what the jury already heard.

Witness Kevin Barlow. The defendant contends that his trial counsel were ineffective by not having witness Kevin Barlow testify that victim Z. Hawkins did not appear to have any difficulty talking or walking as a result

of any alcohol she had consumed. However, his observations would have been after the fact and cumulative. With regard to the point in time just before the alleged incident, not only did the defendant refute Hawkins' claims that she was hardly conscious and could hardly walk or talk when the defendant dragged her upstairs to his room, but witness Anthony Grant testified to that as well. Grant testified Hawkins walked upstairs with the defendant having no difficulty and needing no assistance. He also testified that before Hawkins went upstairs she was engaging in conversation with everyone around her. Trial RP 1595.

The defendant further argues in his petition that that defense counsel were ineffective because they did not ask Barlow to testify that Hawkins said she was angry because no one would give her a ride home. However, Barlow did testify to that.

Q. Do you remember that when you talked to [Z] or the person that I guess we're calling [Z], she said one of the reasons she was mad is that nobody would give her a ride home?

A. True.

Trial RP 1301-1302.

The defendant argues that Z. Hawkins herself should have been cross-examined concerning the fact that she was considering bringing suit against Wiatt. However, while such questioning would have been admissible on the

issue of bias, such consideration would hardly have been inconsistent with having been victimized in the manner Z. Hawkins claimed.

Cross-examination of H. Kalmikov. During the cross-examination of victim H. Kalmikov, defense counsel asked whether Kalmikov's statement to Detective Adams about a year after the charged incident was the first time she had claimed that Wiatt had raped her. Trial RP 1265. Thereafter, Erik Nelson and Luke Nelson testified that Kalmikov talked to them by phone the same morning of the alleged incident and that Kalmokov claimed she had been raped. Trial RP 1411, 1427. In his petition, the defendant contends that defense counsel was ineffective in opening the door to the testimony of the two Nelsons.

However, at the time defense counsel cross-examined Kalmikov, the issue of when Kalmikov had first made an accusation of rape was already before the jury. Richard Phillips had testified that when Kalmikov came to his door that morning, she claimed a man had tried to rape her. Trial RP 1083. The defense then sought to impeach Phillips with a law enforcement report indicating Phillips had originally reported that Kalmikov denied there was a rape. Trial RP 1108. Phillips responded that Kalmikov had said something "close to that". Trial RP 1108. Then Kalmikov testified on direct that she had told Phillips that a man had tried to rape her. Trial RP 1181.

Under the fact of the complaint doctrine, the State was permitted in its case-in-chief to present evidence that Kalmikov had made a timely claim of having been raped. State v. Murley, 35 Wn.2d 233, 236-237, 212 P.2d 801 (1949); State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980). The State did not have to wait for the defense to open the door in order to present such evidence. Phillips' testimony was less than clear on this subject. The testimony of Eric and Luke Nelson was admissible to show that a timely complaint of rape was made by Kalmikov.

Cumulative error. The defendant argues that this court should look at the defendant's claims of ineffective assistance cumulatively to determine if there was prejudice. However, that argument makes no sense. For example, a claimed failure to bring in evidence impeaching one victim would not apply to the strength of charges concerning other victims. Therefore, each claim of ineffective assistance must be examined on its own terms. For the reasons argued above, none of the defendant's claims constitute a showing of ineffective assistance.

4. The trial court properly excluded evidence concerning past sexual conduct of some of the victims in this case pursuant to RCW 9A.44.020 and pertinent rules of evidence, and therefore there was no violation of the defendant's constitutional right to present a defense and to cross-examine adverse witnesses.

The defendant correctly notes his right under the U.S. Constitution's

Sixth Amendment and Article I, section 22 of the Washington State Constitution to present evidence in his own behalf and to confront and cross-examine adverse witnesses. However, the defendant has no right to present irrelevant evidence, either in the form of direct evidence or through cross-examination. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Furthermore, a trial court's ability to exclude evidence because its potential for unfair prejudice outweighs its probative value furthers the truth-determining function of a trial, and so is also consistent with the defendant's constitutional right to present evidence. Hudlow, 99 Wn.2d at 15-16. Consequently, the proper exclusion of evidence pursuant to the dictates of RCW 9A.44.020(2) and (3), Washington's rape shield law, does not conflict with these constitutional requirements. Hudlow, 99 Wn.2d at 16.

The rape shield law provides as follows, in part:

Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section . . .

RCW 9A.44.020(2). Pursuant to RCW 9A.44.020(3), a written pretrial motion must be presented stating an offer of proof regarding any past sexual behavior the defendant wishes to present as evidence in the trial and asserting

what relevancy is claimed for this evidence in regard to the issue of the consent of the victim. At a hearing on this matter, the court decides: (1) whether the evidence is relevant to the issue of consent; (2) if the evidence is relevant, whether its probative value substantially outweighs the probability that its admission will create a substantial danger of undue prejudice; and (3) whether exclusion of the evidence would constitute a denial of substantial justice to the defendant. RCW 9A.44.020(3)(d).

The determination whether evidence of a victim's past sexual conduct is admissible under RCW 9A.44.020 is within the discretion of the trial court. State v. Gregory, 158 Wn.2d 759, 784, 147 P.3d 1201 (2006). A court's discretionary decision in this regard should not be overturned unless no reasonable person could take the view adopted by the trial court. Hudlow, 99 Wn.2d at 17-18.

The defendant sought to admit evidence in the trial that victim R. Rankis had stated her goal was to have sex with every man in the defendant's house. 10-18-02 Hearing RP 13; Appendix Y to Petition. Applying the rape shield law, the trial court ruled that testimony would be limited to reporting Rankis's expressed desire to have sex with the defendant. 10-21-02 Hearing RP 6 in Appendix AA to Petition. Witness Justin Allison then testified at trial that he had heard R. Rankis express a desire to have sexual relations

with the defendant. Trial RP 1818.

The defendant contends that this limitation by the trial court constituted an abuse of the court's discretion. The relevancy inquiry under the rape shield law is whether some sexual activity of the victim in the past, without more, makes it more probable or less probable that she consented to sexual activity in the charged incident. Gregory, 158 Wn.2d at 785. Any desire of Rankis to have sex with some other person living in the residence would not have made it more probable that she wished to have sex with the defendant. Therefore, the court's decision was not error.

The defendant proposed to have Alisha Cochran testify that after the charged incident involving R. Rankis and the defendant, Rankis left he defendant's home and went to another location where she had sex with another young man. 10-18-02 Hearing RP 12; Appendix Y to Petition. Again applying the rape shield law, the court excluded testimony about this later act of sexual intercourse with another man. 10-18-02 Hearing RP 42.

The court noted that the assumption a woman experiencing unwanted sex would be so traumatized that she would not want physical contact with another person was just one scenario. The court reasoned that in some instances a woman might desire the comfort of physical intimacy with another person in a consensual context. Therefore, the court found that there

was, at best, minimal relevancy that was outweighed by the potential prejudicial effect on the truth-finding process. 10-18-02 Hearing RP 50-52. The defendant also argues that this decision was error, claiming that this evidence would have shown that R. Rankis did not act like a woman who had been raped.

In State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987), the Washington Supreme Court considered whether there was a set of symptoms generally displayed by victims of rape. The court found in the relevant scientific literature consistent indication that victims of rape display a wide-ranging variety of symptoms. Black, 109 Wn.2d at 343. The court concluded this survey by stating the following:

One overriding theme permeates the literature on this subject: namely, that there is no “typical” response to rape. . . . One commentator explains,

[e]ach rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support.

Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 Am. J. Psychiatry 408, 409 (1976).

Black, 109 Wn.2d at 343-344. The court went on to note that studies show some actual victims of rape exhibit no symptoms at all. Black, 109 Wn.2d at 344.

Thus the trial court properly found that the evidence Rankis had sex with another individual after the alleged rape had marginal, if any, relevance.

An argument to the jury that Rankis did not act like a typical rape victim would have invited the jury to engage in unfounded speculation, and therefore the court did not abuse its discretion in excluding such evidence.

The defendant argues this proposed evidence was no different than evidence allowed into the trial that several victims showed signs of emotional trauma after the alleged incident. However, contrary to the defendant's claim, this evidence was not admitted to show that these women acted like typical rape victims, but rather to show that something had occurred out of the ordinary which had created an unusual emotional impact, and was therefore relevant on that basis. See Black, 109 Wn.2d at 349.

The defendant sought to present testimony from Justin Allison that victim J. Bowles had once performed a striptease for several young men, including the defendant. The defendant also sought to have Allison testify that victim R. Rankis once suggested he have a pole installed in the kitchen so that she could dance for everyone. Appendix Y to Petition. The court excluded such evidence pursuant to the rape shield law. 10-18-02 Hearing RP 53. The defendant contends that this ruling was an abuse of the court's discretion.

The issue regarding the relevancy of the evidence concerning J. Bowles is whether performing a striptease in front of a number of men makes it more likely she wanted to have sex with the men who were present. Of course, as the court found, there was no such connection between this evidence and the issue of consent in this case. The woman could be a free spirit, or acting out of intoxication, or engaging in the act for any number of other reasons. This evidence was completely irrelevant.

The same pertains even more so to the suggestion to Allison by Rantis that he put a pole in the kitchen. It is frivolous to suggest that there was any connection between this remark to someone who was not even the defendant and the issue of consent in this case.

The defendant sought to have Justin Allison testify that he heard J. Bowles state she wanted to “get with” the defendant, and sought to have Allison give an opinion that Bowles meant she wanted to have sex with the defendant. Appendix Y to Petition. The court ruled that Allison could testify that Bowles made that statement but would not allow him to express an opinion as to what Bowles meant by that statement. 10-21-02 Hearing RP 3-4 in Appendix AA to Petition. The defendant contends that this ruling was in error.

The defendant argues that it would have been appropriate for Allison

to present a lay opinion concerning what Bowles meant by the words “get with” based on Bowles’ tone of voice and facial expressions. However, there was no such offer of proof. Rather, the proffer made was that Allison interpreted Bowles’ meaning from her behavior around the defendant at times separate from when she made the statement. See Appendix Y to Petition. Thus, it was really the behavior of Bowles with the defendant that the defense sought to rely on to both explain the ambiguous words “get with” and to support the defendant’s claim that Bowles consented to sex during the charged incident.

Given that fact, it is not surprising that ultimately the defense did not even choose to have Allison testify about the use of the phrase “get with” by Bowles. Instead, Allison testified about seeing Bowles hugging and kissing the defendant before going into the bedroom with him. Trial RP 1823-1824. He also testified he heard noises sounding like sex coming from the defendant’s room after Bowles went in there, including a female voice moaning. Shortly afterward, Bowles came out of the room. Trial RP 1825-1839. Clearly, it was this evidence that more directly supported the defense claim of consent than would a prior statement of Bowles that she wanted to “get with” the defendant. Given that all this evidence of Bowles’ behavior was testified to at the trial, it was not an abuse of discretion for the trial court

to find that asking Allison to interpret the meaning behind Bowles' ambiguous words was more prejudicial than probative.

The defendant argues that even if testimony concerning the striptease by victim J. Bowles was properly excluded initially, that the prosecution opened the door to this testimony in its cross-examination of witness Anthony Grant, and therefore evidence of the striptease should have been admitted at that point. Grant testified concerning the charged incident at the residence of the defendant involving Bowles. He stated that a group of people, including Bowles and the defendant, had gone up to the defendant's bedroom to see his new massage chair. While the group was in the bedroom, according to Grant, Bowles began massaging the defendant and then they began kissing. The rest of the group then left the bedroom, and the bedroom door was closed. Trial RP 1573-1574, 1579-1583.

Grant then heard sounds coming from the bedroom which seemed to be coming from Bowles. Grant described these as "sexual-type noises, sounds, moans". Trial RP 1583. Grant waited for about 30 minutes to an hour. Then, according to his testimony, he and two others went to the defendant's bedroom, knocked, and walked in. Grant testified that the defendant was in his underwear doing something on the computer while Bowles sat on the bed in her bra and underwear. Bowles then engaged in

conversation with Grant and the others showing no embarrassment. Trial RP 1584-1587. On cross-examination, the prosecutor focused on Grant's assertions concerning Bowles' actions and state of undress in front of others just before and after apparently having sex with the defendant.

The trial court denied a defense request to admit evidence of Bowles' striptease in response to this cross-examination, ruling there was an insufficient nexus between the striptease and what was being described by Grant. The court determined that the danger of unfair prejudice outweighed any probative effect the evidence might have. Trial RP 1674-1675.

In his petition, the defendant argues that this ruling was an abuse of the court's discretion. The defendant contends that he should have been allowed to show that Bowles was the type of person who would comfortably engage in passionate kissing and be in an unclothed state in front of others after just having sexual intercourse by presenting testimony concerning the striptease.

The only relevance claimed by the defendant in this argument would pertain to Bowles' character. Essentially, the evidence of a striptease would be used to claim that Bowles' character included traits relating to sexual practices contrary to community standards, in order to show that she acted in conformity with those unusual tendencies on the particular occasion

described by Grant.

Under ER 404(a), evidence of a person's trait of character is not admissible to prove that a person acted in conformity with that trait on a particular occasion unless it constitutes a pertinent trait of character of the victim offered by the defendant. Even if the claim that Bowles was willing to act sexually and be unclothed in front of others could be shown to relate to a pertinent trait of character, evidence regarding that trait could only have been by reputation evidence pursuant to ER 405, and no such evidence was offered. The only exception is when a trait of character is an essential element of a charge or defense. ER 405(b). To be an essential element, the trait of character, standing alone, must satisfy an element of the charge or defense. State v. Hutchinson, 135 Wn.2d 863, 886-887, 959 P.2d 1061 (1998).

In this case, the defense was one of consent. It cannot seriously be argued that Bowles' supposed willingness to perform a striptease in front of others on a separate occasion, standing alone, showed that she consented to sexual intercourse with the defendant on this occasion. Therefore, the evidence did not meet the combined requirements of ER 404(a) and ER 405 and was properly excluded.

Furthermore, the court did not abuse its discretion in finding that the

probative value of Bowles' striptease was outweighed by the danger of unfair prejudice. Any willingness on Bowles' part to engage in a striptease on some prior occasion would say little about her willingness to converse with a group of people in her underwear after just engaging in sexual intercourse. On the other hand, there was a substantial danger of jurors reacting to a claim of behavior on the part of Bowles that many jurors would likely find unacceptable.

For the reasons set forth above, the trial court properly excluded evidence in this case pursuant to Washington's rape shield law and other rules of evidence. Therefore, there was no violation of the defendant's constitutional right to present a defense.

5. The defendant has failed to show that any of what he claims to be newly discovered evidence satisfies the criteria for a new trial.

The defendant contends in his petition that newly discovered evidence justifies a new trial on all counts. Such relief pursuant to a personal restraint petition will be granted if material facts are shown to exist which have not been previously presented and heard and which, in the interests of justice, require vacation of a conviction. RAP 16.4(a) and (c)(3). The standard applied to a personal restraint petition under RAP 16.4(c)(3) is the same as is applied to a motion for a new trial alleging newly discovered

evidence. In re Personal Restraint of Lord, 123 Wn.2d 296, 319, 868 P.2d 835 (1994). That standard requires the defendant to show that the evidence: (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered prior to the trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. State v. Williams, 96 Wn.2d 215, 222-223, 634 P.2d 868 (1981). The absence of any one of these five factors constitutes grounds for a denial of a new trial. Williams, 96 Wn.2d at 223.

With regard to the first factor, whether the evidence would probably change the result of the trial, the defendant argues the effect of any newly discovered evidence should be assessed cumulatively. The State disagrees. Evidence material to the allegations concerning one victim will generally not be material to the allegations involving a separate victim. As set forth above, the rule for the evaluation of a request for a new trial based on a claim of newly discovered evidence requires that the probable effect on a conviction be assessed only on the basis of evidence which is material to that conviction. Therefore, cumulative assessment of this evidence would violate that requirement.

Kevin Murphy. The defendant in his petition presents a declaration from Kevin Murphy which is claimed to be newly discovered evidence.

However, it appears that the claims in Murphy's declaration were known to defense counsel prior to the trial. At the very least, there is no showing that the evidence was not discoverable by the exercise of due diligence. Thus, this is not newly discovered evidence that can justify a new trial.

Kevin Murphy was interviewed by the defense in this case prior to trial. The choice was made not to call him as a witness because his testimony concerning the charge involving victim S. Waltermeyer, as set forth in Count 24, would have been detrimental to the defendant. Appendix A to Petition at 3. When Count 24 was severed from the bulk of the counts for trial, defense counsel recognized that Murphy could provide testimony as to other counts that might be helpful. A number of telephone calls were made to Murphy but he was not contacted. Appendix A to Petition at 3.

A declaration was subsequently obtained from Murphy for purposes of this petition. However, no claim has been made that the information contained in that declaration is other than what was presented to the defense before trial.

Thus, Murphy's declaration cannot meet the test of newly discovered evidence. In the alternative, the defendant contends that the defendant's trial counsel rendered ineffective assistance by not presenting Murphy's testimony at the trial. The defendant's burden in alleging ineffective

assistance of counsel has been discussed in a previous section of this Response to the defendant's petition, and that discussion is incorporated herein by reference.

Clearly, defense counsel's initial decision not to call Murphy as a witness was a tactical choice based on Murphy's potentially harmful testimony, and so cannot be considered deficient performance. Once the court ordered a severance of some charges, the less than persistent effort made to contact Murphy thereafter is not surprising given the cumulative nature of his information.

Z. Hawkins testified that she was in and out of unconsciousness due to the alcohol she consumed, that when the defendant came home he got on top of her, that she felt in no shape to resist, and that he then dragged her upstairs to his bedroom. Trial RP 1322-1326. Murphy states in his declaration that that Hawkins did not appear to be intoxicated, that he saw the defendant and victim Z. Hawkins making out, that they then went upstairs to the defendant's room, and that Hawkins appeared happy with what was taking place. Appendix M to Petition at 2.

At the trial, the defendant testified to all that Murphy claims. Trial RP 2064-2069. In addition, the defendant's testimony was corroborated by Anthony Grant. In his testimony, Grant stated that Hawkins did not appear

to be intoxicated that evening. He related that the defendant and Hawkins walked in from the kitchen. Hawkins was having no difficulty moving under her own power according to Grant. He stated that Hawkins spent several minutes talking to Grant and the others present. Then Hawkins and the defendant went upstairs walking side by side, Hawkins again having no difficulty. Trial RP 1594-1595, 1640-1641.

In his petition, the defendant argues that Murphy could impeach Hawkins' claim that she never went back to the defendant's residence because he recalls seeing her there more than once. However, that would have contradicted the defendant's testimony. The defendant claimed he banned Hawkins from ever returning to his residence after the night of the alleged incident and never saw her again. Trial RP 2076.

In Count 12, the State alleged that K. Hoskins was incapable of consent to the sexual intercourse with the defendant because she was physically helpless or mentally incapacitated by the alcohol she had consumed. She testified she did not remember much of what occurred at the defendant's residence after she had a mixed drink, did not recall how she ended up in the defendant's bed, and did not recall the sexual intercourse with the defendant. Trial RP 952-955. Murphy claims he was at the defendant's residence that night. He states that Hoskins did not seem

intoxicated, that he saw the defendant and Hoskins cuddling on the couch, and that they then went upstairs. Appendix M to Petition at 2.

Again, the defendant testified to these same matters. Trial RP 2053-2054. Lindsey Howard also testified that Hoskins did not seem to be intoxicated that night. Trial RP 922, 925-931. Barry Specht testified he observed Hoskins flirting with the defendant that night. Trial RP 1735. Thus, again, Murphy's testimony would have been cumulative.

Alisha Cochran. The defendant's trial counsel had an out-of-state subpoena served on Cochran in Oregon to have her testify at the trial, based on a taped statement Cochran had provided to Detective Adams. Appendix A to Petition at 3. She did not appear to testify. In response, defense counsel asked that the court issue a bench warrant so that it could be sent to Oregon to enforce her requirement to testify. The court authorized the issuance of a material witness warrant. Trial RP 1753. The trial record does not indicate what took place thereafter other than the fact that Cochran did not testify, nor are those details provided by the defendant's petition.

The defendant in his petition refers to the information contained in Cochran's statement to Detective Adams as newly discovered evidence. Clearly, it is not. In the alternative, the defendant apparently claims that his trial counsel were ineffective in failing to present Cochran's testimony at the

trial. However, there has been no showing of deficient performance on the part of defense counsel. Moreover, it has not been shown that there would probably have been a different result as to any of the defendant's convictions had Cochran testified.

In her statement, Cochran only spoke to the charge concerning victim Rankis. Cochran stated that Rankis did not appear to be intoxicated. Cochran related that at one point she went into the defendant's bedroom, Rankis was in there with the defendant, Cochran tried to get Rankis to leave but Rankis refused, and that the bedroom door was locked thereafter. According to Cochran, she and Rankis eventually left and Rankis had sexual intercourse with another individual. Rankis never claimed the defendant had raped her. See Statement of Cochran as attachment to Appendix A to Petition.

Cochran's information was cumulative. The defendant testified to the details of what occurred at his residence. Trial RP 1962-1965. Steve Aguilar testified that Rankis showed an interest in the defendant that night, that she and the defendant went up to his room, and that Cochran was upset about this. Trial RP 1791-1792. Justin Allison testified that Rankis told him she was interested in having a sexual relationship with the defendant. Trial RP 1818. Crystal Phillips testified Rankis stated she would like to sleep with the

defendant. Trial RP 1985-1986.

Rankis herself testified that she probably engaged in mutual kissing with the defendant that night, and that she only refused consent when the defendant started to have sexual intercourse with her. Trial RP 732-735, 765-766. Rankis admitted she did not tell Cochran what had actually occurred because she felt partially to blame. Trial RP 738, 774. In the light of the evidence that was presented, it cannot reasonably be argued that Cochran's testimony would have likely changed the result at trial concerning the defendant's third-degree rape conviction for Count 16, or any other conviction in this case.

Ian Klotz. The defendant presents as newly discovered evidence a declaration by Ian Klotz in which he states he went into the defendant's bedroom on one occasion and observed a female (presumably Z. Hawkins) actively engaged in sexual intercourse with the defendant. Appendix I to Petition. This is not new evidence. At the trial, the defendant testified about how Klotz came into the defendant's room while the defendant was engaged in sexual intercourse with Hawkins. Trial RP 2073-2074, 2210-2211.

If the defendant is arguing defense counsel were ineffective in not producing Klotz's testimony, there is no showing that this testimony would probably have changed the result at trial. Klotz was a former roommate of

the defendant. See Appendix I to Petition at 1. There was already at trial testimony from one of the defendant's friends, Anthony Grant, corroborating the defendant's testimony that Hawkins was fully conscious, acting under her own power, and that she went upstairs with the defendant willingly and without assistance, contrary to Hawkins' description of her condition. Kevin Barlow had also testified that he did not recall Hawkins exhibiting obvious signs of intoxication after the sexual intercourse had occurred. Trial RP 1293-1294. Clearly, the jury found Hawkins' testimony to be more credible as to what occurred at the defendant's residence that night.

Justin Allison. There was testimony in the defense case at trial from Justin Allison. The defendant has now produced a declaration from Allison in which Allison claims that he told defendant's counsel before trial that he did not want to testify at the trial concerning information he had relating to victim K. Hoskins. Allison states that he may have told defense counsel at that time what he knew about Hoskins. According to Allison, defense counsel agreed not to question him at trial concerning Hoskins. Appendix B to Petition.

In his declaration, Allison states what information he could have provided at trial concerning Hoskins. The defendant refers to this as newly discovered evidence. Obviously, it is not. There is no showing that Allison

did not reveal this information to defense counsel before trial. Even if he did not, defense counsel were alerted to the existence of the information and could have required Allison, as a reluctant witness, to respond to questions under oath in a deposition. CrR 4.6(a).

Defense counsel clearly made a strategic choice to forego questioning Allison about Hoskins in order to avoid alienating a cooperative witness who had evidence helpful to the defense. Allison provided testimony at the trial impeaching both H. Kalmikov and J. Bowles. As discussed previously, such a strategic choice cannot constitute ineffective assistance of counsel.

Furthermore, Allison's information concerning Hoskins would only have been cumulative evidence. He claims that Hoskins did not appear intoxicated the night of the alleged incident. Appendix I to Petition at 3. However, Lindsey Howard gave that same testimony at the trial. Trial RP 922, 930-931.

Allsion also claims that he saw Hoskins holding hands and cuddling with the defendant that night, and that Hoskins did not seem upset after she had apparently had sex in the defendant's bedroom. Appendix I to Petition at 2-3. However, Barry Specht testified at the trial that Hoskins was flirting with the defendant that evening, and that she did not appear noticeably upset when she left the residence the next morning. Trial RP 1735-1736. Specht

also testified that he spoke with Hoskins later, and that Hoskins admitted having sex with the defendant but did not accuse the defendant of any wrongdoing. Trial RP 1736. Thus, it cannot be shown that Allison would have provided new information concerning Hoskins that would probably have changed the result at the trial.

Joel Hawkins. In the declaration of Joel Hawkins provided by the defendant, Hawkins states he was not forthcoming before the trial about some information he had because he had formerly lived at the defendant's residence, was a high school teacher at the time, and was concerned about his job. Appendix G to Petition at 1. Therefore, it appears his declaration contains information learned since the trial that could not have been discovered beforehand with due diligence. However, the defense cannot show that this information would probably change the result of the trial with regard to any of the defendant's convictions.

Hawkins claims that on one occasion, the time frame for which is not indicated, he overheard K. Hoskins at the defendant's house commenting to other girls on how good it was to have sex with the defendant, and that she had her first orgasm when she had sex with him the first time. Appendix G to Petition at 2. However, Hoskins testified she entered into a sexual relationship with the defendant after the charged incident in December, 2000,

and tried to make that relationship work out over a period of approximately four months. She stated she felt ashamed of what had happened in December and saw this relationship as a way to make it be all right. Trial RP 960-961, 1023.

Presumably, the statement by Hoskins that Joel Hawkins refers to would have been made during that relationship since there was no evidence Hoskins was ever back at the defendant's residence after the relationship ended. Hiding the fact that she had no memory of her first time with the defendant would have been consistent with Hoskins' attempt to convince others, and perhaps herself, that her relationship with the defendant was a good thing and not something to be ashamed of.

Furthermore, there is reason to question the credibility of Hawkins' claim that he really did hear this but hid that information in a defense interview out of concern for his teaching job. He claims Detective Adams suggested his connection to the defendant could cause him problems with his employment. However, he would not have been testifying to being present when a minor was consuming alcohol or when any sexual acts occurred, but simply that he overheard a certain statement while he happened to be present at the house. He had already admitted to Detective Adams that he was living at the house and was present when minors consumed alcohol there, despite

his present claim that he was fearful about the effect his testifying might have on his employment. See Statement of Hawkins in Appendix G to this Response. It is difficult to accept that he really believed overhearing the statement of Hoskins was the sort of connection to the defendant for which his employment could be terminated.

Natalie Van Brunt. Apparently, a friend of the defendant and of his brother has come forward since the trial to make claims concerning several of the victims in this case that she inexplicably failed to mention prior to the trial, even though she was aware of the case and even attended portions of the trial. Appendix O to Petition. She claims that on one occasion victim J. Bowles stated she wanted to sleep with the defendant. However, such testimony would be cumulative. Both the defendant and Anthony Grant testified that Bowles engaged in heavy kissing with the defendant before the alleged act of rape occurred. Trial RP 1580-1581, 2015-2016. Justin Allison testified he observed Bowles flirting with the defendant and kissing him. Trial RP 1823-1824. Allison stated he then saw Bowles go into the defendant's room with him, and heard a female voice moaning in a manner that indicated sex was taking place. Trial RP 1838.

Van Brunt claims that later Bowles told her she had sex with both the defendant and his brother and "seemed proud" of that. There is no dispute

sex occurred between the defendant and Bowles. As to Bowles seeming proud about it, there is no foundation detailed in the declaration for this lay opinion, and so it is not even clear that it would be admissible. ER 701.

Van Brunt states that Bowles suggested she could get money from the defendant based on his misconduct. This would constitute solely impeachment evidence and so cannot be newly discovered evidence supporting a new trial. Williams, 96 Wn.2d at 223. Furthermore, the statement is consistent with having been victimized by the defendant.

Van Brunt claims that she heard Rankis state that she would not mind having sex with the defendant. This would be cumulative evidence. Both Justin Allison and Crystal Phillips testified to the same thing at the trial. Trial RP 1818, 1885-1886.

As discussed above, E. Gundlach testified in regard to Count 18, furnishing liquor to a minor, that she went to the defendant's residence in May, 2000, at which time the defendant served her a mixed drink. Trial RP 845-847. Gundlach then testified to ending up in the defendant's bedroom, her clothes being taken off, and the defendant getting on top of her. This testimony was admitted as evidence of the defendant's common scheme or plan. Trial RP 849, 851-853.

Van Brunt states that she was at the defendant's residence at an

unspecified time, and so it may or may not be the same incident Gundlach testified about. Van Brunt states that she was in the kitchen, that Gundlach and some others were there, that Kevin Barlow was making alcoholic drinks, and that the defendant was not in the kitchen at the time. Appendix O to Petition at 2. There is no claim Barlow gave a drink to Gundlach or that she had a drink at that time. If this is the same incident Gundlach testified about, Van Brunt does not provide any evidence that the defendant did not provide Gundlach a drink at some other point that same evening. The defendant claims in his Petition that this evidence contradicts the testimony of Gundlach regarding the defendant's common scheme or plan, but it does not address that matter at all.

Diana Moye. The declaration of Diana Moye makes several claims against Thurston County Sheriff's Detective Louise Adams and Jeannette Hawkins, mother of victim Z. Hawkins. These claims are addressed in the next sections of this Response to the defendant's petition. For the reasons discussed in those sections, there is no showing that any of these claims could affect the outcome of this trial in any way, and so do not justify a new trial.

6. The claims of improper influence made by the defendant against Detective Adams and the State's victim advocate are disputed, but in any event the defendant has failed to show that any of the statements alleged

to have been made to witnesses by Detective Adams could have resulted in any actual prejudice to the defendant at the trial, and the defendant has failed to make even a prima facie showing of evidentiary support for his claim against the State's victim advocate, or for his claim that Adams intimidated Joel Hawkins to prevent Hawkins from testifying for the defense, and so these claims should be disregarded.

The defendant claims in his petition that his constitutional right to due process was violated because the lead investigator, Detective Adams, and a victim advocate for the Thurston County Office of Prosecuting Attorney coached certain witnesses, and that Detective Adams intimidated a witness from testifying. Attached to this Response are declarations from Detective Adams and Victim Advocate Kim Carroll in response to those accusations. See Appendices G and H.

In making such accusations in a personal restraint petition, assuming that the defendant is correct in claiming a constitutional issue is involved here, the defendant must make at least a prima facie showing of actual prejudice with regard to the trial of this cause. In re Personal Restraint of Rice, 118 Wn.2d 876, 884-885, 828 P.2d 1986 (1992). It is the State's contention, for the reasons argued below, that the defendant has failed to meet that burden here. However, if this court were to hold that the burden had been met, the appropriate next step would be to direct the matter to the trial court for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12.

Rice, 118 Wn.2d at 885-887.

Witness Amanda Chinn. The defendant accuses Detective Adams of coaching Amanda Chinn to change her testimony to match that of J. Bowles. The transcript of Adams' taped interview with Chinn is attached as Appendix D. In that interview, Chinn initially recalled that Bowles had gone back to the defendant's residence after the date of the charged incident. To test that memory, Adams indicated Bowles said she never went back and Adams then asked Chinn how sure her memory was on that point. Chinn responded that she was not very sure. Chinn Interview at 3 in Appendix D.

At trial, Chinn was questioned about this portion of the interview in cross-examination. She stated that she was confused on this point at the time of the interview with Adams, and upon thinking about it afterwards recalled that the charged incident was the second time they had gone to the defendant's residence, and that the other occasion they went there occurred before that night. Trial RP 523-524.

This matter was fully explored at the trial. There is no evidence that Chinn testified according to anything but her own recollection. There is no showing of prejudice.

Witness E. Gundlach. The defendant claims that Detective Adams coached E. Gundlach to change her testimony to match that of Z. Hawkins.

The transcripts for the two interviews that Detective Adams had with Gundlach are attached in Appendix E. At several points, Adams made brief reference to statements by Hawkins to see if that triggered Gundlach's memory. In some instances, Gundlach recalled the matter similar to Hawkins and in other instances Gundlach had a different recollection. However, at no time did Adams suggest that Gundlach should testify to anything but her own memory.

At trial, defense counsel saw no need to cross-examine Gundlach on the manner in which she was questioned by Adams. However, defense counsel did use the interviews, which the defendant now characterizes as coaching the witness, to extensively impeach Gundlach by her inconsistent statements to Adams. Trial RP 858-863, 870-877, 881-883. If anything, these statements provided a valuable resource for the defense case. Thus, there is no showing of prejudice regarding the interviews with E. Gundlach.

Testimony of J. Bowles. At the trial, the following exchange took place between defense counsel and witness J. Bowles:

Q. And the detective told you that she had a videotape of girls lying on beds in a row and Jerry having sex with them one after another as he walked from one to another?

A. Something like that, yes.

Trial RP 626. Detective Adams has denied she ever made such a statement.

Appendix G. The transcript of Adams' interview with Bowles is attached as Exhibit F, and the statement is not present there. The prosecution certainly never suggested to the jury that there was such a videotape. There is no showing how this statement by Adams, if made, prejudiced the defendant at the trial of this cause, since it was actually used at trial to try and discredit Adams.

Diana Moyer. The victim of Count 22, voyeurism, was M. Blevins. The defendant pled guilty to that count. Diana Moyer is the mother of Blevins. She did not testify at the trial, nor did Blevins. In her declaration, Moyer claims that Detective Adams told her that law enforcement had found evidence of date rape drugs at the defendant's residence. Detective Adams denies this. However, even if it were true, there is no showing of how this alleged statement to Moyer caused actual prejudice for the defendant at trial.

Moyer also claims that Detective Adams said Wiatt was connected to the Asian Mafia, that police had Wiatt under surveillance for a year, and that there were incidents where girls ran out of the house half-naked after being raped. Adams disputes these claims also, but again, there is no showing of how such statements to Moyer affected the trial in any event.

Moyer claims she met with some parents of victims, specifically the mother of A. Cruz, the mother of K. Hoskins, and the parents of E. Gundlach.

There is no showing that any of these parents, other than Moye, related to his or her daughter what was said at these gatherings. Nevertheless, the defendant seeks to avoid his burden of proof by simply asking this court to assume that took place.

However, even if it did take place, there is no showing of how that could have affected the trial. None of the victims whose parents were at these gatherings were witnesses as to what happened to other victims. The counts involving A. Cruz, except for one count of furnishing liquor to a minor, have been vacated and the State has not chosen to retry those counts. The only count in which E. Gundlach was the victim was one for furnishing liquor to a minor. The testimony of K. Hoskins was that she could not remember what the defendant did to her, and there is no showing her version of events changed after her initial report to law enforcement.

Witness Justin Allison. In his declaration, Allison claims that after the trial K. Hoskins told him that she felt pressured by Detective Adams to confirm that the defendant used a date rape drug on her. This is hearsay and so cannot be utilized in support of the defendant's claim for a new trial in his petition. Rice, 118 Wn.2d at 886. Even if it could be utilized, there is no showing that Hoskins ever did confirm such a thing or how she could possibly have done so. Hoskins certainly never testified to that at the trial.

Thus, there is no showing of prejudice.

Joel Hawkins. The defendant claims Detective Adams intimidated Joel Hawkins into declining to testify for the defense. However, there is no evidence Hawkins ever declined to testify for the defense. Furthermore, Hawkins does not claim that Adams tried to pressure him not to testify or that she ever discussed with him the subject of testifying.

Hawkins' claim is that Detective Adams suggested to him that his connection to Jerry Wiatt might cause him problems with his job as a high school teacher. Appendix G to Petition at 1. Hawkins was a roommate of Wiatt's in January, 2001. Testimony of many witnesses at trial indicated that persons under 21, including high school students, were frequently being furnished with alcohol at parties put on at the residence by Wiatt and his roommates. The further indication from the evidence was that young females at these parties often became intoxicated, and that Wiatt and his roommates then engaged in sex with them. The trial court noted that the evidence of these practices amounted to evidence of a common scheme or plan.

Hawkins certainly did not need Detective Adams to figure out that school officials would likely not look kindly upon the matter if Hawkins was connected to such practices at the defendant's residence. The transcript of Adams' tape-recorded interview with Joel Hawkins is attached to Adams'

declaration in Appendix G to the Response to Petition. As that transcript shows, it was Hawkins who brought up the concern about events taking place at the defendant's residence affecting Hawkins' occupation. Hawkins stated that the reason he moved out of Wiatt's residence was a concern that the frequent use of alcohol there by underage females could threaten Hawkins' employment as a teacher. See Interview of Joel Hawkins in Appendix G at 2-3. If Hawkins kept silent about information he had, it was not because of any intimidation by Detective Adams but because of concerns Hawkins already had dating back to early 2001.

Claim against the State's victim advocate. The defendant claims that a victim advocate for the Office of Prosecuting Attorney coached several victims to cry when on the stand. The victim advocate who worked on this case, Kim Carroll, has submitted a declaration denying these accusations. Appendix H. Notably, there is no allegation by any victim that Ms. Carroll ever coached them in this way. Instead, the defendant relies upon two declarations which provide no support for this accusation.

The defendant claims in his petition that Natalie Van Brunt has reported that the prosecution's victim advocate coached witnesses to cry on the stand. That is not accurate. Van Brunt simply states that during the trial of this cause she saw "a woman" tell some of the witnesses to cry when they

were on the stand, and that this “woman” made a motion with her hand near her eye during the testimony of a couple of these witnesses. The nature of that motion is never described. There is nothing in Van Brunt’s declaration providing any indication who this “woman” was. Appendix O to Petition at 2.

Apparently, the defendant wishes this court to engage in pure conjecture and assume the “woman” was the victim advocate for the prosecution. That would not be appropriate. Rice, 118 Wn.2d at 886. This claim by Van Brunt must therefore be disregarded.

In the second declaration, the mother of the defendant, Lina Wiatt, states that she sometimes observed “Kim”, the victim advocate, speak with alleged victims in the hallway but cannot say anything about what was discussed on those occasions. Lina Wiatt then states that “once or twice” she saw Kim making a motion with her hand near her eye before a witness went into the courtroom to testify. Again, the motion is never described. There is nothing to indicate whether the motion was intentional or inadvertent. There is nothing to indicate it was intended as a form of communication, or if so, what it was intended to convey. Engaging in simple speculation, Linn Wiatt states that Kim was indicating that the witness should cry. No basis is provided for this conclusion other than the apparent desire of the defendant’s

mother that it be so.

On such a frivolous basis, the defendant chooses to accuse the prosecution's victim advocate of misconduct. The defendant has not met his threshold burden in this regard.

As discussed above, the defendant is unable to substantiate a single specific instance of actual prejudice deriving from the accusations made against Detective Adams and the State's victim advocate. This, however, does not deter the defendant from characterizing their alleged actions as outrageous government conduct, a term reserved in Washington law for the most egregious and flagrant forms of lawlessness by government officials. State v. Lively, 130 Wn.2d 1, 19-20, 921 P.2d 1035 (1996). The fact is that, for the reasons stated above, the defendant has failed to show any misconduct by Detective Adams or Ms. Carroll, much less some form of flagrant violation of the defendant's due process rights.

Claim of failure to disclose. The defendant further argues that even if the actions of Detective Adams or those of the victim advocate did not violate the defendant's right to due process, that right was violated by a failure to disclose these actions, citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant has a due process right to information in the possession of the prosecution that is relevant,

admissible, and material. Gregory, 158 Wn.2d at 797-798. Evidence is material if there is a reasonable probability that if the information had been disclosed to the defense, the result at the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. Gregory, 158 Wn,2d at 797. In evaluating the impact of any nondisclosure, the court must consider whether the information was already known to the defense or whether it could have been discovered with reasonable diligence through alternative means. Id. at 798.

For the most part, the defendant's accusations against Adams and the victim advocate are based on information available to the defense prior to the trial. For example, the defendant criticizes the manner in which Detective Adams questioned some of the victims, but there is no contention that the State failed to provide the defense transcripts of those interviews. Moye's claims regarding statements made about the defendant by Detective Adams are duplicated by declarations from persons close to the defendant, such as his brother Jeff, his former roommate Ryan Carlson, and his friend Thomas Ho. See Appendices E, H, and P to Petition. Carlson testified at the trial and Ho was interviewed by the defense. The only person making any specific claim regarding the State's victim advocate is Lina Wiatt, the defendant's mother.

The defendant makes the conclusory statement that there is a reasonable probability this information, if disclosed, would have changed the result of the trial, but provides no explanation for how the evidence would have had such an effect. First, as discussed above, most of the information was known to the defense. Second, some of it was already used at the trial. Third, some of it, such as speculation about whether the defendant was connected to the Asian Mafia, would have been inadmissible at the trial. Fourth, as shown above, there is no support provided for accusations such as the claim that Adams intimidated Joel Hawkins not to testify or that the State's victim advocate coached victims to cry while testifying. Therefore, there is no showing of a failure to disclose material evidence.

7. The defendant has not presented competent, admissible evidence that would establish that jurors received extrinsic evidence in this case, and therefore a reference hearing is not appropriate.

The defendant claims that extrinsic evidence was received by jurors during the trial of this cause. The defendant has presented a declaration by Diane Moyer claiming that, during the trial, Moyer overheard the mother of victim Z. Hawkins state that she would find a way to get an article concerning date rape drugs to the jurors. No further information is provided concerning the context of this alleged statement in order to gauge the seriousness of it. No evidence is provided that Hawkins' mother ever did

anything to actually follow through on this alleged statement. No evidence is provided that any juror ever saw such an article.

It should be remembered that the defense in this case engaged in an intensive investigation of the jurors concerning their consideration of the subject of date rape drugs. This included questioning jurors regarding where they had obtained information on that subject. No juror indicated that the jury was ever exposed to an article on date rape drugs either during the trial or during deliberations. See Appendices EE and II to Petition.

The defendant argues that the statement by Moye is at least sufficient to require a reference hearing. However, a reference hearing is not intended to be an investigative tool. A reference hearing is not appropriate unless the defendant can show that he has competent, admissible evidence that would establish his claim that the jury considered extrinsic evidence.

As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, has no apparent basis in provable fact. In other words, the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. . . . If the petitioner's evidence is based on matters outside the record, the petitioner must demonstrate he has competent, admissible evidence to establish the facts that entitle him to relief.

Rice, 118 Wn.2d at 886. The defendant has not met that threshold burden.

8. The defendant has failed to show any actual or potential bias

on the part of the trial judge and has failed to present anything more than speculation in an attempt to obtain a reference hearing on that issue, and so the request for a hearing should be denied.

The defendant has presented declarations by persons who observed a daughter of the Honorable Judge Gary Tabor at several parties held at the defendant's residence. Declarant Andrea Denton states that, to the best of her recollection, Judge Tabor's daughter was a friend of victim Z. Hawkins. Denton does not claim to have been personally acquainted with Judge Tabor's daughter, does not state the source of her recollection that Judge Tabor's daughter was a friend of Hawkins, nor the time frame for this supposed friendship. Appendix F to Petition.

Counsel representing the defendant for purposes of this personal restraint petition reports that he spoke with Judge Tabor's daughter. According to Counsel, she stated that she does not know Wiatt and does not recall having been at his house, but that it is possible she went to a party there without being aware of who owned the residence. She further related that she would not have told her father about being at a party where alcohol was served because he would not have approved. No evidence has been provided by the defendant that Judge Tabor was ever aware that his daughter attended a party at the defendant's house, if that did in fact occur.

Based upon the above evidence, the defendant asserts that the judge

in this case was biased and should have recused himself. There is a presumption that a trial judge has properly discharged his official duties without bias or prejudice. In re Personal Restraint of Davis, 152 Wn.2d 647, 692-693, 101 P.3d 1 (2004). A party claiming the contrary must show actual or potential bias on the part of the judge. State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). To meet this burden, the party must present specific facts establishing such bias. In re Davis, 152 Wn.2d at 692-693. Mere speculation is not enough. In re Personal Restraint of Haynes, 100 Wn. App. 366, 377 n. 23, 996 P.2d 637 (2000).

The defendant speculates that Judge Tabor's daughter may be wrong about not informing her father of having been at Wiatt's house. In the alternative, he speculates that Judge Tabor could have learned of his daughter's attendance there from some other source. He further speculates that Judge Tabor's daughter may have spoken to Z. Hawkins or to other victims or witnesses in this case and may have communicated what she learned to Judge Tabor. He then speculates based upon the above speculation that Judge Tabor could therefore have felt some animosity toward the defendant for exposing his daughter to the illegal and/or immoral conduct at his residence.

As noted above, speculation is not enough to establish a claim of

actual or potential bias. The defendant argues that, even if that is so, he should still be granted a reference hearing on this claim. However, speculation is also an insufficient basis for a reference hearing. In setting forth the threshold burden for a reference hearing, the Washington Supreme Court stated the following:

. . . In short, petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.

Rice, 118 Wn.2d at 886.

In support of his request for such a hearing, the defendant cites Bracey v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). However, in that case, a judge had been convicted of accepting bribes from criminal defendants to make rulings in their favor. Evidence was presented at the judge's trial that the judge had penalized defendants who did not submit bribes to him, and petitioner Bracey alleged he had been victimized in this way. Bracey, 520 U.S. at 907 n. 5. The judge had appointed his former associate, an individual also involved in past corruption, to represent Bracey in a death penalty murder case, and there was evidence that lawyer had been less than diligent in Bracey's defense. Bracey, 520 U.S. at 907-908.

In Bracey, the Supreme Court confirmed the rule that mere speculation would be insufficient to warrant relief. However, in Bracey's

case it was found that circumstantial evidence had been presented in support of his claim of bias. Bracey, 520 U.S. at 909. The relief granted was not a hearing, but rather access to discovery under the rules of civil procedure. Bracey, 520 U.S. at 904, 908.

In the present instance, no direct or circumstantial evidence has been presented in support of the claim of bias. In fact, the evidence is that Judge Tabor was not aware of any visit by his daughter to the defendant's residence, and so refutes the claim of bias.

9. The defendant is incorrect in claiming that the trial court closed the courtroom to the public for purposes of a hearing on a claim of attorney-client privilege. In the alternative, pursuant to the defense waiver of an open proceeding and pursuant to the rule of invited error, the defendant cannot now complain of any decision by the trial court to limit access to the courtroom for such a hearing, and in any event there were grounds noted on the record for limiting such access.

Johan Lo was charged with two counts of voyeurism and two counts of sexual exploitation of a minor. All these charges resulted from two incidents involving victim A. Cruz. Trial RP 417-418. These same incidents were the basis of Counts 1 through 6 charged against defendant Wiatt, also concerning victim A. Cruz. Prior to Wiatt's trial, Lo reached a plea agreement with the State whereby he was allowed to plead guilty to one count of attempted voyeurism and in return Lo agreed to testify truthfully at Wiatt's trial. Trial RP 414-415.

Attorney David Allen was one of defendant Wiatt's trial counsel in this case. Prior to that representation, Lo sent an email to Allen requesting that Allen represent Lo with regard to the charges cited above. In the email, Lo gave details concerning his version of events, including a claim that Cruz had shown an ID indicating she was 18 years old. Allen did not represent Lo.

Pursuant to the plea agreement with Lo, Wiatt's attorneys were informed Lo would testify that Cruz never showed him an ID. Trial RP 22. Wiatt's attorneys wished to cross-examine Lo concerning his inconsistent statement in the email to Allen. Trial RP 23. Lo's attorney asked that the court find that Lo's email was within the attorney-client privilege in order to foreclose any such cross-examination. Lo's counsel also requested that the court close the courtroom to consider this motion in order to protect the confidentiality of the purportedly privileged communication. 10-4-02 Hearing RP 4.

In response, the court initially discussed the matter with the attorneys in chambers. 10-4-02 Hearing RP 6-7. When the court came back on the record, defense counsel stated that the defense was in agreement with the proposal that the courtroom be closed for consideration of this motion. 10-4-02 Hearing RP 7. The prosecution also stated its agreement. 10-4-02 Hearing RP 8. The court proceeded to specifically excuse the prosecutors

from the courtroom. 10-4-02 Hearing RP 7-8.

There is no indication that any member of the public was in the courtroom at that time. The court made no reference to whether the public was excluded, as it appears there was no need to address that issue. 10-4-02 Hearing RP 6-13.

The court next addressed the issue of whether the defendant could be present. The defense objected to any exclusion of the defendant from this hearing. Based on the discussion in chambers, the court concluded that it would be necessary to allow defendant's counsel to address the court specifically on the content of Lo's email in order to fully make his argument in support of allowing use of the email in cross-examination of Lo. Trial RP 10.

The court determined that it had a responsibility to protect the confidential nature of a communication which was alleged to fall within the attorney-client privilege. 10-4-02 Hearing RP 12-13. The court further concluded that a hearing to determine whether the email was privileged was not a critical stage in the prosecution. 10-4-02 Hearing RP 13. Therefore, the court ordered that the defendant leave the courtroom. However, the court again made no reference to excluding the public from the courtroom. 10-4-02 Hearing RP 13.

Pursuant to Article 1, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, a defendant has a right to a public trial, and this right encompasses pre-trial hearings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (2000). While the right is not absolute, the trial court must satisfy five criteria on the record in order to justify closing the courtroom to the public:

1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
4. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-259.

The defendant contends that his right to a public trial was violated in regard to the pre-trial hearing concerning Lo's email. However, there is nothing in the record to suggest that the court ever excluded the public from

the courtroom. Rather, the courtroom's orders were very specifically aimed at the prosecutors and the defendant. 10-4-02 Hearing RP 7-8. Had the court been faced with making a decision about the public, it is possible the court may have excluded the public to protect the confidentiality of the email. On the other hand, if faced with weighing the issue of public access and the concern for confidentiality, the court may have taken a different approach. All of that is necessarily a matter of speculation because the court was not faced with that decision.

If it is determined that the court somehow did exclude the public without ever making that decision, it is clear that the defendant waived any objection to such a closure. Lo's counsel asked for a closed hearing and Wiatt's counsel agreed with that request. 10-4-02 Hearing RP 4, 7. Therefore, the defense waived the right to a public trial with regard to this one hearing.

Despite this waiver, the defendant argues that he can still claim error in this instance on behalf of the public's own right to an open public trial. It is correct that the public has a right to an open public trial pursuant to Article I, section 10 of the Washington State Constitution. Easterling, 157 Wn.2d at 179. However, defense counsel's agreement to the request of Lo's attorney for a closed courtroom essentially supported excluding the public from the

courtroom and encouraged the court to proceed in that manner.

As argued above, the court never had to reach that issue, presumably because no member of the public was in attendance. However, should this court hold otherwise, under the doctrine of invited error a party cannot set up an error at the trial and then make a claim about it on review by the appellate court. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). In this case, defense counsel having supported the proposal to exclude the public from the courtroom, the defendant cannot now sidestep his waiver by purporting to bring a claim of error on behalf of the public.

Even if it were the case, contrary to the arguments expressed above, that the trial court did exclude the public from this hearing and there was no effective waiver by the defense or barring of the defendant's claim due to invited error, the record shows that the criteria for closing the courtroom were considered by the trial court. The attorney for Lo, as the proponent for closure, sought to protect the compelling interest of what was purported to be an attorney-client communication by Lo. The serious and imminent threat to the attorney-client privilege perceived by Lo's attorney was that attorney Allen would use a privileged communication from Lo to impeach Lo at the trial in the service of a separate client.

The record indicates all those present were given the opportunity to

object to the proposed closure. The State agreed to it. The defense also agreed to closing the courtroom but argued for the right of the defendant to remain. No member of the public was asked to address the court, but then no member of the public was excluded by anything the judge decided. It appears no member of the public was present.

The method adopted by the trial court was required to be the least restrictive means necessary to protect the threatened interest. Protecting the confidentiality of the communication required preventing a discussion of the communication in front of others. The defendant argues there was a less restrictive alternative, in that the court could have addressed the issue without a discussion in court about the specifics of the communication. However, the court addressed on the record why that option was not an available alternative.

The court noted that it was the defendant's counsel who was seeking to address the specifics of Lo's email on the record in order to fully explain why the defense should be allowed to refer to those specifics in cross-examining Lo. 10-4-02 Hearing RP 10. Thus, the court was persuaded that reference to the specifics of the communication on the record was necessary to avoid prejudice to defendant Wiatt.

In arguing against the claim of privilege, Wiatt's attorney did discuss

the contents of the email extensively. He did so in order to argue that excluding reference to the contents of the email during the cross-examination of Lo, on the basis of attorney-client privilege, would allow Lo to commit a fraud upon the court and would affect defendant Wiatt's right to a fair trial. 10-4-02 Hearing RP 22-24. Thus, prohibiting reference at the hearing to the specifics of Lo's communication was not an available alternative. Moreover, again on the basis of invited error, since it was the defendant's counsel who persuaded the court to allow a discussion of the contents of Lo's communication on the record, the defendant cannot now claim that the court erred in failing to prohibit any such reference during the hearing.

Finally, the defendant argues that, even if the right to a public trial was not infringed at the hearing on October 4, 2002, his own constitutional right to be present at the hearing was violated. A defendant has a constitutional right under the Confrontation Clause of the Sixth Amendment to be present at all critical stages of a criminal proceeding against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). However, when evidence is not being presented against a defendant, and so the right of confrontation is not implicated, whether a hearing is a critical stage requiring the defendant's presence is more properly analyzed under the Due Process Clause of the Fifth Amendment. Gagnon, 470 U.S. at

526.

The first question the court must ask is whether the subject of the hearing is a purely legal matter not requiring the resolution of disputed facts. In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The State contends that such was the case at this hearing concerning whether Lo's communication fell within the attorney-client privilege. In such an instance, the defendant does not have a constitutional right to be present unless his absence will affect his opportunity to defend against the charge or unless a fair or just hearing will be thwarted by his absence. Gagnon, 470 U.S. at 526.

The trial court found that this hearing was not a critical stage requiring the defendant's presence. That ruling is supported by the case law cited above. The defendant contends that the court's ruling was in error. However, the defendant does not explain how his absence from the hearing affected his ability to defend against the charge or how it prevented a fair hearing from taking place.

In any event, it is not necessary for this court to reach the question of whether this hearing constituted a critical stage. In his petition, the defendant has the burden of demonstrating how his absence from the hearing resulted in actual and substantial prejudice to him in this case. In re Personal Restraint

of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). However, Lo's evidence in this case pertained solely to the offenses charged against the defendant concerning victim A. Cruz in Counts 1 through 6 of the Fourth Amended Information. Trial RP 349-453. The defendant was acquitted on Count 1, and Counts 2 through 6 were vacated by the Court of Appeals in the direct appeal of this case. The state has elected not to retry the defendant on those counts. Therefore, the defendant has not and cannot cite any prejudice resulting from his absence at the 10-4-02 hearing concerning Lo's testimony, regardless of whether this hearing constituted a critical stage.

IV. CONCLUSION

For the reasons set forth above, the State asks that this personal restraint petition be denied, but that this case be remanded back to the trial court for the imposition of standard-range sentences on the two convictions for rape in the second degree.

RESPECTFULLY SUBMITTED this 9th day of May, 2007.

EDWARD G. HOLM
Prosecuting Attorney


JAMES C. POWERS/WSBA #12791
Deputy Prosecuting Attorney