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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has Defendant Wright failed to meet his burden of showing that the prosecutor engaged in misconduct or that there was any resulting prejudice to his trial?

2. Did the trial court properly exercise its discretion in instructing on accomplice liability when there was evidence from which the jury could conclude that two or more men were involved in the rape of the victim?

3. Did the trial court properly exercised its discretion in giving instructions on the lesser degree crime of rape in the third degree when the jury could believe the victim's testimony but still have a reasonable doubt as to whether forcible compulsion was used to commit a non-consensual act of sexual intercourse?

4. Was sufficient evidence adduced at trial to uphold the jury's verdict finding both defendants guilty of rape in the third degree?

B. STATEMENT OF THE CASE.

1. Procedure

On June 21, 2006, the Pierce County Prosecutor's Office filed an information charging appellant, RICHIE CARTER (Defendant Carter),

with one count of rape in the second degree in Pierce County Cause Number 06-1-02781-9. CCP 1-2, 3.<sup>1</sup>

On February 9, 2007, the Pierce County Prosecutor's Office filed an information charging appellant, HAROLD WRIGHT (Defendant Wright), with one count of rape in the second degree in Pierce County Cause No. 07-1-00808-1. WCP 1-2, 3-5. The State alleged an alternative crime of indecent liberties. *Id.*

The two cases were consolidated for trial as they arose out of the same incident and the matter was assigned to the Honorable Lisa Worswick for trial. CCP 150-151; RP 3. The court ultimately instructed on the charged offenses and the lesser degree crime of rape in the third degree. CCP 167-193; WCP 37-63. Both defendants objected to the instruction on the lesser offense. RP 1902-1903. After hearing the evidence the jury could not reach a verdict on the charged offense of rape in the second degree, but did find both defendants guilty of the lesser degree offense of rape in the third degree. CCP 268, 269; WCP 118, 119; RP 2043-2047.

Both defendants brought a post verdict motion for new trial arguing the court improperly instructed on rape in the third degree. CCP

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<sup>1</sup> The clerk's papers for Defendant Carter shall be referenced as "CCP" and the clerk's paper's for Defendant Wright shall be referenced as "WCP."

270-274; WCP 120-121; RP 2061-2075. The court denied the motion.  
CCP 352-353; WCP 122-123; RP 2074-2075.

Defendant Carter came before the court for sentencing on August 31, 2007. The court imposed a high end standard range sentence of 14 months in the department of corrections followed by community custody range of 36-48 months and \$3,688.61 in legal financial obligations. CCP 333-346, 364-365; RP 2114-2115.

Defendant Wright came before the court for sentencing on August 31, 2007. The court imposed a low end standard range sentence of 6 months in the county jail followed by 12 months of community custody and \$3,688.61 in legal financial obligations. WCP 95-107, 114-115; RP 2113-2114.

The execution of the sentences was stayed pending appeal. RP 2115-2116. Both defendants filed timely notices of appeal from entry of their judgment. CCP 354-355; WCP 80-91.

## 2. Facts

S.F.<sup>2</sup> was 23 years old at the time of trial and 19 years old on January 30, 2004. RP 535-536, 541. S.F. graduated from Spanaway Lake High School when she was eighteen and she knew Defendant Wright from there as he was an assistant principal. RP 537-538. S.F. grew up in the

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<sup>2</sup> The victim's name was Sarah Failey, but her initial's will be used to protect her privacy.

same neighborhood as Jerry McClurkin and Defendant Carter. RP 540-541. Both men were several years older than she. RP 541. She has never been married. RP 824.

On January 30, 2004, S.F. was at a party with her friends Ms. Fincham and Ms. Whittaker, when she got a call from an ex-boyfriend, Nate, who said that he was at the Chalet bar celebrating his birthday with S.F.'s brother. RP 542-545. As some fights were beginning to break out at the party, the three girlfriends decided to go to the Chalet, even though S.F. doubted that she would be able to get in because she was underage. RP 544-546.

S.F. drove her friends to the Chalet in her car and Ms. Fincham and Ms. Whittaker went inside to find Nate. RP 544-546. While waiting for her friends, S.F. realized that she was in need of a bathroom; she reached her friends by cell phone and they helped her sneak in the back door to the bar. RP 546-548. After using the bathroom, she found her friends socializing with Defendants Wright and Carter, Wright's brother (Daryl Wright), and Jerry McClurkin, who is called "Boogey"; S.F. spent most of the time socializing with Nate and his friends. RP 548-549, 553-554, 605-606. While at the bar, Defendant Carter and McClurkin asked if the three girlfriends wanted to come over to McClurkin's townhouse to party. RP 556-557.

From the Chalet, S.F. drove her friends to a gas station and the defendants and their friends followed in two cars. RP 557-558. Some of

the men went inside and purchased beer. RP 558. At the gas station, S.F. saw two people she knew who had been abandoned without a ride; she agreed to take them home. RP 558-559. The defendants and their friends followed in their car while S.F. dropped off the two people. RP 559. After that was done, the defendants' car got in front of S.F.'s car to lead the way to McClurkin's house. RP 559-560. S.F. indicated that she did not have any concerns about her safety because she had known Defendant Carter and McClurkin since she was a small child. RP 561. When they got to the house there was beer and tequila available; S.F. recalls taking some shots of tequila and that it made her drunk, although previously she had been sober. RP 561-562, 566-568. She recalled that everyone was drinking at the house. RP 569-570. Then she and Ms. Fincham were given a tour of the house, which was new. RP 562. There was music playing and it was so loud that it was hard to hear what others were saying, unless they were sitting right next to you. RP 565-566.

S.F. testified that as the evening wore on she observed Ms. Fincham with Daryl Wright and sensed that her friend was uncomfortable; she thought it was time to leave. RP 572-574. She went to find her shoes, which she had left by the front door, but they weren't there. RP 575. S.F. went to look for them in an upstairs bedroom with a queen sized bed.<sup>3</sup> RP

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<sup>3</sup> There were three bedrooms upstairs; only one, the guest bedroom, had a bed in it. RP 1180. There were two bathrooms upstairs: one was off of the master bedroom and the other was off the landing or loft area. RP 1180.

575-576. She testified that somehow Ms. Fincham got pulled out of the room and that she got pulled in. RP 577. There were several men in the room, but she testified that it was dark and she could not see who was there. RP 577, 733-734. She did not yell for help. RP 717. After she was pulled into the room she was pushed down on the bed, so that she was on her back; someone held down her left shoulder so that she could not get up. RP 577-578. She was not being held down in a manner that caused pain. RP 722. She described it feeling as if someone was leaning over her. RP 588. S. F. felt her clothes being removed; she was wearing a bra and panties, jeans, and two tank tops; she also had a hoodie and a hat but was not wearing them at the time. RP 580, 582. As her clothes, except for her bra, were being removed, S.F. recalled saying that "This is not right" and "Stop," but did not yell or scream out, because she was scared. RP 585-586, 592. When asked how many times she said "stop." S.F. stated that she didn't remember. RP 591. She did not recall trying to push anyone off of her, until her recollection was refreshed by reading a statement made a few days after the event. RP 645-647. S.F. was on the bed and her pants and panties had been removed; someone was kissing and touching her breast. RP 592-593. She could feel male hands and penises touching her vagina. RP 589-590. She felt a penis inside of her vagina, then it would stop and then she felt a penis inside of her again. RP 590. This activity would stop and start again and she thinks that more than one man was involved, but testified that she is uncertain. RP 589,

590. S.F. did not know if anyone ejaculated inside of her or if they wore condoms. RP 594-595. S.F. testified that she did not consent to any sexual intercourse. RP 591. A deep male voice told her "It's okay. Everything is okay." RP 590-591. At one point she saw the door open a crack because the light from the hallway came in and it looked like someone was trying to come in. RP 592-594. When the man got off of her and allowed her up off the bed, S.F. tried to locate her clothes so that she could go. RP 595. Crying, she found her pants and put them on, still in the dark. RP 595. S.F. testified that at this point she knows Defendant Wright was there because he was grabbing her arms, touching her vaginal area and breasts, and saying "Come on more, more" trying to persuade her not to put her clothes on. RP 595-598, 601, 733-734, 752-753, 757-758. She replied "No. I want to go. I want to go." RP 595-598. She testified that Defendant Wright told her "Don't ever tell anybody about this." RP 599. S.F. testified that she ran downstairs crying and went straight to her car; she waited there for her friends to appear. RP 600. She did not leave the house wearing her underwear. RP 584.

S.F. recalled being hysterical in the car and telling her two friends what had happened. RP 609-610. She hit the curb as she left. RP 612. She testified that her car was not driving right so after getting away from the house she stopped her car and realized that her tire was flat. RP 611-613. They got in touch with some friends, Kevin and DJ, who came to pick them up. RP 616. S.F. testified that she was afraid to call the police

because she was underage and driving while drunk and not sure who to tell. RP 615-616. The friends took the S.F., Ms. Whittaker and Ms. Fincham first to S.F.'s brother's house, and then they all went to Kevin and DJ's house arriving between 5:00 and 6:00 a.m. RP 617-619. Once there, S.F. noticed that her pants were on inside out and that they were bloody in the crotch. RP 619. She was not menstruating; the blood was caused by what had happened at McClurkin's house. RP 619-621, 641-642.

S.F. called her best friend Angie Armitage to come pick her up and she did. RP 621-622, 924-926. She knows that she gave Angie some information about what had happened but is not certain how much detail she provided. RP 622-623, 926. Angie wanted S.F. to call her mom and the police, but S.F. did not want to do that because she was scared and embarrassed. RP 623. Angie called her mom anyway. RP 926. Later that day the police were called and an officer responded to Angie's house. RP 653-654, 926-928. An officer took S.F. to St. Clare's Hospital for an examination, but a nurse told S.F. that it would be better if she went to Tacoma General Hospital, so she did. RP 656-657. At Tacoma General, S.F. spoke to a nurse about what had happened and then the nurse took swabs and scrapings and part of the examination. RP 657-659. The nurse took some of S.F.'s clothes into evidence. RP 659-660. Her clothes were not ripped or torn as a result of these events. RP 729-730.

Jamie Whittaker testified that she went to high school at Spanaway Lake High School where she met S.F., who was two years behind her in school, as well as Defendant Wright, who was a dean of students at the school. RP 120-122. Ms. Whittaker recalled that on a Saturday approximately three years prior to the trial, she was at the Chalet bar with S.F. and another friend, Stephanie Fincham, when they ran into Defendant Wright and three other men, whom Ms. Whittaker had not met before. RP 126-129. One of these men was Defendant Wright's brother and another one she came to know as "Boogey." RP 269. Ms. Whittaker and Ms. Fincham had gone into the bar, which was crowded looking for S.F.'s ex-boyfriend, Nate; S.F. did not go into the bar with her two friends because she was not yet twenty-one years old. RP 129-131. Ms. Whittaker testified that they found Nate and sent him outside to talk to S.F., before they began talking with the Defendant Wright, who bought them each a drink. RP 132-133, 229. After a while Ms. Whittaker saw that S.F. was inside the bar. RP 133. Later the three girlfriends decided that they would follow Defendant Wright, "Boogey," and the other two men with Wright over to Boogey's house to continue the party. RP 134-135. Ms. Whittaker and Ms. Fincham got into their car with S.F. driving; they also gave a ride to two friends of Nate's, whom they dropped off at a nearby gas station. RP 135-136, 143. At the gas station, Defendant Wright and his friends went into the store and bought some beer. RP 163.

Ms. Whittaker described Boogey's house as a new townhouse. RP 165-166, 239. Ms. Whittaker saw nothing to indicate that the adjoining townhouse was occupied. RP 309-310. There were the four men and the three women at the house. RP 164. Ms. Whittaker testified that everyone but her danced and that she continued to drink. RP 164-166, 226, 254-255, 281. The music was so loud inside that she could not hear what someone was saying unless that person was very close to her and speaking to her. RP 165, 239-240, 310-311. Ms. Whittaker testified that at various points in time both S.F. and Ms. Fincham went up stairs; they both spent more time upstairs than down. RP 166-167, 242, 251-252. She also stated that at various times Defendant Wright and his friends were upstairs as well. RP 167, 185-186. Other than to use the bathroom, Ms. Whittaker stayed downstairs. RP 166. She was mostly in the kitchen or on the porch/patio, where she smoked cigarettes and some marijuana. RP 167-169, 181, 184. Defendant Wright also smoked some marijuana. RP 1818. Most of the time Defendant Wright was with her, but she knows that he went up stairs on at least one occasion and was out of her sight at other times as well. RP 181,185-186, 235, 275. He was out of her sight while S.F. was upstairs. RP 186-187,314. Both S.F. and Ms. Fincham came downstairs and went out on the porch before returning upstairs, but not at the same time; neither of them looked upset while they were downstairs. RP 187-189, 254, 280. Later Ms. Fincham came downstairs; she was followed a short time later by S.F. RP 189. Ms. Whittaker

testified that S.F. stormed down the stairs, looking upset and said “We got to go. We got to go[,]” then walked out the door without stopping. RP 189-191, 259. Defendant Wright had come downstairs a short time before S.F. came down for the last time. RP 206. Ms. Whittaker noticed that S.F. looked scared and that her pants were on inside out. RP 189, 209. Ms. Whitaker testified that she and Ms. Fincham followed her out and that she was still getting into the car when S.F. started to drive away. RP 192-193. Ms. Whittaker described S.F. and extremely upset and crying and that she screamed “They raped me. They raped me.” RP 191-193, 195. S.F. told them that she had tried to scream for them, but the music was too loud; she also indicated that she had tried to get out of the room but they kept pushing her back down. RP 209. After driving a few minutes one of the tires on the car popped and they had to pull over. RP 210. A car was behind them and the women locked the doors and did not get out of car for fear that it was one of the men from the house. RP 210. When the car passed, it looked to Ms. Whittaker like one of the cars associated with the men at the house. RP 210-211. They called friends who came to pick them up. RP 211-213. While they were waiting, S.F. cried the whole time and complained of soreness in her vaginal area. RP 213. The next day, Ms. Whittaker got a call from Defendant Wright who said that he had called to make sure that they had “gotten home okay.” RP 217-218, 221-222. She told them they had, then hung up the phone. RP 222. Defendant Wright made some other calls to Ms. Whittaker that she did not pick up.

RP 221-223. At another point, he left a message on her phone that said he had heard some allegations about what had happened last night and that he wanted to know what was going on. RP 224. About three days later, Ms. Whittaker spoke with a detective; she still had the message on her phone and she played it for him to hear. RP 159,215, 224, 268.

Ms. Whittaker testified that she never saw S.F. dancing around in her bra. RP 224, 282-283. She never heard any screams from upstairs but thought the music was too loud for her to be able to hear anything. RP 252, 310-311. Ms. Whittaker testified that at one point Defendant Wright tried to kiss her but that she stopped him; she did not feel uncomfortable by this. RP 226-227.

Ms. Fincham testified that she met S.F. and Jamie Whittaker in junior high and has been friends with them ever since. RP 324-326. Defendant Wright was one of Ms. Fincham's teachers at Spanaway Lake High School. RP 327. Ms. Fincham testified that one night near the end of January 2004, she, Ms. Whittaker, and S.F. were at a friend's house partying when the three decided to go to the Chalet bar to find S.F.'s boyfriend, Nate, because it was his birthday. RP 328-332.

When they got to the bar, she and Ms. Whittaker went inside to find Nate while S.F. waited outside, because she was not yet twenty one. RP 332-333. She and Ms. Whittaker saw Defendant Wright at the bar with three other men; Defendant Wright bought each of the girls a drink. RP 333-335. The three men she met that night who were with Defendant

Wright were Richy Carter, Jerry McClurkin and Daryl Wright. RP 328. She thought that she might be able to recognize Daryl Wright but not the other two men. RP 328. At some point S.F. got into the bar despite being underage. RP 344. Ms. Fincham testified that she left the bar with Ms. Whittaker and S.F, who was driving, and went to a 76 station. RP 345-346. Ms. Fincham got out to use the restroom. RP 346. Inside the mini-market restroom she saw Defendant Wright and another of his male companions buying beer. RP 346-347. It was agreed that the girls should follow them back to a house that belonged to one of Wright's companions. RP 347-348. Ms. Fincham testified that none of the women had any romantic interest in any of the four men, but went to the house because they were in the mood to party. RP 352-353.

The house was a new two story house; the music was turned on and was very loud. RP 349-351. Ms. Fincham testified that over the course of the evening that Daryl Wright was flirtatious with her and that Defendant Wright seemed interested in S.F. RP 353, 357. Ms. Fincham testified that she and S.F. took a tour of the house and that then they came downstairs. RP 363-364. She later went back upstairs and was "kissing and stuff" with Daryl Wright in an unfurnished bedroom upstairs. RP 362, 366. She indicated that Daryl Wright tried to unbutton her pants to have sex, but that she stopped him. RP 366. Ms. Fincham testified that after she told him no that they both went downstairs; she found Ms. Whittaker and Defendant Wright in the kitchen; she does not recall where the others

in the house were at that time. RP 367-368. Ms. Fincham recalls that at some point she saw S.F. come outside onto the porch with her shirt off, so that she was wearing her pants and her bra. RP 388. Ms. Fincham recalled that she went upstairs one more time to find S.F.; Defendant Wright was not downstairs as at that time. RP 368, 370-371. Ms. Fincham went to the bedroom to the right of the bathroom and tried to open the door; it opened slightly, but then stopped as if someone were holding the door closed or blocking the pathway. RP 371-372. The music was still playing loudly at this point. RP 423-424. The door then shut and Ms. Fincham went downstairs. RP 372-373. Ms. Fincham found Ms. Whittaker and the man called Boogey downstairs. RP 427-428. Ms. Fincham testified that S.F. came downstairs a short time later and pulled her aside, S.F. was shaking and “freaked out;” S.F. told Ms. Fincham that they had to leave now as she had been raped. RP 373-374. Ms. Fincham went to find her shoes; they ended up being in the bedroom where S.F. had been; she noticed condom wrappers on the bed. RP 432. S.F. left the house and Ms. Fincham and Ms. Whittaker followed. RP 374-375, 432-433. Ms. Fincham testified that at this point Defendant Wright told her not to tell anyone that they had been hanging out with them. RP 421, 432. On the way out to the car, Ms. Fincham asked Defendant Wright, who was now in a car parked in the driveway, what had happened; he did not respond and the car he was in drove off. RP 433.

The three women got into their car with S.F. driving. RP 375-376. Ms. Fincham stated that S.F. was more emotional now, screaming and crying, repeating that she had been raped. RP 376. Shortly after she drove off, S.F. hit a curb causing a tire to go flat. RP 376. S.F. stopped the car; a car with Defendant Wright drove by them. RP 376-377. Ms. Fincham testified that she got on a cell phone and called friends to come help them. RP 378-379. Two friends came to pick them up, they went to see S.F.'s brother and she told him what had happened; eventually they ended up at Angie's house. RP 383. S.F. and Ms. Fincham called their parents and when they arrived, they told them what had happened. RP 383-384. Ms. Fincham's mother called the police and an officer came out and got statements from S.F. and Ms. Fincham. RP 384-387. Ms. Fincham gave a taped statement a day or so later. RP 387.

Christine Schlatter testified that she was employed as a sexual assault nurse at Tacoma General Hospital for one and a half years and described the components and procedures used by the hospital to preserve evidence recovered in a sexual assault examination. RP 867-878. She testified that she conducted the rape examination on S.F. on January 31, 2004. RP 878-879. Using the protocols that had been established, Ms. Schlatter interviewed S.F. RP 880, 885-891. She indicated that S.F. cried during the interview and was visibly upset. RP 880-881. S.F. gave Ms. Schlatter a narrative account that was generally consistent with her trial testimony although it contained some details that S.F. could not recall

when she testified. RP 916-917. Ms. Schlatter testified that upon questioning S.F. told her that one person was holding her down with his weight while another would be penetrating her. RP 891. Ms. Schlatter saw no physical evidence that S.F. fought her assailants. RP 911-912. S.F. did not tell Ms. Schlatter that she fought with her assailants. RP 911-912. Ms. Schlatter collected S.F.'s socks and jeans, but she was not wearing underwear. RP 882-883, 902. She did not notice any injuries on S.F.'s body, but there was a little vaginal bleeding. RP 884, 890. S.F. was not menstruating at the time. RP 893. Ms. Schlatter took eight swabs from S.F.'s vagina, and two from the outer vaginal area, two oral swabs, two from the outside of the rectum and two from the inside and one from her breast area. RP 895-897, 899-900. She also scraped under S.F.'s fingernails. RP 897. The parties stipulated that the samples taken during this rape examined were properly collected and stored by the hospital, the Pierce County Sheriff's department and the Washington State Crime lab. RP 1002-1003.

Deputy Parfitt testified that January 31, 2004 he was dispatched to respond to residence in Spanaway regarding a report of a sexual assault. RP 767-772. At the residence he came in contact with S.F. and Ms. Fincham and gathered information from them about the sexual assault. RP 772-775. He also directed S.F. to go to a hospital for a rape examination where physical evidence could be collected. RP 781-782. Officer Parfitt located the car that S.F. had been driving that night and saw that it had a

flat tire; he also drove around the community near the car to see if he could locate the house where the women had been, but was unable to do so with the vague description that he had been given. RP 784-785. Additional follow-up would have been done by an assigned detective. RP 784-785. The matter was initially assigned to Detective Donlin, then reassigned to Detective Harai on February 2, 2004. RP 933, 935. That same day, Detective Harai, re-interviewed S.F., Ms. Whittaker, and Ms. Fincham. RP 936-937. Detective Harai also contacted S.F.'s mother and collected the shirts that S.F. had been wearing and a tire for her car and placed them into evidence. RP 938.

In her handwritten statement that she gave to the police on January 31, 2004, S.F. indicated that "Richy, Harold and Daryl" had taken her into the bedroom but that she did not know who had raped her because it was really dark in the bedroom. RP 604-605. S.F. told Detectives Harai and Dogeagle that defendants Wright and Carter were in the room, but that she thought it was McClurkin rather than Daryl Wright who had been with them. RP 606-607.

Detective Harai determined that the sexual assault had occurred at 6813 131<sup>st</sup> Street Court East in Puyallup. RP 939. He obtained a search warrant for that address and executed it on February 4, 2004, aided by several other law enforcement personnel. RP 940-941. Inside the residence deputies found a water bill indicating that the primary resident of the house was Jerry McClurkin. RP 944. The house appeared to have

been recently cleaned; there was no garbage in the interior garbage pails and no sheets on the bed. RP 947-948. They did not find any condom wrappers, boxes of condoms, women's panties, or a baseball cap inside the house or in the exterior trash/recycling containers. RP 948-949. They did find empty beer cans and a tequila bottle in the outside dumpsters. RP 949. A forensic investigator for the Pierce County Sheriff's Department testified he assisted Detective Harai in the service of a search warrant at 6813 131<sup>st</sup> Street Court East in Puyallup and took several photographs of the residence, which were admitted in to evidence. RP 856-860. He testified that the two upstairs bedrooms were sparsely furnished – one just had some clothes in it and the other had a bed that was covered with a comforter but no other bedding. RP 858-861.

Detective Harai left the sheriff's department in 2005. RP 953-954. He did not recall attempting to collect DNA samples from any of the suspects or asking the State Patrol Crime Lab to analyze the swabs taken during the rape examination prior to his departure. RP 953-954. The case was then reassigned to Detective Shaviri in January of 2005. RP 972-974. He did obtain buccal or DNA swabs from Defendants Wright and Carter, Daryl Wright, and Jerry McClurkin. RP 975-977. The parties stipulated that the samples taken from the suspects were properly collected and stored by the Pierce County Sheriff's department until released to the Washington State Crime lab and that further the Crime lab properly preserved and stored these samples. RP 1003-1004.

Jeremy Sanderson a forensic scientist employed by the Washington State Crime lab in the DNA analysis section testified that he examined the swabs collected from S.F.'s rape examination, her pants and the reference samples taken from the four suspects. RP 1005-1018. The swabs taken from S.F. were first screened for semen. RP 1019-1021. Based upon the amount of DNA received from this screening only certain swabs, the vaginal and debris swabs, were taken forward for DNA analysis. RP 1019-1022. He also screened S.F.'s jeans for semen and those were taken forward for further DNA analysis. RP 1020-1023. DNA was extracted from the rape kit swabs and from the jeans and then the male component DNA was separated from the female component DNA so that Sanderson ended up with two 13 site profiles from all of these samples. RP 1023-1027. He then extracted DNA profiles for each of the defendants' known samples and compared these to the profiles obtained from the jeans and the swabs. RP 1027-1029. The male DNA profile obtained from the vaginal swabs matched that of Defendant Carter; the "random match probability" of finding someone in the general population whose DNA matched was one in 210 quadrillion. RP 1029-1036. None of Defendant Wright's, Daryl Wright's or Jerry McClurkin's DNA was found on the vaginal swabs. RP 1036-1037. Testing of the sample taken from the jeans also revealed the DNA found there matched Defendant Carter's while the

others were excluded as possible donors. RP 1036-1037. Mr. Sanderson also conducted DNA testing on the swabs taken of S.F.'s breast area and found that it contained a mixture of more than one individual. RP 1038-1039. He could not identify what type of bodily fluid was involved in the DNA found on S.F.'s chest or whether it came from direct contact; he did not conduct a semen test on these swabs so cannot say whether it contained semen. RP 1043-1045. Mr. Sanderson indicated that the amount of male DNA found in the breast area swab was substantial so that indicated a significant or "heavy" amount of contact. RP 1045. Mr. Sanderson excluded Daryl Wright and Jerry McClurkin as possible contributors but found that DNA consistent with both Defendant Wright's and Defendant Carter's DNA in this sample. RP 1039-1049. The random match probability on this sample is much lower due to it being a mixed sample, but was calculated to be one in 17,000. RP 1040, 1049-1050.

The defendants called Daryl Wright to testify, who indicated that he is the younger brother of Defendant Wright and that he has known Defendant Carter and Jerry McClurkin since the seventh grade. RP 1065-1066. Mr. Wright testified that on January 30, 2004 he met his brother, Defendant Carter, and McClurkin at the Chalet bar for drinks. RP 1067-1069. While he was there he met S.F., Ms. Fincham, and Ms. Whittaker. RP 1069-1070. Mr. Wright testified that he thought he was making a

connection with Ms. Fincham so he invited her and her two friends to come to McClurkin's house with them. RP 1071. The three girlfriends accepted the invitation. RP 1071. On the way to McClurkin's house, they stopped to buy beer at a gas station. RP 1072. Daryl Wright testified that once at McClurkin's house people started drinking and dancing and that S.F. started dancing provocatively with her shirt off. RP 1074-1076. According to Daryl Wright, S.F. spent most of the evening walking around in just her bra. RP 1090. Daryl Wright testified that after a while he went upstairs to the unfurnished bedroom with Ms. Fincham where they continued to talk; he indicated that they started to kiss and become intimate. RP 1078-1081. Daryl Wright suggested to Ms. Fincham that they move to the other bedroom, which had a lock on the door, and Ms. Fincham agreed. RP 1081-1082. He testified that in the other bedroom he had consensual sexual intercourse with Ms. Fincham using a condom that he either purchased at the gas station or had in his possession. RP 1082-1083. Afterward there was a knock on the door and McClurkin and S.F. came into the room; Defendant Carter was out on the upstairs landing. RP 1084-1086. Daryl Wright testified that he and Ms. Fincham left and that he went to use the bathroom. RP 1086-1087. When he came out of the bathroom he went downstairs where he saw his brother, Ms. Fincham, and Ms. Whittaker; a short time later he saw McClurkin. RP 1087, 1099. He testified that this group stayed downstairs for most of the rest of the evening except for when someone went upstairs to use the bathroom. RP

1088-1089. He testified that he saw Defendant Carter come down later. RP 1100. He also testified that he saw S.F. before she left and that she did not appear to be in discomfort. RP 1102. According to Daryl Wright, the girls left without incident and he did not hear until the next day that someone was alleging that they had been raped. RP 1094-1095. Daryl Wright worked for the Bethel School district at the time and was put on administrative leave the following Monday; Defendant Wright worked for the Tacoma School district and also was the subject of an administrative investigation. RP 1116. Daryl Wright was concerned about his career and livelihood as well as his brother's. RP 1116-1117.

Jerry McClurkin testified that he was childhood friends with Defendant Carter and Daryl Wright and that he met Defendant Wright through his brother. RP 1156-1157. On January 30, 2004, Defendants Wright and Carter came over to his townhouse at 6813 131 Street Court East, Puyallup; they had a couple of drinks before going to the Chalet bar where they were to meet up with Daryl Wright. RP 1157-1159. At the bar, McClurkin testified that he saw S.F. who had been a neighbor of his growing up but who was several years younger than he. RP 1161-1163. He indicated that she was there with a couple of girlfriends and that it was understood when the bar closed that she and her friends were going follow him and his friends to come over to his townhouse. RP 1163-1167. The girls went in one car and the men were in two cars; they all stopped at a gas station, where Defendant Wright bought some beer. RP 1168-1170.

At the townhouse, he gave everyone a tour then the group ended up in the kitchen where everyone had a shot of tequila. RP 1175-1183. He testified that S.F. began dancing provocatively, bumping and grinding against him. RP 1185-1186. McClurkin testified that after S.F. began to kiss him that they both went upstairs. RP 1190-1191. He testified that S.F. willingly followed him up to the unfurnished bedroom where they engaged in some kissing and groping. RP 1192-1193. He testified that S.F. willingly removed her top so that she was in her pants and bra. RP 1193-1195. They continued to “make out” until S.F. decided to go check on her friends. RP 1196. McClurkin testified that she abruptly got up and went downstairs and that he followed. RP 1196-1197. He testified that S.F. went out to the patio and then came back inside and started dancing provocatively again; he and she then went upstairs again, to the master bedroom and resumed the “make out” activity. RP 1197-1201. According to McClurkin, he suggested that they move to the bedroom with the bed and S.F. agreed. RP 1201. McClurkin saw Daryl Wright and Ms. Fincham leaving that room as they walked to it. RP 1202. Once inside the room, McClurkin testified that the kissing resumed, until a few minutes later when Defendant Carter came into the room. RP 1205. McClurkin testified that Defendant Carter walked over to S.F. touched her on the shoulder and breast and then leaned in and began to kiss her. RP 1206 -1207. McClurkin indicated that the kiss turned into a longer kiss and then S.F. began “making out” with Defendant Carter rather than with

him. RP 1207. McClurkin testified that he got up and left the room, at that point, and went downstairs. RP 1208-1210. He did not see any signs of distress or unwillingness on S.F.'s part before he left. RP 1211. He passed Daryl Wright on the stairs and encountered Defendant Wright, Ms. Fincham and Ms. Whittaker in the kitchen. RP 1211-1212. As McClurkin begins to clean up the kitchen, Defendant Wright asks him to make him a drink; Defendant Wright then starts to head for the stairs. RP 1228. While he is gone, McClurkin gets into a verbal disagreement with Ms. Fincham. RP 1228-1229. McClurkin testified that Defendant Wright came back to the kitchen; he then saw Defendant Carter come downstairs and, five minutes later, Daryl Wright comes downstairs. RP 1229-1230. McClurkin testified that then he saw S.F. come downstairs and that she did not appear to be distressed or upset. RP 1231-1232. McClurkin indicated that there was some exchanging of phone numbers then everyone started to leave the house; no one seemed angry or mad. RP 1234-1235. McClurkin recalled throwing away two condom wrappers when he cleaned up the guest bedroom containing the bed. RP 1354-1355. The next day, McClurkin heard from Defendant Wright that one of the women at his house the previous night had reported a rape. RP 1261-1262.

Defendant Wright testified that he was principal at a middle school but that prior to that he had been a teacher and dean of students at Spanaway Lake High School. RP 1370-1371. On January 30, 2004, he went to the Chalet bar with his friends, McClurkin and Defendant Carter;

he expected his brother to show up at the bar later on. RP 1372-1375.

While at the bar he came in contact with Ms. Fincham, Ms. Whittaker, and S.F. RP 1375-1379. At closing time, they all drove to McClurkin's house, stopping at a gas station to buy some beer. RP 1379-1382. They arrived at McClurkin's around 2:00 a.m. RP 1383-1384. The group went to the kitchen and got something to drink, then everyone but Defendant Wright and Ms. Whittaker took a tour of the house. RP 1387. He testified that he and Ms. Whittaker were in and out - from the kitchen to the patio; at one point when he came in people were dancing in the living room, including S.F. who was in her bra. RP 1387-1393. Defendant Wright testified that as he was coming through a sliding door that S.F. came up to him and "dances on" him. RP 1394-1398. A short time later, Defendant Wright noticed that his brother and Ms. Fincham, who had been kissing each other, were going upstairs. RP 1403. He also saw that S.F. and McClurkin were getting friendly as well and they, too, headed upstairs; Defendant Carter also went up at some point. RP 1403-1404. Defendant Wright testified that after a while he and Ms. Whittaker also went upstairs to see what was going on. RP 1404-1405. Ms. Whittaker was using the bathroom off the master bedroom when McClurkin came into the master bedroom; Defendant Wright teased him about not having any furniture in the room. RP 1406-1408. Defendant Wright testified that he thought it was time to leave; he went over to the guest bedroom opened the door, poked his head in, and said "Richy, let's go." RP 1408. He thought that

he saw S.F.'s silhouette laying on top of someone and he heard kissing and moaning. RP 1408-1412. Wright acknowledged that it was dark in the room and that he could not be sure that it was S.F. RP 1526-1529. Wright testified that he repeated that it was time to go then went downstairs to the patio to smoke a cigarette. RP 1412-1413. He then came inside and asked McClurkin to make him a drink; he knows that Ms. Whittaker was also in the kitchen at that point. RP 1414. Defendant Wright testified that he went back upstairs and was headed toward the guest bedroom when S.F. came out of the room, putting her clothes on over her bra. RP 1415-1416. He indicated that she came over to him and began dancing in a suggestive manner; he indicated that he wasn't interested, pushed her away, and went downstairs to get his drink. RP 1416-1417, 1535- 1536. Everyone started coming downstairs; S.F. and Ms. Whittaker got into a tiff about S.F.'s attire. RP 1418-1421. Defendant Wright stated that some of the females started handing out their phone numbers before the party broke up and everyone left; none of the girls looked unhappy or upset at that time. RP 1422-1424. As they walked out to their cars, Ms. Fincham came over to him and Defendant Carter and asked what was wrong with S.F. RP 1428. Defendant Wright denied ever having intercourse with S.F. RP 1424. He denied ever holding her down while someone was having intercourse with someone else. RP 1425-1426.

Defendant Carter testified that on January 30, 2004, he got together with his friends Jerry McClurkin and Defendant Wright at McClurkin's house; once there they made plans to go to the Chalet bar where they would meet up with Daryl Wright. RP 1565-1571. The bar was crowded. RP 1572-1575. After a while, Ms. Whittaker and Ms. Fincham came over and began to talk with Defendant Wright and another man; S.F. also came over to talk to them. RP 1575-1580. Defendant Carter testified that at closing time he was told that Whittaker, Fincham, and S.F. were coming back to McClurkin's house. RP 1592-1593. They arrived at the house after stopping at a gas station where Defendant Wright bought some beers. RP 1593-1602. At the house everyone went to the kitchen to get something to drink. RP 1606-1610. While watching television, Defendant Carter noticed that Ms. Fincham and Daryl Wright were talking with each other so he decided to talk to S.F. RP 1611. He described S.F. as being "bubbly" and "flirtatious" with him. RP 1611-1613. Carter indicated that when he walked away from her that S.F. began talking with McClurkin and acted the same way towards him. RP 1612-1613. Carter observed Daryl Wright and Ms. Fincham go upstairs together, Defendant Wright and Ms. Whittaker go outside to the patio, and McClurkin and S.F. go upstairs together. RP 1613-1615. When Carter saw Daryl Wright and Ms. Fincham come downstairs, he went upstairs to use the restroom even

though there was one located on the ground floor. RP 1616- 1617.

Defendant Carter testified that upstairs he heard giggling and laughing in the master bedroom. RP 1618. After using the bathroom, he went into the master bedroom to see who was in there. RP 1618-1619. He testified that he saw S.F. wearing only her bra and pants, face to face with McClurkin, “groping Jerry’s behind quarters.” RP 1619. Carter testified that he left, went downstairs, and got himself another beer. RP 1620. He went on to state that S.F. -wearing only her bra and pants- and McClurkin came downstairs, then S.F. began to dance. RP 1621-1622. Carter indicated that S.F. danced with him in a sexually provocative manner including rubbing her rear against his groin. RP 1623- 1624. Following that, he saw S.F. go back upstairs with McClurkin. RP 1626. Based upon her dancing, Carter testified that he thought that S.F. was attracted to him so he went upstairs to find her. RP 1626. Carter testified that he went into the guest bedroom where S.F. was sitting on the bed with McClurkin; as he walked over to her, she reached up and grabbed him by the waist. RP 1628-1629. He testified that he leaned over and that S.F. began to kiss him so he kissed her back. RP 1629-1630. He testified that McClurkin must have left because he sat down on the bed where McClurkin had been previously. RP 1630. Carter then testified, in detail, as to how he and S.F. engaged in consensual foreplay, disrobing, and penile/vaginal intercourse.

RP 1630-1636. Carter testified that he was going to use a condom, but didn't because S.F. told him that she was on birth control. RP 1635-1636. Carter testified that after the intercourse, S.F. was giggling; he pointed to her pants and told her to hurry because he didn't "want people to think...that we've been doing anything." RP 1637. He then left and went downstairs. RP 1637-1638. He testified that when S.F. came downstairs that she was still laughing while trying to get her tops on; she then started dancing again, trying to get McClurkin to dance, but that he was not responsive. RP 1639-1641. Shortly after that, the party began to break up with some people exchanging phone numbers before getting in to their cars and leaving. RP 1641-1650.

C. ARGUMENT.

1. DEFENDANT WRIGHT HAS FAILED TO MEET HIS BURDEN OF SHOWING FLAGRANT AND ILL-INTENTIONED PROSECUTORIAL MISCONDUCT MUCH LESS ANY ENDURING PREJUDICE THAT COULD NOT HAVE BEEN ELIMINATED BY A CURATIVE INSTRUCTION.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015

(1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962). Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Defendant Wright asserts that the prosecutor engaged in misconduct during the prosecutor's pretrial preparations by asking the victim, who would be a key prosecution witness, about a sworn statement made in a pleading pertaining to her civil law suit. The record contains the following information on this issue. During the prosecution's direct examination, the prosecutor adduced that S.F. had filed a civil law suit against the defendants arising out of the same events that were the focus of the criminal trial. RP 550-552. It was also adduced that S.F. signed the civil complaint under penalty of perjury, attesting that she had read the contents of the complaint for accuracy. RP 550-552. In the complaint, it stated that the defendants had purchased alcohol for S.F. at the Chalet bar and that she had drank with them at that location. RP 550-552. At trial, S.F. testified that she did not have anything alcoholic to drink at the Chalet bar. RP 549-550. When confronted with the inconsistent statement made in the civil pleading, S.F. testified that the statement in the civil law suit was inaccurate or false, and that she had not read the document carefully before she signed it. RP 552. There was cross examination by both defendants regarding the inconsistent statement in the civil pleading. RP 684-693, 739-741. Wright's defense counsel asked when and how she learned of the inaccuracy in the pleading; S.F. indicated that she learned about it "just recently" from the prosecutors. RP 740-741. On redirect examination it was established that she learned about the inaccuracy during a phone call from the prosecutor which had occurred within the last

two weeks prior to her testimony. RP 820-821. The record has extremely limited information about the content of the conversation between the prosecutor and S.F. during this phone call other than the fact that the prosecutor initiated the call to the victim and that the topic of the statement in the civil suit arose during the course of the phone call.

Defendant Wright contends that the prosecutor's act of asking the victim about inconsistent statements prior to trial was misconduct as the only purpose behind such action was to "immunize the prosecutor's chief witness against what would have been a potentially devastating cross-examination" and to ensure that S.F. was "not surprised on cross examination." Wright's Opening brief at p.32. Essentially, Defendant Wright argues that a prosecutor commits misconduct by preparing her case for trial. The State can find no authority to support this contention and defendant has presented none to the court.

Once a trial attorney, be it prosecutor or defense counsel, is aware that a witness he or she is calling to the stand has made inconsistent statements, it is reasonable to assume the attorney will want to know which statement the witness will endorse as being accurate prior to this information being adduced before the jury. Once the trial attorney has this information, then he or she must decide whether to raise the subject on direct examination or leave the matter for opposing counsel to address on cross-examination. Decisions such as these are understood to be a matter of trial strategy.

Moreover, whether or not S.F. was drinking with the defendants at the Chalet bar was irrelevant to the ultimate determination of the criminal case. Everyone agreed that S.F. was drinking at McClurkin's house. S.F. testified that she got drunk from the alcohol she consumed at McLurkin's house. There was no "potentially devastating cross-examination" to be had on whether she was or was not drinking at the Chalet. The inconsistent statement was simply not on a material issue. The damage to S.F.'s credibility came not from the subject matter of her inconsistent statement, but rather from the fact that she had signed a document under penalty of perjury without carefully reading its contents. Showing S.F.'s carelessness in sworn statements was useful to the defense and nothing the prosecutor did affected the defense's ability to impeach S.F. on this point.

It is absurd to contend that a prosecutor commits misconduct by conducting pretrial investigations and interviews or by developing a trial strategy. In the absence of any case authority supporting his contention, Defendant Wright has failed to meet his burden of showing that the prosecutor's act of asking a witness about an inconsistent statement prior to trial constitutes improper conduct.

Defendant Wright also contends that in light of the victim's inconsistent statement in the civil pleading, the prosecutor engaged in misconduct by arguing that the victim had "never changed her account of what occurred" at several points during the rebuttal closing. *See* Wright's Opening Brief at p. 33, citing to RP 2014, 2015, 2017, 2028. A review of

the record reveals that Defendant Wright did not object to any of these challenged arguments in the trial court. Consequently, he must meet the heightened standard of showing conduct so flagrant and ill-intentioned that the resulting prejudice that could not have been neutralized by an admonition to the jury. He cannot meet that standard.

A review of the challenged arguments in context of the entire argument reveals that the prosecutor was arguing that the victim had remained fairly consistent in her report of being raped and as to what she could relate about what had occurred inside McClurkin's guest bedroom the early morning hours of January 31, 2004. RP 2014, 2015, 2017, 2028. This is reasonable argument based upon the evidence and issues in the case. The prosecutor did not argue that S.F. had never changed her account of whether she was drinking at the Chalet bar. Thus defendant has failed to demonstrate improper argument. Moreover, none of the challenged arguments are so flagrant or egregious that a curative instruction could not have eliminated the resulting prejudice. Defendant cannot meet his burden of showing reversible error stemming from the arguments that failed to draw an objection in the trial court. The claim of prosecutorial misconduct is without merit.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN INSTRUCTING THE JURY ON ACCOMPLICE LIABILITY AND ON THE LESSER DEGREE CRIME OF RAPE IN THE THIRD DEGREE.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

*State v. Fernandez-Medina*, 94 Wn. App. 263, 266, 971 P.2d 521, reversed on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A party is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133

Wn.2d 541, 544, 947 P.2d 700 (1997); *State v. Hernandez*, 99 Wn. App. 312, 997 P.2d 923 (1999) (trial court properly refused to instruct on manslaughter). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

a. The Trial Court Properly Exercised Its Discretion In Instructing On Accomplice Liability.

Defendant Wright assigns error to the court's instructions on accomplice liability. After a discussion of the appropriateness of the instructions, the court determined there was sufficient evidence to support the giving of the instruction. RP 1873-1878. Defendant Wright took exception to the court's instructions that referenced accomplice liability.

RP 1903. The Court gave a instruction as to the definition of accomplice liability, Instruction No. 8 (Appendix A), and also included references to “an accomplice” in the instruction defining rape in the third degree, Instruction No. 13 (Appendix B) and in the “to convict” instructions for rape in the second and third degree, Instruction Nos. 10 and 17 (Appendices C and D).

As it is “error to submit to the jury a theory for which there is insufficient evidence,” *see State v. Munden*, 81 Wn. App. 192, 195, 913 P.2d 421 (1996), the question becomes whether there was sufficient evidence to support instructions that the rape may have been committed by a principal acting in concert with one or more accomplices. In Washington, an accomplice need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal. *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991). The accomplice liability statute, RCW 9A.08.020(3)(a), requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate “the crime” for which he or she is eventually charged, and that knowledge of “‘a crime’ does not impose strict liability for any and all offenses that follow.” *State v. Roberts*, 142

Wn.2d 471, 513, 14 P.3d 713 (2000). Courts have upheld accomplice liability instructions where the evidence supports an inference that the defendant was either the principal or an accomplice, even if the prosecution primarily argued principal liability. *State v. Munden*, 81 Wn. App. 192, 913 P.2d 421 (1996) (when the evidence did not exclude the possibility that defendant acted both as principal and accomplice, the trial court did not err in instructing on accomplice liability); *see also State v. McDonald*, 128 Wn.2d 680, 689, 981 P.2d 443 (1999) (“[a]ccomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation”).

In this case the evidence supported the instructions on accomplice liability. S.F. testified that there were several men in the room where she was raped. RP 577, 733-734. After she was pulled into the room she was pushed down on the bed, so that she was on her back; someone held down her left shoulder so that she could not get up. RP 577-578, 891. She described it feeling as if someone was leaning over her. RP 588. S. F. felt her pants and top being removed and testified that someone else was removing the clothes. RP 580, 582, 584-585. This evidence supports an inference that more than one set of hands, and therefore more than one person, was involved in the process of disrobing S.F. and holding her down. RP 891. As her clothes were being removed, S.F. voiced a lack of consent by stating “This is not right” and “Stop,” thereby putting

everyone in the room on notice as to her lack of consent. RP 585-586, 592. Anyone engaging in or assisting acts of intercourse after these statements of non-consent would be promoting or facilitating the crime of rape.

S.F. described that while she was on the bed- after her clothing had been removed -that someone was kissing and touching her breast and she could feel male hands and penises touching her vagina. RP 589-590, 592-593, 891. This evidence also supports that more than one person was involved. S.F. testified that she felt a penis inside of her vagina, then it would be removed and then she would feel a penis inside of her again. RP 589-590. While she could not be positive, it was her testimony that she thinks that more than one man was involved. RP 589, 590. Again, this suggests multiple participants in the rape. While each person engaged in non-consensual intercourse would be a principal in the rape, the principals would be acting as accomplices to one another. Finally, S.F. testified that at one point she saw the door open a crack and it looked like someone was trying to come in. RP 592-594. Ms. Fincham recalled that she went upstairs trying to find S.F., and that she tried to open the door to the guest bedroom, but after opening slightly, it stopped as if someone were holding the door closed or blocking the pathway. RP 371-372. This evidence supports an inference that at least one person was aiding or facilitating the commission of the rape by blocking Ms. Fincham from entering the room.

Based upon this evidence the trial court was well within its discretion in finding a sufficient factual basis for instructions on accomplice liability. The trial court ruling should be upheld.

b. The Trial Court Properly Exercised Its Discretion In Instructing Of The Lesser Degree Offense Of Rape In The Third Degree.

Both Defendant Wright and Carter assign error to the court's instruction on the lesser degree crime of rape in the third degree asserting that the instruction was not factually supported. This argument was raised in the trial court. RP 1887-1893. After hearing the argument and considering *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995), and *State v. Jeremia*, 78 Wn. App. 746, 899 P.2d 16 (1995), the court ruled that there was a factual basis for the giving of instructions on the lesser degree offense. RP 1893.<sup>4</sup> Both defendants objected in the trial court to the court instructing on this lesser degree crime. RP 1902-1903. On appeal, defendants are unable to show that the trial court abused its discretion in finding that the evidence adduced at trial supported an instruction on rape in the third degree.

In general, the crimes charged in an information are the only crimes for which a criminal defendant may be convicted and on which a jury may be instructed. *State v. McJimpson*, 79 Wn. App. 164, 171, 901

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<sup>4</sup> The court further discussed its reasoning in instructing on the lesser degree offense in its oral ruling denying the motion for new trial. RP 2074-2075.

P.2d 354 (1995), *review denied*, 129 Wn.2d 1013, 917 P.2d 576 (1996). However, a defendant may be convicted of, and the jury instructed on, a crime that is an inferior degree or one that is a lesser included offense to the one charged. RCW 10.61.003; *McJimpson*, 79 Wn. App. at 171; *Ieremia*, 78 Wn. App. at 750-754. Rape in the third is not a lesser included offense of rape in the second degree but it is an inferior degree offense. *Ieremia*, at 750-754. There was a legal basis for the court to instruct on this offense.

A party is entitled to an instruction on a lesser degree offense if the evidence supports an inference that the lesser crime--and only the lesser crime--was committed. *Ieremia*, 78 Wn. App. at 754-755; *State v. Hurchalla*, 75 Wn. App. 417, 421-23, 877 P.2d 1293 (1994). There must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser degree crime. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *disapproved on other grounds*, *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). A reviewing court examines the evidence in the light most favorable to the proponent of the instruction. *State v. Fernandez-Medina*, 141 Wn.2d at 455-456. A lesser included instruction should not be denied simply because the theory underlying the instruction is inconsistent with other theories supported by the evidence, because to do so would require the court to improperly weigh and evaluate the evidence. *Fernandez-Medina*, 141 Wn.2d at 460-61.

Engaging in sexual intercourse with another person by forcible compulsion constitutes rape in the second degree. RCW 9A.44.050(1)(a). Sexual intercourse with a person who does not consent and clearly expresses a lack of consent by words or conduct constitutes third degree rape. RCW 9A.44.060(1)(a). To establish forcible compulsion, the evidence must “show that the force exerted was directed at overcoming the victim’s resistance and was more than that which is normally required to achieve penetration.” *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989); *State v. Ritola*, 63 Wn. App. 252, 817 P.2d 1390 (1991).

A couple of decisions have addressed whether certain evidence justified the giving instructions on a lesser degree crime of rape in the third degree. In *State v. Charles*, 126 Wn.2d 353, 894 P.2d 558 (1995), Charles was charged with second degree rape. The victim testified that Charles forced her to have sex with him. The victim described being grabbed around her shoulders and being pushed onto her back on the ground behind a bush, the defendant removing her clothes while she pleaded with him to stop and struggled. She testified that she scratched him, and may have hit him once. Charles claimed the intercourse was consensual. The Supreme Court held Charles was not entitled to an instruction on third degree rape because there was no evidence that the intercourse was nonconsensual but unforced. The court reasoned that, if the jury believed the victim’s testimony, Charles was guilty of second degree rape. If, however, it believed Charles’ testimony, he was not guilty

of any degree of rape. In order to find him guilty of third degree rape it concluded, “the jury would have to disbelieve both Charles’ claim of consent and the victim’s testimony that the act was forcible.” 126 Wn.2d at 356.

Similarly, in *Jeremia*, the court concluded that an instruction on rape in the third degree was not supported by evidence that showed the following:

[The victim] testified that Jeremia approached her as she was sitting in a park, grabbed her wrists and told her they were going for a ride. She protested and tried to pull away, but did not scream or call for help, although there were other people in the park. Jeremia drove her to another nearby park, where he pulled her hair, covered her mouth when she tried to scream, and, despite her struggles, raped her. Jeremia then dropped M.R. off near her home. She did not say anything about the rape to her mother-in-law, with whom she lived, but soon left the house and called the police to report the rape. The officer who responded to M.R.’s call described her as upset, shaking, and crying. The officer drove M.R. to the hospital where an examination revealed no signs of physical or vaginal trauma.

Jeremia testified that he approached [the victim] as she was sitting on a bench in the park, and she agreed to go for a ride with him. They drove to a nearby park and engaged in consensual intercourse.

*State v. Jeremia*, 78 Wn. App. at 749-750. The court in *Jeremia* came to the same conclusion as the court in *Charles*, the jury would either convict of rape in the second degree if it believed the victim or acquit if it believed

Jeremia, but there was no affirmative evidence that the intercourse was unforced but still nonconsensual. *State v. Jeremia*, 78 Wn. App. at 756.

In assessing whether there was sufficient evidence to uphold the trial court's decision to instruct on third degree rape, it is important to remember that this is a distinct issue from whether the evidence presented at trial would have been sufficient to uphold a verdict on the second degree rape had the jury returned such a verdict. More than one reasonable inference may flow from the same evidence. For example, in *State v. Barker*, 103 Wn. App. 893, 14 P.3d 863, *review denied*, 143 Wn.2d 1021, 25 P.3d 1019 (2001), Barker was charged with first degree robbery but was convicted of second degree robbery following a jury trial. On appeal he claimed that the trial court erred in instructing the jury on second degree robbery by arguing that the evidence presented was legally sufficient to uphold a conviction for first degree robbery. The appellate court upheld the trial court's decision to instruct on second degree robbery even though the evidence before the jury would have been sufficient to uphold a verdict on the greater charge, stating: "While [the defendant's] conduct--pointing a finger under a shirt--certainly supports the 'display' element of first degree robbery, it does not follow, necessarily that it supports *only* first degree robbery." *Barker*, 103 Wn. App. at 899 (emphasis in original). In sum, the question in this case comes down to whether the jury could have believed everything the victim testified to and still convicted only of rape in the third degree.

S.F.'s descriptions of her rape were just as consistent with a nonconsensual rape in the third degree as they were with a second degree rape by forcible compulsion. RP 578-597, 715-722, 729-730, 734-737. Her testimony simply supported more than one rational inference about whether there was forcible compulsion. S.F. testified that she was pushed or pulled or shoved into the room but could not describe how that occurred. RP 578-579. She could not describe how she got to the bed. RP 587-588. She described her clothes as being removed but did not indicate that this was done forcefully. RP 585. Her clothes were not ripped or torn. RP 729-730. She described that she was "held down" on the bed; when asked to describe how this was done she stated that it was like someone was leaning over her and that it was only the weight of the individual that held her down. RP 587-588, 884. She testified that she could not get up because of the weight of the individual. RP 592-597. She was not being held down in a manner that caused pain. RP 722. Although it is, perhaps, technically possible to achieve penetration without one body laying on another, it is also extremely common for this type of contact to occur in the act of sexual intercourse, be it consensual, nonconsensual or forced. S.F.'s description does not necessarily indicate any use of force that is more than what is required or usual to achieve penetration. Nor did S.F. put up resistance which might increase the quotient of forcible compulsion. She testified that she told them to "stop" but did not scream or yell out. RP 585, 591. She did not recall trying to

push anyone off of her, until her recollection was refreshed by reading a statement made a few days after the event that she did try but was unsuccessful. RP 645-647. The nurse conducting the rape examination saw no injuries or bruising and S.F. did not report being in pain. RP 646, 884. S.F. testified that she did not like to use the word “rape” to describe what happened to her because that was a strong word, but indicated that what had happened not “willing” and was “not consensual.” RP 651-652. This evidence could support several inferences. When viewed in a light most favorable to the State, it supports the inference that there was no forcible compulsion used engage in intercourse but that it was clear that the intercourse was nonconsensual. A rational trier of fact could have believed every word of S.F.’s testimony and still had a reasonable doubt as to the existence of forcible compulsion.

As noted earlier, a trial court’s decision to give a requested instruction, when based on the facts of the case, is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds* by *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). This court should find no such abuse of discretion on the basis of the record before the trial court. This court should uphold the trial courts decision to instruct on the crime of rape in the third degree.

Defendant Carter asserts that he was *acquitted* of the crime of rape in the second degree. Consequently, he argues that were this court to find

that the trial court should not have instructed on rape in the third degree, he is entitled to a dismissal rather than a remand for new trial. *See* Brief of Carter at p. 27. The State disputes that either defendant was acquitted of rape in the second degree. The jury instructions in this case were comparable to those used in *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006), and the jury was instructed to leave the verdict form blank if it could not reach a unanimous decision as to the defendants' guilt on the crime of rape in the second degree. CCP 167-193; WCP 37-63 (Instruction No 21). The verdict forms for the charge of rape in the second degree were left blank for each defendant. CCP 268; WCP 118. Under *Ervin*, this is an express statement of the jury's inability to agree and, consequently, retrial of the defendants on the crime of rape in the second degree is not necessarily precluded. *State v. Ervin*, 158 Wn.2d at 756-757. If there was error in instructing on rape in the third degree, remand for new trial is the appropriate remedy.

3. SUFFICIENT EVIDENCE WAS ADDUCED TO UPHOLD THE JURY'S DETERMINATION THAT BOTH DEFENDANTS ARE GUILTY OF RAPE IN THE THIRD DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must 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).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

*State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Both defendants challenge the sufficiency of the evidence to support their convictions for rape in the third degree. The jury was instructed that to convict defendants of the crime of rape in the third degree, the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the 31<sup>st</sup> day of January, 2004, the defendant, or an accomplice, engaged in sexual intercourse with S.F.;
- (2) That S.F. was not married to the defendant;
- (3) That S.F. did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and
- (4) That the acts occurred in the State of Washington.

Instruction Nos. 16 and 17, CCP 167-193; WCP 37-63.

S.F. testified that she had never been married thereby providing sufficient evidence to support element (2). RP 824. The evidence was uncontroverted that the events in question took place in Jerry McClurkin's

residence in Puyallup, Washington, thereby providing evidentiary support for element (4). RP 165-166, 239, 559-560, 939, 1157-1159, 1383-1384. S.F. testified that she did not consent to any intercourse and that as she was being undressed on the bed she stated "This is not right" and "Stop." RP 585-586, 591-592. This is sufficient evidentiary support to satisfy element (3).

Element (1) has two components: 1) proof of sexual intercourse; and, 2) proof of the identity of the person engaging in the intercourse or the criminal liability of the defendant for the person engaging in the sexual intercourse. There is overwhelming evidence of the act of intercourse and also that Defendant Carter engaged in sexual intercourse with S.F. S.F. testified that she felt a male penis inside of her vagina more than once on the January 31, 2004. RP 589-590. S.F. reported vaginal discomfort and minor bleeding from her vagina following the sexual assault. RP 213, 619-621. The bleeding was confirmed by the blood left in her pants and by the examination conducted by the nurse at Tacoma General Hospital. RP 583, 641-642, 884, 890. Male DNA and semen was found on the vaginal swabs taken during the rape examination. RP 1019-1022. The DNA recovered from the vaginal swabs was linked to Defendant Carter. RP 1027-1036. Defendant Carter admitted having sexual intercourse with S.F. RP 1630-1636.

There is also considerable evidence on which a jury could conclude that Defendant Wright also had intercourse with S.F. or that he

was an accomplice to Defendant Carter when he engaged in nonconsensual sex with S.F. Defendant Wright's presence in the room during the rape is established by S.F.'s testimony and the reasonable inferences flowing from it. S.F. testified that immediately after the intercourse, once she was able to sit up on the bed, she knows Defendant Wright was in the room. She testified that he was grabbing her arms, touching her vaginal area and breasts, and saying "Come on more, more" trying to persuade her not to put her clothes on. RP 595-598, 601, 733-734, 752-753, 757-758. She replied "No. I want to go. I want to go." RP 595-598. She testified that Defendant Wright told her "Don't ever tell anybody about this." RP 599. This evidence not only establishes Defendant Wright's presence in the room, but his awareness of what had occurred; the reasonable inference from his words to S.F. are that he was in the room when another person had had intercourse with her and that he wanted to have intercourse with her at that time. His words are also consistent with an inference that he was in the room, had brief intercourse with her, but wanted to engage in additional intercourse. Defendant Wright's presence in the room is also established by circumstantial evidence as other witnesses indicate either that he was upstairs at the critical time or that he could not be accounted for downstairs. RP 181,185-187, 206, 235, 275, 314, 368, 370-371, 1228-1231.

The jury could conclude from the evidence that there was more than one major participant in the rape from S.F.'s testimony that she

thought that more than one man had intercourse with her. RP 589-590. Other circumstantial evidence supporting a conclusion that there was more than one major participant in the crime is the presence of condom wrappers in the room. Both Ms. Fincham and Jerry McClurkin testified that there were condom wrappers in the guest bedroom at the end of the evening. RP 432, 1354-1355. Daryl Wright testified that he used a condom when had sexual intercourse with Ms. Fincham. RP 1082-1083. Defendant Carter denied using a condom when he had sexual intercourse with S.F. which is corroborated by the presence of his sperm in her vaginal vault. RP 1635-1636. Even assuming that the jury gave credence to Daryl Wright's testimony, there is a condom wrapper unaccounted for in the guest bedroom. A reasonable inference from this evidence was that the other condom was used in nonconsensual intercourse with S.F.; this would also account for why there was semen and DNA from only one man found in her vaginal vault. RP 1029-1036.

The DNA found on the swab of her breast area supports the inference that the other man having intercourse with her, or at least touching her while she was on the bed being assaulted, was Defendant Wright. S.F testified that while she was lying on the bed that men were kissing her breast. RP 592-593. A swab of her breast area revealed the presence of a mixed DNA sample consistent with both Defendant Carter's and Defendant Wright's DNA, while Daryl Wright and McClurkin were excluded as possible donors. RP 1039-1049.

Finally, as discussed earlier, S.F. testified that at one point during the nonconsensual intercourse she saw the door open a crack and it looked like someone was trying to come in. RP 592-594. Ms. Fincham recalled that she went upstairs trying to find S.F., and that she tried to open the door to the guest bedroom, but after opening slightly, it stopped as if someone were holding the door closed or blocking the pathway. RP 371-372. As it is beyond question that Defendant Carter had intercourse with S.F., the reasonable inference from this evidence is that it was Defendant Wright who was blocking Ms. Fincham's entrance into the room, thereby allowing the rape to continue without interruption.

Finally it must be reiterated that the jury heard testimony from all three women and all four men present at McClurkin's residence the night of January 30-31, 2004. There were significant differences among the testimony and the jury was required to make credibility determinations. By its verdict, the jury indicated that it found S.F. to be a credible witness and that it found the credibility of the defendants lacking. Credibility determinations are not subject to review by an appellate court.

The evidence presented at trial was sufficient for the jury to conclude that Defendant Carter was guilty of rape in the third degree as a principle or major participant in that crime. There was also sufficient evidence to find Defendant Wright guilty of rape in the third degree – either as a major or lesser participant in the crime. The jury had evidence from which it could conclude that he had sexual intercourse with S.F. It

also had evidence from which to conclude Defendant Wright was in the room and despite S.F. voicing her lack of consent, he continued to assist Defendant Carter in engaging in sexual intercourse with S.F. by holding her down, helping to remove her clothes, and keeping others who might come to her aid from entering the room.

This court should uphold the jury verdicts returned below.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the convictions entered below.

DATED: SEPTEMBER 2, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

Kathleen Proctor  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/2/08 G. Johnson  
Date Signature

*to O.C. Arnold*

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BY \_\_\_\_\_  
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**APPENDIX "A"**

*Court's Instructions to the Jury*  
*No. 8*

INSTRUCTION NO. 8

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

**APPENDIX "B"**

*Court's Instructions to the Jury*  
*No. 13*

INSTRUCTION NO. 13

A person commits the lesser included crime of RAPE IN THE THIRD DEGREE when under circumstances not constituting rape in the second degree that person, or an accomplice, engages in sexual intercourse with another person not married to the perpetrator when the victim did not consent to sexual intercourse with the perpetrator, and such lack of consent was clearly expressed by the victim's words or conduct.

**APPENDIX "C"**

*Court's Instructions to the Jury*  
*No. 10*

INSTRUCTION NO. 10

To convict defendant Harold Wright, Jr. of the crime of RAPE IN THE SECOND DEGREE, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 31st day of January, 2004, the defendant, or an accomplice, engaged in sexual intercourse with S.F.; and
- (2) That the sexual intercourse occurred by forcible compulsion; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements, then it will be your duty to return a verdict of not guilty.

**APPENDIX "D"**

*Court's Instructions to the Jury*  
*No. 17*

INSTRUCTION NO. 17

To convict the defendant Harold Wright, Jr. of the lesser included crime of RAPE IN THE THIRD DEGREE, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 31st day of January, 2004, the defendant, or an accomplice, engaged in sexual intercourse with S.F.;
- (2) That S.F. was not married to the defendant;
- (3) That S.F. did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements, then it will be your duty to return a verdict of not guilty.