

NO. 39877-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER FLYNN, Appellant

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STATE OF WASHINGTON
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Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff
Pierce County Superior Court Cause No. 07-1-06027-0

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR:

1. Should this court dismiss the defendant's conviction for attempted second degree rape where the State failed to adduce sufficient evidence for each alternative means charged?

2. Should this court dismiss the defendant's conviction for resisting arrest when the State failed to adduce sufficient evidence to prove the charge beyond a reasonable doubt?

3. Although the defendant has served the sentence for resisting arrest, should this court nevertheless grant his relief where the issue is not moot because the Sentencing Reform Act permits a court to consider misdemeanor history at sentencing?

4. Did the defendant fail to receive effective assistance of counsel where trial court failed to object to victim impact statement evidence in a case where the alleged victim's credibility was the central issue at trial?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Was the defendant denied his constitutional right to a unanimous jury verdict where the State failed to adduce sufficient evidence to sustain the defendant's conviction for attempted second degree rape charged by alternative means?

2. Was the defendant denied his constitutional right to have the State prove the charges of attempted rape in the second degree and resisting arrest where the where the State failed to adduce sufficient evidence to sustain these convictions?

3. Was the defendant denied his constitutional right to effective assistance of counsel where counsel failed to object to inadmissible evidence buttressing the credibility of the complaining witness where her credibility was the central issue at trial?

C. STATEMENT OF THE CASE:

1. Procedural Facts:

On December 3, 2007, the State charged Christopher Flynn, hereinafter the Defendant, with the crimes of Attempted Rape in the First Degree and Resisting Arrest under Pierce County Superior Court Cause No. 07-1-06027-0.

The matter was assigned for trial to Department 4, the Honorable Bryan Chushcoff on August 10, 2009. RP 4. The State then filed a second amended information which the court accepted and to which the defendant entered not guilty pleas. RP 1, RP 5; RP 34, 43; SCP 1.

At that time, the defendant had not yet interviewed the complaining witness, who had failed to appear for an interview. RP 4.

The court called the case and then recessed to permit the defendant time to interview her. RP 4.

On August 11, 2009, the defendant moved for a trial continuance. RP 12. The defendant noted that as a result of the belated interviews of the complaining witness and other civilian witnesses, the defendant believed that the interview had disclosed something that was seriously at odds with the discovery in the police reports. RP 13-14.

Although the defendant was reticent to disclose the details of his case, the defendant agreed that the interviews had provided new information that was seriously at odds with discovery in the police reports. RP 13-14.

The court pressed the defendant for additional details. RP 2 15. Although defense counsel did not believe that the new information warranted a continuance, the defendant believed that it did. RP 15-16.

The defendant then addressed the court. RP 16-17. The defendant informed the court that he received the discovery just a few days prior to trial. RP 17. The defendant contended that new information provided in interview summaries from trial counsel had revealed “discrepancies all in this thing here.” RP 18.

The court told the defendant that the inconsistencies may help him. RP 18.

The defendant and his mother wanted a continuance to retain private counsel. RP18-19. When the court inquired as to the timeliness of this request, the defendant noted that he had never seen discovery until a few days before trial and therefore did not appreciate the evidence against him. RP 19. This was true although the case had been pending for more than a year. RP 19. The defendant also related that trial counsel had informed him that the case was unwinnable. RP 19.

The defendant informed the court that he had consulted about his case with two private attorneys. RP 20. He even discussed financial arrangements with one of them. RP 20.

The court denied the motion for continuance, despite the defendant's uncontroverted statement that he had received discovery only the Wednesday prior to trial. RP 22-23. The defendant called his trial counsel a liar when trial counsel claimed that he had met with the defendant to discuss discovery on several occasions. RP 23.

The State then filed a Second Amended Information alleging the crimes of rape in the second degree by alternative means (count 1; indecent liberties with forcible compulsion (count 2); and resisting arrest (count 3). SCP 1; RP 1 5-6; 33. The defendant had no objection to the second amended information, except as to the additional charge of indecent liberties. RP 34.

The court denied the motion. RP 42 , noting that if the jury convicted the defendant of the first two counts there would be a sentencing issue at most. RP 42.

The court held a CrR 3.5¹ hearing to determine the admissibility of the defendant's statements to police. RP 32. The State called one witness, Tacoma Police Department (TPD) Officer Kenneth Smith. RP 47.

Officer Smith testified that on November 30, 2007, he responded to an incident at Dawson's Tavern. RP 49. That incident occurred in the alley behind the bar. RP 51-52. Upon arriving he saw a male and female who appeared to be having sexual intercourse. RP 52. Because the dispatcher had reported the call as a possible rape, officers ordered the defendant to get up, face away from the police, and put his hands on top of his head. RP 3 53. When the defendant did not immediately respond to police commands, Officer Smith used his taser on him. RP 53. The officers then took the defendant to the ground and ordered him to put his hands behind his back. RP 54. When the defendant failed to do so, officers successfully tased and restrained him. RP 54.

After the defendant was arrested, police officers read the Miranda² rights to him. RP 55. The defendant stated that he understood his rights and agreed to talk to police. RP 55-56.

¹ Appendix A.

The defendant then averred that he knew the woman, who asked to smoke some crack from his pipe. RP 58. The woman offered to perform oral sex on the defendant in exchange for crack. RP 58.

The defendant explained that his pants were down because they would not stay up when his penis was out. RP 58. The defendant also said that he was helping the woman up when the police arrived. RP 58.

Officer Smith confronted the defendant with information that a witness had observed him dragging the very intoxicated woman from the bar. RP 3 58. The defendant agreed the woman was drunk and stated that he had to hold her up. RP 3 58. The defendant insisted that the sexual intercourse was oral sex. RP 58. The defendant denied that he had raped the woman. RP 59.

The defendant appeared intoxicated to police. RP 59. Officer Smith described his conversation with the defendant as “pretty normal for --- as intoxicated as he appeared to me.” RP 60.

The court ruled that the defendant’s custodial statements were admissible. RP 3 75-76.

The court then granted the defendant’s motion to prohibit police from referring to his statements as “a story.” RP 78.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

The court also granted the defendant's motion to prohibit witnesses from referring to the complaining witness as "the victim." RP 86. The court noted that the use of this term was prejudicial to the defendant as it persuaded the jury that the complaining witness indeed was a victim and therefore unfairly prejudiced the defendant. RP 84-86. The court also granted the defendant's motion to prohibit witnesses from describing what they observed as "a rape." RP 99.

During the trial, the prosecutor asked the complaining witness Deborah Raymond, "what kind of impact does this [the alleged rape] have on you?" RP 123. She answered. "It is not good. I'm changed. I won't be the same. I don't go out at night. I don't trust people. I don't go anywhere by myself. I just want it to go away." RP 123.

Defense failed to object to this irrelevant and prejudicial testimony.

Passim.

During trial, defense counsel elicited testimony from Raymond regarding her sister. RP 125-126. Defense counsel asked if Raymond's sister Vicky had a drug problem. RP 126. Raymond stated that Vicky had a cocaine problem and that "once a problem, always a problem." RP 4 126. Raymond testified that her sister had been in treatment and that "she goes to meetings." RP 126. Defense counsel then elicited in admissible

hearsay testimony that her sister knew the defendant because “she had seen him at meetings.” RP 126.

At the conclusion of the state’s case, the defendant moved to dismiss the alternative prong of “unable to consent” in the second degree rape charge and the indecent liberties charge. RP 390. The basis of the motion was Raymond’s testimony that she told the defendant to stop. RP 390. In addition, Randy Smith heard Raymond hollering “no” when he drove by. RP 392. There was no testimony that at the time of the alleged rape Ms. Raymond was unable to speak and unable to protest. *Passim*.

The court denied the defendant’s motion. RP 401.

The defendant also moved to dismiss the resisting arrest charge because at the time the police used the taser against the defendant, they had not told him that he was being arrested. RP 401-03. Although the court noted that if a person resisted being detained, that was not an arrest and therefore there could be no resisting arrest charge, the court denied the motion to dismiss. RP 404. The court stated that there was “at least evidence in the case that Mr. Flynn knew why he was being arrested and resisted.” RP 6 405. The court failed to elucidate exactly what evidence supported this inference. RP 6 405-406.

During closing argument the State argued both that the defendant acted with forcible compulsion and also that Raymond was too drunk to

consent. RP 511, 512. The State argued that Raymond blood alcohol level of .385 made her unable to consent because she was “drunk out of her mind”. RP 512.

Despite arguing that Raymond was “drunk out of her mind” and suffered a blackout at the time of the incident, the State nevertheless urged the jury to rely on her testimony about the event. RP 514. That testimony provided a detailed account of what had happened, including how clothing was removed and how she physically struggled against the defendant, and how the defendant had raped her. RP 515. Despite conceding Raymond’s complete intoxication and admission that she had been in an alcoholic blackout, the State also urged the jury to rely on her testimony that the head of the defendant’s penis entered her vagina “but not for very long.” RP 525.

The jury convicted the defendant of the crimes of attempted second degree rape, indecent liberties and resisting arrest. RP 7 576-77; CP 104-108.

On October 9, 2009, the court sentenced the defendant on the crime of attempted rape in the second degree and resisting arrest. CP 142-143. The court sentenced the defendant to 198 months to life for the charge of attempted second degree rape. The court sentenced the

defendant to 365 days with credit for 365 days served for the misdemeanor of resisting arrest. SCP 2³.

The defendant thereafter timely filed this appeal. CP 180.

2. Evidence at Trial:

On November 30, 2007, at 1:18 a.m., someone called 911 to report an incident. RP 4 106. Police responded to the call and worked the call until 4:07 a.m. RP 106-07.

That call was made by Randy Smith, a patron at Dawson's, who knew a girl named "Debbie." RP 286. They greeted each other at the bar. RP 5 286. He noted that she seemed pretty intoxicated. RP 287. He saw a man he later identified to be the defendant at the bar, too. P 287. The defendant asked Debbie if she wanted a ride home. RP 288. She was unresponsive and did not want to be bothered. RP 288. The defendant repeatedly asked her and she repeatedly rebuffed him. RP 288-89. When Smith told the defendant to leave Debbie alone, the defendant told him to mind his own business. RP 289. Smith later noticed the defendant "dragging" her out of the backdoor of the bar. RP 290. Smith did not call anyone's attention to this nor did he call the police at this time. RP 291. He left from the front door and then drove away in his car. RP 5292. As he left, he drove by the alley and saw the defendant on top of Debbie. RP

³ The misdemeanor Judgment and Sentence sentencing form has been designated at SCP 2.

292. Debbie was wearing her bra and panties. RP 304. The defendant's pants were down. RP 305. He drove down the alley and formed the belief that Debbie was trying to get away from the defendant. RP 294. The defendant and Debbie both appeared disheveled. RP 294-95. Smith told the defendant to get off Debbie or he would call the police. RP 5 294. Smith eventually called 911. RP 295.

Heidi Maas, a bartender at Dawson's tavern, observed Raymond talking to the defendant on November 29-30, 2007. RP 411. Maas observed interaction: "She [Raymond] was talking." RP 411. Maas did not hear any arguments or detect discomfort in their interactions. RP 418. Maas also had previously waited on Raymond's sister Vicky and knew that they looked alike. RP 414. Had Maas noted that someone had over consumed or had a problem with another patron, she would intervene. RP 414. Around the time that Maas heard fire trucks and police vehicles in the alley, she observed band members removing equipment out of the front and back doors. RP 415.

Prior to the citizen's 911 call, Deborah Raymond had been drinking at Dawson's Tavern. RP 108-09. Raymond had consumed a drink or two, Vodka 7's, prior to going to Dawson's. RP 111. She consumed maybe two or three drinks at the tavern. RP 111, 129.

While at the tavern, Raymond was contacted repeatedly by a man later identified as the defendant. RP 112. She told the man that she was not interested in him. RP 112. As she left the bathroom later on, the defendant grabbed her shirt and pulled her out. RP 114. She did not feel threatened by his conduct. RP 4 114. The defendant then asked her to have sex with him but she declined. RP 115.

Raymond exited the tavern to walk to her car. RP 115. However, once outside she realized that she was too drunk to drive. RP 115. She decided to sit in her car to remove herself from the defendant's presence. RP 116.

As she proceeded to her car, the defendant wanted oral sex and "kept turning my head." RP 116. He had unzipped his pants so that his penis was exposed. RP 116. The defendant kept trying to put his penis into her mouth. RP 117. This was unsuccessful. RP 117.

The defendant then put her on her back in the alley and tried to remove her clothing. RP 117. She fought him. RP 117. He pulled her pants down to her mid-thigh. RP 117. She then was able to use her pants to keep him from getting too close to her. RP 117. Raymond told the defendant to stop what he was doing and to get away. RP 120. As Raymond slide back from the defendant, "every cop in Tacoma showed up." RP 118. Then it was "just a blur, blur, blur." RP 118.

Raymond “believed” that she had been partially penetrated by the defendant. RP 4119. She denied that she had agreed to exchange sex for drugs. RP 121.

Raymond noted that the defendant never slapped her, hit her, choked her, or punched her. P 147-48.

At the time of this incident Raymond was upset with her boyfriend because he had taken a trip contrary to her wishes. RP 128.

Raymond was not more drunk than usual on November 30, 2007. RP 131.

Raymond was having her menstrual period on November 30, 2007. RP 139. She wore a Kotex pad that night. RP 139.

Raymond initially told the police officer that there had not been penetration. RP 346. she stated that she had seen the defendant in the bar before but had not spoken to him. RP 346. She said that she told him to stop but that he did not stop nor did he listen to her. RP 346.

TPD Officer Gutierrez spoke to Raymond prior to the arrival of paramedics. RP 346. She was crying and upset. RP 344-46. Raymond was taken to Tacoma General Hospital where many hours later she was examined by nurse Janice Agen. RP 168, 175. Upon arrival at the hospital at approximately 2 a.m., Drs Marshal and Boyd treated her in the emergency room. RP 199 Raymond’s blood alcohol level was tested and

determined to be .385, or more than four+ times the legal limit of .08. RP 193. Raymond was in the emergency room for seven or eight hours before the examination by Agen. RP 194.

Raymond was too intoxicated to provide any history to doctors. RP 200. However sometime during the exam she recalled that she remembered walking out of the bar with her sister and then being on the ground. RP 215. Raymond recalled a man pulling on her clothes and then did not want to talk about it. RP 215.

She initially refused to see a sexual assault nurse. RP 201.

At 9 a.m., Dr. Boyd examined Raymond and ordered another blood alcohol test. RP 202. At that time her blood alcohol level was .330, or still more than four+ times the legal limit of .08. RP 202. Dr. Boyd's examination dovetailed with Agen's examination, which occurred from 9 – 10:15 a.m. RP 4 203. Agen proceeded with the sexual assault examination despite Raymond's extraordinarily high blood alcohol reading. RP 203 Dr. Boyd's chart notes affirmed that Raymond wanted to go home at 10:30 a.m. RP 204.

The nurse sometimes performs the sexual assault examination in the emergency room as likely was done in this case. RP 204. Agen did not recall where she performed the examination although she conceded that she may have done so in the emergency room. RP 204-206.

Raymond told Agen that she was unsure about what had happened. RP 212. She said that “as far as she knew, it was just penile-vaginal penetration.” RP 178. She was unsure whether the man ejaculated; exhibited sexual dysfunction; used a lubricant, jelly or condom; kissed or licked her; appeared intoxicated; bit her, choked her, burned her, threatened her. RP 178-79.

Raymond told Agen that she had blacked out secondary to alcohol consumption. RP 179.

Raymond then changed her story from her initial report: “I was walking out to my car near Dawson’s tavern. I had been drinking and I was kind of out of it. All I remember is being thrown to the ground and some man trying to have sex with me. I kept pushing him off and telling him to stop. That is all I really remember.” RP 180.

Agen made no physical finding consistent with a sexual assault. RP 187.

TPD Officer Smith’s memory of the incident is set forth above in his pretrial testimony at the CrR 3.5 hearing, with, *inter alia*, the following additions: the defendant and Raymond appeared to be close in weight; the officer did not notice whether the defendant’s penis was erect when he got off Raymond at the officer’s command; the defendant’s pants were opened at the fly, thereby by exposing his penis; RP 232, 234 23. Raymond was

nude from the waist down. RP 4 235; he did not notice any blood on the defendant's penis. RP 270.

TPD Officer Smith recounted that the defendant stated that he had been drinking with the complaining witness but that he did not know her name. RP 253. The defendant stated that the complaining witness offered to give him a "blow job" if he would give her crack cocaine. RP 253. He said that when they went out into the alley for this transaction, the complaining witness was so drunk that he needed to hold her up. RP 353.

Officer Smith's partner, Officer Frisbie made his own observations. RP 364. "The fondest thing that sticks out in my head about this whole thing is him [the defendant] staring straight at our car and then the final thrust." RP 264.

Dr. Michael Hlastala, an expert in the subject of alcohol intoxication as well as alcohol and memory, testified for the defense. RP 426 *et. seq.* He testified regarding the levels of intoxication and their effects on human physiology and performance. At the legal limit of .08, an person is in the euphoria stage, characterized by such effects as increased sociability, decreased inhibitions, loss of efficiency in fine performance skills. RP 432. Between the ranges of .09 and .25, a person in the excitement stage and evinces such markers as increased emotional instability, impairment of memory and comprehension. RP 432. The

confusion stage overlaps the levels of .18 and .30. A person in this stage exhibits such traits as disorientation, mental confusion, dizziness. RP 433. From .27 to .40 is the stupor range. RP 433-34. This is characterized by traits such as apathy, general inertia approaching paralysis, vomiting, incontinence, sleep. RP 434. The next overlapping stage is coma and is found between .35 and .50. That stage is characterized by such traits as complete unconsciousness, coma, respiratory and heart malfunctions, and death. RP 434.

Dr. Hlastala also testified that when someone is passed out from alcohol and/or is in a blackout, they do not perceive events and therefore have no memory of them. RP 439. In a sensory blackout, a person might be able to walk, for example, but would not perceive anything. RP 439.

Dr. Hlastala opined that if Raymond had been drinking up to the time of the incident, she may have still been absorbing alcohol. This would have caused her blood alcohol to rise thereafter. RP 441. The average burn off rate for a woman is .03 per hour. RP 6 441. Burn off rate is affected by how the person drinks (all at once or gradually over time, for example). RP 441-42.

Based on his review of the facts of the case as well as his education and professional experience, Dr. Hlastala opined that Raymond likely was

in a blackout at some time. RP 442. He opined that she had suffered acute memory loss of the event as a result thereof. RP 443.

Considering circumstances where an individual had a high BAC and likely was in a blackout at the time of the event, the person would not likely have a reliable memory of the event. RP 6 448. Because of the blackout and the attendant difficulties in perception, recollection , and long-term memory, it would be very difficult for the person to recall events accurately. RP 6 448-49. He further opined that it would be just very difficult to recall anything, although they may recall something. RP 449.

TPD Officer Shelbie Brown also responded to the incident and followed the paramedics to the hospital. RP 480-81. There he asked Raymond if she had been actually penetrated and/or raped. She said she did not think so. RP 481. Raymond stated that all she could remember was coming out of the bar into the alley; she had parked her vehicle back there; she thought she had fallen. The next thing she knew she had a man on top of who she didn't know. She said she did not belong in the alley and that she had never met the man before. RP 481-82. She said she did not have any injuries or bruises except for three small bruises on the underside of her right arm. RP 482-83.

During his testimony Officer Smith used term “the victim” in several answers. RP 223; RP 253, 259. The defendant failed to object. *Passim*. Officer Frisbie also called her “the victim” several times. RP 369. Defense counsel failed to object. *Passim*. Defense counsel referred to the complaining witness as “the victim” as well. See, RP 268, 275; RP 376.

D. LAW AND ARGUMENT

1. THIS COURT MUST DISMISS THE DEFENDANT’S CONVICTION FOR ATTEMPTED SECOND DEGREE RAPE WHERE THE STATE FAILED TO PROVE THE CRIME BEYOND A REASONABLE DOUBT; THE INSUFFICIENCY OF THE EVIDENCE REQUIRES DISMISSAL.

Criminal defendants in Washington have a right to a unanimous jury verdict. *Const. art. 1, sec.21*⁴. This right includes the right to an expressly unanimous verdict.

In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987); *State v. Simon*, 64 Wn.App. 948, 831 P.2d 139 (1991).

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence

⁴ Appendix B.

exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because the appellate court will infer that the jury rested its decision on a unanimous finding as to the means. *State v. Whitney, supra*; *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976). On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. *State v. Green, supra*.

Evidence is sufficient to support a jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element beyond a reasonable doubt. *State v. Green, supra*. 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In alternative means cases, jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to support each of the alternative means charged. *State v. Linehan*, 147 Wn.2d 638, 645, 56 P.3d 542 (2002), citing *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976).

In this case, the State was required to prove beyond a reasonable doubt that the defendant took a substantial step toward fulfilling his intention to commit the crime of second degree rape against Raymond.

The State was also required to prove that the defendant intended to have sexual intercourse via forcible compulsion OR that the defendant intended to have sexual intercourse with Raymond who was physically or mentally incapacitated.

Regarding the first prong of the alternative means (forcible compulsion), there was no evidence that the defendant intentionally used force to overcome Raymond's resistance. The defendant told police that Raymond had agreed to exchange sexual intercourse for a smoke off his crack pipe. RP 58. His statement was corroborated by Officer Smith's testimony that the defendant was dressed except for his penis which was hanging out the fly of his pants. RP 232, 234. His statement also was corroborated by Raymond's statement that the defendant wanted her to perform oral sex on him. RP 117. This affirms that the defendant did not take a substantial step toward having sex by forcible compulsion.

Raymond further testified that she moved her head so that she would not have to perform oral sex. RP 116. Her successful repositioning shows that the defendant did not use forcible compulsion to overcome her resistance. Likewise, Raymond testified that the defendant then put her on her back and tried to remove her clothes. RP 117. She testified that he pulled down her pants to mid-thigh which permitted her to use her pants to keep her from getting too close. RP 117. Raymond testified that these

acts occurred before the arrival of the police. RP 120, 118. Raymond never testified that the defendant was sufficiently close to her to penetrate her prior to the arrival of the police. *Passim*. This evidence also affirms that Raymond was able to prevent any unwanted sexual contact with the defendant. The jury obviously rejected her testimony that she believed that she might have been penetrated.

Thus, the State failed to adduce sufficient competent evidence at trial to prove the forcible compulsion prong of attempted second degree rape.

Regarding the second prong, the State failed to prove beyond a reasonable doubt that the defendant took a substantial step toward intentionally committing the crime of second degree rape with another person who was incapable of consent by reason of being physically helpless or mentally incapacitated. The evidence on whether Raymond was so intoxicated, or “drunk out of her mind” as the prosecutor put it, was inconsistent to say the least. Dr. Hlastala testified that an individual with a blood alcohol content of .385 likely would be unconscious or comatose. RP 334. This, of course, was the blood alcohol content of Raymond when she arrived at Tacoma General Hospital. RP 193. In addition, the treating physicians noted that when Raymond arrived at the hospital she was too intoxicated to provide any history whatsoever. RP

200. Doctors then decided to allow Raymond to sleep to see whether when she eventually sobered up, she would provide information. RP 194. Her blood alcohol level remained high throughout her stay. At 9 a.m. Raymond's blood alcohol level was .330, still well above the legal limit for intoxication. RP 202. Nevertheless she appeared competent to consent to and cooperate with a sexual assault examination. While she was still highly intoxicated she participated in a sexual assault exam. RP 203, 204, 212. She reportedly made statements to nurse Agen, including the report that she had blacked out during the incident. RP 196. Other partial statements that she made were wildly inconsistent.

Raymond's statements to police at the scene were admitted as excited utterances. ER 803(a)(2). Her statements to treatment providers were admissible pursuant to ER 803(a)(4)⁵, statements for purposes of medical diagnosis or treatment. Her testimony at trial also needed to be considered in light of the other competent evidence.

Thus, given the evidence in this case, there was not substantial evidence to support each alternative means of committing the crime of attempted second degree rape. Succinctly put, the defendant would not have had to intend to commit rape by forcible compulsion if Raymond was physically or mentally incapacitated. Likewise, the defendant would not

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have intended to commit rape against a physically or mentally incapacitated Raymond if she were able to offer physical resistance.

For these reasons, this court must dismiss the defendant's conviction for attempted second degree rape.

2. THIS COURT MUST DISMISS THE DEFENDANT'S CONVICTION FOR RESISTING AREST WHERE THE STATE FAILED TO PROVE THE CRIME BEYOND A REASONABLE DOUBT; THE INSUFFICIENCY OF THE EVIDENCE REQUIRES DISMISSAL.

As noted above, when reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the state. *Green, supra*.

To prove the crime of resisting arrest, the State is required to prove beyond a reasonable doubt that the defendant attempted to prevent a police officer from arresting him, that the defendant acted intentionally, and that the arrest or attempt to arrest was lawful. CP 63-103. RCW 9A.76.040⁶.

In this case, the defendant was convicted of resisting arrest for actions that were taken well before the police had problem cause to arrest him. The evidence at trial established that police received a dispatch call to a possible rape in progress. RP 230. When they arrived they ordered the defendant off Raymond. RP 233. The defendant complied. RP 234. The police officer contacted Raymond who appeared to be "completely

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out of it” and she said “thank you.” RP 235. Officer Smith then ordered the defendant to turn around and face away from them with his hands up. RP 235. This was a standard safety procedure. RP 235. Officer Smith treated the defendant in this way because “he is a suspect in a rape *and I don’t know the specifics.*” RP 236. When the police believed that the defendant failed to respond to their directives, they tased him. P 237-239.

On these facts, there is no evidence that the police officers even intended to arrest the defendant at the time of the alleged resisting. At most, they wanted to remain in the area while they investigated a matter about which they did not know the specifics.

In this case, there is no issue about the lawfulness or unlawfulness of the arrest. This is so because at the time of the defendant’s conduct, police did not intend to arrest him. The intention to arrest and the communication of that intention to police are the minimum requirements for the crime.

Further, although the defendant has served the sentence⁷ for resisting arrest, the issue is not moot and therefore should be decided by this court. Generally, the appellate court will not consider a question that is purely academic. “A case is moot if a court can no longer provide

⁷ The trial erroneously sentenced the defendant to 365 days in custody with credit for time served. That sentence assumed that the crime of resisting arrest was a gross misdemeanor. It is not. The maximum sentence for resisting arrest, a simple misdemeanor, was 90 days. RCW 9A.76.040.

effective relief." *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995). However, if a case presents an issue of continuing and substantial public interest and that issue will likely reoccur, the court may still reach a determination on the merits to provide guidance to lower courts. *State v. Blilie*, 132 Wn.2d 484, 488, n1.,939 P/2d 691 (1997).

In this case, this court should consider the merits of the issue. This is so because pursuant to the Sentencing Reform Act, the sentencing court may consider a defendant's misdemeanor history as a basis for an exceptional sentence. *RCW 9.94A.530(2)(b)* provides that that trial court may consider as an aggravating factor "the defendant's prior unscored misdemeanor history . . . [if it] results in a sentence that is clearly too lenient considering the purposes of this chapter."

Mr. Flynn already has some misdemeanor convictions. SCP 2⁸ . An additional misdemeanor would provide further fodder for a future exceptional sentence if this resisting arrest charge is not dismissed. Because Mr. Flynn may suffer future harm if this misdemeanor is not dismissed for lack of evidence, this court should dismiss the charge and not dismiss this argument for mootness.

3. THIS COURT MUST REVERSE THE DEFENDANT'S CONVICTIONS WHERE TRIAL COUNSEL'S REPRESENTATION CONSTITUTIONALLY INEFFECTIVE.

⁸ The misdemeanor Judgment and Sentence sentencing form has been designated at SCP 2

Effective assistant of counsel is guaranteed under the federal and state constitutions. See *U.S. CONST., amend, VI*; *WASH. CONST., art. I, sec. 22*. This right was comprehensively discussed in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

In *Strickland*, the U.S. Supreme Court observed that the right to counsel is crucial to a fair trial because “access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. 466 U.S. at 685 (citations omitted). Any claim of ineffective assistance must be judged against this benchmark: “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” 466 U.S. at 686.

To prove ineffective assistant of counsel, an appellant must show that (1) trial counsel’s performance was deficient; and (2) the deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1998). Put another way, the defendant must show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the

Sixth Amendment. 466 U.S. at 687. The prejudice requirement is satisfied by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Although the reviewing court indulges a strong presumption that counsel's representation falls within the wide range of proper professional assistance, the defendant may overcome that presumption by showing that trial counsel had no legitimate strategic or tactical rationale for his conduct. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result likely would have been different. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Competency of counsel is

determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Counsel's actions pertaining to the defendant's theory of the case do not constitute ineffective assistance. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Competent counsel in a criminal case (or any case) is expected to be cognizant of the rules of evidence, including the rules and case law regarding the admission of hearsay evidence. In this case, trial counsel failed to object to patently inadmissible hearsay. There is no legitimate tactical or strategic reason for failing to object to such evidence.

In this case, trial counsel failed to object to Raymond's testimony regarding the lasting effect this incident left on her. Defense counsel thus allowed her to testify that because of the defendant's conduct, "I'm changed. I won't be the same. I don't go out at night. I don't trust people. I don't go anywhere by myself. I just wanted it to go away. It is not . . . " RP 123.

This testimony had no place in the criminal trial and would have been appropriate only at a sentencing hearing. Instead, the State used this evidence to buttress its theory that Raymond actually had been conscious of the acts allegedly committed upon her, as well as the credibility to Raymond.

To be admissible, evidence of the victim's state of mind must be relevant to a material issue of fact before the jury. *State v. Haack*, 88 Wn.App. 423, 439, 958 P.2d 1001 (1997) citing *State v. Cameron*, 100 Wn.2d 520, 531, 674 P.2d 650 (1983), citing *State v. Parr*, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980) and *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758 (D.C. Circuit 1973). Whatever the psychological consequences may have been for Raymond in the months and years following the alleged attempted rape was not relevant to the jury's determination of what may have happened in November 2007.

ER 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

The Washington courts have held that it is error to admit a witness's fear of the defendant absent an attack on the witness's credibility. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997). However, even that case does not stand for the rule that post-event psychological trauma is admissible as substantive evidence as to whether any crime was committed. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945).

In this case, the prosecutor elicited this testimony on direct examination, thus prior to any attack on Raymond's credibility. RP 123. The prosecutor clearly did this to buttress the testimony of a very weak witness. Because trial counsel failed to perform as effective counsel, the prosecutor succeeded in diverting the jury's attention from the real issue in this case: that is, had the State proved beyond a reasonable doubt that the defendant committed the charged crimes. Instead of forcing the State to pin down Raymond's memory or lack thereof regarding this incident, the State was allowed to make excuses for Raymond by emphasizing the alleged trauma. No reasonably competent defense attorney would have failed to object to this testimony. There is no legitimate or strategic reason to permit the admission of such evidence.

To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. *In re the Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the appellant must also show that the trial court would have sustained an objection to the evidence. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). In this case, even the prosecutor knew that he had gone too far when eliciting this evidence because he cut

Raymond's answer off in mid-sentence. Because there is no legal authority justifying the admission of such evidence, the trial court would have sustained other objections to such evidence. The trial court also would have sustained motions to strike.

Defendant's counsel also was ineffective for failing to object to the testimony that Raymond's sister Vicky was a drug addict and attended meetings as part of her recovery. Raymond then testified via inadmissible hearsay that Vicky "had seen him [the defendant] at meetings." RP 126. The unmistakable import of this evidence was to inform the jury that the defendant had a drug problem, too. This inadmissible evidence likely caused the jury to infer that the defendant's use of street drugs was far more serious than the happenstance that he possessed a crack pipe on the night of this incident. Defendant should have objected to this inadmissible evidence and made a motion to strike the unfairly prejudicial evidence from the record.

Finally, defense counsel was ineffective for failing to object to the repeated use of the term "the victim" and also for using the term himself. RP 223, 259, 369, 266, 275, 376. The trial court had granted the defendant's motion to prohibit use of this term because of its inherent potential for unfair prejudice. The court emphasized that use of this term was unfairly prejudicial to the defendant because it persuaded the jury that

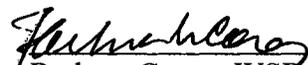
the complaining witness indeed was “the victim”. RP 84-86. This case turned Raymond’s credibility. To permit her credibility to be enhanced by the repeated use of the term “the victim” was ineffective. There is simply no legitimate reason or strategic/tactical justification for remaining silent during such testimony. The defendant won the motion to exclude the evidence and then inexplicitly permitted it to come in.

As noted above, trial counsel’s failure to do his job resulted in verdicts in which there can be little confidence. The defendant’s convictions must be reversed based on ineffective assistance of counsel.

E. CONCLUSION

For the reasons noted above, the defendant respectfully asks this court to dismiss this case. If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *Id.*

DATED this 10th day of May, 2010.


Barbara Corey, WSB # 11778
Attorney for Appellant

Appendix A

Washington Criminal Rule 3.5. Confession procedure

(a) *Requirement for and time of hearing* When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) *Duty of court to inform defendant* It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) *Duty of court to make a record* After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) *Rights of defendant when statement is ruled admissible* If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

HISTORY: Adopted April 18, 1973, effective July 1, 1973.

Appendix B

Washington Constitution Article

Section 22. Rights of the accused

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Appendix C

Rule 803. Hearsay exceptions; availability of declarant immaterial

(a) *Specific exceptions* The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present sense impression* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited utterance* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then existing mental, emotional, or physical condition* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for purposes of medical diagnosis or treatment* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.



Appendix D

Rev. Code Wash. (ARCW) § 9A.76.040 (2010)

§ 9A.76.040. Resisting arrest

(1) A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.

(2) Resisting arrest is a misdemeanor.