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No. 40047-2-II

STATE OF WASHINGTON

BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LOGAN L. GORE

Appellant.

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

The Honorable, Judge
Cause No. 08-1-01436-7

BRIEF OF RESPONDENT

John C. Skinder
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion when it denied the defense motion for a mistrial based on alleged prosecutorial misconduct?
2. Was defense counsel ineffective when he chose to not request an instruction for the lesser degree offense of rape in the third degree?
3. Did the trial court abuse its discretion when it chose to only question the bailiff and not the individual jurors when there was no allegation of misconduct?
4. Was there sufficient evidence that Mr. Gore committed both crimes of rape in the second degree as found by the jury?
5. Was there an accumulation of errors warranting reversal?
6. Did the trial court abuse its discretion in determining that Mr. Gore's two convictions for rape in the second degree were not the same criminal conduct for sentencing purposes?

B. STATEMENT OF THE CASE.

The State accepts Gore's statement of the substantive and procedural facts with the following exceptions and corrections.

On June 28, 2008, there was an under-age drinking party at a residence in Lacey, Washington. [RP 31, 34, 48, 153, 343, 506, 527, 851-2]. As many of the witnesses, including the victim J.L.C. were minors, they will be referred to by initials only.

J.L.C. (DOB: April 4, 1992) attended school in Elizabethtown, Kentucky, and she competed in pageants in the

Miss America system. [RP 506]. She testified that she moved from Olympia, Washington to Kentucky in March 2007. [RP 507]. J.L.C.'s best friend T.G. and she have maintained daily contact with each other since she moved to Kentucky. [RP 507].

Before attending the party, she and T.G. had gone to church services and after that she had a tuna wrap sandwich at Subway. [RP 511]. J.L.C. stated she watched what she ate because of her involvement in the pageants. [RP 511-512]. J.L.C. indicated that she had consumed alcohol five times before June 28, 2008, but she had never been drunk before June 28, 2008. [RP 516-8].

She recalled that they went to the party and that M.M. offered to make her a "vodka and rum" drink. [RP 521-2]. She indicated the drink was served in large red plastic cup; she described the drink as "fruity tasting". [RP 523-4]. She drank that mixed-drink and asked M.M. for another one five minutes later. [RP 524]. J.L.C. "gulped" this second drink down quickly. [RP 526]. She started feeling a "buzz". [RP 526]. J.L.C. stated that she did not eat anything at the party and no food was offered; the only beverages she consumed were alcoholic. [RP 526].

She met Mr. Gore shortly thereafter. [RP 527]. J.L.C. thought he was "cute". [RP 527]. Mr. Gore asked her to be his

“beer pong” partner; she had never played before and said yes. [RP 527]. According to the rules, partners were to alternate turns drinking beer; initially that occurred but then Mr. Gore said he had to drive so he stopped drinking and she drank for both of them. [RP 529-530]. She testified that she drank an additional 5-6 quarter cups of beer. [RP 530-1]. J.L.C. testified that she was feeling “pretty drunk”. [RP 532].

E.W. left the party before her curfew of 11 p.m.; J.L.C. did not want to go and stayed at the party. [RP 532]. She indicated that she was having fun with Mr. Gore at that point. [RP 532]. J.L.C. described that she started hanging out more with Mr. Gore,

“At first – well, when we went back inside, Logan was, you know, getting beer from the keg outside and giving it to me, so I had more beer, and then after that I remember going into the kitchen that they had and taking shots with him, and it was vodka, and it was in the freezer, and a girl came into the kitchen and told him that was her vodka and not to touch it.”

[RP 535]. J.L.C. remembered having three beers from the keg in big red plastic cups. [RP 536]. She also remembered three or four shots of vodka. [RP 542]. After the additional beers and shots of vodka, she testified that,

“I remember having to hold myself up. I was like – I was like leaning up against the wall, and that was holding me up. I felt really dizzy.”

[RP 537]. She further described her speech as “I wasn’t making sense.” [RP 537].

After the shots of alcohol in the kitchen, Mr. Gore filled her beer. [RP 546]. J.L.C. indicated Mr. Gore kissed her once earlier and she described that kiss and a second kiss,

“It was really forceful and aggressive. Umm, he liked pulled my hair back and my head was, you know, like this (demonstrating), and the second time I was so drunk I don’t even know if I really kissed back. I just remember it happening. I don’t – the first time, I can remember that more. I just remember it hurting.

[RP 549].

Mr. Gore guided J.L.C. to a bedroom down the hall. [RP 550]. She said:

I just – I saw the bed, and I felt really, umm, tired, like really worn out, and I just kind of – I don’t know. I laid on the bed really – I was closing my eyes. I was really dizzy. I just kind of wanted to sleep, you know. I was just really tired.

[RP 550]. J.L.C. remembered that Mr. Gore closed the door and turned off the lights. [RP 551]. He started kissing her and she was not moving. [RP 551]. She said to him that she was a virgin and not to have sex with her. [RP 551]. Mr. Gore said he was not going to have sex with her. [RP 552]. He started digitally penetrating her vagina; she felt “pressure” and it was painful. [RP

553]. She kept telling him she was a virgin and not to have sex with her. [RP 553].

He took off her clothes and then took off his clothes. [RP 553-4]. He performed oral sex on her. [RP 554]. J.L.C. testified that,

“I don’t know. I just – there was like points where I was kind of going in and out of like knowing what was going on, and then, you know, it seemed like I would just kind of black out and then something else would be happening, but I didn’t know how I was, how I got I a certain position or – I don’t know. Like everything would go – it was like I was asleep for a little bit and then I’d wake up and I’d be like on my stomach or on my back or something but I don’t know how I got there. Like I didn’t feel like I was in control at all.”

[RP 554-5]. She continued,

“I just remember like facing a wall and he was behind me, and I just felt a lot of pain but I didn’t know that he was doing it.”

[RP 555]. She felt pain everywhere. [RP 555]. Her head was hurting. [RP 555]. Her vagina was “really hurting”. [RP 555]. Her anal area was “hurting really bad.” [RP 555].

At some point J.L.C. recalled waking up when Mr. Gore was getting dressed, saying that people were trying to get in the room. [RP 557-8]. Mr. Gore dressed her because she was not able to respond. [RP 558]. He helped her up and helped her exit the room; she remembers stumbling and having a hard time walking.

[RP 559]. They exit the front door and she remembers falling down outside. [RP 559]. She recalls her physical condition as,

“I was in a lot of pain. I couldn't walk. Like it just really hurt. I was feeling more pain when I was walking than when I – I just wanted to stay still and not move.”

[RP 560]. J.L.C. discussed how she blamed herself because she made the choice to drink. [RP 563].

T.G. testified that she has known J.L.C. since the seventh grade and they have remained best friends. [RP 337]. She indicated that she, J.L.C. and some friends planned on going to a party in Lacey. [RP 339]. First, they went to church service at 5:30 p.m. and left church at approximately 7 p.m.; after that, they went to dinner at Subway. [RP 340]. T.G. remembered that J.L.C. only had half a sandwich because she was trying to watch her weight and was making a “point of not eating.” [RP 341-342].

T.G. indicated when they got to the party on June 28, 2008, J.L.C. was immediately given a “purple” mixed-alcohol drink in a red cup; T.G. took a sip of J.L.C.'s drink and described it as tasting “really fruity.” [RP 371-372]. Soon after, someone at the party brought J.L.C. another mixed-drink this time in a bigger glass. [RP 374-375]. Soon after J.L.C. finished the second mixed-drink, they were introduced to Mr. Gore. [RP 377].

Mr. Gore and J.L.C. started playing a drinking game called "beer pong". [RP 384]. T.G. drank a small amount of beer while she watched them play "beer pong". [RP 386]. T.G. testified, "I just noticed that [J.L.C.] was drinking all of, everything, you know, that was on that side." [RP 387].

T.G. stated that when their ride had to go home because of a curfew of 11 p.m., J.L.C. did not want to leave the party. [RP 391]. She noticed that J.L.C.'s speech seems affected by the alcohol that she has consumed; she also noticed that J.L.C. and Mr. Gore were talking, flirting and holding onto each other. [RP 392]. T.G. decided to stay at the party with J.L.C. [RP 393]. T.G. stated that J.L.C. appeared unsteady on her feet and "wobbly". [RP 394].

T.G. stayed with J.L.C. but was starting to feel awkward as J.L.C. and Mr. Gore continued to flirt. [RP 395]. Mr. Gore left for a moment and came back with a beer for himself and a beer for J.L.C. [RP 405]. T.G. asked Mr. Gore if she could "could have a beer", Mr. Gore responded "the keg's outside". [RP 405].

Next, T.G. saw Mr. Gore and J.L.C. doing shots of alcohol in the kitchen. [RP 408-9]. T.G. remembered that J.L.C. consumed three shots of alcohol in the kitchen. [RP 410-11]. T.G. wanted to leave the party and went outside at this point and sat on the porch.

[RP 415]. Sometime later, T.G. went back in the residence and could not find J.L.C. [RP 416]. She felt very uncomfortable because she did not know the owners of the house. [RP 418-9]. She knocked on the bedroom doors and there was no answer; she also tried one of the door knobs and it was locked. RP [419-20].

T.G. began to think that J.L.C. and Mr. Gore may have been outside; she felt very uncomfortable and wanted to get back to E.W.'s house. [RP 421]. T.G. asked some of the other girls at the party if they had seen J.L.C. but "they didn't have a clue." [RP 422]. At this point, T.G. called Mr. Marmaduke, a volunteer firefighter for East Olympia and his girlfriend M.K., and explained the situation; she felt "really horrible, really frantic" and was crying. [RP 423]. She explained that she became "hysterical" and "just really overwhelmed". [RP 424]. Mr. Marmaduke and M.K. drove to the residence to help. [RP 425]. After they got there, T.G. saw Mr. Gore and J.L.C. appear on the front porch of the residence. [RP 430]. T.G. described how they were acting,

"Umm, not really interested in each other at all anymore. He seemed to be holding her up as she really was having a hard time standing. She was just – she was very floppy.

[RP 430]. T.G. stated that her friend could not walk and did not appear to be in control of her body. [RP 430].

T.G. remembered J.L.C. separating from Mr. Gore, going a short distance and falling to the ground. [RP 432]. She remembered Mr. Gore picking J.L.C. up and throwing her over his shoulder; he said he would take J.L.C. [RP 433]. Mr. Marmaduke said no, we will take her. [RP 433]. J.L.C. could not climb into Mr. Marmaduke's truck without assistance; T.G. described the scene:

"We – several times had to pick her up, all of them. I was not. Logan and Malcolm and [M.K.], they were trying to get her to stand up. She had collapsed, you know, right there. When he put her down actually right there is when I remember her – I really remember her falling. It was when he put her down and she – that's when she just collapsed down, and she really wanted to like sit there. She said she didn't want to move and she just wanted to sit there. She never really said – she didn't really say too much. She just gestured to kind of leave her. They tried, you know, several times to get her to stand up, and it was eventually evident that, you know, she couldn't stand up, and [M.K.] and [Mr. Marmaduke] just really – essentially it was [Mr. Marmaduke] but [M.K.] kind of, you know, shifted things to get her into the car. I mean, they physically had to manipulate her body to get – she was just really a doll. She was a rag doll."

[RP 433-4].

T.G. described how J.L.C. was "kind of mumbling"; "the only impression I got from her was that she didn't want to be touched."

[RP 434-5].

T.G. described how she confronted Mr. Gore,

"I was – I was really nervous. He's really big and it's not like I was gonna come at him and say, you know, what did you

do, but she was acting so lethargic and just laying there and just like – I said, you know, what happened? What did you guys do, you know? What did you do, you know? And he said that they did some stuff, you know, but nothing, nothing more, and that's when I – you know, I said – I said, you know, what did you do to her? I just – I don't know. I guess I was just – he answered me, but I was just being really – I wanted to know.

[RP 435-6].

Once in the vehicle, J.L.C. said she was in pain and bleeding; she said “why did he do that to me?” [RP 436]. J.L.C. was crying. [RP 437]. J.L.C. really wanted to take a shower. [RP 442-3]. J.L.C. was clearly in pain and could not sit comfortably. [RP 443-4].

Before her 11 p.m. curfew, E.W. had left the party. [RP 54-58]. T.G. called E.W. later stating she could not find J.L.C. and she needed help to look for her; E.W. and Mr. Marmaduke drove to the party to help. [RP 69].

About 30 to 45 minutes later, J.L.C. was found by her friends. [RP 71]. E.W. described J.L.C. as “pretty out of it”; she further described the condition of J.L.C.:

“Like drunk and kind of wobbly, like a not very clear mental state at that point. She was kind of – she was crying.”

[RP 71].

E.W. further answered regarding J.L.C.'s ability to walk well,

“Not – no, I believe she – I don’t know if [Mr. Marmaduke] carried her or helped her, but she needed assistance getting into the house”

[RP 71].

E.W. testified that J.L.C. said that she was suffering vaginal and rectal pain. [RP 73]. E.W. also stated that J.L.C.’s rate of speech was “slow, slurred” and she was crying. [RP 74].

E.W. subsequently called Mr. Gore and asked him what happened; E.W. testified that Mr. Gore responded that he and J.L.C. had “made out” but nothing happened. [RP 75]. E.W. indicated that Mr. Gore’s speech was not impaired. [RP 76].

Ms. Swift, the mother of E.W., is an advanced registered nurse practitioner with over twenty years experience. [RP 90].

[RP 95]. Ms. Swift described J.L.C.’s condition,

“She was – when she tried to get up, she was stumbling. She had difficulty walking. Her eyes were bloodshot. She appeared disheveled.”

RP [95-96]. Ms. Swift stated that J.L.C. told her that her vaginal area was painful. [RP 97].

J.L.C. agreed to go to the hospital and Ms. Swift described that her husband and Mr. Marmaduke “lifted her on each side and got her to the car”. [RP 97]. They went to St. Peter’s Hospital where they waited for a long time; they eventually left and came

back later in the morning when the sexual assault nurse examiner was on-duty. [RP 97-99].

Mr. Marmaduke testified that he went to the party with his girlfriend M.K. to find J.L.C. [RP 107-111]. After looking through the house, they found T.G. first. [RP 121].

Mr. Marmaduke then testified that he saw J.L.C. come out the front door with Mr. Gore,

“[S]he came out with Logan. She was by his side, couldn’t really walk. She fell down a little bit past the front door in the grass.”

[RP 125]. He further said that it looked like Mr. Gore “was just kind of trying to keep her up.” [RP 125]. He related that J.L.C. walked away from Mr. Gore and fell to the ground. [RP 126]. J.L.C. kept saying “it hurts.” [RP 126]. Mr. Marmaduke indicated he helped get her subsequently to the hospital and J.L.C. was “moaning like she was in pain” and she “kept saying her vagina hurt.” [RP 133].

Ms. Stewart, an emergency room nurse and sexual assault nurse examiner (SANE) at St. Peter’s Hospital, testified that she saw J.L.C. at the emergency room on June 29, 2008. [RP 217]. J.L.C. told Ms. Stewart that she was suffering vaginal and anal pain from a sexual assault. [RP 230-31]. Ms. Stewart testified that

J.L.C. “did smell of alcohol; she appeared to be – she appeared to be hung over.” [RP 229].

Ms. Stewart also clarified that she examined J.L.C. on J.L.C.’s second visit to St. Peter’s Hospital which was approximately 10 a.m. the next day June 29. [RP 250]. Ms. Stewart testified regarding the trauma to the vaginal opening, the anus and the area between. [RP 265-267]. Her hymen was detached and not intact and there was an abrasion where the hymen should be; Ms. Stewart also described additional redness and abrasions toward the bottom of the vaginal opening and then towards J.L.C.’s anus which had also suffered trauma. [RP 267]. The injuries were abnormal and medically significant. [RP 267-272].

Ms. Stewart testified that she obtained swabs from J.L.C.’s body to preserve any forensic medical evidence; she secured these swabs in the rape kit and subsequently turned the rape kit over to a Thurston County Sheriff’s Office deputy. [RP 279-283].

Dr. Gilday, an emergency room physician at St. Peter’s Hospital, testified that he saw J.L.C. on June 29, 2008, after she had received her sexual assault exam from Ms. Stewart. [RP 296-

297]. As Ms. Stewart had already examined J.L.C.'s vaginal area and rectal area, he did not examine those areas again. [RP 300-1].

Dr. Gilday also testified regarding the effects of alcohol and regarding the metabolism of alcohol,

“Well, again it’s an inexact science. Everyone metabolizes differently based on our livers and our general metabolism and our bodies, but generally accepted is the average person who is not habituated to alcohol, meaning someone who is not, quote-unquote, an alcoholic, would process at a certain rate; I believe it’s around, using the milligrams per deciliter measurement of alcohol in the bloodstream, about 15 to 20, maybe even upwards of 25 milligrams per deciliter, which is about, give or take, a drink an hour.”

[RP 307].

Dr. Gilday further explained,

A. “Again it’s difficult because there’s so many underlying factors, whether or not they have eaten, how much food is in their stomach at the time, but the more you have to drink early on in succession, there can be different absorption rates. Potentially you could become more intoxicated quicker, but that’s just a general guideline. I think it’s referred to as a common sense guideline, not something that’s necessarily scientifically supported in the emergency room.

Q. Okay. So hypothetically speaking, if you had an individual who was known to have consumed at least seven alcoholic drinks, that would be six shots and at least one beer, is it fair to say that you could add for every alcoholic drink or take seven times .025 to come up with a blood alcohol level and then subtract the number of hours for burn-off?

A. Yeah, I think that’s essentially what we do. In that equation that’s a general approximation. Again everyone

deals with it differently, but certainly that's a reasonable thing to use.

[RP 307-308].

The State asked Dr. Gilday another hypothetical question:

Q: Okay. So hypothetically speaking, if you had that and we calculated seven drinks at .025 and it puts us at a .175 – if you check my math on that and correct me if I'm wrong – and say it's even over the course of two hours –

Mr. Dixon: I'm objecting to that, Your Honor, based on facts that are not in evidence.

[RP 308].

After a discussion at sidebar, the State abandoned this last hypothetical question asked of Dr. Gilday. [RP 309].

Ms. Reid, a forensic scientist at the Washington State Patrol Crime Laboratory from the DNA section, testified that she tested the biological samples contained in the sexual assault kit of J.L.C. and a reference sample obtained from Mr. Gore. [RP 319-330]. Ms. Reid testified that she located spermatozoa on the perineal/vulvar swabs, the endocervical/vaginal swabs, and the anal swabs. [RP 323]. Ms. Reid testified that the DNA from the sperm matched Mr. Gore to a very high degree of scientific certainty. [RP 330].

Ms. Rogers, a family friend who lives in Washington, testified that on the morning of June 29, 2008, she learned what happened and that J.L.C.'s mother was flying to Washington from Kentucky; J.L.C. and her mother stayed with Ms. Rogers for three days before returning to Kentucky. [RP 614-8]. Ms. Rogers described J.L.C.'s appearance when she saw her on June 29, 2008 as follows,

A. "She, umm – she had red-rimmed eyes, and she had fingerprint bruises on her upper arms, and she was walking like someone whose recently given birth, and she could hardly make it to the stairs, and when she would sit she couldn't sit flat on her bottom. She's have to sit on one hip or the other, and she couldn't stand sitting for long so then she would go lay in the bed. She didn't look like the little girl I know.

Q. Have you ever seen her in this condition?

A. Never.

Q. How were her spirits?

A. It was like she was a shell of a human being. She – she didn't want to talk much. She said she wasn't hungry. She wanted her favorite drink, which is apple juice, and pretty much she just wanted to lay in my little boy's room 'cause it looks like an undersea aquarium and she said oh, this is nice, this is nice. That's what she said.

Q. How long did she stay with you?

A. About three days I think.

Q. Did they go home then?

A. Yes.

Q. Did she seem to improve at all from the time, the three days she stayed with you?

A. Not really, no. She talked a little bit more but not really.

[RP 617-8].

Mr. Gore testified in his own defense. He denied that he forcibly kissed J.L.C. and he denied drinking any shots of hard alcohol in the kitchen. [RP 822, 824]. Mr. Gore alleged that much of the sexual activity was at J.L.C.'s urging: that J.L.C. asked if she could perform oral sex on him, that he digitally penetrated her because J.L.C. pushed his hand down towards her vagina, that J.L.C. was "fairly aggressive" during intercourse, and that "she wanted to have anal sex so I participated." [RP 837-9]. Mr. Gore testified he was with J.L.C. in the bedroom engaged in sexual relations for "25, 30 minutes." [RP 843]

Mr. Gore testified that he did not ejaculate during the sexual intercourse. [RP 859]. However, as described above, semen was located on the swabs taken from J.L.C. which contained DNA which matched Mr. Gore to a very high degree of scientific certainty. [RP 329]. Mr. Gore admitted J.L.C. fell down in the middle of the front lawn and that he had to carry J.L.C. from the front yard to the truck. [RP 847-8]. When confronted by J.L.C.'s friends, who asked Mr. Gore what he had done to J.L.C., Mr. Gore stated that he had done "nothing." [RP 863].

The defense also called Mr. Casey Jones who claimed that he went outside the house to spy on Mr. Gore and J.L.C. through

the open window of the bedroom. [RP 873]. Mr. Jones testified that he was standing approximately 8 – 12 feet away from the window, and that he observed them for less than five minutes. [RP 875-6]. Mr. Jones stated that he was inside the house when J.L.C. left, therefore, he did not hear the victim complaining that she was in pain, nor did he see her fall and the defendant pick her up. [RP 880].

During the trial, the bailiff notified the court that four jurors had individually expressed their discomfort to the bailiff with having to pass in close proximity to the defendant as they entered and exited the courthouse. [RP 349-50]. One juror described the defendant's actions as a "conscious tactic" and another described it as "staging." [RP 350]. The Court addressed this matter twice; first off the record to counsel, then in open court with both parties and the defendant present. [RP 349]. The court held a hearing on the record in which the bailiff was questioned by counsel. [RP 351-5].

The court concluded, on the basis of the bailiff's testimony, that there was "nothing close" to a showing of misconduct and no basis to conclude that the jury was in any way tainted. [RP 357]. The court ruled:

More information is always a good thing, and yet on the basis of what I have heard so far from the bailiff, which is exactly the same thing that counsel have heard, I don't think there has been anything close to a showing of any kind of misconduct or any basis that the jury is tainted in any way.

Frankly, in many cases jurors might feel intimidated by the size of somebody or by how somebody is looking at them in the courtroom, and it would not be the first case that issues were raised by what people think somebody is doing or how they are looking at them. I don't think there is a showing at this point that there needs to be individual voir dire of the jurors. I, frankly, think that by doing that the Court would be creating more of a problem.

Based on what I know now, which is what you know, and based on the fact that I don't have any authority that has been presented to me otherwise, we are going to keep going.

Mr. Gore, I am pretty sure that Mr. Dixon (defense counsel) has been clear with you. The Court doesn't have any belief that you are doing anything to try to sway things one way or the other, and we have really small space in this building. I know that Mr. Dixon talked to you about maybe a better place to sit. The Court has been trying as hard as it can to make sure that there is no inadvertent contact by anybody. If that means we need to bring the jurors in a different way or people need to sit in a different location we will continue to do that, but based on what I know now I am not going to do individual voir dire. I think it would cause more problems that it would fix.

You can, both of you, counsel, feel free to bring it up again if you have additional authority or additional information you want me to consider, but we are going to keep going.

[RP 357-8].

Based on this ruling, defense counsel, with the stated intention to preserve the issue on appeal, moved for a mistrial. [RP 358-9]. No other issues regarding this issue were raised by the bailiff, the jury or counsel throughout the remainder of the trial.

At closing argument, the State argued that despite conflicting testimony about whether J.L.C. was capable of walking, “nobody testifies that she is walking by herself” by the time J.L.C. and Mr. Gore emerge from the bedroom. [RP 913]. Upon exiting the residence, J.L.C. could not stand up and wanted to lay on the front lawn. [RP 913]. The State argued that J.L.C. “wasn’t just all of a sudden drunk the minute she walked out of that room. She was drunk before she got in there.” [RP 913]. “It’s not gonna go from completely sober to completely drunk” in a span of 15 or 20 minutes. [RP 913].

Relying upon the evidence given by T.G., the State argued:

When [T.G.] gets in his face [on the front lawn], what did you do to my friend? And he gets right up there, pushes her right in the chest, nothing. We kissed. I didn’t have sex with her. He even admitted it on the stand. He said nothing. He lied.

Mr. Dixon: Objection.

The Court: Sustained.

Ms. Jinhong: He admitted to lying to everyone.

Mr. Dixon: Objection.

The Court: Sustained.

[RP 915-6].

The State further argued:

You guys [the jury] are the sole judges of his [the defendant's] credibility. What else do you know about this defendant? You know he's been convicted of a felony for lying, right? For stealing, for dishonesty. He has a conviction for that . . . You know that he changed his story and said 'I never knew she was a virgin,' but we know from [M.M.] that he did, all right? We know that all of a sudden his testimony is different about how she wanted it. In fact, he says I didn't ejaculate. That's his testimony to you. I knew I was hurting her, so I stopped. I didn't ejaculate. What do we know? Well, that's a big fat lie.

Mr. Dixon: Objection.

The Court: Sustained.

Ms. Jinhong: What is this, folks? This is Exhibit 14. This is a DNA laboratory report from the crime lab that says there's a 4.1 trillion change that it's not him. It is. . . We found semen in her vagina. We found semen outside her vagina. We found semen in her anus. He did ejaculate, and it was him. . . It's not disputed, folks. Why lie about that?

Mr. Dixon: Objection.

The Court: Sustained.

[RP 918-9].

The State further argued: "Now, Casey Jones, he wants to tell you, oh, I was peeping in there; I was voyeuring on these people. . . He's good friends with the defendant. He was probably mistaken. I'll probably draw another objection if I call him a liar, but the point is--

Mr. Dixon: Objection.

The Court: Sustained.

Mr. Dixon: You Honor, I –

The Court: Counsel.

Ms. Jinhong: We've got three inconsistencies, right? [J.L.C.]'s testimony as to what she remembers inside there and we've got the same three inconsistencies from his own witness. Look at the fact that he's not telling the truth and he's been proven –

Mr. Dixon: Objection.

The Court: Sustained.

Ms. Jinhong: To be inconsistent with the actual forensic evidence in this case. It's impossible for him to have the story that he has and be consistent with the medical findings. Think of that, folks.

[RP 923].

In closing arguments, the State also addressed the discrepancy surrounding the number of drinks that J.L.C. consumed:

So we know that we've got seven drinks over the course of two hours. Let's even assume that one burns off, okay? Let's assume that there's only six in her at the time of this sexual intercourse. Well, folks, if you take the retrograde extrapolation – that's why we had testimony on that, so you could figure it out – it's .25, .025.

Mr. Dixon: Objection. No testimony about retrograde extrapolation. That was stricken from the record, Your Honor.

The Court: Sustained.

Ms. Jinhong: Folks, you heard that each alcoholic drink – each drink is .025. Add it up yourself. We're at .15, folks, for six drinks, .15. Now, nobody is saying that she's out there driving or anything else or that there's this legal limit for being too intoxicated, but if she were driving it would have been a .08. She's double the limit now, double the limit. . . But even again going to the lowest amount, right, not assuming that she's ever exaggerating, just going with the lowest amount we're certain she's had – we get eight to ten drinks in her. We're up to a .20 now, folks.

Mr. Dixon: Objection.

Ms. Jinhong: If you believe it's a ten –

The Court: Sustained.

Ms. Jinhong: Add it up, folks. Add it up for yourself, all right? . . . If we go with he [M.M]'s estimate of one and a half beers during beer pong, we've got three and a half drinks. Still, folks, if you add that up it's a .0875.

Mr. Dixon: Objection.

The Court: Sustained.

Ms. Jinhong: And then Malcolm doesn't even say, 'Hey, I waited around,' right? . . . What else do we have? Nobody took a blood alcohol on her, on Jessica. What do we have? Well, we have the effects of alcohol. . . We have slurred speech. We've got glassy eyes, bloodshot, watery, right?

[RP 907-8].

Following the State's closing, defense counsel asked the Court to declare a mistrial on the basis of prosecutorial misconduct.

[RP 924]. This was on the basis that the State twice mentioned retrograde extrapolation and that the State called the defendant a "liar" based on the numerous discrepancies in the defendant's testimony. [RP 924].

After hearing oral arguments by the parties and examining the relevant case law, the Court found that the jury instructions stipulating the jury to be the sole judge of credibility of the witnesses, in combination with a curative instruction, was sufficient to alleviate the matter. [RP 943].

The Court then told the jury:

I want to give you one more cautionary instruction at this point. I am not going to give it to you in writing. It is already in your instructions.

That is this: You are the sole judges of the credibility of the witnesses. The lawyers' statements and arguments are not evidence.

Defense counsel followed up:

What she means, ladies and gentlemen, is that when the prosecutor says somebody is a liar you are to disregard that. You judge the credibility of the witnesses.
[RP 944].

Following deliberations, Mr. Gore was convicted on both counts and subsequently sentenced. [RP 975; CP 62]. Now Mr. Gore brings this timely appeal.

C. ARGUMENT

1. The trial court did not abuse its discretion when it denied the defense motion for a mistrial based on alleged prosecutorial misconduct.

On appeal, Mr. Gore contends that the trial court abused its discretion by denying his motion for a mistrial on the grounds of prosecutorial misconduct. This motion was based on the prosecutor's reference to retrograde extrapolation and on her allegations that Mr. Gore was a "liar." [RP 924]. The appellate contends that the instructions issued by the court were not sufficient to alleviate any potential prejudice. [Appellate Brief 17]. However, this argument is contrary to Washington case law, which

recognizes that a curative instruction is sufficient to deflect potential prejudice in this context.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced the defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983). Misconduct occurs where the prosecutor during closing argument gives a personal opinion on the credibility of witnesses. *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Whether an opinion of guilt is expressed directly or through inference, such opinion is equally improper and equally inadmissible because it invades the province of the jury. See *State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn. 2d 1006 (1973).

"However, prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion." *Swan*, 114 Wn.2d at 664. While it is improper for a prosecutor to assert a personal belief as to the defendant's guilt, comments based upon evidence which may bear upon a defendant's credibility are not improper. *State v. Jefferson*,

11 Wn. App. 566, 569, 524 P.2d 248 (1974). This includes inferences as to why the jury would want to believe one witness over another. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996). In judging the propriety of jury argument, statements of counsel cannot be considered out of context. *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963). Thus, allegedly improper comments must be reviewed in the context of the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Bryant*, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), review denied, 137 Wn. 2d 1017, 978 P.2d 1100 (1999).

Furthermore, an improper argument does not necessarily warrant the granting of a new trial. A new trial should be granted only if the argument prejudiced the defendant's right to a fair trial. *State v. Harold*, 45 Wn.2d 505, 275 P.2d 895 (1954); *State v. Walton*, 5 Wn. App. 150, 486 P.2d 1118 (1971). In closing argument a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). The issue is whether there was

a substantial likelihood that the alleged misconduct affected the jury's verdict, thereby depriving defendant of a fair trial. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Resolution of this issue lies within the sound discretion of the trial court. *State v. Price*, 33 Wn.App. 472, 476, 655 P.2d 1191 (1982). The trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Lewis*, 130 Wn. 2d 700, 707, 927 P.2d 235 (1996).

In the present case, defense counsel objected and brought a motion for a mistrial. The trial court in the present case heard this motion and denied it. After hearing oral arguments by the parties and examining the relevant case law, the Court found the jury instructions which stipulated that the jury was the sole judge of credibility of the witnesses, in combination with an additional oral admonishment, was sufficient. [RP 943]. The jury was instructed that counsel's argument was not evidence and was to be disregarded when not supported by the evidence. Jurors are presumed to follow the court's instructions. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). It is the State's position that the prosecutor's arguments in regard to Mr. Gore's credibility were within the bounds of Washington law and that any potential prejudicial was alleviated by the court's curative instruction.

First, it bears noting that when defense objected to the State's arguments regarding retrograde extrapolation, defense counsel's stated that the entirety of this body of testimony was stricken. [RP 924]. However, the original objection by defense counsel was based upon the State posing a hypothetical question to the expert witness. Dr. Gilday was asked about a particular set of facts, namely how one would calculate the blood-alcohol level of seven drinks, and defense counsel objected on the grounds of facts not in evidence. [RP 308]. This is distinctly different than the State's application of the retrograde analysis in closing arguments, where the State applied Dr. Gilday's methodology of retrograde extrapolation to its own calculation.

Second, each time the prosecutor used the word "liar" was in the context of the evidence. There were between four and five separate instances in which the prosecutor alleged that the defendant had lied in his testimony. [RP 907-8]. Thus each allegation that the defendant was lying was predicated upon inconsistencies in evidence. The State's argument was based primarily on disputing Mr. Gore's testimony that he did not ejaculate, which was in contradiction to the medical evidence presented by the State, as well as the defendant's admission that

he lied to J.L.C.'s friends regarding sexual contact with the victim. Each allegation as to the defendant's credibility was predicated upon an instance where the defendant either admitted to not telling the truth, or offered testimony in contradiction to the State's forensic evidence. This standard is reflected by the case law.

In *State v. Jefferson*, the prosecutor argued that the evidence would permit a finding that Jefferson was not truthful. *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974). In his closing argument the prosecutor said:

I suggest to you two things; one, he is a liar; and, two, he was the possessor [*sic*] of controlled substances. First, he is a liar on this point. He says he didn't take any drugs on November 19th except marijuana. Okay. We have got phencyclidine, cocaine and alcohol[.]

State v. Jefferson, 11 Wn. App. at 568.

Then, in reference to Jefferson's failure to appear for trial, the prosecutor said:

Mr. Jefferson told you he had no intention of showing up. At this point I will ask you, if he was the unwitting possessor [*sic*], didn't know anything about it, why, why isn't he going to show up in court? I think this is consistently indicative of a man who is guilty and knows he is guilty. . . He had no intention of showing up, and yet this man is represented as being an honest, truthful person.

Id. at 568.

The prosecutor prefaced his argument with the admonition that both counsel were "advocates" and that their remarks were not evidence, but the evidence would permit a finding that Jefferson was not truthful. *Jefferson*, 11 Wn. App. at 569-70. The appellate court upheld the holding of the trial judge that the prosecutor's closing argument was not improper as the evidence would permit a finding that Jefferson was not truthful. *Jefferson*, 11 Wn.App. at 570.

In *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (*rev'd on other grounds by Adams v. Washington*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971)), the prosecutor called the defendant a liar several times during closing argument. Each time, the prosecutor referred to specific evidence, including the defendant's own testimony, which "clearly demonstrated that in fact [the] defendant had lied." The court held that the argument fell within the rule allowing counsel to draw and express reasonable inferences from the evidence, and this finding was affirmed on appeal. *Adams*, 76 Wn.2d at 660. *See also State v. Luoma*, 88 Wn.2d 28, 40, 558 P.2d 756 (1977) (defendant argued that prosecutor's comments in closing argument to effect that defendant was a liar and he knew the jury would have the "guts" to do what they had to

do were improper; court found support for statement in the evidence).

By contrast, in *State v. Jungers*, the appellate court found that the prosecutor's closing statements constituted reversible error. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005). In *Jungers*, the prosecutor's closing argument made repeated references to credibility testimony which the court had already deemed improper and stricken. The appellate court found that "absent the State's uncured, improper argument" there was room to believe the jury might have found Jungers not guilty. *Jungers*, 125 Wn. App. at 905. The State submits that this case highlights the important role that a curative instruction plays in alleviating prejudice. In the present case, the trial court explicitly instructed the jury with regard to the prosecutor's closing arguments, and this instruction was elaborated upon by defense counsel. [RP 944]. It is on this basis that the trial court did not abuse its discretion when it applied a curative instruction as a remedy to any potential prejudice.

2. Defense counsel was not ineffective when he chose to not request an instruction for the lesser degree offense of rape in the third degree.

To establish ineffective of counsel, Mr. Gore must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have differed. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The Court starts with a strong presumption of counsel's effectiveness. *Id.*, at 335. Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

To succeed on his ineffective assistance of counsel claim, Mr. Gore must show that defense counsel's failure to the lesser degree offense was an unreasonable trial tactic given the facts of this case. See *State v. Pittman*, 134 Wn. App. 376, 387, 166 P.3d 720 (2006). Although a defendant may, under RCW 10.61.003, be

convicted of a lesser degree of a crime than the one charged, a lesser degree instruction is improper unless there is evidence that he committed only the lesser degree offense. *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579, *review denied*, 114 Wn.2d 1015, 791 P.2d 534 (1990). It is not sufficient that the jury might simply disbelieve the State's evidence supporting the charged crime. *State v. Hurchalla*, 75 Wn. App. 417, 423, 877 P.2d 1293 (1994). Rather, the evidence must support an inference that the defendant committed the lesser offense instead of the greater one. *State v. Bergeson*, 64 Wn.App. 366, 369, 824 P.2d 515 (1992).

Under the facts of this case, the evidence clearly supports that J.L.C. was incapable of consent based on her extreme level of intoxication. However, assuming for the sake of argument, that the trial court, if requested, may have given the instruction for the lesser degree offense of rape in the third degree, it was clearly a reasonable trial tactic for counsel not to request that instruction under the facts and posture of this case.

Defense counsel capably provided a strong defense theory that the sexual intercourse was consensual, that J.L.C. was able to consent, and that Mr. Gore reasonably believed that she was capable of giving consent. In this vein, defense counsel requested

and the court gave Instruction No. 12, the affirmative defense instruction to the crime of rape in the second degree which read,

“It is a defense to a charge of rape in the second degree that at the time of the acts the defendant reasonably believed that [J.L.C.] was not mentally incapacitated or physically helpless. The defendant has the burden of proving the defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.”

This was a part of the consistent defense strategy that trial counsel aggressively pursued and argued throughout this case. At no point did trial counsel or Mr. Gore, when he testified, concede in any, way, shape, or form that this was anything but consensual sex between two people who were fully able to give consent and who reasonably appeared able to give consent. Arguing the lesser degree crime of rape in the third degree was antithetical to the defense strategy in their case.

Perhaps if Mr. Gore had elected to not testify or present an active and strong defense, then it might have been reasonable to request the lesser degree crime focusing the jury on the possibility that this was actually an unforced, nonconsensual act of sexual intercourse. Instead, Mr. Gore exercised his constitutional right to

provide testimony and it was his position that he was innocent of any crime and stated repeatedly that J.L.C. consented to the sexual intercourse. For trial counsel to have argued that his client could or should be convicted of rape in the third degree, he would be undercutting the entire version of events testified by Mr. Gore.

Under the facts of this case, defense counsel made a tactical choice with his client to present this defense and giving the jury the option of convicting Mr. Gore of rape in the third degree would have undercut this choice and strategy. Also, on appeal, Mr. Gore argues that the prison sentences for rape in the second degree and rape in the third degree are very different. Indeed, the length of the prison sentences are quite different. However, both crimes are sex offenses that carry with them the requirements and stigma of sex offender registration and public notice. It is clear, based on the defense theory of the case and Mr. Gore's own testimony, that a conviction for a sex offense was unacceptable to Mr. Gore. Seen in this light, Mr. Gore's request that this court find that his trial counsel was ineffective for failing to ask for a lesser degree crime of rape in the third degree is simply an example of being unhappy with an unfavorable outcome. Defense counsel's trial strategy was reasonable under the above-cited case law and facts but ultimately

unsuccessful based on the jury's deliberation of the testimony and evidence in this case.

3. The trial court did not abuse its discretion when it chose to only question the bailiff and not the individual jurors when there was no allegation of misconduct.

Mr. Gore next contends that the statements by the jurors, made to the bailiff, suggest a possible prejudicial impact against the defendant. [Appellate Brief 27]. However, the record does not support this contention. Rather, the record suggests only that the jurors felt uncomfortable when they passed in close proximity to the defendant. [RP 350-1]. Moreover, it was within the discretion of the trial court as to how the issue was addressed, and it is the State's position that the trial court did not abuse its discretion in choosing not to conduct a full inquiry.

At trial, defense counsel did not articulate a specific statutory ground upon which they sought to question the identified jurors, nor is a specified ground offered on appeal. Mr. Gore now contends a prejudicial effect; RCW 2.36.110 states in part:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

[RCW 2.36.110]

A trial court's decision to excuse (or retain) a juror is reviewed for abuse of discretion. *State v. Hughes*, 106 Wn.2d 176, 204 n.68, 721 P.2d 902 (1986); *State v. Ashcraft*, 71 Wn.App. 444, 461, 859 P.2d 60 (1993). The test is whether the record establishes that the juror engaged in misconduct. *State v. Jorden*, 103 Wn.App. 221, 229, 11 P.3d 866 (2000). The trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party. In deciding whether to grant or deny a challenge for cause based on bias, the trial judge has "fact-finding discretion." *Ottis v. Stevenson-Carson Sch. Dist. No. 303*, 61 Wn. App. 747, 753, 812 P.2d 133 (1991); see also *State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). This discretion allows the judge to weigh the credibility of the prospective juror based on his observations. *Rupe*, 108 Wn.2d at 749; *Ottis*, 61 Wn. App. at 753-4. As with other factual determinations made by the trial court, we defer to the judge's decision. *State v. Noltie*, 116 Wn.2d 831, 839-40, 809 P.2d 190 (1991); *Ottis*, 61 Wn. App. at 755.

In *State v. Jorden*, the appellant challenged the trial court's decision to dismiss a juror without extensive inquiry. Jorden argued

on appeal that the court should have questioned the juror to determine if misconduct had occurred, rather than dismiss her. *State v. Jordan*, 103 Wn. App. 221, 11 P.3d 866 (2000) (published in part).

In *Jordan*, the State made multiple requests to excuse the juror because the juror was seen sleeping during the trial, although defense counsel objected. After discovering the same juror's mother was in the hospital, the court revisited the State's motion to excuse the juror. At 225. The trial court applied RCW 2.36.110 and dismissed the juror without questioning the jurors; rather, the trial court relied upon the testimony of the bailiff, who observed the juror sleeping on several occasions. *Jordan*, 130 Wn. App. at 225. The court found no fault with the trial judge for not questioning the juror and found this to be within the scope of discretion. *Jordan*, 130 Wn. App. at 228. The court speculated that if the judge had questioned the juror, the parties presumably would also have been entitled to question her, and this may have put her in an adversarial position with the State. *Id.* In its conclusion, the court stated:

The test is whether the record establishes that the juror engaged in misconduct. We are unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has

discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party.

Id. at 229.

Likewise, in the present case, if defense counsel questioned the jurors, it might have given rise to either prejudice the defense through an adversarial exchange, or given rise to impermissible testimony (i.e. their perceptions of the defendant). This rationale was echoed in the State's arguments in the present case, when the State urged that to question the jurors would merely draw attention to the problem. This is reasonable given the fact that no prejudice was expressed in the bailiff's testimony. Rather, the entirety of the record suggests only that some jurors suspected "staging," but that most jurors stated only that they felt "uncomfortable." (RP 350).

It is the State's position that given the record in the present case, there was nothing put forward by the bailiff's testimony to indicate an abuse of discretion, nor to indicate or suggest any misconduct or prejudice. Rather, it is reasonable that the jurors were expressing concern based upon their understanding of court procedure and their concern for safeguarding the impartiality and procedural integrity of the trial. This interpretation is substantiated by the court's instructions to the jury, which by their actions, these

four jurors could reasonably be viewed to be following. At the beginning of the trial, the court issued specific instructions to the jury, including the following:

As I told you earlier this morning, it is important that you not remain in the open areas or out in the hallways or in the front of the courthouse because if you are out there you may inadvertently hear something from somebody who is a witness or a participant in the case.

[RP 17].

It can reasonably be inferred from these instructions that by bringing their concerns to the attention of the bailiff, the jurors were merely following the instructions of the trial court. Given that this conclusion is a reasonable one, supported by the record, it is the State's submission that the trial court was well within its discretion in deciding not to conduct an inquiry.

4. There was sufficient evidence that Mr. Gore committed both crimes of rape in the second degree as found by the jury.

When reviewing a challenge to sufficiency of the evidence, this court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Joy*, 121

Wn.2d 333, 338, 851 P.2d 654 (1993). The defendant's insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

This court defers to the fact finder's resolution of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "Circumstantial evidence provides as reliable a basis for findings as direct evidence." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

The appellant challenges that the victim J.L.C. was not "physically helpless" or "mentally incapacitated" for the purposes of the crime of rape in the second degree. The trial court defined these legal terms in Jury Instruction No. 11 as,

Mental incapacity is a condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance, or from other cause.

A person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to act.

J.L.C. was only conscious for small portions of the rapes but then passed out and was unconscious for the majority of the sexual assaults perpetrated by Mr. Gore. J.L.C. testified that,

"I don't know. I just – there was like points where I was kind of going in and out of like knowing what was going on, and then, you know, it seemed like I would just kind of black out and then something else would be happening, but I didn't know how I was, how I got I a certain position or – I don't know. Like everything would go – it was like I was asleep for a little bit and then I'd wake up and I'd be like on my stomach or on my back or something but I don't know how I got there. Like I didn't feel like I was in control at all."

RP 554-555. She continued,

"I just remember like facing a wall and he was behind me, and I just felt a lot of pain but I didn't know that he was doing it."

RP 555. J.L.C. was a sixteen year old who was significantly under the influence of alcohol; the testimony from numerous witnesses had her falling to the ground shortly after the rapes. Even Mr. Gore acknowledges that she fell to the ground and he had to carry her over his shoulder to get her to Mr. Marmaduke's car. RP 847-8.

While the testimony of defense witness disputes the level of intoxication of J.L.C., the appellant's insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Under this standard and the

evidence adduced at trial, there is clearly sufficient evidence to support the two convictions for rape in the second degree for the vaginal and anal rapes of J.L.C. by Mr. Gore based on J.L.C. being physically and mentally incapable of consent.

5. There was no accumulation of errors warranting reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors, taken together, resulted in a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant bears the burden of proving an accumulation of error of such magnitude that retrial is necessary. *Id.*, at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in this Response Brief, there was no accumulation of legal errors supporting reversal of these convictions. This trial was a hard-fought case on the part of State and the defense involving a brutal vaginal and anal rape of a

sixteen year old intoxicated girl; each side presented a strong case. The trial judge performed a commendable job of presiding over the case fairly and impartially. Regarding the alleged prosecutorial misconduct claim, she issued a curative instruction to the jury that defense counsel further argued in his closing statement.

A defendant is entitled to a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Based on the facts and law cited in this Response Brief, there is not cumulative error supporting reversal of these convictions.

6. The trial court did not abuse its discretion in determining that Mr. Gore's two convictions for rape in the second degree were not the same criminal conduct for sentencing purposes and counsel was not ineffective at sentencing.

Mr. Gore committed two separate rapes by separate and different means; therefore, the rapes should not be considered "same criminal conduct" pursuant to RCW 9.94A.589. In fact, Mr. Gore penetrated J.L.C. in numerous different ways that could have satisfied the definition of sexual intercourse but the State elected to only charge two counts to reflect the vaginal penetration (digital, oral, and penile) as count one and the anal penetration (penile only) as the basis for count two. The question of whether a court includes

all current convictions as separate criminal acts in calculating an offender score is addressed in RCW 9.94A.589. The general rule is found in RCW 9.94A.589(1)(a):

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . .

If any element is not present, the crimes cannot be considered "same criminal conduct." *State v. Grantham*, 84 Wn. App. 854, 858; 932 P.2d 657 (1997) (citing *State v. Vike*, 125 Wn. 2d 407, 410; 885 P.2d 824 (1994)). In addition, another important factor is whether the one act furthered the other; where one act furthers another, they are more likely to be considered "same criminal conduct." *State v. Dunaway*. 109 Wn.2d 207, 215-18; 743 P.2d 1237 (1987). Washington courts will review a trial court's finding of "same criminal conduct" for abuse of discretion. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The two separate rape convictions Mr. Gore committed against J.L.C. do not constitute “same criminal conduct.” It is undisputed that the rapes were committed in the same place and against the same victim. The only element in dispute is whether the rapes were committed with the same criminal intent. In *State v. Grantham*, the victim went to an apartment with the defendant; once inside, he beat her, forcibly removed her clothes, and anally raped her. 84 Wn. App. 854, 856; 932 P.2d 657 (1997). After the anal rape, the defendant kicked the victim multiple times, grabbed her, and ordered her not to tell. *Id.* The victim cried and asked him to stop, but the defendant slammed her head into the wall and forced her to perform oral sex on him. *Id.* The *Grantham* Court agreed with the State’s argument that “the two intents differed because Grantham’s intent to commit the first rape was complete when he stopped and withdrew. He then formed a second, new objective intent, which was completed with the accomplishment of the second rape.” *Id.* at 859. Grantham completed the crime of rape and “had time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *Id.* at 859. The court found that the crimes were “sequential, not simultaneous or continuous.”

In the present case, Mr. Gore brutally vaginally and anally raped J.L.C. while she was very intoxicated and incapable of consent to these sexual assaults. J.L.C., a sixteen year old girl, suffered vaginal and anal injuries. Semen was located both on her vaginal swabs from her rape kit as well as from her anal swabs further indicating two separate and distinct rapes. The *Grantham* Court held that the use of different methods to accomplish rape is “significant” in proving different intents. *Id.* at 859.

The present case is distinguishable from *State v. Tili*, where a defendant penetrated his victim three times in a very short time period. 139 Wn. 2d 107; 985 P.2d 365 (1999). The court described the rapes in *Tili* as follows:

Tili proceeded to use his finger to penetrate L.M.'s anus and vagina. Tili inserted his finger into these two orifices separately, not at the same time. Tili told L.M. to say she liked it. She complied. Tili then tried to penetrate L.M.'s anus with his penis, but stopped, and instead inserted his penis into her vagina.

Id. at 111. The sexual attack lasted approximately two minutes. Id. at 111. Citing this extremely short time period, and the continuous, uninterrupted conduct, the court deemed the rapes in Tili “same criminal conduct.” Id. at 124. In the present case, the evidence is that the attack on J.L.C. occurred over a relatively much longer

period of “25, 30 minutes.” [RP 843]. Unlike *Tilli*, Mr. Gore had time to reflect on his actions and form the new intent to commit the new crime. Although twenty-five to thirty minutes may not seem like a long time, in *Grantham*, where “same criminal conduct” was not found, the rapes were also “relatively close in time.” 84 Wn. App. 854, 858; 932 P.2d 657 (1997). Therefore, a finding of “same criminal conduct” is not mandated if the rapes occur relatively close together in time.

Mr. Gore penetrated J.L.C. vaginally and anally; semen was found on her vaginal and anal swabs. Although Mr. Gore’s purpose or objective for each act of rape may have been the same, to achieve sexual intercourse, that does not mean that Mr. Gore had only one criminal intent throughout the attack. See *Id.* at 860 (distinguishing *State v. Walden*, 69 Wn. App. 183; 847 P.2d 956 (1993)). Intent is not the same thing as objective or purpose. *Id.* “Rather, the defendant’s intent, viewed objectively as the law requires, is to act “with the objective or purpose to accomplish a result which constitutes a crime.” *Id.* (citing RCW 9A.08.010(1)(a)). Mr. Gore chose to rape her by two separate and different means. According to the *Grantham* Court,

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, --an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

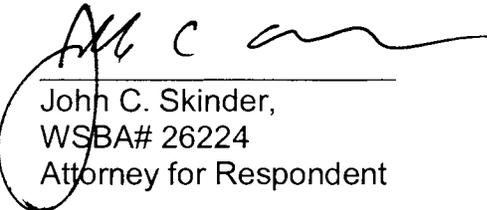
Id. (quoting *Harrell v. State*, 88 Wis. 2d 546; 277 N.W.2d 462, 466 (1979)). Mr. Gore should be punished for each separate, distinct intentional act of invasion into J.L.C.'s body. The two rape convictions found by the jury should not be considered "same criminal conduct" for sentencing purposes.

Defense counsel was well aware of the above case law and therefore, based on the facts of this case, did not make a same course of criminal conduct argument. Instead, he argued for a low-end standard range sentence based on a large number of letters of support submitted on behalf of the defendant. 12-3-09 RP 3, 13-14. The trial court obviously listened to these defense arguments as she imposed a sentence of 120 months when the standard range was 111-147 months. 12-3-09 RP 16-17.

D. CONCLUSION.

For the above reasons, the State respectfully requests that this Court affirm Mr. Gore's convictions and sentence for two counts of rape in the second degree.

Respectfully submitted this 26th day of AUGUST, 2010



John C. Skinder,
WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

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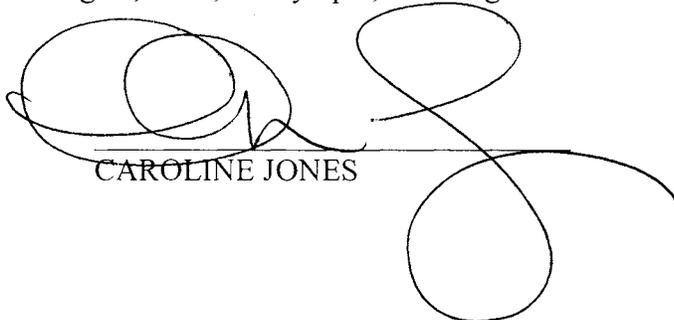
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--AND--

THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 26 day of August, 2010, at Olympia, Washington.


CAROLINE JONES