

NO. 40696-9-II
STATE OF WASHINGTON
BY: *Cm*
DEPUTY

NO. 40696-9-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

**STATE OF WASHINGTON,
Respondent,
vs.
SCOTT WEAVILLE,
Appellant.**

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial violated Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it gave the jury a supplemental instruction that relieved the state of its burden of proving each and every element of the crimes charged in counts I and II beyond a reasonable doubt.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow the defense to elicit relevant, exculpatory evidence.

3. Trial counsel's failure to object when a state's expert rendered an opinion upon a subject for which she was unqualified denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it gives a supplemental instruction over defense objection that in order to convict the defendant for rape, the state need only prove a touching of sexual organs instead of actual penetration?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defense to elicit relevant, exculpatory evidence, the presentation of which would more likely than not have resulted in verdicts of acquittal?

3. Does a trial counsel's failure to object when an unqualified state's expert renders an opinion constitute ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when a timely objection would have been sustained and, absent the improper evidence, the jury would have acquitted the defendant?

STATEMENT OF THE CASE

Factual History

In July of 2009, the defendant Scott Weaville finished a four year enlistment and was honorably discharged from the United States Marine Corps. RP 521-525.¹ Following his discharge in San Diego, he moved back to his hometown in Vancouver, Washington. RP 525-527. His plans were to use the G.I. Bill to attend college. RP 530. Once back in Vancouver, he rented an apartment and rekindled prior close friendships with a number of his high school friends, including Amber Sylvester and Thomas Wilson. RP 523-530. In fact, on at least one occasion while previously on leave during his military service, the defendant engaged in a sexual relationship with Amber Sylvester. RP 5-8, 521-525. By August of 2009, Thomas Wilson, who was out of work, moved into the defendant's apartment. RP 248-252.

During July and August, the defendant and his friends attended a number of social occasions together, some at the defendant's apartment, some at other's houses, and all including the use of alcohol. RP 134-137, 248-252, 521-530. On the evening of August 13, 2009, Amber Sylvester went to one such occasion in North Portland, while the defendant and Thomas Wilson sat

¹The record on appeal includes five volumes of continuously numbered verbatim reports of the jury trial, referred to herein as "RP [page #]." The record also includes the verbatim reports of a post-trial motion and the sentencing hearing, referred to herein as "RP2 [page #]."

around their apartment, played video games, and drank alcohol. RP 93-98, 254-257, 536-539. During the evening, Thomas suggested the defendant get some “mollies” for them to take. RP 254-257, 536-539. A more common street name for this drug is “ecstasy,” which is actually 3,4-Methylenedioxymethamphetamine, a Schedule I hallucinogen derived from methamphetamine, also known by the abbreviation “MDMA.” RP 353-363. It is used as a “rave” or “party” drug to induce euphoria, a sense of intimacy with others, and diminished anxiety and depression. *Id.* It has mild psychedelic effects, consisting of mental imagery and auditory and visual enhancement. *Id.* It is not a “date rape” drug, such as rohypnol, which causes memory loss and physical incapacitation. RP 340-341. There is only one anecdotal report in medical literature of MDMA ever causing physical incapacitation. RP 368.

In response to Thomas Wilson’s suggestion, the defendant left the apartment and purchased three MDMA pills for \$30.00. RP 248-252, 536-539. He then returned to the apartment. *id.* Later than evening, the defendant sent a text message to Amber Sylvester asking if she wanted to come over and “hang out,” stating that he had a surprise for her. RP 93-95, 540-541. She replied that she would be over later. PR 93-95. The “surprise” the defendant had for her was the MDMA pill. RP 540-541. After leaving the party in North Portland, Amber drove home, changed, and then drove

over to the defendant's apartment, which was only a short distance from her apartment. RP 93-95. She arrived sometime around 2:00 in the morning and brought beer with her. RP 93-98, 542-543. She found the defendant and Thomas drinking and playing video games. RP 93-98. Just after she arrived, Thomas Wilson's cousin Douglas Foy also came to the apartment. RP 248-252. He left about 30 minutes later. RP 254-255.

What happened after Amber arrived at the defendant's apartment was later contested among the defendant, Thomas, and Amber. RP 93-125, 248-276, 533-579. Amber's version was as follows. Once Douglas Foy left, the defendant gave her what he said was a "Tylenol" pill because she complained of a headache. RP 103-105. She, Thomas, and the defendant then sat down and watched a movie. RP 105-109. Thomas eventually went back to his bedroom to go to bed, and she and the defendant sat on the couch to watch another movie. *Id.* Amber then began to feel her legs and feet become numb. *Id.* At the same time, the television started getting louder and louder. *Id.* Eventually, her whole body became numb and she slumped over on the couch, unable to move or speak, although she could see and hear without any problems. *Id.*

According to Amber, at this point, the defendant pulled off her shoes, shorts and underwear and positioned her with her chest and face on the couch and her knees on the floor with her legs spread apart. RP 108-114. The

defendant then got Thomas out of his bedroom, and suggested he have sex with Amber. *Id.* Although reluctant, Thomas took off his pants and put on a condom the defendant gave him. *Id.* The defendant then went out on the balcony at Thomas's suggestion, and Thomas knelt down behind Amber. *Id.* At trial, Amber testified that at this point Thomas penetrated her vagina with his penis. *Id.* By contrast, less than 24 hours after the event, Amber told a forensics nurse at Southwest Washington Medical Center that Thomas had not penetrated her. RP 207-211.

Amber went on to relate that after Thomas either attempted to or did actually have intercourse with her, he went out to the balcony to get the defendant. RP 114. The defendant then came back into the living room, picked her up, took her to his bedroom, laid her on his bed, and had penile-vaginal intercourse with her after putting on a condom. RP 114-125. When he was done, he took her back out to the living room and put her on the couch. *Id.* At some point thereafter, she was able to regain the use of her arms and legs, put her clothes back on, leave the apartment, call her old boyfriend, and drive home. *Id.* Once at her apartment, she met her old boyfriend and told him what happened. RP 125-128. She then took a shower, changed clothes, and drove over to her mother's house, where she called the police. *Id.* From this point, she went to the hospital for a physical examination. *Id.* Later examination of Amber's urine collected at the

hospital revealed the presence of alcohol and MDMA, but no other drugs such as rohypnol. RP 326-329. Later examination of the underwear she said she had worn failed to reveal any DNA material from either the defendant or Thomas Wilson. RP 452-456. However, her underwear did have semen on it from a third party. RP 5-8.

Thomas Wilson, although later testifying as a witness for the state, told a different version of events from that told by Amber. RP 248-280. According to Thomas, before Amber got to the apartment that night, he and the defendant each took one of the three MDMA pills he had suggested the defendant get. RP 248-252. Once Amber got to the apartment, she took the third pill, but only after an extended conversation during which they assured her that it would only stay in her system for a few days. RP 287-292. She was particularly concerned about this because she had signed up for a delayed enlistment with the military, and was subject to random urinalysis tests. *Id.* Once she took the pill, Douglas Foy left and Thomas went to bed, while Amber and the defendant sat on the couch to watch a movie. RP 254-257.

According to Thomas Wilson, the defendant later woke him up and took him out into the living room where he saw Amber lying on her stomach on the couch wearing only her sweatshirt. RP 254-260. The defendant then suggested that he have sex with Amber. *Id.* Although reluctant, he did take a condom from the defendant, who went out onto the balcony. RP 261-265.

Thomas Wilson then put the condom on his penis and knelt down behind Amber. *Id.* However, he was unable to have intercourse with her because he was unable to get an erection. *Id.* At this point, he went out onto the balcony and told the defendant that he could not go through with it. *Id.* The two of them then reentered the living room, where they both saw Amber get up, go into the bathroom, and then go into the defendant's bedroom. RP 267-268.

At this point, Thomas went back into his bedroom, then returned to the living room to get his iPod. RP 267-271. When he did, he saw Amber and the defendant lying together on the couch. *Id.* After retrieving his iPod, Thomas went into his bedroom to listen to music for about an hour. *Id.* At this point, he heard Amber and the defendant talking in the living room. *Id.* Upon reentering the living room, he saw Amber walk out of the apartment and leave. *Id.* According to Thomas, the defendant then admitted to him that he had "raped" Amber. RP 272-275. Indeed, Matthew McDowell, Amber's ex-boyfriend, also claimed that he had confronted the defendant the next day and that the defendant had admitted sexually assaulting Amber. RP 224-230.

Finally, the defendant's story varied from that told by Amber and that told by Thomas. RP 536-579. According to the defendant, once Douglas Foy had left the apartment and Thomas had gone to bed, he and Amber sat on the couch to watch a movie. RP 548-555. When they did, Amber put her legs across his lap, and he began rubbing her thighs. *Id.* He then took off her

shoes, shorts, and underwear with her assistance. *Id.* At this point, he went into Thomas's bedroom and brought him out into the living room, asking if he wanted to have sex with Amber. RP 559-561. He then gave Thomas a condom, and went out onto the balcony to smoke. *Id.* A little while later, Thomas came out onto the balcony and said that he had not had sex with Amber. RP 562-563. The two of them then went back inside and saw Amber walk into the bathroom. *Id.* At this point, Thomas said he was tired and went back to his bedroom. *Id.*

Once Thomas went back into his bedroom, Amber came out of the bathroom, and the defendant asked her if she wanted to have sex with him. RP 564-568. She replied that she did, so the two of them went into his bedroom and got on his bed. *Id.* However, he was unable to get an erection, so they did not have intercourse. *Id.* He then fell asleep on the bed. *Id.* He woke up later in the morning and Amber was gone. *Id.* Later that day he got a threatening voice mail from Matthew McDowell, accusing him of raping Amber. RP 572-579. He later met with Matthew, who repeated his accusation. *Id.*

Procedural History

By information filed August 17, 2009, and later amended, the Clark County Prosecutor charged the defendant Scott Weaville with one count of second degree rape against Amber Sylvester, one count of attempted second

degree rape against Amber Sylvester under allegations that he was an accomplice to Thomas Wilson's acts, and one count of delivery of MDMA. CP 3-4, 10-11. Both counts of rape alleged that Amber Sylvester "was incapable of consent by reason of being physically helpless," under RCW 9A.44.050(1)(b). *Id.* The defendant responded to the rape allegations by claiming that Amber Sylvester had consented to any and all sexual contact. RP 5-8.

Prior to the presentation of evidence in this case, the state moved *in limine*, to preclude the defense from eliciting evidence that the defendant had engaged in a prior sexual relationship with Amber Sylvester, and that the underwear that she had worn on the night of the alleged rapes had a third party's semen on them. RP 5-17, 167-170. The defendant first responded that his prior sexual relationship was admissible to show the reasonableness of his belief that Amber consented to her sexual contact with him and Thomas on the night in question. *Id.* The defendant further argued that the presence of the third-party's semen on the underwear she gave to the police was admissible to prove that she was untruthful in her claims of non-consensual sexual contact. *Id.* The court granted the state's motions and precluded the defense from presenting this evidence. *Id.*

Following the court's rulings on the motions *in limine*, the case came on for trial before a jury with the state calling 10 witnesses, including Amber

Sylvester, Matthew McDowell and Thomas Wilson, as well as a number of police officers and a forensic scientist. RP 88-559. One of the expert witnesses the state called was Christine Mitchell, a forensic toxicologist with a degree in chemistry and employed by the Washington State Patrol crime lab. RP 319-348. She provided testimony concerning her evaluation of the defendant's urine. *Id.* She also testified as an expert on the physiological effects of MDMA on humans. *Id.* However, she did not claim to be a medical doctor, an anesthesiologist, or to having any training in pharmacology. *Id.* In attempting to qualify her to render such an opinion, the state elicited the fact that she had "read" a number of articles in medical journals concerning the effects of MDMA on humans. *Id.* The defense did not object that she was not qualified to render an opinion on the effects of MDMA on the human body. *Id.*

After the close of the state's case, the defense called six witnesses, including an anesthesiologist and the defendant. RP 349-606. The court then instructed the jury, and the parties presented closing arguments. RP 622-647, 647-686. The court's instructions included the following definition for sexual intercourse:

INSTRUCTION NO. 9

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

CP 38.

After a number of hours of deliberations, the jury sent out the following question:

Regarding instruction #9 - is "touching" considered "slight penetration?"

CP 53.

Over repeated defense objection, the court replied to the jury's question with the following supplemental written instruction:

SUPPLEMENTAL INSTRUCTION # 1

"Penetration" means any contact, however slight, between the sex organ of one person and the sex organ of another person, or any intrusion, however slight, of any part of the body of one person into the sex organ of another person.

CP 52; RP 687-694.

Following further deliberation, the jury returned verdicts of "guilty" on each count charged. CP 55-56. After a presentence investigation report and the denial of a motion for a new trial, the court sentenced the defendant to life in prison on counts I and II with a minimum mandatory time to serve before first being eligible for release within the standard range. CP 57-72, 73-86; RPII 15-22, 24-43. The court also sentenced the defendant within the standard range on count III. CP 73-86. The defendant thereafter filed timely notice of appeal. CP 89.

ARGUMENT

I. THE TRIAL VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT GAVE THE JURY A SUPPLEMENTAL INSTRUCTION THAT RELIEVED THE STATE OF ITS BURDEN OF PROVING EACH AND EVERY ELEMENT OF THE CRIMES CHARGES IN COUNTS I AND II BEYOND A REASONABLE DOUBT.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Under this rule, the court must correctly instruct the jury on all of the elements of the offense charged. *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988) (citing *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). The failure to so instruct the jury constitutes constitutional error that may be raised for the first time on appeal. *Id.*

For example, in *State v. Salas*, 74 Wn.App. 400, 873 P.2d 578 (1994), the defendant was charged with vehicular homicide under an information alleging all three possible alternatives for committing that offense. At the end of the trial, the court, without objection from the defense, instructed the jury that to convict, the state had to prove that (1) the defendant drove while intoxicated, and (2) that the defendant's driving caused the death of another

person. The court's instruction did not include the judicially created element that intoxication be a proximate cause of accident that caused the death.

Following deliberation, the jury returned a verdict of guilty, and the defendant appealed, arguing that the court's instructions to the jury violated his right to due process because it did not require that the state prove all the elements of the offense charged. The state replied that the defendant's failure to object to the erroneous instruction precluded the argument on appeal. However, the Court of Appeals rejected the state's argument, holding that (1) the court had failed to instruct on the judicially created causation element, and (2) the defense could raise the objection for the first time on appeal because it was an error of constitutional magnitude. Thus, the court reversed the conviction and remanded for a new trial.

In the case at bar, the state charged the defendant in count I with second degree rape and in count II with attempted second degree rape RCW 9A.44.050. Under the first allegation, the state had the burden of proving beyond a reasonable doubt that the defendant engaged in "sexual intercourse" with Amber Sylvester. Under the second allegation, the state had the burden of proving beyond a reasonable doubt that the defendant, or an accomplice, attempted to engage in sexual intercourse with Amber Sylvester. The element of "sexual intercourse" is required under RCW 9A.44.050(1), which states as follows:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

RCW 9A.44.050(1).

Under RCW 9A.44.010, the legislature has provided a specific definition for the term “sexual intercourse,” separate and distinct from the term “sexual contact.” These two definitions are as follows:

(1) “Sexual intercourse” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(1)&(2).

As subsection (a) states, the term “sexual intercourse” first has its “ordinary meaning” in society. In looking for the “ordinary meaning,” the court may employ the common definition of the term used in the dictionary. *State v. Smith*, 118 Wn.App. 480, 93 P.3d 877 (2003). Webster’s New Collegiate Dictionary defines the term “sexual intercourse” to mean

“heterosexual intercourse involving penetration of the vagina by the penis.” Webster’s New Collegiate Dictionary (1977), p. 1063. The hallmark of this definition is “penetration,” not mere touching that does not constitute penetration.

In addition, under subsection (b) of RCW 9A.44.010(1), the term “sexual intercourse” includes “any penetration of the vagina or anus however slight, by an object.” Thus, this statutory provision expands the “ordinary meaning” of the term “sexual intercourse” to include penetration of the anus, as well as the vagina. However, once again, the hallmark of this expanded definition is “penetration,” not mere touching.

Subsection (c) of this same statute states that the term “sexual intercourse” also includes “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” Here, finally, is an expanded definition that does not specifically require an act of penetration. Rather, it only requires “sexual contact.” However, for that “sexual contact” to qualify as “sexual intercourse” under RCW 9A.44.010(1)(c), it must be “between persons involving the sex organs of one person and the mouth or anus of another.” In the case at bar, this third definition does not apply because the state did not allege, and Amber Sylvester did not claim, that either the defendant or Thomas Wilson had any contact with her mouth or anus of any sort. Thus, in the case at bar, the issue

on count I was whether or not the state had proved any “penetration,” and in Count II whether or not the state had proved an attempt at “penetration.”

The term “penetration” is not defined in RCW 9A.44. However, the word “penetrate” is defined in the dictionary as “to pass into or through” or “to enter by overcoming resistance.” Webster’s New Collegiate Dictionary (1977), page 847. This definition is somewhat enhanced by RCW 9A.44.010(1), which adds the clarifying language “any” and “however slight.” Once again, though, the underlying requirement is some type of passing into or entering. This requirement is embodied in WPIC 45.01, which states as follows:

WPIC 45.01 Sexual Intercourse – Definition

Sexual intercourse means
[that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight]
[or]
[any penetration of the vagina or anus however slight, by an object, [including a body part,] when committed on one person by another, whether such persons are of the same or opposite sex [except when such penetration is accomplished for medically recognized treatment or diagnostic purposes]] [or]
[any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex].

WPIC 45.01.

In the case at bar, the trial court gave this instruction employing the first alternative as Instruction No. 9, which thereby became the law of the

case. This instruction stated as follows:

INSTRUCTION NO. 9

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

CP 38.

The evidence in this case was equivocal at best on the issue of both “intercourse” and “attempted intercourse.” First, while Amber Sylvester claimed on the witness stand that Thomas Wilson had penetrated her vagina with his penis, she had previously denied any penetration when she spoke with the ER nurse. In addition, in his testimony as a state’s witness, Thomas Wilson denied any penetration. Similarly, the defendant denied any penetration. Finally, there was no DNA evidence at all to support this claim. Obviously, the jury had a difficult time with this issue, because it sent out the following questions:

Regarding instruction #9 - is “touching” considered “slight penetration.”

CP 53.

The answer to this question under the definition for “sexual intercourse” as it is defined in RCW 9A.44.010(1), is that “touching” without an “entering” only constitutes “sexual intercourse” if it involves “sexual contact” “between persons involving the sex organs of one person and the

mouth or anus of another.” However, since no such contact was alleged in the case, the answer to the jury’s question was simply “no, unless the touching involves an entering.” This answer is required under RCW 9A.44.010(1). Unfortunately, in the case at bar, the court, over defense objection, gave the jury the following answer to this question.

SUPPLEMENTAL INSTRUCTION # 1

“Penetration” means any contact, however slight, between the sex organ of one person and the sex organ of another person, or any intrusion, however slight, of any part of the body of one person into the sex organ of another person.

CP 52.

The problem with this instruction is that under the first alternative definition, it allowed the jury to convict solely upon a finding that there was “contact” between the “sex organ of one person and the sex organ of another person,” without a requirement that there be “entering.” Thus, the trial court gave the jury a definition that allowed it to convict the defendant without a finding that the state had proven beyond a reasonable doubt that there actually was penetration as is required under RCW 9A.44. Given the paucity of evidence on this issue and the jury’s obvious difficulty on the issue of penetration, the state cannot prove beyond a reasonable doubt that this error was harmless. As a result, this court should reverse the defendant’s convictions for rape and attempted rape and remand for a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO ALLOW THE DEFENSE TO ELICIT RELEVANT, EXCULPATORY EVIDENCE.

As was stated in the previous argument, while due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson, supra; Bruton v. United States, supra*. As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis.

However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the state charged the defendant in Count I with second degree rape and in Count II with attempted second degree rape as an accomplice. The defendant responded to these charges by claiming that the complaining witness consented to all sexual contact, that she had lied to the police about her lack of consent, and that she had provided clothing to the police with another man's semen on it to bolster her claims of rape. In order to effectively present these claims, the defense proposed to elicit the facts that (1) the complaining witness had previously engaged in a consensual sexual relationship with the defendant, and (2) that another man's semen was on the

underwear that she told the police she had worn when she was raped by the defendant. As the following explains, both of these facts constituted relevant, exculpatory evidence and the trial court's refusal to allow the defense to elicit these facts denied the defendant a fair trial.

(1) Evidence of the Defendant's Prior Sexual Contact with the Complaining Witness Was Relevant to Prove the Reasonableness of the Defendant's Belief That the Complaining Witness Consented to Sexual Contact and the Exclusion of That Evidence Denied the Defendant a Fair Trial.

Although not necessarily included in the definitions for first, second, or third degree rape under RCW 9A.44, consent is a valid defense to each level of rape because, as the Washington State Supreme Court has held, "nonconsent traditionally has been the essence of the crime of rape." *State v. Camara*, 113 Wn.2d 631, 636, 781 P.2d 483 (1989). Thus, whether specifically stated or not, lack of consent is an implicit requirement of the crime of rape in the first, second, and third degrees under RCW 9A.44.040, .050, and .060, and the claim of consent is always a defense, albeit an affirmative defense that the defendant has the burden of proving. *Id.* In *Camara*, the court put this principle as follows:

Though the rape statutes no longer expressly mention nonconsent as an element of rape, we believe consent remains a valid defense to a rape charge, for several reasons. First, nonconsent traditionally has been the essence of the crime of rape. Second, the concept of consent has been retained in the new rape statutes in the element of forcible compulsion, its conceptual opposite. Finally, the "continuing validity" of consent as a defense is implied by statutory provisions (1)

describing crimes against victims who are “physically helpless” or “mentally incapacitated”, *see* RCW 9A.44.050(1)(b); (2) defining rape as sexual intercourse with a victim who “did not consent”, *see* RCW 9A.44.060(1)(a); and (3) permitting evidence of a victim’s past sexual conduct only when probative of consent, *see* RCW 9A.44.020(3).

State v. Camara, 113 Wn.2d 636-637 (footnote omitted; some citations and authorities omitted).

In the case at bar, the state charged the defendant with second degree rape and attempted second degree rape under RCW 9A.44.050(1)(b), which provides as follows:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

...

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

RCW 9A.44.050(1)(b).

As the Washington Supreme Court clarified in the preceding quote from *State v. Camara, supra*, this subsection of the rape statute is itself evidence of the continued legislative recognition that consent is a defense to the charge of rape. Thus, in the case bar, the trial court erred when it held that the defendant’s evidence that he reasonably believed that the complaining witness consented, based in part on his prior sexual relationship with her, was irrelevant because consent was not a defense under RCW

9A.44.050(1)(b). As a review of RCW 9A.44.020(3), reveals, this evidence was relevant and admissible to support the defendant's claim of consent.

This statute provides as follows:

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

RCW 9A.44.020(3).

In the case at bar, the defense had specifically endorsed a claim of consent at pretrial, and had given the state notice that it intended to elicit evidence of the defendant's prior sexual relationship with the complaining witness as evidence to support the defendant's claim that he had reasonably believed that the complaining witness had consented. Indeed, the state

responded with a trial brief noting as much and moving *in limine* to exclude this evidence, arguing that consent was not at issue under a prosecution charged solely under RCW 9A.44.050(1)(b). Thus, in the case at bar, the defense met the statutory requirements for presentation of this evidence, and the trial court's erroneous acceptance of the state's argument prevented the defendant from presenting his case.

As the foregoing establishes, the trial court erred when it refused to allow the defense to present this relevant, exculpatory evidence in the form of the defendant's prior sexual relationship with the complaining witness. In addition, a review of the evidence presented at trial as a whole reveals that this error caused the defendant prejudice and denied him a fair trial. This evidence included the following four facts, which strongly refuted the claims of the complaining witness: (1) both the state and the defendant's expert witnesses testified that the drug in the defendant's blood, MDMA, was a form of methamphetamine that had slight hallucinogenic qualities and in all of the medical literature, there was only one anecdotal claim that it had ever caused paralysis as the complaining witness claimed; (2) one of the state's witnesses specifically refuted the claims of the complaining witness by testifying that when he came back into the living room with the defendant, they saw the complaining witness get up and walk into the bathroom; (3) three witnesses, one called by the state and two by the defense, specifically refuted the claims

of the complaining witness that she did not know that she had taken an MDMA pill; and (4) the complaining witness had specifically denied penetration to the ER nurse and then adamantly claimed penetration while testifying at trial.

Given the highly equivocal nature of this evidence, and the contradictory nature in the state's own version of the events, it is more likely than not that had the jury been able to hear the defendant's evidence that he had previously engaged in a sexual relationship with the complaining witness, it would have returned verdicts of acquittal on the first two counts. Thus, the trial court's error in refusing to admit this relevant, exculpatory evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and entitles the defendant to a new trial. This conclusion is also supported by the fact that the trial court also erred when it refused to allow the defense to elicit the fact that the complaining witness had submitted physical evidence to police that did not support her claims. The following addressed this issue.

(2) Evidence of a Third Party's Semen on the Clothing of the Complaining Witness Was Relevant to Impeach the Claims of the Complaining Witness and the Exclusion of That Evidence Denied the Defendant a Fair Trial.

In the case at bar, as in many rape investigations, the police obtained the clothing of the complaining witness in order to test it to determine

whether or not any of the defendant's semen or other bodily fluids were present, thus potentially corroborating the claim of the complaining witness that there had been sexual intercourse. An examination of the underwear that the complaining witness told the police she had been wearing showed the presence of semen, thus initially corroborating her claims of intercourse, which both the defendant and the original co-defendant denied. However, further testing revealed that the semen belonged to a third party. At the beginning of trial, the trial court granted a state's motion to exclude this evidence as irrelevant. As the following explains, this ruling was in error.

In the case at bar, the defendant testified and argued to the trial that both he and the original co-defendant had consensual sexual contact with the complaining witness, although neither had intercourse with her. The defense further argued that the complaining witness had intentionally manufactured the claims of rape, perhaps out of a desire to shield herself from a claim that she had knowingly taken MDMA in violation of the requirements of her delayed enlistment into the military. Under this theory, which was supported by the evidence that she had been worried about the MDMA showing up during a urinalysis test, it was arguable that she had submitted underwear to the police because she knew there was semen present in order to bolster her claim of rape. Thus, under this theory, the evidence was relevant and admissible to attack the credibility of the complaining witness and show that

she had knowingly attempted to present false evidence.

As was previously discussed, the evidence in support of the state's case was equivocal at best. Thus, as with the erroneous refusal to allow the defense to present relevant, admissible evidence on consent, the refusal to allow the defense to present relevant, admissible evidence that the complaining witness had attempted to present knowingly false evidence also denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. Thus, the defendant is entitled to a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN A STATE'S EXPERT RENDERED AN OPINION UPON A SUBJECT FOR WHICH SHE WAS UNQUALIFIED DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's

assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims that (1) trial counsel's failure to object when the state called a toxicologist with a degree in chemistry to render opinions that only a medical doctor or other person trained in human physiology was qualified to render fell below the standard of a reasonably prudent attorney, and (2) that given the paucity of the state's evidence, this error caused prejudice in that but for the admission of this evidence the jury

would have rendered a verdict of acquittal. The following presents these arguments.

The admission of expert testimony in Washington is governed by ER 702, which states as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

Prior to the admission of expert evidence under this rule, the court is required to go through a two-step process. The first is determining whether or not the proposed expert is qualified to render an opinion on the proposed subject. The second is determining whether or not the evidence will assist the trier of fact to understand the evidence or determine a fact at issue. *In re Det. of Pouncy*, 144 Wn.App. 609, 624, 184 P.3d 651 (2008), *aff'd*, 168 Wn.2d 382, 229 P.3d 678 (2010). Expert testimony is helpful to the trier of fact “if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury.” *State v. Thomas*, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004). However, where jurors are as competent as an expert to reach a decision on the facts presented without an expert’s opinion, the expert’s opinion is not helpful because it does not offer the jurors any insight that they would not otherwise have. *State v. Smissaert*, 41 Wn.App. 813,

815, 706 P.2d 647 (1985) (“If the issue involves a matter of common knowledge (like the effects of alcohol) about which inexperienced persons are capable of forming a correct judgment, there is no need for expert testimony.”)

In the case at bar, the state called Christine Mitchell an expert to testify, in part, as to the physiological effects of MDMA on humans. In attempting to qualify her to render such an opinion, the state elicited the fact that she works for the Washington State Patrol crime lab as a forensic toxicologist and has a degree in chemistry. While her degree in chemistry and work at the crime lab undoubtedly qualified her to render an expert opinion on the presence and identification of substances in the human body such as alcohol or drugs, which she did, it in no way qualified her to testify concerning the physiological effects of MDMA once a person ingests it. Rather, her only stated qualification on this subject was her “reading” of medical articles on the effects of MDMA on humans. She did not claim to be a medical doctor or person trained in human physiology. Thus, she was not qualified to render an expert opinion on the effects of MDMA on the human body.

In addition, a careful review of her testimony reveals that it in no way helped the jury to determine whether or not MDMA had put the complaining witness into a physically helpless state as claimed. In fact, the substance of

her testimony, in relation to the facts of this case, was that she had read a number of articles about the effects of MDMA, and that she had been able to find one article in which there was an anecdotal report of a single person claiming such an effect. This evidence was not an opinion by an expert qualified in the field of human physiology. Rather, it was the speculation of a layperson in this area of expertise and was in no way admissible under ER 702. Thus, a timely objection by defense counsel would have been sustained by the trial court.

In this case, there was no tactical reason for the defense to fail to object that Ms Mitchell did not qualify as an expert under ER 702 to render an opinion on the effects of MDMA on the human body. Her testimony in no way aided the defense, and to a large extent confused the jury and invited them to convict on her speculation that the claims of the complaining witness were corroborated by medical science. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney. In addition, this failure caused prejudice in that it allowed the jury to consider the argument that MDMA had caused the complaining witness to lapse into a catatonic state. In a case in which the state's ability to convict turned on extremely contradictory evidence, the admission of her evidence was enough to change a verdict of acquittal to a verdict of conviction. Thus, trial counsel's failure to object to her evidence caused prejudice. As a result, the defendant was

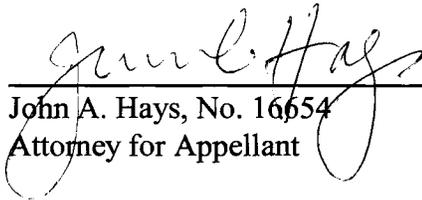
denied effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and is entitled to a new trial.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's erroneous instruction defining the word penetration, based upon the trial court's refusal to allow the defense to present relevant, exculpatory evidence, and based upon trial counsel's failure to object to the state's presentation of an unqualified expert witness.

DATED this 8th day of December, 2010.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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 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 of 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.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

INSTRUCTION NO. 9

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight.

SUPPLEMENTAL INSTRUCTION # 1

“Penetration” means any contact, however slight, between the sex organ of one person and the sex organ of another person, or any intrusion, however slight, of any part of the body of one person into the sex organ of another person.

**ER 702
Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RCW 9A.44.010
Definitions

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which 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 some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse

or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of > RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1)(c) or (e) and 9A.44.100(1)(c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW

9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a “mental disorder” as defined in RCW 71.05.020.

(13) “Person with a chemical dependency” for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is “chemically dependent” as defined in RCW 70.96A.020(4).

(14) “Health care provider” for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) “Treatment” for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) “Frail elder or vulnerable adult” means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. “Frail elder or vulnerable adult” also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

RCW 9A.44.020

Testimony – Evidence – Written motion – Admissibility

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual

behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

RCW 9A.44.050
Rape in the second degree

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is a person with a developmental disability and the perpetrator is a person who is not married to the victim and who:

(i) Has supervisory authority over the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment;

(e) When the victim is a resident of a facility for persons with a mental disorder or chemical dependency and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim; or

(f) When the victim is a frail elder or vulnerable adult and the perpetrator is a person who is not married to the victim and who:

(i) Has a significant relationship with the victim; or

(ii) Was providing transportation, within the course of his or her employment, to the victim at the time of the offense.

(2) Rape in the second degree is a class A felony.

STATE OF WASHINGTON
DIVISION II
INDEXED IN 0912008
STATE OF WASHINGTON
BY le DEPUTY

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

STATE OF WASHINGTON,
Respondent,

CLARK CO. NO: 09-1-014086
APPEAL NO: 40696-9II

vs.

AFFIRMATION OF SERVICE

SCOTT E. WEAVILLE,
Appellant.

STATE OF WASHINGTON)
County of Clark) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On December 8th, 2010, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
- 3. AFFIRMATION OF SERVICE

to the following:

ARTHUR D. CURTIS
CLARK COUNTY PROS ATTY
1200 FRANKLIN ST.
P.O. BOX 5000
VANCOUVER, WA 98666-5000

SCOTT E. WEAVILLE #339157
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

Dated this 8th day of DECEMBER, 2010 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS