

FILED  
COURT OF APPEALS  
DIVISION II

NO. 40696-9-II

11 FEB -7 PM 1:39

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

STATE OF WASHINGTON  
81  
DEPUTY *cm*

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STATE OF WASHINGTON, Respondent

v.

SCOTT E WEAVILLE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROGER A. BENNETT  
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01408-6

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
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Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869  
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I. STATEMENT OF FACTS

The State agrees with the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplied in the argument section of this response.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court violated his rights when it gave the jury a supplemental instruction after the jury had already begun deliberation. His claim is that this supplemental instruction relieved the State of part of its burden of proving the elements of the crimes charged in Counts 1 and 2.

The Amended Information filed in this matter (CP 47) charged in Count 1, Rape in the Second Degree, and Count 2, Attempted Rape in the Second Degree. A copy of the Amended Information is attached hereto and by this reference incorporated herein.

The Court's Instructions to the Jury (CP 99) contained the elements of the crimes. During the course of deliberation the jury had a question concerning one of the issues and the court made response to it. Court's Instructions to the Jury Supplement (CP 100). A copy of the Court's Instructions to the Jury and the Court's Instructions to the Jury Supplement are attached hereto and by this reference incorporated herein.

The question sent out by the jury read as follows: “Regarding Instruction No. 9 – is ‘touching’ considered ‘slight penetration’”. To this the court provided a supplemental instruction defining the concept of penetration.

“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.

-(Supplemental Instruction, CP 100)

When the supplemental question was asked by the jury it triggered a long discussion among the parties. The court was inclined to assist the jury in the terminology. As the court set forth “They’re asking for a definition of the term, ‘penetration’. How is that a factual issue?” (RP 689, L2-3). The court went on in its discussion with the defense and finally arrived at the following conclusion:

MS. CLARK (Defense Counsel): Well, if you touch something – penetration is actual entry into it. It’s crossing a threshold, basically.

THE COURT: I tend to agree with you. So I did a search on the definition of the term “penetration” and actually found one. RCW 7.90.010 sub 5, which is the statute dealing with sexual assault protection orders. Definitional section.

Sexual penetration – and there’s a whole bunch of things in there. But taking out the terms that don’t apply, sexual 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.

When defining terms in jury instructions, if the actual term isn’t defined by law, usual resort – permissible resort is to definitions under – dictionary definitions. Here we don’t have to go that far, we don’t have to get into the dictionary. Because there is another statutory definition, although, again, it’s in the sexual assault protection order chapter.

-(RP 689, L14 – 690, L8)

The court found statutory definitions to support its position and felt that this was not a factual issue but rather an interpretation of law to assist the jury. (RP 691). Ultimately the court indicated as follows:

I will give Supplemental Instruction No. 1. Because it’s a correct statement of the law, it responds to the jury’s question to request, essentially, to define a term not defined by the other instructions.

-(RP 692, L13-16)

Once a jury begins its deliberations, the trial court may supplement an instruction with an explanatory instruction if the meaning of the language is unclear or if the language might mislead persons of ordinary intelligence. State v. Johnson, 7 Wn. App. 527, 539, 500 P.2d 788 (1972),

aff'd, 82 Wn.2d 156, 508 P.2d 1028 (1973); CrR 6.15 (f). Whether words used in an instruction require definition is necessarily a matter of judgment for the trial court. State v. Castro, 32 Wn. App. 559, 565, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982); Seattle v. Richard Bockman Land Corp., 8 Wn. App. 214, 217, 505 P.2d 168, review denied, 82 Wn.2d 1003 (1973). A court's jury instructions may describe the crime charged in the language of the statute. State v. Bixby, 27 Wn.2d 144, 177 P.2d 689 (1947). The court may supplement the statutory language by an explanatory instruction. State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967). However, an explanatory instruction is unnecessary if the statutory language is reasonably clear and not misleading to persons of ordinary intelligence.

#### § 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.

The State submits that the trial court was using its broad discretion in this matter to assist the jury in a question of law, that is a specific definition that needed clarification. The parties agreed that it was not a factual question that was being asked, but one of interpretation of a legal standard. The trial court felt that this was appropriate and exercised its judgment accordingly.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is two prong in nature and deals with a claim that the trial court denied the defendant a fair trial by refusing to allow the defense to present evidence. Specifically, the two areas on appeal are:

1. A claim that there was evidence of the defendant's prior sexual conduct with the complaining witness, and
2. A claim of evidence of a third party's semen on the clothing of the complaining witness.

These matters were raised pre-trial with the court. It should be remembered that the nature of the prosecution in this case was a claim that the rape occurred because the complaining witness was physically helpless

or incapacitated. (Court's Instructions to the Jury, CP 100, Instruction No. 8 and Instruction No. 12). With that in mind, the pretrial motions centered on the significance of the consensual sex at a previous time and the physical findings of semen in the underwear. The State maintained that there was no relevance to these matters. (RP 14-15).

Concerning the issue of prior sexual contact the court succinctly set forth the contention by the defense:

THE COURT: She consented once, therefore she probably consented the second time; is that what it boils down to?

MS. CLARK (Defense Counsel): That's the relationship between these people.

THE COURT: Okay.

MS. CLARK: They've had casual sex once before in this friendship. It's not unrealistic to be doing that again. And, in fact, that's what he believed was going on.

-(RP 14, L2-9)

The State submits that there were issues here concerning relevance. The claim was incapacity of the complaining witness and, because of that, it doesn't make any difference what the defendant's belief was consent. As the court indicated the claim is that she was rendered incapable of consent. (RP 14).

The court went on then to question the exact nature of the defense in relation to this claim of consensual sex at a previous time and the defense raised the possibility of a diminished capacity defense on the part of the defendant. (RP 15-16). The court was then confused as to whether this was a claim of diminished capacity or consensual act. As the court set forth: "Consent is not an issue. You simply can't have sex with a person who's mentally or physically debilitated or incapacitated, whether they consent or not." (RP 16, L24 – 17, L2). The second issue dealing with the semen on the underwear is even more confusing for the defense. The defense maintained that she did have a recollection of the evening's events but was lying to the officers about it. Further, that there were questions about the third party that she had had sexual intercourse with on a previous occasion.

MS. CLARK: She gives the police officer the clothing she says she was wearing at the time of this incident or right after it. The clothes she put on after she claims she was raped by Mr. Weaville and Mr. Wilson.

Those pieces of clothing, one of them is a pair of underwear that are pretty distinct looking. They're a hot pink, black lace trimmed pair of panties. She says these are the underwear I was wearing last night.

Now, she's going to sit here and tell the jury that she remembers every detail of the night. But when we interview her after the crime lab comes back and says the DNA isn't from either of the defendants, it's from this third guy named Kasey Crumb – and I'm not even submitting to

the court that we necessarily have to have who it was. It's just the fact that she basically gave them the wrong underwear, but she's claiming to have this absolutely perfect recollection of the night before.

-(RP 11, L4-20)

The court is then confused as to why any of that information was necessary when she admitted that she gave the police the wrong underwear. (RP 11-12).

THE COURT: Yes. I mean, that's the perfect compromise. You get your evidence in that her memory was messed up and she gave the wrong underwear, without going into her prior sexual conduct. Right? And that way there's no danger of arguing or the jury concluding the wrong thing, that she's promiscuous or doesn't wash her underwear.

-(RP 12, L14-19)

The defense then indicates that it is attempting to show consent as related to this third party on a previous occasion. (RP 13). The court is reminded however that this is charged as physical helplessness and therefore not the issue that the defense is seeking to uncover. (RP 13-14). The State maintained at the time that this was an attempt to violate the rape shield statute when consent wasn't an issue in the case. (RP 14).

The court had previously raised the concept of the rape shield statute in reference to this material being elicited by the defense. (RP 8). The Judge asked of the defense: "Tell how the fact that she had sex with Mr. Crumb, apparently months before, establishes the – establishes some hole in the State's case?" (RP 9, L24 – 10, L1). The State submits that under the nature of the allegations raised in this matter that the court was properly ruling in limiting the defense. There just is no relevance to these issues that are trying to be raised by the defense on appeal, or that these issues may tend to confuse a jury.

A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1018, cert. denied, 508 U.S. 953, 124 L. Ed. 2d 665, 113 S. Ct. 2449 (1993). In order to be relevant, and therefore admissible, the evidence connecting another person with the crime charged must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party. State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996). The evidence must establish a nexus between the other suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031, 877 P.2d 694 (1994). The defendant has the burden of showing that the "other suspect" evidence is

admissible. State v. Pacheco, 107 Wn.2d 59, 67, 726 P.2d 981 (1986). Evidence offered only to encourage the jury to speculate as to possible other assailants is inadmissible. See State v. Drummer, 54 Wn. App. 751, 755, 775 P.2d 981 (1989). The admission or refusal of evidence lies largely within the sound discretion of the trial court and is reviewed only for an abuse of discretion. Rehak, 67 Wn. App. at 162.

The general rule is that a witness cannot be impeached upon matters collateral to the principal issues being tried. State v. Oswalt, 62 Wn.2d 118, 381 P.2d 617 (1963). The trial court, however, has discretion to permit a cross-examiner to inquire into collateral matters testing the credibility of the witness, but the cross-examiner is concluded by the answers given. State v. Anderson, 46 Wn.2d 864, 285 P.2d 879 (1955). The test of collateralness is: Could the fact to which error is predicated have been shown for any purpose independently of the contradiction? State v. Oswalt, *supra*.

A trial court's admission of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). This court "will not disturb a trial court's rulings on ... the admissibility of evidence absent an abuse of the court's discretion." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse of discretion exists "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based

upon untenable grounds or reasons.” Id. The court has long recognized that it is the function and province of the jury to weigh the evidence and determine the credibility of the witnesses and decide disputed questions of fact. State v Snider, 70 Wn.2d 326, 422 P.2d 816 (1967); State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. McDaniels, 30 Wn.2d 76, 190 P.2d 705 (1948). The trier of fact may believe or disbelieve any witness whose testimony it is called upon to consider. State v. Chapman, 78 Wn.2d 160, 469 P.2d 883 (1970).

The rape shield statute clearly limits the ability of either party to introduce at trial evidence of the past sexual behavior of the complaining witness. RCW 9A.44.020(2). Although the defendant does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009) (*citing State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004)). The admissibility of evidence under the rape shield statute, in turn, “is within the sound discretion of the trial court.” State v. Hudlow, 99 Wn.2d 1, 17, 659 P.2d 514 (1983).

In Hudlow, we made a clear distinction between evidence of the general promiscuity of a rape victim and evidence that, if excluded, would deprive defendants of the ability to testify to their versions of the incident. Id. at 17-18. In that case, evidence of past general promiscuity could be

excluded, but the clear implication was that evidence of high probative value could not be restricted regardless of how compelling the State's interest may be if doing so would deprive the defendants of the ability to testify to their versions of the incident. Id. at 16-18.

-(State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010)).

The rape shield statute was created for the purpose of ending an antiquated common law rule that “a woman's promiscuity somehow had an effect on her character and ability to relate the truth.” Id. at 8. The statute was aimed at ending the misuse of prior sexual conduct evidence, so that a woman's general reputation for truthfulness could not be impeached because of her prior sexual behavior. Id. at 8-9. More specifically, the statute “is based on the observation that such evidence is usually of little or no probative value in predicting the victim's consent to sexual conduct on the occasion in question.” Id. at 9 (*citing* State v. Geer, 13 Wn. App. 71, 73-74, 533 P.2d 389 (1975)).

-(State v. Jones, 168 Wn.2d at 723).

The State submits that the trial court was within its rights to limit the questioning by the defense.

#### IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim of ineffective assistance of counsel for failing to object to the testimony of a State's expert witness. Specifically, the claim by the defense was that the

subject for which the expert was testifying was an area that she was unqualified to testify about.

The witness called by the State was Christine Mitchell (RP 319). Ms. Mitchell was a forensic scientist with the Washington State Patrol. In that capacity she performed analysis on blood, urine, and other biological specimens, usually for the presence of drugs and alcohol. (RP 319-320). The defense on appeal claims that she was not qualified to discuss the affects of MDMA. The official title of the drug is methylenedioxymethamphetamine. (RP 328). The defense did not object to her testifying about the affects of this drug.

She examined the rape kit that had been submitted and found traces of this drug along with other controlled substances in the sample supplied by the complaining witness. Concerning the sample of the MDMA drug she gave the jury her background with the drug and her familiarity with trainings and the literature as it related to this particular drug. (RP 329-336). The State submits that this is a proper foundation for this particular witness to testify concerning the affects of the drug.

However, the defense on appeal is missing a fundamental point. The question of the affect of the MDMA on the complaining witness is also raised by their own expert who testified at trial. Doctor Robert Julien, PhD indicated that he received a Masters Degree and a Doctorate in

pharmacology from the University of Washington in 1970. He also indicated that he had been an Assistant Professor of Medical Pharmacology at one time in California and conducted experiments and research concerning the affects of drugs. (RP 349-350). He further indicated that he had traveled extensively around the country educating on pharmacology and the affects of drugs on individuals. (RP 350-351). He testified for our jury in reference to the affects of the drug on the complaining witness and also possibly on the defendant.

The State submits that there was a tactical reason for the defense not to object to the State's expert. The basic response is that, either the State expert agreed with their expert, or they disagreed and the defense would stand on the testimony of Dr. Julien.

In Washington, experts are permitted to testify on subjects that are not within the understanding of the average person. ER 702; see also State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984). Experts are allowed to express opinions concerning their fields of expertise when those opinions will assist the trier of fact. ER 702; ER 701. The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion. Kirkman, 159 Wn.2d at 929; State v. Ring, 54 Wn.2d 250, 255, 339 P.2d 461 (1959); State v Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). Important to the determination of

whether opinion testimony prejudices the defendant is whether the jury was properly instructed. See *id.* at 937. In Kirkman, this court concluded there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors ““are the sole judges of the credibility of witnesses,”” and that jurors ““are not bound”” by expert witness opinions. Virtually identical instructions were given in our case. (CP 78, Instruction number 1, RP 614). There was no written jury inquiry or other evidence that the jury was unfairly influenced, and the Court should presume the jury followed the court's instructions absent evidence to the contrary. An abiding faith in the intelligence of juries and their commitment to follow the law has long been a fixture of our jurisprudence. “We assume that jurors are intelligent and responsible individuals.” State v. Lord, 161 Wn.2d 276, 278-79, 165 P.3d 1251 (2007). This assumption is fundamental to our democratic system. Our system of laws depends upon the assumption that jurors are intelligent. “A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box.” People v. Barnum, 86 Cal. App. 4th 731, 104 Cal. Rptr. 2d 19, 24 (Cal. Ct. App. 2001) (citation omitted) (quoting People v. Long, 38 Cal. App. 3d 680,

689, 113 Cal. Rptr. 530 (1974)), superseded on other grounds, 29 Cal. 4th 1210, 64 P.3d 788, 131 Cal. Rptr. 2d 499 (2003).

Even if the defense were correct to disregard the assumption of jury intelligence in a particular case, “[a]s further protection, jury panels are instructed and solemnly charged by the court with the duty to avoid bias or prejudice.” Lord, 161 Wn.2d at 279. “It is to be presumed that the jurors, as sensible and intelligent men, obey the instruction of the court. . . .” State v. Smails, 63 Wash. 172, 183, 115 P. 82 (1911); see also Coy v. Iowa, 487 U.S. 1012, 1035, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) (Blackmun, J., dissenting) (“[W]e must assume [the jury] to have been intelligent and capable of following [court] instructions . . . .”); State v. Montgomery, 163 Wn.2d 577, 605, 183 P.3d 267 (2008) (J.M. Johnson, J., concurring) (“Jurors are presumed to be intelligent [and] capable of understanding instructions . . . .” (*quoting* People v. Carey, 41 Cal. 4th 109, 130, 158 P.3d 743, 59 Cal. Rptr. 3d 172 (2007)).

There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d

1011 (2001) (*quoting* State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-(Strickland, 466 U.S. at 689).

But even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. A defendant must affirmatively prove prejudice, not simply show that "the errors had some

conceivable effect on the outcome.” Strickland, 466 U.S. at 693. “In doing so, ‘[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” State v. Crawford, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 694).

When trial counsel's actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The State submits that the defense was attempting to gain a tactical advantage by not objecting. Further, the State submits that even if an objection was made, it would not have been sustained.

V. CONCLUSION

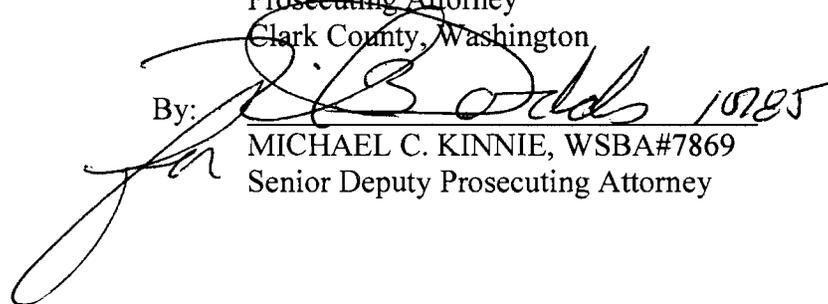
The trial court should be affirmed in all respects.

DATED this 4<sup>B</sup> day of Feb, 2011.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

A handwritten signature in black ink, appearing to read "M. C. Kinnie", is written over a horizontal line. To the right of the signature, the number "10785" is handwritten.

MICHAEL C. KINNIE, WSBA#7869  
Senior Deputy Prosecuting Attorney

**FILED**

DEC 15 2009

2:37 pm

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

SCOTT E WEAVILLE

Defendant.

**AMENDED INFORMATION**

No. 09-1-01408-6

(VPD 09-15298)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

**COUNT 01 - RAPE IN THE SECOND DEGREE - 9A.08.020(3)**

**/9A.44.050/9A.44.050(1)(b)**

That he, SCOTT E WEAVILLE, together and with another, in the County of Clark, State of Washington, on or about August 13, 2009 did engage in sexual intercourse with A.E.S. when A.E.S. was incapable of consent by reason of being physically helpless or mentally incapacitated; contrary to Revised Code of Washington 9A.44.050(1)(b). and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

**COUNT 02 - ATTEMPTED RAPE IN THE SECOND DEGREE - 9A.08.020(3)**

**/9A.44.050/9A.44.050(1)(b) /9A.28.020(3)(b)**

That he, SCOTT E WEAVILLE, together and with another, in the County of Clark, State of Washington, on or about August 13, 2009, with intent to commit the crime of Rape in the Second Degree, did an act which was a substantial step toward the commission of that crime, to-wit: by attempting to engage in sexual intercourse with A.E.S. when A.E.S. was incapable of consent by reason of being physically helpless or mentally incapacitated; contrary to Revised Code of Washington 9A.44.050(1)(b). and/or was an accomplice to said crime pursuant to RCW 9A.08.020.

AMENDED INFORMATION - 1  
ar

CLARK COUNTY PROSECUTING ATTORNEY  
1013 FRANKLIN STREET  
PO BOX 5000  
VANCOUVER, WASHINGTON 98668-5000  
(360) 397-2261

Handwritten initials/signature

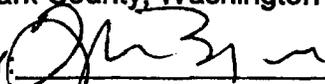
1 This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability  
2 Act (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW  
3 9.94A.570).

4 **COUNT 03 – DELIVERY OF A CONTROLLED SUBSTANCE - NARCOTIC FROM**  
5 **SCHEDULE I AND II (EXCEPT HEROIN OR COCAINE) TO WIT: MDMA (ECSTASY) -**  
6 **69.50.401(1),(2)(a)**

7 That he, SCOTT E WEAVILLE, in the County of Clark, State of Washington, on or about  
8 August 13, 2009, did knowingly deliver a controlled substance, to-wit:  
9 Methylendioxyamphetamine; contrary to Revised Code of Washington  
10 69.50.401(1), (2)(a).

11 ARTHUR D. CURTIS  
12 Prosecuting Attorney in and for  
13 Clark County, Washington

14 Date: December 15, 2009

15 BY:   
16 Jeanne M. Bryant, WSBA #17607  
17 Deputy Prosecuting Attorney

18 <b>DEFENDANT: SCOTT E WEAVILLE</b>			
19 <b>RACE: W</b>	<b>SEX: M</b>	<b>DOB: 11/30/1986</b>	
<b>DOL: WEAWISE147QT WA</b>		<b>SID: WA25261561</b>	
<b>HGT: 511</b>	<b>WGT: 184</b>	<b>EYES: GRN</b>	<b>HAIR:</b>
<b>WA DOC:</b>		<b>FBI: 592552ED8</b>	
<b>LAST KNOWN ADDRESS(ES):</b>			
20 H - 812 SE 136TH AV #G74, VANCOUVER WA			

25

**FILED**

MAR 18 2010

10:56 AM

Sherry W. Parker, Clerk, Clark Co.

K. Boehm, Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

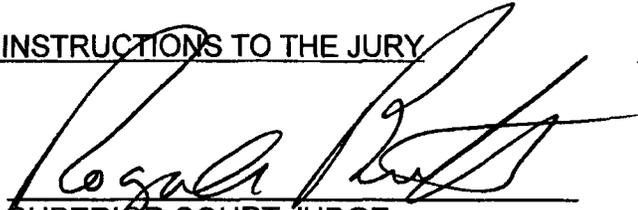
SCOTT E. WEAVILLE,

Defendant.

No. 09-1-01408-6

COURT'S INSTRUCTIONS TO  
THE JURY

COURT'S INSTRUCTIONS TO THE JURY



SUPERIOR COURT JUDGE

DATE 3/17/10

99(kb)

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness

might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. The lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

A trial judge may not comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. \_\_\_\_\_

3

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

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INSTRUCTION NO. \_\_\_\_\_

5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 8

**To convict the defendant of the crime of Rape in the Second Degree, as charged in count 1, each of the following three elements of the crime must be proved beyond a reasonable doubt:**

- (1) That on or about August 13, 2009, the defendant engaged in sexual intercourse with A.E.S.;**
- (2) That the sexual intercourse occurred when A.E.S. was incapable of consent by reason of being physically helpless.**
- (3) That this act occurred in the State of Washington.**

**If you find from the evidence that the elements (1), (2), and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty.**

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.

INSTRUCTION NO. 10

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

INSTRUCTION NO. 11

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 12

**To convict the defendant of the crime of attempted Rape in the Second Degree, as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:**

**(1) That on or about August 13, 2009, the defendant acted as an accomplice to Thomas Wilson in an act that was a substantial step toward the commission of Rape in the Second Degree; as defined in instruction number 8.**

**(2) That the act was done with the intent to commit Rape in the Second Degree.**

**and**

**(3) That the act occurred in the State of Washington.**

**If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.**

INSTRUCTION NO. 13

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

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

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

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

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 14

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

**INSTRUCTION NO. 15**

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

INSTRUCTION NO. 16

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 17

**It is a defense to a charge of Rape in the Second Degree or Attempted Rape in the Second Degree that at the time of the acts the defendant reasonably believed that A.E.S. was not physically helpless.**

**The defendant has the burden of proving this 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.**

INSTRUCTION NO. 18

A "reasonable belief" is one that a reasonable person would have under the same or similar conditions, taking into consideration all the facts and circumstances as they appear at the time of the incident.

INSTRUCTION NO. 19

To convict the defendant of the crime of delivery of a controlled substance, as charged in count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 13, 2009, the defendant delivered a controlled substance;
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That this act occurred in the State of Washington.

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

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

INSTRUCTION NO. 20

Deliver or delivery means the actual transfer of a controlled substance  
from one person to another.

INSTRUCTION NO. 20

Methylenedioxymethamphetamine is a controlled substance.

INSTRUCTION NO. 22

When you begin deliberating, you should first select a foreman. The foreman's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will need to rely on your notes and your memory as to the testimony presented in this case. Testimony will not be repeated for you during your deliberations.

You will be given the exhibits admitted in evidence, these instructions, and three verdict forms for recording your verdicts.

You must fill in the blank provided in the verdict forms the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decisions. The foreman must sign the verdict forms and notify the bailiff, who will bring you into court to declare your verdict.

09-1-01408-6

SUPPLEMENTAL INSTRUCTION # 1

**FILED**

MAR 18 2010

3:02 PM  
Sherry W. Parker, Clerk, Clark Co.

**“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.**

100 (K)

SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY  
DEPARTMENT NO. 1  
PO BOX 5000  
VANCOUVER, WA 98666-5000



ROGER A. BENNETT  
JUDGE

TELEPHONE (360) 397-2315  
FAX (360) 397-6078  
TDD (360) 397-6172

DATE: 03/18/10  
RE: Instruction # 9

TIME QUESTION RECEIVED: 2:50 pm

TIME QUESTION ANSWERED: 3:05 pm

This note must be saved because it is part of the official court record.

Regarding instruction # 9 —  
is "touching" considered "slight penetration."

