

NO. 42658-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK GREGORY,

Appellant.

BRIEF OF APPELLANT

MICHELLE BACON ADAMS
WSBA #25200
Attorney for Appellant

Law Offices of MICHELLE ADAMS,
PLLC
623 Dwight Street
Port Orchard, WA 98366-4693
(360) 876-9900

TABLE OF CONTENTS

I. Assignment of Error Page 1

 1. Trial counsel's failure to object to inadmissible evidence violated Mr. Gregory's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution
 Page 1

 2. Insufficient evidence was presented to convict Mr. Gregory of Rape in the Third Degree and/or Assault in the Fourth Degree with Sexual Motivation as alleged in the third amended information. Page 1

 3. The trial court improperly imposed a maximum sentence under RCW 9.94A.507. Page 1

II. Issues Pertaining to Assignments of Error Page 1

 1. Did trial counsel's failure to object to evidence of statements ABR made to law enforcement, SANE nurse examiner and family members violate Mr. Gregory's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 1)
 Page 1

 2. Whether sufficient evidence was presented to support a finding of guilt on the charges of Rape in the Third Degree or Assault in the Fourth Degree with Sexual Motivation (Assignment of Error No. 2) Page 1

 3. Did the trial court exceed its sentencing authority by sentencing Mr. Gregory to a maximum term of life under RCW 9.94A.507? (Assignment of Error No. 3) Page 1

III. Statement of the Case Page 2

 A. Procedural History Page 2

 B. Facts Page 3

IV. Argument Page 4

- A. Mr. Gregory's right to effective counsel was violated. As a result of counsel's deficiencies, he did not receive a fair trial. Page 14
 - 1. Defense counsel's failure to object to the admission of statements ABR made to law enforcement, SANE nurse examiner and family members . As a result of counsel's deficiencies, Mr. Gregory did not receive a fair trial Page 15
- B. The trial court violated Mr. Gregory's right to due process when it entered a judgement of conviction for offenses unsupported by substantial evidence. Page 22
 - 1. The evidence presented was insufficient to support a finding of guilt on the charge of Rape in the Third Degree Page 22
 - 2. The evidence presented was insufficient to support a finding of guilt on the charge of Assault in the Fourth Degree with Sexual Motivation. Page 24
- C. The trial court exceeded its sentencing authority by sentencing Mr. Gregory to a maximum term of life under RCW 9.94A.507. Page 25

V. Conclusion Page 27

TABLE OF AUTHORITIES

	<u>Page</u>
<hr/> FEDERAL COURT CASES <hr/>	
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984);	Page 14
<hr/> WASHINGTON STATE CASES <hr/>	
<i>In Re Personal Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992) ..	Page 14
<i>In re Postsentence Review of Leach</i> , 161 Wn.2d 180, 184, 163 P.3d 782 (2007)	Page 26
<i>State v. Alams</i> , 93 Wn.App. 754, 970 P.2d 367 (1999), review denied 138 Wn.2d 1014, 989 P.2d 1142.	Page 19, 21
<i>State v. Armendariz</i> , 160 Wn. 2d 106, 110, 156 P.3d 201 (2007)..	Page 26
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.,2d 227, 228 (1970)	Page 22
<i>State v. Hendrickson</i> , 129 Wn.2d.61, 917 P.2d 563 (1996)	Page 14
<i>State v. Moore</i> , 8 Wn. App. 1, 499 P.2d 13 (1972)	Page 22
<i>State v. Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (2002) ..	Page 14-15,18, 25
<i>State v. Saunders</i> , 91 Wn.App 575, 958 P.2d 364 (1998)	Page 15
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986)	Page 26
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1979)..	Page 27
<i>State v. White</i> , 80 Wn.App 406, 410, 907 P.2d 310 (1995)	Page 14
<i>State v. Williams</i> , 137 Wn.App 736, 154 P.3d 322 (2007)	Page 20

STATUTES & COURT RULES

Sixth Amendment to the United States Constitution Page 1

Washington Constitution, Article I, Section 22 Page 1

RCW 9.94A.030 Page 24

RCW 9.94A.345 Page 26

RCW 9.94A.507 Page 25, 26, 27

RCW 9A.36.041 Page 24

RCW 9A.44.606 Page 22-23

ER 801 Page 15-16

ER 803 Page 20

I. Assignment of Error

1. Trial counsel's failure to object to inadmissible evidence violated Mr. Gregory's right to effective assistance of counsel under the Washington Constitution, Article I, Section 22 and the Sixth Amendment to the United States Constitution.
2. Insufficient evidence was presented to convict Mr. Gregory of Rape in the Third Degree or Assault in the Fourth Degree with Sexual Motivation as alleged in the information.
3. The trial court improperly imposed a maximum sentence under RCW 9.94A.507.

II. Issues Pertaining to Assignments of Error

1. Did trial counsel's failure to object to evidence of ABR statements to law enforcement, SANE nurse examiner and family members which would not have been admissible, violate Mr. Gregory's right to effective assistance of counsel under the Washington State Constitution, Article I, Section 22 and Sixth Amendment to the United States Constitution? (Assignment of Error No. 1)
2. Whether sufficient evidence was presented to support a finding of guilt on the charges of Rape in the Third Degree or Assault in the Fourth Degree with Sexual Motivation?(Assignment of Error No. 2)
3. Did the trial court exceed its sentencing authority by sentencing Mr. Gregory to a maximum term of life under RCW 9.94A.507? (Assignment of Error No. 3)

III. Statement of the Case

A. Procedural History

Mr. Gregory was charged by way of third amended information of the crimes of rape in the third degree (count I), unlawful imprisonment (count II), and assault in the fourth degree with the special allegation of sexual motivation against ABR. CP 67-70. (To protect the privacy of the named

victim, she will be referred to by her initials ABR.) A jury trial was conducted before the Honorable Judge Roof. 1 RP 1-391. (The report of the proceedings for the trial in this matter will be referred to as 1RP in this brief. The preliminary hearings which occurred prior to trial will not be referred to in this brief.)

Immediately after ABR's testimony, the prosecutor attempted to file a second information which struck the charge of rape in the second degree and instead charged the crime of rape in the third degree and added in the alternative the charge of assault in the second degree with sexual motivation. 1 RP 291. The prosecutor sought to modify the charge in the event the jury had an issue with whether consent for sexual intercourse had been given. Id. Defense counsel objected to the amended information. 1 RP 292. The trial court did not allow an amendment of the charge to include second degree assault. 1 RP 300. Defense counsel continued to object to the amendment based on a concern the course of conduct alleged could not be piecemealed. 1 RP 302-303. The trial court denied the objection finding separate acts were alleged which could be charged separately. 1RP 303. The trial court did however allow an amendment of the charge to assault in the fourth degree with sexual motivation. 1RP 300. Ultimately, a third amended information was filed which charged Mr. Gregory with rape in the third degree as count 1,

unlawful imprisonment as count 2, and assault in the fourth degree with sexual motivation as count 3. 1 RP 301, CP 67-70.

The jury found Mr. Gregory guilty of the charges of rape in the third degree and assault in the fourth degree with sexual motivation. CP 139-140, 146-155. The jury acquitted Mr. Gregory of the charge of unlawful imprisonment. Id Mr. Gregory was sentenced to serve 29 months in confinement by Judge Roof. CP 146-155. The Judgement and Sentence also sentenced Mr. Gregory to a maximum term of life. CP 147. This appeal timely follows. CP 141-142.

B. Facts

On June 12-13, 2010 Mr. Gregory was driving a cab through his employment with the Bumble Bee Taxi Company. 1RP 306. On the evening of June 12, 2010 ABR and her husband went to a bar called Kelvin G's Tropic Blast. 1RP 242. ABR'S husband drove them to the bar. 1RP 243. ABR and her husband lived together but were not getting along. 1RP 245-246 . The two of them argued that night at the bar. 1RP 246. A petition for dissolution of their marriage had been filed. 1RP 238. ABR consumed five or six rum and coke drinks while at the bar. 1 RP 244. ABR danced and conversed with other men at the bar. 1RP 244-247. ABR's husband left her at the bar. 1RP 247.

At one point, presumably after 1am on June 13, 2010, ABR left the bar with another man but returned to the bar when she discovered the

gentleman she left with took her to a nearby hotel. 1RP 247-248. ABR left when they reached the second floor of the hotel. 1RP 244. ABR thought the two of them were going to a different bar because Kelvin G's Tropic Blast had stopped serving alcohol. 1RP247-248. ABR returned to Kelvin G's Tropic Blast and asked the bouncer there to call a cab for her. 1RP 248. Mr. Gregory, who was employed as a taxi driver, was on duty that evening/early morning. Id. Mr. Gregory was in his taxi outside of the bar at the time ABR was seeking a taxi to take her home. Id. ABR got into the front seat of the taxi. 1RP 249. The two drove towards ABR's residence. Id.

ABR and Mr. Gregory have differing recollections of what transpired while they were in the taxi during the early morning on June 13, 2010. ABR recalled Mr. Gregory asked her questions. 1RP 250-252. ABR conversed with Mr. Gregory and described the events of the evening, including her encounters with other gentlemen that evening. 1 RP 275. ABR had no concerns about telling Mr. Gregory about what happened that evening include telling him she had been dancing that night with gentlemen who wanted to have sex with her. ABR recalled telling Mr. Gregory she got into an argument with her husband earlier that evening and the two of them were divorcing. 1RP 252. ABR recalled Mr. Gregory parked the vehicle in bushes by Safeway. 1 RP 252. ABR testified she did not know where they were. 1 RP 253. Next, ABR recalled asking Mr.

Gregory "what are we doing here?". 1 RP 253. She testified Mr. Gregory responded by saying they were "taking a break" and he then started to rub her left leg. 1RP 253. ABR testified that next Mr. Gregory put her hand on top of his pants, on his penis, outside of his pants. 1RP 253-254. ABR did not say anything to Mr. Gregory. 1RP 254. ABR testified she did not say anything to Mr. Gregory because she was nervous and scared. 1RP 254. Again, while that contact was occurring, ABR did not say anything to Mr. Gregory. 1RP 255. While this contact was occurring ABR did not push Mr. Gregory or do anything to prevent further contact from occurring. Id. ABR indicated she was scared. Id.

ABR testified next Mr. Gregory got out of the vehicle and walked to the other side of the cab. 1RP 255. During questioning by the prosecutor, ABR recalled Mr. Gregory grabbed her and put her into the backseat of the cab, which was a minivan. 1RP 256-257. Upon questioning of defense counsel ABR said that Mr. Gregory guided her to the back seat of the vehicle and she went to the back seat under her own power. 1 RP 281. ABR "walked and got into the backseat.". 1 RP 281. At the time the two of them moved to the backseat ABR told Mr. Gregory that she was having her period but did not tell him that she did not want to have further contact with him. Although ABR testified that in her mind she did not want to have sex with Mr. Gregory because she did not know him, at no time did she tell that to Mr. Gregory. 1 RP 282.

ABR did not cry out or scream for help while this was going on. 1RP 257. ABR was wearing a dress with short tights. 1RP 258. ABR testified Mr. Gregory attempted to pull down her underwear. Id. ABR asked Mr. Gregory what he was doing. Id. At the time these events where occurring, ABR testified she was thinking she just wanted to get it over and go home. 1RP 259. Mr. Gregory attempted to perform oral sex on ABR. Id. ABR pushed Mr. Gregory's head away from the area of her vagina and told Mr. Gregory she was having her period. 1RP 259-260. Mr. Gregory did not resist ABR pushing his head back. 1RP 260.

Next, ABR recalled Mr. Gregory pulled his penis from his pants, opened her legs, pulled out her tampon and proceeded to have sex with her. 1RP 261. Again, ABR did not say anything to Mr. Gregory or attempt to push him away while these acts where occurring. 1 RP 262. ABR did not say anything to Mr. Gregory while the intercourse was happening. 1RP 263. The intercourse lasted "five or less than 10 minutes." 1 RP 262. ABR and Mr. Gregory moved to the front seat of the vehicle after intercourse. 1RP 263-264. Mr. Gregory opened the vehicle doors for her. 1RP 264. ABR did not make any noise or attempt to attract attention for help. Id. Mr. Gregory assisted ABR to the front seat of the vehicle, but she moved to the front seat under her own power. 1 RP 286. After intercourse Mr. Gregory did not make any threats to ABR if she told anyone what had happened. Id. Although ABR had made previous statements indicating

she had rubbed Mr. Gregory's stomach, she did not recall that at the time of her testimony, but acknowledged it was possible. 1 RP 288-289. Mr. Gregory took ABR home. Id. During the ride home, Mr. Gregory asked ABR for her phone number. 1 RP 265. ABR gave Mr. Gregory a fictitious number. 1RP 265. ABR attempted to give Mr. Gregory money for the cab fare, but he refused to take money from her. 1RP 265. About five minutes after ABR arrived at her home, she went across the street to the residence of her in-laws. 1 RP 266-267.

During her encounter with Mr. Gregory at no time did ABR see any weapons, at no time was she restrained by Mr. Gregory, at no time did Mr. Gregory tell her she was not free to leave. 1 RP 277-278. Mr. Gregory never made any threats against ABR or her family. 1RP 280. At no time did Mr. Gregory raise his voice. Id. Mr. Gregory neither took ABR's cell phone or any of her personal belongings. 1RP 278. ABR never told Mr. Gregory she was scared. 1 RP 278. ABR never demanded Mr. Gregory take her home. Id. ABR made no attempts to get away from Mr. Gregory or leave the cab. 1RP 278-279, 280. ABR did not ask Mr. Gregory to stop touching her legs. 1 RP 279. ABR did not attempt to move Mr. Gregory's hand away from her. ABR did not indicate to Mr. Gregory in any way that she did not want him touching her. 1 RP 279. She did not tell Mr. Gregory that she did not want to touch his penis. Id. She did not try to pull her hand away from Mr. Gregory. Id.

Mr. Gregory testified at trial. 1 RP 306-324. Mr. Gregory recalled having a friendly conversation with ABR during the cab ride and ABR appeared to be friendly towards him. 1 RP 308-309. Mr. Gregory recalled that ABR held his hand during the ride as well for about five to ten minutes. 1RP 309. Mr. Gregory also recalled ABR kissed him, or they kissed each other while they were stopped at a traffic light. 1RP 310, 317. The two of them leaned towards the center of the vehicle to kiss each other. 1RP 317. After the kiss, Mr. Gregory asked ABR if she wanted to "fool around". 1 RP 310. ABR responded by saying yes. Id. After that conversation, Mr. Gregory pulled ABR's hand to his penis and released her hand. Id. ABR touched his penis for five to ten minutes. While that was occurring ABR was friendly towards Mr. Gregory. 1RP 311. ABR stopped rubbing his penis when Mr. Gregory pulled over in an alley across from Safeway. Id. After the vehicle stopped, Mr. Gregory opened the passenger door and the sliding door to the backseat area and ABR climbed into the backseat of the vehicle. Id. ABR laid down on the seat and Mr. Gregory pulled off her pants and underwear. 1RP 312. Mr. Gregory next attempted to perform oral sex on ABR. Id. ABR told Mr. Gregory to stop his attempt because she was having her period. Id. ABR did not indicate to Mr. Gregory that she did not want to continue their sexual activity nor did she make any attempt to push him away or tell him to stop. 1RP 312-313. Mr. Gregory interpreted ABR's actions to indicate

she did not want to engage in oral sex. 1 RP 323. When ABR asked him to stop his attempt to engage in oral sex, he did. Id. ABR pulled out her tampon and the two of them engaged in sexual intercourse. 1RP 313. Mr. Gregory recalled ABR telling him that the sex was good. Id. After the intercourse Mr. Gregory drove ABR home. Id. When they arrived at the residence ABR patted Mr. Gregory's belly and got out of the vehicle. 1 RP 314. After the encounter Mr. Gregory looked for the tampon but could not find it. 1 RP 321.

Mr. Gregory recalled speaking with Detective Birkenfeld on his boat at the marina. 1 RP 314-318. Initially Mr. Gregory told law enforcement that he did not touch ABR and she had paid him \$13 for the car ride. 1 RP 315. Later during the conversation Mr. Gregory admitted to having sex with ABR. Id. Mr. Gregory told Detective Birkenfeld that the sex was consensual. 1RP 318.

Deputy Hedstrom responded to investigate the reported rape. 1RP 9. Deputy Headstrom called a female deputy to speak with ABR. 1 RP 17. Deputy Gray arrived at the residence and spoke with ABR. 1RP 18. Detective Birkenfeld spoke with ABR at Harrison Hospital. 1RP 181-199. At the time Detective Birkenfeld spoke with ABR she appeared to be "a little bit upset". 1RP 182. The detective described in detail the events that occurred in the early morning hours of June 13, 2010 without objection from defense counsel 1RP 183-199. ABR was not under the influence of

any alcohol at the time the Detective spoke to her. 1RP 185. The conversation occurred at about six in the morning. 1RP 199. ABR described Mr. Gregory as having a big belly. 1 RP 188. The description of what ABR told the Detective was different in some aspects. Detective Birkenfeld testified ABR told him Mr. Gregory asked her if she was intoxicated 1RP 192. ABR did not describe that discussion during her testimony. 1 RP 192. ABR told the Detective that she stroked Mr. Gregory's penis and was not forced to do so. 1RP 212-213. The Detective also testified ABR told him Mr. Gregory kissed her when he came around to the passenger side of the vehicle. 1RP 194. Detective Birkenfeld also indicated that ABR reported crying a little bit. 1RP 194.

Detective Birkenfeld testified that ABR told him she just wanted to go along with Mr. Gregory's actions to avoid getting hurt any worse. 1RP 197. Defense counsel asked Detective Birkenfeld questions regarding statements ABR made to him as well. 1RP 211-214. Defense counsel did confirm that ABR told the Detective that Mr. Gregory did not make any threats to her, did not attempt to harm her or act violently towards her. 1RP 211. Additionally, the Detective stated ABR told him that she did not ask Mr. Gregory to stop and never told Mr. Gregory that she did not want to have sex with him, and she at no time fought off Mr. Gregory's advances. 1RP 211-212

After speaking to ABR, Detective Birkenfeld spoke to Mr. Gregory.

1RP 200-207. Although Mr. Gregory initially denied having sexual contact with ABR, he did admit to the contact later in the conversation. 1RP 203-204. Detective Birkenfeld searched the cab and located the used tampon under the driver's seat inside the vehicle. 1RP 208-209.

Sheila Morgan, the mother of ABR's husband also testified. 1RP 217-223. Ms. Morgan was allowed to testify as to what ABR told her the early morning of June 13, 2010 without objection of defense counsel. 1RP 218-223. Ms. Morgan testified ABR told her she had been raped by a taxicab driver. 1RP 220. Ms. Morgan was with ABR at the hospital. 1RP 222. Joseph Ray, ABR's husband also testified at trial. 1RP 224-239. Mr. Ray testified that he and ABR were doing separate things at the bar and he and ABR were in the process of separating or were thinking about separating. 1 RP 228. Mr. Ray had previously filed for a dissolution of their marriage. 1RP 238. ABR did not want to be around him that evening because she was mad at him. 1RP 230-231. The two of them had an argument at the bar and he believed ABR did not want to go home with him that night. 1RP 232. Mr. Ray did not see ABR and walked home. 1RP 233. Mr. Ray was allowed to testify that ABR told him she had been raped without objection from defense counsel. 1RP 236.

Deputy Hedstrom testified that he overheard ABR tell Deputy Gray that a taxi driver raped her. 1RP 18. Defense counsel did not object to the testimony. 1RP 19. Deputy Hedstrom produced a photo montage which

was presented to ABR 1RP 23, 25. The photo montage was first produced in black and white. Id. ABR had difficulty with an identification so the montage was reproduced in color. 1RP 25. Deputy Gray also testified at trial, 1RP 29-85. Deputy Gray indicated ABR was upset at the time she spoke with ABR. 1RP 35-36. Deputy Gray testified that ABR told her she had been raped by a taxi driver named Mark. 1RP 37. Defense counsel did not object to that testimony. 1RP 37. The description of the events at issue which ABR provided to Deputy Gray varied from the statements provided to others. ABR told Deputy Gray she had consumed four to six rum and coke drinks. 1RP 42. Deputy Gray testified as to ABR's description of the events in detail without objection of defense counsel. 1RP 42-78. Deputy Gray questioned ABR both at her in-law's residence and at the hospital. 1RP 46. Deputy Gray reported ABR told her that when she realized the taxi was not going in the direction of her home she told Mr. Gregory he was going the wrong way. 1RP 45.

Deputy Gray testified ABR told her at the time Mr. Gregory pulled off the road by Safeway he told her they were going to talk. 1RP 45-55. ABR also told the Deputy that Mr. Gregory kissed her on the mouth while he touched her legs. 1RP 55-56 ABR told the Deputy at that point she pushed Mr. Gregory away. ABR reported to the Deputy that Mr. Gregory told her that he wanted to have sex with her. 1RP 57. ABR told Deputy Gray that all of the contact occurred in the front seating area. 1RP 59.

ABR also told the Deputy that she responded to Mr. Gregory having intercourse with her by resisting and attempting to push him off. 1RP 59. After the intercourse, ABR told the Deputy that Mr. Gregory told her he was trying to protect her at the bar. 1RP 61. Deputy Gray spoke with ABR again at the hospital, the time of that contact was no later than 8:00am. 1RP 66. ABR had calmed down by that time. 1RP 67. ABR was not talkative at that time. 1RP 68. Deputy Gray was present when ABR looked at the first photo montage prepared. 1RP 70. Using that montage ABR identified an individual other than Mr. Gregory as the perpetrator. Id. An hour or so later ABR was presented with a color version of the montage. 1RP 72. ABR identified Mr. Gregory from the second photo montage. 1RP 73.

Nora Sullivan is employed as a sexual assault nurse examiner for Harrison Hospital. 1RP 108. Ms. Sullivan was called in to see ABR early the morning of June 13, 2010. 1RP 113. Ms. Sullivan lives on Vashon Island, so it takes her some time to reach the hospital. Id. ABR was upset when Ms. Sullivan saw her. 1RP 115. Ms. Sullivan described in detail the statement of the events at issue provided to her by ABR. 1RP 118-146. Defense counsel did not object to the testimony. Id. ABR told Ms. Sullivan that initially she put her left hand on Mr. Gregory's penis then he opened his pants and put her hand on his penis. 1RP 119. ABR told Ms. Sullivan

she rubbed Mr. Gregory's belly so he would not hurt her and take her home.

IV. Argument

A. Mark Gregory's right to effective counsel was violated. As a result of counsel's deficiencies, he did not receive a fair trial.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App 406, 410, 907 P.2d 310 (1995). Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a defendant must prove the representation fell below an objective standard of reasonableness under professional norms and a reasonable possibility exists that but for counsel's error, the result would have been different. *State v. Rice*, 118 Wn.2d at 888-89. The Court starts with the presumption that counsel's representation was effective. *State v. Hendrickson*, 129 Wn.2d.61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel for failure to object, the defendant must show the absence of a legitimate or tactical reason for not objecting, and that the trial court would

have sustained the objection if it had been made, and the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn.App 575, 578, 958 P.2d 364 (1998).

1. Defense counsel's failure to object to the admission of evidence of statements ABR made to law enforcement, the SANE nurse, and family members was ineffective assistance of counsel. As a result of counsel's deficiencies, Mr. Gregory did not receive a fair trial.

Throughout the trial law enforcement, the SANE nurse and ABR's family members provided testimony describing statements ABR made to them during both direct and cross examination regarding her description of the events at issue. Throughout trial defense counsel failed to object to the admission of ABR's statements to others. The hearsay statements of ABR presented through law enforcement and the SANE nurse was different in many aspects from the testimony presented by ABR. Those inconsistencies will be addressed below.

To prevail on a claim of ineffective assistance of counsel, Mark Gregory must establish counsel's performance was deficient. In this case, counsel's failure to object to evidence of hearsay was deficient because the evidence would have been excluded under ER 801. The statements ABR made to law enforcement, the SANE nurse and ABR's family members were hearsay. Hearsay is defined in *ER 801(c)* as: "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted".

ER 801(c)

The second test to show ineffective assistance of counsel is to demonstrate a reasonable possibility exists but for the error of counsel, the outcome of the trial would have been different. *State v. Rice*, supra. In this case the evidence shows that but for the admission of the improper evidence, Mark Gregory would not have been found guilty of the charges. The allegations made by ABR indicating Mr. Gregory raped her was described again and again by the majority of the witness during the course of the trial. The erroneous admission of the evidence led to a conviction in this matter.

The statements of ABR to law enforcement, the SANE nurse, and family members are clearly hearsay. The statements were offered to prove Mr. Gregory was involved in appropriate sexual touching and or intercourse with ABR without her consent. The statements attempted to prove the crimes charged. Therefore, the statements were offered to prove the matter asserted. An objection to the hearsay would have been sustained.

As previously indicated, the testimony of what ABR said to others differed from the testimony ABR presented at the time of trial. Those inconsistencies are significant in both quantity and quality. Most of the inconsistencies made the events to be far worse than ABR testified to at the time of trial. ABR did not indicate Mr. Gregory kissed her, different than Detective Birkenfeld's description of ABR's statement of events. 1RP

194. ABR did not testify she cried while Mr. Gregory touched her legs. 1 RP 194-195. ABR did not testify that she went along with Mr. Gregory to avoid getting hurt any worse, which was attributed to her by Detective Birkenfeld. 1RP 197. The amount of alcohol ABR reported she consumed varied. She told Deputy Gray she consumed four to six drinks. 1RP 42. ABR testified she had five to six rum and coke drinks. 1RP 244. ABR told Deputy Gray that when she realized she was heading towards a hotel with a man outside the bar, she left to return back to the bar. 1RP 43. However, ABR testified she turned back to the bar when she was on the second floor of the hotel. 1RP 273, 275 During her testimony, ABR did not tell Mr. Gregory that he was going the wrong way as Deputy Gray testified she had told her. 1 RP 24, 276-278. ABR's statements as to what Mr. Gregory said to her differed. For example, she told Deputy Gray, Mr. Gregory said they were going to talk, but she testified that Mr. Gregory said they were taking a break. 1RP 45-55, 277. ABR also told Deputy Gray that Mr. Gregory indicated he was protecting her at the bar, but ABR did not testify as such at the time of trial. 1RP 61.

ABR's description of any kissing varied as well. 1RP 56, 289. During trial ABR stated no kissing occurred. 1RP, 289. ABR's description of her actions was not consistent. ABR told Deputy Gray that she pushed Mr. Gregory away from her when he touched her leg and kissed her. 1RP 56. However, ABR testified she did not push Mr. Gregory away from her.

1RP 56. ABR's statements regarding what Mr. Gregory told her was inconsistent. ABR told Deputy Gray that Mr. Gregory told her he wanted to have sex with her. However, she did not testify as to that statement at the time of trial. The timing of when she touched Mr. Gregory's penis was not consistent. ABR told Ms. Sullivan that Mr. Gregory opened his pants and placed her hand directly on his penis, but her testimony at trial was that she put her hand on Mr. Gregory's penis over his clothes. 1RP 119, 279. ABR's statements regarding where the contact took place was also inconsistent. ABR told Deputy Gray that contact occurred in the front seating area but, at the time of trial, she testified that the contact occurred in the backseat. 1RP 59, 281.

ABR told Deputy Gray that she resisted and attempted to push Mr. Gregory off of her when the intercourse was occurring, but ABR testified that she made no attempts to resist or indicate to Mr. Gregory that she did not want to have sex with him. 1RP 59, 282. Deputy Gray also indicated ABR was in fear for her life. 1RP 60. ABR did not testify that she was in fear for her life. ABR's testimony at trial was that she did not specifically recall whether she rubbed Mr. Gregory's belly. 1RP 288. However, Ms. Sullivan testified that ABR reported rubbing Mr. Gregory's belly so he would not hurt her and would take her home. 1RP 121. That testimony was not consistent with ABR's testimony at the time of trial. ABR told Ms. Sullivan that Mr. Gregory put his mouth on her vagina. 1RP 130.

However, ABR testified at trial that Mr. Gregory attempted to have oral sex with her but she asked him to stop and he did. 1RP 284.

Reversal of the conviction is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142.

The evidence was prejudicial to Mark Gregory and likely improperly suggested to the jury that he was guilty of the crimes he was charged with. The result of the trial would have been different if the objections, and inappropriate lines of inquiry into what ABR had told law enforcement the SANE nurse, and family members, had been made or the repeated questioning during cross examination had not been presented. The effect of the repeated hearsay testimony was twofold. First, the testimony of law enforcement improperly bolstered the credibility of ABR. The credibility of ABR was key to this case. In this case, ABR and Mr. Gregory had different perspectives as to whether the sexual contact between them was consensual. ABR has a motive to claim that Mr. Gregory raped her to save her troubled marriage. At the time of trial, ABR and her husband were living together. The jury likely did not consider issues with ABR's credibility due to the repeated hearsay testimony which consistently repeated statements made by ABR. Secondly, the repetition of ABR's version of events unduly emphasized her testimony as it was

repeated through several witnesses during the trial. The jury may have believed the hearsay accounts provided through law enforcement and the SANE nurse rather than ABR. The hearsay testimony painted a far worse picture of the events in question than the direct testimony of ABR at trial.

The evidence would not be admissible under any hearsay exceptions, such as an excited utterance under *ER 803(a)(2)*. Since no objection to the admission of the statements were made, the tests required to determine if evidence is admissible as an excited utterance were not conducted in this matter. Under *ER 803(a)(2)* a statement may be admitted as a excited utterance. *ER 803(a)(2)* states as follows: "*Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *ER 803(a)(2)*. Before the trial court may admit a statement as an excited utterance, the proponent must satisfy three closely-related requirements; (1) a startling event or condition must have occurred, (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement must relate to the startling event or condition. *State v. Williams*, 137 Wn.App 736, 154 P.3d 322 (2007)

Since no objection was made to the admission of the statements, the Court did not establish the purpose for which the evidence was admitted as required. It is not clear from the testimony the amount of time

that transpired between the alleged events and the interviews. Although at times witnesses testified that ABR appeared to be upset, there is insufficient evidence to determine ABR was under the influence of the alleged events at the time the statements were made. Not all statements made while a declarant is upset fall within the excited utterance exception to the hearsay rule. In this case ABR may not have been under the influence of the event at the time the statements were made.

The trial court would not have admitted the evidence of ABR's hearsay statements. The evidence was presented to the jury by virtue of defense counsel's ineffective assistance. Defense counsel made no objection to the admissibility of the statements which were raised throughout the trial both through direct and cross examination.

No legitimate or tactical reasons existed for the failure to object to the evidence of ABR's statements made to other individuals. As argued above, the evidence of the statements would have been excluded from the trial if an objection had been made.

Reversal of the convictions is required. It is within reasonable probabilities that had the error not occurred the outcome of the trial would have been materially effected. *State v. Alams* 93 Wn.App. 754, 970 P.2d 367 (1999), *review denied* 138 Wn.2d 1014, 989 P.2d 1142. In this case reversal is appropriate. The effect of the evidence of the statements was to both bolster the credibility of ABR and repeated ABR's version of

events throughout the trial. This evidence influenced the jury . This Court should reverse the convictions entered in this matter.

B. The trial court violated Mr. Gregory's right to due process when it entered a judgement of conviction for offenses unsupported by substantial evidence.

The standard for examining a sufficiency of the evidence claim is outlined in the previous section and will not be repeated here. "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1979) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.,2d 227, 228 (1970)). Mere possibility, suspicion, speculation, conjecture or even a scintilla of evidence is not substantial evidence. *State v. Moore*, 8 Wn. App. 1, 499 P.2d 13 (1972).

1. The evidence presented was insufficient to support a finding of guilt on the charge of Rape in the Third Degree.

Mark Gregory was charged with Rape in the third degree. CP 67-70. The elements of that charge are set forth in RCW 9A.44.606 which states as follows:

- 1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person, not married to the perpetrator:
 - (a) Where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or

conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

RCW 9A.44.606

The evidence presented at trial did not prove Mr. Gregory committed this offense. Specifically, the evidence did not show that ABR clearly expressed a lack of consent to the sexual activity as required to warrant a conviction.

At no time did Mr. Gregory tell her she was not free to leave. 1 RP 277-278. Mr. Gregory never made any threats against ABR or her family. 1RP 280. At no time did Mr. Gregory raise his voice. Id. Mr. Gregory neither took ABR's cell phone or any of her personal belongings. 1RP 278. ABR never told Mr. Gregory she was scared. 1 RP 278. ABR never demanded Mr. Gregory take her home. Id. ABR made no attempts to get away from Mr. Gregory or leave the cab. 1RP 278-279, 280. ABR did not ask Mr. Gregory to stop touching her legs. 1 RP 279. ABR did not attempt to move Mr. Gregory's hand away from her. ABR did not indicate to Mr. Gregory in any way that she did not want him touching her. 1 RP 279. She did not tell Mr. Gregory that she did not want to touch his penis. Id. She did not try to pull her hand away from Mr. Gregory. Id.

ABR did tell Mr. Gregory to stop his attempt to perform oral sex on her. 1RP 283. As a result, Mr. Gregory stopped any attempts to perform oral sex. ABR did not tell Mr. Gregory that she did not want to have sex

with him. Id. ABR did not say anything to Mr. Gregory when he took his pants down. 1 RP 284. At no point during the sexual intercourse did ABR tell Mr. Gregory to stop. 1 RP 285. ABR did not indicate to Mr. Gregory in any way that she did not want to have sex with him. 1RP 285. For these reasons, the evidence even when viewed in the light most favorable to the State, does not support a finding of guilt on the charge of rape in the third degree. This court should reverse the conviction entered in this matter.

2. The evidence presented was insufficient to support a finding of guilt on the charge of Assault in the second degree with sexual motivation.

Mark Gregory was also charged with the crime of criminal assault in the Fourth Degree with Sexual Motivation. The elements for that offense are found in RCW 9A.36.041(2) which states as follows:

- (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
- (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.041(2)

The information included a special allegation of sexual motivation. Sexual motivation is defined in *RCW 9.94A.030(46)*. "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. *RCW 9.94A.030(46)*

In this case the evidence did not support a conviction for assault in the fourth degree with sexual motivation. The testimony of ABR did not

indicate that she showed the advances of Mr. Gregory were unwelcome. The two of them conversed in the cab without issue. The contact turned physical and sexual in nature. In closing arguments, the prosecutor suggested the assault in the fourth degree charge was based on the touching of ABR's leg and grabbing of ABR's hand and the rubbing of Mr. Gregory's penis with ABR's hand. 1RP 355. It was Mr. Gregory's belief that he and ABR were engaged in consensual sexual activity and ABR did not indicate anything to the contrary to him. Mr. Gregory did not have the intent to touch ABR in a harmful and/or offensive manner. Touching in the course of consensual sexual activity cannot be a basis for a charge of assault in the fourth degree. The touching was for the purpose of sexual gratification. However, the evidence presented does not prove that an assault in the fourth degree occurred. This Court should reverse the conviction entered against Mr. Gregory.

C. The trial court improperly imposed a maximum sentence under RCW 9.94A.507.

In this case the Judgment and Sentence includes a provision for sentencing Mr. Gregory to a maximum term of confinement with DOC for the remainder of his life. CP 147. This was in error. RCW 9.94A.507 sets forth as follows:

- 1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
 - (a) Is convicted of:

- (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;
 - (ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnaping in the first degree, kidnaping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or
 - (iii) An attempt to commit any crime listed in this subsection (1)(a); or
- (b) Has a prior conviction for an offense listed in *RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

RCW 9.94A.507.

The date of Mr. Gregory's alleged offenses was June 12-13, 2010. CP 67-70. When imposing a sentence under Washington's Sentencing Reform Act (SRA), the court's authority is limited to the sentence granted by statutes in effect at the time the offense was committed. *RCW 9.94A.345; In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007); *State v. Smith*, 114 Wn.2d 665, 673-75, 30 P.3d 1245, 39 P.3d 294 (2001). The imposition of a proper sentence is a question of law which is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

In this case Mr. Gregory was given a maximum sentence of life pursuant to RCW 9.94A.507 for the charge of rape in the third degree. CP

147. That sentence was improper. RCW 9.94A.507 does not apply to Mr. Gregory's conviction.

V. Conclusion

A review of the record of the proceedings in this matter shows that defense counsel was ineffective on a number of occasions. Mr. Gregory did not receive a fair trial as a result of the ineffective representation. Additionally, the evidence did not prove Mr. Gregory committed the crime of either rape in the third degree or assault in the fourth degree. Mr. Gregory respectfully requests this court to reverse the convictions entered against him in this matter for the reasons stated above. At the very least, this matter should be remanded to correct the sentencing error.

Respectfully submitted this 19 day of March , 2012.



MICHELLE BACON ADAMS

WSBA No. 25200

Attorney for Appellant

NO. 42658-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARK GREGORY,

Appellant.

DECLARATION OF MAILING

I, Alicia Lanoue, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of the Appellant in the above-captioned case sent electronically, hand-delivered or mailed as follows:

Brief of the Appellant Electronically To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Copy of Brief of the Appellant Hand-Delivered To:

Randall Sutton
Kitsap County Prosecuting Attorney's Office

614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Brief of the Appellant Mailed To:

Mark Gregory, DOC#327673
C/o Monroe Correctional Complex
PO Box 777
Monroe, WA 98272

DATED this 19th day of March, 2012, at Port Orchard, Washington.

A handwritten signature in cursive script, appearing to read "Alicia Lanoue", written over a horizontal line.

Alicia Lanoue
Legal Assistant

KITSAP COUNTY PUBLIC DEFENDER

March 19, 2012 - 5:40 PM

Transmittal Letter

Document Uploaded: 426587-Appellant's Brief.pdf

Case Name: State of Washington v. Mark Gregory

Court of Appeals Case Number: 42658-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Alicia A Lanoue - Email: alanoue@cmpyd.com

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us