

FILED

JUL 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 289851-III
Consolidated With
NO. 289869-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

TAYLOR ROSS LANDRUM, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-00749-2
Consolidated With
No. 08-1-01051-5

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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COUNTER STATEMENT OF FACTS

The defendant repeatedly got women in his truck, drove them to isolated areas and either attempted to force himself on them or succeeded in doing so.

Ashley Monlux on July 4, 2006:

On July 3, 2006, Ashley Monlux was walking along a street. (RP 528¹). Although she did not know the defendant, he drove up to her, stopped, and started talking to her. (RP 529). The defendant asked her about whether she had a job and if she was interested in making money. (RP 529-30). Ms. Monlux felt the conversation had turned sexual; she said “no.” (RP 530).

On the following day, July 4, 2006, the defendant drove by Ms. Monlux’s location several times². (RP 531). Ms. Monlux needed to go somewhere, and the defendant and Ms. Monlux made contact when the defendant again drove by her location. (RP 531). Instead of going in any particular direction, the defendant drove out into a country area outside of Pasco. (RP 532). He got out of his truck and asked Ashley to go with him.

¹ Volumes I – VI of the Transcript of the Verbatim Report of Proceedings hereinafter referred to as “RP.”

² It is unknown how the defendant knew where Ms. Monlux was staying; she had not told him where she lived. (RP 531).

(RP 533). Ms. Monlux stated they walked a long way, with her getting more concerning, when the defendant grabbed her. (RP 533). He made sexual advances to her and stated he was going to have sex with her. (RP 533).

As a ruse, Ms. Monlux told the defendant they would be more comfortable in his truck. (RP 533). The defendant accepted this suggestion and let go of Ms. Monlux. (RP 534). When Ms. Monlux started walking away, the defendant grabbed her again, and threatened her with a knife. (RP 534). Ms. Monlux was able to get away. (RP 534). Ms. Monlux jumped over a fence and hailed a ride. (RP 534).

Christina Hutchins on August 21, 2006:

On August 20, 2006, Christina Hutchins went out with her friend, Brianna, on her 21st birthday. (RP 539). They both drank, and Brianna became “extremely” intoxicated, lost her car keys, and eventually passed out. (RP 541-43). The defendant, who Ms. Hutchins had met twice before, offered Ms. Hutchins and Brianna a ride home. (RP 540, 542).

Once the women were in his truck, the defendant claimed he knew a shortcut to their residence and drove out to a remote location. (RP 542-43). The defendant stopped the engine, put his hands on Ms. Hutchins’s shoulders, and pushed her down in the seat. (RP 543-44). Ms. Hutchins told the defendant, “get the f... off me.” (RP 544). The defendant

responded that if she “didn’t do it” then he would make her life a living hell around where she lived. (RP 545). He told Ms. Hutchins to call the police because they would not believe her. (RP 545).

Ms. Hutchins tried hard to get the defendant off her, and she was able to get out of his truck. (RP 546). Ms. Hutchins then yanked Brianna out of the truck, and they trudged a mile to a mile and a half to Ms. Hutchins’s house. (RP 547, 550).

Jean Smith on August 21, 2008:

On August 21, 2008, Jean Smith was working at the Benton-Franklin County fair. (RP 564). Ms. Smith got off work around 8:00 p.m., decided to go to a dance in Pasco with some friends, and had some drinks. (RP 564-65, 570). The defendant, who was in the group, offered Ms. Smith a ride. (RP 566).

After Ms. Smith got in the defendant’s truck, the defendant started driving, but he went the wrong way. (RP 567). The defendant claimed he knew a shortcut, but he ended up driving down a country road. (RP 567). The defendant pushed Ms. Smith up against the truck door, told her she was a “dirty little cunt” and that he would have his way with her. (RP 567-68).

Ms. Smith was able to jump out of the truck, although in doing so she left her backpack in the defendant's vehicle and hit her head pretty hard. (RP 569).

Jennifer Reyes on August 29, 2008:

On August 28, 2008, Jennifer Reyes, who was living in Toppenish, came to Kennewick with her cousin, Rosalyn, and Rosalyn's fiancé, Jay Legarde, and went to a casino. (RP 589-90). Ms. Reyes had some drinks at the casino and became "highly" intoxicated. (RP 591). Sometime after 2:00 a.m., Ms. Reyes was sitting by herself. (RP 591, 602). The defendant approached her, and offered to drive her to a Dennys for breakfast. (RP 591, 593). Ms. Reyes accepted the offer, with the understanding that Rosalyn and Jay would follow them to Dennys. (RP 594).

Once Ms. Reyes got in the defendant's truck, the defendant offered her money for sex. (RP 594). He started driving fast in an effort to lose Rosalyn and Jay. (RP 595). The defendant told Ms. Reyes he had a gun, and drove to a secluded area. (RP 595-96).

At that point, Rosalyn and Jay caught up to the defendant. (RP 596). Ms. Reyes jumped out of the defendant's truck, leaving her purse and shoes therein. (RP 598).

Carolyn Strand on October 10, 2008:

On October 10, 2008, Carolyn Strand was in a bar in Richland, Washington, where she met the defendant for the first time. (RP 679-80). Ms. Strand wanted a lighter for a cigarette, and the defendant said he had one in his truck. (RP 680). Ms. Strand accompanied the defendant to his truck, but initially kept her feet out of the passenger door. (RP 681). The defendant offered to let her warm up in his truck, and turned the heater on. (RP 680, 682). Ms. Strand then put her legs in the truck and the defendant immediately took off fast, causing the passenger door to slam. (RP 682). The defendant drove into an alley where he said he had a knife, grabbed her leg and shirt and said, "you need to lay down, you fat bitch, because . . . I'm going to do this." (RP 682, 684). The defendant told Ms. Strand "you're going to get what's coming to you." (RP 686). The defendant tore off Ms. Strand's undergarment, put his weight on her chest, and had sex with her against her will. (RP 686-87).

Ms. Strand was eventually able to grab the door handle and fall out of the truck. (RP 688). She ran into a bar to get help, leaving her pants in the defendant's truck. (RP 689).

The Defendant's explanations:

Regarding Ms. Hutchins: The defendant told police that he offered Ms. Hutchins a ride home, and asked for a date. (RP 555). Ms. Hutchins

said she would not date him because he was “butt ass ugly.” (RP 556). Ms. Hutchins then started crying, for some reason unknown to the defendant. (RP 556).

Regarding Ms. Reyes: The defendant initially denied having any female in his truck on the night of August 29, 2008. (RP 623). The defendant stuck to that story even after the police found Ms. Reyes’ identification and shoes in the defendant’s truck. (RP 624). The defendant eventually stated to police that he was approached by a prostitute, but that he rejected her offer, saying “I’ve never paid for sex.” (RP 625).

Regarding Ms. Strand: The defendant claimed that he and Ms. Strand had consensual sex, and thereafter, the female [Ms. Strand] asked the defendant for money. (RP 738, 744). Although the defendant claimed Ms. Strand was engaging in prostitution, Ms. Strand wanted the defendant to drive to an area where there were security cameras. (RP 739-40). For some reason unknown to him, Ms. Strand just “freaked out.” (RP 735).

The defendant solicits perjury from a cellmate:

Once charged and in custody, the defendant started writing notes to cellmate, Robert Pyke. (RP 644). Although Mr. Pyke did not know Ms. Strand, the defendant asked Mr. Pyke to discredit her. (RP 650, 653). For

example, he wrote to Mr. Pyke:

I understand all we need is a couple guys to come forward saying that she told them that she said she was making all this up to get some cash. They could say we were told by her that she is doing this because she wants money and the sex was consen[s]ual. If they contact whomever then I could get off same with the Indecent Liberties one to. (Ex. 5; RP 649).

We need to come up with a story. We could say that your friends know this girl from selling pot to her and she one night was telling a group of people about the episode and your friends could say that they felt obligated to come forward. (Ex. 6; RP 651).

I need your friend to say that he overheard Carolyn Strand say that she set up a guy named Taylor Landrum to collect money. That the sex was consen[s]ual and he took off because she said she had a pimp that she made the whole thing up. And that she stands out front of the Town Crier prostituting herself all the time. Which Pyke you told me. When can you tell him. (Ex. 7; RP 652).

All I need is for you to say is that she told you that she told you that she set up some guy named Taylor who's a rodeo clown that you partied with her and she flat out said "I said he raped me because how else was I going to explain why I was naked in an alley. Were you Pyke locked up Oct. 31st you could tell her she told you H[a]lloween night you know her because she prostitutes herself out and you sell her dope. (Ex. 8; RP 654).

I know her I sell her dope she flat out told me Halloween night that she set up a guy named Taylor who [is] a rodeo clown because he left her naked in an alley after they had sex that when he took off she didn't know how else to explain how she became naked. So she said she said he raped me so she wouldn't look like a hooker to the cops and when I mentioned money he took off! Or something[.] (Ex. 8; RP 654).

ARGUMENT

Response to Defendants Argument Number 1 (The Court Erred in Ordering a Single Trial on the 2006 and 2008 Complaints³.) (App. Brief, 6).

Facts relating to the issue: The following is a timeline of key events:

July 15, 2008: The State charges the defendant by Information No. 08-1-01051-5, of Rape in the Second Degree. The victim is CS. (CP 106).

July 18, 2008: The State charged the defendant by Information No. 08-1-00749-2, of Attempted Indecent Liberties. The victim is CRH. (CP 1).

August 28, 2009: The Court declines to join the Informations for trial; however, the Court notes that it is not addressing the issue of cross admissibility, which may be addressed at a future hearing. (RP 83).

September 16, 2009: The States files Amended Information No. 08-1-01051-5, charging the defendant with seven additional counts of Solicitation to Commit Perjury. (CP 110-113).

September 25, 2009: In a hearing pursuant to ER 404 (b), the court finds the testimony of Ms. Monlux, Ms. Smith, and Ms. Reyes are admissible. (CP 149-152).

September 28, 2009: The Court holds that the allegations from Ms. Strand, Ms. Hutchins, Ms. Monlux, Ms. Smith, and Ms. Reyes are cross-admissible. (RP 444-453). The Court notes that separating the Informations will have no practical effect on the jurors' ability to render a fair and impartial verdict; therefore, the Informations will be consolidated. (RP 462).

1. THE TRIAL COURT DID NOT ERR IN ORDERING A SINGLE TRIAL.

A. The defendant must prove that the trial court abused its discretion.

A defendant who seeks to sever offenses has the burden of showing that joinder is so prejudicial that it outweighs the need for judicial economy. *State v. Williams*, 156 Wn. App. 482, 234 P.3d 1174 (2010). On appeal, the defendant must prove that the trial court abused its discretion in refusing to sever charges.

B. The defendant has not demonstrated that the trial court abused its discretion.

³ This relates to Defendant's assignments of error numbers 1 and 16.

1. **The interest in judicial economy was high.**

The defendant does not contest that the trial court correctly held that evidence that the defendant sexually abused Ms. Monlux, Ms. Smith, and Ms. Reyes was cross-admissible. Further, the evidence that the defendant solicited Robert Pyke to perjure himself was cross-admissible. Thus, the majority of the witnesses in the two trials were identical; Ashley Monlux, Joan Smith, and Robert Pyke would have testified in both trials.

2. **The prejudice to the defendant was mitigated.**

Prejudice to a defendant can be mitigated by 1) the strength of the State's case, 2) the clarity of defenses as to each count, 3) an appropriate jury instruction, and 4) cross-admissibility of the evidence. Here, consideration of these factors is helpful to determine the amount of prejudice to the defendant.

3. **The cross-admissibility of the evidence is a big mitigator.**

- (a) *The defendant does not contest the ruling on the admissibility under ER404(b) of evidence from Ms. Monlux, Ms. Smith, or Ms. Reyes.*

The trial court noted that the cross-admissibility of the evidence resulted in no practical reason to sever the charges. The trial court was correct. The jury concerning Ms. Hutchins would hear evidence from Ms.

Strand, and vice versa. In addition, both juries would hear from Mr. Pyke, Ms. Monlux, Ms. Smith, and Ms. Reyes. There was no prejudice to the defendant as a result of the trial court's ruling on cross-admissibility.

The defendant's only contention on appeal is that the evidence regarding Ms. Strand and Ms. Hutchins was not cross-admissible.

(b) *The allegations from Ms. Strand and Ms. Hutchins are cross-admissible.*

- **The evidence is cross-admissible under ER 404(b) to show intent and a common plan.**

Intent: Ms. Hutchins was able to get out of the defendant's truck before he raped or had sexual contact with her; Ms. Strand was not. However, his intent was clear. The evidence that the defendant raped Ms. Strand is admissible in Ms. Hutchin's case to show that the defendant did not just intend to give her a good-night kiss. This is consistent with *State v. Myers*, 82 Wn. App. 435, 918 P.2d 183 (1996), where the defendant was charged with sexual exploitation of a minor. The State was properly allowed to introduce evidence of videos the defendant made depicting the genital areas of adults and children.

Common scheme or plan: In all of the cases of sexual misconduct, the defendant planned to get a woman in his truck, drive her to a secluded area, and then force himself on her. That was true of Ms. Monlux, Ms.

Smith, Ms. Reyes, as well as Ms. Strand and Ms. Hutchins. The trial court's ruling, looking only at Ms. Strand and Ms. Hutchins, is consistent with *State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (2009). Kennealy was charged with sexually abusing four children. The Court held that the evidence demonstrated a design to molest young children and was admissible as a common scheme or plan.

The defendant's emphasis on the passage of time between the assault on Ms. Strand and the assault on Ms. Hutchins is misplaced. See *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), for a case in which the Court found a common scheme or plan, although the crimes were 15 years apart.

- **The evidence is admissible under RCW 10.58.090.**

Although not argued before the trial court, this statute provides that even if evidence of the commission of another sex offense is not admissible under ER 404(b), it is admissible under the circumstances stated therein. If evidence is admissible on any theory, it is admissible. Whether or not the evidence from Ms. Hutchins and Ms. Strand, standing alone is cross-admissible under ER 404 (b), it is certainly cross-admissible under RCW 10.58.090.

- **Even if the allegations from Ms. Strand and Ms. Hutchins were not cross-admissible, severance would not be required.**

State v. Bythrow, 114 Wn.2d 713, 720, 790 P.2d 154 (1990), held that where the evidence of Count A would not be admissible in Count B, the cases need not be severed. The prejudice to a defendant must outweigh concerns for judicial economy. *Id.* at 722. Judicial economy essentially trumps the prejudice from a lack of cross-admissible evidence.

4. The strength of the cases also mitigates any prejudice.

The defendant's contention that this factor applies when there is a disparity in the strength of the cases is incorrect. As stated in *State v. Bythrow*, 114 Wn.2d at 722, FN4, the issue is similar to a harmless error analysis. If the cases are strong, then the results of the trial would not have been different if the counts were not joined. If the counts are weak, then a joinder may have caused a different result.

In any event, given the admission of the evidence from Ms. Monlux, Ms. Smith, and Ms. Reyes, and given the defendant's solicitation of perjury, the evidence on both sex offenses was strong. At the point that the trial court found that ER 404(b) applied to the additional allegations, the outcome on both counts, the State submits, was a forgone conclusion. Although the defendant did not complete the crime regarding Ms. Hutchins, his goal was as clear as it was with Ms. Strand.

Further, any prejudice was mitigated by the nature of the defense. The likelihood that joinder will cause a jury to be confused as to the accused defenses is very small where the defense is identical on each charge. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994). Here, the defenses were the same in both cases: the defendant was with Ms. Strand; the defendant was with Ms. Hutchins. The defendant's sexual intercourse with Ms. Strand was consensual. (RP 10/02/09, 85). The defendant did not do anything non-consensual with Ms. Hutchins. (RP 10/02/09, 78). Further, the trial was not too long. It started on Tuesday, September 29, 2009. (RP 526). Closing arguments were completed at 12:35 p.m. on Friday, October 2, 2009. (RP 01/02/09, 94). There is little danger that the jurors were unable to compartmentalize the evidence.

2. RESPONSE TO ARGUMENT NUMBER 2 (Sealing the Juror Questionnaires Violated Article 1, Section 22, and requires reversal)

The sealing does not require reversal of the convictions. Facts in the record that are relevant to the issue follow:

September 28, 2009: Trial is called with a jury pool of 65 individuals. (RP 466). Of those 65, there were 23 positive answers to the juror questionnaire. (RP 466). The defendant did not request transcription of the voir dire; there is no record of what happened on voir dire.

October 2, 2009: Closing arguments are completed. (RP 10/02/09, 93). The jury returns a verdict. (CP 80-85).

October 26, 2009: The Court, on its own motion, seals the jury questionnaires. (CP 86-87).

A. The defendant has not established there was a violation of his right to a public trial.

The defendant has not claimed, and cannot claim that any juror was questioned in closed court, that the defendant did not have access to the juror's questionnaires, that the defendant could not discuss those questionnaires with his attorney or members of the public, that any juror who answered the questionnaire positively was not examined about that answer in open court, and that any member of the public was excluded from the entire trial, including voir dire.

As held in *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (2011), where the defendant fails to show that the questionnaires were unavailable for public inspection during jury selection, it is fatal to a claim that the court violated the defendant's right to a public trial. Where there is no evidence that the questionnaires were used for anything other than jury selection, which proceeded in open court, and where the questionnaire may have been available for inspection by the public (the record was silent), the defendant failed to establish that his right to a public trial was

violated. This is consistent with *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009). Where the members of the venire completed questionnaires that included matters concerning their sexual histories, the questionnaires were provided to counsel and selection of the jury proceeded in open court, the defendant's right to a public trial was not violated. The issue is not whether the defendant's right to a public trial was violated; it is whether the public's right to open courts was violated by the sealing order.

B. While the trial court did not conduct a *Bone-Club*⁴ analysis regarding the order to seal the questionnaires, the length of time between the verdict and the sealing order is a distinction.

The State concedes that the Order Sealing Original Jury Question Forms was not done pursuant to *Bone-Club*. However, the State suggests that the length of time between the verdict and the sealing order distinguishes this case from others dealing with the issue of the public's right to an open trial. In *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (2011), the sealing was done three days after the jury was sworn. *State v. Lee*, 159 Wn. App. 795, 247 P.3d 470 (2011), also involved a three-day period between the time when the jury was sworn and the sealing order. The holding in *Lee* was the same: the defendant's

⁴ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

right to a public trial was not violated, but there should be a remand to reconsider the sealing order.

Coleman, 151 Wn. App. 614, also involved a three-day period. Here, the public had the opportunity to access the juror questionnaires well after the jury was sworn in and well after the verdict was rendered. The public had almost one month to review the questionnaires after the verdict.

The defendant argued, “[W]here, as here, juror questionnaires are ordered sealed at the same time that they are filed with the Clerk’s Office - the only location where public access to copies of case record, by any person for any reason, can legally occur -- the public is entirely barred from inspecting this written portion of the voir dire process.” (App. Brief at 20). The defendant’s statement is not correct; the sealing order was 28 days after the questionnaires were completed. More importantly, the statement touches on the reason courts are open: the public has a right to observe a trial as it occurs, thereby fostering public understanding and trust in the judicial system, assuring a fair trial, and giving judges the check of public scrutiny. See *Coleman*, 151 Wn. App. at 620.

The State suggests that by keeping the questionnaires open for 28 days after the start of the trial, the court did not violate the public’s right to open court.

C. In any event, the error in not holding a *Bone-Club* analysis is not structural; the remedy is remand to reconsider the order sealing the questionnaires.

The defendant suggests that *Coleman* was decided incorrectly and that the remedy for a violation should be reversal, not just remand for reconsideration of the sealing order. However, the Courts in *Lee, Terhan*, and *In re Stockwell*, 160 Wn. App. 172, 248 P.3d 576 (2011) have all followed the holding in *Coleman*. Sealing of the juror questionnaires is not a structural error. The holding in all those cases makes sense. The defendant's right to a public trial was not violated and he should not receive a windfall from a theoretical interest that some member of the public has in open courts. If this Court believes that the trial court erred in entering the sealing order, a remand for reconsideration of that order is appropriate.

3. RESPONSE TO ARGUMENT NUMBER 3 (The defendant's multiple convictions for solicitation of perjury must be reversed, dismissed and/or vacated).

The State concedes that the Solicitation of Perjury convictions should have been considered one unit of prosecution. This Court should remand to the trial court for dismissal of all but one of the convictions and a follow-up resentencing pursuant to those dismissals.

4. RESPONSE TO ARGUMENT NUMBER 4 (The defendant's second degree rape conviction must be reversed for individual or cumulative error)

There was no error, much less any error justifying reversal.

A. The Standard on review is abuse of discretion.

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court. *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997). The court's decision will not be reversed absent an abuse of that discretion. *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843(1998). An abuse of discretion occurs only if no reasonable person would take the view adopted by the court. *Id.*

B. The trial court did not abuse its discretion with either evidentiary ruling.

1. Evidence of prescription medication was properly denied.

The trial court did not abuse its discretion by sustaining Mr. Landrum's objection and concluding that the complainant could not be asked about any medications she was taking, absent "some offer of proof as to how these medications that she was taking, or is taking, or how that impacts her ability to either observe or to recall." (RP 697). This reasoning is firmly grounded in case law.

It is not disputed that asking whether or not Ms. Strand had been drinking alcoholic beverages on the night of question was permissible. A defendant's use of alcohol or other drugs at the time of the event in question is generally admissible. *State v. Clark*, 48 Wn. App. 850, 743 P.2d 822 (1987); *State v. Kendrick*, 47 Wn. App. 620, 736 P.2d 1079 (1987). Distinguished from asking Ms. Strand about drinking the night of the incident, however, is asking whether or not Ms. Strand was taking any medication or drugs. The standard applied for questioning a witness regarding his or her drug use is different than asking about alcohol. A witness's addiction or general use of drugs, unrelated to the specific events in question, is generally inadmissible for impeachment. See *State v. Tigano*, 63 Wn. App. 336, 818 P.2d 1369 (1991); *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004). The proponent must be able to offer some proof of the effects of the drugs upon the credibility of the witness. *State v. Tigano*, 63 Wn. App. at 336.

Mr. Landrum wanted to present evidence that Ms. Strand was taking the medications Diazepam and Lithium, noting they are drugs that have common side effects with alcohol. (RP 693). He argued that the complainant's testimony should be allowed because "most people know what that means" if the complainant says she is on a medication that interacts with alcohol. (RP 695). Mr. Landrum argued this evidence was

relevant to demonstrate Ms. Strand's state of mind and ability to remember the night of the attack. (693-94). However, Mr. Landrum did not have an expert witness, such as a doctor or nurse, to explain what these drugs were and any specific interactions with alcohol they may have, (695-697). A reasonable person could take the view that absent any expert evidence of how the medications may have interacted with alcohol, any questions to the witness about medications she was taking is inadmissible. Thus, the trial court's decision to sustain the objection to questioning the witness about any medications she was taking was not an abuse of discretion.

2. **The trial court did not abuse its discretion in allowing Officer Lee to testify that the victim's demeanor was consistent with having suffered a traumatic event.**

(a) *The defendant opened the door to this question by asking Officer Lee his impression of Ms. Strand's demeanor.*

By asking the following question, the defendant opened the door to inquiries about Officer Lee's impression of her demeanor:

(Mr. Metro to Officer Lee): Q: "Did you have an impression of what Ms. Strand's demeanor was when you were speaking with her?" (RP 723).

(b) *The defendant has mischaracterized the testimony as “an opinion on the believability of the rape complainant.”*

The question was whether Ms. Strand exhibited the demeanor of other individuals Officer Lee dealt with who had suffered a traumatic event. It was not whether Officer Lee believed Ms. Strand had been raped, whether her demeanor was consistent with other rape victims, or whether her demeanor gave her credibility. This is shown by the following Redirect Examination by Mr. Johnson:

Q And you’ve had a chance to interview victims and witnesses of traumatic events; is that fairly said?

A Yes.

Q Can you tell us whether or not Ms. Strand was consistent or inconsistent with those people you’ve seen?

Metro I’m going to object, Your Honor

Court Overrule the objection.

Q Again my question was -- well how many witnesses, victims of traumatic events have you had to deal with in your years as a police officer?

A Several. I was a detective with Pasco so it’s -- to give you a definitive number, I’m not positive. Specific to these types of crimes, say probably over a hundred.

Q And Mr. Metro asked you about Ms. Strand’s demeanor. And my question to you is, was it consistent or inconsistent with what you’ve seen in cases you’ve investigated?

A It’s consistent.

(RP 725-26).

The Court in *State v. Kirkman*, 159 Wn.2d 918, 929, 155 P.3d 125 (2007), a sexual abuse case, dealt with testimony from a doctor who performed a physical examination of the abuse victim. The doctor testified that “[t]he physical examination doesn’t really lead us one way or the other, but I thought her history was clear and consistent.” *Kirkman* argued that the doctor’s testimony was a comment on the victim’s credibility. *Id.* at 929-30. However, the Supreme Court held the doctor was not clearly commenting on the victim’s credibility. *Id.* at 930. The reasoning was that the doctor’s findings neither corroborated nor undercut the victim’s account. *Id.* The doctor did not say that the defendant was guilty or that he believed the victim’s account. *Id.* Another doctor’s testimony during the same trial was admissible because he never commented on whether he believed the victim or on the credibility or guilt of the defendant. *Id.* At 932.

Likewise, in this case the fact that Ms. Strand acted like she had suffered a trauma does not undercut the defendant’s case. Ms. Strand ran into a bar without her pants on, yelling for someone to call 911. (RP 689). The defendant admits that she “just freaked out.” (RP 735). The question is not whether Ms. Strand acted consistently with a trauma victim, of course she did. The defendant did not dispute it.

The real question is what caused this behavior. The defendant suggested that she was a prostitute who put on a show for her pimp. The State argued that the defendant raped her. The testimony that Ms. Strand's demeanor was consistent with a person who suffered trauma neither undercuts the defendant nor adds to her credibility.

(c) *In any event, the question and answer was harmless.*

With all due respect to Yogi Berra, this case was over before it was over. It was over after the State came into possession of the letters from the defendant soliciting perjury and when the court ruled that the testimony of Ms. Monlux, Ms. Reyes, and Ms. Smith was admissible.

**5. RESPONSE TO ARGUMENT NUMBER 5
(The evidence was insufficient to support the
“attempted sexual contact” and “non-marriage”
elements of the Attempted Indecent Liberties charge)**

**A. There was sufficient evidence to support the
“attempted sexual contact” element.**

1. Standard on Review:

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining the sufficiency of the evidence, circumstantial evidence is not to be

considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

2. The evidence meets this standard.

The jury had the following facts to consider regarding Ms. Hutchins:

- The defendant drove to a secluded area. (RP 542-43).
- He did not follow her instructions. (RP 542).
- He used force in holding Ms. Hutchins down. (RP 544-45).
- He threatened that Ms. Hutchins would have to have sex with him or he'd make her life a "living hell." (RP 545).
- The defendant claimed that Ms. Hutchins burst into tears for no reason. The jury could find this not to be credible. (RP 556).
- Ms. Hutchins had to pull her passed-out friend from the defendant's truck and walk between one and one and one-half miles to her residence. (RP 547, 550).

This was common conduct for the defendant culminating in the rape of Ms. Strand, and as shown by his actions with Ms. Monlux, Ms. Reyes, and Ms. Smith.

3. The defendant's emphasis on the lack of contact with an intimate part of the body is misplaced.

The crime of Attempted Indecent Liberties does not require sexual contact. It only requires a substantial step toward sexual contact by forcible compulsion. RCW 9A.28.020; RCW 9A.44.100(1)(a). A substantial step can include enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission. *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978); *State v. Sivins*, 138 Wn. App. 52, 64, 155 P.3d 982 (2007).

Mr. Landrum committed his substantial step when he induced Ms. Hutchins to enter his automobile. He took another step when he drove her to a secluded location, and again, when he held her down. Another substantial step was taken when he told Ms. Hutchins she would have to “do it” or he would damage her reputation. (RP 545). Any one of these acts constituted a substantial step toward committing the crime of Indecent Liberties, and indeed, perhaps even to the crime of Rape in the Second Degree, the crime Mr. Landrum was convicted of due to his attack on Ms. Strand.

- B. There was sufficient evidence, considering the evidence in the light most favorable to the State, for a rational jury to conclude beyond a reasonable doubt that the defendant and Ms. Hutchins were not married.**

The evidence for this includes:

- Ms. Hutchins knew the defendant as “kind of an acquaintance.” (RP 539). The defendant was not Ms. Hutchins friend, she did not have a romance with him, and she did not date him.
- Ms. Hutchins had met the defendant only twice before, once in a bar when Ms. Hutchins was going through a divorce, and another time while riding a horse and the defendant pulled up to her in his vehicle and started talking to her. (RP 540).
- The defendant’s claims that he asked Ms. Hutchins “What’s wrong with me? And why don’t you date me?” (RP 555).

The obvious inference from the above is that the defendant and Ms. Hutchins were hardly acquainted, were not friends, were not romantic, and were not even dating. The defendant is theoretically correct: it is possible that Ms. Hutchins finalized her divorce after meeting the defendant in the bar. It is possible that while riding her horse, the defendant drove up started chatting, proposed marriage on the spot, and that they hailed down a traveling minister who performed a wedding ceremony on the side of the road. (That does not explain how they could have gotten a marriage license, but who is the State to say that love cannot conquer all.) It may be possible that Ms. Hutchins and the defendant then departed, went their separate ways and did not see each other again until their chance encounter on the night of August 21, 2006, and both independently forgot to mention the wedding to the police.

A conviction may be based on wholly circumstantial evidence even if the evidence is not inconsistent with the hypothesis of innocence. *State v. Bailey*, 52 Wn. App. 42, 51, 757 P.2d 541 (1988). In *Bailey*, there was not direct evidence that the victim and defendant were unmarried, but the Court found that the circumstantial evidence was sufficient.

The crime of attempted indecent liberties was proven with sufficient evidence.

6. RESPONSE TO ARGUMENT 6 (The defendant's indecent liberties conviction must be reversed where the prosecutor improperly elicited police testimony that Mr. Landrum refused to come to the police station to discuss the alleged incident.)

The defendant cannot show that the objection was preserved, that there was error, or that it justifies reversal.

A. There was no objection to the testimony at trial and this Court should not consider it on appeal.

The Court need not consider this argument because the defendant did not object to the testimony at trial. The defendant has the burden to prove that the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a) (emphasis added). A manifest error is an error that is unmistakable, evident or indisputable. *State v. Nguyen*, 165 Wn.2d 428, 197 P.3d 673 (2008). To satisfy the manifest constitutional error

exception in RAP 2.5 (a), there must be actual prejudice shown, and the trial court record must be sufficiently developed to determine the merits of the constitutional claim. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). The defendant must show that the claimed error had practical and identifiable consequences in the trial. *State v. Israel*, 113 Wn. App. 243, 54 P.3d. 1218 (2002).

It may be important to distinguish the defendant's burden to demonstrate that this Court should consider an issue not raised at trial with the State's burden to demonstrate that an error affecting a constitutional right is harmless. Before this Court need consider the issue, the defendant must show that the alleged error herein is "manifest," that is indisputable or resulting in actual prejudice. If this Court decides to consider the alleged error, and if this Court finds that the defendant's right against self-incrimination was violated, the State must then show that the error was harmless. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996).

Here, the argument that the defendant's right to remain silent is of constitutional significance. However, the error claimed is not "manifest" for two reasons. First, it is not at all "unmistakable, evident, or indisputable" that an error occurred. The officer did not state that the defendant refused to answer questions, but only that he did not want to go to the police station out of fear of being arrested. Second, the defendant

has not shown that this caused a change in the result of the trial. The evidence of the defendant's repeated inappropriate sexual contact with women sealed his fate; the fact that he chose not to go to the police station had little importance.

B. In any event, the defendant's argument is without merit.

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996) addressed almost the same line of questions.

Testimony in *Lewis*:

Q What was the nature of your conversation?

A I told him that we were investigating him for two incidents involving assaults on women.

Q And did you go into detail about what the allegations were?

A I told him-my recollection is that I told him or that he asked me if it was about women. He said those women were just at my apartment and nothing happened, and they were both just cokeheads. He was trying to help them is what he said.

Q Did he appear to know what women you were talking about?

A He did appear to? Yes.

Q And did you have any further conversation with him?

A I told him-my only other conversation was that if he was innocent he should just come in and talk to me about it.

Q Was there any other part in the investigation that you had anything else-that you have done?

Id. at 703.

Testimony herein (Direct Examination by Mr. Johnson to Mary Buchan):

- Q Did he tell you what happened as they were going back towards Finley?
- A He said that he had a conversation with her. He asked her what's wrong with me. Any why don't you date me? And those were in quotations.
- Q And did he tell you if Ms.Hutchins answered him?
- A She answered him by saying, in quotation, because you're butt ass ugly.
- Q Did he [Mr. Landrum] say what his reaction to that was?
- A He said that he was upset but then he also said that he was surprised because she then started crying.
- Q Did Mr.Landrum indicate to you why in the world, according to his version of events, Ms. Hutchins started crying?
- A: No. He stated though that she told him to drive [her] home faster.
- Q: Did you want to sit down with Mr.Landrum and talk with him?
- A: Yes, I did.
- Q: And were you actually able to do that?
- A: No. I asked Mr. Landrum if he would be willing to come to the Kennewick Police Department and he said no because he was afraid I was going to arrest him and charge him with something. He also stated that he didn't trust me.
- Q:
Did you have any further contact about the specifics of this incident that night or that day?
- A: No.

(RP 555-56).

As stated in *Lewis*, “pre-arrest silence, in answer to inquiries of a police officer, may not be used by the State in its case in chief as substantive evidence of defendant’s guilt.” *State v. Lewis*, 130 Wn.2d at 705. The question, however, is whether the accused’s silence was used as evidence of his guilt. The *Lewis* court held that the police officer’s

comment (“if he was innocent he should just come in and talk to me”) was not used as evidence of the defendant’s guilt. *Id.* at 706.

The police officer in *Lewis* went farther than Officer Buchan herein. Officer Buchan explained why the defendant did not want to meet with her. She did not state that the defendant declined to answer further questions or requested an attorney. She merely stated that the defendant was afraid of being arrested.

The *Lewis* Court emphasized that the detective did not say that Lewis refused to talk to him, nor did the detective state that the defendant failed to keep appointments. The Court held that the officer did not make any statement to the jury that Lewis’ silence was any proof of guilt. *Id.* at 705-706. Here, Officer Buchan did not make any statement that the defendant refused to answer questions. Nor was there any suggestion that the defendant’s fear of reporting to the police department was a sign of guilt.

As noted in *State v. Curtis*, 110 Wn. App. 6, 37 P.3d 1274 (2002), there is a distinction between whether the right to remain silent is asserted before or after the arrest. Merely mentioning a suspect’s pre-arrest silence is generally not a violation. If a defendant provides an admissible statement, the witness testifying to that statement may relate the defendant chose to stop. *U.S. v. Williams*, 556 F.2d 65 (C.A.D.C. 1977). Here, as in

Lewis, the State did not use the testimony regarding the defendant's decision to decline to go to the police station as evidence of his guilt.

C. The prosecutor's argument did not implicate the defendant's right against self-incrimination.

State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) is helpful. There, a detective testified that she never heard from the defendant after she warned him that she would turn the case over to the prosecutor if he did not contact her, and the prosecutor argued in closing that this failure was not the act of an innocent man. In this case, the prosecutor did not refer to the defendant's electing not to go to the Kennewick Police Station. The prosecutor did not refer to the defendant's fear of being arrested.⁵ Instead, the prosecutor argued that the defendant, throughout his contacts with the police, admitted only the facts he had to admit. For example, Officer Buchan asked the defendant why would Christina Hutchins suddenly begin crying. The defendant had to admit that Ms. Hutchins had been crying; however, he had excuses for the reason she was crying.

At no point did the prosecutor argue, directly or indirectly, that the jury should consider the fact that the defendant refused to go to the

⁵ Likewise, Officer Buchan did not testify that the defendant refused to speak with her; she merely stated that the defendant refused to go to the police station because he was afraid of being arrested.

Kennewick Police Department to talk with Officer Buchan. The State did not violate the defendant's right to remain silent.

1. **Even if the Court considers the argument and finds merit in it, any error was harmless.**

As stated in *Easter*, a harmless error analysis is necessary if the State violated the defendant's right to silence. Here, the defendant was convicted because of the overwhelming evidence: the women who testified with no apparent motive against the defendant about his repeated attempts at sexual assault, the defendant's incredible statements to the police, and the defendant's efforts to solicit perjury. A one-sentence statement that the defendant did not want to go to the police station because he did not want to be arrested had nothing to do with his convictions.

7. **RESPONSE TO DEFENDANT'S ARGUMENT NUMBER 7**

The State agrees with the defendant's argument and requests the matter be remanded for resentencing.

8. **RESPONSE TO DEFENDANT'S ARGUMENT NUMBER 8 (The trial court erroneously imposed 160 months on the Attempted Indecent Liberties conviction, where the sentence for an inchoate offense is 75% of the standard range of the completed crime.)**

The State agrees with the defendant's argument and requests that the matter be remanded for resentencing.

9. RESPONSE TO DEFENDANT'S ARGUMENT NUMBER 9 (The trial court exceeded its statutory authority in imposing court costs without finding Mr. Landrum had an ability to pay.)

The costs were imposed correctly and the defendant waived an objection.

A. The defendant waived his right to appeal the imposition of costs by not objecting when he was sentenced.

The defendant did not object to the costs imposed by the trial court. He has not explained why this Court should consider an objection on appeal pursuant to RAP 2.5.

B. The issue is not ripe.

The failure to raise the objection with the trial court is not just a form-over-substance issue. If the defendant had raised the issue, the trial court should have told the defendant that he could raise concerns about this financial status if the State tried to incarcerate him for failing to pay his legal financial obligations. If the defendant is released from custody and if the State tries to collect the costs, the defendant could then claim indigence. However, as stated in *State v. Blank*, 131 Wn.2d 230, 253, 1930 P.2d 1213 (1997), if a "future repayment will impose a manifest

hardship on a defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award.” There is no reason at this time to deny the State’s cost request based upon speculation about future circumstances.

**10. RESPONSE TO DEFENDANT’S ARGUMENT NO. 10
(The trial court failed to properly inquire into defense counsel’s conflict of interest resulting from representation of prosecution witness Robert Pyke.)**

The defendant did not object to his attorney, there was no conflict, the trial court properly inquired into the conflict, and there was no adverse effect.

In a colloquy at the August 28, 2009, hearing the defendant’s attorney stated:

[I]t is true that I have a document somewhere where Mr. Pyke many, many months ago, which had nothing to do with Mr. Landrum at all, asked me to do a favor for him. And because I represent a variety of different people who are in this pod and around here, I went to each one of them, I’ll do a favor, I’ll go down and see if you paid your fines and then I’m out of here.

I went down, found he did not pay his fines and found out no one let him put his fines together. That’s all I did.

.....

I know I filed a document with the court saying that I would represent him only to look at fines, that’s all I did.

(RP 47-48).

A. The defendant had to object at trial unless there is an actual conflict.

As stated in *State v. Regan*, 143 Wn. App. 419, 177 P.3d 783 (2008), if a defendant does not make a timely objection in the trial court, a conviction will stand unless the defendant can show that his lawyer had an actual conflict that adversely affected the lawyer's performance.

B. There was no conflict, actual or otherwise.

The defense attorney did not represent Mr. Pyke and did not in the past. He did a favor for Mr. Pyke; the defense attorney determined that Mr. Pyke had unpaid fines.

Nevertheless, the defendant must do more than establish that the defense attorney once represented a witness. He must show actual prejudice. Actual prejudice is a conflict which affects the defense attorney's performance, as opposed to a mere theoretical division of loyalties. A defense attorney has an actual conflict of interest, if, during the course of representation, the counsel's interests diverge from those of the defendant with respect to a material, factual, or legal issue. *Id.*

C. In addition, there is no indication that any possible conflict adversely affected the defendant or his lawyer.

Even supposing the defendant is able to show proof of an actual conflict, reversal is still not required, as the conflict did not adversely affect the defendant or his lawyer. In order for a violation of the Sixth Amendment to require reversal, the defendant must always show that his

attorney had a conflict of interest that adversely affected his performances. *State v. Dhillawal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003) (citing *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S.Ct. 1237 (2002)). There has been no offer of proof that the defendant's representation was negatively affected due to any conflict.

D. Finally, the colloquy constitutes an adequate inquiry by the trial court into a potential conflict of interest.

The State asks rhetorically, what else should the trial court have done? The defense attorney stated he had not represented Mr. Pyke, but had only done a favor for him. The defense attorney stated there was no conflict. The defendant did not object to his attorney's continued representation.

The State takes the defense attorney at his word when he made the representations at the August 28, 2009, hearing: he did not represent Mr. Pyke, had not represented him, and knew of no conflict.

CONCLUSION

The convictions for Rape in the Second Degree and Attempted Indecent Liberties should be affirmed. The conviction for one count of Solicitation of Perjury should be affirmed. The cases should be remanded for resentencing pursuant to the defendant's arguments for a concurrent

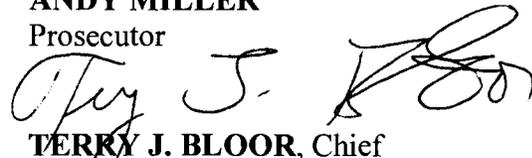
Sentence of Rape in the Second Degree and Attempted Indecent Liberties, a sentence based on 75% of the standard range of Indecent Liberties, and an offender score based on one count of Solicitation of Perjury.

If the Court determines that the trial court erred by sealing the juror questionnaires, it should remand the case for reconsideration of the Order Sealing the Original Jury Question Forms.

RESPECTFULLY SUBMITTED this 25th day of July 2011.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", is written over the typed name and title of Terry J. Bloor.

TERRY J. BLOOR, Chief
Deputy Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

ORIGINAL

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

STATE OF WASHINGTON,

Respondent,

vs.

TAYLOR ROSS LANDRUM

Appellant.

COA NO. 289851

Consolidated with

COA NO. 289869

DECLARATION OF SERVICE

I, **Pamela Bradshaw**, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the **Respondent's Brief** on the 25th day of July 2011.

David L. Donnan
Oliver Davis
Jan Trason
WA Appellate Project
1511 3rd Ave. Ste 701
Seattle, WA 98101-3635

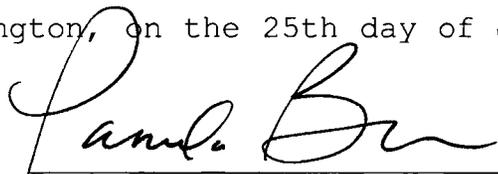
U.S. Regular Mail, Postage Prepaid

Taylor Ross Landrum
#889074
Coyote Ridge Correction Ctr
P. O. Box 769
Connell, WA 99326-0769

U.S. Regular Mail, Postage Prepaid

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

EXECUTED at Kennewick, Washington, on the 25th day of July 2011.



PAMELA BRADSHAW