

FILED

DEC 13 2011

NO. 29693-8 III

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

STATE OF WASHINGTON

RESPONDENT

v.

RYAN HIGGINS

APPELLANT.

RESPONDENT'S BRIEF

**D. ANGUS LEE
PROSECUTING ATTORNEY
Carole L. Highland, WSBA #20504
Deputy Prosecuting Attorney
Attorney for Respondent**

**PO BOX 37
EPHRATA WA 98823
(509)754-2011**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's conviction must be affirmed.

III. ISSUES

1. Whether the phrase "clearly expressed" in the statutory requirements of Rape in the Third Degree is ambiguous.
2. Whether appellant makes a *prima facie* showing that the court made any comment on the evidence.

IV. STATEMENT OF THE CASE

Appellant, Ryan Higgins, was charged by information with one count of Rape in the Third Degree. CP 1. The charge arose from an incident which had occurred while the appellant and his friends were camping in Quincy, Washington on the weekend of April 17 of 2010. RP V II 64, 65. Appellant and the victim, Nichole Nuckols, had first met in December of 2008 at a mutual friend's house. RP V II 61. In March of

2009, the two began dating. RP V II 62. In April or May of 2009, they began a sexual relationship, and the victim would often spend the night at the appellant's parents' home, although Ms. Nuckols maintained a permanent residence with her aunt and uncle. RP V II 62, 113. The pair broke up in early January of 2010 due to intimacy issues between the two. RP V II 63. Mr. Higgins stated that there were times that he wanted sex and Ms. Nuckols did not, and that additionally he desired more public displays of affection between the two of them. RP V II 205, RP V III 12, 16. However the two remained friendly, and began having contact with each other in March of 2010. RP V II 63.

In March of 2010, the pair got back together somewhat tentatively as they each had different plans for their individual futures. Mr. Higgins had planned on enlisting with the Navy, while Ms. Nuckols had planned on attending college and getting her degree. RP V II 64.

Prior to the camping trip, the couple had engaged in sexual intercourse twice since getting back together, once in mid March, and once again in April, both acts occurring at the appellant's home. RP V II 115, 208.

Both the appellant and the victim testified that they had not discussed having sexual relations while they were camping. RP V II 115, 208. Ms. Nuckols testified that she had had no intention of having sex during the camping trip as there would be too many other people around, and she believed that sex should occur in the privacy of a bedroom. RP V II 85.

Ms. Nuckols followed the appellant out to the campsite with Sarah Packer traveling with Mr. Higgins, and Ms. Hunter traveling with Ms. Nuckols. RP V II 209. Initially, there was some talk of Ms. Hunter sleeping in the same tent as the appellant and the victim, if she was unable to secure lodging somewhere else. RP V III 5. Ms. Hunter did not sleep in the tent with Mr. Higgins and Ms. Nuckols. *Id.*

Ms. Nuckols testified that it was a small cramped two man tent with one door, and that although the two of them were sharing the tent and an air mattress, each had a separate sleeping bag. RP V II 117, 118. Mr. Higgins testified that there were two doors to the tent. RP V II 210.

When the individuals arrived at the campsite, they set up camp, began cooking, and began drinking. (It appears that there were approximately six to ten individuals at the campsite.) RP V II 209. Most

all of the witnesses verified that Ms. Nuckols was the first to go to bed. RP V II 67, 68, 165, 176, Accounts varied as to how much alcohol she had consumed. RP V I 182, RP V II 66, 67, 119, 120, 155, 176, 195, 199. Ms. Nuckols testified that she felt a migraine coming on, and in an effort to forestall it, went to bed to go to sleep. RP V II 68, 122. Ms. Nuckols said that she initially woke up when Mr. Higgins came into the tent, but that she then went back to sleep. RP V II 68, 69. Mr. Higgins later woke Ms. Nuckols up by rubbing her upper chest and back with his hand. RP V II 69. She asked him to move over and she moved closer to the door. *Id.* It was her testimony that she was situated closest to the door of the tent, and that Mr. Higgins was situated closest to the rear of the tent. RP V II 81. Sometime later, Mr. Higgins again came closer to Ms. Nuckols and began tugging on her shorts. *Id.* Ms. Nuckols testified that the appellant said something to the effect of “do you want to?”, or “can we?” *Id.* Ms. Nuckols believed that the appellant was referring to sex, and told him “no.” Mr. Higgins said “ok” and left Ms. Nuckols alone at that point. *Id.* Ms. Nuckols then went back to sleep. RP V II 82.

At some later time, Ms. Nuckols could feel the appellant “kind of on top of (her)”. Ms. Nuckols believed that Mr. Higgins was trying to get

out of the tent to go to the bathroom, and so she scooted under him.

Instead, Mr. Higgins got on top of Ms. Nuckols, and began to pull her pants and underwear down. RP V II 82.

Ms. Nuckols asked the appellant “what are you doing?” and said to Mr. Higgins, “stop, you’re drunk”, to which the appellant responded, “oh well you’re drunk too.” RP V II 82. Mr. Higgins then pulled his own pants down. *Id.* Ms. Nuckols testified that she tried to pull up her own underwear and pants, but was unable to do so with the appellant laying on top of her. RP V II 125, 126. Mr. Higgins then proceeded to engage in sexual intercourse with Ms. Nuckols. RP V II 83. She testified that she told him “no” or “stop” five to six times in a firm tone of voice, but that he did not respond. RP II 83, 146. She testified that she did not scream, bite, or kick Mr. Higgins because she “was shocked” that someone she had loved was doing this to her. RP V II 83. Ms. Nuckols testified that at some point during the rape, she began to cry. *Id.* Ms. Nuckols also testified that one of Mr. Higgins’ arms was across her chest and holding her shoulder. RP V II 142. Ms Nuckols said that Mr. Higgins had a hold of her arms using his weight. RP V II 83. Ms. Nuckols tried to get Mr. Higgins off of her by moving closer to the door and by trying to roll on to

her side so that he “would fall off of her.” RP V II 84. She tried to grab Mr. Higgins’ arms but he had a grasp on her elbow. RP V II 84. Ms. Nuckols estimated that the sexual act lasted for five to six minutes. *Id.*

When the sex was over, Ms. Nuckols grabbed her pants and underwear and ran out to her car where she remained for the next few hours. RP V II 85, 127. Mr. Higgins did not follow her. *Id.*

The next morning, while Mr. Higgins was still asleep, Ms. Nuckols went to Quincy with a couple of the other girls to get water and personal items to freshen up with. RP V II 86. Ms. Nuckols testified that she told them that she and Ryan had had a shaky night, but that she had not told them of the rape because she did not know them that well, and did not think that they needed to know. RP V II 86.

When Ms. Nuckols returned to the campsite, the appellant was not there. RP V II 88. She took steps to pack up her belongings and to give Ms. Hunter her things. RP V II 87, 88. Mr. Higgins returned to the campsite, and Ms. Nuckols left soon thereafter. RP V II 88, 130, 131. Ms. Nuckols did not tell Mr. Higgins why she was leaving, and he didn’t ask. RP V II 88.

On her way home, Ms. Nuckols called a friend who advised her to call the police, and have a rape kit performed. RP V II 89. Prior to her doing either however, Ms. Nuckols texted Mr. Higgins to tell him how she felt. Mr. Higgins texted Ms. Nuckols back. RP V II 90, 91. Due to her cell phone plan, some of the texts sent by Ms. Nuckols to Mr. Higgins were dumped, but her remaining text, as well as the appellant's were admitted as follows: RP V II 90. (N.B. Texts are as they were transcribed, but for some capitalization of "I" and "I'm" and the beginning of sentences which the computer automatically capitalizes, the spelling out of the "F" word which is how the prosecutor chose to refer to the word as used by Mr. Higgins, and some punctuation that the computer automatically performs, i.e., the inclusion of the apostrophe in don't)

Mr. Higgins: I'm an asshole. I know what you mean. I was out of control and I feel really bad about it. I don't know if it's a good idea for us to hang out when I'm stupid drunk. I do stupid shit and fuck up.. I feel—I really feel bad. I don't want to hurt you so I think it's a good idea if we don't hang out when I'm drinking hardm im so sorry. Fuck me. You can do better and you know it.

Mr. Higgins: (next message) I know im taking a lomg drive. I feel like total shit. We'll see where I end up cuz c) I dno where im goin or when im comin back.

Mr. Higgins: (next message) me too but im tired of hurting you .
Im headed for spokane, I hate myself rightnow. A
lot. I dno if imgonna go home.

Mr. Higgins: (next message) so what. Im thinkin montana. Got a
5th of whiskey and my debit card. Cya later.

Mr. Higgins: (next message) I love you and always will. Im sorry
I hurt you so much.

Mr. Higgins: (next message) you know me. Drunk and out of
control. About to hit moses lake.

Mr. Higgins: (next message) me too. Im tired of hurting you. I
cant control myself and its bad. Its been fun. Have
a good life.

Mr. Higgins: (next message) trust me I do. I just want you to be
happy and if that means never seeing me again so be
it. Im trouble and I don't want that for you.

Ms. Nuckols: you basically raped me ryan .. how do you think I
feel right now.

Mr. Higgins: I know. I feel like total shit. I get out of control
when im drunk and do very stupid shit. I
understand your – I understand where im coming
from. I fucked up hardcore and ill deal with the
consequences whatever it may be. I just want you
to be happy and its not with me so fuck me and do
better.

RP V II 103-105.

Ms. Nuckols made her initial contact with law enforcement
telephonically. RP V II 106. Grant County Sheriff's Office (GCSO)

Deputy Ed Stevens testified that the when he spoke with Ms. Nuckols on the phone on April 17, 2010 she was very emotional, upset and crying. RP V II 26, 27. He also stated that in the course of their 15 minute conversation, Ms. Nuckols became more emotional. RP V II 27, 28.

Laura Gaukroger-Holland, a registered sexual assault nurse examiner (SANE) at Central Washington Hospital, testified that she had had contact with Ms. Nuckols during the late afternoon or early evening of April 17, 2010 and that Ms. Nuckols was quiet, yet tearful at times. RP V II 21-23. SANE Gaukroger-Holland documented bruising on Ms. Nuckols inner thighs and upper arms. RP V II 23. The bruises were approximately the size of a quarter to the size of a fifty cent piece and did not appear to be old. RP V II 24, 25.

GCSO Detective Kim Cook had contact with Ms. Nuckols at Central Washington Hospital at approximately 7 P.M. on April 17, 2010. RP V I 177, 178. Ms. Nuckols appeared to be reserved, solemn, and quiet. RP V I 177, 178, 199. She identified Mr. Higgins as the individual who had raped her.

The next day Mr. Higgins initiated communication with Ms. Nuckols on Facebook. RP V II 107, 108. During the course of their

communications over the next two days, Ms. Nuckols made the following statement to Mr. Higgins:

Ms. Nuckols: Listen, my mom is pushing for a restraining order. And I want it. I have written my statement and I don't want this to fuck up your life completely. You probably won't hear from anyone for at least a month. I will bring you your jacket sometime this week to your work and leave it on your truck. But as of now you have completely ruined me. And the person I once was is gone.

Mr. Higgins: K go for it. I screwed up major and I'll deal with the consequences of my actions. The restraining order will probably keep me out of the Navy, but that's ok. I've still got a pair of your sweats and sunglasses, I'll leave em in the front seat of my truck. I'm so sorry for all of this, I'm sick to my stomach. You won't ever have to talk to me again after this is over, I'll be far away and gone for good. Have a good life.

RP V II 109.

When interviewed by GCSO Detectives Kim Cook and Matt Messer on April 29, 2010, Mr. Higgins denied having admitted raping Ms. Nuckols, but explained that he had been distraught at the time that he wrote the text messages and was "pissed" because every time something happened in their relationship, he took the blame for it. RP V II 44, 45. When Detective Messer asked Mr. Higgins why Ms. Nuckols would just "get up and leave?", Mr. Higgins told him, "I couldn't tell you." When

Detective Messer then asked Mr. Higgins whether it made common sense that Ms. Nuckols would leave the campground, call law enforcement, and consent to a rape kit, Mr. Higgins replied “she can do whatever she wants to do I mean...” RP V II 47. Mr. Higgins initially told the detectives that he couldn’t think of a reason that Ms. Nuckols would make this allegation, but later stated that she had been mad that they had had sex that night. RP V II 48, 49. When Detective Cook asked Mr. Higgins about his text response to Ms. Nuckols’ statement that he had “basically raped her” and asking him “how he thought she felt,” Mr. Higgins explained his response “I know I feel like a total shit...” by telling the detective that he was distraught at the time and felt that anything that happened within the relationship was his fault, and so as a consequence, he took the blame. RP V II 193, 194. He then told the detective that he would say “Okay, I’m sorry. You’re right. I was wrong.’ ‘ You know,’ ‘Can we work this out and get back together?’” RP V II 207, 223. Mr. Higgins testified that when Ms. Nuckols texted that he had “basically” raped her, he took that to mean that he had not done that, that he had done something short of raping her. RP V II 224.

Mr. Higgins testified that he and Ms. Nuckols had engaged in consensual sex on the night/morning of April 16/17. RP V II 215. In his interview with the detectives, he told them that when he had gone into the tent a couple of hours after Ms. Nuckols, he had asked her to have sex with him, and that she had consented. RP V I 181. He also told the detectives that if Ms. Nuckols had not wanted to have sex with him, she would have left the tent, screamed, or could have escaped from the tent. RP V I 186. He also told the detectives that Ms. Nuckols had not pushed him off. *Id.* At trial, Mr. Higgins testified that he had gone to bed about an hour after Ms. Nuckols and that they had cuddled. RP V II 215. Mr. Higgins testified that they had kissed during their encounter and that Ms. Nuckols did not say “no.” RP V II 216. Mr. Higgins stated that the two of them “weren’t very vocal in our sexual adventures” and that he would have heard Ms. Nuckols say “no.” RP V II 216, 217. According to Mr. Higgins, the sex had been a kind of passionate, “spur of the moment deal”. RP V II 216. Mr. Higgins stated “We were making out and we were groping and getting hot and heavy like what you do when you have sex.” RP V III 7.

Bree Hunter testified that she had known both Mr. Higgins and Ms. Nuckols for about two weeks before the camping trip. RP V II 151. She

testified that she heard no conversation, rustling or noise that might be associated with struggling coming from the tent in which Mr. Higgins and Ms. Nuckols lay. RP V II 158, 159. She didn't hear them have sex. RP V II 167, 172. Ms. Hunter testified that she had been in communication with Mr. Higgins since the incident, but had not been in contact with Ms. Nuckols. RP V II 169, 170. Although Ms. Hunter had initially told Detective Cook that she didn't remember anything about the incident, she testified that once she sat down and thought about it, she did. RP V II 170. She testified that she had asked Ms. Nuckols what was wrong the morning after the rape, but that her testimony that Ms. Nuckols had said "yeah I'm fine" were her words, not Ms. Nuckols, that Ms. Nuckols had in fact shrugged when Ms. Hunter had asked her the question. RP V II 167, 168.

Esia Jasso testified that he was the one individual who did not drink at the campsite. RP V II 173, 175. Mr. Jasso had slept in a canopy in the bed of his truck with both the door and side windows open approximately eight feet away from Mr. Higgins' and Ms. Nuckols' tent. RP VII 177, 178. Mr. Jasso estimated that he was the person closest to the appellant's tent. RP V II 181. He did not hear any noises or conversation coming from the tent. RP VII 178, 179. Mr. Jasso heard absolutely nothing from Mr.

Higgins' and Ms. Nuckols' tent. He didn't hear them having sex. RP V II 182. Mr. Jasso testified that he sees Mr. Higgins a few times a week, but had not seen Ms. Nuckols since this incident occurred. RP V II 183.

Benjamin Williams testified that he had slept on the back of his truck after having consumed ten beers and one shot. RP V II 186, 188. He estimated that he was approximately 20 feet away from the tent, but heard no noises emanating from there, nor did he hear Mr. Higgins and Ms. Nuckols engage in sex. RP V II 191, 194. Since the incident, Mr. Williams has had contact with Mr. Higgins, but not with Ms. Nuckols. RP V II 196.

Todd McNeil who testified that he'd had twelve to fourteen beers that evening, also stated that he'd heard nothing that night; no noise or conversation of any kind from the tent of Mr. Higgins and Ms. Nuckols. RP V II 197, 199, 201, 202.

Mr. Higgins stated in cross examination that there had been no conversation before, during, or after the sexual act with Ms. Nuckols. RP V II 8, 10. He estimated that he had consumed ten beers and two shots and admitted that when he begins to get a little drunk, he gets noisy and loud. RP V III 8, 9. Mr. Higgins testified that in the course of their relationship,

he had wanted to have sex more often than Ms. Nuckols. RP V III 12, and he admitted that he had said that he would take the blame during arguments and say anything to get back together with Ms. Nuckols. RP V III 13.

After the jury had been chosen, the judge made introductory remarks to include the following:

The State Constitution prohibits me from commenting on the evidence in any way, and I will not intentionally do so. By a "comment on the evidence" I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of the evidence once it's been admitted. Once it goes to you, you decide how much weight to be given to it. And it's prohibited for me to comment or make a suggestion as to how much weight you should give to it. If it appears to you I'm commenting on the evidence, you must disregard the comment.

RP V I 162.

In questioning Detective Cook, the prosecutor asked that the detective refer to the transcript of his interview with Mr. Higgins in order to accurately relate Mr. Higgins' statements. RP V II 35. To that end, the 38 page transcript was marked as exhibit eight, and the court allowed reading from the transcript. RP V II 34, 37, 39. Before that occurred however, the Court made the following statement to the jury:

Before you ask that I need t make something clear with the jury. This is an exhibit that will not be admitted and will not go back with you to the jury room. So I've told you before

testimony will rarely, if ever, be repeated for you, so you need to be paying attention, you shouldn't rely on the fact that because this is an exhibit that you can refer back to it. This will be the same as any other testimony and you need to pay attention to it like any other testimony. It will not be an admitted exhibit that will go back with you to the jury. (Emphasis added).

RP V II 40.

Defense counsel objected and asked for a mistrial. RP V II 73.

When the Court denied counsel's motion, defense counsel then asked for a curative instruction which the Court granted. RP V II 74. Outside the presence of the jury, the Court proposed the following language:

Members of the Jury, earlier I advised you that testimony will rarely, if ever, be repeated for you. By saying that I did not mean to comment on the weight or value to be given to that particular evidence. It is your duty to weigh or evaluate the evidence.

The Court then stated "If you would like some different language, I'm open to that. And your objection is still maintained here." Defense counsel responded "Great. Yeah. Then it sounds fine." RP V II 75. The Court then read the aforementioned language to the jury. RP V II 80.

Plaintiff's exhibit one was a copy of the text messages sent by Mr. Higgins to Ms. Nuckols. RP V II 90. Plaintiff's seven was an illustrative display of those messages. RP V II 5, 8, 91. The State asked to publish

State's exhibit number seven which displayed the text messages sent by Mr. Higgins to Ms. Nuckols and her question to him about having raped her. RP V II 90, 91, 98. The Court, heard argument about plaintiff's seven outside the presence of the jury, and ruled that it would not allow the exhibit to go back to the jury room and would tell the jury that plaintiff's seven would be for illustrative purposes only. RP V II 98. When the State moved for admission of plaintiff's seven, the Court made the following statements: One and seven are admitted. And members of the jury –

Well, you can go ahead and ask questions about one and seven, and then I'll instruct the jury about the fact that those exhibits are not going back with them either and they need to pay close attention to that because testimony will rarely, if ever, be repeated.

By saying "pay close attention" I do not mean closer attention to this than any other evidence. That would be commenting on the evidence. But I'm just letting you know that these are also exhibits that will not be going back to you. The State Constitution prohibits the trial judge from commenting on the evidence. (Emphasis added).

RP V II 101.

Jury instruction number one read to the jury after counsels' closings, stated in pertinent part:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the

value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

RP V III 26, 29.

A. THERE IS NO AMBIGUITY IN THE PLAIN LANGUAGE OF THE STATUTE, AND THE TERM “CLEARLY EXPRESSED” IMPLIES DIRECT COMMUNICATION TO THE ACCUSED OF THE VICTIM’S LACK OF CONSENT.

RCW 9A.44..060 defines Rape in the Third Degree:

(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.

RCW 9A.44.010(7) defines Consent as follows:

“Consent” means that at the time of the act of sexual intercourse or sexual contact, there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

Jury instruction number eight read in part:

To convict the defendant of the crime of rape in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

Three, that Nicole E. Nuckols did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct;

WPIC 42.02 (in part). RP V III 33.

Jury instruction number six read:

Consent means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

WPIC 45.04 RP V III 32, 33.

A Court must interpret the plain and ordinary language of the statute. *State v. Delgado*, 148 Wn.2d 723, 732, 63 P.3d 792 (2003), *State v. Bright*, 129 Wn.2d 257, 916 P.2d 922 (1996), *In Re Detention of Coppin*, 157 Wn.App. 537, 238 P.3d 1192 (2010), *State v. Gray*, 151 Wn.App. 762, 215 P.3d 961 (2009).

“If the language is not ambiguous, we give effect to its plain meaning. ‘If a statute is clear on its face, its meaning is to be derived from the language of the statute alone.’” *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010) (cites omitted). “The plain meaning of a statute is discerned from the ordinary of the provision at issue, the context of the statute is found, related statutes, and the statutory scheme as a whole.” *State v. Jacobs* 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

Appellant's assertion of ambiguity is belied by a reading of the statute itself. Not only must there be a lack of consent on the part of the victim, but that lack of consent must be clearly expressed, or in other words, clearly communicated. The plain language of the term "clearly expressed" implies an action on the part of the victim which is communicated to the perpetrator.

In this case, Mr. Higgins did not testify to a different perception of what had occurred between himself and Ms. Nuckols, he testified to an entirely different scenario. Mr. Higgins described an act of passionate "spur of the moment" sex in which the parties were becoming mutually excited and were mutually participatory. Ms. Nuckols testified to having repeatedly told Mr. Higgins no, being physically restrained, and crying during part of the act.

What the jury heard was testimony about two significantly different stories about an admitted act of sexual intercourse; one story was an act of passionate sex told by Mr. Higgins; and the other was an act of unsuccessful resistance to rape told by Ms. Nuckols. Credibility determinations are for the trier of fact. The jury, having heard the testimony of the various witnesses, made a credibility determination that

Ms. Nuckols had not consented to sex, and had made that lack of consent expressly clear to Mr. Higgins.

B. APPELLANT FAILS TO MAKE A *PRIMA FACIE* SHOWING THAT THE COURT MADE ANY COMMENT ON THE EVIDENCE.

“A statement by the court constitutes a comment on the evidence if the court’s attitude towards the merits of the case or the court’s evaluation relative to the disputed issues is inferable from the statement.” *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995). To establish a violation, the reviewing court must find that the practical effect was to put before the jury the trial court’s opinion on an important fact. *Id.* “An instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence.” *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26 (1993), *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986).

The statements at issue in this matter are as follows:

(When the jury had been selected and was being initially instructed).

The State Constitution prohibits me from commenting on the evidence in any way, and I will not intentionally do so. By a “comment on the evidence” I mean some expression or indication from me as to my opinion on the value of the

evidence or the weight of the evidence once it's been admitted. Once it goes to you, you decide how much weight to be given to it. And it's prohibited for me to comment or make a suggestion as to how much weight you should give to it. If it appears to you I'm commenting on the evidence, you must disregard the comment.

(Prior to the prosecutor asking Detective Cook to read Mr. Higgins' statements from the interview transcript).

Before you ask that I need t make something clear with the jury. This is an exhibit that will not be admitted and will not go back with you to the jury room. So I've told you before testimony will rarely, if ever, be repeated for you, so you need to be paying attention, you shouldn't rely on the fact that because this is an exhibit that you can refer back to it. This will be the same as any other testimony and you need to pay attention to it like any other testimony. It will not be an admitted exhibit that will go back with you to the jury. (Emphasis added).

When the Court denied defense counsel's motion for a mistrial, defense counsel then requested that the court provide a curative instruction.

The Court granted the motion and proposed the following language:

Members of the Jury, earlier I advised you that testimony will rarely, if ever, be repeated for you. By saying that I did not mean to comment on the weight or value to be given to that particular evidence. It is your duty to weigh or evaluate the evidence.

The Court then stated "If you would like some different language, I'm open to that. And your objection is still maintained here." Defense

counsel responded “Great. Yeah. Then it sounds fine.” The Court then read the aforementioned language to the jury.

Plaintiff’s exhibit one was a copy of the text messages sent by Mr. Higgins to Ms. Nuckols. Plaintiff’s seven was an illustrative display of those messages. The State asked to publish State’s exhibit number seven which displayed the text messages sent by Mr. Higgins to Ms. Nuckols and her question to him about having raped her. The Court, heard argument about plaintiff’s seven outside the presence of the jury, and ruled that it would not allow the exhibit to go back to the jury room and would tell the jury that plaintiff’s seven would be for illustrative purposes only. When the State moved for admission of plaintiff’s seven, the Court made the following statements:

One and seven are admitted. And members of the jury –

Well, you can go ahead and ask questions about one and seven, and then I’ll instruct the jury about the fact that those exhibits are not going back with them either and they need to pay close attention to that because testimony will rarely, if ever, be repeated.

By saying “pay close attention” I do not mean closer attention to this than any other evidence. That would be commenting on the evidence. But I’m just letting you know that these are also exhibits that will not be going back to you. The State Constitution prohibits the trial judge from commenting on the evidence. (Emphasis added).

Jury instruction number one read to the jury after counsels' closings, stated in pertinent part:

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

All of the aforementioned statements by the court are merely statements which accurately state the law. "An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence." *State v. Ciskie*, 110 Wn.2d 263, 282, 751 P.2d 1165 (1988).

The jurors were instructed twice, once at the beginning of the proceedings, and once again at the close of the proceedings, that a trial judge is not allowed to comment on the evidence, and that if they believed that he had, they were to disregard that comment. Jurors are presumed to follow the law. *State v. Candia*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) citing *Ciskie*.

None of the statements complained of by appellant state any opinion by the court, either express or implied, as to the weight that evidence or testimony should have been given by the jury. Nor are the facts of the evidence ever commented upon by the trial court, either directly or indirectly. The cases cited by appellant contain circumstances (amongst others) in which the court provided jury instructions relieving the State of its burden as to an element; the court questioned a complaining witness, or as the appellate court phrased it, "entered into the fray"; the court directly commented on the credibility of the defendant's testimony. In contrast, all of the statements of this court were neutral statements of the law.

Because Mr. Higgins fails in his claim that a statutorily requisite element of Rape in the Third Degree is ambiguous, as well as his claim that the trial judge made any comment on the evidence, his conviction for Rape in the Third Degree in violation of RCW 9A.44.060 must be upheld.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny appellant's appeal and affirm his conviction.

Dated this 12th day of December, 2011.

Respectfully submitted:

D. Angus Lee, WSBA #36473
Grant County Prosecuting Attorney

Carole L. Highland
Carole L. Highland, WSBA #20504
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent. |) | No. 29693-8-III |
| |) | |
| v. |) | |
| |) | |
| RYAN HIGGINS, |) | DECLARATION OF MAILING |
| |) | |
| Appellant. |) | |

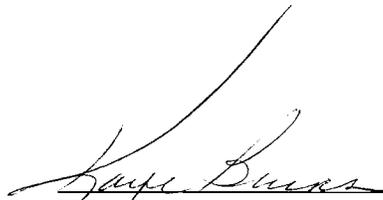
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Lenell Nussbaum, attorney for Appellant, and to Appellant, containing a copy of the *Respondent's Brief* in the above-entitled matter.

Lenell Nussbaum
Attorney at Law
Market Place One, Ste 330
2003 Western Ave.
Seattle WA 98121-2161

Ryan Higgins
2585 Fancher Landing
East Wenatchee WA 98802

Dated: December 12, 2011.



Kaye Burns

Declaration of Mailing.